**Expert Mechanism on the Rights of Indigenous Peoples**
**Seventh session**
**7–11 July 2014**
**Item 5 of the provisional agenda**
**Continuation of the study on access to justice in the promotion and protection of the rights of indigenous peoples**

**Joint Statement of the Grand Council of the Crees (Eeyou Istchee); Canadian Friends Service Committee (Quakers); Assembly of First Nations; Assemblée des Premières Nations du Québec et Labrador/Assembly of First Nations of Quebec and Labrador; Chiefs of Ontario; Federation of Saskatchewan Indian Nations; First Nations Summit; First Peoples Human Rights Coalition; Indigenous Rights Centre; Indigenous World Association; Inuit Circumpolar Council; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women's Association of Canada; Union of British Columbia Indian Chiefs**

**Speaker: Paul Joffe, Grand Council of the Crees (Eeyou Istchee)**

Thank you for the opportunity to address the continuation of the study on access to justice in the promotion and protection of the rights of indigenous peoples.

This statement highlights i) Supreme Court of Canada decision in *Tsilhqot'in Nation* v. *British Columbia*;[1] ii) redress for dispossession of lands, territories and resources; and iii) James Bay Cree justice program.[2]

Access to justice is often assessed in terms of the availability of both judicial and non-judicial remedies. Remedies become illusory if they are not accessible. The Supreme Court of Canada has ruled: "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[3]

## i) Landmark Supreme Court Decision in *Tsilhqot'in Nation* v. *British Columbia*

The *Tsilhqot'in Nation* decision by Canada's highest court is a precedent-setting decision relating to Aboriginal or Indigenous title. The Supreme Court issued a unanimous ruling in favour of the Tsilhqot'in. We convey our heartfelt congratulations to the Tsilhqot'in Nation for their courage, determination and perseverance in obtaining this judicial victory.

This struggle began 31 years ago, when the British Columbia government granted "a forest licence to cut trees in part of the territory at issue".[4] The Supreme Court ruled that the Province failed to consult the Tsilhqot'in on uses of the lands and accommodate their interests and, therefore, breached its constitutional and procedural duty to the Tsilhqot'in.[5] The Province failed to uphold the honour of the Crown.

Throughout Canada's history, no Aboriginal people has ever been successful in proving Aboriginal title in a domestic court. In 2002 and 2007, the UN Committee on the Elimination of

Racial Discrimination conveyed its concern to Canada and urged the government to take steps to facilitate proof of such title before the courts.[6] However, the Canadian and British Columbia government continued to take strong adversarial positions against a territorial approach to title.

The Supreme Court confirmed that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice to establish Aboriginal title based on a territorial approach.[7] The Court ruled that Aboriginal title confers ownership rights including "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[8]

These are essential elements of the collective human right of Indigenous peoples to self-determination, including self-government, and their right to development.

The "right to control the land" conferred by Aboriginal title means that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[9] Incursions on title lands are permitted only with the consent of the Indigenous nation or group, or if they are justified by a compelling and substantial public purpose. Such intrusions must be consistent with the Crown's fiduciary duty to the Aboriginal group.[10] A "compelling and substantial purpose" "must be considered from the Aboriginal perspective as well as from the perspective of the broader public".[11]

The Court also underlined that collective Aboriginal title is "held not only for the present generation but for all succeeding generations" and it "cannot be ... encumbered in ways that would prevent future generations of the group from using and enjoying it."[12] "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society."[13]

In regard to remedies, the Court ruled that if the Crown were to begin a project without consent, prior to Aboriginal title being established, it may have to cancel the project if title is established and if the project would be unjustifiably infringing on title rights. The Court confirmed a similar approach to legislation, even if validly enacted before title was established.

**ii) Redress for dispossession of lands, territories and resources**

Globally Indigenous peoples have been dispossessed of their lands, territories and resources. Such dispossessions have severe consequences for present and future generations, including impoverishment, discrimination, denial of self-determination and self-government, marginalization, forced assimilation and destruction of culture.

The *UN Declaration on the Rights of Indigenous Peoples* calls for effective mechanisms for prevention of, and redress from such dispossession.[14] Access to justice must include processes or mechanisms for redress, including restitution.

In this regard, we wish to draw your attention to the 2014 study[15] on the doctrine of discovery issued by the UN Permanent Forum on Indigenous Issues:

> Within existing States, the key issues urgently requiring resolution are those relating to making jurisdictional space for indigenous sovereignty and self-determination, including the effective operation of distinct indigenous legal orders over their territories. (para. 23)
>
> Processes and mechanisms of redress, as well as independent oversight, are required at international, regional and domestic levels. Decolonization processes must be devised in conjunction with indigenous peoples concerned and compatible with their perspectives and approaches. Such processes must be fair, impartial, open and transparent, and be consistent with the Declaration and other international human rights standards. (para. 34)
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> Such processes should encourage peace and harmonious and cooperative relations between States and indigenous peoples. Where desired by indigenous peoples, constitutional space must be ensured for indigenous peoples' sovereignty, jurisdiction and legal orders. (para. 35)

**iii) James Bay Cree Justice Program**

Finally, we would like to share a leading example of good practice in the restorative justice context. In 1975, the Grand Council of the Crees (Eeyou Istchee) negotiated administration of justice provisions in the James Bay and Northern Quebec Agreement. In 2007, the principles and framework of Cree justice and corrections systems were reaffirmed and expanded upon in a new Justice Agreement with the Province of Québec.

Today, the Department of Justice and Correctional Services (DOCJS) under the Cree Nation Government develops, integrates and maintains Cree values, culture, traditions and language in the provincial and federal juridical and corrections systems. A fundamental principle of justice is that it should represent the people it seeks to serve. Therefore, the Cree systems begin with recognition of Cree collective rights, obligations and interests, and the value of community. Community tribunals of Elders, men, women and youth have the authority to hear a wide variety of cases locally. Courtrooms are made round to reflect the Cree culture and importance of being inclusive in decisions that can impact members, as well as broader groups within Cree society. Eeyou Istchee (the land) is used in restorative justice programming with youth, and in rehabilitation for members returning from detention, to heal, learn and grow through reconnecting with their traditions, culture and language.

It is with the assertion and understanding that an Indigenous group is in the best position to serve, communicate and work with its own people, and it will be within their societies, communities and families they eventually integrate back into. In working with issues such as domestic violence that disproportionately affects women and children, the DOJCS has hosted conferences, studies and working groups leading to the creation of new programs, offices for victims' services, and the creation of two regional women's shelters that integrate culture and focus on protecting and healing families.

The majority of staff are trained in mediation, facilitation and conciliation and establish mechanisms that integrate Cree culture and values when dealing with conflict locally, or working

in the juridical systems. When looking at the overall objectives of a traditional or restorative justice approach, the DOJCS decided to develop programs focusing on high risk youth and children. The program is highly successful, and impacts a whole Nation of children and community members. The Indigenous philosophy of helping children at an earlier age to grow strong in values, traditions, culture, and knowledge has proved an incredible learning experience for both the children and DOJCS staff.

**Recommendations to EMRIP**

1. The *United Nations Declaration on the Rights of Indigenous Peoples* constitutes a principled framework for justice, reconciliation, healing and peace. It is crucial that States, in collaboration with Indigenous peoples, integrate the *Declaration* at legislative and policy levels to protect and promote Indigenous peoples' right to access to justice.

2. States must cease invoking extreme arguments and aggressive procedures in judicial and administrative processes, so as to deny Indigenous peoples their human rights. Such actions deprive them of access to justice and their right to an effective remedy.

3. Access to justice must include processes or mechanisms for redress, including restitution. Decolonization processes must be devised in conjunction with indigenous peoples concerned and be compatible with their perspectives and approaches. Such processes must be fair, impartial, open and transparent, and be consistent with the *UN Declaration* and other international human rights standards. Peace and harmonious and cooperative relations must be encouraged between States and indigenous peoples.

4. In promoting effective restorative justice systems, it is important to recognize that Indigenous peoples are in the best position to serve, communicate and work with their own people in accordance with their own perspectives, legal systems and institutions. It will be within their societies, communities and families that high risk youth and children eventually integrate. In working with issues such as domestic violence that disproportionately affects women and children, it is important to not only provide shelters but also integrate culture and focus on protecting and healing families.

**Endnotes**

[1] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.
[2] www.creejustice.ca.
[3] *B.C.G.E.U.* v. *British Columbia (A.G.)*, [1988] 2 S.C.R. 214, Dickson C.J. for the majority, para. 25.
[4] *Tsilhqot'in Nation*, *supra*, para. 5.
[5] *Ibid.*, paras. 78, 80 and 95.
[6] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* CERD/C/61/CO/3 (23 August 2002), para. 16; and Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 22.
[7] *Tsilhqot'in Nation*, *supra*, para. 44.

[8] *Ibid.*, para. 73. See also paras. 94 and 121.
[9] *Ibid.*, para. 76.
[10] *Ibid.*, paras. 2 and 88.
[11] *Ibid.*, para. 81. And at para. 82: "the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective."
[12] *Tsilhqot'in Nation*, *supra*, para. 74.
[13] *Ibid.*, para. 23.
[14] UNDRIP, arts. 8, 11, 28 and 40.
[15] Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress: Note by the secretariat*, UN Doc. E /C.19/2014/3 (20 February 2014) [Study by Forum member Edward John].