RECONCILIATION THROUGH THE LENS OF
THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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Reconciliation in Canada: Changing Paradigms

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1. Good morning ladies and gentlemen. I want to begin by acknowledging the [Algonquin people] and thanking them for allowing us to meet here today. I also want to acknowledge and thank the Indigenous Bar Association for inviting me to present on the important topic of Reconciliation.

2. The issues I would like to touch upon today include:

   a. First Nations – who we are and our historic and legal relations with Canada;
   b. United Nations (“UN”) mechanisms;
   c. Emerging Standards at the UN; and
   d. First Nations – “Key” to successful partnerships in Canada.

Introduction

3. Reconciliation is a topic of tremendous importance and interest to Indigenous Peoples around the globe, and a fundamental underpinning to Canada-Indigenous relations. We are here to discuss the question, “what is reconciliation”? The Supreme Court of Canada (SCC) has shed light on this issue as follows:

   “Treaties serve to *reconcile* pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.”

4. Canada’s Indigenous Peoples have pursued reconciliation through various initiatives, including litigation, and treaty and other negotiations. Such initiatives are directed at affirming significant legal Aboriginal rights which must be respected and which give rise to corresponding legal duties on the Crown such as consultation and accommodation. These duties prevent the Crown from “doing as it pleases” with lands and resources. The Crown is similarly limited by section 109 of the *Constitution Act, 1867*, which states that Crown title is subject to existing interests in the land, which include Aboriginal title.

First Nations – who we are and our historic and legal relations with Canada

5. Before colonization, Aboriginal peoples accounted for 100% of the population of what is now known as Canada. Today, we make up approximately 5% of the population. There are more than 615 First Nations communities across Canada covering every geographic region of the country. Although some First Nations are located in, or adjacent to, urban areas, most live in rural and remote areas where there is a tremendous abundance of natural resources (e.g. minerals, forests, oil and gas, sea and water resources). Canada’s continued economic development depends heavily on these resources. The government of Canada, the Provinces, as well as private industry groups, aggressively market Canada’s “resource potential” in the international and domestic investors.

6. British Columbia was one of the last regions of Canada to be settled by Europeans. In the mid-1800s, the British Crown assumed sovereignty in the Province, even though it had not concluded treaties with all First Nations in the Province. Therefore, in most of the Province, legal issues relating to land and resource rights have yet to be resolved. This is a crucial point for all developers and investors to be aware of – as it means the legal
title to the land is still in question (what is often referred to as the outstanding “Land Question”).

7. In this regard, it is important to know that, while First Nations may not be the “big players” in Canadian government or industry, we are very much a “strategic player.” This is because Aboriginal rights (which include Aboriginal title) and treaty rights are recognized, affirmed and protected in Canada’s Constitution. As many of you are aware, section 35 of the Canadian Constitution Act, 1982 provides:

“The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.”

8. The significance of this section has become increasingly clear in judgments of the SCC in the last 28 years. Although recognition and protection is afforded to Aboriginal and treaty rights in the Canadian Constitution, section 35 has been the subject of extensive litigation — much of which has arisen in British Columbia. In Van der Peet, the SCC held that the purpose underlying section 35(1) is the reconciliation of Crown sovereignty with the prior existence of Aboriginal societies. In particular, the Court stated:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

9. Yet, 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.

10. Since the early 1980s, the SCC 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 and decided by judges, most of whom have little or no experience with, or knowledge of, Indigenous Peoples or their issues. Further, judge-made law is at times ambiguous and its implementation can be very problematic. Often, in these important cases, government arguments are built around the discredited notions of the “doctrine of discovery” and “terra nullius”. Further, where 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 Aboriginal people, Aboriginal rights and Aboriginal title is a large source of discontent in Indigenous communities.

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4 See, for example, MacMillan Bloedel, at the BC Court of Appeal, where Seaton JA was very clear when he said, “there is a problem about tenure that has not been attended to in the past. We are asked to ignore the problem as others have ignored it. I am not willing to do that…”

5 R v Van der Peet, [1996] 2 SCR 507 at para 31. [Van der Peet]

11. Similarly, those First Nations who are participating in the treaty negotiations process with Canada and British Columbia face these same policies of denial, which underlie government negotiations mandates in modern day land claims and self-government negotiations.\(^7\)

12. These situations continue to occur, despite pleas from the Canadian courts that governments and Aboriginal communities seek solutions and reconciliation through "good faith" negotiations, rather than adversarial litigation. This continued "uncertainty" around the use of lands and resources for development and is, and should be, of major concern to developers and investors. Legal "certainty" with respect to the ownership of, and rights to use, lands and resources is one of the important goals of reconciliation between Aboriginal peoples and the Canadian governments. Indeed, reconciliation is at the heart of section 35.

13. In this regard, it can be challenging to imagine how the reconciliation, now demanded by section 35, can be achieved when the starting point for dialogue is the denial of the very existence of Aboriginal peoples, whose sovereignty must now be reconciled with assumed Crown sovereignty. First Nations should not have to prove their very existence as a starting point for negotiating a reconciliation of their sovereignty with assumed Crown sovereignty. In order to achieve reconciliation, institutional and judicial paradigm shifts must occur.

14. Unfortunately, First Nations often find themselves last in line when it comes to benefiting from the development of the resources in our territories. Yet, as described above, every First Nation has a legal interest in and to their respective territories and the right to make decisions about those lands according to their governance systems and standards (e.g. free, prior and informed consent). Further, First Nations must benefit when development is proposed in their territories (i.e. through impact and benefit agreements or participation agreements with the proponent).

15. As I will explain, First Nations are the key to successful partnerships when it comes to resource development in our traditional territories and, therefore, the legal certainty that developers and investors are keen to achieve. There are some positive examples in which Indigenous communities are working toward achieving reconciliation and increased certainty in British Columbia. A number First Nations along the central and northern coast of BC have entered into "reconciliation agreements" with the Government of British Columbia that recognize the Indigenous role in shared decision-making processes and a share of resource revenues, including the carbon values of protected forests.\(^8\)

16. The direction of the courts on Aboriginal and treaty rights, coupled with the Crown’s duties to Aboriginal Peoples and standards being developed internationally together present a significant opportunity to ensure that resource development occurs in a manner that benefits the environment, the communities most affected, the governments, the developers and the investors. A “win-win” approach is possible.

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\(^7\) 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.

\(^8\) 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. These Reconciliation Protocols address the sharing of carbon offsets.
17. On the social front, reconciliation is also of great importance. 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 must follow up with policies to address the significant multi-generational impacts of this assimilation policy.

18. The importance of reconciliation and relationship building is not limited to the Crown-First Nations sphere. While the legal duty is on the Crown to engage First Nations to identify and address any potential impacts of development on them, this matter is also critically important to developers and investors in terms of conducting corporate “due diligence” and fulfilling “corporate social responsibility.” Furthermore, legal “certainty” of tenure and land use permits requires that First Nations be engaged. As a matter of good business, developers and investors need to seek this certainty before investing significant amounts of time and money into pursuing a project.

UN Mechanisms

19. At the UN level, there are various significant mechanisms, which deal with the rights of Indigenous Peoples, such as the UN Human Rights Council (“HRC”).

20. Over the last 20 years, there have been significant developments regarding Indigenous issues at the UN, including: the adoption of International Labour Organization (“ILO”) Convention 169 in 1989; the establishment of the First and Second Decades of the World’s Indigenous Peoples; and the creation of two specific mandates focused on Indigenous issues – the UN Permanent Forum on Indigenous Issues (“UNPFII”) and the Special Procedures (e.g. Special Rapporteurs and Representatives). In December 2007, the HRC established a third mechanism focused on Indigenous Peoples – the Expert Mechanism.

21. Over the past several years, the UNPFII\(^9\) has undertaken a focused examination of the Doctrine of Discovery, in part because this doctrine is a central outcome of colonialism and has served as a foundation for legal frameworks that have led to the ongoing dispossession of Indigenous lands and resources. The theme for the eleventh session of the UNPFII is “The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples)”.\(^{10}\) In particular, the forum will focus on redefining Indigenous-State relationships, as well as working to understand the Doctrine of Discovery, in order to develop a vision of the future for reconciliation, peace and justice.

22. I mention these UN structures because Indigenous Peoples are actively working within these mechanisms to ensure that our rights and interests are respected and protected. They are available as valuable resources to our people in relation to protecting our rights, advancing our interests and working toward the important goal of reconciliation.

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\(^9\) The UNPFII is mandated to discuss issues related to indigenous economic and social development, culture, the environment, education, health and human rights.

Emerging Standards at the UN

23. 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 (the “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.

24. The SCC’s finding in *Haida Nation* which calls for the reconciliation of pre-existing Aboriginal sovereignty with assumed Crown sovereignty is consistent with the 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.

25. For more than 20 years, Indigenous people around the world have collaborated with Nation States at the UN to finalize the Declaration. On September 13, 2007, the General Assembly overwhelmingly adopted this human rights instrument, which provides important international standards for promoting and ensuring the survival, dignity and well-being of Indigenous Peoples.

26. The Declaration (which is not opposed by any member State of the UN) is an incredibly important international consensus instrument to guide efforts to achieve reconciliation through the development of new Indigenous Peoples-State relations. It provides a set of minimum standards against which State policies, initiatives and actions can be measured. 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. As the implementation of the Declaration will take time, member States and the UN should consider establishing a “Decade for Reconciliation”.

27. Some of the key articles in the Declaration that are directly relevant to reconciliation are:

   Article 25: “Indigenous peoples have the rights to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard,”

   Article 26: “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise acquired,” and

   Article 32: “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources”.

28. The “process” standards in the Declaration, such as the requirement of obtaining the “free, prior and informed consent” (“FPIC”) of Indigenous Peoples where proposed development has the potential to impact them is extremely significant for Indigenous Peoples, as it is Indigenous Peoples and their territories and resources who are impacted first and to the greatest degree, by resource development. It Indigenous
Peoples who must live with the consequences when all industry interests are long gone.  

29. In addition, Articles 15, 18, 19 and 38, set out, at a 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.”

30. So important is the standard of FPIC that the World Bank\(^{12}\) (which is not itself a UN mechanism) updated its environmental and social policies to minimize the harmful impacts of bank-funded development on Indigenous Peoples. On September 14, 2010, the World Bank’s Independent Evaluation Group presented “Safeguards and Sustainability Policies in a Changing World.”\(^{13}\) These policies were put in place to prevent or mitigate adverse impacts of its projects on people and the environment. These goals remain critical given current environmental and social trends. For example, the “Roadmap for Integrating Human Rights into the World Bank Group” (April 2010) noted that, “human rights are an integral part of effective and sustainable development, and should be explicitly considered in all World Bank Group (WBG) investment decisions.” As well, “human rights standards [are] a means of managing risks and recognizing the rights of disempowered people” and of “measuring the effectiveness of development.” Further, the World Bank’s 1991 Indigenous Peoples’ Policy requires clients to create an “indigenous peoples' development plan”, which gives Indigenous Peoples a voice in the future development path of their community.

31. Further, the International Finance Corporation (IFC), the arm of the World Bank Group that lends to companies rather than to governments, developed the IFC Performance Standards for Social and Environmental Sustainability, which are recognized as some of the most rigorous standards in the world for companies operating in the developing

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\(^{11}\) The implications of this standard of FPIC are illustrated by the following - Talisman Energy Inc., a Canadian energy company recently retained the services of Foley Hoag, a law firm with offices in Boston and Washington, to determine the benefits and challenges if the company were to adopt a policy to secure the free, prior and informed consent of Indigenous peoples potentially impacted by its global operations. This report was commissioned at the request of two responsible investors. The authors state in their executive summary: “The report concludes that, in the long term, the benefits for oil and gas companies of obtaining community agreement based on FPIC principles, and thereby both supporting their social license and reputational risks, may outweigh the substantial challenges of securing consent” and further that “In light of global trends, it would be timely and wise for Talisman to consider incorporating FPIC principles into its indigenous peoples or community policy.”

\(^{12}\) Although the World Bank is not a UN mechanism, this body is referred to as it has undertaken significant actions on the basis of standards set by the UN such as free, prior and informed consent.

\(^{13}\) Recommendations in the report include:

- Revise the policy frameworks to harmonize thematic coverage and guidance across the Bank Group and enhance the relevance of those frameworks to client needs: e.g. adopt and use a shared set of objective criteria to assess social and environmental risks to ensure adequacy and consistency…
- Enhance client capacity, responsibility, and ownership: e.g. increase synergies on environmental and social sustainability…
- Revise guidelines, instruments, and incentives to strengthen supervision arrangements: e.g. assign responsibility and budget for safeguards oversight and reporting to environmental and social units in each operational Region…
- Strengthen safeguards monitoring, evaluation, and completion reporting: e.g. include performance indicators on environmental and social outcomes in project results frameworks and ensure systematic collection of data to monitor and evaluate safeguards performance…
- Improve systems and instruments for accountability and grievance redress: e.g. seek greater symmetry in accountability and grievance redress mechanisms…
world. As part of an extensive 2010 review of the standards, the IFC developed “Performance Standard 7”. As a result of this standard, companies will be required to obtain FPIC from Indigenous Peoples, rather than merely consulting with them, before proceeding with projects. The standard requires that FPIC be obtained for “project design, implementation, and expected outcomes” – which means First Nations must be involved in all stages of project development.

32. Given the extensive nature of the rights and obligations in the Declaration and the legal status of the Declaration itself, information dissemination and public education are very important in order for the Declaration to be better understood by both Indigenous and non-Indigenous communities. An increased understanding and interpretation of the Declaration by Canadian courts, government and the business community will help in a fuller understanding and implementation of the rights therein, thereby leading to the reconciliation that we seek.

First Nations – The “Key” to Successful Partnerships in Canada

33. Although arguments advanced by the federal and provincial Crown in Aboriginal title and rights litigation, together with federal and provincial treaty land and governance negotiation mandates provide evidence of a continued denial of Aboriginal rights, there is nonetheless some room for optimism.

34. In British Columbia, Canada and British Columbia have entered agreements with a number of First Nations that offer hope that we can move one step closer to realizing the reconciliation demanded by section 35(1).

35. In 2005, the Province and First Nations leadership agreed to a “New Relationship”. This 6-page political commitment document is intended to chart a new and more positive relationship between the Province and First Nations, based on mutual recognition and respect, through joint initiatives and negotiation of agreements. This document was developed after the Province finally acknowledged that unilateral policy development – without First Nations involvement – was not working and that the solution for progress was to engage in partnership with First Nations.

The New Relationship vision states:

“We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.”

“We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations’ historical and sacred relationship with their territories”.

36. The commitment to this vision, and to build these processes and institutions, is about moving forward. It is about closing the socio-economic gap between First Nations and the rest of society. In this regard, recently, the Taku River Tlingit First Nation and the
province of B.C. signed a historic government-to-government agreement and land use plan, the first of its kind in British Columbia.  

37. Similarly, on the national front, a number of interesting and exciting opportunities have arisen, such as the accord entered into by Assembly of First Nations and the Government of Canada, “A First Nations – Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments” on May 31, 2005 and the “Canada-First Nations Joint Action Plan” announced in June 2011.

38. Such initiatives represent a shift from conflict to collaboration and are founded on partnership and respect. These types of activities have the potential to achieve the reconciliation of Aboriginal sovereignty with assumed Crown sovereignty by creating space for establishing new frameworks for recognition and reconciliation.

39. As noted earlier, developers and investors must also begin working closely with affected First Nations to identify and address any potential impacts of development on First Nations. This is critically important to developers and investors in terms of conducting corporate “due diligence” and fulfilling “corporate social responsibility” (“CSR”). Self-regulating mechanisms must be established where business would monitor and ensure its support of legal requirements, ethical standards and international norms.

40. In short, business and industry need to acknowledge the impacts of their activities on the environment and the local Indigenous communities and embrace responsibility for those impacts. Such a CSR policy would benefit the environment, Indigenous Peoples, as well as the company itself in terms of its marketability.

41. CSR policies include a “due diligence” factor. In the context of Indigenous Peoples, the corporate responsibility to respect human rights means that companies must exercise due diligence. Further, companies must not contribute to States’ failure to meet their international obligations in relation to Indigenous rights, nor should they endeavour to replace States in the fulfillment of those obligations. This point is particularly relevant in relation to the State’s duty to consult Indigenous Peoples, a procedural obligation associated with the duty to protect Indigenous Peoples’ substantive rights.

42. Companies wishing to exercise due diligence with respect to Indigenous rights should be guided in their activities by the rights recognized under the relevant international rules, including the Declaration and ILO Convention No. 169, even if they operate in countries that have not formally accepted or ratified these rules.

Concluding Remarks

43. Canada holds itself out as a champion and defender of human rights. Yet within its own boundaries, it continues to deny the collective Aboriginal rights and individual human rights of Aboriginal Peoples, as evidenced in positions taken by the federal and provincial Crown in Aboriginal rights and title litigation and at treaty tables. Despite these domestic and international obligations, Canada fails to advance reconciliation based on rights recognition. However, as Justice Henry Vickers stated in Tsilhqot’in Nation, “the time to reach an honourable resolution and reconciliation is with us today.”
44. The time has come for First Nations to take their rightful place in the Canadian economy and to achieve necessary reconciliation with the Crown. Indeed, our future as First Nations depends on finding sustainable, beneficial and environmentally sound ways to benefit from the resources on and in our lands.

45. Continuation of our connection to our lands and resources and protection of our cultures must be key factors in any development proceeding. This requires the building of relationships based on trust, recognition and respect. It is important to build relationships with all First Nations even if there is no near-term potential of a project in sight. The potential for partnership gives rise to the need to build relations from the earliest opportunity.

46. First Nations in British Columbia continue to build capacity to negotiate and work with other governments, industry and investors to form these relationships and to promote and ensure only sustainable development of natural resources occurs on our traditional lands. We recognize the need for economic development in order to meet our needs and goals. We are of the view that successful partnerships among First Nations, governments, industry and investors – based on the principles I have discussed here – can lead to a “win-win” situation for all involved.

15 For example, in British Columbia we now have a number of sector-specific Councils that are endorsed by the Chiefs in BC. These include: BC First Nations Energy and Mining Council; BC First Nations Forestry Council; First Nations Fisheries Council; First Nations Technology Council; and First Nations Health Council. These Councils advocate for the 203 First Nations in BC. They are not in place to negotiate agreements with companies but to provide advice to First Nations on public policy matters related to their area of expertise. They are also available to direct you as to which First Nations you need to talk to prior to investment or exploration and could possibly provide introductions if requested.