Brief by the

Innu of Takuaikan Uashat mak Mani-utenam

ON THE RESTITUTION OF LAND TO FIRST NATIONS, INUIT AND METIS COMMUNITIES

NOVEMBER 2, 2023

INNU TAKUAIKAN
UASHAT MAK MANI-UTENAM

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About us

The Innu of Uashat mak Mani-Utenam (Innu of UMM) are a distinct Indigenous community and society, with its own organization, within the Great Innu Nation. We are also an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*, as amended. The Takuaikan Uashat Mak Mani-Utenam Innu band (**ITUM**) No. 80 is a distinct traditional entity. It is also a band within the meaning of the *Indian Act* and acts on behalf of the Innu of UMM. The Innu of UMM are an Indigenous people as defined in the *UN Declaration on the Rights of Indigenous Peoples* and are entitled to the rights it sets forth. As a separate community and independent nation, ITUM has the Aboriginal right and the inherent right to social, community, economic and political self-government. This sovereignty also includes the rights of the Innu of UMM to self-govern with respect to managing their traditional territory and resources.

The Innu of UMM occupy a traditional territory over which we have Aboriginal title as well as other Aboriginal and treaty rights over a vast area of the Quebec–Labrador peninsula (what we call “Nitassinan”). All of Nitassinan lies north of the 49th parallel. For us, Nitassinan is the same as non-Indigenous people’s homes, grocery stores, farms, schools and history books. It’s the source of our food, our education, our language, our culture, our customs and our traditions. Nitassinan is rich, brimming with stories and histories, Innu place names, birthplaces, burial sites, portage sites, campsites, traditional medicines, animals and other important natural resources for us.

Without prejudice

ITUM submits this brief on its behalf as a traditional government and to represent the interests of the Innu of UMM. This brief is submitted WITHOUT PREJUDICE to the constitutional rights of the Innu of UMM.

Introduction

This brief is submitted as part of the Standing Committee on Aboriginal and Northern Affairs’ study on the Restitution of Land to First Nations, Inuit and Metis Communities.

Since the adoption of section 35 of the *Constitution Act*, *1982*, Canadian courts have tied the concept of the Crown’s honour to the goal of reconciliation. ITUM’s aim with this brief is to reiterate what constitutes true reconciliation.

1. Poor understanding of restitution

To start, the concept of “land restitution” is nuanced.[1] The English definition of restitution,[2] meaning “an act of restoring or a condition of being restored:

[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, paras. 25, 44.

[2] Merriam-Webster, definition, restitution. Online. Accessed on November 2, 2023, at: https://www.merriam-webster.com/dictionary/restitution.

such as a restoration of something to its rightful owner," does not reflect the reality of Indigenous peoples. We have concerns about the study of this term regarding what constitutes Aboriginal title.

As the Supreme Court of Canada stated in *Tsilhqot'in Nation*:

> [69] "The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.
> [70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the Constitution Act, 1867."[3]

It has been established that Aboriginal title is common law,[4] arising from the historical occupation and possession by Aboriginal people of their ancestral lands.[5] The Supreme Court of Canada also clarified that, in describing what constitutes a unique interest in land, the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.[6]

Although we're discussing land rights, traditional concepts of ownership specific to common law or Quebec civil law must not be applied[7] for the following reasons:

a. Aboriginal title is a *sui generis* constitutional collective right that pre-dates the assertion of Crown sovereignty;[8]
b. unlike a real right in the strict sense of the term, lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands;[9]
c. although Aboriginal title is a species of Aboriginal right recognized and affirmed by s. 35(1), it is distinct from other Aboriginal rights because it arises where the connection of a group with a piece of land "was of a central significance to their distinctive culture";[10]
d. Aboriginal title is a right that is distinct and independent from any right in the lands and natural resources of the provinces, including Quebec (pursuant to s. 109 of the Constitution Act, *1867*) and the province of Newfoundland and Labrador (pursuant to s. 37 of the *Terms of Union of Newfoundland with Canada* [confirmed by the *Constitution Act,* 1949]). Specifically, the province's underlying title is subordinate to Aboriginal title, and its content is limited to the fiduciary duty to Aboriginal people and the right to infringe on Aboriginal title to the extent that infringement is justified. As such, Aboriginal title lands and natural resources have never been part of provincial ownership, and the provinces have no beneficial interest in Aboriginal title lands and resources.[11]

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[3] *Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 257, paras. 69–70.
[4] *Roberts v. Canada,* [1989] 1 SCR 322, p. 340.
[5] *Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 257, paras. 14, 25 and 30; *R. v. Marshall* [2005] 2 SCR 220, para. 138; *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, para. 190
[6] *Guerin v. The Queen,* [1984] 2 SCR 335, p. 382.
[7] Ibid.; *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, paras. 111, 115, 125, 130*; Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 257, para. 72; *R. v. Marshall*; Re *Bernard*, [2005] 2 SCR 220, para. 138; *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 SCR 746, para. 42; Re *Sparrow,* [1990] 1 SCR 1075, p. 1112; Re *Sappier*, Re *Gray,* [2006] 2 SCR 686, para. 25.
[8] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, paras. 3, 82, 111, 115.
[9] Ibid., para. 125.
[10] Ibid., para. 137.
[11] Ibid., para.175; *Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 256, paras. 69–71, 73–76 (ABO-Tab 30).

Consequently, the provinces of Quebec and Newfoundland and Labrador have never owned the traditional lands of the Innu of UMM since the Innu's Aboriginal title burdens the Crown's underlying title.

ITUM therefore argues that the provinces have never held rights to the resources on the Aboriginal title lands of Aboriginal communities.

2. United Nations Declaration on the Rights of Indigenous Peoples

Canada's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* and its implementation through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, changed the Canadian legal landscape. The declaration recognizes and promotes the rights of Indigenous peoples. The declaration can no longer be said to be a mere aspirational document, since it has tangible effects on the way laws, particularly those relating to statutes of limitation, should be applied.[12]

Implementing the principle of free, prior and informed consent as set out in Article 19 of the declaration requires consultation before adopting and implementing legislative or administrative measures that may affect Indigenous peoples.

Article 26 of the declaration states that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Article 28 of the declaration states that Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

These principles must be considered and applied by the federal government across the board. ITUM would like to point out that the Government of Quebec and the Government of Canada are aware of the content, scope and complexity of the Innu of UMM's claim to their ancestral lands in Quebec since their land claim was accepted by the Government of Canada in 1979 and by the Government of Quebec in 1980.

Quite simply, the Government of Canada must establish in conjunction with First Nations a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, as per Article 27 of the declaration.

3. Certainty and legal reconciliation

The burden currently imposed on Indigenous people by the Canadian legal system requires them to take constitutional action to enforce their pre-existing, constitutionally protected Aboriginal rights, which constitutes blatant injustice. Litigation is both long and expensive, and does not benefit Canada or First Nations.[13]

[12] See the November 1, 2023, ruling in *R*. v. *Montour*, number 505-01-137394-165, in which the Court confirmed the adoption of the UNDRIP into Canadian law.

[13] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, para. 186.

The federal government has to assume all legal costs of defending its interests, and sometimes even those of First Nations. All this litigation, whether before specific claims tribunals or provincial courts, leads neither to a respectful relationship nor to the sound administration of justice.

The burden of proof imposed on Indigenous peoples for judicial recognition of their rights contradicts the very notion of the pre-existence[14] of Indigenous peoples recognized by section 35 of the *Constitution Act*, *1982*.

The government can no longer consider First Nations' rights to lands and resources uncertain. This uncertainty inevitably leads to negating First Nations' constitutional rights. Although this uncertainty was historically intended to be addressed through the signing of treaties, history shows that this approach has failed in many provinces. Quebec and Newfoundland and Labrador deny history and refuse to recognize and respect First Nations rights. These provinces are not open to a true nation-to-nation relationship. Aside from the 1975 James Bay and Northern Quebec Agreement and the 1978 Northeastern Quebec Agreement, no treaties have been signed with other Indigenous communities in Quebec.

The Innu of UMM, with their vast experience before the courts in defending their Aboriginal rights, wish to draw the attention of the House of Commons Standing Committee on Indigenous and Northern Affairs to these failures.

As a result of illegal mining, forestry and hydroelectric development in Nitassinan, the Innu of UMM have brought several lawsuits against the governments of Canada, Quebec and Newfoundland and Labrador, Hydro-Québec and mining companies. Over the years, the Innu of UMM have contributed to the advancement of Indigenous law in complex Aboriginal and treaty rights litigation. As their time in court has shown, the Innu of UMM have always strived to bring a uniquely Innu perspective to court, as well as specific, useful and relevant arguments on issues that may affect Indigenous peoples and their access to justice.

"The central purpose of s. 35 is to effect reconciliation and preserve a constitutional space for Aboriginal peoples so as to allow then to live as peoples—with their own identities, cultures and values—within the Canadian framework."[15]

Legal reconciliation is therefore fundamental. It requires recognizing and respecting the Aboriginal rights, including Aboriginal title, on the Innu of UMM's Nitassinan. This must be done without signing a treaty, and above all without imposing on them the burden of a constitutional challenge before the courts. Land restitution cannot be limited to reserve land.

[14] *Delgamuukw v. British Columbia*, para. 114; *R. v. Desautel*, 2021 SCC 17, para. 28.

[15] *Reference to the Court of appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185, para. 58.

4. Financial reconciliation

First Nations have historically never been considered important, influential players in the country's economic development. Our financial powers have been considerably limited by legislation, including the *Indian Act*, and by limited, if not impossible, access to financial markets.

Like all governments, First Nations must be able to access financial capital to develop their communities' economies. This requires financial reconciliation. Social and economic factors account for 50% of the impact of health determinants on a population's health and well-being. A person's income, especially in the current economy, is the most significant health determinant, since it affects the overall living conditions and lifestyles of First Nations members.[16] The government needs to take a hard look at needed initiatives to facilitate access to capital markets for band councils and First Nations members through both innovative policy and legislation.

As for the past, government must compensate the Innu of UMM for losses and damages resulting from the illegal exploitation of their territory and the consequences of this exploitation on their way of life and the flora and fauna they need to survive. The Innu of UMM never agreed to the degradation and extensive exploitation of Nitassinan.

5. Social reconciliation

For decades, governments have breached their financial obligations by allowing, approving and encouraging the construction and operation of industrial plants on Nitassinan, thereby affecting, diminishing and infringing upon the Innu of UMM's Aboriginal title.

Industrial operations have also undermined the Innu of UMM's traditional economy; ritual, cultural and spiritual practices; and distinct culture and society. There must be an apology before we can move on. Social reconciliation will be achieved when First Nations are finally seen as human beings, without discrimination, and with respect for their unique circumstances and history.

Implementing the wide-ranging recommendations and calls to action of the many inquiries and commissions on the rights of Indigenous peoples in Quebec and Canada is a necessary first step towards social reconciliation.

Many recommendations concerning First Nations rights have been made by various bodies, including the Truth and Reconciliation Commission,[17] the National Inquiry into Missing and Murdered Indigenous Women and Girls[18] and the Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Quebec.[19]

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[16] INSPQ - https://www.inspq.qc.ca/exercer-la-responsabilite-populationnelle/determinants-de-la-sante/principaux-determinants-de-la-sante-environnement-economique [French only].

[17] "Truth and Reconciliation Commission Reports," *Truth and Reconciliation Commission of Canada*, 2015, online: https://nctr.ca/records/reports/#trc-reports**.**

[18] "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls," *National Inquiry into Missing and Murdered Indigenous Women and Girls*, 2019, online: https://www.mmiwg-ffada.ca/final-report/**.**

[19] "Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress: Final Report," *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec*, 2019, online: https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf.

Coroner Bernard Lefrançois' report on suicides in the UMM community also made recommendations.[20]

To date, the recommendations made in the above reports have not been fully implemented. However, in the spirit of reconciliation, it is essential that Canada effectively implement the recommendations that are the result of extensive consultation and engagement from Indigenous communities.

Indigenous peoples must also participate in establishing a social engagement process for restitution and reparation of the lands exploited and degraded without our consent. The very goal of reconciliation implies recognizing Indigenous peoples as nations, governments and full partners in co-creating a future shaped by true reconciliation and nation-to-nation relationships.

Conclusion

Section 35 of the *Constitution Act, 1982*, refers to "Aboriginal peoples." But what is a people without its territory, without respect for its way of life, its language, its origins or its culture?

The House of Commons Committee on Indigenous and Northern Affairs must conclude that Canada is not respecting its constitution by continuing to deny the rights of Indigenous peoples.

In conjunction with First Nations, the Government of Canada must establish a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, as per Article 27 of the declaration.

[20] Bernard Lefrançois, *Report of Inquest Concerning the Deaths of Charles Junior Grégoire-Vollant, Marie-Marthe Grégoire, Alicia Grace Sandy, Céline Michel-Rock and Nadeige Guanish*, *Quebec Coroner's Office*, January 14, 2017, online: https://www.coroner.gouv.qc.ca/fileadmin/Coroners/Rapport_final_-_anglais.pdf.

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