

# Indigenous Peoples' Land Rights and Land Claims

Concept: Indigenous Peoples' Land Rights and Land Claims

Author: Rauna Kuokkanen , McMaster University

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Description Since the establishment of the United Nations Working Group on Indigenous Populations (1982), Indigenous peoples' representatives have repeatedly emphasized the foundational nature of Indigenous peoples' relationship to their homelands. This relationship carries spiritual, social, cultural, economic, and political significance to indigenous societies. In short, Indigenous peoples' relationship with their lands forms the foundation of their societies. As a result, land issues, particularly the dispossession of Indigenous peoples from their territories, is one of the most urgent concerns for Indigenous peoples worldwide. Land and resource issues are also essential to the physical and cultural survival of Indigenous peoples and to their self-determination. The displacement of Indigenous peoples from their lands as a result of colonialism has led to a situation where many Indigenous peoples have no or too little land or resources to maintain their communities and cultures.

The author of the report *Indigenous Peoples and their Relationship to Land*, UN Special Rapporteur Erica-Irene A. Daes, notes that the main problems pertaining to Indigenous land rights include states' failure to recognize the existence of Indigenous land use, occupancy, and ownership and to give legal status to Indigenous peoples in connection with these rights. Also, prevailing discriminatory legislation and doctrines, such as the concept of Aboriginal title comprise a major problem. "Aboriginal title" is discriminatory because it bestows inadequate and subordinate legal status for Indigenous peoples' land ownership (Daes 2001).

In Canada, for example, Aboriginal title is defined as "a legal term that recognizes an Aboriginal interest in the land. It is based on the long-standing use and occupancy of the land by today's Aboriginal peoples as the descendants of the original inhabitants of Canada" (Indian and Northern Affairs Canada 2003). The question of Aboriginal title was given comprehensive consideration in the Supreme Court of Canada decision, *Delgamuukw v. The Queen* in 1997. The decision notes that "aboriginal title is recognized and affirmed in the Constitution Act of 1982" and that "it is a right to land, a property interest and a collective right, and that it is sui generis (unique)" (Daes 2001, para. 39). However, this right differs from and is inferior to free simple title (i.e., absolute title to land that is free of any other claims against that title). Aboriginal title is, then, a right limited to the use and occupation of the land, and is not absolute. In other words, federal or provincial governments can infringe Aboriginal title when considered necessary from the perspective of the larger society (Daes 2001).

In Canada, contemporary treaty and land claims negotiations represent an attempt to resolve the question of Indigenous land rights. Since 1973, Canada has had a land claims policy that recognizes two types of land claims, comprehensive and specific. Comprehensive claims assess existing Aboriginal land and resource rights and include limited land title and resource rights, traditional harvesting rights, financial compensation, and local self-government. Specific claims address grievances by First Nations with regard to treaty or Indian Act obligations. Recently signed comprehensive claim settlements include the Nunavut Agreement of 1999 (that created a new territory in the Canadian Arctic), the Nisga'a Agreement of 2000 in British Columbia, and the Cree Agreement of 2002 in Quebec.

However, Canada's land claim policy and its premises have been criticized for several reasons. The policy requires the extinguishment of Aboriginal rights, including Aboriginal title, in exchange for the rights included in the new settlement or agreement, reflecting the surrender provisions of post-Confederation treaties. There is also a tendency to achieve an agreement "only when the federal government was eager to facilitate an economic development project" (Coolican Task Force 1986, 13). Moreover, Aboriginal women and their concerns are often left out of land claims negotiations. The requisite land use and occupancy study usually focuses on activities traditionally recognized as male, such as hunting, fishing, and trapping. Land claims policy that prioritizes and focuses on large-scale resource development is also male-centered because most jobs created by this kind of development are taken by men and because it neglects the socio-economic and cultural implications that may disproportionately affect women in the form of disruption of family and social relations (Archibald and Crnkovich 1999).

Land claim mechanisms have been criticized also in other countries. The High Court of Australia in its 1992 decision in *Mabo v. Queensland* condemned the doctrine of terra nullius and declared it no longer acceptable. The decision resulted in the Native Title Act adopted in 1993. The act was supposed to establish a framework for Australian Aboriginal peoples to secure their land rights, but as Australian Aboriginal representatives have reported, it continues the discriminatory policy of the state's authority to extinguish Aboriginal land rights. The provisions of the Act were also radically altered in 1998, making it more difficult to make native title claims (Daes 2001).

Economic globalization, restructuring, and intensified resource extraction pose serious threats to Indigenous peoples' land rights. Even in countries where Indigenous rights are constitutionally recognized, resource extraction laws may trump Indigenous peoples' rights to their lands. In some countries, the implementation of free trade agreements have had devastating effects on Indigenous peoples and their physical and cultural survival. In Mexico, the North American Free Trade Agreement (NAFTA) eradicated the communal land and farming system, ejido, established after

the Mexican Revolution in 1917 to protect indigenous and peasant small-scale farmers. The Constitution was amended according to NAFTA requirements to allow the private sale of ejidos. This led to the Zapatista uprising in the province of Chiapas in 1994.

The land rights provisions of International Labor Organization Convention 169 are included in article 13(1). The various aspects of Indigenous peoples' land rights are addressed in more detail in articles 25 to 30 of the UN Declaration on the Rights of Indigenous Peoples. These include the right to maintain the spiritual and material relationship with traditionally owned and occupied lands and resources; the right to own, develop, control and use the lands and territories; the right to the restitution of the lands, territories, and resources; the right to the conservation, restoration, and protection of the environment; and the right to determine and develop priorities and strategies for the development or use of their lands, territories, and other resources. The self-determination provision of the international human rights covenants is also relevant to Indigenous land rights and claims. The provision states: "In no case may a people be deprived of its own means of subsistence" (Covenant of Civil and Political Rights, article 1(2); Covenant on Economic, Social, and Cultural Rights, article. 1(2)).

Work Cited: **Archibald, Linda and Crnkovich, Mary.** 1999. *If gender mattered: A case study of Inuit women, land claims and the Voisey's Bay Nickel Project.* Ottawa: Status of Women Canada. (accessed 10 April 2006)

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