Closing the Implementation Gap

Indigenous Peoples and Human Rights in Canada

A forum to follow up on the 2004 mission to Canada by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen

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Rights & Democracy
International Centre for Human Rights and Democratic Development

Assembly of First Nations, Native Women's Association of Canada, Grand Council of the Crees (Eeyou Istchee), Amnesty International Canada, Canadian Friends Service Committee, and Rights & Democracy with the cooperation of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

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Introduction

Rodolfo Stavenhagen, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, commented in the report of his 2004 mission to Canada that "federal and provincial governments of Canada devote an impressive number of programmes and projects and considerable financial resources" to addressing the situation of Aboriginal peoples. But despite these efforts, the Special Rapporteur noted:

> Economic, social and human indicators of well-being, quality of life and development are consistently lower among Aboriginal people than other Canadians. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among Aboriginal people than in any other sector of Canadian society, whereas educational attainment, health standards, housing conditions, family income, access to economic opportunity and to social services are generally lower.

Over the years, numerous expert high-level reviews – including the report of the Special Rapporteur, concluding observations and general recommendations by UN Treaty Bodies, and domestic commissions such as the Royal Commission on Aboriginal Peoples – have brought forward countless recommendations for closing these gaps in the fulfilment of human rights of Indigenous peoples in Canada.

While governments in Canada have undertaken many programmes relevant to the implementation of these recommendations, it is the view of many Indigenous peoples' organizations and other observers that there is rarely a systematic response to the recommendations made by these experts, and that the recommendations for more substantive reform tend to be ignored altogether.

On October 2 and 3, 2006 human rights and Indigenous peoples' organizations in Canada organized a two-day seminar to consider the impact of the Special Rapporteur's report two years after his mission to Canada, and identify critical paths forward in addressing key concerns in that report and other reviews. The seminar brought together government bureaucrats, Indigenous practitioners, human rights activists, academics, and independent experts.

This report summarizes some of the key opinions, concerns and recommendations shared by participants. A wide variety of opinion was expressed during the discussions. Although there was considerable agreement on many points, on others there was disagreement. This report attempts to capture both the points in common and those where opinions diverged. The organizers are solely responsible for its accuracy.

Acknowledgements

The organizers would like to thank Special Rapporteur Rodolfo Stavenhagen and all the other participants who made presentations or who took part in the discussions in plenary and break-out groups. We would also like to acknowledge and thank Grand Chief William Commanda of the Algonquin Nation who opened and closed the meeting with prayer. In addition, the organizers would like to acknowledge the University of Ottawa, the Government of Canada, and the Office of the UN High Commissioner for Human Rights for their contributions that helped make this event possible.

Agenda

Moderator:
Alex Neve, Secretary General, Amnesty International Canada

OCTOBER 2

Opening prayer:
Grand Chief William Commanda

Welcome and acknowledgements:
Grand Chief Matthew Mukash, Grand Council of the Crees (Eeyou Istchee)

INTRODUCTION

Rodolfo Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigneous people

Sandra Ginnish, Indian and Northern Affairs Canada

Mary Simon, President, Inuit Tapiriit Kanatami

1. OVERVIEW OF IMPLEMENTATION

Obligations under Canadian and international human rights law, implications for implementation of the special relationship between the Crown and Indigenous peoples, structural barriers to implementation, and key opportunities.

Panel: National and International Perspectives

Convenor:
Don Nicholls, Attaché to the Executive Office,Grand Chief and Deputy Grand Chief, Grand Council of the Crees (Eeyou Istchee)

Panelists:

Jose Aylwin, Co-Director of the Observatorio de derechos de los pueblos indigenas, Chile

Wilton Littlechild, Member, UN Permanent Forum on Indigenous Issues

Paul Joffe, Lawyer, Specializing in Indigenous Peoples Human Rights

Fred Caron, Assistant Deputy Minister, Indian & Northern Affairs Canada

2. INDICATORS OF EFFECTIVE IMPLEMENTATION

What specific or concrete changes would indicate progress toward implementation of the Special

Rapporteur's recommendations? To what degree is such progress being made? What barriers or obstacles currently impede such progress? What are recommendations for addressing these barriers and moving forward with implementation?

Indicators Panel 1: Addressing Gender Discrimination

Convenor:
Lea Mackenzie, FIMI, International Indigenous Women's Forum

Panelists:

Sherry Lewis, Executive Director, Native Women's Association of Canada

Wendy Cornet, Consultant, Indigenous Policy and Law

Dorothy Carseens, Crown Witness Co-ordinator, Justice Canada

Jennifer Dickson, Executive Director, Pauktuutit Inuit Women of Canada

Indicators Panel 2: Access to Justice:

Convenor:
Wilton Littlechild, Chair, Saskatchewan Justice Commission

Panelists:

Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies

Donald Worme, Barrister & Solicitor

OCTOBER 3

Indicators Panel 3: Lands, Territories and Treaties

Convenor:
Roger Jones
Assembly of First Nations

Panelists:

Grand Chief Ed John, Assembly of First Nations

Richard Spaulding, Barrister & Solicitor

Barry Dewar, Director General of Comprehensive Claims Branch, Indian & Northern Affairs Canada

Break-out groups

To develop specific recommendations for each theme and modes of collaboration for implementation

Presentation of recommendations from each break-out group

Facilitated discussion on key recommendations

Responses and summing up by Special Rapporteur and moderator

Closing prayer

Summaries

INTRODUCTORY REMARKS

Rodolfo Stavenhagen, UN Special Rapporteur

After the Rapporteur submits the report of a country visit, he often does not know what impact the report has had in the country, or more generally, how the situation of Indigenous peoples is evolving.

Are things changing? Are they changing enough? Are the recommendations made by the Special Rapporteur even being considered by the government, Indigenous peoples and civil society or have they simply been filed away?

Clearly, Indigenous peoples worldwide do face a gap in implementation of international standards and domestic legal protections. How do we close this gap? Do we understand the barriers? Who is responsible?

There may be structural factors. The executive branch of government may not be attentive to its obligations under international law. Or there may not be a budget for implementation.
There may also be political barriers. There may not be enough public pressure for implementation. Or there may be contending pressures from other interests.

Sandra Ginnish, Indian and Northern Affairs Canada

The Canadian government welcomes and supports this forum. The government strives to engage with Indigenous peoples and takes its obligations under the UN system very seriously.

Canada has acknowledged that there is a need for increased action to close the gap between Aboriginal and non-Aboriginal people. Critical issues include poverty, land claims, education, incarceration, and violence against women. The government wants to work with Indigenous peoples to identify practical, implementable solutions and "best practices."

Who is responsible for what? What are the roles for government, broader society, and Indigenous peoples? It has been a short time since the Special Rapporteur's report on Canada. Some important steps have been taken and more are "in the works." For example, the government has supported the Native Women's Association of Canada in its Sisters in Spirit Initiative to address violence

against women, an agreement has been reached on compensation to victims of the residential schools, there has been increased funding for child services on reserves, and a model agreement reached in B.C. about schooling.

Mary Simon, President, Inuit Tapiriit Kanatami

Indigenous peoples in Canada do not fully enjoy their rights. In 2001 the UN Human Rights Committee expressed concerns about the marginalization of Indigenous peoples in Canada, particularly in the areas of justice, environment, health, and economic development. In 2004 the Committee again expressed concerns about the violation of the human rights of Indigenous peoples in Canada.

We must close this gap.

Country visits by the Special Rapporteur are an important pillar for advancing the human rights of Indigenous peoples. Governments must engage meaningfully with the Special Rapporteur's recommendations. This requires political will and cooperation with Indigenous peoples.

We need to see significant breakthroughs, confirmed in understandings and agreements between the government and Indigenous peoples. The National Roundtable discussions are a good example. There was an openness to all participants. However we have seen a change in approach with a change in government.

The UN Declaration on the Rights of Indigenous Peoples seeks to promote harmonious relations and reconciliation. UN Secretary General Kofi Annan has said that the Declaration is vital to the promotion and protection of the human rights of Indigenous peoples. The Government of Canada has not adequately explained its decision to oppose the Declaration. What are the real issues? There has been no consultation with Indigenous peoples over this change of position. We have written to the government expressing our concern that the government is opposing the Declaration. Our concerns deserve a response.

The government of Canada must take a positive role in working with Indigenous peoples to protect their rights so that there can be a shared sense of confidence about the future.

I. OVERVIEW OF IMPLEMENTATION: NATIONAL & INTERNATIONAL

"That the competences of the federal, provincial and territorial governments in their shared responsibility to promote and protect the human rights of Aboriginal peoples be redefined and coordinated so that such rights be effectively protected at all levels." – Recommendation of the UN Special Rapporteur on the Situation of human rights and fundamental freedoms of Indigenous people from the report of his 2004 mission to Canada.

Jose Aylwin, Co-Director of the Observatorio de derechos de los pueblos indigenas, Chile

The Special Rapporteur visited Chile in 2003. He identified a number of areas of concern including judicial treatment. The Special Rapporteur recommended greater consultation between the state and Indigenous peoples and an end to the criminalization of Indigenous protesters.

In response the Government of Chile prepared a report, much like the Royal Commission in Canada, that promised a new relationship with Indigenous peoples based on the strengthening and promotion of Indigenous peoples' cultures and the return of land. But nothing has been done to implement these recommendations.

The Special Rapporteur's report has had a modest impact in Chile. There have been positive practices such as the way Indigenous peoples' organizations have engaged with the Office of the High Commissioner for Human Rights in Geneva to promote the Special Rapporteur's report and the role of NGOs in monitoring implementation. However, there is need for greater coordination among Indigenous groups and NGOs and a more active strategy to create pressure for implementation, particularly through the international arena.

Both Canada and Chile should show political will for improvement by voting yes to the UN Declaration on the Rights of Indigenous Peoples.

Fred Caron, Indian and Northern Affairs Canada

The question of implementation has become a central preoccupation in the international arena. It would be useful to identify best practices – to see what has worked best in different national contexts and to compare that with other countries and with Indigenous groups.

Even if we don't agree, we need to have dialogue and need a constructive way forward. Canada does take its human rights obligations seriously. While there is an undeniable implementation

gap, the international system needs to do more to promote clear and attainable standards for the realization of Indigenous peoples' rights. This is what Canada has said about the Declaration – it fails to provide the kind of clear and attainable standards that are needed.

It's important to note that the Government receives recommendations from numerous international bodies as well as from domestic human rights bodies and processes and from Indigenous groups. Therefore, implementation is necessarily a balancing act. The government cannot automatically implement recommendations from UN bodies or respond to all recommendations in the same manner or through the same process. The government needs to have flexibility with respect to all international instruments, in order to take a realistic approach to implementation that does not infringe upon human rights standards within the state.

Concerning the Declaration, many countries have the same problems that Canada has. This includes countries that have voted in favour of its adoption at the Human Rights Council. Canada's objection to the Declaration doesn't mean that Canada is not participating in international instruments generally.

Wilton Littlechild, UN Permanent Forum on Indigenous Issues Member (North America)

There has been an avalanche of recommendations from UN bodies in respect to the situation of Indigenous peoples in Canada. What's more important is the follow-through. And when you look at the reviews of Canada's human rights record you can see there is an overarching concern over the failure to move forward with implementation. Canada ratifies UN instruments but then disregards the rulings of the Treaty Bodies when they are against Canada.

There are a number of themes and recommendations of particular importance in the Special Rapporteur's report on Canada including: paragraphs 92-95 dealing with access to lands and resources and self-government, where the Special Rapporteur notes the need for greater political will; paragraph 98 on the ratification of ILO Convention 169; and Paragraph 116 calling on Canada to "adopt an even more constructive leadership role in the process leading to the adoption of the Draft Declaration on the Rights of Indigenous Peoples", a recommendation that has become even more important since the reversal of Canada's position on the Declaration.

The Special Rapporteur was right to indicate that there has been progress made on some of these

issues. A number of encouraging land claims settlements do indicate progress. Recent Supreme Court decisions also reflect considerable progress in the recognition of Indigenous rights. Yet, it's important to note that these same decisions continue to be ignored in government policies. In Paragraph 50, the Rapporteur notes that the government continues to play an adversarial role when Indigenous peoples seek legal protection of their rights.

Paul Joffe, Lawyer, specializing in Indigenous human rights

The former UN Commission on Human Rights created the mechanism of the Special Rapporteur to fill a void in the international system. The CHR indicated that it was conscious of the "situation of vulnerability in which Indigenous people frequently find themselves".

The CHR reaffirmed the urgent need to recognize, promote and protect more effectively the human rights and fundamental freedoms of Indigenous peoples. It highlighted the "precarious levels of economic and social development that Indigenous people endure in many parts of the world and the disparities in their situation in comparison to the overall population, as well as ... the persistence of grave violations of their human rights".

The essential mandate and work of the Special Rapporteur is further reinforced by the purposes and principles of the UN Charter, which require actions "promoting and encouraging respect" for human rights. The duty to promote respect for human rights is to be based on "respect for the principle of equal rights and self-determination of peoples".

The Special Rapporteur and his human rights work can serve as an important bridge, linking and bringing international human rights standards into the domestic context of states. State obligations under international human rights law have an enormous importance for domestic law and policy. The work of the Special Rapporteur is one of the foremost means for interpreting these obligations and evaluating how well states are living up to these obligations.

The Special Rapporteur's recommendations themselves may not be legally binding. However, the urgency, nature and scope of the SR's human rights mandate needs to be considered in the context of existing international and constitutional obligations of states.

It is especially important for the Special Rapporteur to incorporate in his work the human rights standards elaborated in the UN Declaration on the Rights of Indigenous Peoples. In June 2006, the Human Rights Council

adopted the UN Declaration and the SR's mandate now comes under the Council. Thus, the legitimacy of incorporating the Declaration in all aspects of the SR's work is considerably strengthened.
The Declaration provides a principled legal framework for Indigenous peoples' international human rights. According to international law, human rights, democracy and the rule of law are interlinked and mutually reinforcing. The Declaration must be understood and interpreted in this overall context.

As affirmed by the Inter-American Court of Human Rights, collective land or property rights are indispensable for the effective exercise of such rights by Indigenous individuals. Collective rights should not be viewed as being in opposition to individual rights.

In contrast to its predecessor, the Conservative government of Canada continues to actively oppose the adoption of the Declaration. Canada was one of only two countries that voted against the Declaration at the Human Rights Council. The government has based its opposition on interpretations that are erroneous and unjustified. It seeks to amend the Declaration so as to conform to Canadian law and policy, which are often in need of basic change.

In international law, domestic law does not prevail over international law. Otherwise, it would be extremely difficult to continue to develop international law and norms, and raise human rights standards within states.

As an elected member of the Council, Canada has the duty to "uphold the highest standards in the promotion and protection of human rights". In view of the diverse effects of the Declaration on Indigenous peoples' rights and Indigenous-state relations, the government also has a duty to uphold the honour of the Crown at all stages of the current UN standard-setting process. These duties are especially relevant, if Canada is seeking to diminish the rights and standards in the Declaration.

According to section 35 of the Constitution Act, 1982, the government of Canada has a constitutional obligation to consult with Indigenous peoples and, where appropriate, to accommodate their concerns. On "very serious issues" that may have adverse effects on Indigenous peoples' established rights, the Supreme Court has indicated that full consent of Aboriginal nations would be required.

For Canada to now take an opposing view to the adoption of the UN Declaration goes against prominent international human rights experts and organizations, states and UN human rights bodies that view the Declaration as an important human rights instrument. Government claims that the Declaration is a "very radical" document are unsubstantiated and simply false.

II. INDICATORS OF EFFECTIVE IMPLEMENTATION

Implementation Panel 1: Addressing Gender Discrimination

"That the Government address with high priority the lack of legislative protection regarding on-reserve Matrimonial Real Property which places First Nation women living on reserves at a disadvantage.

"That particular attention be paid by specialized institutions to the abuse and violence of Aboriginal women and girls, particularly in the urban environment." – Recommendations of the UN Special Rapporteur from the report of his 2004 mission to Canada.

Sherry Lewis, Executive Director, Native Women's Association of Canada

The central concerns of Indigenous women include matrimonial property rights and other housing concerns, Bill C-31, violence against Indigenous women and their children (including sexual exploitation), socio-economic marginalization, and self-determination.

While there has been implementation of some of the Special Rapporteur's recommendations in relation to these concerns, many have not received due attention, leaving Indigenous women and their children still at risk of human rights violations on a daily basis.

Regarding matrimonial property rights, due to the Indian Act, property rights on reserve may be denied to women after the breakdown of a marriage. This is one area where we have seen progress on implementation through the establishment of a tripartite process between NWAC, the Assembly of First Nations and the federal government.

Native women who leave the reserves are particularly vulnerable to violence and exploitation, including in the sex trade. We are pleased that Canada has supported NWAC's Sisters in Spirit Initiative which includes completing research, public education and awareness, and policy development aimed at addressing the issue of violence against Indigenous women. However, the systemic socio-economic marginalization of Indigenous women will take far more to resolve.

The Kelowna Accord, arising from the Canada-Aboriginal Peoples Roundtable Discussions, Cabinet Retreat and First Ministers Meetings, would have addressed some of the critical socio-economic issues facing Indigenous women and peoples. The new Conservative government has failed to implement the Kelowna Accord.

Federal cut backs to funding for women's advocacy is a concern.

Many issues that are vital to Indigenous women – such as child welfare services and funding of women's shelters – don't fit neatly into the little boxes of public policy and so don't receive adequate attention. Changes in the criminal justice system that will result in harsher sentences are also a problem.

The marginalization of Indigenous women at the political level, within Aboriginal organizations and in relations with the federal government, contributes to marginalization at the local level. It is important to ensure that Indigenous women's organizations are equal participants in policy and legislative reform discussions. It is also important that a culturally relevant, gender based analysis is applied by all Indigenous nations, as well as provincial, territorial and federal governments.

Canada has a critical role to play in the promotion of the human rights of Indigenous peoples, nationally and internationally, including by promoting the UN Declaration on the Rights of Indigenous Peoples. Advancing Indigenous women's individual human rights is inextricably linked to advancing the collective human rights of Indigenous peoples.

Wendy Cornet, Consultant, Indigenous law and policy

The Special Rapporteur makes many important recommendations and observations on Canada. Of critical importance are the links between the human rights of Aboriginal peoples, recognition and implementation of constitutional Aboriginal and treaty rights, and poverty. The Special Rapporteur's observations show that public policy in Canada has not worked out the links between human rights in international and domestic instruments and the concept of Aboriginal and treaty rights under the Constitution. This is a substantial barrier to the advancement of human rights of Indigenous peoples, particularly women.

It is vital to use the tools of gender analysis when considering how to improve the situation of Indigenous peoples. The Indian Act doesn't specifically address matrimonial property rights, but it creates inequality through its silence on the issue of matrimonial real property rights. By not addressing Native women's specific reality, situations are created where policies can affect women more adversely than men. A gender based analysis of matrimonial property rights shows that First Nation women are more at risk due to the current lack of protection.

The problem with the compartmentalization of rights – for example, talking about an issue such as matrimonial real property rights as women's issues – is that issues particularly affecting women can be dismissed as unimportant. This compartmentalized approach has incorrectly posed collective

rights against individual rights in opposition to one another, and women's issues are too often regarded as potentially divisive within Indigenous communities. This approach is fundamentally flawed and not in tune with international human rights law.

The right of peoples to self-determination is a pre-requisite for the enjoyment of other human rights, notably various individual human rights. Human rights are interdependent, equally valued—there is no hierarchy of rights in the international system. We have much work to do in Canada to appreciate these linkages—a domestic approach consistent with international human rights theory would lead to collective and individual human rights being understood as operating in complementary ways.

There is a need for lawyers working in the "mainstream" of Aboriginal and treaty rights issues in Canada to undertake gender based analysis as a regular part of their work in order to overcome some of these obstacles in the theory and to the full enjoyment of human rights by Indigenous women in Canada.

Dorothy Carseens, Crown Witness Co-ordinator, Justice Canada

Language is a critical issue. As in many remote communities, Indigenous peoples in the Northwest Territories are served by a traveling court where all the judges, lawyers, and court clerks tend to speak only English.

The alleged offender and other community members (including the offender's family) often engage in intimidation in open court in their Indigenous language. This further victimizes women who suffer from violence and abuse.

The court worker programme plays a pivotal role in improving the victim's access to justice through translation and through supporting her clients in a culturally appropriate, gender sensitive manner.

In order for the rights of Indigenous women in Canada to be realized on the ground, there must be many more resources allocated to improving the level of accessibility of culturally sensitive, gender specific programs and services. This includes court worker programs, shelters and long term healing programs.

Jennifer Dickson, Executive Director, Pauktuutit Inuit Women of Canada

Pauktuutit has produced a report named 'Keepers of the Light', an action plan for Inuit women, released today. Its key recommendations are:

1. *Equity and Empowerment.* In order to fulfill its commitment to gender equity, the Government of Canada makes it a priority to provide

Pauktuutit with recognition and resources commensurate with that provided to the other five National Aboriginal Organizations (NAOs). Pauktuutit must be recognised for the independent national voice of Inuit women that it is, and supported to contribute optimally to the creation of solutions to the critical issues facing Inuit women, their families and communities, with the same stature, resources, responsibilities and influence afforded the other NAOs.

2. *Health and Safety.* Violence in the Community: The Government of Canada engage Pauktuutit with sufficient policy commitment and financial resources to play a pivotal role in bringing about practical, real and lasting change in the critical program areas of the health needs of Inuit women and the related issue of violence and abuse — a multi-faceted problem that is undermining the health and well-being of everyone in Inuit communities.

3. *Strengthening Inuit Families.* A strong partnership between Pauktuutit and the Government of Canada necessitates consistent and adequate support for Pauktuutit's work in the areas that benefit Inuit children and youth. Childbirth, childcare, FASD, teen pregnancies, early childhood development, and child sexual abuse demand attention. Pauktuutit has years of experience dealing with the full dimension of these problems extending from birth to the intergenerational legacy of residential schools. It builds upon experience and employs practical, measurable solutions that offer long-term benefits to Inuit women, their families, and their communities.

4. *Strengthen Inuit Women's Voice in Global Issues.* There is a need for the Government of Canada to establish a predictable and reliable funding strategy that supports Inuit participation in international issues and events. Inuit women must have the tools to provide effective input to Canada's negotiating position well in advance of relevant international meetings. In addition, Inuit women need to participate at national and regional discussions that deal with implementing international decisions. Support must extend beyond travel and accommodation, to funding and capacity-building that assures meaningful contributions to the processes.

Comment from the floor:
We need to have the women participating in the solution. The issue is that at the moment, the safe place to do that is in women-only groups. We are rebuilding our nations. We need to have the women present.

Sherry Lewis' response: This is what creating equality is all about. It is essential to ensure that Aboriginal women's voices are heard, through representative Indigenous women's groups, who have the expertise and are doing the work at all levels, from the grassroots to national to international.

Implementation Panel 3: Access to Justice

"That efforts be increased at all levels to reduce and eliminate the overrepresentation of Aboriginal men, women and children in detention, in particular by establishing measurable outcomes, and that Aboriginal alternative justice institutions and mechanisms be officially recognized and fostered with the full participation of Aboriginal communities."
– Recommendations of the UN Special Rapporteur

Donald Worme, Barrister & Solicitor

We can't talk about access to justice without understanding the underlying suffering of Indigenous peoples. Many existing laws are oppressive to Indigenous peoples. For example, restrictions on hunting that prevent the practice of Indigenous tradition impacts self-esteem and the ability to raise children and pass on our values.

The legal system does little to protect Indigenous peoples from some of the humiliations and inhumanity inflicted upon them. We witness people holidaying on our burial grounds and can do nothing about it. So the most effective indicator of progress would be an actual reduction in the pain and humiliation Indigenous people suffer.

Clearly political will is necessary. Recommendations exist but they are not implemented.

Also there has been an absence of genuine leadership in some Aboriginal communities, either to demonstrate the leadership, or let the young people get in there. This is very important because the patience of the Indigenous young people is growing thin. Right now such frustration is turned inwards, but that will not always be the case.

Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies

There have been countless reports on the situation of Aboriginal women and countless reports on the issue of access to justice generally.

Aboriginal women in the prison system are more likely than non-Aboriginal women to be described as difficult to manage, which leads them to then be labelled as "violent", so they are more often classified as maximum security prisoners than are non-Aboriginal women, even when they have been convicted of less serious crimes. There is also a pattern of women initially going to jail for relatively minor crimes, ending up serving lengthy prison terms as a result of further sentences meted out as punishment for actions committed in prison. Oftentimes, they will also be subjected to the double jeopardy of lengthy periods of isolation as well as the longer sentences.

The justice system does not give adequate consideration to the

context in which women commit crimes. Most women convicted of crimes are survivors of abuse. As the UN has commented on, Indigenous women in Canada contend with low incomes and inadequate social and economic supports. Crimes committed by women often have a distinct character. For example, women who are forced to sell their bodies to pay their rent or feed their children may also face charges for soliciting. Some have faced robbery charges in circumstances where they demand payment after committing the sex act for johns. Others, who live together to share expenses have faced charges of living off the avails and pimping.

Canada currently appears to be ignoring the recommendations made by UN Treaty Bodies and other international human rights experts. When women challenge discrimination before the courts, they are heard and there have been some favourable outcomes. However, inadequate funding for women's legal defences and the recent elimination of funds for the Court Challenges Programme creates a real barrier to women's access to justice.

A clear, concrete indicator of progress would be a 10% reduction in the number of women in jail. In fact, in the past 12 months the numbers women in prison have increased. A programme of de-incarceration, of addressing the factors leading to the criminalization of women and providing suitable alternatives to incarceration, would benefit women from all social groups, but would especially benefit Aboriginal women who are the most likely to be sentenced to lengthy prison terms and to serve their time in the harshest conditions.

Wilton Littlechild, Chair, Saskatchewan Justice Commission

Canadian society needs to become more knowledgeable and familiar with Aboriginal society. We need to begin with the school system, to influence the people who will eventually become lawyers and judges. We also need cultural training for those who work within the criminal justice system.

We have to acknowledge that the highest incidences of violence against Aboriginal people are committed by Aboriginal people, behind closed doors in our own communities.

Access to justice means helping the victims and helping the perpetrators not to offend again. This requires restoring respect for the law. The European legal system and the way it's practiced does not inspire respect. It's foreign to us and represents going to jail.

A critical measure of implementation of Canada's obligations would be reduced incarcerations of Aboriginal people. Another measure is whether Aboriginal people have hope in their lives. Right now we can look and see that many have lost hope.

The cost of doing nothing is very high. Canadian society cannot afford the present system with the high rates of incarceration of Aboriginal people. It is more cost effective to actually make change.

Comments from the floor

The justice system is not trying to find solutions to the problems identified by the speakers. It's just business as usual and the situation of Aboriginal peoples is not even a concern.

Our suffering is a direct result of colonization. The country was born out of racism but has never come to terms with this fact.

Existing protections for Aboriginal people are poorly understood and utilized within the system. For example, there is lack of use and knowledge of the Gladue principle (all available sanctions other than prison shall be considered for all defenders, especially for Aboriginal people)

Need to look at social reality and context and ask why are youths in gangs, and why are women selling their bodies? This is where the focus should be, not on arresting and incarcerating.

The problem with the 'diversion' programmes that provide alternatives to incarceration is that you don't have access unless you plead guilty. But what if there are legitimate reasons not to plead guilty, what if there are factors that the court has not acknowledged?

Governments in Canada are ignoring the evidence that jail for women does not work and instead are creating new prisons. Building prisons is more about creating jobs and business for the white people than about providing justice. Within Aboriginal communities, our priority is not prisons. Rather, priorities are infrastructure and services for our communities and our families including childcare, elementary school, etc. This is another way in which we are not self-governing – our priorities are not respected.

In interviews with children who have joined gangs, most said they had joined because they wanted someone to care for them, to show interest, to show them they are loved. Way down the list it was about money/ violence/ drugs.

There is a growing trend to criminalize those who stand up for their land rights and cultural rights.

When the Indigenous Bar Association suggested that there be an Aboriginal judge appointed to the Supreme Court, there was huge outcry amongst non-Aboriginal people. This will always be the case until people are able to appreciate the pluralism of the law.

Hope is very important; hope fits in with a human rights approach. And if the people that you deal with feel the hope, then it means that you did something right.

Implementation Panel 3: Lands, Territories and Treaties

"That legislation be enacted and effective measures be implemented to expand the existing effectively usable lands and resources base of First Nations, Inuit and Métis communities to ensure their social, economic and cultural survival and well-being; and that regional treaty commissions and an Aboriginal Lands and Treaties Tribunal be established as recommended by RCAP." – Recommendation of the UN Special Rapporteur

Roger Jones, Assembly of First Nations

There are efforts going back 10 and, in some cases, 20 years, to undertake a substantial revision of federal policy in the areas of comprehensive claims, inherent rights, and specific claims policy.

The Aboriginal Roundtable process, which involved the federal government and a cross-section of Aboriginal organizations, concluded that the treaty process is not in line with the law as determined by Supreme Court of Canada cases. Out of the Roundtable meeting that took place January 12 -13, 2005 in Alberta, there was an agreement between Aboriginal peoples and the federal Crown, establishing an intention to work on a policy basis to try to address the short comings of the policy. This is work that still needs to be done.

In short, we can agree that the current policies are deficient, and need to be revised in collaboration between the federal government and Aboriginal peoples.

Richard Spaulding, Barrister & Solicitor

The starting point is to look at whether the government recognizes the problems. Then, does the government really want to engage? Are the policies being changed?

The Royal Commission on Aboriginal Peoples recommended in 1996 that an Aboriginal land tribunal be established. RCAP recommended that the tribunal have a flexible mandate in place with the power to review the adequacy of settlements etc. and a role in settling and policing settlements. The tribunal could enforce compliance, arrange dispute resolutions etc. If the tribunal had this kind of power then it could force the government to the bargaining table, which would allow disputes to be sorted quickly.

The government recognises that there are problems with the settlement process. It can take 15 years to settle a claim. In the meantime funds get diminished. When talks are deadlocked there is nothing in place to ensure a settlement.

There are accords which have come out of the Roundtable process which commits the government to renewal of these policies but not a lot has happened.

RCAP proposed that Canada should work toward a wide framework agreement clarifying and resolving ambiguities around Aboriginal title in Canada. RCAP also recommended that Canada not wait until such an agreement is struck, but should instead revise its policy ahead of time based on a number of established principles, including: the Crown has a fiduciary obligation toward Aboriginal peoples; land interests represent a real right; there must be unpressured consent; Aboriginal peoples must have sufficient land to foster culture rights and political autonomy.

One of the key barriers to progress is the government's reluctance to seriously engage with rights issues. What are Aboriginal rights? What are they in relation to other Canadians' rights? The government seems to not want to clarify this. Or worse it's promoting confusion as in its recent public comments on the UN Declaration which cause fear and uncertainty.

There is a reluctance to take a purposeful approach to Treaties. The government approaches most disagreements as narrow interpretive problems. Too much of Aboriginal time and energy around the implementation goes into disputes with government.

Federal laws and policies do not reflect legal obligations toward Aboriginal peoples as established in court. Federal laws have not been changed since the first Supreme Court decision on Section 35 (even though there are many cases since then). For example, the federal handling of fishing licenses is still not in line with the Marshall Decision.

It is recommended that there should be a formal review of compliance with legal obligations.

In Nunavut the government has dropped old legislation and enacted new to bring it into line with court decisions. Similarly, it is in the process of repealing all the previous harvesting rules, and adopting a whole new set of regulations, in the course of which it is seeking to ensure that each regulation is in line with court decisions, from the Sparrow test onward.

Revision of legislation is a long term goal. In the interim, there should be routine reporting to Parliament on whether existing legislation is infringing upon Aboriginal rights.

Barry Dewar, Director General of Comprehensive Claims Branch, Indian & Northern Affairs

The difficulty with dealing with recommendations from international sources such as Special Rapporteurs is often due to the difficulty in aligning the

international and domestic lenses. There are often domestic social and economic situations, public attitudes, historical factors, etc. to be considered.

Section 35 of the Constitution Act establishes a rights framework, but there have been problems with the implementation. Compliance of legislation, approaches to collaboration between the federal government and Indigenous peoples, the lack of Métis rights protections – these are all issues that need to be addressed.

A fundamental purpose of section 35 of the Constitution is balancing of rights. The Supreme Court has said this many times. The Constitution requires respect for Aboriginal culture and respect for distinct rights, but also respect for rights that all Canadians share. Balancing of rights requires clarity of law and certainty when it comes to title over land and resources.

On the ground, a workable approach to reconciliation needs different approaches depending on the specific context and circumstances. The federal government and the provinces have different interpretations of what is required. Reconciliation is a mutual responsibility of the government of Canada, of provinces, and of Aboriginal people to come to workable approaches. The government can't unilaterally trump rights.

Two key vehicles for achieving reconciliation are the independent judiciary and negotiations.

Independent judiciary: Canada has struggled with the meaning of Aboriginal rights since the incorporation of section 35 in the Constitution. What has been achieved in the courts is remarkable. Now we need to build on that with progresses, including a process for Métis rights, new negotiations etc. We may need to look at the contour of rights, at broader policy change.

Negotiations: Courts have repeatedly held that negotiation is the way forward. The Government has made a lot of investment in this area. Achievements over the past years have been impressive – domestically and in relation to what is happening in other countries.

I disagree with complaints that the negotiations have not given effect to human rights and that there has been ineffective implementation. To the contrary, Treaty negotiations have brought surety to the process, have affirmed Aboriginal access to many benefits, provided protection of Aboriginal traditional economy, and most Treaties include self-government and political rights. There are 300 Aboriginal communities currently participating in negotiations, and $200 million was invested last year. The average is 15 years to reach a negotiated settlement and 10 years to implement.

We need to note that there is no guarantee of successful outcomes: that responsibility lies with the government and Aboriginal groups. At the end of the day, it is important that the arrangements between the Government and Aboriginal peoples are constitutionally binding. It is not important how they are made. It is important to ensure that all peoples – Aboriginal and non-Aboriginal – can rely upon the Treaties. This may require modification of Aboriginal rights.

There is a need for recognition that Aboriginal people come to the table with rights. As well we need mechanisms which ensure these rights. Progress has been made in ensuring that Aboriginal rights do not get extinguished. These are very real changes. It is a disservice to Aboriginal people not to acknowledge these changes.

Grand Chief Ed John, Assembly of First Nations

I want to emphasize the importance of an international presence to monitor and provide of oversight Crown/ Aboriginal relations. The international dimension gives hope. Domestic courts are very expensive to go through and the Crown is adversarial.

The Crown's position is that Section 35 of the Constitution is empty and means nothing. They deny that the peoples exist as Aboriginal peoples, yet they have the audacity to proclaim that Canada is a human rights promoter. This is a holdover from the colonial relationship.

It has been helpful that the Supreme Court has shed light on section 35. But more education for jurists is important, including educating jurists on international standards.

It's true that the goal is reconciliation. But the Court uses this as an argument to ignore the pre-existing Aboriginal sovereignty. The courts do not want to recognise the historical realities. So the Court has not resolved the underlying dispute between Aboriginal peoples and the Crown.

When it comes to negotiations, it's important to note that Aboriginal groups borrow money to undertake the negotiations. They are putting themselves in debt in an attempt to achieve recognition of their rights.

Aboriginal peoples want to have a relationship over the whole territory. It is not about just having a small section of land.

When Aboriginal peoples enter negotiations we do so in good faith.

Instead of modification of Aboriginal rights there needs to be recognition: recognition that the Aboriginal peoples were here first but that both Aboriginal and non-Aboriginal now have to live together. Aboriginal people never ask the Crown to give up sovereignty, so why vice versa.

Comments from the Floor:

The modified rights model is simply a mode of extinguishment. Many Aboriginal groups in BC are not at the negotiating table because of this model.

The government claims that it is taking different approaches for different communities but the documentation is the same for all Treaty negotiations.

We have two missions: respect for Mother Earth and reconciliation among peoples. The country is falling apart, because Indigenous values were not worked into Canadian culture. Outsiders can not entirely grasp this connection with the land. They need to listen and be guided.

Recommendations

The following reommendations were proposed in small group discussions. Although there was considerable interest in and support for these recommendations within the break out groups, it should not be assumed that all participants were in support of every recommendation.

Break-out Group on Barriers to Implementation

1. Canadian law and policies should be periodically reviewed to ensure compliance with international human rights laws and standards.

2. All relevant parliamentary committees should have a permanent agenda item to review international activities pertaining to Indigenous rights such as the recommendations of UN Special Rapporteurs and Treaty Bodies.

3. Indigenous peoples' organizations should also have a permanent agenda item to review international activities.

4. Canada should immediately review its conduct in relation to the adoption of the UN Declaration on the Rights of Indigenous Peoples to fully take into account the far-reaching adverse impacts on the Crown's relationship with Indigenous peoples, on the Human Rights Council, and the international human rights system as a whole;

5. In this context, Canada's failure to uphold the highest standards in promoting and protecting human rights and overall conduct as an elected member of the Human Rights Council should be reviewed by the Council in accordance with its procedures;

6. Canada should immediately consult with Indigenous peoples in Canada concerning the Declaration, in a manner that fully honours its obligations under constitutional and international law and fully responds to the questions and concerns raised by Indigenous peoples and organizations in Canada;

7. The Special Rapporteur should continue to consider the UN Declaration on the Rights of Indigenous Peoples and fully integrate it in carrying out his diverse mandate.

Break-out Group on Gender Equality and Access to Justice

1. **Healing:** Healing is a core concept of Indigenous Justice and a necessary context for access to justice. Two critical elements of healing are: continued and adequate attention to the intergenerational impacts of the residential school system and the implementation of the Kelowna Accord (dealing with socio-economic marginalization in all its contexts).

2. **Indigenous Legal Systems:** Of central importance is respecting and maintaining Indigenous legal institutions, with the goal of ensuring the rights of Indigenous peoples are fully upheld. This requires not only recognition of Indigenous Legal Systems but adequate resources, so that these systems meet basic standards of justice and protection for human rights, particularly the rights of Indigenous women. This has been frequently recommended but there is a lack of political will and public acceptance and understanding. We clearly need to develop positive examples that we can build on more broadly. However, we don't want to repeat the experience of pilot projects where the funding is cut off before things get off the ground.

3. **Overall reform:** Transforming the legal system as a whole. It is important to foster greater understanding and competency among legal professionals in the historic and contemporary contexts of Indigenous peoples' lives, experiences and values.

   A credible expert review should be undertaken regarding myths and arguments that have been raised against appointing an Indigenous person to the Supreme Court of Canada. The Government should commit to support this initiative at the first opportunity.

4. **Training:** Specifically encourage the National Judicial Institution to continue its important training work.

   We need protocols and guidelines for the use of Gladue or section 718.2 of the Criminal Code of Canada.

5. **Accessibility:** There is need for consistent, adequate, long term funding support to independent advocates for Indigenous peoples in contact with the criminal justice system – including Indigenous women's organizations and court workers programs. We need consistent provision of interpretation and access to court. Laws need to be closer to the communities.

   There is a need for an independent forum for collaboration with Indigenous peoples and the state in the context of lands, territories

and resources for the review and implementation of key measures for the protection of Indigenous peoples' rights.

6. **Information:** Support Madrid recommendations (Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid, 12-14 November 2003) calling for consistent national data, disaggregated and compared by gender and identity on victimization and prosecution.

7. **Implementation:** Benchmarks and indicators for prosecution, incarceration and victimization are needed.

   Need to ensure the inclusion of Indigenous women at all levels and for the application of a culturally relevant, gender based analysis by all actors.

Break-out Group on Lands, Territories and Treaties

1. Based on the foundation of collaboration and partnership, Indigenous peoples and Canadian governments have to adopt a common purpose and basis for working together.

2. In accordance with Canadian case law, the common purpose and basis for working together should be reconciliation of Indigenous sovereignty and the assumed sovereignty of the Crown.

3. Canadian case law on Aboriginal and Treaty rights should be interpreted in a manner consistent with international human rights standards. In particular, the UN Declaration on the Rights of Indigenous Peoples provides a principled legal framework for the parties to move forward together.

4. Ideally, the common purpose, guiding principles and standards should be reflected in Canadian law and policy that the parties can utilize as authority for joint activity.

5. Establishing bench marks (i.e. 10 years) for the successful completion of land claim agreements, self-government agreements, and Treaties would be useful.

6. There has to be greater effort to address ongoing community-based and government support so that the exercise is one of building, rather than ongoing negotiations. The parties should approach relationship building and reconciliation as a process that is aimed at community and capacity development and that investments be made for community development in that regard.

7. The availability of a monitoring mechanism to assist the parties in achieving their mutual goals and to monitor implementation of measures for the improvement of Indigenous peoples' conditions is desirable.

Plenary Discussion of Break Out Group Recommendations

ILO 169:
Support for calling for consultation on adoption of International Labour Organization Convention 169. One of the obstacles to Canada ratifying 169 is that the Canadian government is sensitive to possible concerns over 169 within Aboriginal communities.

Indicators:
Support for development of appropriate indicators for implementation of Aboriginal rights. Access to land and resources, health, housing, education etc all need to be looked at. Data and perspectives from the grassroots have to be part of the picture that is reaching the international level. Communities need to have a role in carrying out the research.

Human Rights Education:
Human rights education is vital from the grass roots to the judiciary. This education must include international standards such as the Declaration. Human rights education needs to be available in diverse languages.

Accountability and transparency:
Greater transparency and accountability are required in the implementation of international recommendations from Treaty Monitoring Bodies and experts such as the Special Rapporteur. Perhaps parliament should have a bigger role in this area. The government needs researchers who are concerned with these issues in a meaningful way. Aboriginal communities must also be engaged in monitoring implementation.

Proposal that there be a standing committee of parliament to track implementation, including by receiving input from Indigenous peoples, government and civil society.