# SUBMISSION TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

# BY HUL'QUMI'NUM TREATY GROUP

# IN RELATION TO CANADA'S 19TH AND 20TH PERIODIC REPORTS

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**Executive Summary**

The situation of the Hul'qumi'num indigenous peoples of British Columbia exemplifies Canada's failure to protect indigenous property rights under conditions of equality. In its 2007 Concluding Observations, the Committee on the Elimination of Racial Discrimination ("the Committee" or "CERD") expressed its concern over Canadian processes for settling Aboriginal title claims. The Committee urged Canada to engage in good faith negotiations and examine ways to facilitate proof of Aboriginal title during litigation.

Despite these recommendations, Canadian negotiation and litigation processes continue to pose extreme hurdles to indigenous peoples' efforts to protect, title, and demarcate their traditional lands. Canadian courts have never granted title to a single square inch of Aboriginal lands. Litigation procedures remain lengthy and prohibitively expensive. CERD has repeatedly recognized the inadequacy of Aboriginal title litigation procedures in Canada and the expense and delay caused by Canada's strongly adversarial position before the courts.

Canadian courts have repeatedly recognized shortcomings in their ability to recognize Aboriginal title, urging litigants to engage in negotiation processes. However, negotiation procedures established in the British Columbia Treaty Commission ("BCTC") process have likewise proven lengthy, expensive, and ultimately ineffective. Canada refuses to discuss restitution or compensation for privately held lands, giving preferential protection to non-indigenous title holders. Despite repeated criticism from the international community, Canada also requires First Nations to relinquish all Aboriginal claims in order to finalize a treaty. After nearly two decades, only two treaties with Canadian First Nations have been concluded.

Approximately 85% of Hul'qumi'num traditional lands have been confiscated by Canada. Most of these lands are currently in the hands of private third parties. Large-scale logging and commercial and residential development have caused severe environmental degradation and impeded Hul'qumi'num access to their traditional lands. The Hul'qumi'num peoples are thus increasingly unable to maintain their unique relationship with their ancestral territory, threatening their livelihoods and culture. The Hul'qumi'num peoples have spent 17 years in the BCTC process, incurring $24 million of debt while their traditional lands continue to be degraded.

Canada's treatment of Hul'qumi'num ancestral lands granted by the State to private parties is discriminatory, fails to meet its obligations under the International Convention on the Elimination of Racial Discrimination, and is irreconcilably at odds with previous recommendations of the Committee. Canada continues to fail to fulfill its obligations to provide effective mechanisms to clarify and protect indigenous and tribal peoples' right to communal property, privileging non-Indigenous title holders and permitting the destruction of indigenous lands and cultures.

## I. Introduction and Summary

1. This report is submitted on behalf of the Hul'qumi'num indigenous peoples of British Columbia, Canada represented by the Hul'qumi'num Treaty Group ("HTG") in response to Canada's periodic report of January 2011.[1] The Committee on the Elimination of Racial Discrimination ("the Committee" or "CERD") issued its most recent Concluding Observations on Canada in 2007. In those observations, the Committee emphasized "the importance of the right of indigenous peoples to own, develop, control and use their lands, territories and resources" and the relationship between this right and indigenous peoples' "enjoyment of economic, social and cultural rights."[2] In addition to urging Canada "to allocate sufficient resources to remove the obstacles that prevent the enjoyment of economic, social and cultural rights,"[3] the Committee expressed concern over Canada's processes for settlement of Aboriginal land claims.[4] CERD urged Canada "to engage, in good faith, in negotiations based on recognition and reconciliation," and reiterated its recommendation that Canada "examine ways and means to facilitate the establishment of proof of Aboriginal title . . . before the courts."[5]

2. Since 2007, CERD has repeatedly expressed concern for indigenous land rights in Canada, addressing the issue in early warning letters in 2008 and 2009[6] as well as in its March 2010 follow-up procedure.[7] Nevertheless, Canada continues to fail to meet its international obligations to respect indigenous land rights under conditions of equality, and Canadian negotiation and litigation processes continue to pose extreme hurdles to indigenous peoples' efforts to protect, title, and demarcate their traditional lands.

3. Despite Canada's international obligations, the experience of the Hul'qumi'num peoples illustrates Canada's continuing failure to provide adequate and equitable protection for indigenous peoples' land rights, which are in turn essential to their enjoyment of economic, social, and cultural rights. Canada's refusal to demarcate and title Hul'qumi'num lands, and its woefully inadequate processes of negotiation and litigation, have led the Hul'qumi'num Treaty Group to appeal to international mechanisms. In 2007 HTG filed a petition against Canada with the Inter-American Commission on Human Rights. The proceedings are currently at the merits stage.[8] In its Admissibility Report, the

[1] Canada submitted its 19th and 29th periodic reports, due in 2007 and 2009 respectively, as a single document in January 2011. Nineteenth and Twentieth Periodic Reports of Canada, CERD/C/CAN/19-20, Jan. 28, 2011.
[2] Concluding Observations of the Committee on the Elimination of Racial Discrimination ("2007 Concluding Observations"), CERD/C/CAN/CO/18, May 25, 2007, at para. 21.
[3] *Id.*
[4] *Id.* at paras. 21–22.
[5] *Id.*
[6] Ltr. from CERD to Government of Canada, Aug. 18, 2008 (concerning claims of the Lubicon Lake Indian Nation), available at http://www2.ohchr.org/english/bodies/cerd/docs/Canada_letter150808.pdf; Ltr. from CERD, to Government of Canada, Mar. 13, 2009 (addressing development without consultation in British Columbia and the Kitchenuhmanykoosib Inninuwug case in Ontario), available at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Canada130309.pdf.
[7] Ltr. from CERD to Government of Canada, Mar. 12, 2010 (responding to Canada's 2009 follow-up report), available at http://www2.ohchr.org/english/bodies/cerd/docs/followup/Canada_12032010.pdf.
[8] Petition to the Inter-American Commission on Human Rights submitted by the Hul'qumi'num Treaty Group against Canada ("HTG Petition") May 10, 2007. For more information, see http://www.htg-humanrights.bc.ca/.

Commission held that the state's treaty negotiation process is not an effective mechanism to protect the rights of the Hul'qumi'num[9] and that judicial remedies provide no reasonable prospect of success for resolving Hul'qumi'num land claims:

> "because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, and, therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law."[10]

## II. Canada's International Obligations

4. As a party to the International Convention on the Elimination of Racial Discrimination, ("ICERD"), Canada has pledged to take action to end racial discrimination and to "encourage universal respect for and observance of human rights and fundamental freedoms for all."[11] This includes an acknowledgement that the United Nations has condemned colonialism and "all practices of … discrimination associated therewith, in whatever form and wherever they exist."[12]

5. Article 2 obliges Canada to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination," including "tak[ing] effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating" such discrimination.[13]

6. More specifically, under Article 5 of ICERD, Canada has the duty to ensure, under conditions of equality, the right to equality before the law,[14] property ownership,[15] and enjoyment of economic, social and cultural rights.[16] Additionally, Article 6 requires that Canada provide "effective protection and remedies" for these rights, including the ability to seek reparations for any damaging effects of discrimination.[17]

7. In 1997 CERD noted in its General Recommendation XXIII, that indigenous peoples continue to be "discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises."[18] The Committee observed that such losses

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[9] Hul'qumi'num Treaty Group v. Canada (Admissibility) ("Admissibility Report") Inter. Am.C.H.R., Report No. 105/09, Petition 592-07, October 30, 2009, at para. 37. Available at: http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm

[10] *Id.* at paras. 40-41 (footnote omitted).

[11] International Convention on the Elimination of Racial Discrimination ("ICERD"), Preamble, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) Preamble .

[12] *Id.*

[13] *Id.* at art. 2(1), 2(1)(c).

[14] *Id.* at art. 5(a).

[15] *Id.* at art. 5(v).

[16] *Id.* at art. 5(e).

[17] *Id.* at art. 6.

[18] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, para. 3, Doc. A /52/18, Aug. 18, 1997.

jeopardize the preservation of indigenous peoples' culture and identity.[19] In addition to other obligations, CERD "especially call[ed] upon State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."[20] Furthermore, the Committee stated that only when return of lands is impossible should "the right to restitution be substituted by the right to just, fair and prompt compensation."[21]

8. On November 12, 2010 Canada reversed its position and formally endorsed the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"). UNDRIP articulates the "minimum standards for the survival, dignity and well-being" of indigenous peoples,[22] recognizing that "[i]ndigenous peoples have the right to the full enjoyment, as a collective, or as individuals, of all human rights and fundamental freedoms."[23] This includes the right to be "free from any kind of discrimination,"[24] the right to self-determination,[25] and the "collective right to live in freedom, peace and security as a distinct peoples."[26]

9. With respect to indigenous peoples' traditional lands, Article 26 of UNDRIP recognizes that indigenous peoples' right "to the land, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[27] Article 26 further states that indigenous peoples have the right to "own and control" these lands,[28] and that states have a duty to "give legal recognition and protection to these lands, territories and resources."[29] Additionally, under Article 27 states are obliged to "establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open, and transparent process" for the recognition and adjudication of indigenous land rights, "giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems."[30]

10. When indigenous lands, territories, or resources are taken or diminished without indigenous peoples' free, prior, and informed consent, Article 28 of UNDRIP states that they have the right to redress, including restitution where possible.[31] Additionally, Article 37 recognizes the right to "recognition, observance and enforcement of treaties,

[19] *Id.*
[20] *Id.* at para. 5
[21] *Id.*
[22] United Nations Declaration on the Rights of Indigenous Peoples, art. 43, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, Sept. 13, 2007.
[23] *Id.* at art. 1.
[24] *Id.* at art. 2.
[25] *Id.* at art. 3.
[26] *Id.* at art. 7(2).
[27] *Id.* at art. 26(1).
[28] *Id.* at art. 26(2).
[29] *Id.* at art. 26(3).
[30] *Id.* at art. 27.
[31] *Id.* at art. 28.

agreements and other constructive arrangements concluded with States."[32] States have the duty, articulated by Article 40, to provide indigenous peoples with access to the prompt resolution of conflicts through "just and fair procedures" and to "effective remedies" for all infringements of their rights.[33]

## III. Background on the Situation of the Hul'qumi'num Indigenous Peoples

11. The Hul'qumi'num Treaty Group was formed in 1993 to achieve just resolution of land claims and indigenous rights issues, advance the Hul'qumi'num peoples' standards of living, achieve self-government, promote understanding between indigenous peoples and the general public, improve social and economic independence, and promote Hul'qumi'num language and heritage.[34] HTG is comprised of six First Nations[35] with a combined population of approximately 6,400.[36] These member-First Nations are part of the larger Coast Salish people.[37] HTG's First Nations share a common language and are interconnected by ties of kinship, marriage, travel, trade, and sacred belief.[38]

12. The Hul'qumi'num peoples and their ancestors lived in self-sustaining societies located in their traditional territory, which stretches from southeast Vancouver Island to the Fraser River on the lower mainland of British Columbia.[39] Oral tradition connects the Hul'qumi'num peoples to their traditional lands since time immemorial, and archaeological evidence demonstrates that they have been in continuous occupancy of their ancestral lands for over 9,000 years.[40] Hul'qumi'num communities depend upon their traditional lands and resources to sustain their livelihoods and culture.[41] Hul'qumi'num land-use patterns are based upon a customary land tenure system that combines forms of communal land holding with systems allowing family groups to have exclusive rights to areas.[42]

13. During the nineteenth century colonial era, Canada began unilaterally granting rights, titles, and interests in Hul'qumi'num traditional lands and resources to third parties without Hul'qumi'num consultation or consent.[43] The colonial government originally relied upon the British Navy to terrorize the Hul'qumi'num peoples when they resisted the State's alienation of their traditional lands. Once this process was completed in the late nineteenth century, the colonial government forced the Hul'qumi'num peoples onto reserves representing a tiny fraction of their traditional lands.[44] In many cases,

[32] *Id.* at art. 37.
[33] *Id.* at art. 40.
[34] HTG Petition, *supra* note 8, at para. 17.
[35] Cowichan Tribes; Chemainus First Nation; Penelakut Tribe; Halalt First Nation; Lyackson First Nation; and Lake Cowichan First Nation.
[36] *Id.* at para. 18.
[37] *Id.*
[38] *Id.* at paras. 19, 22.
[39] *Id.* at para. 23.
[40] *Id.*
[41] *Id.* at paras. 25–29.
[42] *Id.* at paras. 30–36.
[43] *Id.* at para. 37
[44] *Id.* at para. 38.

government officials justified their actions in blatantly racist terms, with Canadian government officials in the late nineteenth century consistently expressing a desire to completely dispossess First Nations in British Columbia.[45]

14. The largest confiscation of Hul'qumi'num traditional territory occurred in 1884 when the Canadian government granted the E&N Railway 237,000 acres, or approximately 70% of Hul'qumi'num lands.[46] Known as the "E&N Railway grant," these lands were taken for the benefit of a private railway corporation and to facilitate colonization of Vancouver Island. Subsequently, further grants of Hul'qumi'num lands were made, resulting in a total of approximately 85% of Hul'qumi'num lands being expropriated by the Canadian government and distributed to private entities.[47] Thus, the vast majority of Hul'qumi'num traditional territory passed to the railroad and other private interests without the property or user rights of the Hul'qumi'num peoples' being formally extinguished and without any form of restitution being made to the affected communities.[48]

15. In addition to the E&N Railway grant, the State has continued to allow the granting and re-granting of Hul'qumi'num property rights without engaging in meaningful consultation or offering any form of restitution.[49] Thus, large-scale logging has been allowed to take place on Hul'qumi'num traditional lands, causing irreparable harm to these lands and threatening the ability of the Hul'qumi'num to access their traditional territory and engage in subsistence fishing, hunting and gathering, ceremonies, and other customary practices.[50]

16. Of the forest lands in Hul'qumi'num territory, Canada currently considers 12% Crown lands (owned and controlled by the State) and 88% are "privately held."[51] Few environmental regulations apply to these privately held forest lands.[52] Many of these lands have been transferred to three large forestry companies, which are clear-cutting the land and causing rapid environmental degradation that severely threatens the Hul'qumi'num peoples' ability to maintain their unique relationship to their traditional lands.[53] During this process, Canada has failed to engage in effective consultation with affected Hul'qumi'num communities and has made no efforts to provide benefit sharing or make restitution to the Hul'qumi'num peoples.[54] Many of the Hul'qumi'num forest lands have also been subdivided into smaller lots, further-intensifying development.[55] Such development has included commercial and residential development on the highly populated Vancouver Island, which is very near the location where the 2010 Olympic

[45] *Id.* at para. 39.
[46] *Id.* at para. 41.
[47] *See id.* at para. 43.
[48] *Id.* at para. 44.
[49] *See id.* at para. 47.
[50] *Id.*
[51] *Id.* at para. 49.
[52] *Id.* at para. 50.
[53] *See* Hul'qumi'num Treaty Group, Press Release, Hul'qumi'num Treaty Group Opposing Proposed 1 Billion Dollar Sale by Timberwest Without Consultation, May 12, 2011, available at http://www.hulquminum.bc.ca/pubs/HTG Press Release Final May12, 2011.pdf.
[54] *Id.*
[55] HTG Petition, *supra* note 8, at para. 51.

Games were held.[56] As a result of intense development and environmental destruction, only 0.5% of Hul'qumi'num territory remains original, old-growth forest.[57]

17. The alienation of the Hul'qumi'num peoples' land base continues to negatively impact their economic self-sufficiency. Without any recognized property rights in the majority of their traditional lands, and lacking rights of access to resources needed to sustain their indigenous way of life, the Hul'qumi'num are among the poorest communities in Canada.[58] Hul'qumi'num communities are ranked between 448th and 482nd out of the 486 communities surveyed by Canada's Community Well-Being Index.[59] Additionally, only approximately 50% of Hul'qumi'num members reside on the tiny parcels of reserve lands, which are overcrowded, contain woefully inadequate housing, and lack even the most basic infrastructure and amenities enjoyed by the vast majority of non-indigenous Canadians.[60]

## IV. Canada's Failure to Recognize and Protect Hul'qum'num Rights to Lands and Resources

18. The Hul'qumi'num people continue to use and occupy their traditional lands despite Canada's seizure of Hul'qumi'num lands and resources and the subsequent transfer of these lands and resources to private third parties. The Hul'qumi'num continue to seek demarcation of their traditional lands in order to protect their livelihoods and culture. This has, however, proven difficult in large part because the situation of the Hul'qumi'num people is part of a larger pattern of government failure to provide effective mechanisms for protection of indigenous land rights. Both the Canadian judicial and treaty negotiation processes have proven to be lengthy, extremely costly, and ultimately inadequate mechanisms for demarcation of indigenous title. Thus, in addition to failing to protect indigenous property rights under conditions of equality, Canada is also negligent in its duty to provide an effective remedy to indigenous peoples.

### A. Inadequacies of the Canadian Judicial System

19. Section 35 of the Constitution Act of 1982 amended the Canadian Constitution to affirm both Aboriginal and treaty rights of Canada's First Nations. In the decades of litigation since this amendment, however, Canadian courts have never granted title to one square inch of Aboriginal lands.

20. Canadian courts continue to rely on the colonial era Doctrine of Discovery, perpetuating its principle of a superior sovereign power of indigenous peoples and their ancestral lands. The Doctrine was articulated by United States Supreme Court Chief Justice John Marshall in the case of *Johnson v. M'Intosh*, which spelled out two fundamental

[56] *Id.* at para. 46.
[57] *Id.* at para. 49.
[58] *Id.* at para. 61.
[59] *Id.* at para. 62.
[60] *Id.* at para. 63.

principles of the Doctrine under colonial-era legal principles.[61] First, that a discovering European power had exclusive sovereignty over lands occupied by indigenous peoples, and, second, that the European sovereign had the power to recognize or extinguish indigenous peoples' rights in their ancestral lands.[62] The use of the Doctrine of Discovery in Canadian courts traces back to the landmark 1888 case of *St. Catherine's Milling v. The Queen*,[63] and numerous Canadian cases continue to cite both *St. Catherine's Milling* and *Johnson v. M'Intosh*.[64]

21. Although Canadian courts do not require the government to prove title to lands, there are strict pleading requirements for indigenous litigants, which have thus far successfully prevented any awards of Aboriginal property rights. The landmark case of *Delgamuukw v. British Columbia* is an excellent example of the inadequacies of the Canadian judicial system.[65] Canada notes in its periodic report that *Delgamuukw* is "the leading case on Aboriginal title in Canada."[66] Due to Canada's policies of delay and obstruction, that case lasted over 13 years and cost 14 million dollars.[67] The court rejected Canada's argument that Aboriginal title had been extinguished in British Columbia. Despite affirming the existence of Aboriginal title in British Columbia, the court failed to actually recognize and demarcate the claimants' title, holding that First Nations must prove the existence of title on a specific site by site basis; a very expensive and difficult test and process. Chief Justice Lamer ordered a new trial yet encouraged the parties to negotiate rather than pursue further litigation due to the fact that litigation was "both long and expensive, not only in economic but in human terms as well."[68]

22. Similarly, *Tsilhquot'in Nation v. British Columbia* was decided in 2007 after nearly 20 years of litigation, $15 million spent by the Tsilhqot'in, and a 339-day trial involving extensive oral history, cartographic, ethno-botanical, and archaeological evidence.[69] The 482-page decision issued denied legal recognition for any of the land claimed because the judge determined that the Tshilquot'in Nation had not demonstrated that they met the test for Aboriginal title for the entire claimed area.[70] Again, the judge indicated that Canadian courts were "ill equipped to effect a reconciliation of competing interests" in Aboriginal title litigation, stating that this "must be reserved for a treaty negotiation process."[71]

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[61] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
[62] *Id.*
[63] *St. Catherine's Milling v. The Queen*, 1888 Carswell Ont. 22.
[64] For example, *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.
[65] *Delgamuukw*, *supra* note 64.
[66] Nineteenth and Twentieth Periodic Reports of Canada, *supra* note 1, at para. 110.
[67] *Response to Second Request for Additional Information submitted by the Hul'qumi'num Treaty Group to the Inter-American Commission on Human Rights* (Nov. 1, 2007), Appendix 6 ("Affidavit of Don Ryan"), at para. 32 (on file with author, available upon request).
[68] *Delgamuukw*, *supra* note 64, at para. 186.
[69] *Tsilhquot'in Nation v. British Columbia* [2008] 1 C.N.L.R. 112; Tsilhquot'in Nation Amicus Curiae Brief on the Merits, Hul'qumi'num Treaty Group v. Canada, Inter-Am. C.H.R., ("Tsilhquot'in Amicus Brief") Jan. 24, 2011, para 11 (on file with author, available upon request).
[70] Tsilhquot'in Amicus Brief, *supra* note 69, at para. 12.
[71] *Tsilhquot'in Nation*, *supra* note 69, at para. 542.

23. CERD has repeatedly recognized the inadequacy of Aboriginal title litigation in Canada. In its 2007 Concluding Observations, the Committee noted its concern over the disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken by the federal and provincial governments."[72] The Committee recommended that Canada "examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts."[73] Canada has, however, failed to reform its procedures for proving Aboriginal title.

24. Furthermore, as Canada has noted in its August 2009 follow-up report,[74] even if claimants prove Aboriginal title, there are restrictions on the ways in which indigenous peoples can use their traditional lands, and the government can unilaterally abridge designations of Aboriginal title.[75] This abridgement is called "infringement," and the test for justifiable infringement is quite low. As Canada notes, the government must only demonstrate "a valid legislative objective," which includes, but is not limited to, "the development and management of forestry, mining and hydroelectric power, and conservation of the environment and endangered species."[76] The infringement must be deemed "reasonable" under the circumstances to be upheld in court.[77]

25. Additionally, the Canadian judicial system has proven inadequate in providing interim measures to protect indigenous lands pending demarcation of Aboriginal title. For instance, the Hul'qumi'num people must bring separate legal actions each time the government permits third-party development on their traditional lands. HTG offices are sent hundreds of referrals a year involving applications for development permits, and challenges to such permits have been costly and ineffective. In 2004 Hul'qumi'num elders and religious and spiritual leaders filed administrative appeals challenging the decision to grant a permit for disposal of effluent from a fish hatchery in an area containing ancestral burial grounds known as Walker Hook (*Syuhe'mun* in the Hul'qumi'num language).[78] After ten days of hearings and the Hul'qumi'num incurring nearly $300,000 in legal fees, the State Environmental Appeal Board decided there was insufficient evidence of ongoing connection to *Suyhe'mun* and refused to stop the discharge of effluent upon the graves of Hul'qumi'num ancestors.[79]

26. Ultimately, Canadian judicial processes fail to fulfill Canada's obligation to title and demarcate indigenous lands. Lengthy, costly and ineffective procedures deter indigenous participation in the Canadian judicial system, and despite urging by CERD, Canada has yet to address the difficulty of establishing Aboriginal title in Canadian courts.

[72] 2007 Concluding Observations, *supra* note 2, at para. 22.
[73] *Id.*
[74] Information Provided by the Government of Canada on the Implementation of the Concluding Observations of the Committee on the Elimination of Racial Discrimination ("Canada 2009 Follow-up Report"), CERD/C/CAN/CO/18/Add.1, at para. 46, Aug. 6, 2009.
[75] *Id.*
[76] *Id.*
[77] *See id.*
[78] *See* HTG Petition, *supra* note 8, at paras. 57–60.
[79] *Id.* at para. 60.

Additionally, Canadian courts fail to provide adequate interim protections pending demarcation of Aboriginal title.

**B. Inadequacies of the British Columbia Treaty Process**

27. Even though Canadian courts have repeatedly encouraged indigenous peoples to settle land claims through negotiation processes, the treaty negotiation process established in British Columbia also fails to protect First Nations' rights to their lands, territories, and resources in an effective manner. The British Columbia Treaty Commission ("BCTC") process began in 1992 and has involved 60 First Nations.[80] After nearly two decades–with almost a generation lost–only two treaties have been concluded.[81]

28. Canada draws out negotiations through tactics of delay and adamant refusal to recognize Aboriginal rights including title, since Canada does, as a result of Deglamuukw recognize that Aboriginal rights including title exist in a general way, but refuses to recognize it on the ground for First Nations like the Hul'qumi'num. Meanwhile Canada's First Nations are accruing crippling debt burdens to participate in the treaty negotiation process. Under the BCTC system, the government loans First Nations money to participate in treaty negotiation despite the fact that Canada has an affirmative duty to demarcate and title indigenous lands.[82] Ironically, Canada's indigenous peoples must pay for the government to resolve violations of their human rights caused by the government's alienation and degradation of their traditional lands.

29. Of the funding provided to First Nations to participate in the BCTC process, 80 percent is a loan from the Canadian government. This money is borrowed against future treaty settlements. BC First Nations have borrowed $422 million to participate in negotiations.[83] As of 2006 the Auditor General of Canada estimated that some smaller First Nations had already incurred debts of between 44 and 64 percent of the value of any final settlement they are likely to secure.[84] According to Sophie Pierre, the Chief Commissioner of the B.C. Treaty Commission, tens of millions of dollars in financing agreements are set to expire in the next few years, and First Nations may not have the ability to repay these loans.[85] The Hul'qumi'num Treaty Group has been involved in the BCTC process for 17 years, during which time it has incurred $24 million of debt.

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[80] 2011 Annual Report of the British Columbia Treaty Commission, available at http://www.bctreaty.net/files/pdf_documents/2011_Annual-Report.pdf.
[81] *Id.* at p. 6.
[82] *See* British Columbia Treaty Commission Funding Fact Sheet, http://www.bctreaty.net/files/pdf_documents/funding_fact_sheet.pdf.
[83] 2011 Annual Report of the British Columbia Treaty Commission, *supra* note 80, at p. 29.
[84] Report of the Auditor General of Canada to the House of Commons, Chapter 7: Federal Participation in the British Columbia Treaty Process–Indian and Northern Affairs Canada, Nov. 2006, at para. 7.72, available at http://www.fns.bc.ca/pdf/AGofCanada20061107ce.pdf.
[85] *See* Gary Mason, *Treaty Loans Will Come Back to Haunt B.C. First Nations*, GLOBE AND MAIL, Jul. 1, 2010, available at http://www.theglobeandmail.com/news/opinions/treaty-loans-will-come-back-to-haunt-bc-first-nations/article1624556/.

30. Furthermore, many negotiations are unlikely to succeed because the government has not allowed negotiations on the subject of restitution or compensation for privately held lands. The State's officially declared negotiating policy, repeated in numerous statements to the First Nations participating in the BCTC process, is that so-called "private lands" granted to third parties are not open for discussion, except on a willing seller willing buyer basis within Canada's treaty mandates.[86] This is particularly problematic for indigenous communities like the Hul'qumi'num because the vast majority of their traditional territories have now been transferred to private third parties. The government also refuses to demarcate lands subject to overlapping indigenous claims, despite the fact that overlapping claims do not relieve the state of its duty to demarcate and title indigenous lands.[87]

31. Canada also maintains a policy of "full and final" settlement in the BCTC process, meaning that indigenous peoples must agree to relinquish their Aboriginal rights and title claims in exchange for a treaty.[88] Canada insists First Nations indemnify the Canadian government making the First Nation liable should one of their members bring a legal challenge to secure rights to lands not addressed by a treaty.[89] Canada continues these settlement policies despite the fact that they have been repeatedly admonished by the United Nations' human rights system for nearly a decade.

32. Most recently, in its 2007 Concluding Observations, CERD noted Canada's new approaches, which Canada calls the "modified" and "non-assertion" approaches. CERD, however, stated that it "remains concerned about the lack of perceptible difference in results," and recommended that Canada "ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights."[90] Although Canada stated in its August 2009 follow-up report that the goal of the land claims process "is not to restrict the progressive development of Aboriginal rights,"[91] it has gone no further in addressing the fact that it maintains a comprehensive claims policy that effectively requires extinguishment of Aboriginal rights and title.[92] For example, Canada's most recent treaty is the *Maa-nulth Final Agreement*, which was negotiated in 2009 and ratified in 2011. This treaty includes a "full and final settlement" provision that the treaty agreement "exhaustively sets out" Maa-nulth rights under Section 35, and an indemnity clause.[93] Additionally, Canada continues to insist that HTG

[86] HTG Petition, *supra* note 34, at para. 76.
[87] The Inter-American Commission, for instance, has stated that rather than relieving the State of its duty to demarcate, resolution of conflicts "demands flexibility in the specific legal forms recognizing communal property, responding to the *sui generis* nature of communal property without ceasing to guarantee indigenous patterns of territorial use and occupation." Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources* ("IACHR Ancestral Lands Report"), OEA/Ser.L/V/II. Doc. 56/09, December 30, 2009, para. 184.
[88] *See* HTG Petition, *supra* note 8, at para. 80.
[89] *Id.*
[90] 2007 Concluding Observations, *supra* note 2, at para. 22.
[91] Canada 2009 Follow-up Report, *supra* note 74, at para. 50.
[92] *See* HTG Petition, *supra* note 8, at paras. 83, 149.
[93] Maa-nulth First Nations Final Agreement, §§ 1.11.0–1.11.7, available at http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf.

relinquish rights to traditional lands granted to private third parties in order to negotiate a treaty.[94]

33. Other United Nations bodies have also criticized Canada's extinguishment-by-treaty policy. In 1998, the UN Committee on Economic, Social and Cultural Rights ("CESCR") stated in its concluding observations that Canada cease demanding extinguishment of Aboriginal title and rights as the price of a treaty settlement.[95] In 2004, Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples criticized Canada's treaty negotiating policies because they effectively require extinguishment of outstanding aboriginal title and property rights claims.[96] Noting that Canada had withdrawn the requirement for "an express reference to extinguishment of Aboriginal rights and titles," in 2006 the CESCR expressed the view that Canada's new approaches "do not differ much from the extinguishment and surrender approach."[97]

34. Even when treaties are concluded, Canada has failed to implement them in good faith,[98] as has been repeatedly recognized by Canadian government entities. For instance, in 2003 the Auditor General of Canada reported that the government had failed to fulfill the spirit of both the *Nunavut Land Claims Agreement* ("NLCA") and the *Gwich'in Comprehensive Land Claims Agreement*.[99] The NLCA was concluded in 1993 after nearly 20 years of negotiation, and for the past 18 years the Nunavut have struggled to achieve implementation.[100] In 2004 Canada unilaterally terminated implementation negotiations and refused to endorse or implement the recommendations of the neutral conciliator it had previously agreed upon.[101]

35. Similarly, the Standing Senate Committee on Aboriginal Peoples noted in a 2008 interim report that Canada is more concerned with concluding, rather than implementing, treaties.[102] The Committee acknowledged "deep structural reasons for the government's failure to make measurable and meaningful progress on issues affecting Aboriginal Canadians," attributing much of the failure to the Department of Indian Affairs and

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[94] *Id.* at para. 83.
[95] *Id.* at para. 81; Committee on Economic, Social and Cultural Rights, Concluding Observations: Canada, Dec. 10, 1998, E/C.12/1/Add.21 at para. 18.
[96] *Id.* at para. 177; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, E/CN.4/2005/88/Add.3, Dec. 2, 2004, at paras. 19–20, 99, available at http://www.gcc.ca/pdf/INT000000012.pdf.
[97] HTG Petition, *supra* note 8, at para. 82; Committee on Economic, Social and Cultural Rights, Concluding Observations: Canada, E/C.12/CAN/CO/5, May 22, 2006, at para. 16.
[98] Agreements reached after 1998 require the negotiation of implementation plans. These implementation plans do not receive constitutional protection under section 35. Standing Senate Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes* ("*Honouring the Spirit*"), May 2008, p. 7–8, available at http://www.parl.gc.ca/Content/SEN/Committee/392/abor/rep/rep05may08-e.pdf.
[99] *See Honouring the Spirit*, *supra* note 98, at p. 3.
[100] *See* Terry Fenge and Paul Quassa, *Negotiating and Implementing the Nunavut Land Claims Agreement*, available at http://www.tunngavik.com/wp-content/uploads/2010/04/negotiating-implementing-the-nlca.pdf.
[101] Nunavut Tunngavik Incorporated Amicus Curiae Brief on Admissibility, Hul'qumi'num Treaty Group v. Canada, Inter-Am. C.H.R., Jan. 2008, para. 20 (on file with author, available upon request).
[102] *Honouring the Spirit*, *supra* note 98, at p. 13.

Northern Development, which it described as "steeped in a legacy of colonialism and paternalism."[103]

36. Further diminishing the ability of treaty negotiations to sufficiently protect indigenous land rights is the fact that Canadian courts have explicitly stated that treaty rights "may be unilaterally abridged."[104] As mentioned above, Aboriginal title may be infringed, and what constitutes justifiable infringement is broadly defined.[105] The Canadian Supreme Court has extended this same test to treaty rights,[106] thus merely requiring a valid legislative objective and infringement that is reasonable under the circumstances. Such unilateral infringement was condemned by the UN Human Rights Committee in 1999 as incompatible with the right of self-determination affirmed in Article 1 of the International Covenant on Civil and Political Rights ("ICCPR").[107] Nonetheless, a decade later Canada maintained the same position with respect to unilateral infringement of Aboriginal rights.[108]

**C. Rights Violations Resulting from Activities on Hul'qumi'num Lands**

37. Canada's treatment of Hul'qumi'num ancestral lands granted by the State to private parties is discriminatory, fails to meet its obligations under ICERD and is at complete odds with the previous recommendations of the Committee.[109] The rights to equality before the law, equality of treatment and non-discrimination mean that states must establish legal mechanisms to clarify and protect indigenous and tribal peoples' right to communal property in the same way that property rights in general are protected in the domestic legal system.[110] However, Canada provides preferential protection to non-Indigenous private property title holders. In Canada "private lands" are recognized and safeguarded through the Torrens land registry system as demarcated lands in which the registered owners (purchasers for value) hold title in fee simple, while Aboriginal property rights go unrecognized and unprotected. [111]

38. Canada is violating the Hul'qumi'num's rights to equality before the law,[112] property ownership,[113] and enjoyment of economic, social and cultural rights—under conditions of equality—as guaranteed by Article 5 of ICERD through its failures to grant indigenous

[103] *Id.* at p. viii.
[104] *R v. Badger*, [1996] 1 S.C.R. 771, at para. 77.
[105] *Supra* notes 75–77 and accompanying text.
[106] "Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged." *Badger*, *supra* note 104, at para. 77.
[107] Human Rights Committee, *Concluding Observations: Canada*, UN. Doc. CCPR/C/79/Add. 105 (1999) at para. 8.
[108] Canada 2009 Follow-up Report, *supra* note 74, at para. 46.
[109] 2007 Concluding Observations, supra note 2.
[110] IACHR Ancestral Lands Report, *supra* note 87, at para. 61
[111] Lawyers' Rights Watch Canada as Amicus Curiae Brief on the Merits, Hul'qumi'num Treaty Group v. Canada, Inter-Am. C.H.R. [undated], para. 72 (on file with author, available upon request).
[112] *Id.* at art. 5(a).
[113] *Id.* at art. 5(v).

peoples the protections necessary to exercise their right to property fully and equally with other members of the population.[114]

## V. Conclusion and Recommendations

39. As the situation of the Hul'qumi'num peoples illustrates, Canada is failing in its international obligations to respect indigenous rights to property and to economic and cultural rights under conditions of equality.

40. Canadian courts do not provide an adequate process for resolving Aboriginal title claims, and the Canadian Supreme Court has repeatedly directed litigants toward negotiation processes instead. However, Canadian treaty-negotiation processes are also failing to provide an effective avenue for indigenous peoples to secure title to their traditional lands. Rather, negotiation procedures have proven lengthy, prohibitively expensive, and ultimately ineffective. The Hul'qumi'num have fruitlessly spent 17 years and $24 million in the BCTC process. Meanwhile, Hul'qumi'num traditional lands continue to be degraded, threatening the ability of the Hul'qumi'num peoples to sustain their livelihoods and culture.

41. In fact, even Canadian officials are recognizing that the treaty process is broken. In November 2011, British Columbia Premier Christy Clark stated that the BCTC process has failed to deliver economic growth or a stable investment climate, announcing that her government will be undertaking a dramatic shift in policy away from the treaty-negotiation process.[115] Clark indicated that the BC government will focus instead on negotiating agreements between private investors and First Nations.[116] While the treaty process has not been effective in demarcating Aboriginal title, de-prioritization of treaty-negotiation, in lieu of reformation of the treaty process, may have grave consequences for indigenous peoples seeking protection of their lands and resources.

42. In light of Canada's failure to provide effective mechanisms for the demarcation and titling of indigenous lands, the Hul'qumi'num Treaty Group requests:

43. More generally, that the Committee urge Canada to:

    a) Reform its laws and policies with respect to settlement of Aboriginal land claims to ensure they are in conformity with ICERD and other international legal standards.

    b) Establish mechanisms to provide effective remedies to recognize and protect indigenous title and rights in Canada;

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[114] *Maya Indigenous Communities of the Toledo District v. Belize* ("Maya Belize"), Int. Am. C.H.R., Report No. 40/04, Case 12.053, Oct. 12, 2004, at para. 171. Available at: http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm

[115] Hunter, Justine, 4 November 2011, Globe and Mail, *BC Premier Breaks with Decades Long First Nations Strategy*, available at: http://m.theglobeandmail.com/news/national/british-columbia/bc-politics/bc-premier-seeks-non-treaty-deals-with-natives/article2225063/?service=mobile.

[116]

c) Abandon its extinguishment policies that require relinquishment of Aboriginal rights and title in exchange for a treaty; and

d) Affirm Canada's duty to demarcate indigenous lands even in if there are overlapping claims with other indigenous communities.

44. With respect to the Hul'qumi'num indigenous peoples, that the Committee urge Canada to:

a) Demarcate and title Hul'qumi'num traditional territory based on customary land tenure and resource use, or provide restitution in the form of return, replacement or payment of just compensation for the taking of those lands;

b) Suspend consideration of property sales, permits, licenses, and concessions on Hul'qumi'num traditional lands originally granted to the E&N Railway until Hul'qumi'num property claims have been resolved, or the Hul'qumi'num provide written agreement;

c) Establish and implement, in coordination with the Hul'qumi'num, a plan to mitigate and repair the environmental harm caused by development activities on Hul'qumi'num lands within the original E&N Railway grant;

d) Establish effective safeguards to guarantee the effective participation of the Hul'qumi'num, in accordance with their customs and traditions, regarding any development, investment, exploration or extraction plan, and guarantee that the Hul'qumi'num will receive a reasonable benefit from any such plan within their territory, and that independent environmental and social impact assessments will be conducted;

e) Establish any other safeguards to preserve, protect and guarantee Hul'qumi'num property rights; and

f) Provide any other recommendations the Committee considers appropriate.