## **Submission to the Expert Mechanism on the Rights of Indigenous Peoples**

Dr Elizabeth Cassell, MA(Cantab). LLM. MPhil(Polar Studies), PhD, Solicitor, Visiting Fellow, University of Essex, 25 Old Ferry Road, Wivenhoe, Essex, UK, CO7 9SW, liz.cassell@btinternet.com, telephone: +44 1206 822714, 07825 416 571

This submission is based on 12 year’s research on indigenous land rights in Canada and my resulting book, *The Terms of Our Surrender: Colonial and Dispossession and the Resistance of the Innu*, University of London Press, 2021

## **Examine the barriers (structural, economic and social) to, and the enabling conditions necessary to promote constructive dialogue between states and indigenous peoples for the establishment of treaties, agreements and other constructive arrangements including peace accords and reconciliation initiatives and their constitutional recognition**

The recent discovery of more than 7,000 unmarked graves of Indian Residential Schools students in North America should be a turning point in reconciliation attempts between nations, states, provinces and the original owners of the lands they now occupy. Yet issues of trauma are omitted from preparation for negotiation and discussions at the negotiation table. In order for states to reconcile with indigenous peoples, apologies cannot and should not be enough to bring about reconciliation. There must be action and fundamental change.

This is about to be tested with the passing of UNDRIP into Canadian law through Bill C-15. Through its Comprehensive Land Claims system, the Crown in right of Canada maintains a strict control over the terms under which indigenous land is ceded to the state or the province both in the drafting of the land settlement agreement, the conduct of the negotiation and the implementation of its provisions.

Indigenous peoples in Canada are presented with a standard agreement under which they are asked to part with, usually, 90% of their land for money and opportunities which in no way represent the true value of the land transferred. The agreement is written in approximately 450 pages in English, with no translation available in the indigenous language. No full copy of the agreement is available for scrutiny by people who will be called upon to ratify it. A summary has limited circulation among indigenous representatives at the negotiation table. The Crown insists that the negotiations are conducted by lawyers and consultants for whom the indigenous people have to pay. The fees are provided through a loan from the government which is the first thing to be repaid when any money is paid out under the settlement. Negotiations are conducted for the main part in cities, away from the land concerned, and the views expressed around the table are Euro-centric. The presence of the lawyers is designed to translate the concepts of the indigenous people into colonial concepts of land ownership and that colonial approach extends with outdated concepts of discovery and terra nullius, as well as an institutionalised racist approach which, The Royal Commission on Aboriginal Peoples maintains, has ‘converted differences into inferiorities’. Reaching a final Land Settlement Agreement can take 25 years and so the fees mount up and corporations can start exploitation of the land without a final agreement in place.

In this process, the value and meaning of the land to the indigenous peoples is lost. Although the Crown negotiators submit to indigenous prayers and ceremonies at the beginning of negotiation sessions, their implications are not followed through. No concessions are made to the indigenous concerns for their stewardship of the land, on which their whole world view is based and which is of much greater significance to them than any money they will receive. There is no attempt to balance the short-term gain of resource extraction against the damage to the land and the climate. Often the land is ruined for the sake of twenty years or less of resource extraction. In the construction of hydro-electric dams in Quebec, no proper research was carried out into the presence of methyl mercury in captured waters and this passed into the food chain. Governments have little control over resource extraction which is covered by Impact Benefits Agreements with the corporations who partner the state or province.

Both Land Settlement Agreements and Impact Benefits Agreements are draconian in the way in which they seek to maintain certainty for the success of the project. Clauses in these documents severely restrict the rights of the indigenous peoples to protest, to pursue court cases and to monitor the works carried out on the land. Even when there is provision for monitoring, indigenous peoples find themselves barred from construction sites. Further, the presumption in favour of indigenous people in interpretation of the documents is specifically excluded, even though this is a fundamental of indigenous law. The indigenous ‘nation’ created under the Land Settlement Agreement must give warranties that it represents all possible claimants under the terms of the agreements and must indemnify the Crown for any damages that ensue for their claims.

Indigenous rights are extinguished under the terms of the modern Canadian treaties. This is said to be in the interests of certainty for the indigenous peoples who already know every path, portage, river, lake, rock and mountain in their territory, together with close knowledge of its flora and fauna – knowledge which is recognised only when it confirms the less detailed and more speculative scientific knowledge upon which the corporations rely. Thus, the stewards of the land know the catastrophic consequences of resource extraction projects and no heed is paid to their warnings. Certainty is necessary, not to the indigenous peoples, but to the corporations and their financial backers. Extinguishment of indigenous title is not necessary. The *Paix de Braves* of 2002, part of the renegotiation of the James Bay & Northern Quebec Agreement, gave the Crown a fifty-year lease of the land taken for the James Bay hydro-electricity project.

So far, Canada has done nothing to implement Article 19 of UNDRIP. The case law since *Delgamuukw* (1996) has preserved a sliding scale of a duty to consult. Under the court’s interpretation of s35(1) of the Constitution Act 1982, even consultation need not take place if the Crown can justify use of the land for purposes including resource extraction and hydro-electricity. Even with the commitment given in the Royal Proclamation 1763 which imposed a fiduciary duty on the Crown with regard to indigenous land, Canada has never acknowledged its duty of proceed only with the free, prior and informed consent of its indigenous people.

Although current agreements, licences and court cases all declare that they are concluded for the purpose of reconciliation, reconciliation is never defined and the terms of the documents are targeted at preserving the status quo rather than movement towards reconciliation. Government policies are often advanced by dealing with the Band Council (an entirely Canadian construct) rather that with the elders or the hereditary chiefs. While the Supreme Court of Canada exhorts the indigenous peoples to seek a solution in negotiation, Canada can retain control of the acquisition process with its pre-drafted documentation. This is not in the interests of reconciliation.

In order for this situation to change, Canada must fully acknowledge its dark history with regard to indigenous peoples. A comprehensive programme of education for all settlers must be undertaken so that there can be no doubt of what is owed to the people from whom the land was taken. This should address the way in which the land was taken from them, the appalling attempts at extermination through the deliberate spread of disease, the genocidal residential schools and their treatment as children under the infamous Indian Act. Truthful explanations should be given of the causes of the alcoholism and violence that beset indigenous communities. Canada has, after all, committed to a process of *truth* as well as reconciliation.

Most important of all, especially in these times of climate change, settlers must accept the indigenous ideals of respect for the land and their wealth of traditional knowledge which for millennia have preserved its ecology for generations to come. If decisions on resource extraction were taken only after consultation with and free, prior and informed consent from, indigenous peoples, catastrophes like the Alberta tar sands would be avoided.

This raises the question as to representation of the indigenous people concerned. Through the Band Council system, representatives are chosen who are attuned to Canadian ways and, advised by consultants who look at land through western eyes. When elders guided a community, they chose the leader who they believed was best-suited to the task in hand. If UNDRIP Article 18 were fully implemented in Canada, the people could be represented by, for example, the best hunter or the most trusted negotiator and the decision would not necessarily be made by the Band Council.

In Canadian courts, questions of indigenous law are reserved to the judge at first instance as questions of fact. They are not given equal status with Canadian law. Lawyers in indigenous cases must have training in both systems. Further, when indigenous lawyers and consultants are available for the negotiation process, these should be given priority over settler lawyers, especially those who are not trained in both legal systems.

‘Consultation’ on the Tshash Petapen (New Dawn) Agreement in Labrador, excluded the Innu domiciled in Quebec who had ancestral lands in Labrador when they refused to entertain any provision for the extinguishment of their land rights. Those Innu who were consulted in the two government villages in Labrador were given a PowerPoint presentation at poorly-attended meetings. There were 28 slides, only six of which were relevant to the Agreement in Principle. These emphasised what land the Innu would retain, not pointing out that 90% of their land would be given away. Proposed extinguishment of their rights was not mentioned, and was not spelt out in the summary of the AIP. The Impact Benefits agreements made no mention of the dangers of the project, apart from a clause which excluded the corporations’ liability for damage caused by methyl mercury poisoning. It was left to the Innu to translate the 480 page agreement and explain its content in Innu-Aimun, even though many of the concepts in the agreement had no Innu equivalent.

**It is essential that a protocol is put in place which defines more clearly the states’ obligations under UNDRIP which includes:**

* **a clear definition of what states must do to fulfil their obligation under Article 19 to obtain full, prior and informed consent;**
* **a comprehensive explanation of the agreement, giving the disadvantages of entering into it equal status with the advantages;**
* **free circulation of the full agreement so that the indigenous people can take independent advice on its content with copies available in the indigenous language;**
* **prohibition and reversal of any provision which ousts the rule of interpretation in favour of the indigenous party;**
* **full disclosure of all research carried out on the project and all reports and other documents consulted with a right for the indigenous peoples to require further research;**
* **traditional knowledge to be considered with the same weight given to it as that given to scientific knowledge;**
* **equal representation with equal voting rights on all working groups and committees;**
* **freedom for the indigenous party to choose its negotiators and consultants according to traditional methods;**
* **the duty to take into account the rights of future generations;**
* **full acknowledgement of the rights of nomadic peoples to their land;**
* **where the state claims a greater public interest overrides their duty to indigenous peoples, this must be assessed from the indigenous point of view and must not be judged on purely financial considerations and a definition of public interest must exclude resource extraction, hydro-electric projects and other projects which will destroy the land;**
* **each land settlement to have its own agreement drawn up jointly between the parties with an acknowledgement that the indigenous party has full beneficial rights to the land, its contents and subsurface rights;**
* **no form of extinguishment clause to be allowed and no right for the state to make further incursions to take more land without FPIC;**
* **fair indemnity and release clauses;**
* **the setting up of an effective and fair arbitration procedure;**
* **full acknowledgement that the agreement forms a living relationship so that the parties will review the agreement at set intervals in order to ensure that it works for everyone, especially with regard to environmental issues.**

Indigenous peoples should not have to sign these agreements in order to receive full recognition and funding. With no agreement in place they remain wards of the Crown in Canada and have no control over their funding. The education of their children is provided by the federal government rather than the provincial government and is inferior because it is not properly funded. Further, Innu land has been allocated by the state to indigenous groups who have no ancestral links to the land given them. When the Innu have refused to sign away their land, that land has been allocated elsewhere with no compensation or acknowledgement of Innu ownership. This is a situation which must be addressed. Land should not be allocated to groups with no indigenous title.

There must be a presumption in favour of indigenous land ownership. Doctrines of discovery and terra nullius must be expressly revoked by states. Any presumption on the part of courts of state ownership and sovereignty must be reversed.

States and their people must be educated in the value of the land other than monetary value and must respect and, hopefully, accept the spiritual meaning of land. States must also accept that they are stewards of the land, possibly to the extent of treating the land as a legal person whose rights must be protected.

Approaches to land claims must be culturally sensitive. The modern treaty process must be consensual, not adversarial.