



DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS

Division for Social Policy and Development  
Secretariat of the Permanent Forum on Indigenous Issues

**INTERNATIONAL EXPERT GROUP MEETING**  
**Indigenous Peoples and Forests**

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**PRESENTATION BY GRAND CHIEF EDWARD JOHN<sup>1</sup>**

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<sup>1</sup> The author is an elected member of the political executive of the First Nations Summit in British Columbia, Canada and a member and Grand Chief of the Tl'azt'en Nation. The author is also a member of the UNPFII from 1 January 2011.

## INTRODUCTION

1. The Concept Paper on Indigenous Peoples and Forests prepared by the Secretariat of the Permanent Forum on Indigenous Issues broadly describes the cumulative impacts of, and the consequent challenges arising from, resource extraction activities on Indigenous Peoples<sup>2</sup> globally. It also correctly identifies pressures brought by Indigenous Peoples' concerted efforts, and many others, to affect a "normative shift ... towards a more people centred approach to forest conservation and protected areas..." Building on this framework, the following describes some steps to consider regarding ways to include Indigenous Peoples in decisions about their respective lands, territories and resources in the context of "reconciliation" generally and "forests" specifically.

## RECONCILIATION

### A New International Doctrine

2. Historic and current practices, largely based on misguided assumptions and principles underlying the doctrine of discovery, have led to widespread dispossession of Indigenous lands and the subsequent marginalization of Indigenous Peoples in their respective homelands. This needs to be replaced with an approach that builds on the minimum standards in the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) and gives rise to a new international doctrine, a "Doctrine of Reconciliation", to address historic wrongs and provide a solid foundation for co-existence. The Supreme Court of Canada's decision in the *Haida Nation*<sup>3</sup> case that calls for the reconciliation of "pre-existing Aboriginal sovereignty with assumed Crown sovereignty" is consistent with this doctrine of reconciliation. The key to this approach is one which recognizes and gives a full and effective say to Indigenous Peoples in the planning, sustainable use/development and conservation/preservation of their traditional lands, territories and resources.

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<sup>2</sup> These terms are often used interchangeably, though they can have significant meanings or implications particularly when they are being used in a legal context. The term "Indigenous" is most used and understood in the international context. The term "Aboriginal" is used in the Canadian *Constitution Act, 1982*, as well as in Canadian jurisprudence on Aboriginal rights. "Aboriginal peoples" in Canada include First Nations, Métis and Inuit. "First Nations" is a term of ethnicity that refers to the Aboriginal peoples in Canada who are neither Inuit nor Métis. (Note: The descriptors "Indian" and "Eskimo" are falling into disuse in Canada.)

<sup>3</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para 20.

3. With the recent endorsement by the United States of America, the Declaration (which is not opposed by any member State of the UN) becomes an incredibly important international consensus instrument to guide the development of new Indigenous Peoples-State relations. The adoption of the Declaration and its minimum set of standards represents a truly remarkable achievement by the world's Indigenous Peoples and those many individuals, organizations and States who stood shoulder to shoulder with them.

#### **“Decade for Reconciliation”**

4. The implementation of the standards set out in the Declaration at the international level, within the member States of the UN and in Indigenous communities, is necessary to ensure the “survival” of Indigenous Peoples as Indigenous Peoples, to respect their “dignity” as human beings and to promote their individual and collective “well-being”. Implementation of the Declaration should guide Indigenous Peoples-State efforts to achieve reconciliation. As the implementation of the Declaration will take time, member States and the UN should consider establishing a “Decade for Reconciliation”.

#### **Processes for Reconciliation**

5. The “process” standards in the Declaration, such as the requirement of “free, prior and informed consent” of Indigenous Peoples and those in Articles 15, 18, 19 and 38, represent at minimum some steps to assist Indigenous Peoples and States to develop viable approaches to achieve the intent of the Declaration. For example, Articles 19 and 38, considered together, provide an important framework for Indigenous Peoples and States to build a sustained collaborative approach. Article 38 provides: “States, in consultation and cooperation with Indigenous Peoples, shall take appropriate measures including legislative measures, to achieve the ends of the Declaration”, while Article 19 provides: “States, shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

6. The steps being taken by the current US administration and Tribal Nations to meet annually to address key issues and develop new policies and practices promises to be an important collaborative initiative and a useful model for member States to consider.
  
7. In the Canadian context, meetings among the First Ministers (i.e. the Prime Minister and Provincial Premiers) and Indigenous Leaders (referred to as First Ministers' Conferences or FMCs) following the repatriation of Canada's Constitution in 1982 provide a useful example of a high level Indigenous Peoples-State engagement on important constitutional issues and amendments. These meetings held in 1983, 1984, 1985 and 1987 were designed to consider constitutional amendments and the implementation of historic and modern constitutional provisions relating to Indigenous Peoples-State relations. Although the actual high-level FMCs lasted only three days each year, there was an ongoing Ministerial and senior-level officials process throughout to discuss constitutional issues, options for amendments and the implementation of existing constitutional provisions. In the end, this process resulted in only two constitutional amendments clarifying existing provisions. The political will necessary to effect important and historic transformative change did not materialize as had been hoped and it was left for the courts to determine the nature, scope, content and application of inherent Indigenous rights. Nonetheless, it is important that we understand precedents that may assist in Indigenous Peoples-State implementation of the Declaration.
  
8. Not being able to find the necessary solutions through the political process has not deterred Indigenous Peoples. For the most part, it has forced Indigenous Peoples into the streets and into the courts. Many are familiar with the Mohawk standoff at Oka, Quebec in the early 1990s arising from a golf course development on disputed lands. Since then, Indigenous leaders have been sentenced to prison for protesting against mining development activities in their traditional territories.<sup>4</sup> Public protest by Indigenous Peoples has not abated, largely because State (federal and provincial level) governments continue to deny the existence of Indigenous Peoples' rights and Indigenous title to their respective traditional territories.

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<sup>4</sup> More information on the charges against the leaders of the Kitchenuhmaykoosib Inninuwug First Nation is available online on the First Nation's site at <http://kitchenuhmaykoosib.com/id49.html> and on the Mining Watch site at <http://www.miningwatch.ca/en/aboriginal-leaders-face-jail-time-spreading-disputes-over-first-nations-rights-and-mining-claims-con>.

9. In June 2009, Prime Minister Stephen Harper apologized to the Aboriginal Peoples on behalf of Canadians for Indian residential schools system. While this apology is an important and necessary step on the path to reconciliation, Canada needs to follow up with policies to address the significant multi-generational impacts of this assimilation policy.
10. In the courts, government lawyers routinely deny the very existence of Indigenous Peoples and their rights, stating in their pleadings and legal arguments that, unless proven by Indigenous Peoples in the courts, neither Indigenous Peoples nor their rights exist. This means Indigenous Peoples must bring their elders, histories, cultures, ways of life and stories into a legal system foreign to them, while State governments do not have to prove, in any way, the legitimacy of their assertion of Crown sovereignty. Notwithstanding this, Indigenous Peoples continue to take their fight to the courts hopeful the necessary declaratory relief will eventually be granted.
11. Since the early 1980s, the Supreme Court of Canada has heard over 40 cases concerning the rights of Indigenous Peoples in the context of lands, fisheries, forestry, hunting and mining issues. Many of these cases arise from State decisions concerning the granting or renewing of tenures. These cases, brought before a largely inaccessible and adversarial justice system, have been extremely time-consuming and costly for Indigenous Peoples. Judges at all levels of the judiciary and lawyers with little or no experience with, or knowledge of, Indigenous Peoples or their issues have constantly grappled with understanding the nature of the inherent and Treaty rights of Indigenous Peoples.
12. Judge-made law is at times ambiguous and its implementation can be very problematic. In *Gladstone*,<sup>5</sup> a clear decision by the Supreme Court of Canada confirming an Aboriginal right to harvest herring roe on kelp for commercial sale has yet to be implemented by the Government of Canada 14 years later. While cases on the inherent Indigenous (Aboriginal) title to lands, territories and resources have clarified the nature of this title, no Canadian court has yet issued a declaration of title. This is disturbing as it continually forces

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<sup>5</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723.

Indigenous Peoples back to the courts where their oral evidence as told by the elders is no longer available in certain cases because many of the elders have passed on. The most recent case on this, brought by Tsilhqot'in was recently appealed to the British Columbia Court of Appeal<sup>6</sup> where judgment was reserved. In short, governments argued that the Tsilhqot'in had framed their case as an "all or nothing" claim, that in any event the evidence given by them was insufficient to prove the existence of any title interests and that, if they did have any title interests, it was only to support small tracts of land. These outrageous and dishonourable arguments bring us right back to the colonial era and to the discredited notions of the "doctrine of discovery" and "*terra nullius*". Where, however, some degree of certainty is achieved in the courts, this generally does not find its way into documents and agreements brought forward by governments. This ongoing reluctance by State governments to recognize the existence of inherent rights including the existence of Indigenous/Aboriginal Peoples, Aboriginal rights and Aboriginal title is a large source of discontent in Indigenous communities. These same policies also underlie government negotiations mandates in modern day land claims and self-government negotiations.<sup>7</sup>

13. For example, government negotiators do not have mandates to negotiate "compensation" for any and all lands taken or infringed and resources alienated. However, Indigenous Peoples are required, in "final agreements", to forego any future claims and relieve governments of any legal liabilities. This is perhaps the main reason why only three modern-day treaties<sup>8</sup> or "final agreements" have been reached in British Columbia thus far. Where Indigenous Peoples have historic or modern treaties, they protest the lack of full, proper and

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<sup>6</sup> British Columbia Court of Appeal file number CA 035618, appealing *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, a judgment of the British Columbia Supreme Court.

<sup>7</sup> Information about the treaty negotiation process in British Columbia can be found on the First Nations Summit website at <http://www.fns.bc.ca>. The British Columbia Treaty Commission's Annual Reports on BC treaty negotiations highlight areas where progress is being made, but also what issues are preventing the parties from reaching agreements. These Annual Reports and additional information on BC treaty negotiations are available online at <http://www.bctreaty.net>.

<sup>8</sup> The Nisga'a Final Agreement, the Maa-nulth First Nations Final Agreement and the Tsawassen First Nation Final Agreement have all been ratified. Five First Nations communities are represented in the Maa-nulth Agreement.

effective implementation of their treaties.<sup>9</sup> Given that these government policies are unilateral and self-serving, they represent standards that have not served Indigenous Peoples well. This is why the minimum standards in the Declaration become important. They provide a credible international law based source of recognition of the existence of Indigenous Peoples and a range of important and critical rights and State obligations. They also provide a set of minimum standards against which State policies, initiatives and actions can be measured.

14. In any event, I am certain all States' judicial systems have similar challenges. Given the extensive nature of the rights and obligations in the Declaration and the legal status of the Declaration itself, I strongly recommend a process of public education and information, through the UN system, for judges. Their understanding and interpretation of the Declaration will help in a fuller understanding and implementation of the rights therein.

15. On a wider front, information dissemination and public education are very important in order for the Declaration to be better understood by both Indigenous and non-Indigenous communities. Indigenous organizations and communities have issued requests for educational materials to be developed on the Declaration that appropriately reflect their needs, language, level of understanding and literacy. They have also requested that materials be developed that specifically address the issues that confront Indigenous Peoples. More generally, there is a need to develop and implement an appropriate public awareness raising campaign on the Declaration. It is imperative that the content of educational materials reflect the realities of Indigenous communities, as well as the challenges in, opportunities for, making use of the provisions of the Declaration to promote Indigenous rights and well-being.

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<sup>9</sup> In 2003, a Land Claims Agreements Coalition was formed to address the shared interests and challenges of land claim organizations and Indigenous governments with modern treaties across Canada. The Coalition's primary mission is to ensure that comprehensive land claims and associated self-government agreements are respected, honoured and fully implemented in order to achieve their objectives. More information on the Lands Claims Agreements Coalition is available online at <http://www.landclaimcoalition.ca/CoalitionBackground.php>.

16. Part of the mandate the Canadian Human Rights Commission (CHRC), which flows from the *Canadian Human Rights Act*<sup>10</sup>, is to inspire “a vision for Canada where ‘all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have’, free from discrimination.” The CHRC has identified that, “knowledge development is a key area of Commission activity.” Further, the CHRC aims to inform and influence public debate through research, policy development and special initiatives and to focus on making its programs more accessible and culturally sensitive to First Nations and on supporting First Nations’ human rights.<sup>11</sup> The CHRC is working within a new service delivery model that, among other things, provides discrimination prevention initiatives, regulatory, policy, and knowledge development. Based on its mandate and scope of work, the CHRC can and should play a critical role in the successful implementation of the Declaration by, for example, producing educational materials for widespread distribution using visual, broadcast and print media.

## **INDIGENOUS PEOPLES AND FORESTS**

17. The Concept Paper identifies three key inter-related elements to forests uses: development projects; protected areas; and using forests to fight global warming. However, the question for me is what recognition, weight and support is provided to each of these uses?

### **Indigenous Teachings and Beliefs**

18. Unfortunately for Indigenous Peoples, most protection-related measures, including rights to ensure some forested areas remain untouched, continue to be fought on the land or in the courts. And, while the legal underpinnings of Indigenous rights (whether constitutional, legislative, regulatory or policy) are being clarified, mostly through the courts (and usually negotiations following court decisions), forest development interests continue to be granted, resources continue to be alienated and impacts on Indigenous Peoples grow. Policies, reflected in and through legal mechanisms, to better protect and conserve forests

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<sup>10</sup> *Canadian Human Rights Act*, c. H-6.

<sup>11</sup> The Canadian Human Rights Commission mandate statement and additional information is available online at <http://www.chrc-ccdp.ca/about/mandate-eng.aspx>.



are important for the survival of Indigenous teachings, beliefs and ways of life – all of which are rights contained in the Declaration.

19. While there is always emphasis on rights, they also inherently bear important responsibilities to the ancestors and to present and future generations. It is the land, and everything on it, that provides a foundation for Indigenous beliefs, teachings, cultures and ways of life and ensures the survival of Indigenous Peoples. Not everything in the forests can, and should, be measured by its commercial value. Forests are not always just “fibre” for commercial exploitation. Elders, through their teachings, continue to remind their younger generations of certain fundamental beliefs which underpin Indigenous responsibilities: that if you “take care of the land it will take care of you”; that you must honour and respect all life that keeps its place in the forest; and that if you must take anything (plant, tree etc.) from the forest, you must first return something – to provide an offering to thank the spirit which you hope will provide for your health and well-being.

20. Among the Coast Salish of the west coast, the word for “cedar” is the same as the word for “family”. Cedar is used to build longhouses and canoes, for clothing, cooking utensil and baskets, for medicine, for final resting places of relatives, for initiating new dancers and in ceremonies. In sacred winter ceremonies, the spiritual connection to the cedar is respected and the spirit of the cedar must be appeased through rituals and song. This is where the sacred spirit world of the ancestors and the temporal world co-exist. Through sacred songs and rituals, ancestors are called back into the longhouse in memorial ceremonies to remember and acknowledge the passing of a loved one. Witnesses are called to remember the ceremonies. It is said in the teachings that the Salish relationship to the cedar provides the discipline necessary for a life well-lived and honours the ongoing connections with the ancestors.

21. These examples hopefully provide a small lens to the forest world of Indigenous Peoples. These traditional teachings are shared in a respectful way by those who use and cherish them with the hope they will not be ridiculed. There was a time when these, and the spiritual beliefs and practices of other Indigenous Peoples, were deemed by Christian missionaries to be evil and governments outlawed their practice. Sacred sites such as burial

and ceremony sites are routinely desecrated in the name of development. These have had tremendous negative consequences on the survival, dignity and well-being of Indigenous Peoples. Where there may not be State laws or policies, which recognize, respect or protect these, the Declaration at least provides this.

## **Development**

22. The impact of deforestation and climate change, in particular, was foretold in stories handed down by elders. One of the concerns of Indigenous Peoples in western Canada is the climate-induced infestation of the mountain pine beetle (MPB) destroying millions of hectares of lodgepole pine. This disaster dwarfs any other insect epidemic seen in Canada and is caused by the fact that winters are no longer as cold as they used to be. This has allowed the MPB population to multiply at dramatic rates year after year unchecked.
23. As a consequence, immense tracts of lands (the size of Portugal or Korea) in the interior of the province have dead or dying forests. This epidemic rivals the destruction of the Amazon and Indonesian rainforests. The economic value of these trees exceeds \$65 billion (USD).
24. The conditions created as a result of the MPB epidemic have produced a massive tinderbox literally waiting for a spark to set it ablaze. In the last several years, forest fires have burned in and dangerously close to many First Nations communities. Some communities have had to be evacuated because of smoke hazards and extreme fire conditions. In the province, some 103 Indigenous/First Nations communities live in or adjacent to these forests.
25. The forest industry, the economic engine of the province, is undergoing massive changes to adapt. The recent worldwide economic meltdown has also had its impacts – with forest operations closing down and communities dependant on them becoming virtual ghost towns. In the meantime, Indigenous communities (because of successive court victories) have begun to acquire forest tenures and become involved in the management of commercial forests. According to provincial government statistics, since 2002 some 171 First Nations communities have signed short term (3-5 yrs) forestry agreements that have provided them with \$243 million in revenue sharing and access to some 54 million cubic meters of timber. Although there are still many concerns about the terms and conditions

contained in the government-driven agreements, they provide welcome relief – with jobs and financial resources to communities desperately needing them. These Indigenous communities have understood their “strategic positions” and have used this to influence the pace and direction of resource extraction activities.

26. Some Indigenous communities in the central and north coast of the province have entered into “reconciliation agreements” with the Government of British Columbia that recognize Indigenous “ownership” of the carbon values in the standing forests.<sup>12</sup> These agreements provide for their role in shared decision making processes and a share of resource revenues, including the carbon values of protected forests. Other communities, that do not have such agreements, have asserted their interests in carbon offsets.
27. The challenge is to create less conflict, more certainty and greater positive conditions for Indigenous Peoples. Sustainable resource development, including forests, can be structured in ways that can be a “win-win” for all. In dealing with industry interests, one such important tool is an impact benefit agreement (IBA). This mechanism is one that could be structured to include: recognition of the prior legal title of Indigenous Peoples to their respective lands, territories and resources; use of traditional knowledge in development planning; the inclusion of free, prior and informed consent in all aspects of development including renewal of tenure; protection of areas within the tenure area for spiritual and cultural practices; reforestation commitments as an important condition prior to any development; revenue sharing; training, employment and business opportunities.
28. Another important mechanism is the use of certification standards. Many of these are industry-developed standards to meet quality control requirements and are usually met with suspicion and skepticism. The Forest Stewardship Council’s (FSC) certification standards are generally more independent and therefore more acceptable to Indigenous Peoples.

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<sup>12</sup> For example, the Haida Nation and Coastal First Nations each signed Reconciliation Protocols with the Province of British Columbia in 2009, which can be found at [http://www.newrelationship.gov.bc.ca/agreements\\_and\\_leg/reconciliation.html](http://www.newrelationship.gov.bc.ca/agreements_and_leg/reconciliation.html). These Reconciliation Protocols address the sharing of carbon offsets.

29. As the natural resources and traditional territories of Indigenous Peoples are increasingly impacted by resource extraction and development activities, it is critical that industry exercise corporate social responsibility and respect international standards relating to the rights of Indigenous Peoples. These standards include the minimum standards set out in the Declaration, the International Labour Organization's Convention 160 and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which includes in particular, the right to lands, territories and resources. Furthermore, industry, consultants and investors must ensure that their policies in relation to activities and investments in Indigenous territories reflect the rights articulated in the Declaration.

### **Protected areas**

30. While some progress is being made by Individual Indigenous communities on this front, concerns are being raised about the policy framework for Reducing Emissions from Deforestation and Degradation (REDD) and the Clean Development Mechanism (CDM). The concerns, as I understand them, stem from the way in which some REDD and CDM projects have been carried out. In any event, at a minimum, Indigenous Peoples must be able to make their own decisions, by exercising their free, prior and informed consent, about matters that affect their traditional territories.

31. Protecting or growing new forests in one area to offset emissions in another will, no doubt, have dual consequences. For example, Indigenous Peoples in northern Alberta are directly impacted by the Athabasca oil sands development. I understand companies which are extracting oil from the tar sands are seeking to offset the massive carbon emissions from those projects through REDD programs or similar carbon credit programs. This issue is squarely addressed in the Concept Paper where it states that, "some Indigenous peoples have questioned the ethics of trading carbon stocks on international markets and reject the principle that industrial and corporate polluters can buy permission to continue polluting by trading in carbon credits" and that it is "...unethical and irrational because it does not tackle climate change ... and may establish perverse incentives for governments and big business to expropriate Indigenous peoples' forests and displace their communities in order to capture carbon funds." These raise incredibly important issues and challenges not only in relation to

the forests where carbon is stored, but also in connection with the industrial activity that emits carbon into the atmosphere in the first place.

32. I come from a community in the boreal forests, one of the last, large intact forests on earth. The boreal forests in Canada store more carbon than any other forest, including the remaining Brazilian Amazon rainforest.<sup>13</sup> In Canada alone, the boreal forests store an estimated 208 billion tons of carbon, equivalent to 26 years of global carbon emissions from burning fossil fuels. Most of this is in the wetlands, not in the trees, and is on lands subject to Indigenous rights and title and treaty rights.
33. As Indigenous Peoples, we have always understood and fought to keep our lands, territories and resources intact, to keep the air and water clean and to provide for good homelands for people and all who depend on it. The “ecosystem services” provided by the natural world are worth protecting and fighting for. Mechanisms are needed to deal with climate change and one is hard pressed to not support that which we find in the natural world. In this, the Indigenous Peoples’ teachings, beliefs and values need to find their way into the centre of this global dialogue. We cannot ignore the gifts provide by the Creator and passed on by our ancestors.

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<sup>13</sup> More information on Canada’s Boreal Forest is available at <http://www.borealcanada.ca/boreal-regions-e.php>.