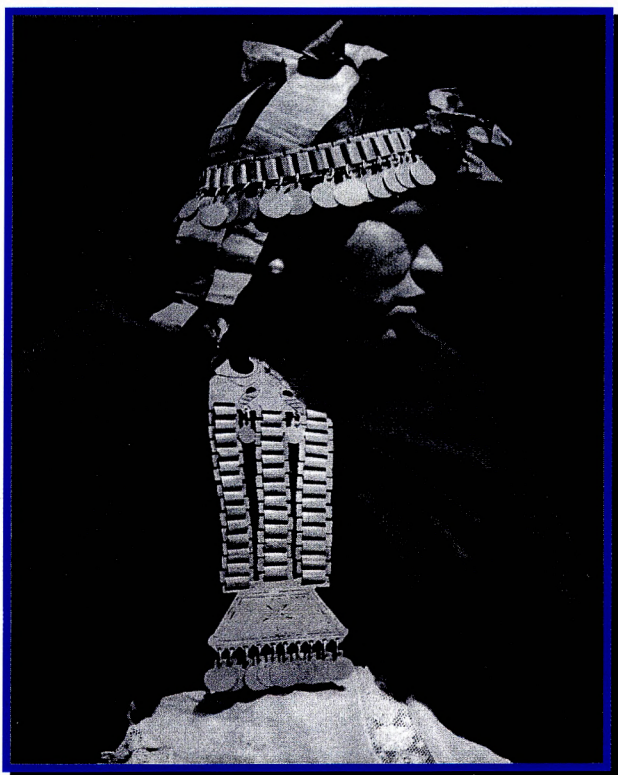




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## DEPARTMENT OF JUSTICE CANADA

Aboriginal Affairs Portfolio

DIAND Legal Services

Canada/Chile

Information Exchange

2003



Michael R. Hudson  
General Counsel  
DIAND (Federal Treaty Negotiation Office)  
Legal Services

August 2003



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## INTRODUCTION

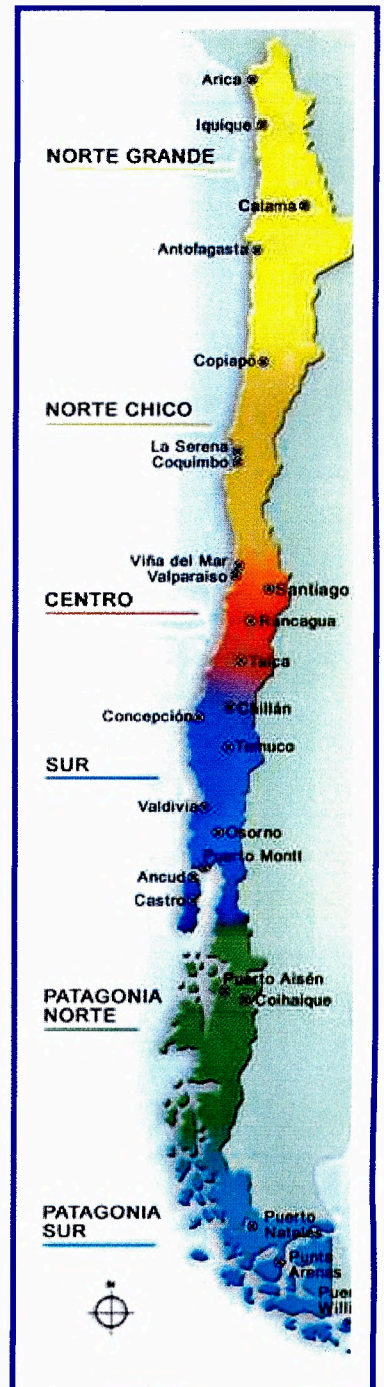
In early Summer 2003, the Department of Foreign Affairs contacted the Department of Justice about the possibility of sending a representative to attend a meeting of international experts on indigenous law and policy in Chile. I was extremely fortunate in having the opportunity to participate at the meeting.

It was held at the Institute of Indigenous Studies at the University of the Frontier (Universidad de la Frontera) in Temuco in southern Chile. The meeting was under the auspices of the Ford Foundation and the German, British and Canadian governments. Annex "A" is a copy of the meeting agenda. Annex "B" is the paper that I presented to the meeting through the use of a translator.

In addition, the Canadian Embassy facilitated my participation in an international meeting of experts on indigenous issues sponsored by the United Nations Economic Commission on Latin America and the Caribbean (CEPAL). Annex "C" is a copy of the meeting agenda.

The Embassy also arranged a number of initial meetings with key government and academic individuals for exchanges of information.<sup>1</sup> These initial meetings led to a series of in-depth individual discussions with a wide range of governmental officials, academics and indigenous representatives from both Chile and elsewhere in Latin America. Annex "D" lists the individuals and their organisations with which I had detailed discussions over the course of nearly two weeks.

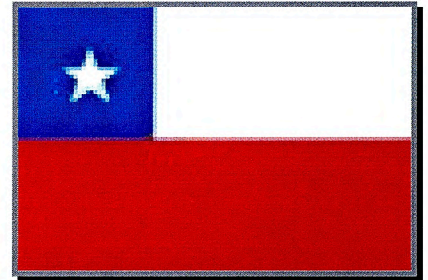
These discussions led to my participation in a number of meetings with indigenous organisations. Through the Chilean Ministry of Justice, I was invited as an observer to a meeting of Latin American indigenous organisations in preparation for the CEPAL roundtable.



<sup>1</sup> I would particularly like to express appreciation for the efforts of Jeffrey Marder, Second Secretary at the Embassy in facilitating these contacts. The Embassy was very helpful in arranging the assistance of Maria Teresa Contreras to attend as translator for my presentation to a number of Santiago-based Mapuche organisations. I would also like to acknowledge the help of Jose Alywn, Coordinator of the Institute of Indigenous studies at the Universidad de la Frontera in facilitating my discussions in and around Temuco, especially by arranging the invaluable services of my two translators, Malena and Willy. Finally but not least, I am very indebted hard work & perseverance of my legal assistant, Maureen Cooke, in helping me with the trip and meeting arrangements and preparing this report.

Through the Canadian Embassy, I was also asked to attend a meeting of Santiago-based Mapuche organisations to speak on Canada's laws and policies on indigenous issues, and then to respond to their questions about the experience of Canada and its possible application in a Chilean context.

Through the offices of the Universidad de la Frontera in Temuco, I participated as an observer at a day-long meeting between Mapuche leaders from throughout southern Chile with Rudolfo Stavenhagen, United Nations Special Rapporteur. They shared with the Special Rapporteur the many concerns that the Mapuche have with Chile's indigenous policies.



Chilean Flag

The following document contains my personal views and should not be taken to be the official views of either the Department of Justice or the Government of Canada. It is structured as follows:

- Part I** provides basic information about Chile and the main features of its indigenous policies.
- Part II** describes on a thematic basis the major points of discussions held with many Chilean government and non-government individuals over the period of July 16<sup>th</sup> to July 26<sup>th</sup>.
- Part III** summarizes discussions and presentations made by international representatives from elsewhere in Latin America, the Organisation of American States and the United Nations about the trends on indigenous issues relevant to the Americas.
- Part IV** concludes with a brief observation on what lessons we can learn from Chile and what Canada can share with Chileans about our experience with indigenous issues.





## PART I - CHILE

### (1) The country



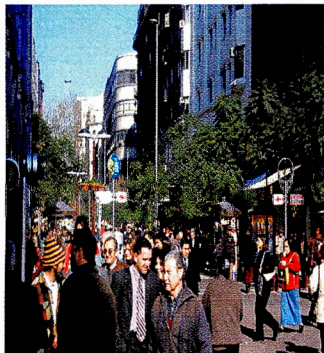
*Santiago Skyline*

Chile lies on the southwestern side of the Andes in South America. Its land mass is approximately 1/10<sup>th</sup> that of Canada and significant portions are mountainous in the eastern and southern portions or desert in the north.

Its population is about 15.5M with an overall population density 7 times higher than Canada. The population is slightly more urban than Canada with 86% of the population living in towns and cities. The capital, Santiago, is the largest city with over 4 M inhabitants.

**Approximately 1 M  
Chileans or about  
10% of the  
population identify  
themselves as  
"Indians"**

### (2) The people



*Downtown Santiago*

Many Chileans are descended from mixed marriages between Spanish settlers and Indians. Although not as heavily settled by Europeans in the 19<sup>th</sup> century as Argentina, there were significant waves of immigration from Germany, Italy, France and the Middle East in the late 19<sup>th</sup> and 20<sup>th</sup> century. In recent decades, immigrants have tended to come from Korea and Peru.<sup>1</sup> Chileans speak Spanish with a very small number speaking English, though older members of the educated class know French as a second language.

There are many indigenous groups in the country, though three significant ones are the Aymara in the north, the Rapa Nui on Easter Island and the Mapuche in the areas of Santiago and southwards.<sup>2</sup> Numerically, the Mapuche are the largest group.

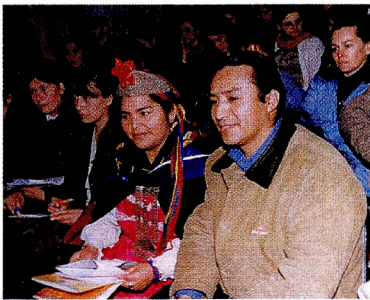
<sup>1</sup> *Fourteenth period report of States parties due in 1998: Chile*, United Nations, Committee on Elimination of Racial Discrimination, CERD/C/337/Add.2, 28 October 1998 (CERD Report)

<sup>2</sup> In addition to the Aymara, Mapuche and Rapa Nui, smaller but sizeable groups exist of the Atacamenos in the Atacama desert, the Collas in the northern mountains, and the few remaining descendants of the



Approximately 1 M Chileans or about 10% of the population identify themselves as “Indians” or indigenous on recent censuses. About half of persons identifying as Indian live in large towns and cities, with about 400,000 living in Santiago alone.

Debates exist within Chile about the accuracy of these numbers, with some indigenous leaders saying that the numbers are too low, while some non-indigenous commentators argue that the recent census artificially inflated the numbers due to unclear questions. It may be that cultural or social factors continue to discourage persons with indigenous ancestry or background to self-identify in an official context like a census.



Gross national income in 2001 was US\$4350 which is approximately 1/5 of the Canadian average.<sup>3</sup> Income distribution in Canada is much more egalitarian than is reportedly the case in Chile.<sup>4</sup> As in Canada, indigenous people and particularly rural communities dominate the poorest economic sections of the population.

The United Nations Human Development Index for 2000 placed Canada third among the world's nations, whereas Chile was 38 out of 173 countries.<sup>5</sup> Life expectancy is generally comparable between the two countries, though child mortality rates in Chile are twice the Canadian average. Literacy rates are comparable. Access to drinking water is roughly comparable in the urban areas, though significantly lower for rural Chileans than their Canadian counterparts.

**Indigenous people  
dominate the  
poorest economic  
sections of the  
population**

---

hunting, fishing and canoeing peoples of the far south, the Kawashkars or Alacalufes, the Yamanis or Yaganes and the Onas or the Selknam. Source: CERD Report

<sup>3</sup> Chile – Facts at a Glance, CIDA. See [www.acdi-cida.gc.ca/cidaweb/webcountry.nsf/VLUDocEn/Chile](http://www.acdi-cida.gc.ca/cidaweb/webcountry.nsf/VLUDocEn/Chile)

<sup>4</sup> “Per capita income increased 24% between 1990 and 1994, according to the World Bank, and poverty fell 4% between 1994 and 1996. About 23% of the population, or 3.3 million Chileans, live in poverty in 1996. In 1987, the poor represented 55.4% of the population... Chile has one of the worst income distributions in the modern world, according to a 1997 World Bank report. Despite sustained economic growth during the last decade, the income distribution gap has remained steady since 1987. In that year, the income of the poorest 20% of the population represented 4.5% of the total compared to 56% of the country's wealth earned by the richest 20% of the population. In 1994, those figures were 4.6% and 56.1%, respectively. (Mideplan, CASEN 1997) cited at [www.chip.cl/derechos/chile\\_profile\\_eng](http://www.chip.cl/derechos/chile_profile_eng)

<sup>5</sup> CIDA website, above





### (3) The government

Politically, Chile has undergone considerable change over the past 30 years. In the early 1970's, the leftist government of Salvador Allende was elected by narrow margin but then attempted major changes in the distribution of land and wealth in the country. A military coup in 1973 began nearly 20 years of dictatorship.



*Statue of Salvador Allende  
before Ministry of Justice  
Building*

The Constitution was substantially revised in the 1980's by the dictatorship before the return to democracy in the early 1990's. The 1980 Constitution provides for an elected president and a bicameral legislature (Congress) with a Chamber of Deputies comprised of 120 elected members and a 46 member Senate, eight of which are appointed by the President.<sup>6</sup> Former presidents, such as General Pinochet, are appointed as senators-for-life on leaving office. The Constitution also provides for a Supreme Court and a State Security Council.



*Honour guard at  
Presidential Place*

There are 17 incorporated political parties, and seven with significant presence in the legislature. The ruling Concertation of Parties for Democracy is a coalition of centre and left of centre parties which has ruled Chile since the return to democracy in 1990. Conservative parties along with the designated senators form a majority in the Senate.<sup>7</sup>

**Debates continue whether  
the return to party politics  
has fulfilled hopes for a  
modern, liberal and social  
democratic society**

Debates continue among some Chileans about whether the return to party politics has fulfilled hopes for a modern, liberal and social democratic society. In their view, the small wealthy elites that controlled government, the military, mainstream media and major companies over the past 30 years continue to hold the reins of power and dictate major social and economic policies.

<sup>6</sup> [www.chip.cl/derechos/chile\\_profile\\_eng](http://www.chip.cl/derechos/chile_profile_eng)

<sup>7</sup> Ibid



While Chile is a democracy, the military still has a prominent role in society. For example, General Pinochet remained Commander-in-Chief of the military until 1997. Military service is obligatory for all males at 18, and there is no provision for conscientious objectors. Laws adopted under the dictatorship provide the military with an automatic 10% proportion of state copper corporation revenues and guarantee that funding for the military cannot fall below 1989 levels.<sup>8</sup> As a result, 3% of GDP in 1994 went to military spending which was the same percentage as spent on education.

#### **(4) The economy**

Both Canada and Chile are heavily reliant on the extraction of natural resources (e.g. mining, forestry); the structure of each country's GDP is roughly comparable in terms of the proportion in services and industry.<sup>9</sup> Large foreign companies mining nitrates and then copper have played a major role in the Chilean economy and politics though much of the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Agriculture and fishing, particularly products for export, are also important features of the Chilean economy. Forestry, particularly through plantations using North American conifer species or Australian eucalyptus trees, has emerged as a major economic sector. These renewable products are significant exports earners in recent years.

**During the dictatorship,  
the Chilean economy  
was radically liberalized**

During the dictatorship, the Chilean economy was radically liberalized with the result of a rising standard of living, though as noted above, not necessarily on an equal basis amongst Chileans. Many public services and functions were either privatised or terminated. The delivery of social services such as health, education and public transportation has been heavily privatised on a user-pay basis. Companies from North America, including Canadian, and European companies, now dominate many economic sectors.

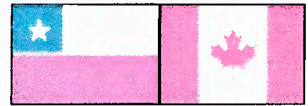
Chile has also aggressively pursued free trade agreements with its major trading partners. In 1999, a FTA was entered into with Canada. Similar agreements with the United States and the European Union are well on their way to completion.

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<sup>8</sup> Ibid

<sup>9</sup> CIDA website, above





## **(5) Indigenous / European relations**

The lands, which currently constitute Chile, were conquered by the Spanish in the north in the 16<sup>th</sup> century and in the south by the Chileans in the mid-19<sup>th</sup> century. The pattern of violent conquest and forced labour in colonial Chile is a marked contrast with the British policies of negotiating treaties and the relatively peaceful integration of First Nations and the Inuit into a pluralistic society.<sup>10</sup>

While historical and other circumstances varied greatly between the two countries, there is a striking parallel in the sense that there was an underlying goal of assimilation with some interim protection in both nations' policies for much of their history. In both countries, for example, small areas of lands were set aside for the collective use of indigenous communities ("reserves" in Canada and "reducciones" in Chile) with some legal protections against their alienation to non-indigenous peoples.

**Canadian and Chilean indigenous policies began to diverge markedly in the 1970's and the trend continues to the present**

Canadian and Chilean indigenous policies began to diverge markedly in the 1970's and the trend continues to the present. Starting in the 1970's, Canadian law and policy has increasingly been marked by an acceptance of Aboriginal collectivities, their legal rights to traditional lands and resources outside of Indian reserves, and a readiness to permit their autonomous development within the parameters of the Canadian state and society. Canada has also successfully developed a range of policies and processes designed to serve as conflict prevention or resolution mechanisms.

In contrast, Chile continued through the 1970's and 1980's with the path foreshadowed in Canada's 1968 White Paper. The main focus of policies during this time was the elimination of distinctions between indigenous and non-indigenous Chileans, leading to a 1979 decree by the military government aimed at ending the special communal status of indigenous lands.

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<sup>10</sup> An excellent comparison of the Chilean and Canadian historical experience with indigenous issues can be found in the 2002 Master of Laws thesis of Jose Alwyn at the University of British Columbia Law School.



The 1979 law itself was the logical conclusion of a legal process that dated from the 1920's. As a result, by the early 1990's, virtually all of the formerly communal indigenous lands held in reducciones had been assigned into individual enclosures and significant amounts had been lost to non-indigenous occupiers.<sup>11</sup>

Following the end of the military dictatorship, a Special Commission for Indigenous Peoples (CEPI) was created in 1990. As a result of its recommendations, the government of President Alwyn sent three motions to the National Congress:

- 1) to amend the Constitution to recognize indigenous peoples,
- 2) to ratify Convention No. 169 of the International Labour Organisation and
- 3) to adopt a law to protect and promote the development of indigenous peoples and to protect their remaining lands.

Congress rejected the first two motions, and only adopted the law (Law 19.253 of October 1993) with significant modifications to weaken its contents.<sup>12</sup>

The 1993 law sets out a series of principles including,

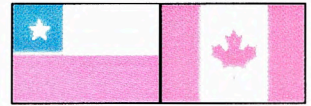
“The State recognizes that the indigenous people (indigenas) of Chile are those descendants of the human groups that existed on the national territory in pre-Columbian times, that have maintained their own ethnic and cultural features among which are that land is a fundamental basis for their culture and existence...It is a duty of society in general and the State in particular through their respective institutions to respect, protect and promote the development of indigenous people, their cultures, families and communities...” (unofficial translation)

The law also established the Corporacion nacional de Desarrollo Indigena (CONADI) as an institutional focus for development programs and for efforts to protect the integrity of the relatively small amount of land

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<sup>11</sup> Report on the Situation of the Rights of the Mapuche People, Indigenous Rights Programme, Institute of Indigenous Studies, Universidad de la Frontera, Temuco, October 2002, p.5

<sup>12</sup> Ibid, p.6



remaining in the hands of indigenous communities.<sup>13</sup> The CONADI National Council is composed in part of indigenous representatives elected by indigenous electors across the country.



*1930 Picture of Mapuche Artists*

<sup>13</sup> A good review in English of the roles of CONADI can be found in Chile's 1998 report to the United Nations Committee on the Elimination of Racial Discrimination: Fourteenth period report of States parties due in 1998: Chile, CERD/C/337/Add.2, 28 October 1998.



## **PART II – DISCUSSIONS**

The following section discusses a number of themes that emerged from discussions with many individuals, rather than trying to summarize in sequence the numerous meetings over the course of two weeks. The themes are as follows:

- (1) Indigenous identity
- (2) Recognition of modern pluralism
- (3) Reconciliation with the past
- (4) Conflict resolution strategies
- (5) Social and economic development
- (6) Equality of opportunity
- (7) Urban challenges.

### **(1) Indigenous Identity**

The high proportion of mixed race individuals in Chile may explain, in part, the frequent debates about identity that emerged in my discussions. As noted above, about 10% of Chileans in the two last census self-identified as “indigenous”. The discussions that these figures have provoked in all parts of Chilean society suggests a much more profound debate about what persons or communities should be defined as “indigenous”.

**The high proportion of mixed race individuals in Chile may explain frequent debates about identity**

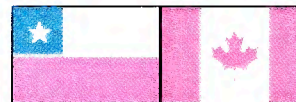
In my discussions, it became apparent that “indigenous” did not have a universal meaning. In addition, it appears that a person’s identity as indigenous or non-indigenous can change over time and can depend on the circumstances.

For example, in the north and the cities, there are significant numbers of Peruvian and other Andean immigrants. To an external observer, their racial and cultural characteristics might argue that they are indigenous, though Chileans see them as “immigrants” rather than indigenous.<sup>1</sup>

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<sup>1</sup> Interestingly, the extent of discrimination aimed at immigrants from Peru seems proportional to the extent that Chileans feel that they look “Indian”. Source: CERD Report





In contrast, some of the northern communities generally regarded as indigenous appear to be made up in part of the descendants of migrant labour from the late 19<sup>th</sup> and early 20<sup>th</sup> century from these same neighbouring countries.

In the major cities, particularly Santiago, rural persons with a high degree of Mapuche ancestry or attachment to Mapuche culture may chose to self-identify as non-indigenous in urban settings where integration is important for economic reasons. But at the same time, on many occasions, I met urban indigenous persons that spoke about “re-discovering” their “indigenusness” late in life or sometimes one or two generations after their ancestors had moved to the cities.<sup>2</sup>

Another example is the division between indigenous and non-indigenous. Although there seemed to be a large number of Chileans with varying degrees of mixed heritage, both indigenous and non-indigenous individuals spoke as if there was a sharp and easily determined demarcation between the two groups.

In this regard, there seemed to be relatively few debates about whether rural communities leading traditional lifestyles were “Indian”. Debates did arise whether urban individuals, particularly where they may have a mixed racial heritage, could claim to be “indigenous”. These discussions were particularly interesting, since they brought to the surface many different underlying definitions of what it meant to be “indigenous”. For some it meant racial heritage, for others the continuation of pre-Columbian cultural activities, for others it was determined by a sense of self-identification with the “Mapuche Nation”.

**Debates about “Indianness”  
in Chile seem much more  
profound and widespread  
than in Canada**

Another aspect of “identity” that seemed to trouble many Chileans was the idea that identity could change over time. Some were dismissive of urban people identifying as “indigenous” late in life or particularly after several generations of their family identified themselves as non-indigenous. Others questioned whether non-indigenous people marrying indigenous rural persons should be regarded as indigenous. Underlying some of these comments seemed to be an assumption that assimilation was a one-way

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<sup>2</sup> The CERD Report discusses the trend for many decades of indigenous persons applying for name changes to adopt a Spanish family name in order to avoid social discrimination and assist in their integration, particularly in urban settings.



street and could not be reversed by individual choice about identity.<sup>3</sup> To some extent, these questions have echoes in the Canadian context, particularly about the debates on how to identify or define the “Metis” or “non-status Indians”.

It was striking however how the debates about “Indianness” in Chile seem much more profound and widespread than in Canada. Given the absence of a single coherent national voice for the Mapuche or other large Indian groupings, and the large number of small rural communities with relatively little political power, Chile seems quite different from our experience.<sup>4</sup> In



Mapuche Flag

Canada, the existence of the Indian Bands and now broader recognition of First Nations means that we have tended to define “Indianness” in terms of appurtenance to a recognized entity with political status, rather than focussing on the many other factors that Chilean society seems to be struggling to apply.

If Chileans are conflicted about the cultural pluralism that we take for granted in Canada, our approach to political pluralism seemed completely foreign to their experience. By way of context, Chilean municipalities have far fewer powers and much less capacity to raise their own revenues when compared to their Canadian counterparts. Chile’s regions have very limited functions, other than delivering national programmes, and rudimentary political institutions when compared against Canadian territories and provinces.

Chile remains a highly centralized, unitary State, especially compared to Canada with its plethora of federal, provincial, territorial, indigenous and municipal governments. It is therefore perhaps not surprising that indigenous self-government has not advanced very far as a major topic of public debate over Chile’s indigenous policies.

When describing Canada’s policy on the negotiation of self-government, I encountered two reactions. Non-indigenous persons felt that the Canadian

<sup>3</sup> An interesting parallel to the Chilean debates about identity is the similar debate in Brazil about the re-identification of “Afro-Brazilians” in recent years as a distinct group for affirmative-action programs within the highly mixed Brazilian population. See: “*Race in Brazil – Out of Eden*”, Economist, July 5, 2003, pp. 31-32

<sup>4</sup> The lack of a national political voice for the Mapuche has not prevented the emergence of “national” symbols. See for example the Mapuche Flag and its regional counterparts at [http://www.crwflags.com/fotw/flags/cl\\_mapuc.html](http://www.crwflags.com/fotw/flags/cl_mapuc.html)



experience was too far removed from Chilean realities to be applicable. Indigenous persons regarded it as an ideal they could only aspire to achieve one day.

The gulf between the two countries' experiences was brought home by discussions with a number of urban Mapuche organisations in Santiago. After my presentation on Canadian history, law and policy on indigenous issues, their primary interest was information about Nunavut. While audience questions implied the need for a "Nunavut-style" government for the Mapuche, I was struck that they had no real understanding of how a federation worked, or even how a country could have different levels of governments each with their own areas of competency. Our "solution" therefore risked having little relevance to the problems that the audience encountered in their daily lives.

## **(2) Recognition of modern pluralism**

Since the start of British rule in Canada, the co-existence of Aboriginals and non-Aboriginals has been recognized in both law and government policy. While government policies and social conditions may not have always made that co-existence a happy one, no one has seriously questioned the reality.

In recent years, the existence of Aboriginal collectivities within the Canadian State has increasingly been reflected in government policy and arguably become part of the way Canadians define themselves. The inclusion of section 35 in the 1982 Constitution shows how profound this acknowledgement of pluralism exists in our country.

**Chilean law has focussed  
on a unified Chilean people  
formed from its Indian and  
European ancestors – a  
single people with a unitary  
State**

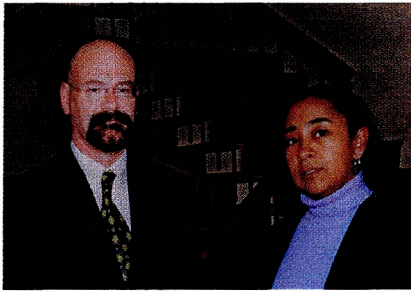
This contrasts sharply with modern Chile. Starting from its hard-fought independence from Spain, Chilean law has focussed on a unified Chilean people formed from its historical Indian and European ancestors - a single people with a unitary State. Chilean constitutions since the start have reflected this vision.

Many Chileans were surprised therefore when the first national census after the return to democracy showed 1 in 10 Chileans as still self-identifying as indigenous. Fuelled by different numbers caused by different questions in





the two last censuses, debates continue in Chile whether the “true” number is considerably higher or lower than 10% being indigenous.



**Discussion with Columbian expert  
on cultural pluralism in parks  
management**

Indigenous organisations were key players with other sectors of society in the return to democracy. This in turn led to the first law on indigenous affairs in the early 1990s based on the recommendations of a Special Commission (see above).<sup>5</sup> While a significant advance, the 1993 law has not translated into a broad willingness to amend the Chilean constitution to acknowledge the existence of indigenous individuals or groups as distinct features within Chilean society.<sup>6</sup>

Efforts in recent years to amend the Constitution to recognize the existence of cultural pluralism have failed in the Senate. While the failure is criticized by some as the conservatism of right wing parties, the reluctance to recognize indigenous collectivities may reflect an underlying view amongst many Chileans that everyone is Chilean and should be equal before the law. Similar sentiments seem to underlay the government's inability to have Convention No. 169 of the International Labour Organisation ratified by the National Congress.

While such issues may seem foreign to Canadians, they echo to some extent debates in Canada about the appropriate place of Aborigines within Canadian society and the desire voiced by some Canadians (including judges) that government policies should treat all citizens in the same way regardless of their origins.

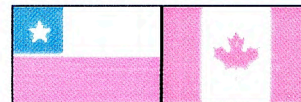
In this regard, a particularly interesting paper was recently prepared by Professor Maximilano Prado of the University of Alberto Hurtado in Santiago on the need for Chilean society and the State to recognize the reality of cultural pluralism.<sup>7</sup> While based on Chilean circumstances,

<sup>5</sup> Ley no. 19.253, Establece normas sobre proteccion, fomento y desarrollo de los indigenas, y crea la Corporacion nacional de desarrollo indigena. Full text in Spanish at: [Leg.Chile.org/Directorio de Derecho Chileno/Ley 19.253: desarrollo indigena y CONADI](http://Leg.Chile.org/Directorio de Derecho Chileno/Ley 19.253: desarrollo indigena y CONADI).

<sup>6</sup> Several recent attempts by the government to amend the Constitution have been blocked by conservative elements in the Senate.

<sup>7</sup> La Cuestion Indigena y las Exigencias del Reconocimiento, Coleccion de Investigaciones Juridicas 2003, No. 3, pp. 3-100, Escuela de Derecho, Universidad Alberto Hurtado. Paper written with assistance of





Professor Prado offers compelling moral and legal arguments for modern societies to find an appropriate and respectful place for indigenous peoples.

### **(3) Reconciliation with the past**

In Canada and many other countries, the phrase “reconciliation” has come to mean a process or a desire for bringing closure on past injustices and to build new relationships within society or between one or more sections of society and the State. In over 20 countries around the world, this has led to the creation of truth and reconciliation bodies.<sup>8</sup>

In Chile, the first post-dictatorship president, Patricio Aylwin, created a National Commission on Truth and Reconciliation (Rettig Commission) in the early 1990’s. It was intended to review the events of the previous two decades, to account for every person that had disappeared or died through human rights abuses, to propose measures of reparations and to propose measures of prevention. It was given 9 months to complete its work, but had no subpoena powers or the ability to compel testimony, and was hampered by the lack of access to key documents particularly from the security or military forces.

Despite these limitations, the Commission’s report led the President to apologize on behalf of the State to the victims and their families. The apology was both collective and individual through letters sent to each family along with a copy of the Commission’s report. It also led to a 1992 law providing significant financial support to the families of all victims. A number of parallel programs were put into place, including a special fund to educate the children of the disappeared and Ministry of Health teams around the country to provide medical and mental health services to victims’ families.

**The Commission on Historical Truth & a New Pact will likely recommend major changes to Chilean laws & policies**

While not viewed as an unreserved success, the experience of the Rettig Commission has led to the creation of a new Commission on Historical Truth and a New Pact to deal with indigenous issues. The Commission has a broad membership of business, church, and indigenous and non-indigenous



members. It has focussed on seeking a new and common view of the history of indigenous/non-indigenous relations in Chile and will likely recommend major changes to Chilean laws and policies on indigenous matters.

I met at length with the Executive Director of the Commission to discuss its work and the likely elements of its report in Fall 2003. A key element of its long term impact on Chilean society will be the degree to which the government is prepared to shape or lead public opinion. It faces no small challenge, since the issue the place of indigenous peoples in Chile goes to the very heart of the identity of individual Chileans and how they view their fellow citizens, in a much more profound sense than Canada.

While many indigenous leaders hold out great expectations for the report, especially in addressing land claims, others question whether the government will be in a position to push any major changes to indigenous law through the National Congress. They point to the extremely low public profile that the Commission has had in Chile, including its virtual invisibility on the Internet.

On the other hand, the next presidential election in 2005 may afford an opportunity for politicians on all sides of the political spectrum to show that they are progressive on human rights issues. As a result, these elections may offer an opening for new policies and laws to be negotiated in Chile.

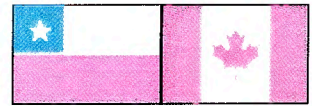
#### **(4) Conflict resolution strategies**

Many indigenous and non-indigenous Chileans spoke with admiration of Canada's experience with peaceful conflict resolution strategies over the past 30 years to resolve differences of views between Aboriginal peoples and the State.

**Chileans spoke with  
admiration of Canada's  
experience with peaceful  
conflict resolution  
strategies**

In my discussions, I focussed on four main strategies that we have adopted in Canada:

- a) **Conflict avoidance or prevention** through socio-economic development and policies to consult with Aboriginal peoples and to attempt to accommodate their interests in decision-making;
- b) **Alternative conflict resolution strategies** such as the Comprehensive Claims and Specific Claims Processes, the British Columbia Treaty Process or the Indian Residential School

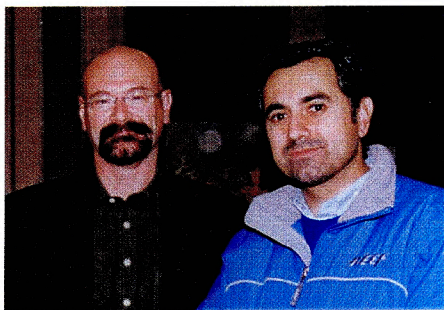


resolution strategies whereby disputes could be resolved through negotiation;

- c) **Creation of independent third parties** to facilitate conflict resolution processes, such as the British Columbia Treaty Commission; and
- d) **Facilitation of access to the courts** by Aboriginal peoples to clarify their rights and the State's duties, including programs such as the DIAND Test Case Funding program.

Many of these processes would appear to lend themselves to one of the most pressing issues in Chile, namely the resolution of disputes over past losses of indigenous lands through State actions or the current intrusion of State-approved economic activities on the lands traditionally used or claimed by indigenous communities.

Noteworthy in this regard have been major struggles between government agencies or private companies and local indigenous communities over dam construction and forestry projects.<sup>9,10</sup> Forestry plantations using foreign species have become particularly contentious in the lands claimed by the Mapuche, especially since these plantations displace local plants and animals traditionally harvested by the local Indians.<sup>11</sup> In the case of the eucalyptus, the plantations displace access by Indian communities to their traditional water supplies.



**Discussion with CONADI legal  
counsel on land claims policies**

Chile has created a limited range of mechanisms to address some of these disputes. In particular, the Corporacion nacional de Desarrollo Indigena (CONADI) maintains a Public Registry of Indigenous Lands which records the titles of lands granted to or held by indigenous communities under laws dating back to 1823.

<sup>9</sup> Ralco Dam and the Puhénche People in Chile – Lessons from an Ethno-environmental Conflict, Jose Alwyn, Presented to “Towards Adaptive Conflict Resolution: Lessons from Canada and Chile”, Centre for Global Study, University of British Columbia, September 25-27, 2002

<sup>10</sup> Report of the Situation of the Rights of Mapuche People, *supra*, at p. 27

<sup>11</sup> Indigenous Peoples Rights in Chile – Progresses and Contradictions in a Context of Economic Globalization, Jose Alwyn, Presentation to Canadian Association for Latin American and Caribbean Studies XXVIII Congress, Simon Fraser University, March 19-21, 1998





It also administers a fund (Fondo para Tierras y Aguas Indigenas) for the acquisition of land and waters for the benefit of indigenous families and communities.<sup>12</sup> CONADI also attempts to use its good offices to resolve disputes over historic lands and to acquire such lands through the fund.<sup>13</sup>

Many indigenous representatives criticize the Corporation for its slowness and limited resources. Interviews with CONADI employees, including its legal counsel, highlighted the monumental backlog of land disputes (3,000 cases) that it faces with a handful of staff and very limited funds at its disposal when compared with its Canadian counterparts.

While admiring Canadians' openness to conflict resolution, many Chileans felt our solutions would be unworkable in Chile. Some argued that the Chilean civil law legal system could not accommodate common law concepts like Aboriginal rights and title, and that the Chilean judiciary was unlikely to ever adopt the activism seen in Canada.

Several Chileans observed that their country is almost entirely owned privately with relatively little "fiscal" land equivalent to our Crown land owned by the State. As a result, they felt that Canada's claims policies were unrealistic on the assumption that they rely largely on the transfer of public lands to indigenous control.

**Many Chileans feel our  
solutions are  
unworkable in Chile**

Others regarded the length of time needed and the costs of our negotiation processes as proof of our national wealth and patience as a people, and therefore, unsuited to the needs of a relatively poor country requiring a fast settlement of land disputes.

From my perspective, however, the differences between the two countries, and the corresponding rejection of Canadian solutions, tended to be exaggerated by some commentators, particularly those in positions of relative power within Chilean society. In my view, the key difference between the two countries is Canada's greater willingness to create new

<sup>12</sup> Between 1994 and 1997, approximately 16,000 hectares of private land were purchased for Mapuche communities in the south, much of the land having been lost through government policies to private land owners. The State funds CONADI with about \$10M US annually for land purchases. In addition, CONADI has assisted in the transfer of nearly 30,000 hectares of public lands into the hands of indigenous communities. Source: CERD Report, above.

<sup>13</sup> One example cited by Chile to the United Nations was the role of CONADI to provide communities with legal assistance and assist in their relocation as a result of a State-approved hydroelectric dam built by private enterprise. Source: CERD Report, above.





resolution processes and to make the investments necessary to make such processes effective.

In contrast to some government officials, indigenous representatives were genuinely interested in the conflict resolution processes that have worked in Canada and wanted as much information as could be provided about their potential application to the Chilean context. In some cases, however, their expectations about taking Canadian processes and transplanting them into Chile may be unrealistic.

Many of the features of Canadian law and society (e.g. constitutional recognition, common law of Aboriginal rights, policy of inherent right of self-government, federalism) would be difficult to graft onto the current Chilean legal system. In addition, while I highlighted in many discussions and presentations that the current place of Aboriginal peoples in Canada was hard-won and took nearly 40 years of political and legal struggle, many indigenous leaders in Chile were clearly impatient to speed up the process in the country.



*Rudolfo Stavenhagen (left)  
listens to Mapuche grievances*

The impatience is most evident when it comes to addressing land claims, particularly the perception that Chile is unwilling or unable to deal with claims based on the use of traditional lands. I participated as an observer at a day-long meeting in Toltén in the IX Region (Araucania) between Mapuche leaders from throughout southern Chile with Rudolfo Stavenhagen, United Nations Special Rapporteur.<sup>14</sup>

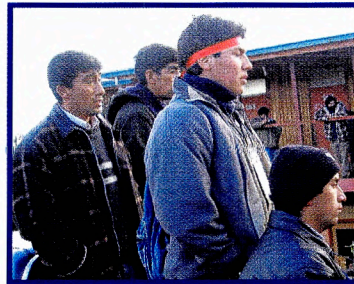
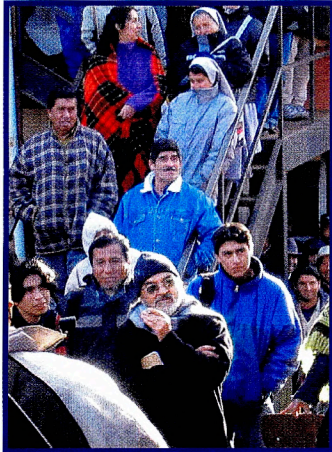
In speech after speech from delegations from many different communities, the concerns were the same – the gradual and in some instances rapid loss of traditional common lands and resources in the face of rapid development by the State or companies authorized by the State. The frustration has boiled over in recent years in violent actions targeting non-indigenous farms or corporate forestry plantations on lands claimed by indigenous communities.

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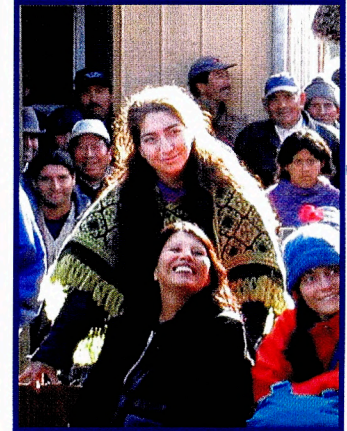
<sup>14</sup> On the work of Mr. Stavenhagen, see generally, “Indigenous Issues – Human Rights and Indigenous Issues”, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people submitted in accordance with United Nations Human Rights Commission resolution 2001/57, 9 January 2003, E/CN.4/2003/90



These acts of violence have resulted in death in one case and imprisonment in other instances. Unfortunately, they also seem to have contributed to further polarization within Chilean society with the conservative media denouncing “domestic terrorists”, while others on the left call for the release of a new generation of “political prisoners”.



*Mapuche participants in Toltén*



Based on published reports, it appears that the Mapuche criticisms of Chilean law and practice were heeded by Special Rapporteur Stavenhagen. He is reported to have expressed concern at the end of his mission to Chile at the situation of the human rights and fundamental freedoms of Chile's indigenous groups as a result of their social and economic marginalisation.<sup>15</sup>

I was frequently struck by the sense that the relative openness and goodwill about indigenous issues generated in Chile after the return to democracy is being replaced by a hardening of positions on both sides, particularly about the land question. While Canada may not be perfect, Chile risks further violence and social disruption unless it can find more effective conflict resolution processes to address indigenous/non-indigenous disputes, especially about land and resource use.

**Openness and goodwill  
about indigenous issues  
is being replaced by a  
hardening of positions**

<sup>15</sup> “Chile Condemned for Treatment of Indigenous Population”, Memorandum to the Press 03.53, Council on Hemisphere Affairs, Washington D.C., August 1, 2003 at [www.coha.org](http://www.coha.org) website.





## (5) Social and economic development

With the exception of the Rapa Nui people of Easter Island, indigenous people are the poorest and most vulnerable groups in Chile.<sup>16</sup> On average, indigenous families receive almost half the income of comparable non-indigenous families and 65% fall within the poorest half of Chileans. Most economically active indigenous people are in unskilled jobs (31%) or agriculture and fisheries (25%).<sup>17</sup>

**Indigenous people are the poorest and most vulnerable groups in Chile**



**Mapuche community representatives**

Schooling is about 2.2 years below the national average for the non-indigenous population. Eighty percent of household heads have less than 4 years of schooling and only 3% of the rural Mapuche population above 15 has any education beyond high school.<sup>18</sup>

The 1993 Chilean law created a Fund for Indigenous Development (Fondo de Desarrollo Indígena) administered by CONADI to finance programs for the development of indigenous individuals and communities. Between 1994 and 2001, approximately US\$16M was invested into a variety of development projects.

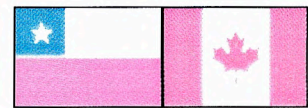
In May 1999, the government established an Indigenous Development Task Force comprising key public and indigenous leaders. Its tasks are to propose policies aimed at improving the quality of life of indigenous peoples. Its work led to a 1999 development plan with over US\$250M to be invested in a wide range of social program areas.

Another significant investment in development has occurred through the “Orígenes” (origins) Integral Development of Indigenous Communities Project launched in the early 1990’s with US\$153M from the InterAmerican Development Bank and the Chilean government. Monies have been used to build institutional capacity in government and non-governmental

<sup>16</sup> Indigenous Peoples in Chile: Current Situation and Policy Issues, Estanislao Gacitua-Mario, World Bank, August 2000 at p.p.173-174 (hereinafter “World Bank”)

<sup>17</sup> *ibid*

<sup>18</sup> *ibid* at p. 173



organisations, to promote rural development, to support intercultural health initiatives, a communications strategy and to encourage cultural and art development.

While these investments are not insignificant in the Chilean context, both CONADI and Origenes are criticized by many indigenous leaders as overly bureaucratic and inefficient. Phase I of the Origenes money has largely been spent in the first five year phase, but rural leaders complain that they have seen little of the money in the form of grants or contributions for local projects.

Similar accusations are made about CONADI as an inefficient bureaucracy with insufficient funds to carry out its broad policy goals laid out in the legislation. Both CONADI and Origenes have also been criticized for a perceived failure to coordinate among the various CONADI funds and between its priorities for development and those of Origenes.

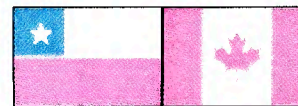
The frustration felt by many indigenous organisations about the government's failure to address their poverty and social isolation was evident in many meetings. While CONADI has a significant indigenous presence in its employees and its leadership, there appears to be considerable antagonism aimed at those individuals as well as the corporation as a whole. The indigenous criticism of CONADI is even greater when it concerns Origenes.

From a Canadian perspective, the problem of unequal development between indigenous and non-indigenous communities was familiar. There is a sharp contrast however between the funds that Chile and Canada devote to addressing this inequality. Chileans were frankly astounded at the amounts of money spend on Aboriginal programmes in Canada, which represent about 100 times their expenditures.

**Canada is criticized for  
fostering dependency on  
the State by Aboriginal  
citizens**

Not surprisingly, indigenous representatives felt that their country should emulate Canada in its programme spending. Interestingly, several non-indigenous persons were critical of the Canadian approach. They felt that Canada was fostering a permanent and unhealthy dependency on the State among its Aboriginal citizens, even while encouraging greater self-reliance among other citizens.





## **(6) Equality of opportunity**

The Chilean Constitution guarantees equality for all citizens regardless of race, sex, religion, disability, language or social status. As in other countries, including Canada, constitutional statements of equality do not necessarily translate into social reality. Many discussions with indigenous individuals or organisations focussed on their daily challenges facing discrimination on the basis of their ethnic origin, particularly in urban settings.<sup>19</sup>

**Constitutional  
statements of equality  
do not necessarily  
translate into social  
reality**

In contrast to Canada, the Chilean government does not have an elaborate series of mechanisms designed to overcome discrimination, such as our federal and provincial human rights commissions. There are however targeted programs to overcome challenges for indigenous people gaining access to public services.

For example, the Ministry of Justice has programmes designed to facilitate access to the judicial system by indigenous persons. Programmes range from the dissemination of information through NGOs to indigenous groups about their rights, training for prosecutorial and defense attorneys in cross-cultural issues and funding for judicial assistance organisations.<sup>20</sup> Efforts are also underway in the context of a major reform of the Chilean criminal justice system to make it more sensitive to the needs and challenges of indigenous accused.<sup>21</sup>

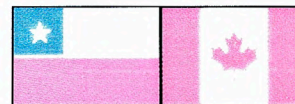
At the same time, Chile does not seem to have progressed as far as some of its neighbours, such as Bolivia, in terms of recognizing the legal validity of traditional customary law or empowering indigenous institutions as part of the judicial system. In this regard, Canada's efforts to make its judicial

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<sup>19</sup> See generally CERD Report, above for more information about discrimination in Chilean society and the government's efforts to improve the situation of racial minorities, particularly indigenous groups. One interesting barometer of change concerns the official publications for name changes. Many Mapuche family names are identifiable as indigenous, even if the individual does not wish to be identified as such. As a result, one person interviewed observed that in the past many name changes were Mapuche adopting Spanish personal and family names, whereas recent years have seen a drop in these applications. The significance of the phenomenon even merited mention in Chile's report to the U.N. as a sign of progress in its fight against racial discrimination: CERD Report, above.

<sup>20</sup> *Informe Pueblos Indigenas Subsecretaria de Justicia Ano 2000-2003*, Ministerio de Justicia, Division Defensa Social, Departamento de Asistencia Juridica

<sup>21</sup> Interview with Jorg Stippel of the German international aid agency working with the Ministry of Justice on legal reform.



system more responsive and accessible to indigenous people and its readiness to negotiate the creation of indigenous judicial institutions makes it one of the most progressive countries in the Americas.

### **(7) Urban challenges**

Approximately 50% of Chilean indigenous people live in urban settings. Organisations speaking for these individuals said that their key issues were access to development resources related to human capital (i.e. training), discrimination in the labour market and limited access to capital for small businesses.<sup>22</sup> While CONADI-sponsored programs for micro businesses and training have assisted in this regard, they are criticized for inadequate funding.

**Approximately 50% of  
Chilean indigenous people  
live in urban settings.**

In discussing the situation of some urban Aborigines in Canada, Santiago-based organisations said that the Canadian experience reflected many of their own concerns. In addition to the points above, they noted the risks associated with poverty – poor housing, inadequate health and education services, exposure to crime. They also spoke about their struggle to have programs which target the urban poor to be tailored to the specific needs of urban indigenous persons.

The situation of the urban indigenous groups appears to be exacerbated by the number of sometimes competing organisations speaking on their behalf. Combined with the social pressures which encourage assimilation, social norms which discourage identification as “Indian”, and the lack of a strong political voice from their “home” rural communities, urban Indians face challenges finding a political voice to press for their issues.

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<sup>22</sup> World Bank, p. 188



### PART III – INTERNATIONAL TRENDS IN THE AMERICAS

While an invaluable opportunity to exchange information and views with our counterparts in Chile, another benefit of the trip was to gather information on trends in indigenous policies in the Americas. In this regard, key opportunities were the two roundtable discussions organised by the United Nations Economic Commission on Latin America & the Caribbean and the Universidad de la Frontera.

#### **(1) CEPAL Roundtable**

The United Nations Economic Commission on Latin America & Caribbean (CEPAL) held a day-long meeting of international experts to discuss indigenous issues in the Americas and their relevance to judicial reform in Chile. Experts from throughout Latin America and a variety of regional and international multilateral institutions attended. In addition, several hundred indigenous people representing a wide range of Chilean NGOs were in attendance. A number of governments (Canada, Argentina, Germany) participated as observers. I attended in this capacity in the company of the acting Canadian Ambassador at his invitation.

The session was started by statements from the **Deputy Ministers of Justice and Planning**, the head of the Chilean Public Defender Association, and the chairperson of CONADI. The common themes of their statements were to acknowledge the challenges of demands for pluralism and constitutional reform in the context of attempts to assist the development of indigenous peoples.

At the same time, all acknowledged that developing sensitivity to indigenous cultures was a key issue for State institutions at all levels. A goal for institutions should therefore be ensuring full participation of indigenous citizens in economic, social and political life, while respecting their cultural distinctiveness.

**Chile needs a frank  
assessment of society's  
assumptions and its  
prejudices**

Former **President Patricio Aylwin** spoke about the need for a frank assessment of society's assumptions and its prejudices. He mentioned in particular the popular misunderstandings about the historical realities of many Latin American countries. In his view, a fundamental step forward for Chilean society would be a State respectful of the rights of its indigenous





peoples. He called for a constructive and consensual approach to build a foundation for such a change within Chilean society.

**Rudolfo Stavenhagen, United Nations Special Rapporteur** on indigenous issues spoke at length about the emergence of an international “Magna Carta” of the rights of indigenous peoples. He highlighted the trend away from treating indigenous individuals as the subjects of international human rights law, and instead, treating them as true actors in the international arena helping to shape the law on their concerns.

With respect to the draft UN Declaration on the Rights of Indigenous Peoples, he said that it has already made considerable progress and reflects the domestic policy trends in countries like the United States, Canada, New Zealand, Australia and Norway. He also cited that 14 countries have now ratified Convention No. 169 and that many domestic laws across Latin America recognize the special place of indigenous peoples.

He noted however that there remain key issues to be resolved in the international arena: (1) the definition of indigenous people in relation to the right of self-determination and (2) the degree to which international law was prepared to accept them as intentional actors.

**Key issues: the right of self-determination & indigenous peoples as actors in international law**

**Ceciliana Medina, Judge with the InterAmerican Court of Human Rights** spoke about the challenge of applying international norms on individual human rights to indigenous issues, which by their nature are defined as collective issues. She noted that the early focus on anti-discrimination is now being overtaken by collective demands for peoples’ rights to lands and administrative autonomy.

In her view, the InterAmerican Court has played a positive role in this evolution, both through its judgements and through its mediation efforts between States and their indigenous citizens. She cited a number of decisions concerning collectivities in Honduras, Guatemala and Brasil and particularly the key recent decision on the duty of States to consult with indigenous peoples and to protect their traditional lands (Awas Tigni v. Republic of Nicaragua).<sup>1</sup>

<sup>1</sup> *Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment of August 31, 2001, InterAmerican Court of Human Rights



She noted that the Court and the InterAmerican Commission and Court of Human Rights see the primary arena for change to still be national constitutions, laws and institutions. However, the Court accepts the necessity for collective rights as a context for the enjoyment of certain individual rights. In her view, the new focus in future cases will be the need to respect indigenous cultures in national policies and institutions through acceptance of the multicultural reality of the Americas.

**Respect indigenous  
cultures through  
acceptance of our  
multicultural reality**

Key presentations were made about the trends in national policies in three countries: Mexico, Guatemala and Bolivia. **Magdalena Gomez, a leading practitioner in indigenous law in Mexico** spoke to the situation in her country. She noted that the presentation by Judge Medina highlights the gulf between national laws and the reality of the political powerlessness of many indigenous communities. She noted that Mexican society and laws started to acknowledge the special place and needs of Indian cultures after World War II, but only in terms of a focus on assimilation as the domestic expression of the international norms of the time through the ILO Convention No. 107.

In her view, the current debate needs to move beyond individual rights and respond to the demands of indigenous peoples to be treated as such. She criticized Mexico for its position that international legal norms are only part of domestic law as long as they conform with the Constitution. In her view, the Mexican political class continues to pressure the state to resist the reality that Mexico is a multicultural society. Despite the peace pact following the Zapatista uprising, the State has failed to respond adequately to indigenous needs.

As a result, she calls for a fundamental rethinking of the Mexican societal norms and government organisations in order to reject the cultural hegemony of a unicultural State. Without a profound reform of the Mexican constitutional order, she was not confident that indigenous people would see an adequate domestic reflection of the emerging international norms on their treatment.

**Romeo Tiu, a legal practitioner from Guatemala**, spoke of the challenges facing indigenous peoples in his country. He noted that the Constitution has recognized since 1985 indigenous rights to their collective cultural identity and the protection of their lands within a multiethnic state. However, the civil war, which has only recently ended, has prevented any broad social



debate on the issue and resulted in these constitutional rights remaining “empty letters”. He noted that many Indian leaders were killed during the civil war, and that even today, the elite view Indian leadership with suspicion as potential terrorists. In his view, the current problems facing Guatemala’s Indians reflect more the failure of the country’s democracy rather than the inadequacy of its Constitution.

**Problems facing Indians reflect more the failure of a country’s democracy rather than the inadequacy of its Constitution**

On a positive note, **Pillar Quintanilla, a legal practitioner from Bolivia**, discussed the recent reforms to criminal procedural law in her country. The changes to the law recognize that Bolivia is a multicultural country, which accepts that the “natural law” of indigenous communities has value and the force of law. She noted that many problems remain, particularly with respect to land claims, but the legal instruments for criminal law reform are now in place.

As a result, while local law cedes to the national penal law in the case of conflict, these traditional laws now have legitimacy in the eyes of the Bolivian legal system. Local communities have the means to resolve local disputes and to use indigenous languages in court proceedings. In this regard, she noted a recent decision of the Bolivian Constitutional Court, which acknowledged the co-existence of national and indigenous law in the division of matrimonial property.

**Traditional laws now have legitimacy in national legal systems**

## **(2)Universidad de la Frontera Roundtable**

### **a) Introduction**

The Institute of Indigenous Studies at the Universidad de la Frontera was created in the 1990’s to serve as a focus for academic and social examination of these questions in the newly democratic Chile. The university is located in Temuco, a city 1000 miles south of Santiago and the regional capital of the region where the Mapuche people are most numerous. In recognition of its role and the stature of its members, the Institute is supported by a number of international agencies (e.g. Ford Foundation).





Under the leadership of Professor Jose Alwyn, son of the former Chilean President, an international seminar was organised with the title “Human rights and indigenous peoples – International trends and local realities”. The



*Jose Alwyn (centre) Coordinator, Institute of Indigenous Studies*

meeting was co-sponsored by a number of countries and international agencies (i.e. Canadian embassy, Canadian International Aid Agency, British embassy, German international aid agency, Ford Foundation), the Chilean government (Ministry of Planning and Cooperation), a number of Chilean academic institutions and a wide range of Chilean indigenous organisations.

The programme (see Annex “A”) was very ambitious with over 100 speakers over a three-day period. Given the numbers of speakers, four panels ran simultaneously from 9AM until 8 PM on most days. The meeting was extremely well attended with upwards of 500 people in some of the larger sessions, many from surrounding Mapuche communities. The meeting also garnered significant media attention in Chile, partly due to the present of Special Rapporteur Stavenhagen and his day-long session with the Mapuche leadership just prior to the Temuco meeting.

### **b) Keynote speakers**

A keynote speaker on the first day was **Jaime Andrade, Under-secretary of the Ministry of Planning and Cooperation**. In that capacity, he is responsible for the coordination of indigenous policy for the Chilean government and is roughly the counterpart of the Canadian Deputy Minister of DIAND. He is widely rumoured to be leaving his position in the Fall 2003, allegedly from some sources due to frustration with the lack of any real progress or change in indigenous policies, despite reassurances from the current government of its willingness to change.

Mr. Andrade spoke of the 1993 indigenous peoples law as a major step forward for Chile. He noted that, when it was passed, many leaders present at the meeting participated in its preparation. In his view, its main thrust was dealing with land issues, but since then, much has happened in the world and in Chile. Faced with growing indigenous demands and the continued progress elsewhere and in the international arena, Chile as a State must respond.



He also felt that the government faced a huge challenge to improve the place of indigenous peoples in Chilean society. He said frankly that Chile is not known as a tolerant society and admitted that discrimination exists against indigenous people. He also recognized that the degree of interest among parliamentarians varies greatly from indifference to hostility to indigenous demands.

However, to those that call on the State to solve their problems, he also challenged indigenous people to seek their own recognition and advancement within society.

**It is not enough to pressure the State; the entire society must be convinced of the need to recognize diversity**

In his view, it is not enough to pressure the State to respond to indigenous claims; the entire society must be convinced of the need to recognize diversity. As a result, the lessons to be learned from other countries and international agencies were especially valuable.

He was followed by **United Nations Special Rapporteur Stavenhagen**. He provided a lengthy and detailed explanation of the international legal system on human rights, and the emergence in the past 2 decades of international standards on the treatment of indigenous peoples. He commented that we are seeing the re-emergence of indigenous peoples in international law in a way, which has not been seen since the earliest days of colonialism.

**We are seeing the re-emergence of indigenous peoples in international law, in a way not seen since the earliest days of colonialism**

He contrasted the emergent international law with the situation in 1919, when a delegation of North American Indians failed to convince the



**Rudolfo Stavenhagen (left)  
& indigenous representatives**

Versailles Conference to deal with their demands for self-determination. He recalled that these same claims to self-determination lie at the heart of current debates about the United Nations Declaration of the Rights of Indigenous Peoples. He posed as challenges, “how do we work beyond the current narrow definition of self-determination?” and “how do we define a people?”.

Inspired both by the failure to respond to their demands in 1919 and the relative success of recent decades, he regards indigenous peoples as being at a crossroads in terms of their status in international law. Based on recent





successes, including his appointment as Special Rapporteur and the creation of a Permanent Forum on indigenous issues at the United Nations, he appeared to be optimistic that indigenous peoples would eventually succeed in their demands.

### c) Conference themes

Given the number of panelists and presentations, I will highlight major themes that emerged from the various discussions, rather than summarize individual presentations though I have notes for most panels that I attended.



Panel presentation

My own presentation on State duties to consult indigenous peoples in development projects appeared to be well received by both the academics and indigenous participants. During the question/answer period, my observations about Canadian law and policy served as the basis for rather pointed comments about the lack of equivalent rights in Chile law and society.

A major theme that emerged from many panellists from throughout Latin America was the regional trend towards **cultural pluralism**. In many respects, Chile appears to have fallen behind the trend in other

**Regional trend is towards cultural pluralism**



Protest for release of Mapuche political prisoners interrupting Temuco roundtable

countries for Constitutions and laws to recognize indigenous peoples as distinct cultural entities within the State. Unlike Canada and the United States, however, there seemed to be less willingness to recognize them as distinct political or legal entities within the nation state.

Several countries have made considerable efforts to accommodate **traditional indigenous law and custom**. For example, Bolivia's efforts to recognize in its legal system and institutions the value and force of traditional law. Another example was Colombia's willingness to incorporate traditional law and institutions, particularly shamans and their traditional

**Region-wide struggle over land and water between indigenous communities and State-sponsored developments projects.**





medical knowledge, into the creation and management of a new national park on the Andes/Amazon border.

Despite these advances, another common theme was the region-wide **struggle over land and water** between indigenous communities and State-sponsored development projects. Many presentations outlined the relative powerlessness of local communities in the face of these projects, with limited success in domestic courts to advance their claims due to lack of funds.

There was some limited positive news. One example was the work of CEPAL and the Dutch Agriculture Ministry to work with indigenous communities on sustainable water management at a local level. Another related theme which emerged was the importance of **local management of lands and resources** to promote sustainable development for indigenous communities, while recognizing that development for national purposes will continue to occur.

**Recourse to international institutions is inevitable**

In the absence of willingness by States to accommodate local and indigenous concerns, **recourse to international institutions** is inevitable. The Awas Tigni decision against Nicaragua at the InterAmerican Court of Human Rights was discussed in detail in several panels as an example of where the international system could remedy the failure of domestic laws and policies.



**Dialogue between international & indigenous representatives**



#### **PART IV – CLOSING OBSERVATIONS**

Chile is not a southern hemisphere version of Canada. Although there are similarities in terms of our economies and roles in the world, there are many differences between our societies, some quite profound.

The essentially social democratic and pluralistic nature of our society and the consequent role played by the State in its support can be invisible to Canadians, until they visit a country like Chile where society and the role played by the State are quite different.

The various roundtables and meetings gave a fascinating glimpse into the challenges facing Chile and its indigenous peoples. While Canada may not have all the answers, our experience over the past three decades is relevant to Chileans. For example, both sides in the current Chilean debate about land issues could benefit from learning more about Canada's experience with alternative conflict resolution.

**While Canada may not have all the answers, our experience is relevant to Chileans ...**

In this regard, many individuals seek more information about Canada's experience. Some indicated their desire to visit Canada to gain greater insight into what has worked and what lessons we can offer on what has not worked. One lawyer in particular from CONADI wants to come to Ottawa to learn more about our land claims processes. The Canadian embassy has offered to provide information about programs that might assist him.

But Canada can also learn from the experience of Chile. One area of common concern to both countries is the plight of the large and growing urban indigenous populations. The challenges facing such peoples are similar in both countries and arguably throughout the hemisphere, and both countries appear to be struggling to find the right answers.

**... but Canada can also learn from Chile**

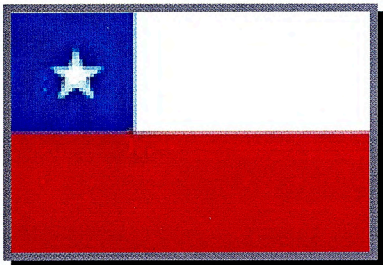
As one small practical step in that direction, urban Mapuche organisations in Santiago are organising a major conference in Spring 2004 on the challenges facing urban people. They asked that contacts be made with Canadian urban Aboriginal groups so that they could invite them to attend the conference. In terms of follow-up, it would be a useful starting point for further discussion between urban indigenous groups in the North and the South.



These requests lead me to my closing observation – Chile and Canada can learn from each other's experience about the place of indigenous individuals and collectivities in pluralistic and democratic societies. The risk of violence in Chile due to social disadvantage or the failure of the State to respond effectively to indigenous concerns is a sobering lesson for Canada. Chile in turn should take heart that a move towards pluralism can be a positive move which strengthens, rather than weakens, their society and State.

The bottom line is the value of further visits and exchanges, both between governments and among indigenous peoples in both countries. While Chile may not be typical of Latin America, it affords Canada a good opportunity to make concrete and practical contributions to a region-wide trend towards democracy and pluralism.

**Bottom line: further  
exchanges are valuable**





## **Annex A**

### **SEMINARIO INTERNACIONAL “DERECHOS HUMANOS Y PUEBLOS INDÍGENAS: TENDENCIAS INTERNACIONALES Y REALIDAD LOCAL”**

**20, 21 y 22 DE JULIO DE 2003**

**HOTEL DE LA FRONTERA  
TEMUCO, IX REGIÓN, CHILE.**

#### **Organizaciones Indígenas Patrocinantes:**

Consejo Nacional Aymara Arica-Parinacota / Área Desarrollo Aymara, Jiwasa Orage, Iquique / Consejo de Jefes Rapa Nui Urbanos / Asociación Indígena Lafkenche / Asamblea Constituyente de la Identidad Territorial Nagche / Parlamento del Territorio Nagche / Asociación Nankuqueo de Lumako / Comisión Jurídica Urbana, Santiago / Centro Cultural y Comunicaciones Jvfken Mapu, Santiago / Asociación Kona Pewman / Asociación Indígena Poyenhue de Villarrica / Coordinación de Organizaciones e Identidades Territoriales Mapuche / Referente Indígena Comunal Fūta Trawun de Lago Ranco / Gvbam Logko Pikum Wijimapu / Asociación Mapu Lawal del Buta Huilli Mapu / Federación de Comunidades Huilliche de Chiloé / Consejo General de Caciques Williche Chilwe.

#### **Instituciones Patrocinantes:**

Instituto de Estudios Andinos Isluga de la Universidad Arturo Prat (Iquique) / Escuela de Derecho de la Universidad Católica de Temuco / Escuela de Antropología de la Universidad Austral de Chile (Valdivia), Colegio de Antropólogos de Chile A.G. / Agenda Regional de La Araucanía (AGRA)

#### **Instituciones Auspiciadoras:**

Fundación Ford, Oficina para la Región Andina y el Cono Sur / Ministerio de Planificación y Cooperación (MIDEPLAN) / Embajada de Gran Bretaña en Chile / Embajada de Canadá en Chile / Cooperación Técnica Alemana (GTZ), Oficina IX Región / Servicio Civil Alemán de Cooperación Social y Técnica para la Paz (DED), Oficina VIII Región / Programa CyC UPAZ-CIID Canadá.

**SEMINARIO INTERNACIONAL**  
**“DERECHOS HUMANOS Y PUEBLOS INDÍGENAS: TENDENCIAS INTERNACIONALES Y REALIDAD LOCAL”**  
**20, 21 y 22 DE JULIO DE 2003**  
**HOTEL DE LA FRONTERA**  
**TEMUCO, IX REGIÓN, CHILE.**

**PROGRAMA PRELIMINAR**

Horario	Domingo 20 de Julio
10:00-18:30 hrs.	<ul style="list-style-type: none"> <li>• <b>Reunión (Trawun)</b> de los dirigentes y líderes de las organizaciones indígenas mapuche de las VIII, IX y X Regiones, más delegaciones de organizaciones Rapa Nui, Aymaras, Quechua, Atacameños, Kaweshkar e indígenas urbanos, con el Dr. Rodolfo Stavenhagen, Relator Especial ONU para derechos humanos indígenas, e invitados internacionales.</li> <li>- <b>Lugar:</b> Comunidad Mapuche-Lafkenche Chanquín, Comuna de Toltén, a 102 Kilómetros al suroeste de Temuco, tiempo estimado del viaje: 1 hora y 30 minutos.</li> <li>- <b>Organización:</b> Asociación de Comunidades Lafkenche.</li> <li>- <b>Logística:</b> Instituto de Estudios Indígenas UFRO.</li> </ul>

Horario	Lunes 21 de julio Hotel de La Frontera, Temuco.
08:30-09:30 hrs.	Inscripción asistentes y entrega de materiales.
09:30-10:00 hrs	<b>Llallipun</b> (Cereemonia mapuche)
10:00-11:00 hrs	<b>Acto Inaugural:</b> <ol style="list-style-type: none"> <li>1. Palabras de Bienvenida a cargo del Sr. Sergio Bravo Escobar, Rector de la Universidad de La Frontera.</li> <li>2. Palabras del Sr. Galvarino Reiman, Representante de la Coordinación de Organizaciones e Identidades Territoriales Mapuche.</li> <li>3. Palabras del Sr. Jaime Andrade, Subsecretario de MIDEPLAN, Coordinador de Política Indígena del Gobierno de Chile.</li> <li>4. Palabras del Sr. Alejandro Herrera, Director del Instituto de Estudios Indígenas de la Universidad de La Frontera.</li> </ol>
11:00-13:00 hrs.	<ul style="list-style-type: none"> <li>• <b>Conferencia Inaugural:</b> Dr. Rodolfo Stavenhagen, Relator Especial ONU para los derechos humanos indígenas.</li> </ul>
13:00-14:30 hrs.	<ul style="list-style-type: none"> <li>• <b>Almuerzo.</b> (Observación: el almuerzo es responsabilidad de cada participante, a excepción de los líderes indígenas becados por el Instituto).</li> </ul>

**INICIO DE PRESENTACIONES**

Lunes 21 de julio

Hotel de La Frontera, Temuco.

Horario:

14:30-16:30 hrs.

Horario:	<b>PANEL 1: El derecho internacional y los pueblos indígenas.</b>	<b>PANEL 2: Derechos indígenas en América Latina: experiencias, conflictos, y desafíos.</b>	<b>PANEL 3: Derecho indígena (consuetudinario) y derecho estatal.</b>	<b>PANEL 4: Medio ambiente, propiedad intelectual y pueblos indígenas.</b>
14:30- 14:35	<b>Moderador:</b> Rodrigo Lillo Vera, abogado, Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Pellaifa, Hotel Frontera.	<b>Moderador:</b> Roberto Morales Urra, antropólogo, Escuela de Antropología, UACH. <b>Sala:</b> Centro de Convenciones, Hotel Frontera.	<b>Moderador:</b> María del Rosario Salamanca Huenchullan, abogado, Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Trancura, Hotel Frontera.	<b>Moderador:</b> Jaime Soto Navarro, antropólogo, Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Sala Conferencias, Edificio San José.
14:35- 14:50	<b>Expositor:</b> Pantel Blaise <b>Institución:</b> Universidad de Toulouse-le-Mirail. <b>País:</b> Francia. <b>Título de la Ponencia:</b> "Derechos internacionales y derechos políticos indígenas : el desafío democrático?".	<b>Expositor:</b> Alvaro Bello Maldonado <b>Institución:</b> UNAM-IIA. <b>País:</b> México. <b>Título de la Ponencia:</b> "Territorio y acción colectiva indígena en América Latina: algunas visiones e interpretaciones".	<b>Expositor:</b> Romeo Tiu Lopez <b>Institución:</b> MINUGUA <b>País:</b> Guatemala. <b>Título de la Ponencia:</b> "El Derecho Indígena y su importancia en el Derecho Penal".	<b>Expositor:</b> Elsa Cadena, Martha C. Rosero <b>Institución:</b> Instituto de Etnobiología. <b>País:</b> Colombia. <b>Título de la Ponencia:</b> "Aspectos jurídicos en torno a la constitución del Parque Nacional Natural Alto Fragua Indi Wasi".
14:50- 15:05	<b>Expositor:</b> Marcos Orellana <b>Institución:</b> Center for International Environmental Law. <b>País:</b> EE UU. <b>Título de la Ponencia:</b> "Fragmentación y acumulación de regímenes internacionales: los derechos indígenas v/s. privilegios de los inversionistas".	<b>Expositor:</b> Diego Iturralde Guerrero <b>Institución:</b> Instituto Interamericano de Derechos Humanos. <b>País:</b> Costa Rica. <b>Título de la Ponencia:</b> "Participación electoral indígena: avances en las condiciones legales en diez países de la región".	<b>Expositor:</b> Luis Guillermo Davinson <b>Institución:</b> INACAP <b>País:</b> Chile <b>Título de la Ponencia:</b> "Normas y ejercicio local del poder en un pueblo indígena de Tlaxcala, México".	<b>Expositor:</b> Hellen Pacheco <b>Institución:</b> Centro Interdepartamentale di Studi sulla America Indigena (CISA), Università Degli Studi di Siena. <b>País:</b> Italia. <b>Título de la Ponencia:</b> "La propiedad Intelectual sobre Conocimientos Tradicionales Indígenas. Un vacío legal".
15:05- 15:20	<b>Expositor:</b> Claudio Nash Rojas <b>Institución:</b> Centro de Derechos Humanos, Fac. de Derecho, U. de Chile. <b>País:</b> Chile. <b>Título de la Ponencia:</b> "Los derechos humanos de los indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos".	<b>Expositor:</b> Francois Lartigue <b>Institución:</b> CIESAS <b>País:</b> México. <b>Título de la Ponencia:</b> "Cambios socioculturales, aumento de la conflictividad y transformaciones jurídico institucionales: México y Guatemala".	<b>Expositor:</b> Reinaldo Imania Arriaga <b>Institución:</b> Asesor Congreso de Bolivia. <b>País:</b> Bolivia. <b>Título de la Ponencia:</b> "Los derechos indígenas en el proceso penal boliviano".	<b>Expositor:</b> Ingo Gentes <b>Institución:</b> Universidad de Wageningen/ CEPAL. <b>País:</b> Chile. <b>Título de la Ponencia:</b> "WALIR- Un aporte al empoderamiento del derecho local a los recursos hídricos".



Horario:	PANEL 1: El derecho internacional y los pueblos indígenas.	PANEL 2: Derechos indígenas en América Latina: experiencias, conflictos, y desafíos.	PANEL 3: Derecho indígena (consuetudinario) y derecho estatal.	PANEL 4: Medio ambiente, propiedad intelectual y pueblos indígenas.
15:20-15:35	<b>Expositor:</b> Luis Rodríguez-Piñero Royo <b>Institución:</b> Programa de Derechos y Políticas Indígenas (IPLP), Universidad de Arizona. <b>País:</b> EE UU. <b>Título de la Ponencia:</b> "El caso Awas Tingni y el régimen de derechos territoriales indígenas en la Costa Atlántica de Nicaragua".	<b>Expositor:</b> Isabel Hernández Manfredi. <b>Institución:</b> CEPAL <b>País:</b> Chile. <b>Título de la Ponencia:</b> "Autonomía o ciudadanía incompleta: Identidad e historia del Pueblo mapuche en Chile y Argentina".	<b>Expositor:</b> María del Pilar Quintanilla Vidaurre <b>Institución:</b> Centro de Estudios sobre Justicia y Participación (CEJIP). <b>País:</b> Bolivia. <b>Título de la Ponencia:</b> "La justicia comunitaria en Bolivia".	<b>Expositor:</b> Stefanie Wickstrom, Rex Wirth <b>Institución:</b> Central Washington University <b>País:</b> EE UU. <b>Título de la Ponencia:</b> "Un resumen de los derechos de aguas de los pueblos Yakama y Skokomish en el estado de Washington".
15:35-15:50	<b>Expositor:</b> Pablo Gutiérrez Vega <b>Institución:</b> Departamento de Ciencias Jurídicas Básicas, Facultad de Derecho, Universidad de Sevilla. <b>País:</b> España. <b>Título de la Ponencia:</b> "El archivo esquivo. La Sección de Tratados de la Organización de Naciones Unidas (UNTS) y el registro de los tratados entre pueblos indígenas y Estados".	<b>Expositor:</b> Javier Aroca Medina <b>Institución:</b> Oficina Regional para América del Sur de Oxfam América. <b>País:</b> Perú. <b>Título de la Ponencia:</b> "Derechos de los pueblos indígenas en el caso peruano".	• Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas
15:50-16:05	<b>Expositor:</b> Ulrike Bieker <b>Institución:</b> Instituto de estudios comparativos de culturas (Etnología), Marburg. <b>País:</b> Alemania. <b>Título de la Ponencia:</b> "Los derechos de los niños y el derecho al trabajo".	<b>Expositor:</b> Hernán Darío Correa <b>Institución:</b> Centro de Estudios de la Realidad Colombiana (CEREC). <b>País:</b> Colombia. <b>Título de la Ponencia:</b> "Derechos colectivos indígenas y replanteamiento de los derechos humanos: Elementos para la discusión a partir de algunas experiencias colombianas".	• Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas
16:05-16:35	• Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas	• Café	• Café
16:35-17:00	• Café	• Café		

Horario	<b>PANEL 5:</b> <b>Pueblos indígenas en el derecho comparado: el caso de Canadá.</b>	<b>PANEL 6:</b> <b>Pueblos indígenas en el derecho comparado: el caso de Argentina.</b>	<b>PANEL 7:</b> <b>Diversidad cultural: los derechos de la mujer indígena.</b>	<b>PANEL 8:</b> <b>Conflicto y colaboración en el manejo de los recursos naturales.</b>
17:00-17:05	<b>Moderador:</b> José Aylwin Oyarzún, abogado, Coordinador Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Pellaifa, Hotel Frontera.	<b>Moderador:</b> Aldo Vidal Herrera, antropólogo, Depto. de Ciencias Sociales, UFRO. <b>Sala:</b> Centro de Convenciones, Hotel Frontera.	<b>Moderador:</b> Orietta Jara, abogado, Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Trancura, Hotel Frontera.	<b>Moderador:</b> Alejandro Herrera <b>Sala:</b> Sala Conferencias, Edificio San José.
17:05-17:25	<b>Expositor:</b> Michael Hudson <b>Institución:</b> Oficina Federal de Negociación de Tratados, Ministerio de Justicia de Canadá. <b>País:</b> Canadá. <b>Título de la Ponencia:</b> "El desarrollo y la obligación de tener en cuenta los derechos indígenas por parte del Estado: Tendencias recientes en la jurisprudencia canadiense".	<b>Expositor:</b> María Silvia Raninqueo. <b>Institución:</b> Honorable Legislatura del Neuquén (Argentina). <b>País:</b> Argentina. <b>Título de la Ponencia:</b> "Reconocimiento de los derechos de pueblos indígenas: su reflejo en las políticas de Estado".	<b>Expositor:</b> María Teresa Sierra Camacho <b>Institución:</b> CIESAS <b>País:</b> México. <b>Título de la Ponencia:</b> "Derechos humanos y multiculturalidad: la apuesta de las mujeres indígenas".	<b>Expositor:</b> Rene Apaza Anamuro <b>Institución:</b> CAPRODA <b>Título de la Ponencia:</b> "Proceso de concertación de la Asociación Para el Uso Sostenible de la Toia, en Arequipa, Perú"
17:25-17:50	<b>Expositor:</b> Luis Rodríguez-Pinero Royo <b>Institución:</b> Programa de Derechos y Políticas Indígenas, Universidad de Arizona <b>País:</b> EE.UU. <b>Título de la Ponencia:</b> "El caso Awas Tingni y el régimen de derechos territoriales indígenas en la Costa Atlántica de Nicaragua".	<b>Expositor:</b> Zulema Semorile <b>Institución:</b> Universidad Nacional del Comahue <b>País:</b> Argentina. <b>Título de la Ponencia:</b> "Los mapuche: nuevos sujetos de derecho? Reflexiones y desafíos".	<b>Expositor:</b> Patricia Richards <b>Institución:</b> Universidad de Georgia <b>País:</b> EE.UU. <b>Título de la Ponencia:</b> "Las demandas de las mujeres indígenas: impresiones comparativas".	<b>Expositor:</b> Miguel Valbuena Wouriya <b>Institución:</b> CEREC <b>Título de la Ponencia:</b> "Conflicto social y concertación intercultural en las salinas de Manaure"
17:50-18:05	<b>Expositor:</b> Juan Jorge Faundez <b>Institución:</b> Fundacio Instituto Indigena <b>País:</b> Chile <b>Título de la Ponencia:</b> "El reconocimiento de los pueblos indígenas en Chile, una propuesta de reforma al Estado".	<b>Expositor:</b> Jorge Nahuel <b>Institución:</b> Coordinadora Mapuche de Neuquén. <b>País:</b> Argentina. <b>Título de la Ponencia:</b> "Desafíos mapuche para un nuevo Estado".	<b>Expositor:</b> Elsa Gabriela González Caniulef <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO. <b>País:</b> Chile. <b>Título de la Ponencia:</b> "La discriminación en Chile: El caso de las mujeres mapuche".	<b>Expositor:</b> Mirna Liz Inturias Canedo <b>Institución:</b> CIDOB <b>País:</b> Bolivia <b>Título de la Ponencia:</b> "Un espacio en construcción, hacia la gestión territorial de las tierras comunitarias de origen: saneamiento de tierras y sobreposición con megaproyectos"
18:05-18:35	<b>Expositor:</b> Hernán Darío Correa <b>Institución:</b> Centro de Estudios de la Realidad Colombiana (CEREC) <b>País:</b> Colombia <b>Título de la Ponencia:</b> "Derechos colectivos indígenas y replanteamiento de los derechos humanos – Elementos para la discusión a partir de algunas experiencias colombianas".	<b>Expositor:</b> Morita Carrasco <b>Institución:</b> Facultad de Filosofía y Letras, Universidad de Buenos Aires. <b>País:</b> Argentina. <b>Título de la Ponencia:</b> "Derechos territoriales y estrategias indígenas. el caso de la asociación de comunidades aborígenes Lhaka Honhat".	<b>Expositor:</b> Tatiana Araya Toro <b>Institución:</b> Mag. En Desarrollo Rural, UACH. <b>País:</b> Chile. <b>Título de la Ponencia:</b> "Desde el género y la diversidad cultural: necesidades de mujeres mapuches y políticas públicas".	
18:35-19:30	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>
21:00-23:00 hrs.	<ul style="list-style-type: none"> <li><b>Acto Cultural y Convivencia. para los asistentes inscritos en el Seminario:</b> <b>Lugar:</b> Casino Central UFRO, ubicado en Calle Uruguay esquina calle Montevideo, Campus Central UFRO, enfrente de la Sede del Instituto de Estudios Indígenas. <b>Participantes:</b> Invitados de organizaciones indígenas, expositores, y participantes en general que hayan cancelado costos de inscripción.</li> </ul>			

Continuation de Paneles  
Martes 22 de julio  
Hotel de La Frontera, Temuco.

Horario:  
9:00 – 20:00

Horario:	<b>PANEL 1:</b> Textos etnográficos, revisión histórica y derechos indígenas.	<b>PANEL 2:</b> Antecedentes y derechos de los pueblos andinos.	<b>PANEL 3:</b> Derechos de los Rapa Nui y de las comunidades de los canales australes	<b>PANEL 4:</b> Derechos de los mapuche-huilliche
09:00- 11:00	<b>Moderador:</b> Jorge Pinto Rodríguez, historiador, Depto. De Ciencias Sociales. <b>Sala:</b> Salón Pellaifa, Hotel Frontera.	<b>Moderador:</b> Marco Cabana Villarca, Programa Derechos Indígenas IEI- UFRO <b>Sala:</b> Centro de Convenciones, Hotel Frontera.	<b>Moderador:</b> Jose Aylwin, abogado, Programa Derechos Indígenas IEI- UFRO <b>Sala:</b> Salón Trancura, Hotel Frontera.	<b>Moderador:</b> Tatiana Araya, antropología, Programa Mag. Desarrollo Rural, UACH. <b>Sala:</b> Sala Conferencias, Edificio San José.
9:05-9:20	<b>Expositor:</b> Eugenio Aclaman <b>Institución:</b> CONADI <b>Título de la Ponencia:</b> "Sujeción y ciudadanía: la integración, diferenciada y la asimilación forzada de los mapuche-williche"	<b>Expositor:</b> Hans Gundermann <b>Institución:</b> IIAM-UCN <b>Título de la Ponencia:</b> "Autodiscripción étnica de los pueblos andinos de Chile, analizada a través de las cifras censales de 1992 y 2002"	<b>Expositor:</b> Andreas Inglesias Ruiz <b>Institución:</b> Secretaría Regional Ministerial de Planificación y Coordinación de Magallanes y Antártica Chilena. <b>Título de la Ponencia:</b> "Situación actual de los pueblos canoeros australes: como hacer valer sus derechos en la Región de Magallanes et Antártica Chilena"	<b>Expositor:</b> Jose Manuel Guerrero <b>Institución:</b> CREAS-IEI <b>Título de la Ponencia:</b> "Borde costero y pueblo mapuche williche en la X Región de los Lagos: El impacto de las concesiones de acuicultura y áreas de manejo"
9:20-9:35	<b>Expositor:</b> Jaime Flores Chavez <b>Institución:</b> Depto. Ciencias Sociales, UFRO <b>Título de la Ponencia:</b> "El vejido trata: relaciones interétnicas en la araucanía 1850-1930"	<b>Expositor:</b> Raul Molina Otarola <b>Institución:</b> Tepu Consultores <b>Título de la Ponencia:</b> "Pastoreando la cordillera, la puna y los llanos: Patrones de ocupación y demanda territorial Colla"	<b>Expositor:</b> Juan Carlos Tonko Paterito <b>Institución:</b> Comunidad Indígena Kawesquar <b>País:</b> Chile <b>Título de la Ponencia:</b> "Resena de la realidad indígena en Magallanes"	<b>Expositor:</b> Fidel Rain <b>Institución:</b> Consejo general de caciques de Chiloe. <b>Título de la Ponencia:</b> "Los efectores de las empresas forestales en el territorio Williche de Chiloe"
9:35-9:50	<b>Expositor:</b> Rolf Foerster <b>Institución:</b> Depto. De Antropología, Univ. de Chile <b>Título de la Ponencia:</b> "El pasado de una ilusión: La Dirección de Asuntos Indígenas (1961-1973) y la política indígena actual"	<b>Expositor:</b> Reynaldo Huelguero <b>Institución:</b> Comunidad Quechua Yachay Wasi, Arica <b>Título de la Ponencia:</b> "El Pueblo Quechua en Chile"	<b>Expositor:</b> Lenki Atan Ito <b>Institución:</b> Consejo de Jefes Rapa Nui <b>Título de la Ponencia:</b> "El Pueblo Rapa Nui hoy frente al tratado con el Estado de Chile en 1888"	<b>Expositor:</b> Sergio Cuyil <b>Institución:</b> Federación de Comunidades Huilliche de Chiloe <b>Título de la Ponencia:</b> "Experiencia de Reindigenización con comunidades de Federación de Comunidades Huilliche de Chiloe"



9:50-10:05	<b>Expositor:</b> Jose Ancan Jara <b>Institución:</b> Centro de Estudios y Documentación Liwen <b>Título de la Ponencia:</b> "Sobre escrituras y anonimatos: Quienes son autores de los textos etnográficos, los informantes – facilitadores o los investigadores - transcriptores"	<b>Expositor:</b> Wilson Reyes <b>Institución:</b> <b>Título de la Ponencia:</b> "Empoderamiento de las comunidades indígenas y puesta en valor de sitios arqueológicos indígenas"	<b>Expositor:</b> Nancy Yanez <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO <b>Título de la Ponencia:</b> "Relacion Estado-Pueblo Rapa Nui: Un análisis desde la perspectiva de los Derechos Indígenas"	
10:05-11:00	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>	<b>Debate, comentarios y preguntas a los panelistas</b>

Horario:	<b>PANEL 5:</b> Población y comunidades indígenas en un contexto urbano.	<b>PANEL 6:</b> Derecho a la tierra y a los recursos naturales en territorio Aymara.	<b>PANEL 7:</b> Conflictos en el territorio mapuche en un contexto de globalización	<b>PANEL 8:</b> Relaciones interétnicas, conflictos y derechos indígenas en Arauco.
11:00-11:05	<b>Moderator:</b> Rolf Foerster, antropólogo <b>Institución:</b> Univ. de Chile	<b>Moderator:</b> Jorge Vergara, antropólogo <b>Institución:</b> Instituto Isluga, Univ. Arturo Prat.	<b>Moderator:</b> Juan Carlos Skewes, antropólogo <b>Institución:</b> Univ. Austral de Chile	<b>Moderator:</b> Adolfo Millabur, Alcalde de Tirúa, <b>Institución:</b> Asociación de comunidades Lafkenche
11:05-11:20	<b>Expositor:</b> Elías Pallan <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO, Centro de Comunicación Mapuche Jvfen Mapu <b>Título de la Ponencia:</b> "Los derechos de los indígenas en la Región Metropolitana"	<b>Expositor:</b> Juan Pablo Leon Ancasi <b>Institución:</b> Asociación General de Proprietarios Andinos <b>Título de la Ponencia:</b> "SNASPE y propiedad privada: Situación de la Provincia de Parinacota"	<b>Expositor:</b> Alfredo Squel <b>Institución:</b> Agrupación Mapuche Kanapewman <b>Título de la Ponencia:</b> "Radiografía al conflicto forestal en el territorio mapuche"	<b>Expositor:</b> Chistian Espinoza Chamorro <b>Institución:</b> Universidad Academia de Humanismo Cristiano <b>Título de la Ponencia:</b> "Relaciones interétnicas en Nahuelbuta"
11:35-11:50	<b>Expositor:</b> Mauricio Cozzi Paredes <b>Institución:</b> Agencia de Gestión Territorial, Universidad Autónoma del Sur <b>Título de la Ponencia:</b> "Las comunidades mapuches de la periferia urbana de Temuco: estrategias para un modelo de desarrollo sustentable".	<b>Expositor:</b> Sergio Fuenzalida <b>Institución:</b> Universidad ARCIS <b>Título de la Ponencia:</b> "Sobre aguas indígenas del norte"	<b>Expositor:</b> Víctor Toledo <b>Institución:</b> <b>Título de la Ponencia:</b> "La Arena del conflicto en tiempos de globalización: de tierras a territorios – el caso Mapuche"	<b>Expositor:</b> Rodrigo Lillo Vera <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO <b>Título de la Ponencia:</b> "Los conflictos de tierras de los mapuches en la Octava Región"
11:50-12:05	• Debate, comentarios y preguntas a los panelistas	<b>Expositor:</b> Juan Arturo Araya Moruna <b>Institución:</b> <b>Título de la Ponencia:</b> "Poblando aymara rural de parca cerca de minera bhpbilliton cerro Colorado – transgresión de límites aprobados internacionalmente y contaminación ambiental"	<b>Expositor:</b> Jeannette Pailan <b>Institución:</b> <b>Título de la Ponencia:</b> "Conflictos territoriales desde una mirada visual mapuche"	• Debate, comentarios y preguntas a los panelistas
12:05-12:30	• Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas	Debate, comentarios y preguntas a los panelistas	Debate, comentarios y preguntas a los panelistas

Horario	<b>PANEL 9: Desarrollo, participación y discriminación en territorio Aymara</b>	<b>PANEL 10: Políticas públicas y derechos Indígenas.</b>	<b>PANEL 11: Educación indígena y derechos lingüísticos</b>
14:30- 16:30	<b>Moderador:</b> Nancy Yáñez, abogado, Programa Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Pellaifa, Hotel Frontera.	<b>Moderador:</b> Alejandro Herrera, IEI- UFRO <b>Sala:</b> Centro de Convenciones, Hotel Frontera.	<b>Moderador:</b> Eliseo Canulef, Investigador, IEI-UFRO, Programa NICE <b>Sala:</b> Salón Trancura, Hotel Frontera.
14:35- 14:50	<b>Expositor:</b> Angelino Santo Nuanca Maita <b>Institución:</b> Consejo Nacional Aymara <b>País:</b> Canadá. <b>Título de la Ponencia:</b> "Discriminación de los Aymara en la Provincia de Parinacota"	<b>Expositor:</b> Jose Alywn Oyarzun <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO. <b>Título de la Ponencia:</b> "La política pública y el derecho de los mapuche a la tierra y al territorio"	<b>Expositor:</b> Marlene Opazo <b>Institución:</b> Municipalidad de Temuco, Depto. Educación UFRO <b>Título de la Ponencia:</b> "Los derechos des niño y niña mapuche en las escuelas rurales municipales de la comuna de Temuco"
14:50- 15:05	<b>Expositor:</b> David Paco Chura <b>Institución:</b> Programa Orígenes <b>Título de la Ponencia:</b> "A donde vas, a donde me llevas: El desarrollo v/s territorialidad en Comunidades Indígenas del Norte de Chile"	<b>Expositor:</b> Raul Ruallaf Maichin <b>Institución:</b> Programa Orígenes <b>Título de la Ponencia:</b> "Programa Orígenes: en la construcción de un Nuevo Trato".	<b>Expositor:</b> Miguel Sánchez Contreras <b>Institución:</b> Área EIB, IEI-UFRO <b>Título de la Ponencia:</b> "Convenios internacionales y legislación educativa nacional – una mirada crítica desde la Educación Intercultural Bilingüe".
15:05- 15:35	<b>Expositor:</b> Marco Cabama Villica <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO, Pacha Uru <b>Título de la Ponencia:</b> "Desarrollo y mecanismos de participación y representación indígena Aymara en las Provincias de Arica y Parinacota"	<b>Expositor:</b> Liliana Cortes <b>Institución:</b> CONADI <b>Título de la Ponencia:</b> "Derecho ancestral de la propiedad indígena: trabajo CONADI - ocho años de historia"	<b>Expositor:</b> Jorge Calfuqueno <b>Institución:</b> Sociedad de Profesores Mapuche Kimeltucefe <b>Título de la Ponencia:</b> "El derecho a la educación superior y a vivir en espacios dignos para los estudiantes Mapuche".
15:20- 15:35	<b>Expositor:</b> Ximena Vasquez <b>Institución:</b> Comunidad indígena de Putre <b>Título de la Ponencia:</b> "El derecho humano, como un deber y obligación humana"	<b>Expositor:</b> Juan Carlos Skewes <b>Institución:</b> Universidad Austral de Chile <b>Título de la Ponencia:</b> "Creando desorden: Orígenes, el Estado y la sociedad Mapuche en Chile"	<b>Expositor:</b> Julio Marileo <b>Institución:</b> Coordinador de Hogares Mapuche IX y X Región <b>Título de la Ponencia:</b> "El derecho a los hogares mapuche en el contexto de la educación superior".
15:35- 15:50	<b>Expositor:</b> Silivia Mendoza Flores <b>Institución:</b> <b>Título de la Ponencia:</b> "Discriminación y abuso de los derechos humanos individuales Aymara, por las instrucciones policiales fonderizas en las provincias de Arica y Parinacota"	<b>Expositor:</b> Jaime Soto Navarro <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO. <b>Título de la Ponencia:</b> "Políticas públicas y desarrollo en comunidades Hulliche"	<b>Expositor:</b> Enrique Hamel <b>Institución:</b> UAM-IZT <b>Título de la Ponencia:</b> "Educación indígena y derechos lingüísticos"
15:50- 16:50	<b>Debate, comentarios y preguntas a los panelistas</b>	• <b>Debate, comentarios y preguntas a los panelistas</b>	• <b>Debate, comentarios y preguntas a los panelistas</b>

Horario	<b>PANEL 13: Experiencias, reflexiones y propuestas para un reconocimiento de los derechos indígenas</b>	<b>PANEL 14: Justicia estatal y pueblos indígenas</b>	<b>PANEL 15: Educación indígena y políticas lingüísticas en el territorio Aymara</b>
16:50- 16:55	<b>Moderador:</b> Hilda Llanquina Derechos Indígenas IEI-UFRO. <b>Sala:</b> Salón Pellaifa, Hotel Frontera.	<b>Moderador:</b> Juan Jorge Faundez, abogado, Fundación Instituto Indígena <b>Sala:</b> Centro de Convenciones, Hotel	<b>Moderador:</b> Miguel Sánchez Contreras, profesor, IEI-UFRO <b>Sala:</b> Salón Trancura, Hotel Frontera.



		Frontera.	
16:55-17:10	<b>Expositor:</b> Glvariono Reiman <b>Institución:</b> Identidad Territorial Nagche, Comunidad Juan Maika Traiguen <b>Título de la Ponencia:</b> "Situación actual y proyecto político de la Identidad Territorial Nagche"	<b>Expositor:</b> Carlos del Valle Rojas <b>Institución:</b> Escuela de Periodismo, Universidad de la Frontera <b>Título de la Ponencia:</b> "Interculturalidad y reforma procesal penal en Chile"	<b>Expositor:</b> Georgina Luque Arias <b>Institución:</b> Asociación de Profesores Indígenas de Arica <b>Título de la Ponencia:</b> "Derechos humanos de alumnos de antecedencia Aymara de Enseñanza Media urbana"
17:10-17:25	<b>Expositor:</b> Fernando Kilaleo Aguirre <b>Institución:</b> Comisión Jurídica Indígena, Santiago <b>Título de la Ponencia:</b> "Derechos colectivos, participación y política"	<b>Expositor:</b> Fabien le Bonniec <b>Institución:</b> Escuela de Altos Estudios en Ciencias Sociales – EHESS <b>País:</b> París, Francia <b>Título de la Ponencia:</b> "Movimiento mapuche y justicia chilena en la actualidad: reflexiones acerca de la judicialización de la reivindicaciones mapuche en Chile".	<b>Expositor:</b> Luis Godoy <b>Institución:</b> Instituto de Estudios Andinos Isluga, Univ. Arturo Prat. <b>Título de la Ponencia:</b> "Demandas y políticas lingüísticas en los Aymara de Trapaca"
17:25-17:40	<b>Expositor:</b> Boris Hualme <b>Institución:</b> Asociación de Comunidades Kafenche <b>Título de la Ponencia:</b> "El derecho mapuche en el lafkenmapu"	<b>Expositor:</b> Jaime Madariagao <b>Institución:</b> NorAlinea <b>Título de la Ponencia:</b> "Ley antiterrorista, conflicto mapuche y reforma procesal penal"	<b>Expositor:</b> Mireya Uycra Pae <b>Institución:</b> Asociación Patichiri Jaquinaka <b>Título de la Ponencia:</b> "Participación y pertinencia en la educación rural, zona Aymara".
17:40-17:55	<b>Expositor:</b> Mauenl Painequeo <b>Institución:</b> Parlamento Nagche del Territorio Nagche <b>Título de la Ponencia:</b> "Revitalizar la cosmovisión mapuche nos permite un desarrollo integral sostenible"	<b>Expositor:</b> María del Rosario <b>Institución:</b> Programa Derechos Indígenas IEI-UFRO <b>Título de la Ponencia:</b> "La Reforma Procesal Penal y el Pueblo Mapuche en Chile – una mirada crítica y sistémica"	Debate, comentarios y preguntas a los panelistas
17:55-18:10	<b>Expositor:</b> Silivia Mendoza Flores <b>Institución:</b> <b>Título de la Ponencia:</b> "Discriminación y abuso de los derechos humanos individuales Aymara, por las instrucciones policiales fortalecidas en las provincias de Arica y Paríacola"	<b>Expositor:</b> Mylene Valenzuela Reyes <b>Institución:</b> Ministerio de Justicia <b>Título de la Ponencia:</b> "La política pública y la incorporación de la pertinencia cultural en el ámbito de justicia"	Debate, comentarios y preguntas a los panelistas
18:10-18:30	Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas	• Debate, comentarios y preguntas a los panelistas
19:00-20:00 hrs.	<b>Panel de conclusiones y Clausura del Seminario</b> <b>Coordinación:</b> Sr. José Alwyn, Coordinador, Programa Derechos Indígenas del Instituto		

## **Annex B**

### **Development & State Duties to Accommodate Indigenous Rights - Recent Trends in Canadian Jurisprudence**

Michael Hudson

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Department of Justice (Canada)<sup>1</sup>

July 2003

A world-wide phenomenon is the interaction between State-facilitated development projects and the claims of indigenous peoples to land and resource rights in their traditional territories. Not infrequently, indigenous peoples perceive that States pay inadequate attention to their rights to traditional lands and resources when States issue legal rights to third parties to develop public lands. Many express grave concerns that their traditional rights have inadequate legal standing in national law or their legally recognized rights are simply disregarded by States and their agencies when making decisions.

At the same time, States can struggle with the need to balance the sometimes competing interests of indigenous peoples with the broader needs of their societies, including the use of public lands to promote general social and economic development for all citizens, both indigenous and non-indigenous. Even where States are prepared to deal with indigenous interests, they may hesitate to halt or modify major developments in the face of indigenous claims which are not recognized in domestic legal systems. States may also face competing demands from different indigenous groups claiming entitlement to the same lands and resources.

Against this global background, the following paper considers recent jurisprudence within Canada on the duties of consultation and accommodation of the Canadian federal and provincial governments and to a related extent on private companies. While the jurisprudence and government policy in response continues to evolve, the Canadian Courts offer some possible guidance on these challenging issues to other jurisdictions.

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<sup>1</sup>

Views expressed are personal and solely those of the author and should not necessarily be interpreted as the position of the Department of Justice or the Government of Canada as whole.

## Canadian Juridical Context

In Canada, the term “indigenous” is used less frequently than the term “Aboriginal” to designate the modern descendants of the peoples that occupied the northern part of North America at the time of colonisation by the French, English and other European States. The Canadian Constitution recognizes three peoples to be “Aboriginal”: “Indians” more commonly known as the First Nations, the Inuit (formerly called the Eskimo) residing in the northern parts of Canada and the Metis descended from historical intermarriage between First Nation persons and Europeans but with a distinct modern cultural identity.

The Canadian Constitution was substantially revised in 1982, including the addition of a *Charter of Rights and Freedoms* setting out human rights and fundamental freedoms for all Canadians. Another major change was the inclusion of an express recognition and protection of the existing Aboriginal and treaty rights of Canada’s indigenous peoples.<sup>2</sup>

The 1982 constitutional revision reflected a fundamental feature of Canadian law from its earliest days, namely the need to reconcile the sovereignty of the British and then Canadian Crown with the prior existence of Aboriginal societies. As a result, the British and Canadian Courts have acknowledged since the 19<sup>th</sup> century the concept that Aboriginal peoples possessed property rights in their traditional territories prior to colonisation. These traditional property rights were recognized by British colonial law and, since the creation of the Canadian Confederation in 1867, by Canadian public and common law.

Canadian Courts in recent decades have laid to rest previous arguments that Aboriginal rights to their traditional territories were capable of extinguishment merely because the French or British sovereigns did not expressly recognize their existence. Similarly, Canadian Courts have rejected arguments that these rights disappeared simply because laws existed which opened lands for settlement or development without any provision for dealing with Aboriginal rights. Furthermore, the Courts have found that legal and other government-imposed impediments to Aboriginal peoples advancing their claims to rights should not be interpreted as incompatible with the continued existence of those rights.

Since 1982, section 35 of the *Constitution Act, 1982* provides a substantive protection to Aboriginal rights, and imposes a high burden on federal and provincial governments to justify infringement with those rights. Interference with such rights can only occur for

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<sup>2</sup> *Constitution Act, 1982* s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [hereinafter *Constitution Act, 1982*]- “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”



compelling interests of the public good, and only if the government concerned demonstrates that it has consulted and tried to take into account Aboriginal interests before reaching a final decision. Section 35 serves as a fulcrum in a balance between Aboriginal and other interests, but in a manner which preserves the distinct identity and promotes the survival of Aboriginal societies.

As with many areas of Aboriginal law and policy, the Canadian law on Aboriginal rights remains in evolution. Litigation driven by resource development pressures demonstrates the dynamic nature of the law which evolves with nearly every new case brought by Aboriginal peoples.

Broadly speaking, the past 20 years has seen the first “generation” of Aboriginal rights cases go through the Canadian Courts.<sup>3</sup> Through those cases, the basic principles have been established about the legal existence of Aboriginal rights to traditional lands and resources, the test for their proof, the essential features of some of those rights as common law property rights, and the ability of the governments to interfere with their exercise and enjoyment.

The next “generation” of cases are starting to emerge as the Canadian Courts build upon and elaborate these basic principles - three examples:

☆ the potential conflict or co-existence of Aboriginal title with private interests created by the State<sup>4</sup>

☆ the State’s duty to consult/duty to negotiate/duty to accommodate in

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<sup>3</sup> *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313; *The Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.* [1980] 1 F.C. 518 (F.C.T.D.) [hereinafter *Baker Lake*]; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *Bear Island Foundation v. Ontario* [2000] 2 C.N.L.R. 13 (Ont. C.A.); *R. v. Sparrow* [1990] 1 S.C.R. 1075; *R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. Marshall* [1999] 3 S.C.R. 456 (*Marshall I*); *R. v. Marshall* [1999] 3 S.C.R. 533 (*Marshall II*)

<sup>4</sup> See Australian and Canadian cases about the co-existence of some transitory property interests with Aboriginal title such as mine prospecting, timber and pastoral leases - *Baker Lake, Delgamuukw, Haida Nation v. British Columbia (Minister of Forests)* [2002] B.C.C.A. 147 [hereinafter *Haida I*]; *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Aust. H.C.), and also Canadian cases about the impact of fee simple grants on Aboriginal title - *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. 4<sup>th</sup> 135 (Ont. C.A.)

response to the existence (or even reasonable claims) of Aboriginal title and early signals about the potential extension of the duty to private parties such as resource corporations<sup>5</sup>

☆ the extent to which the **State can balance the interests of Aboriginal and other Canadians** when making decisions which potentially impact upon Aboriginal title.<sup>6</sup>

### Canadian Policy Context

Since the re-emergence of Aboriginal rights to traditional land and resources as a major force in Canadian law since the 1970's, policies of the Canadian government have tended to focus on two matters:

- (1) resolving claims to Aboriginal rights by applying a modern adaptation of 18th century British colonial policy of negotiating the exchange of Aboriginal claims to rights in return for blocks of lands and other benefits with clear legal rights for indigenous communities as a necessary precursor to opening public lands to settlement and other forms of economic development; and
- (2) managing claims to Aboriginal rights in such a manner that the State's operational decisions on land and resource management can proceed in order to meet national objectives (eg. economic development, conservation).

#### (1) Resolving claims to rights

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<sup>5</sup> *Gitanyow First Nation v. Canada* (2000), B.C.S.C. 1332 (*Luuxhon*); *Transcanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4<sup>th</sup>) 403 (Ont. C.A.); *Quebec (Attorney General) v. Canada (National Energy Board)* [1994] 1 S.C.R. 159; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2002] 1 C.L.N.R. 169 (F.C.T.D.); *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), B.C.C.A. 470; *Taku River Tlingit First Nation v. Ringstad* (2002), B.C.C.A. 59 [hereinafter *Taku River*]; *Haida Nation v. British Columbia (Minister of Forests)* (2002), 216 D.L.R. (4<sup>th</sup>) 1 (B.C.C.A.) [hereinafter *Haida II*]

<sup>6</sup> See cases which anticipate the need to balance Aboriginal interests with the public good as expressed through national sovereignty, economic development and conservation objectives - *Delgamuukw*, *Haida I*, *Carrier-Sekani Tribal Council v. Canada (Minister of Environment)* [1992] 3 F.C. 316 (F.C.A.); *Mitchell v. Canada (Minister of National Revenue)* [2001] 1 S.C.R. 911

In terms of resolving claims to Aboriginal rights, the 1973 Comprehensive Claims Policy was a major change in federal government policies. Its major objectives and practices were to seek through negotiated agreements a full and final settlement of claims to Aboriginal rights in order to permit development on public lands. Through the exchange of those claims for specific and legally recognized interests in lands and other benefits, another policy goal was advanced, namely to facilitate the integration of Aboriginal peoples into the broader Canadian economy and society.

The 1973 Policy has been supplemented over the years by a number of negotiation tools and policies. Perhaps the most significant was the 1995 Inherent Right of Self-Government policy in which the Government of Canada accepted that there is an inherent right of self-government for Aboriginal peoples. While not tied explicitly to Aboriginal rights to traditional lands and resources, in practice, the two have become synonymous in the minds of many Aboriginal claimants.

A good example of a process focussed on negotiation to resolve possible conflicts is the British Columbia Treaty Process. It was designed jointly by the federal and British Columbia provincial governments and First Nations representatives. The two governments and First Nations also jointly mandated and created the British Columbia Treaty Commission with a mandate to oversee the negotiation process.<sup>7</sup> The treaty process focusses on building a new relationship between governments and First Nations, as well as between First Nations and their non-indigenous neighbours, such as municipalities and private actors like industry.

The objective of the process is to negotiate modern treaties which provide certainty of legal rights to all parties, cash and other benefits to the First Nations and agreed-upon governance structures and powers for First Nations. Increasingly, modern treaties provide the framework for First Nations and governments to work together in cooperative management structures to manage issues such as fisheries and migratory birds. In addition, modern treaties commonly set out the respective rights and duties of the First Nations and governments with respect to future consultations about development projects in or adjacent to First Nations lands and resources.

In this manner, these modern-day treaties are intended to form the foundation for First Nations to take their place as modern and economically viable governments whose members are full participants in the modern global society, while providing the tools necessary for preserving and promoting their distinctive cultures and identities.

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<sup>7</sup>

See BC Treaty Commission website for more information: **online:**  
<<http://www.bctreaty.net>> (date accessed: 11 June 2003).



The Nisga'a Final Agreement (NFA) is illustrative of the types of economically beneficial partnerships and processes that may be developed as an outcome of a treaty negotiation process.<sup>8</sup> While maintaining Ministerial discretion, the NFA provides for Nisga'a participation in the development of fisheries and wildlife harvesting plans and establishes a formal advisory role for Nisga'a in fish and wildlife management through the establishment of the Joint Fisheries Management Committee and a Wildlife Committee. The NFA provides funding for commercial fishing licences and, within the parameters of a defined consultation process, provides for consultation on forest management and access to forest tenures. It also provides for consultation on migratory birds and the negotiation of habitat management and enforcement measures. Finally, it provides for Nisga'a involvement in environmental assessment and protection including law-making on settlement lands, consultation off settlement lands, and participation on advisory boards.

## **(2) Managing claims to rights**

In the absence of settlements of claims to Aboriginal rights, and particularly post-1982 with section 35 of the *Constitution Act, 1982*, the Government of Canada and many provinces have adopted a risk management approach to permit operational decisions to proceed in the face of such claims.<sup>9</sup>

In addition, examples abound of federal and provincial government policies designed to ensure appropriate consultation with Aboriginal claimants and other means for accommodation of their claims before major government decisions on land and resource disposition are taken.

Thus, most federal government departments try to work cooperatively with Aboriginal

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<sup>8</sup> See generally the website of the Nisga'a Lisims Government: **online:**  
<<http://www.nisgaalisims.ca>> (date accessed: 11 June 2003).

<sup>9</sup> See for example British Columbia's policy on the use of interim measures to protect lands and resources claimed by First Nations or to provide them with legally recognized access to land and forestry resources:  
Land and Water British Columbia Inc., *First Nations' Interests: Economic/Treaty Related Measures* (2002), **online:**  
<[http://www.lwbc.bc.ca/for\\_first\\_nations/interim\\_treaty\\_related\\_measures](http://www.lwbc.bc.ca/for_first_nations/interim_treaty_related_measures)> (date accessed: 11 June 2003).  
B.C. Ministry of Forests: Aboriginal Affairs Branch, *Ministry of Forests' Policy and Interim Measures Section*, (2001), **online:**  
<[http://www.for.gov.bc.ca/aab/int\\_msrs/pim\\_pg.htm](http://www.for.gov.bc.ca/aab/int_msrs/pim_pg.htm)> (date accessed: 11 June 2003).

peoples in carrying out their operational responsibilities without unjustifiably interfering with the enjoyment of their traditional land and resource rights. Most, if not all, government departments responsible for land or resource management have significant interaction with Aboriginal groups and have consultation guidelines in place. These guidelines may vary in their approach based on each department's specific responsibilities.<sup>10</sup>

As a result, consultation guidelines range from general consultation principles to sophisticated arrangements that provide for a significant involvement of Aboriginal peoples in government decision-making processes. On a broader level, the federal government is exploring possible models for enshrining consultation principles or guidelines to provide consistent guidance to all federal departments and agencies in their dealings with Aboriginal peoples. Similar trends can be seen in many provinces with significant Aboriginal populations or where there are unresolved claims to traditional lands and resources.<sup>11</sup>

In addition to the State assuming consultation duties, there is an increasing practice for governments and Aboriginal peoples to enter into contractual arrangements to resolve their differences for a fixed period of time. Called variously "interim measures", "treaty-related measures" or a number of other terms, these arrangements frequently involve the parties setting aside their conflicts over the existence of traditional rights and instead

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<sup>10</sup> See for example the federal government policy to consult with First Nations before it disposes of surplus public lands:  
Treasury Board of Canada, *Treasury Board Policy on the Disposal of Surplus Real Property*, (2001), online: <[http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/realproperty/dsrp-abie1\\_e.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/realproperty/dsrp-abie1_e.asp)> (date accessed: 11 June 2003).

<sup>11</sup> For example, British Columbia has adopted extensive policies on consultation with First Nations in the management of its public lands and resources:  
B.C. Ministry of Forests, *Ministry Policy Manual: Policy 15.1 – Aboriginal Rights and Title*, (1999), Online: <<http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm15-1.htm>> (last modified: 14 May 2003);  
Land and Water British Columbia Inc. *First Nations' Interests*, (2002), online: <[http://www.lwbc.bc.ca/for\\_first\\_nations](http://www.lwbc.bc.ca/for_first_nations)> (last modified: 14 January 2003).  
Land and Water British Columbia Inc., *Aboriginal Interest Assessment Procedures*, (2002), online: [www.lwbc.bc.ca/for\\_first\\_nations/assessment\\_procedures.htm](http://www.lwbc.bc.ca/for_first_nations/assessment_procedures.htm) (last modified: 30 May 2003).

focussing on a mutually beneficial stability in terms of access to lands and resources.<sup>12</sup>

### **Recent Jurisprudence - Duty to Consult and Accommodate**

The policy responses outlined above are not universally viewed by Canada's Aboriginal peoples as sufficient to meet their demands and needs. As a result, litigation continues about the State's duties to consult with Aboriginal peoples and to Accommodate their claims of traditional land and resource rights.

Two recent decisions of the British Columbia Court of Appeal highlight both Aboriginal dissatisfaction with government policies and the Courts' willingness to expand upon the State's duty to consult and accommodate. It should be noted that both decisions are currently under appeal to Canada's highest court, the Supreme Court of Canada. However, they are a strong signal of judicial activism to ensure an appropriate balance between indigenous and non-indigenous land use. They also mark the Canadian Courts' readiness to restrain State activities from proceeding without adequate consultation with local indigenous communities and modifying development plans to accommodate their concerns about interference with traditional land and resources rights.

#### ***(1) Taku River Tlingit First Nation v. Ringstad***

A mining company, Redfern Resources Ltd., sought to reopen the Tulsequah Chief Mine which lies within the traditional territory claimed by the Tlingit First Nation. Pursuant to legislation of the Province of British Columbia on environmental assessments, the mining company sought permission to build an access road from the mine to a nearby town. The Tlingit asserted that the road would be detrimental to their claimed Aboriginal rights in the area.

Under the provincial environmental assessment legislation, a committee was established to examine the company proposal and to assess its environmental implications. The Tlingit were represented on the committees, but disagreed with the final report of the non-

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<sup>12</sup> For information on recent examples of interim measures in British Columbia see: BC Ministry of Forests, *News Releases*. online:  
<[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2002FOR0076-000825.pdf](http://www2.news.gov.bc.ca/nrm_news_releases/2002FOR0076-000825.pdf)  
<[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2003FOR0015-000107.htm](http://www2.news.gov.bc.ca/nrm_news_releases/2003FOR0015-000107.htm),  
<[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2003FOR0014-000106.htm](http://www2.news.gov.bc.ca/nrm_news_releases/2003FOR0014-000106.htm),  
<[http://www2.news.gov.bc.ca/nrm\\_news\\_releases/2002FOR0058-000657.pdf](http://www2.news.gov.bc.ca/nrm_news_releases/2002FOR0058-000657.pdf)  
Indian and Northern Affairs Canada, *Progress in Interim Measures Agreements*, online:  
<[http://www.ainc-inac.gc.ca/bc/ftno/bctc/pima\\_e.html](http://www.ainc-inac.gc.ca/bc/ftno/bctc/pima_e.html)> (last modified: 13 January 2003);



indigenous members of the committee. When the Province of British Columbia approved the road on the basis of the committee's assessment, the Tlingit challenged the decision in the Courts.

The Province argued that the Tlingit were required to prove at law that they held Aboriginal rights to the territory in question, and that before those rights were proven at law, there was not requirement on government officials to consult with the Tlingit. Instead, the Province argued that its policy of consultation set out in legislation was the sole basis upon which there could be said to be any obligation to seek the views of the local indigenous community.

In its January 2002 decision, the British Columbia Court of Appeal found that the Tlingit had not been adequately consulted about possible interference with their Aboriginal rights. The Court rejected squarely the government's argument that the First Nation was obliged to first prove that they had Aboriginal rights on the lands in question or that their voluntary participation in the environmental assessment process prevented them from challenging decisions contrary to their traditional rights.

Instead, the Court found that the acceptance of the Tlingit as a claimant for purposes of negotiating a land claim over their traditional lands was sufficient proof that the Province had made a preliminary determination that the Tlingit had legal rights. This aspect of the decision is not without controversy, since modern treaty negotiations in British Columbia are not predicated on a recognition of Aboriginal rights as a precondition to negotiations.

However, more importantly for purposes of this discussion, the Court went on to find that the government had extensive duties both to justify any interference with the claimed rights and to accommodate the claimed rights by ensuring that the design of the development project avoid interference as far as possible.

The Court commented,

“...prior to the issuance of the Project Approval Certificate, the Ministers of the Crown had to be "mindful of the possibility that their decision might infringe aboriginal rights" and, accordingly, to be careful to ensure that the substance of the Tlingits' concerns had been addressed.”<sup>13</sup>

In its summary, the Court of Appeal concluded,

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<sup>13</sup> *Taku River*, *supra* note 5 at para 193.

“...The Tlingits are an aboriginal people within the meaning of s. 35(1) of the *Constitution Act, 1982*, who participated in an environmental review process required under provincial legislation in relation to a project that would have a profound impact on their aboriginal way of life and their ability to sustain it. The Tlingits were willing to participate in that process in an apparent effort to have their needs accommodated but the Project Approval Certificate for the Tulsequah Chief Mine Project was issued without their concerns having been met. The fact that the Tlingits were prepared to participate in the process [cannot] deprive them of the constitutional protection given to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*...”<sup>14</sup>

## ***(2) Haida Nation v. British Columbia***

A forestry company based in the United States, Weyerhaeuser, purchased the shares and assets of a Canadian company, MacMillan Bloedel. One of the assets was the transfer of permits for cutting timber on the Queen Charlotte Islands, the traditional territory claimed by the Haida Nation. The permits had been in place for nearly 30 years, and the transaction involved the Province of British Columbia consenting to the change of ownership for purposes of continuing the cutting rights. The Haida Nation objected to the transfer of cutting rights between the companies without their involvement and challenged the Province’s decision to permit the transfer.

In two judgements involving the duties of both the Province and Weyerhaeuser,<sup>15</sup> the British Columbia Court of Appeal reiterated its decision in the *Taku River* case about the government’s duty to consult with the Haida. The Court found that, although the Haida had not proven the existence of Aboriginal rights to their traditional territory, they had presented sufficient evidence that there was a reasonable probability that their rights still existed in some portions of those traditional lands.

On that basis, the Court of Appeal found that both the government and the private company had duties to consult with the Haida before proceeding with their decisions. The Court concluded that the obligation to consult and to seek an accommodation arose from several circumstances:

- a) The Province had fiduciary obligations of utmost good faith to the Haida people with respect to their claims to Aboriginal rights to their traditional lands and resources;

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<sup>14</sup> *Ibid.* at paras 202-203.

<sup>15</sup> *Haida I*, *supra* note 4; *Haida II*, *supra* note 5.

- b) The Province and Weyerhaeuser were aware of the Haida claims to Aboriginal rights over all or at least some significant part of the area covered by the transfer of cutting rights, through evidence supplied to them by the Haida people and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and
- c) The claims of the Haida people to Aboriginal rights were supported by a good *prima facie* case in relation to all or some significant part of the area covered by the company's cutting rights.

The Court of Appeal repeated earlier comments from the Supreme Court of Canada about the State's duty to consult whenever it contemplated taking an action which could interfere significantly with the enjoyment of traditional rights to lands and resources. The Supreme Court of Canada had commented in this regard in an earlier decision,

"There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law...The nature and scope of the duty of consultation will vary with the circumstances.

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.

In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."<sup>16</sup>

## Conclusion

As noted at the outset of this paper, the interaction between State-facilitated development activities and the claims of indigenous peoples to their traditional lands and resources can lead to conflict. Preferably those conflicts can be avoided or resolved if they ever arise

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<sup>16</sup> Delgamuukw, *supra* note 3 at paras.165-169.



through honourable negotiation with give and take on both sides. In the absence of negotiated resolutions, however, the Canadian Courts offer an example where judicial activism can fill the space left by a perceived gap in public policy or a failure of the parties to resolve their differences through negotiation.

## **Annex C**

### **Primer Seminario Internacional Sobre Los Derechos De Los Pueblos Indigenas en El Contexto Internacional, su Aplicacion en El Sistema Interamericano y en la Reforma Procesal Penal Chilena**

**Programa Viernes 18 de Julio  
CEPAL**

- 8:30 Locucion del evento**  
Sr. Juan Nanculef, Unidad de Cultura  
Corporacion Nacional de Desarrollo Indigena (CONADI)
- 9:00 Palabras de bienvenida**  
Sr. Subsecretario de Mideplan  
Represente de la Embajada de Alemania  
Sr. Defensor Publico  
Sr. Subsecretario de Justicia
- 9:30 Palabras de don Patricio Alywin A.**  
Coordinator Comision Veridad y Nuevo Trato
- 9:45 Charta Magistral: Derechos de los Pueblos Indigenas en el contexto internacional**  
Sr. Rodolfo Stavenhagen, Relator Naciones Unidas
- 10:45 Sistema interamericano de Proteccion de Derechos Humanos y Jurisprudencia de la Corte Interamericana de Derechos Humanos en materias indigenas**  
Sra. Cecilia Medina, Centro de Derechos Humanos, Univ. de Chile, Jueza, Corte Interamericana de Derechos Humanos
- 11:15 Ronda de Preguntas**  
Modera: Sr. Jorg Stippel, Agencia de Cooperacion Alemania
- 11:45 Panel: Los Derechos Indigenas en America: Visiones des Norte, Centro y Sur**  
Modera: Srta. Mylene Valenzuela R., Ministerio de Justicia
- “Los Derechos Indigenas en Mexico”  
Sra. Magdalena Gomez, Abogada, experta en Derecho Indigena
- “El Derecho Consuetudinario Indigena y su importancia en el Derecho Penal”  
Sr. Romeo Tiu, Abogado, Asesor de los Alcaldes de Totonicapan, Guatalama

“ Los Derechos Indigenas en el Proceso Penal Boliviano”  
Sra. Pilar Quintanalla, Abogada, Asesora del Congreso de Bolivia”

**12:45** Ronda de Preguntas

**15:00 Panel: Los Derechos de los Pueblos Idigenas en la Reforma Procesal Penal Chilena**

Moderadora: Srta. Mylene Valenzuela R., Ministerio de Justicia

“Experiencia de la Defensoria Penal Publica de la IX Region”

Sra. Sandra Jelves, Jefa Oficina Mapuche, Defensoria Penal Publica

“Experiencia en la Defensa Penal Indigena en le ambito privado”

Sr. Sergio Oliva, Coordinador Programme de Defensa Juridica, CONADI

**16:45 Panel: El respeto de los derechos de los pueblos indigenas – un desafio para la sociedad chilena**

Moderadora: Sra. Antonia Urrejola, Defensoria Penal Publica

Representantes pueblos indigenas: Atacameno, Aymara, Mapuche y Rapa Nui  
Representantes Parlamentarios

**18:15** Ronda de Preguntas

**18:45** Cierre de evento



## Annex D

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