PETITION
to the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

submitted by
THE HUL'QUMI'NUM TREATY GROUP

against
CANADA

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I. Introduction

1. The Hul'qumi'num indigenous peoples of British Columbia, Canada represented by the HUL'QUMI'NUM TREATY GROUP ("HTG"), hereby submit this petition to the Inter-American Commission on Human Rights (the "Commission") against the State of CANADA (the "State" or "Canada"). HTG, the duly recognized organization that represents six indigenous Hul'qumi'num First Nations (as they are commonly called in Canada) in deadlocked treaty negotiations with the State,[1] seeks redress for the violation of the rights of the Hul'qumi'num indigenous communities over their traditional lands and natural resources.

2. Canada's actions in this case directly contradict the decisions of this Commission and the Inter-American Court of Human Rights (the "Court") which have repeatedly affirmed indigenous peoples' right to property in their traditional lands and the duty of member States of the Organization of American States ("OAS") to recognize the right of restitution belonging to the members of indigenous communities for the loss of traditional lands taken by the State.[2]

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[1] The Hul'qumi'num Treaty Group was founded in 1993 to jointly negotiate a comprehensive treaty on aboriginal title, property, self-government and other rights with Canada and British Columbia in the British Columbia Treaty Commission Process. Robert Morales, *Canada's British Columbia Treaty Process and the Human Rights Situation of the Hul'qumi'num Mustimuhw: A Study on State Failures to Engage the Duty to Negotiate in Good Faith with Indigenous Peoples under International Law*, paper presented to the Expert Seminar on Indigenous Peoples and the Administration of Justice, organized by the Office of the United Nations High Commissioner for Human Rights, Tucson 2005 at 1 ("*Canada's British Columbia Treaty Process*") (App. 1). *See also* Hul'qumi'num Treaty Group, *Getting to 100%* (Ladysmith, B.C.: Hul'qumi'num Treaty Group, 2005) at 7 (App. 2).

[2] *See Case of Yakye Axa v. Paraguay* ("*Yakye Axa*"), Judgment of June 17, 2005, Inter-Am. Ct. H.R. Ser. C. No. 125 (2005); *Case of Sawhoyamaxa v. Paraguay* ("*Sawhoyamaxa*"), Judgment of March 29, 2006, Inter-Am. Ct. H.R. Ser. C. No. 146 (2006); *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua* ("*Awas Tingni*"), Judgment of August 31, 2001, Inter-Am. Ct. H.R. Ser. C., No. 79 (2001); *Case of Maya Indigenous Communities of the Toledo District v. Belize (*"*Maya Belize*"*)*, Inter-Am C.H.R., Case No. 12.053, Report No. 40/04 (October 12, 2004); *Case of Mary and Carrie Dann v. United States* ("*Dann*"), Inter-Am. C.H.R., Case No. 11.140, Report No. 75/02 (December 27, 2002) (Final Report). *See also* Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 Hum. Rts. L.R. 281 (2006) (App. 3). The Court's decisions in *Yakye Axa*, *Sawhoyamaxa* and *Awas Tingni* interpreted indigenous peoples' right to property and to restitution in the context of Article 21 of the American Convention on Human Rights ("American Convention"). The *Maya Belize* and *Dann* cases were decided by the Commission interpreting the right to property under Article XXIII of the American Declaration of the Rights and Duties of Man ("American Declaration"). As the Commission noted in its Final Report on the *Maya Belize* case; "Although phrased in somewhat different terms, the right

3. Disregarding Hul'qumi'num property, cultural and other fundamental human rights, Canada has granted approximately 85% of the lands traditionally used and occupied by the Hul'qumi'num communities to private land owners. In particular, a huge tract of land, approximately 237,000 hectares (or 70% of the Hul'qumi'num ancestral territories), was granted to a private railroad corporation. That corporation in turn has regranted many of these same Hul'qumi'num communal lands to private third parties with the sanction of Canada under its internal domestic land laws. The State has claimed the unilateral right to confiscate these Hul'qumi'num traditional lands without ever offering any form of restitution, either through return, replacement or payment of just compensation to the indigenous communities affected. In fact, Canada refuses to even recognize or discuss with HTG the claims of the Hul'qumi'num indigenous peoples to restitution for these lost ancestral lands.

4. The State's so-called "privatization" of Hul'qumi'num traditional lands has resulted in negative impacts on the natural environment upon which the Hul'qumi'num peoples depend for their subsistence, livelihood, enjoyment of their culture and survival as indigenous peoples. Large-scale logging and mining operations and intensive commercial, residential and tourist development activities have taken place on these lands traditionally used by the Hul'qumi'num for hunting, gathering, and maintaining their traditional culture, economy and way of life as indigenous peoples. Most destructive among these developments are the private forestry activities which have stripped these lands of original forest and, in many cases, of the second growth forest that succeeded it.

5. Planned future development activities on these ancestral lands threaten further environmental damage and interference with Hul'qumi'num property rights and the continuing cultural survival of the Hul'qumi'num indigenous peoples.

6. The environmental damage caused by this development activity is being made worse by the rapidly increasing number of subdivisions and sales of smaller lots of Hul'qumi'num traditional lands to private entities. British Columbia will host the 2010 Winter Olympic Games. The 2010 Olympics and strong growth in the British Columbia economy are causing a huge influx of residential, commercial, tourist and other forms of development, actively promoted and encouraged by the State. Much of this growth is occurring in and around the traditional territory of the Hul'qumi'num peoples. Several major residential subdivision developments are underway or have been planned for by local and regional governments. Forested lands are being clear cut to make way for these intensive and environmentally destructive activities. Rapidly rising real estate values are increasing the development pressures on the Hul'qumi'num peoples' traditional territory.

7. Hul'qumi'num members fear that their beneficial property interests in these subdivided and settled lands, as well as their ability to continue exercising their traditional and customary methods of fishing, hunting and gathering on these so-called

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to property affirmed in Article XXIII of the American Declaration is essentially the same human right as that provided for in Article 21 of the American Convention. The value of coherence and consistency within the Inter-American system for the protection of human rights mitigates in favor of extending a similar interpretation to both instruments." *Maya Belize* at para. 132 n.135.

"private lands," will be further restricted by the State, which already pursues a policy of vigilantly enforcing the rights of these private land owners under Canada's internal land laws. The failure of the State to secure and protect the property and user rights of Hul'qumi'num members in these lands threatens the enjoyment of their special relationship to their ancestral territories as indigenous peoples and their continuing survival as indigenous peoples.

8. The State-sanctioned grants of Hul'qumi'num traditional lands have been made without prior consultation with the Hul'qumi'num peoples and without duly considering their property and user rights or interests in their traditional territories. No offer of restitution in the form of return or replacement with suitable alternative lands, or payment of just compensation has ever been made by Canada to any of the Hul'qumi'num communities for the unlawful taking of their traditional lands, territories and resources.

9. Despite the State's policy of confiscating their traditional territory without any consultation or recognition of their rights in their ancestral lands, the Hul'qumi'num indigenous peoples continue to exercise, assert, and defend their property, user, self-government and other rights and interests in their traditional lands, territories, and resources through hunting, fishing, gathering, and spiritual and ceremonial activities unique to their culture and indigenous way of life.

10. Canada's confiscation of Hul'qumi'num traditional lands for the benefit of the private railroad corporation and other third parties is part of a long-standing pattern of government neglect, abuse and racist policies directed against the Hul'qumi'num peoples. Communications of protest, made for over one hundred years to the responsible government officials about the grants and the failure of the State to recognize and protect Hul'qumi'num property and user rights in these traditional lands have repeatedly gone unanswered.

11. After thirteen years of futile negotiations, the British Columbia Treaty Commission ("BCTC") process established by the State to settle the territorial claims of indigenous peoples within the province[3] has proven to be completely ineffective in recognizing and protecting the property rights of the Hul'qumi'num indigenous communities in these so-called "private lands." Despite repeated requests by HTG to responsible government officials involved in the BCTC treaty process, the State has adamantly refused to recognize the specific existence of any property rights or other interests based on customary tenure belonging to the Hul'qumi'num indigenous communities in their traditional lands that were confiscated by Canada for the benefit of the railroad company and other private development interests. Instead, Canada steadfastly

[3] *See* Robert Morales, *Canada's British Columbia Treaty Process, supra* note 1 at 1 (App. 1). The BCTC treaty process was established by provincial legislation as part of Canada's comprehensive claims policy for its First Nations indigenous peoples. The primary purpose of the process, as stated in the Federal Policy for the Settlement of Native Claims "is to negotiate modern treaties which provide a clear, certain and long-lasting definition of rights to lands and resources. Negotiated comprehensive claims settlements provide for the exchange of undefined aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements": Canada, Minister of Indian Affairs and Northern Development, *Federal Policy for the Settlement of Native Claims* (Ottawa: Minister of Public Works and Government Service, 1993) at i.

refuses to provide a fair process by which to address the ongoing claims of the Hul'qumi'num peoples to these ancestral communal lands.

12. Effective judicial remedies are foreclosed in this case by numerous adverse Canadian legal precedents, a legal system that has proven itself overtly hostile to indigenous peoples' property rights claims in private lands, and a "loser pays" rule that can be used by the State to impose huge financial penalties on indigenous litigants who are unsuccessful in challenging violations of their rights in Canada's courts. The State's strong-arm negotiating tactics and steadfast unwillingness to consider any mechanism for recourse for infringements on these "private lands" in the BCTC treaty process thus are reinforced by a wholly ineffective Canadian judicial system. Canada's judicial system has totally failed to protect the property rights and other interests based on customary tenure belonging to the Hul'qumi'num indigenous peoples in their traditional lands confiscated by the State. No Canadian court decision has ever recognized the existence of indigenous peoples' property rights in their traditional ancestral lands once those lands have been "privatized" through State-sanctioned grants to third parties. Any possibility of restitution for their lost ancestral lands is only available to the Hul'qumi'num through the treaty process established by the State to settle British Columbia First Nations' property rights claims, yet Canada refuses to even discuss with HTG the claims of the Hul'qumi'num peoples to restitution for the taking of their traditional lands for the benefit of private third parties. All that the member-First Nations of HTG ask of Canada in this case is to provide a fair process by which to address their ongoing claims for restitution of their property rights in the form of return, replacement, or payment of fair compensation for the taking of their traditional lands for the benefit of the E & N Railway corporation and other private parties.

13. The acts and omissions of Canada described in this Petition constitute violations of the right to property, the right to restitution for its taking, the right to cultural integrity, the right to consultation, and Canada's obligation to effectively secure these and other human rights of the Hul'qumi'num indigenous peoples represented by HTG. These rights are affirmed and protected by the American Declaration of the Rights and Duties of Man (the "American Declaration") and other provisions of international law.

14. HTG seeks the Commission's assistance in reversing the acts and omissions of Canada that violate Hul'qumi'num rights and in safeguarding those rights in the future. The Commission's involvement is particularly important since, as set forth below, domestic remedies have proven completely ineffective or unavailable.

II. Jurisdiction

15. The Inter-American Commission on Human Rights has competence to receive and act on this petition in accordance with Articles 1(2)(b), 18, 20(b) and 24 of the Statute of the Inter-American Commission on Human Rights ("Statute").

III. The Victims and the Petitioner

16. The victims in this case are the indigenous peoples of the HTG and members of these First Nations peoples whose property, cultural life and physical well-being are

adversely affected by Canada's unlawful taking of Hul'qumi'num traditional lands, territories and resources. The victims include the following six member-First Nations of the HTG, and the individuals who live in or are otherwise members of these Hul'qumi'num indigenous communities of Canada:

a. Cowichan Tribes;
b. Chemainus First Nation;
c. Penelakut Tribe;
d. Halalt First Nation;
e. Lyackson First Nation; and
f. Lake Cowichan First Nation.

17. The petition in this case is submitted on behalf of the victims by the HUL'QUMI'NUM TREATY GROUP, through the HTG's duly authorized legal counsel. The HTG is an organization that is a registered Society of British Columbia. The HTG's address is 12611-B Trans Canada Highway, Ladysmith, British Columbia, Canada V9G 1M5. The treaty group was established 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 better understanding between indigenous peoples and the general public, improve social and economic independence and promote Hul'qumi'num language and heritage. The HTG's constituency includes all the Hul'qumi'num indigenous peoples of the six First Nations who are the victims in this case.

18. The six individual First Nations who comprise the HTG have a combined population of approximately 6,400 individuals.[4] HTG's member-First Nations are part of a larger group of indigenous peoples in British Columbia, Canada and Washington State; the Coast Salish people.

19. Like other Coast Salish indigenous communities, the HTG's member-First Nations are socially, culturally, and economically inter-connected by marriage, travel, trade and sacred beliefs. The Hul'qumi'num communities represented by the HTG continue to hunt, fish and gather on their traditional lands, even though the bulk of these lands have been taken by the State and granted to third parties. They continue to practice their traditional ceremonies such as the winter dance and maintain and develop their unique cultural identity as indigenous peoples through many other shared spiritual beliefs and religious practices connected to their ancestral lands. They share a common language, sacred songs and stories passed down from generation to generation. They have a unique set of hereditary names they give to their children. Their names for the many special places of spiritual and cultural significance are still remembered and perpetuated throughout their traditional lands and ancestral territories. Through great communal sporting events and spectacles like their famous canoe races, the Hul'qumi'num communities represented by the HTG proudly celebrate their indigenous culture, customs

[4] Data compiled from Department of Indian Affairs and Northern Development, "First Nation Profiles", *available at* <http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_home.htm> (last accessed: February 23, 2007).

and way of life; one that has endured for thousands of years on the North American continent.[5]

20. The HTG is governed by a Board of Directors. The members of the Board are the six Chiefs from the member-First Nations. The current Chiefs are:

a. Chief Harvey Alphonse, Cowichan Tribes;
b. Chief Terry Sampson, Chemainus First Nation;
c. Chief Lisa Shaver, Penelakut Tribes;
d. Chief Bert Thomas, Halalt First Nation;
e. Chief Rick Thomas, Lyackson First Nation; and
f. Chief Cyril Livingston, Lake Cowichan First Nation.

21. The current Chief Negotiator, Robert B. Morales, LL.B., is authorized to act in all matters related to the present case and proceedings before the Inter-American Commission. In his capacity as Chief Negotiator, Mr. Morales has designated Professor Robert A. Williams, Jr. and his associates from the University of Arizona Rogers College of Law Indigenous Peoples Law and Policy ("IPLP") Program as the HTG's legal representative in these proceedings.

IV. Facts

A. The Hul'qumi'num Peoples and Their Lands

The Culture, Customs and Way of Life of the Hul'qumi'num Peoples

22. There are many ties of kinship and connection that weave throughout the Coast Salish world of the Hul'qumi'num indigenous communities represented by HTG. There are also vitally important, life-giving and ongoing ties to the land that have sustained these indigenous peoples, their unique culture and their way of life for thousands of years before there even was a Canada or province of British Columbia.[6]

23. From time immemorial, the Hul'qumi'num Mustimuhw ("peoples") and their ancestors lived and prospered as self-sustaining societies inhabiting a traditional territory stretching from southeast Vancouver Island to the Fraser River on the lower mainland of British Columbia. Oral tradition links the Hul'qumi'num peoples to their territory in the most ancient of times. Archaeological evidence dating back more than 9,000 years shows the Hul'qumi'num peoples in continuous occupancy of their ancestral lands.[7]

24. According to the Hul'qumi'num peoples' sacred creation stories, those they call the "First Ancestors" were the original occupants of their anciently-held territory. These First Ancestors are said to have descended from the sky or emerged from the land or sea at various locations within the Hul'qumi'num traditional territory – places like

[5] Robert Morales, *Canada's British Columbia Treaty Process*, *supra* note 1 at 1 (App. 1). *See* Affidavit of Luschiim Arvid Charlie (App. 4).
[6] *Getting to 100%*, *supra* note 1 at 2 (App. 2).
[7] Robert Morales, *Canada's British Columbia Treaty Process*, *supra* note 1 at 2 (App. 1).

Hwsalu'utsum (Koksilah Ridge), *Skw'aakw'num* (Mount Sicker), *Swuq'us* (Mt. Prevost) and *Silaqwa'ulh* (the mouth of the Chemainus River).

25. Access to their traditional lands, territories and resources is vital to the continuance of the language and culture of the Hul'qumi'num peoples. Community maps show more than 500 Hul'qumi'num place names blanketing the landscape, demonstrating their intimate and ongoing cultural and linguistic connection to local lands, waters and resources.[8]

26. The ocean and the many rivers, lakes and streams included within the Hul'qumi'num traditional territories are an essential part of the ecosystem that supports the subsistence economy and traditional way of life of the Hul'qumi'num peoples.[9] Present-day fishing by spear and by modern techniques not only provides nourishment and sustenance, but also serves important economic, social and ceremonial purposes. In addition, many Hul'qumi'num members continue to harvest a large variety of other marine resources, both as a means of subsistence and economic development. These include clams, oysters and other shellfish, geoduck and sea urchins, among other sea resources.[10]

27. The forest resources of Hul'qumi'num traditional lands also provide vital sustenance to the Hul'qumi'num peoples. The forests continue to be used by the Hul'qumi'num for hunting and for gathering medicinal plants. Besides providing materials for the construction of traditional longhouses and other dwellings, the forests sustain traditional Hul'qumi'num art forms like carving and canoe building. Forest resources provide the unique materials necessary for indigenous artists and carvers to capture and preserve the history and traditions of the Hul'qumi'num peoples in their works and to perpetuate, enjoy and share their culture and heritage.[11]

28. In addition, there are many irreplaceable cultural heritage sites throughout the traditional territories of the Hul'qumi'num that carry deep spiritual and religious significance for these indigenous peoples. There are more than 1,000 identified archaeological sites that include ancient monuments and cemeteries built by ancestors within Hul'qumi'num territory. The vast majority of these are located on what is now called "private property" by the State.[12] This land has been granted by the State to private entities without the consent of the Hul'qumi'num indigenous communities affected and without any form or pretense of prior consultation, or offer of restitution in the form of return, replacement, or payment of just compensation for these so-called "privatized" lands.[13]

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[8] *Getting to 100%, supra* note 1 at 2 (App. 2).
[9] A study of present-day use and perspectives of the Hul'qumi'num indigenous peoples with respect to their traditional territories can be found in Hul'qumi'num Treaty Group, *Shxunutun's Tu Suleluxwtst: Interim Strategic Land Plan for the Hul'qumi'num Core Traditional Territory*, (Ladysmith, B.C.: Hul'qumi'num Treaty Group, 2005) ("*Interim Strategic Land Plan*") (App. 5).
[10] *Id.* at 16. (App. 5).
[11] *See id.* (App. 5).
[12] *Getting to 100%, supra* note 1, at 32 (App. 2).
[13] Robert Morales, *Canada's British Columbia Treaty Process, supra* note 1 at 5 (App. 1).

29. There are also many intangible cultural landscapes and places that, according to Hul'qumi'num traditions, law and oral history, hold central symbolic and sacred significance for the Hul'qumi'num peoples. Cultural landscapes are places where the Hul'qumi'num First Ancestors descended from the sky or where *Xeel's* (the "transformer") marked the land.[14] These cultural landscapes are honored today by Hul'qumi'num peoples as sacred heritage sites due to their unique spiritual significance. These sacred sites commemorate ancestors, venerate the spirit world, and reflect the Hul'qumi'num indigenous peoples' ongoing cultural relationship with their land.

The Hul'qumi'num Customary Land Tenure System

30. The life and continuity of the Hul'qumi'num peoples depend upon an intricate, complex combination of traditional subsistence and cultural practices that are still carried out today upon the traditional lands and territories that they have used and occupied for centuries. The close, intimate, and continuing life-sustaining connection between the Hul'qumi'num and their land is fundamental to their cultural identity, integrity, way of life and very survival as indigenous peoples.

31. The present-day connection of the Hul'qumi'num peoples to their traditional lands, territory, and resources is based on their ongoing history of use, occupancy and customary laws of land ownership and is deeply rooted in their cultural fabric. Their *snuw'uy'ulh* (Hul'qumi'num laws) tell the members of these indigenous communities that their inalienable connection to the land and resources is not only their fundamental human right belonging to them as indigenous peoples; it is their responsibility as Hul'qumi'num Mustimuhw.

32. Hul'qumi'num land use patterns are governed by a complex system of customary rules that form part of the social and political organization of Hul'qumi'num communities. Like other Coast Salish communities, the customary land tenure system of the Hul'qumi'num is a three-fold structure of residence groups' common areas; corporate descent group (family) owned sites and territories that are held and controlled by named "tribes" of villages occupying watershed or island-shed regions.[15] Under the Hul'qumi'num customary land tenure system, there are certain lands owned as property by descent groups whose members have exclusive rights to the areas and whose leaders are the stewards of corporately held lands on behalf of the co-heirs.[16]

33. Other lands are held in common by the local village or tribe under Hul'qumi'num customary land tenure law. Descent group sites are usually geographically localized, highly productive, defensible and capable of being enhanced by labor or technology. These sites often are located in areas some distance from the village. The commonly held lands of these residence groups are much like those properties held by the family groups;

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[14] *Id.* at 3 (App. 1).
[15] *See* Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World*, Chapter 6: Local Histories of Land Alienation and Coast Salish Resistance, Chapter 7: Coast Salish Land Tenure: Descent and Residence Group Properties and Chapter 8: Coast Salish Territories **(**Ph.D. Thesis, McGill University 2005) [unpublished] (App. 6).
[16] *Id.* at 273 (App. 6).

34. Other Hul'qumi'num resource areas are jointly owned by two or more residence groups. This type of customary shared-use property rights arrangement usually occurs in areas some distance from the permanent villages, where two or more Hul'qumi'num communities have a long-established practice and tradition of amicable joint use and occupation of an area.[18]

35. These jointly-owned resource sites of the named "tribes" are territories in which others may share, use or occupy only through the rules and norms of Hul'qumi'num customary land tenure law.[19] Under Hul'qumi'num law, all of these different types of traditional customary land uses are regarded as property rights held by the Hul'qumi'num peoples, and include fishing, gathering, hunting, economic and ceremonial uses of specific sites.

36. The traditional land use and occupancy of each of the HTG member-First Nations is illustrated by maps that are included in *Shxunutun's Tu Suleluxwtst: Interim Strategic Land Plan for the Hul'qumi'num Core Traditional Territory.*[20]

B. The Unlawful Taking and Granting of Hul'qumi'num Lands

37. Beginning in the nineteenth century colonial era, Canada began unilaterally granting the rights, title and interests in the traditional lands and resources of the Hul'qumi'num peoples to private third parties without ever consulting them or seeking their consent. The State, despite repeated requests from the Hul'qumi'num, has refused to return these lands. Nor has the State ever offered suitable replacement lands or payment of just compensation to the Hul'qumi'num peoples in return for a valid extinguishment of their property rights and interests in these lands based on their customary tenure. In fact, Canada has refused to recognize or even discuss the ongoing claims of the Hul'qumi'num to any form of property right or interests in their confiscated ancestral lands.

38. The colonial government originally relied upon the British Navy's gunboats to terrorize and pacify the Hul'qumi'num peoples when they sought to resist the State's unlawful taking of their traditional lands.[21] In the late nineteenth century, once the military suppression and pacification of the Hul'qumi'num was complete, the colonial government unilaterally established an ad hoc system of small Indian band reserves representing a tiny fraction of the traditional lands and property rights belonging to these

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[17] *Id*. at 278 (App. 6).
[18] *Id*. at 280 – 83 (App. 6).
[19] *Id.* at 357 – 82 (App. 6).
[20] *Interim Strategic Land Plan*, *supra* note 9, at 108 – 13 (App. 5).
[21] *See* B. Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-90*, Chapter 4: The Smouldering Volcano (Vancouver: University of British Columbia Press, 1984) at 50 – 72 (App. 7).

communities.[22] These tiny reserve lands were forced upon the Hul'qumi'num communities without any regard for the Hul'qumi'num way of life, political institutions, familial organizations, property rights or customary land tenure laws.

39. In many cases, government officials justified their harsh actions in denying the property rights of the Hul'qumi'num peoples to their traditional lands, territories and resources in the most blatantly racist of terms. Canadian government officials in the late nineteenth century consistently expressed the desire to bring about the complete dispossession of First Nations peoples in British Columbia. Joseph Trutch, the Commissioner of Land Works for the colonial government in British Columbia, in his 1867 report to the Governor stated:

> The Indians regard these extensive tracts of land as their individual property but of by far the greater portion thereof they make no use whatever and are not likely to do so; and thus the land, much of which is either rich pasture or available for cultivation and greatly desired for immediate settlement, remains in an unproductive condition … [23]

Trutch, who played a key role in formulating the colonial government's policies that led to the unilateral granting of Hul'qumi'num traditional lands to third parties without consultation, permission or payment of just compensation, "personified settler interests and attitudes, considering Indians 'as bestial rather than human,' 'as uncivilized savages,' as ugly and lazy, and as 'lawless and violent.'"[24]

40. The traditional territories, customary land tenure laws and subsistence patterns of the Hul'qumi'num peoples extend well beyond the tiny reserve boundaries that were unilaterally imposed by the State following the dispossession of these indigenous peoples in the nineteenth century. Currently, aside from these small government-owned and controlled reserves, the Hul'qumi'num enjoy no recognized property rights in their traditional territories confiscated and then "privatized" by the State. In many cases, their access to these traditional lands and resources is limited, restricted, or even prohibited by Canada's internal laws. In fact, they can be and have been arrested and criminally prosecuted by the State simply for attempting to use their traditional lands and resources according to their customary tenure and laws.[25]

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[22] *See* C. Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Vancouver: Talon Books, 1999) at 308 (App. 8). In May 1867, Surveyor General Benjamin W. Pearse confirmed boundaries that reduced the Cowichan Reserve lands to a mere 2705 acres. *See generally* D.P. Marshall, *Those Who Fell from the Sky* (Duncan, B.C.: Cowichan Tribes, 1999) at 129 (App. 9).

[23] P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989*, Chapter 4, Segregation and Suppression, 1864-87 (Vancouver: UBC Press, 1990) at 43 (App. 10). In 1879, Trutch informed the governor as follows: "The title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by the Government, but on the contrary, is distinctly denied." *Id.* at 39.

[24] *Id.* at 39 (App. 10).

[25] *See, e.g., R. v. Sampson*, [1995] B.C.J. No. 2634; *R. v. Johnnie*, [1996] B.C.J. No. 74; *R. v. Seward*, [1996] B.C.J. No. 3247 and *R. v. Jimmy*, [2004] B.C.J. No. 1555. In these cases, the defendants were arrested and prosecuted for attempting to exercise their aboriginal rights to either hunt or fish.

41. By far, the largest confiscatory grant of Hul'qumi'num traditional territory by the State was the "E & N Railway grant", which occurred in 1884. This grant of approximately 237,000 hectares – 70% of the Hul'qumi'num territory – was made to benefit a private railroad corporation and to facilitate more rapid colonization of Vancouver Island. Canada's seizure of almost three-quarters of the entire Hul'qumi'num traditional land base was ratified by corresponding federal and provincial legislation.[26]

42. Under Canada's internal land laws of the time (which incorporated familiar colonial era racist legal principles and discredited notions like the "doctrine of discovery" and *terra nullius*),[27] the grants to the E & N Railway corporation and other third parties supposedly "privatized" the majority of Hul'qumi'num traditional lands. These grants made way for further grants and subdivisions of Hul'qumi'num traditional lands to third parties, and led to large-scale mining, forestry and other industrial, commercial and residential uses and encroachments throughout the traditional territories of the Hul'qumi'num peoples.

43. Although the lands confiscated for the benefit of private entities included much of the Hul'qumi'num traditional territory (85%), Canada did not bother to seek or obtain a surrender of Hul'qumi'num property rights and other interests based on customary tenure in these lands. Nor was the granting of these lands preceded by meaningful consultations with the Hul'qumi'num indigenous communities. They were simply confiscated and sold for the benefit of private third parties that were invited by the State to invade and colonize the lands of the Hul'qumi'num indigenous peoples.

44. Government officials never considered Hul'qumi'num land use patterns, cultural practices, or customary laws regarding land tenure in the affected areas when they granted the lands to support the construction of the E & N Railway or for the benefit of other private parties. No accommodations for Hul'qumi'num property rights and interests have ever been made as the railway line and surrounding lands have been developed through subsequent grants and regrants of Hul'qumi'num traditional territories to third parties. As a result, most of the land in the 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 ever having been formally extinguished, and without any form of restitution ever being offered to the communities affected. To this day, the Hul'qumi'num peoples have continued to assert, exercise and defend their fundamental human rights as indigenous peoples in their traditional lands granted to the E & N Railway and other private entities, despite the State's ongoing denial of their repeated claims and demands for recognition, restitution, or at the least, a fair process for addressing their claims for the taking of their property.

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[26] *An Act Relating to the Island Railway, the Graving Dock and Railway Lands of the Province (Settlement Act*), S.B.C. 1884, c. 14.

[27] *See generally* B. Slattery, *Understanding Aboriginal Rights* (1987) 66 Can. Bar Rev. 727; Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

C. The Negative Impact of the State's Grants on Hul'qumi'num Lands

45. The State's grants to the E & N Railway and other private entities cover areas of traditional Hul'qumi'num lands that include valleys, forests, rivers, streams and coastal areas that are critical parts of the natural environment upon with the Hul'qumi'num people have depended and continue to depend for their subsistence, enjoyment of their culture and survival as indigenous peoples.

46. Throughout the traditional territory of the Hul'qumi'num, State "privatization" has irretrievably damaged forests and essential water supplies, straining plant and wildlife populations and threatening access to and use of Hul'qumi'num natural resources and sacred sites. Pollution and noise from private logging operations and commercial and residential developments adversely affect and interfere with Hul'qumi'num hunting, fishing and gathering practices, as well as their ceremonial practices, all of which are essential to Hul'qumi'num cultural and physical survival.[28]

47. The State's continuing practice of allowing the granting and regranting of Hul'qumi'num traditional territory and property rights without offering any form of restitution and without engaging in any form of meaningful consultation with the indigenous communities affected has led to the wholesale destruction and spoliation of valuable forest lands and streams. Large-scale logging and mining operations have taken place on forest lands traditionally used by the Hul'qumi'num for subsistence fishing, hunting and gathering, and important ceremonies and other customary practices.[29]

48. Many of the stream beds in these forests have been choked with discarded logs and timber residue causing many negative environmental effects on stream flow and fish and wildlife populations. As a result of these environmentally destructive practices, many of these forests and streams are no longer usable by Hul'qumi'num communities. Once rich ecosystems have been depleted over the years by over-harvesting, pollution and ongoing development. Accordingly, the Hul'qumi'num peoples have lost opportunities to practice, and prosper from, their traditional ways of life on their traditional lands.[30]

49. Of all the forest lands in Hul'qumi'num territory, 12% are currently labeled as Crown lands (owned and controlled by the State) and 88% are so-called "privately held" lands. As a result of the intense development and environmental destruction that has resulted from the State's policies of granting Hul'qumi'num traditional lands to third parties, only 0.5% of the Hul'qumi'num territory remains as original old growth forest.[31]

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[28] Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World*, Chapter 2: The Island Hul'qumi'num Coast Salish People in the 21st Century (Ph.D. Thesis, McGill University 2005) [unpublished] at 67-72 ("Thom Chapter 2") (App. 11). *See also Interim Strategic Land Plan, supra* note 9, at 9, 31, 41 (App. 5).

[29] Thom Chapter 2, *supra* note 28 at 67-72 (App. 11). *See also Interim Strategic Land Plan, supra* note 9, at 19, 42 (App. 5).

[30] Thom Chapter 2, *supra* note 28 at 67-72 (App. 11). *See also Interim Strategic Land Plan, supra* note 9, at 31, 42, 43 (App. 5).

[31] *Canada's British Columbia Treaty Process, supra* note 1 at 5 (App. 1).

50. The threat of future and even greater lasting environmental damage is intensified by the inability or unwillingness of government officials to adequately monitor and enforce its own environmental standards regarding the logging and other development activity occurring on Hul'qumi'num traditional lands. So-called "private lands" are the most complete form of right that can be conveyed to private parties under Canada's land laws. Furthermore, few environmental regulations apply to these private forest lands in Hul'qumi'num territory. As a general rule under Canada's constitution and internal laws, private forest owners may harvest their timber and manage their lands as they wish,[32] without any regard for Hul'qumi'num property rights in these traditional lands used and occupied by these indigenous peoples for centuries. They can refuse access, erect fences and barriers, and even have Hul'qumi'num peoples arrested by the State as trespassers on their own traditional lands![33]

51. The environmental damage caused by the private logging activity is being exacerbated by the subdivision into smaller lots and further-intensified development activities presently occurring on these traditional Hul'qumi'num lands. British Columbia will host the 2010 Winter Olympic Games. Already, a huge influx of residential, commercial, tourist and other forms of development, actively promoted and encouraged by the State, is occurring in and around the traditional territory of the Hul'qumi'num peoples. Several major residential subdivision developments are underway or are in the early planning stages. Rapidly rising real estate values are increasing the practice of "forest liquidation" on so-called "private lands." The resulting development pressure on the Hul'qumi'num peoples' traditional territory is one of the primary precipitating causes of this Petition to the Commission.[34]

52. If Hul'qumi'num property and user rights continue to remain unsecured and unprotected by the State, large scale encroachment onto the lands that the Hul'qumi'num indigenous communities have used for centuries for their subsistence, religious, spiritual and other cultural activities is certain to intensify as the 2010 Olympic Games approach. Many of the subdivided parcels in forested lands will be clear cut for large-scale residential and other intensive types of industrial, tourist and commercial development. The ability of Hul'qumi'num members to exercise their traditional methods and customary practices of hunting, fishing and gathering on these lands will be further

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[32] Daoewi Zhang, "Forest Tenures and Land Value in British Columbia" (1996) 2:1 *Journal of Forest Economics* 7, 7-12 (App. 12).

[33] *See* note 25 *supra.*

[34] Most recently, Toronto-based Brascan Financial Corporation announced completion of a $1.2 billion (Canadian) acquisition of 635,000 acres of "high quality, freehold timberlands" on Vancouver Island in areas in or near traditional Hul'qumi'num territory. As Brascan states in its own corporate announcements, many of these lands "are viewed to have greater value in non-timber use" and it expects "that the constantly growing rural-urban interface will result in ongoing land sale opportunities." *See* "Weyerhaeuser's BC Legacy of Forest Liquidation" (App. 13), *available at* <http://www.forestcouncil.org/tims_picks/view.php?id=1103> (last accessed: December 27, 2006). As one forestry expert for the Western Canada Wilderness Committee has noted, "Brascan has already said it will sell off 13,000 hectares of forest land near urban centres for residential development. That means the loss of Arbutus-Douglas Fir ecosystems and endangered species such as the coastal screech owl which live there." *See* "Brascan –Weyco buyout triggers hopes, fears on island" (App. 14), *available at* <http://www.wildernesscommitteevictoria.org/index.php?action=fullnews&showcomments=1&id=143> (last accessed: December 27, 2006).

restricted by the State, which pursues a policy of vigilantly enforcing the rights of these private land owners under Canada's land laws.

53. The ability of Hul'qumi'num indigenous peoples to visit their sacred sites and perform their cultural and religious ceremonies on these private lands will also likely be prohibited entirely once the State allows these lands to fall into the hands of numerous, smaller parcel individual land owners.[35]

54. The provincial government currently holds the authority to protect First Nations' archaeological and cultural heritage sites based on their scientific, cultural and public significance to Canadian history.[36] However, indigenous burial grounds and other heritage sites have not been accorded the same kind of legal protection and respect as non-indigenous cemeteries in British Columbia and Canada. The province has frequently permitted development of many of these sites for private land use, despite repeated protests from the affected Hul'qumi'num communities.[37] The protection of Hul'qumi'num sacred sites is essential to the preservation and perpetuation of Hul'qumi'num culture.

55. The social and religious values of the cultural landscapes regarded as sacred to the Hul'qumi'num indigenous peoples have never been officially recognized in Canada. These sacred places, essential to the preservation of Hul'qumi'num culture, remain at risk from the ruinous impacts of modern land-use and development permitted by the State to occur on "private lands" situated within the traditional territory of the Hul'qumi'num indigenous peoples.

56. Recent events in Hul'qumi'num territory have demonstrated the destructive threat to Hul'qumi'num sacred sites posed by so-called "private" landowners who are inadequately regulated by the State. This continuing pattern and increasingly occurring practice of Canada in allowing the environmental degradation and desecration of Hul'qumi'num sacred sites and other cultural resources is also a primary precipitating cause of this Petition to the Commission.

57. One urgent example that HTG seeks to bring to the attention of the Commission concerns Walker Hook, known as *Syuhe'mun* to the Hul'qumi'num peoples, located on Salt Spring Island within the traditional territory of the Hul'qumi'num. The portions of Walker Hook that lie above the high-tide mark are owned by a private landowner who

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[35] As just one example of the escalating environmental threats to Hul'qumi'num traditional lands, in 2003 during the construction of a $40 million dollar luxury Gulf Island resort, a private land developer, Poets Cove Resort and Spa, illegally excavated and removed massive amounts of archaeological deposits containing ancient human remains and artifacts from a recorded archaeological site (DeRt-044) and subsequently dumped these remains in the resort's tennis courts, parking lots and new roadbed. In Coast Salish life, the protection of the dead is an integral part of their customary laws, beliefs and cultural practices. As stated by Robert Morales, Chief Negotiator of the HTG "these places have to be respected and protected. You can't do archaeology with real estate agents and backhoes. But as more and more development is being proposed in British Columbia, there is greater potential for our value systems to clash". M. Cernetig, "Destroying Middens Not to be Taken Lightly" *The Vancouver Sun* (August 14, 2006) A3 (App. 15).

[36] *Heritage Conservation Act*, R.S.B.C. 1996, c. 187.

[37] *Getting to 100%*, *supra* note 1 at 33 (App. 2).

was permitted by the State to lease the land to a commercial hatchery. During the construction of the project, the remains of Hul'qumi'num ancestors were found.

58. The threatened development and desecration of an ancestral Hul'qumi'num burial ground led to vigorous protests from Hul'qumi'num elders and religious and spiritual leaders. The demonstrations even resulted in the arrests by the State of several protestors who were simply supporting the most basic and universally recognized human right of any group of human beings to respect for their dead. The State's Ministry of Water, Land and Air Protection nonetheless issued an approval to the private corporation to discharge the waste products and effluent from the fish farm directly onto the lands containing the remains of the Hul'qumi'num ancestors![38]

59. The Hul'qumi'num elders and religious and spiritual leaders filed separate administrative appeals as required under Canadian law against the decision, arguing that the effluent discharge would permanently destroy the cultural and spiritual values of *Syuhe'mun*. They argued that the discharge of effluent to a sacred site, such as *Syuhe'mun*, would be an affront to their indigenous culture and history and that it would prevent the Hul'qumi'num from using the site for spiritual practices, thereby depriving them of their basic human rights as indigenous peoples.[39]

60. The State's Environmental Appeal Board (which contained no citizen representatives from any of the State's indigenous communities) issued a unanimous ruling against the Hul'qumi'num elders. In a case which had totally exhausted the limited financial resources available to the elders and which had caused demonstrations of protest and arrests in opposition to the State's actions, the Board found that the evidence and testimony failed to prove to the Board's satisfaction that indigenous peoples have maintained an ongoing connection to *Syuhe'mun* as a sacred burial site, integral to the distinctive culture of the Hul'qumi'num![40] The State agency also concluded that the elders did not provide enough evidence to establish that the ability of the Hul'qumi'num to conduct their traditional spiritual and religious practices requires cessation of the effluent discharge upon their ancestor's graves![41] The elders have no money left to pursue further fruitless appeals in a hostile Canadian legal system.[42]

61. The economic self-sufficiency of the Hul'qumi'num peoples has also suffered gravely as a result of the E & N Railway land grants. Without any recognized property rights in their traditional land base to rely upon, and lacking the right of access to the natural resources needed to sustain their indigenous way of life under the internal laws of the State, the Hul'qumi'num member-First Nations are in fact among the poorest communities in all of Canada.

62. The Community Well-Being Index has been developed by Canada to measure the well-being and livelihood of Canadian communities. Various indicators of socio-

[38] *Penelakut First Nation Elders v. British Columbia (Regional Waste Manager)*, [2004] B.C.E.A. No. 34 (App. 16).
[39] *Id* at para. 194 (App. 16).
[40] *Id*. at para. 219 (App. 16).
[41] *Id*. (App. 16).
[42] Affidavit of Renee Racette, lawyer for the Penelakut Elders (App. 17).

economic well-being, including education, income, housing, and labour force activity were derived from the 2001 Census of Canada and combined to give each community a well-being "score" between 0 and 1. Out of 486 communities surveyed, with 1 being the highest and 486 being the lowest, six Hul'qumi'num communities scored between 448th and 482nd.[43]

63. Currently, only approximately 50% of Hul'qumi'num members reside on the tiny parcels of reserve lands unilaterally set aside by the State after seizure of the bulk of their traditional territory in the nineteenth century.[44] For the most part, these small reserve lands are over-crowded, contain woefully inadequate housing and lack even the most basic infrastructure and amenities enjoyed by the vast majority of non-indigenous communities in Canada. The cultural integrity and survival of the Hul'qumi'num indigenous peoples depend upon the perpetuation of their indigenous way of life upon their traditional lands. Presently, however, only approximately 15% of the Hul'qumi'num traditional territory remains unencumbered by private land titles granted by the State.

64. The State, despite repeated requests and appeals by HTG, has adamantly refused to discuss the recognition or protection of Hul'qumi'num property and user rights in these so-called "private lands" granted to the railroad company and other third parties. Government officials have made it plain on repeated occasions that the traditional lands belonging to indigenous peoples in British Columbia unlawfully seized and parceled out to third parties by the State are not part of the BCTC treaty negotiation process.[45] HTG's latest effort to initiate discussions with Canada on the issue came after waiting nearly eight months for the government to respond to a specific request made by HTG negotiators at the treaty table in February 2006. The request was renewed once again in writing to responsible government officials after this long period of delay, this time by letter dated October 2, 2006. A prompt written response was requested from the government.[46] When no response came after waiting for over two months, HTG enquired again in writing in December 2006 whether the State was prepared to discuss the E & N Railway grant.[47] When BC and Canada finally replied to the HTG's requests in January 2007, their responses were utterly evasive and self-serving in addressing HTG's concerns regarding these "private lands."[48] British Columbia's letter of January 19, 2007 stated

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[43] Indian and Northern Affairs Canada, *Measuring First Nations Well-Being: The Human Development Index (HDI) and the Community Well-Being Index (CWB), available at* <http://www.ainc-inac.gc.ca/pr/ra/index_e.html> (last accessed: December 27, 2006). In 1996, Canada was ranked number one in the world on the United Nations Human Development Index. However, Canada's indigenous peoples ranked a distant 63rd on the same index according to the Canadian Department of Indian Affairs Research and Analysis Directorate. Robert Morales, *Canada's British Columbia Treaty Process, supra* note 1 at 6 (App. 1).

[44] Data compiled from Canada, *2001 Community Profiles*, (Ottawa: Statistics Canada, 2002).

[45] Affidavit of Robert Ben Morales, Chief Negotiator, Hul'qumi'num Treaty Group (App. 19).

[46] Letter from Robert Morales, Chief Negotiator, Hul'qumi'num Treaty Group, to Dan Goodleaf, Chief Federal Negotiator, Federal Treaty Negotiation Office, and Terry Clark, Provincial Negotiator, BC Treaty Negotiation Office, dated October 2, 2006 (App. 18(a)).

[47] Letter from Chiefs Harvey Alphonse, Terry Sampson, Lisa Shaver, Rick Thomas, James Thomas and Cyril Livingstone to Dan Goodleaf, Chief Federal Negotiator, Federal Treaty Negotiation Office, and Terry Clark, Provincial Negotiator, BC Treaty Negotiation Office, dated December 19, 2006 (App. 18(b)).

[48] Letter from Dan Goodleaf, Chief Federal Negotiator, Federal Treaty Negotiation Office to Robert Morales, Chief Negotiator, Hul'qumi'num Treaty Group, dated January 17, 2007 (App. 18(c)); Letter from Terry Clark, Provincial Negotiator, BC Treaty Negotiation Office, January 19, 2007 (App. 18(d)).

that the issue of compensation for the E & N land grant is technically "on the table," but only because it has been raised by HTG. However, the province reiterated that it "does not approach land negotiations as a matter of compensating First Nations for past dispositions of Crown land." [49] The State's refusal to address past grants of these "private lands" in negotiations means that the issue remains effectively "off the table." Thus, the lands regarded as having been privatized by the government, comprising the bulk (approximately 85%) of all Hul'qumi'num traditional territory are unavailable for treaty settlement purposes as far as Canada is concerned.[50]

D. Lack of Recognition and Protection of Hul'qumi'num Indigenous Lands

65. Canada's outright seizure of the bulk of Hul'qumi'num traditional lands and resources for the benefit of the private railroad corporation and other third parties, with no regard for Hul'qumi'num property rights and customary land tenure and without any effort at restitution through return, replacement or payment of just compensation, is part of a larger, long-standing pattern of government neglect and abuse on the part of the State. Canadian courts, administrative agencies and government officials have consistently refused to recognize and protect indigenous peoples' property rights or interests in their traditional lands on the basis of customary tenure once those lands have been confiscated by the State and granted to private third parties such as the E & N Railway.

66. "Aboriginal title" is the term commonly used in Canadian law to refer to indigenous peoples' property rights of ownership in their traditional lands.[51] For over a century, the State's officially declared policy in British Columbia has been to deny the existence of indigenous peoples' aboriginal title or any other form of user right or interest in land based on indigenous customary tenure. According to Canada, the assertion of property rights by the Hul'qumi'num indigenous peoples in their traditional lands, territory and resources granted to the E & N Railway or any other private party is "incompatible" with, and effectively extinguished by, Canada's formal system of land titling, leasing, and permitting under its internal laws:

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[49] Letter from Dan Goodleaf, *supra* note 48.

[50] The State's policy and unilaterally dictated negotiating "mandates" on so-called "private lands" have been made clear to First Nations, including the six First Nations represented by HTG, on numerous occasions. As just one definitive example, a provincial referendum passed by huge majorities of the province's non-indigenous voters directed the provincial government to exclude private property from any treaty settlement negotiated as part of the BCTC process. The government's position is that it is legally bound to uphold the will of the voters in this referendum, which was universally opposed by the province's First Nations. *See The Honourable Claude Richmond, Speaker of the Legislative Assembly, Province of British Columbia, Treaty Negotiations Referendum, Results, July 3, 2002, available at* <http://www.elections.bc.ca/referendum/finalresults.pdf> (last accessed: December 27, 2006) (App. 20). *See also First Nations Summit Statement on the BC Treaty Making Process Presented to Premier Gordon Campbell and Members of the Provincial Parliament, August 17, 2001* at 2, *available at* <http://www.fns.bc.ca/pdf/FNSAug17issues.pdf> (last accessed: December 27, 2006) (App. 21) ("We have been advised by First Nations that until further notice the new provincial mandate prohibits provincial negotiators from discussing any of the following key issues at treaty tables….The inclusion of fee simple lands as Treaty Settlement Lands on a willing seller/willing buyer basis.").

[51] *See generally* B. Slattery, *Understanding Aboriginal Rights, supra* note 27, at 729.

> In the Crown's view, if the petitioners were to challenge the fee simple owner's title, such a challenge would not succeed either because of the inherent incompatibility of fee simple and aboriginal title or because the infringement of aboriginal title would be justified. … The Crown also submits that aboriginal title to the Removed Lands may have been extinguished as a result of the Federal Crown grant in 1887 to the Esquimault and Nanaimo [E & N] Railway…. With respect to aboriginal rights short of title, [the Crown] argued that any aboriginal rights exercised…on the Removed Lands are at the sufferance of the private landowner, which can at any time prohibit access to its private property. He further submitted that aboriginal rights are subject to the right of the fee simple landowners to put their lands to uses that are visibly incompatible with the exercise of aboriginal rights, such as the harvesting of commercial timber.[52]

67. With only a few minor exceptions, treaties were never negotiated in British Columbia with most First Nations. Indigenous peoples' property rights and interests based on customary tenure and continuing use and occupation therefore remained undefined and completely unprotected in the province under Canadian law.[53] The provincial government of British Columbia consistently asserted and maintained that all indigenous property and user rights that might have once belonged to indigenous peoples in the province had been extinguished, despite any express statutory or judicial authority to support its extreme rights-denying position.[54]

68. Even today, evidence of the State's lack of good faith toward First Nations in British Columbia can be found reflected in the government's continuing policies of denial and refusal to recognize the existence of indigenous peoples' property and user rights in their traditional lands. Despite overwhelming evidence of continuing use and occupancy by indigenous peoples of their traditional territories, the government's Crown attorneys have filed Statements of Defense expressly denying the existence of aboriginal title in numerous court cases.[55] In addition, the State has asserted in litigation that any occupation by indigenous peoples has not been continuous, due to overlapping traditional territories.[56] The State consistently argues that aboriginal title is incompatible with Crown sovereignty[57] and fee simple private lands.[58] Finally, and perhaps most damaging in terms of revealing the State's lack of good faith and true attitudes toward indigenous peoples' human rights in British Columbia, are the Crown attorneys' repeated denials in litigation involving aboriginal title and property rights claims of the existence of a First Nation as a distinct cultural or political entity.[59] In other words, the State's official legal

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[52] *Hupacasath First Nation v. British Columbia*, [2005] B.C.J. No. 2653, 2005 B.C.S.C. 1712 at paras. 160, 162, 165.
[53] *See Gitanyow First Nation v. Canada*, 66 B.C.L.R. (3d) 165 (B.C.S.C. 1999) at paras. 12 – 15.
[54] *See* P. Tennant, *Aboriginal Peoples and Politics*, *supra* note 23, at 52 (App. 10).
[55] Memo re Crown Defences in Aboriginal Rights Cases from Braker & Company Barristers and Solicitors to First Nations Summit (9 September 2005) **(**App. 22).
[56] *Id.* at 2 (App. 22).
[57] *Id.* at 3 (App. 22).
[58] *Id.* (App. 22).
[59] *Id.* at 5 (App. 22).

position in these cases is that the indigenous peoples bringing these claims for recognition of their aboriginal title and property rights under Canadian law do not even exist in British Columbia!

E. Hul'qumi'num Efforts to Protect their Traditional Territory

69. Despite the overt hostility of the State's legal and political system to their claims, the Hul'qumi'num peoples have a long history of vigorously defending their traditional territory, property rights, and resources from attacks and repeated violations by Canada.[60] Their human rights struggle for recognition of their rights in their traditional lands and protection of their cultural survival as indigenous peoples continues today.[61]

70. Between 1927 and 1951, under the terms of Canada's national legislation called the *Indian Act*, [62] indigenous peoples could not even legally hire a lawyer to bring a claim against the Crown without the Government of Canada's permission. When those provisions of the *Indian Act* were finally repealed, the Hul'qumi'num peoples, like many indigenous peoples in Canada, began to pursue their outstanding grievances against Canada in legal and political forums.

71. Beginning in the 1970s, indigenous peoples throughout Canada brought a number of legal challenges to Canada's laws and policies in the courts. Instead of gunboats and racist colonial policies aimed at the extermination of their traditional way of life, indigenous peoples found themselves confronting a judicial system so intractable and hostile to the property rights claims of First Nations that a landmark 1990 United Nations Human Rights Committee decision condemning Canada's treatment of its indigenous peoples, *Ominayak and the Lubicon Lake Band v. Canada* ("*Lubicon Lake Band*")[63], recognized that "the road of litigation" in Canada's judicial system would not have constituted "an effective remedy" for the protection of indigenous peoples' human rights.[64]

72. After nearly two decades of drawn out litigation efforts brought by First Nations in British Columbia (costing these impoverished communities millions of dollars in attorneys' fees), several court rulings and decisions were issued that suggested that indigenous peoples' property rights in their traditional lands indeed might still exist in some form in the province.[65] The provincial government of British Columbia had little choice but to finally abandon its long-held position of refusing to negotiate the existence of indigenous peoples' long-asserted claims to property rights on the basis of traditional

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[60] After repeated failures in their efforts to seek redress from the provincial and federal governments of Canada, representatives of the Cowichan and other Hul'qumi'num bands traveled to London in 1909 to petition the British Crown to recognize their property rights in their traditional lands, but they were not granted relief: B. Thom, *supra* note 15, at chapter 6 (App. 6).
[61] *Id.*
[62] *An Act to Amend the Indian Act*, S.C. 1926-27, c. 32 (17 Geo. V.) para. 6 (App. 23).
[63] Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).
[64] *Id.* at para. 31.1.
[65] *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313; *Guerin v. Canada*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

use and occupancy, or "aboriginal title and rights" in the domestic legal terminology, with First Nations groups.

73. In December 1990, British Columbia finally agreed to participate in tripartite treaty negotiations between First Nations, the province, and the federal government,[66] leading to the execution of the British Columbia Treaty Commission Agreement and the passage of implementing legislation, the *British Columbia Treaty Commission Act*, S.C. 1995 c. 45 and the *Treaty Commission Act*, R.S.B.C. 1996, c. 461, by the federal and provincial governments respectively.

F. Failures of the State's Treaty Process to Protect HTG Property Rights

74. The Hul'qumi'num member First Nations of the HTG have participated in good faith in the BCTC treaty process for more than thirteen years, seeking recognition, protection and redress for their traditional lands that were confiscated by Canada and then granted to the E & N Railway and other third parties. Under the BCTC process, the State "loans" money to First Nations to participate in the treaty negotiations, with the condition that it will deduct those outstanding loan amounts from any future treaty settlement. In other words, the member-First Nations of HTG are literally paying the State to participate in negotiations for the recognition and restitution of some small portion of what was illegally taken from them by Canada in the nineteenth century colonial period!

75. HTG has now borrowed over $13 million in outstanding loans from the State to participate in the BCTC treaty process![67] These huge loan amounts are necessary in order to conduct the type of sophisticated and highly complex historical, legal, geographical, ethnographical and other types of research required to participate meaningfully in these negotiations involving the future cultural survival and integrity of the Hul'qumi'num indigenous peoples. After all this time and money spent, the HTG has nothing to show for its efforts, expense, and legal liabilities incurred in the BCTC treaty process because the government refuses to negotiate over or even discuss the issue of restitution for the taking of the E & N Railway lands from the Hul'qumi'num peoples.

76. The State's officially declared negotiating policy, repeated in numerous statements to the First Nations participating in the BCTC treaty process,[68] is that so-called "private lands" granted to third parties are not open for discussion by the State. Despite repeated requests by HTG for good faith negotiations on this central issue of the negotiations (as far as its member-First Nations are concerned), Canada unilaterally insists that any claim for restitution in the form of the return or replacement of

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[66] British Columbia Treaty Commission, "British Columbia Treaty Commission Agreement," *available at* <http://www.bctreaty.net/files_3/bctcagreement.html> (last accessed: December 27, 2006).

[67] B.C. Treaty Commission, *Amendment of Funding Amounts Agreement Number Two* (2006/2007 fiscal year) (App. 24).

[68] Importantly, a large number of First Nations in British Columbia, representing roughly a third of the indigenous peoples in the province, have refused to participate in the BCTC process. *See* BC Treaty Commission, *Negotiation Update*, *available at* < http://www.bctreaty.net/files_3/updates.html> (last accessed: December 28, 2006).

Hul'qumi'num traditional lands granted to the E & N Railway is not a subject open to negotiation.[69]

77. Canada also refuses to negotiate with HTG over the central issue of payment of just compensation as a form of restitution for these Hul'qumi'num traditional lands that it seized for the benefit of private parties. While HTG and other First Nations have consistently asserted the fundamental principle that compensation is an issue that must be addressed at the treaty table, Canada and the provincial government of British Columbia counter that compensation is a legal concept and so has no place in what the State calls "political negotiations."[70] "The BC treaty process has always been guided by the principle that private property (fee simple land) is not on the negotiation table."[71]

78. Because of the huge costs ($13 million to date and rising) of HTG's loans from the State, and the fact that these monies will be deducted from any final treaty settlement, a lack of good faith on the part of Canada and the province in the negotiations can have serious financial consequences for the member-First Nations of the HTG. Bad faith on the State's part in refusing to recognize or at the least, even discuss the legitimate claims of the Hul'qumi'num peoples to their lost traditional lands contributes to delay and deadlock in the negotiations. Stalled negotiations can only benefit the financial interests and leverage of the government as HTG must continue to borrow more money in order to continue its participation despite the lack of any real progress on the core issue of restitution for confiscated Hul'qumi'num lands at the treaty table. Meanwhile, private development activities on Hul'qumi'num traditional lands and the ensuing environmental damage and harms to Hul'qumi'num cultural survival associated with this development continue on apace unabated by Canada, and without any meaningful consultations taking place with the indigenous communities affected.

79. The member-First Nations represented by HTG recognize that any final treaty settlement payments they receive from the State will go to offset the millions of dollars in loans taken on to participate in the lengthy and protracted BCTC treaty process.[72] A lack of good faith on the part of the State in refusing to discuss the return, replacement or payment of just compensation for the taking of Hul'qumi'num traditional lands contributes to the mounting debt being incurred by HTG and its member-First Nations. What is even worse from the perspective of these indigenous peoples, any delay in recognizing Hul'qumi'num property rights leaves Hul'qumi'num traditional lands unprotected from encroachment and environmental destruction by private development interests.

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[69] *See* para. 64, *supra.*

[70] British Columbia Treaty Commission, *FAQs, available at* <http://www.bctreaty.net/files_3/faqs.html#Private> (last accessed: December 28, 2006) at 2 (App. 25).

[71] *Id.* at 11 (App. 25).

[72] *See* Arthur Manuel, Indigenous Network on Economies and Trade, *Report on Canada's Self-Government & Land Rights Policies at the Root of Canada's Opposition to the UN Draft Declaration on Indigenous Rights: Submitted to Mr. Rodolfo Stavenhagen, UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* at 12-13 (October 1, 2006) ("Manuel Report") (App. 26). As the report notes; "Eighty per cent of funding for First Nations negotiation costs is in the form of loans from Canada and is repayable from treaty settlements," *id.* at 13 (quoting "*Notes to Consolidated Summary Financial Statements Province of British Columbia for the Fiscal Year Ended March 31, 2006*", 25. Contingencies and Contractual Obligations, Aboriginal Land Claims at 63).

80. Canada's failure to negotiate in good faith in the BCTC treaty process is further evidenced by its enforcement of a "full and final" settlement policy and an "indemnity" requirement as necessary to secure a treaty agreement with the State. This negotiating position, most importantly, would require the Hul'qumi'num peoples to indemnify the State, post-treaty, in the event that any Hul'qumi'num member might bring a legal challenge or cause of action relating to, for example, the illegal taking of the E & N Railway lands.[73] For HTG, the State's demand for this indemnity clause would mean that the Hul'qumi'num peoples' claims to their property rights in what amounts to more than 70% of their traditional territory represented by the E & N Railway grant would be, for all intents and purposes, forcibly extinguished as the price of their treaty settlement negotiated with the State.

81. Significantly, Canada, for nearly a decade now, has been repeatedly admonished within the United Nations ("UN") human rights system for pursuing precisely this type of forced extinguishment policy with respect to indigenous peoples' property rights in their traditional lands.[74] In 1998, the UN Committee on Economic, Social and Cultural Rights ("CESCR") stated in its concluding observations that Canada had to stop this policy of demanding extinguishment of aboriginal rights and title as the price of a treaty with the State:

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people

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[73] To date, every "Agreement in Principle", a preliminary step toward concluding a treaty with the State, that has been negotiated with First Nations under the BCTC process includes such "full and final settlement" and indemnity clauses. For example the, Maa-nulth First Nation Final Agreement, December 9, 2006, states:

> 1.11.6 Each Maa-nulth First Nation releases Canada, British Columbia and all other persons from all claims, demands, actions or proceedings, of whatever kind, whether known or unknown, that that Maa-nulth First Nation ever had, now has or may have in the future, relating to or arising from any act or omission before the Effective Date that may have affected, interfered with or infringed any aboriginal right, including aboriginal title, of that Maa-nulth First Nation.
>
> 1.11.7 Each Maa-nulth First Nation will indemnify and forever save harmless British Columbia from any and all damages, costs excluding fees and of solicitors and other professional advisors, losses or liabilities, that British Columbia, respectively, may suffer or incur in connection with of any suit, action, cause of action, claim, proceeding or demand initiated before or after the Effective Date relating to or arising from:
>
> a. the existence of an aboriginal right, including aboriginal title, Maa-nulth First Nation that is determined to be other than, or attributes or geographical extent from, the Maa-nulth First Nation Rights of that Maa-nulth First Nation set out in this Agreement;
>
> b. any act or omission by Canada or British Columbia, before the that may have affected, interfered with or infringed any aboriginal including aboriginal title, of that Maa-nulth First Nation.

"Maa-nuuth First Nation Final Agreement, December 9, 2006," Chapter 1 General Provisions, Sec. 1.11.0 Certainty, *available at* <http://www.bctreaty.net/nations_3/agreements/Maanulth_final_intial_Dec06.pdf> (last accessed: December 28, 2006) (App. 27).

[74] *See infra*, paras. 177-178.

> from their lands, as recognized by RCAP [Royal Commission on Aboriginal Peoples], and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.[75]

82. Most recently, the CESCR in its concluding observations in 2006 expressed the view that Canada's response to such criticisms and concerns on the part of international human rights bodies did not materially differ from its earlier extinguishment and surrender approach:

> The Committee, while noting that the State party has withdrawn, since 1998, the requirement for an express reference to extinguishment of Aboriginal rights and titles either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement, remains concerned that the new approaches, namely the "modified rights model" and the "non-assertion model", do not differ much from the extinguishment and surrender approach. It further regrets not having received detailed information on other approaches based on recognition and coexistence of rights, which are currently under study.[76]

83. Canada has been repeatedly warned within the UN international human rights monitoring system about its treaty negotiation policies of requiring extinguishment of indigenous peoples' property rights claims.[77] Yet it continues to demand that HTG surrender the rights of the Hul'qumi'num peoples to their traditional lands confiscated by the State and granted to private third parties as the cost of negotiating and securing a treaty in the BCTC process in flagrant violation of international law.

84. The HTG, acting in good faith and in the sincere desire for reconciliation with the State, has tabled reasonable alternative measures seeking some form of protection of the Hul'qumi'num peoples' continuing connections to their traditional territory, understanding that recognition of Hul'qumi'num property rights is absolutely essential to the cultural integrity and survival of the Hul'qumi'num indigenous peoples. In an effort to protect these rights, HTG has come to the treaty table willing to negotiate for co-management and revenue sharing on the E & N Railway private lands. However, the State has repeatedly rejected these proposals for accommodation, declaring that such "private lands" are not on the table for discussion of co-management of the land and resources or for the sharing of revenue generated from those lands.[78]

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[75]Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (December 10, 1998), E/C.12/1/Add.31 at para 18.

[76] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (May 22, 2006), E/C.12/CAN/CO/5 at para. 16.

[77] *See, e.g.*, UNESCO Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen: Canada* (December 2, 2004), E/CN.4/2005/88/Add.3, para. 91 ("Recent land claims and self-government agreements aim at certainty and predictability, but the inclusion of clauses in land claims agreements requiring Aboriginal peoples to 'release' certain rights, leads to deep concerns that this may only be another semantic term for the older 'extinguishment' policy, despite official denials.").

[78] Affidavit of Robert Morales, Chief Negotiator, Hul'qumi'num Treaty Group, *supra* note 45 (App. 19).

85. Canada's lack of good faith is also evidenced by its "litigate or negotiate policy" in the BCTC treaty process. Canada has repeatedly declared and threatened to enforce a negotiating policy that any attempt by the HTG or any of its individual member-First Nations to litigate on a treaty-related issue can result in termination or suspension of the negotiations process. This is a policy which has even been criticized by the Chief Commissioner of the BCTC; "First Nations may feel they are forced to take legal action to protect their rights. And then they can't negotiate a resolution of their rights because they have taken legal action. It's a catch-22." [79]

86. The effect of this "litigate or negotiate policy" is to deny the Hul'qumi'num communities practical recourse to the Canadian courts in order to pursue any type of judicial remedy that would require the State to fulfill its duty to protect and secure Hul'qumi'num property rights and interests in traditional lands based on customary tenure and use. The State's policy effectively prohibits contemplation by HTG of the use of Canada's courts to resolve significant differences between the parties under the BC treaty negotiation process because such action could lead to termination by the State of treaty talks. Filing a law suit in Canada's courts puts at risk the significant amount of time and the financial resources that HTG has had to borrow from the State ($13 million to date) in order to participate in the BCTC process. HTG's options to walk away from the negotiations are greatly compromised by the possibility of a huge debt becoming due and payable to the government of Canada. Since the State is not incurring a similar debt load, there is no real incentive on its part to engage in good faith negotiations, opening the door to meaningless "surface bargaining" by the government without any repercussions and no form of recompense to HTG, as delay only serves the financial and development interests of the State in such protracted treaty negotiations.

87. As a result of Canada's unilaterally dictated negotiating mandates and policies on private lands, only a tiny fraction of the traditional territory of the Hul'qumi'num indigenous peoples is on the table for negotiation in the BCTC treaty process, strongly supporting the belief of HTG's treaty negotiators that the issue of "private lands" is being used as a pretext by the government to avoid good faith negotiations on the issue of recognition of Hul'qumi'num property rights and interests in traditional land based on customary tenure.

88. Because the State has taken the position that it reserves the unilateral privilege of suspending the entire treaty negotiation process and withdrawing funding from the HTG should it seek to vindicate any of its rights connected with that process through the Canadian courts, HTG has been coerced into foregoing litigation on any of the substantive issues connected in any way with the treaty process, including the issues raised in this Petition to the Commission. The Hul'qumi'num indigenous peoples believe

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[79] British Columbia Treaty Commission, *Treaty Commission Update: The Independent Voice of Treaty Making in British Columbia* (Feb. 2004) at 2, *available at* <http://www.bctreaty.net/files_3/pdf_documents/Feb04.pdf > (last accessed: December 28, 2006) (App. 28). As stated by the Commission in this, its own official publication; "It now appears the First Nations will have to place their legal actions in abeyance in order to continue negotiations as the governments of Canada and BC have been unwilling in most cases, to negotiate with a First Nation that is taking legal action with regards to unresolved claims". *Id.*

that good faith treaty negotiations, of the kind Canada refuses to engage in, are the only viable and just means for resolving their property rights claims to their traditional lands under Canadian law.

G. Absence of Judicial Protection

89. As previously discussed, if HTG were to attempt to litigate in the State's courts any of the issues connected with Canada's obligation to recognize and protect Hul'qumi'num property rights and interests in traditional lands granted in fee simple to private parties, it would run the risk of suffering the draconian and financially ruinous penalty of cancellation of all treaty negotiations by the State under its punitively-enforced "litigate or negotiate policy."[80] But even if HTG were willing to take this heavy risk of cancellation of treaty talks by the State and seek judicial protection for Hul'qumi'num property rights, it would be to no avail. Canada's hostile judicial system has proven itself time and time again incapable of protecting the property rights of indigenous peoples in their traditional lands confiscated by the State and granted in fee simple to private third parties.

90. Canada's domestic courts have never legally recognized or affirmed one single square inch of aboriginal title rights belonging to indigenous peoples in their traditional lands that were granted by the State in fee simple to private third parties in British Columbia. Prior efforts by Hul'qumi'num community members to protect their rights and interests in their traditional lands confiscated by the State for the benefit of private parties have met with no avail in Canada's legal system, and have exhausted their financial resources.[81] Canada's Supreme Court itself has pointedly told British Columbia's First Nations that the treaty process represents the only effective remedy for recognition of indigenous peoples' aboriginal title and property rights in British Columbia.[82] Canada's government has also reiterated this very same position to indigenous peoples in British Columbia.[83] Canada's courts have never once in their entire history ordered restitution in the form of return, replacement or payment of just compensation for the taking of indigenous peoples' traditional lands in British Columbia, once those lands have been granted to private third parties under the State's internal land laws. Restitution by Canada

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[80] *See* paras. 85-88 *supra*.

[81] *See* Affidavit of Renee Racette, lawyer for the Penelakut Elders, *supra* note 42 (App. 17).

[82] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186 ("Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve . . . the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."). Since that clear signal sent by Canada's highest court, other Canadian courts have bluntly repeated this fact to indigenous litigants from British Columbia in a growing number of recent decisions involving indigenous peoples' property rights claims in the province. *See also R. v. Kapp*, [2006] B.C.J. No. 1273 at para. 45; *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 378 at para. 57.

[83] As Canada's then-Minister of Indian Affairs stated in 2000: "The *Delgamuukw* decision, of the Supreme Court of Canada, did not award Aboriginal title to any First Nation in Canada. Instead, it established a legal test for proving Aboriginal title on a case-by-case basis. I would note that the tripartite BCTC process is consistent with one of the main recommendations in the *Delgamuukw* decision, namely, that negotiation is the preferred way to effect a reconciliation of the interests of Aboriginal and non-Aboriginal Canadians and to achieve certainty with respect to the use and ownership of lands and resources." Manuel Report, *supra* note 72, at 9 n. 7 (App. 26).

for the taking of Hul'qumi'num property rights is only possible through the treaty negotiation process established by the State in this case.

V. Exception to Exhaustion of Domestic Remedies

Lack of access to "real and effective" judicial remedies

91. Article 31(1) of the Commission's Rules of Procedure specifies: "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." However, the reference to "generally recognized principles of international law" makes it clear that there must be more than formal access to remedies.[84]

92. "Formal" access to domestic remedies does not necessarily lead to "real and effective" remedies.[85] For example, Canada might well assert to this Commission that the Hul'qumi'num communities represented by the HTG have formal access to domestic judicial remedies in Canada's courts. But Canada would be unable to show to this Commission a single instance in its entire history where its judicial system ever awarded a First Nation in British Columbia a "real and effective" final remedy for the State's uncompensated taking of its property rights and interests in traditional lands. Reiterating the findings of the UN Human Rights Committee in its landmark *Lubicon Lake Band* decision, the endlessly protracted "road of litigation" that confronts indigenous peoples in Canada makes pursuing domestic remedies for the taking of their property rights in the State's courts an exercise in utter futility and financial ruin.[86]

93. Most significantly, effective judicial remedies are foreclosed in this case by Canadian judicial precedents asserting the incompatibility of indigenous peoples' aboriginal title and property rights with fee simple title in lands held by private third parties. Canada's courts, including its highest court, the Supreme Court of Canada, have affirmed repeated judicial rulings that the assertion of aboriginal title rights in private lands by First Nations is, as stated by one leading Canadian judicial precedent on the issue, "an absurdity."[87] This type of openly-expressed judicial hostility to indigenous

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[84] *Velásquez-Rodríguez*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) no. 4, at para. 63 (1988).
[85] Case 10.636 (Guatemala), Inter-Am. C.H.R., OEA/ser. L/V/II.91, doc.7 rev., at 125, 133 (1996).
[86] *See* paras. 71-72, *supra*. *See also Lubicon Lake Band*, *supra* note 63 at para. 31.1. The Human Rights Committee issued a strongly worded decision in *Lubicon Lake Band* which condemned Canada's violation of Article 27 of the International Covenant on Civil and Political Rights by permitting the Province of Alberta to grant leases for mineral exploration and timber development within the Band's aboriginal territory. The Committee summarily rejected Canada's exhaustion argument by condemning Canada's judicial system in strong and consistent terms; "At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy": *Id.*
[87] *See, e.g., Hamlet of Baker Lake v. Canada*, [1980] 1 F.C. 518:

> The coexistence of an aboriginal title with the estate of the ordinary private landholder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land.

litigants is also reflected in the fact that no court in British Columbia or Canada has ever issued a final ruling requiring that owners of privately-held lands must consult with First Nations who assert aboriginal claims prior to making any lawful use of those private lands.[88]

94. Government attorneys representing the State have consistently relied upon these precedents and this overtly-expressed attitude of judicial hostility in litigation brought by British Columbia First Nations seeking to have their aboriginal title rights legally recognized in so-called "private lands."[89]

95. This Commission has stated that it "shares the view of the European Court of Human Rights that a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of

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Id. at para. 102. *See also Chippewas of Sarnia Band v. Canada (Attorney General)*, (2000) 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.), application for leave to appeal dismissed [2001] S.C.C.A. 63 (S.C.C.), in which the Supreme Court of Canada upheld a decision of the Ontario Court of Appeal which held that the Chippewas of Sarnia First Nation were not entitled to a remedy for the return of their lands where those lands were sold by the Crown without a surrender and were now held by private individuals and corporations.

[88] The Court of Appeal for British Columbia in *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, (2000) 80 B.C.L.R. (3d) 233, 2000 (B.C.C.A.) 525, concluded that the Registrar of Land Titles had acted correctly in refusing to register a certificate of pending litigation regarding the appellant First Nation's land claim on the basis that aboriginal title was not a registrable interest where the subject parcel was held in fee simple by a private party seeking to develop the land.

> The appellant's ultimate objective is stated to be reconciliation of the claimed aboriginal title with Kamlands title to the 6 Mile Ranch in some form of accommodation of interests. The appellant argues that the present use of the lands as a ranch is compatible with aboriginal title but an intensive resort development with hotels, condominiums and golf courses would be incompatible. This submission appears to have an inherent contradiction inasmuch as the claimed aboriginal title and the fee simple title each involve rights to exclusive possession which are mutually exclusive.

Id. at par. 72. *See also Uukw v. British Columbia*, (1987) 16 B.C.L.R. (2d) 145 (B.C.C.A.), where the British Columbia Court of Appeals held against the First Nation which sought to register its aboriginal title rights in land held in fee simple; "It is enough to observe that aboriginal title can have no place in a Torrens [land title registration] system which has the primary object of establishing the ownership of indefeasible titles and simplifying transfers." The Court went on to state that British Columbia's land laws required "the claim of a registerable estate or interesting land" and that the aboriginal title claim of the First Nation "claimed in this case is not registerable." *Id.* at 155.

[89] Memo re Crown Defences in Aboriginal Rights Cases from Braker & Company Barristers and Solicitors to First Nations Summit (9 September 2005), *supra* note 55 (App. 22). Canada's official negotiating position, as argued by government attorneys in the case of *Hupacasath First Nation v. British Columbia*, is summarized with utmost clarity by the British Columbia Supreme Court:

> Under the terms of the British Columbia Treaty Process, the petitioners will not be able to obtain title to any private lands, except on a willing seller/willing buyer basis, and the Crown relies on that fact as further support for its position that <u>there is a fundamental incompatibility between aboriginal title and fee simple title.</u> The Crown's position is that it does not recognize aboriginal title to lands that are privately held and that it does not have jurisdiction to provide privately held land if it is claimed.

Hupacasath First Nation v. British Columbia, *supra* note 52, at para. 164 (emphasis added).

prevailing jurisprudence of the state's highest courts."[90] The European Court of Human Rights has made clear that a petitioner need not exhaust domestic remedies where there is only "a possibility of reversal" of the prevailing rule of law, or even the status quo.[91] Moreover, the Inter-American Court of Human Rights has considered remedies that prove illusory due to the circumstances of the case or the general situation in the State to be ineffective.[92]

96. Thus, this Commission has stated that if a claim or argument has "no serious prospect of success in light of domestic precedents," including those of the State's highest courts, the petitioner is excused from the exhaustion requirement.[93] The repeated judicial precedents issued by Canada's courts that deny the possibility of the continuing existence of aboriginal title on private lands, oftentimes in the most hostile of terms, demonstrate conclusively that there is no "serious prospect of success" and therefore excuse the Hul'qumi'num indigenous peoples from fruitlessly pursuing "the road of litigation" in this case to protect their property rights in their traditional lands. Because of the adverse judicial precedents and the internal law of Canada, restitution for Hul'qumi'num indigenous property rights and interests in ancestral communal lands taken by the State in the nineteenth century can only be secured through good faith negotiations between HTG and Canada under the BCTC treaty process.

97. Second, the unavailability of judicial remedies for protecting the property rights at stake here is compounded by the indigence and poverty of the member-First Nations of the HTG. As previously discussed, the member-First Nations of HTG are among the poorest communities in all of Canada.[94]

98. For the purposes of analysis, HTG refers to the Inter-American Court of Human Rights Advisory Opinion OC-11/90 on the issue of exhaustion of remedies, in which the Court in construing Article 46(1)(a) and 46(2) of the American Convention on Human Rights ("American Convention")[95] (which is similar to Article 31 of the Commission's Rules of Procedure) stated the following:

> Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reason of economic status (Art.1(1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the convention without first exhausting the applicable domestic remedies. The answer to this question . . . is that if it can be shown that an indigent needs legal counsel

[90] *Case of Tracy Lee Housel*, Case 129/02, Report No. 16/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 504 (2004) at para. 36.
[91] *De Wilde, Oomas and Versyp Cases*, Eur. Ct. H.R. Publ. E.C.H.R. Ser. A, Vol. 12, 34, paras 61, 62 (18 June 1971).
[92] *See Case of Las Palmeras v. Columbia*, Judgment of December 6, 2001, Inter-Am. Ct. H.R. Ser. C., No. 90, para. 58; *Case of Constitutional Court v. Peru*, Judgment of January 31, 2001, Inter-Am. Ct. H.R. Ser. C., No. 71, para. 93.
[93] *Case of Tracy Lee Housel*, *supra* note 90 at para. 36.
[94] *See* paras. 61-63, *supra.*
[95] Advisory Opinion OC-11/90, Series A. Judgments and Opinions, No. 11 at endnote 19.

> to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning for the language of Article 46(2) read in conjunction with Articles 1(1), 24 and 8.[96]

99. The HTG has already spent over $13 million financed by outstanding loans from the State in pursuing recognition of their property rights in the BCTC treaty process.[97] The huge financial burden and real prospect of financial ruin in pursuing a protracted legal remedy in Canada's hostile judicial system to protest the uncompensated taking of aboriginal title and property rights in their traditional lands, even without the debt burden of cancelled treaty negotiations, makes judicial remedies inaccessible to the Hul'qumi'num indigenous peoples.

100. Lawyers with specialized expertise in indigenous land claims litigation in the province of British Columbia have charged in the past as much as $6,000 per day and court costs can be astronomical (an estimated $800 per hour) because the depth of legal and historical research required to build a successful case is often far greater than in "normal" litigation practice. The Canadian government has a history of expending enormous sums of money in fighting First Nations' property rights cases in court while indigenous peoples, by comparison, have often had to rely on "feasts, public appeals, raffles, bingos, etc," to raise funds to fully present their cases during even the first round of court action.[98]

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[96] *Id*. at para 31.

[97] B.C. Treaty Commission, *Amendment of Funding Amounts Agreement Number Two* (2006/2007 fiscal year), *supra* note 67 (App. 24).

[98] *See* Karen Lochead, From Common Law Recognition to Judicial Confirmation: An Analysis of Native Title's Proof Criteria in Canada and Australia, paper presented at the Annual Meeting of the Canadian Political Science Association, June 1-3, 2006, text accompanying notes 77-82 (App. 29). As Lochead explains:

> In addition to being expensive and requiring a tremendous harnessing of legal expertise, native title litigation is also both time consuming and risky, as the experience of the Teme-Augama Anishnabai, or Bear Island Band, clearly demonstrates. In 1973, the Teme-Augama Anishnabai took the first step towards asserting legal jurisdiction over their traditional territories in north-eastern Ontario. After failed attempts to resolve the dispute through negotiation, however, the case went to trial in the Superior Court of Ontario in 1982. "Two years later, after 119 days of proceedings, the court ruled against the band's claim. The band appealed, but it took five more years before the Appeal Court of Ontario issued its ruling, which went against the band. A final appeal to the Supreme Court of Canada was lodged shortly after the Appeal Court of Ontario's 1989 verdict, but on 15 August 1991 the Supreme Court of Canada upheld the lower courts' decision and dismissed the Teme-Augama Anishnabai's claim of continuing native title. As a result, after almost two decades of legal research, court costs, and lawyers fees, the Teme-Augama Anishanbai not only lost their legal battle to secure common law recognition of their continuing native title claim but also the hope of regaining rightful jurisdiction over the territories their ancestors had occupied and cared for since time immemorial. In the words of Murray Angus: "[t]o 'go for broke' in the courts can mean winning big, but it can also mean losing big, and losing once-and-for-all".

Id. at text accompanying notes 83-87. In another, more recent case involving the aboriginal rights claims of a British Columbia First Nation similarly situated to the HTG member-First Nations, the Kitkatla Band of British Columbia was forced to seek eleven separate judgments from Canada's court system in its efforts to

101. For example, Hul'qumi'num elders who sought to challenge the State's actions desecrating Hul'qumi'num burial grounds on Walker Hook quickly spent their limited available financial resources in their futile efforts to protect their basic human rights to respect for their dead ancestors' burial remains.[99] Being among the poorest communities in all of Canada, the member-First Nations of the HTG simply do not possess the huge financial resources needed to fight the State and its well-paid and well-heeled armies of government attorneys, private law firms and hired experts in protracted litigation that will take years to resolve their property and other human rights claims in court and administrative proceedings, while private third party development of their traditional lands proceeds on apace, threatening their continuing cultural survival as indigenous peoples.

102. As in *Lubicon Lake Band*, the "road of litigation" would be equally fruitless for the Hul'qumi'num indigenous peoples, given that Canadian courts have never recognized an aboriginal title claim or right of restitution in favor of a British Columbia First Nation in so-called "private lands." Many similarly situated First Nations have been involved in financially ruinous litigation for decades without having their aboriginal title and property rights claims recognized by Canada's ineffective and hostile judicial system.[100]

103. Furthermore, with respect to HTG's argument relating to exhaustion and the ineffectiveness of judicial remedies, under Article 31(2)(b) of the Commission's Rules of Procedure, domestic remedies need not be exhausted where the party alleging a human rights violation "has been denied access to the remedies [available] under domestic law or has been prevented from exhausting them." As previously discussed, the State has effectively denied HTG access to a judicial remedy by its policy of threatening suspension of treaty negations if HTG attempts to seek a judicial determination of its aboriginal title or other property rights and interests in Hul'qumi'num traditional lands.[101] Thus, even if Canadian law was less hostile to recognizing indigenous peoples' rights of aboriginal title in British Columbia, HTG has no real access to the courts if it hopes to continue negotiating toward reconciliation and a favourable outcome in its treaty negotiations with the State.

104. Finally, if treaty negotiations were unilaterally halted by the State because of HTG's decision to litigate any issue connected with the treaty process, HTG would become immediately liable for the debt it has incurred to the State, which has financed HTG's treaty negotiations and which HTG has agreed to reimburse out of its eventual treaty settlement. The debt burden ($13 million) without a treaty settlement would be ruinous to HTG and its member-First Nations which it represents in the treaty process.

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halt a private corporation's logging operations on its traditional lands. At one point, the band was ordered to pay the private corporation's legal costs after the British Columbia Supreme Court refused to issue an injunction halting the company's logging on its lands. *See Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1998] B.C.J. No. 3041 (Q.L.) (B.C.S.C.); *Fed. Ct. Rules, 1998,* Rule 400 (SOR/98-106).

[99] *See* paras. 57-60, *supra*; Affidavit of Renee Racette, lawyer for the Penelakut Elders, *supra* note 42 (App. 17).

[100] *See* paras. 71-72, *supra.*

[101] *See* paras. 85-88, *supra.*

Such risk is compounded by the possibility of courts ordering HTG to pay costs of the opposing party.[102] Taken together, these and the other fatal defects discussed above render a judicial remedy totally ineffective to protect the HTG from the violations of its rights in this case. The "road of litigation"[103] for the HTG is literally the road to financial ruin. Judicial remedies cannot be said to be available under these oppressive circumstances.

The State's lack of good faith and the ineffectiveness of the BCTC process remedy

105. The Hul'qumi'num indigenous peoples recognize, as has been told to them by Canada's own highest court and by high-ranking government officials,[104] that the only viable method for resolution of their rights in their traditional lands and resources is through the remedy provided by the BCTC treaty process. HTG has made good faith efforts to resolve the grievances set out in this Petition through the treaty negotiation process, but those efforts have consistently failed because of the State's bad faith in enforcing unilaterally dictated negotiating mandates and policies at the treaty table.

106. The State, despite repeated requests and appeals by HTG to establish a fair process for addressing their property rights claims in the E & N Railway lands, refuses to discuss the recognition or protection of Hul'qumi'num property and user rights in so-called "private lands" as part of the BCTC treaty process. Renewed and repeated requests by HTG to responsible government officials in February, October and December 2006 to discuss the property rights and claims of restitution belonging to the Hul'qumi'num peoples in their lost traditional lands have been either ignored or dismissed by the State.[105] The State's continuing refusal to negotiate in good faith respecting the traditional lands of the Hul'qumi'num confiscated by Canada and granted to a private railroad corporation and other third parties therefore renders the BCTC treaty process ineffective in providing a remedy for protecting the property rights and interests of the Hul'qumi'num peoples in these lands.

107. The lack of real access to any form of protection for Hul'qumi'num traditional lands and natural resources through the BCTC treaty negotiation process, particularly in light of the refusal of the State's courts to even recognize any form of indigenous property rights or interests when so-called "private lands" are involved, means that with each passing day the land and resources upon which the Hul'qumi'num peoples depend for their economic and cultural survival are being subjected to irrevocable destruction.

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[102] *See, e.g., British Columbia (Ministry of Forests) v. Okanagan Indian Band,* [2003] 3 S.C.R. 371 at para. 25:

> Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in furtherance of the efficient and orderly administration of justice.

[103] *Lubicon Lake Band*, *supra* note 63, at para. 31.1.

[104] *See* para. 90, *supra.*

[105] See para. 64 *supra*. Letter from Robert Morales, *supra* note 46 (App. 18(a)); Letter from Chiefs Harvey Alphonse, Terry Sampson, Lisa Shaver, Rick Thomas, James Thomas and Cyril Livingstone, *supra* note 47 (App. 18(b)); Letter from Dan Goodleaf, *supra* note 48 (App. 18(c)); Letter from Terry Clark *supra* note 48 (App. 18(d)).

Under Article 31(2)(b) of the Commission's Rules of Procedures, HTG has no access to domestic remedies and exhaustion is not necessary.

VI. Timeliness

108. Ordinarily, under Article 32(1) of the Commission's Rules of Procedure, a petition to the Commission should be lodged within six months of notification of the final ruling that comprises the exhaustion of domestic remedies. However, Article 32(2) provides that in cases such as the present in which the requirement of exhaustion does not apply, "the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

109. The circumstances of this case are such that this petition is being presented within a reasonable period of time. The acts and omissions being complained of – that is, the failure of the State to adequately take account of and protect Hul'qumi'num property rights and interests in its administration of lands and natural resources – are ongoing. HTG and the Hul'qumi'num indigenous peoples have been diligent in trying to resolve the matter at the domestic level; however the rapidly escalating pace of development on Hul'qumi'num traditional lands is of grave concern. Desiring to give the State one final chance to address the concerns of the Hul'qumi'num peoples about the rapidly escalating pace of development on their traditional ancestral lands as part of the BCTC negotiations, HTG asked responsible government officials in February, October and December 2006 to discuss the issue of restitution in the form of return, replacement or the payment of just compensation for the taking of the E & N Railway lands. The government, however, simply continues to dismiss HTG's requests for good faith negotiations on these important matters vital to the cultural survival of the Hul'qumi'num indigenous peoples. HTG is now bringing this case to the Commission as it is becoming increasingly apparent that domestic remedies will never be effective in recognizing the property rights and interests based on customary tenure of HTG members in their traditional lands seized by the State for the benefit of the E & N Railway.

VII. Absence of Parallel International Proceedings

110. The subject of this Petition is not pending in any other international proceeding for settlement.

VIII. State Responsibility for the Violation of Hul'qumi'num Human Rights

111. By virtue of the facts described above, Canada is internationally responsible for violating rights that are affirmed in the American Declaration and by other relevant rules and principles of international human rights law. As a member of the OAS and a party to the OAS Charter, Canada is legally bound to promote the observance of human rights. The Court has declared that the rights affirmed in the American Declaration are, at a

minimum, the human rights that OAS member States are bound to uphold.[106] Thus Canada incurs international responsibility for any violation of rights articulated in the American Declaration, as well as for the violation of rights affirmed in international human rights treaties to which Canada is a party and in applicable general or customary international law.

112. By unilaterally granting rights and interests in the traditional lands and resources of the Hul'qumi'num peoples to private third parties without ever consulting them, seeking their consent, or offering restitution or payment of just compensation in return for a valid extinguishment of their aboriginal title and property rights and by permitting damaging logging and other development activities on these lands used, occupied and relied upon by the Hul'qumi'num for their cultural survival, Canada is acting in violation of the right to property, the right to restitution for its taking, the right to cultural integrity, the right to consultation and other human rights belonging to the Hul'qumi'num as indigenous peoples.

113. Canada has further incurred international responsibility by failing to take effective measures by appropriate legislation or otherwise to recognize and protect the customary land tenure of the Hul'qumi'num indigenous peoples. Canada is also responsible for failing to establish a fair process for consultation in addressing the ongoing claims of the Hul'qumi'num to their lost traditional lands, including the claim to a right of restitution from the State for the taking of Hul'qumi'num lands. Such international responsibility arises by virtue of the principle of equality under the law and the duty of states to adopt effective measures to secure indigenous property and other rights that are related to land and resource use. Included in this duty is a corresponding obligation on the part of the State to negotiate in good faith with indigenous peoples regarding their just claims to recognition, protection, and restitution for their property rights and interests in their customary ancestral lands, which Canada also has violated in this case.

A. State Responsibility for the Taking of Hul'qumi'num Traditional Lands and Grants to Third Parties

114. Canada has granted virtually all the lands traditionally used and occupied by the Hul'qumi'num communities located on Vancouver Island in British Columbia to a private railroad corporation and to other private third parties. The confiscation and the grants of these traditional Hul'qumi'num lands by Canada without any offer of restitution in the form of return, replacement with suitable alternative lands, or payment of just compensation to the Hul'qumi'num peoples constitute violations of rights affirmed in the American Declaration and in other relevant international instruments.

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[106] *See* Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-1089 of July 14, 1989, Inter-Am. Ct. H.R. (1989), paras. 42, 43. Similarly, the American Convention declares that "[e]veryone has the right to the use and enjoyment of his property…. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law": American Convention Article 21, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9, (January 2003), *available at* <http://cidh.org/Basicos/basic3.htm> (last accessed: January 25, 2007).

The Right to Property

115. Article XXIII of the American Declaration affirms the human right to "own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[107] The right to property affirmed in Article XXIII of the American Declaration and other human rights instruments, especially when considered in light of the fundamental principle of non-discrimination, embraces those forms of individual and collective landholding and resource use that derive from the traditional land tenure system of the Hul'qumi'num indigenous peoples of British Columbia.

116. The Court definitively affirmed the independent existence of indigenous peoples' collective rights to their land, resources, and environment in its landmark decision in the *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua* ("*Awas Tingni*").[108] The Court held that the government of Nicaragua had violated the Awas Tingni's rights to property and judicial protection when it granted concessions to a foreign company to log on their traditional lands without consulting or acquiring the consent of the communities affected. In the context of indigenous land rights, the Court declared; "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[109] The Court further noted that, "[b]y the fact of their very existence, indigenous communities have the right to live freely on their own territories."[110]

117. In the *Case of Maya Indigenous Communities of the Toledo District v Belize* ("*Maya Belize*"), the Commission found that Belize violated the Maya indigenous peoples' right to use and enjoy their property by granting concessions to third parties to exploit resources that degraded the environment within lands traditionally used and occupied by the Maya communities.[111] Indigenous peoples' human right to property, the Commission noted, is based in international law, and does not depend on domestic

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[107] The American Declaration, Article XXIII, Organization of American States (O.A.S.) Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.8 (May 2001), *available at* <http://cidh.org/Basicos/basic2.htm> (last accessed: March 19, 20007). Similarly, the American Convention Article 21, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9, (January 2003), *available at* <http://cidh.org/Basicos/basic3.htm> (last accessed: January 25, 2007), also secures the right to property. The Universal Declaration of Human Rights ("Universal Declaration"), G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 72, U.N. Doc A/810 (1948), Article 17, recognizes property rights as well.

[108] *Awas Tingni*, *supra* note 2, at para. 149. While *Awas Tingni* was decided by the Court and interpreted the right to property belonging to indigenous peoples under Article 21 of the American Convention, this Commission has consistently relied on the Court's interpretation of the right to property in its decisions citing Article XXIII of the American Declaration respecting indigenous peoples' property rights. *See Dann*, *supra* note 2, at para. 129-13; *Maya Belize*, *supra* note 2, at paras. 116-119; *Case of Juan Raul Garza v. United States* ("*Garza*"), Inter-Am. C.H.R., Case No. 12.243, Report No. 52/01 (2000), paras. 88, 89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[109] *Awas Tingni*, *supra* note 2, at para. 149.

[110] *Id.*

[111] *Maya Belize*, *supra* note 2, at paras. 153, 194.

recognition of property interests.[112] The communal property right of indigenous peoples has an autonomous meaning and foundation under international law.[113] The Commission noted that indigenous property rights are broad, and are not limited "exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."[114] In fact, the failure of the state to recognize indigenous property rights was itself one basis for the Commission's finding of a violation of the Maya people's right to property.[115]

118. The Commission recognized in *Mary and Carrie Dann v. United States* ("*Dann*") that international law generally supports indigenous peoples' property rights in their ancestral lands.[116] In that case, the indigenous petitioners were the Dann sisters, members of the Western Shoshone people from the United States. The Danns challenged the government's purported extinguishment of their aboriginal title to lands they had traditionally used and enjoyed within the state of Nevada. They had been denied restitution and ownership of their ancestral lands, and the government had not taken into account the meaning the land had for them and the Western Shoshone people in efforts aimed at offering compensation.[117]

119. In ruling that the extinguishment of aboriginal rights to ancestral land violated the Danns' right to property as indigenous peoples, the Commission held that the Dann sisters' property claims to their ancestral lands had not been determined through a fair process that complied with international human rights law.[118] The Commission also pointed to the Proposed American Declaration on the Rights of Indigenous Peoples, and noted that it reflected "general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples."[119] The Commission explained that this was particularly true of the Proposed Declaration's Article XVIII, which states that "[i]ndigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood."[120]

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[112] *Id.* at para. 117.
[113] *Id.* at para. 131.
[114] *Id.*
[115] *Id.* at para. 152.
[116] *Dann*, *supra* note 2, at para. 129.
[117] *Id.* at paras. 85 and 112
[118] *Id.* at para. 142.
[119] *Id.* at para. 129.
[120] Proposed American Declaration on the Rights of Indigenous Peoples ("Proposed American Declaration"), (approved by the Inter-Am C.H.R., Feb. 26, 1997), OEA/Ser./L/V/.II.95 Doc. 6 (1997), at Article XVIII (2). Other human rights instruments also recognize the right of indigenous peoples to use and occupy their ancestral lands under international law. For example, the International Labour Organization's Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries declares, "[t]he rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized,"Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the General Conference of the International Labour Organization, June 27, 1989, (entered into force September 5, 1991) ("ILO Convention No. 169"), Article 14.1. The United Nations

120. Traditional Hul'qumi'num patterns of use and occupancy of lands and natural resources are discussed above and detailed in several supporting documents.[121] These patterns correspond with a system of customary rules that determine individual and collective entitlements to land and natural resources. For the Hul'qumi'num, this customary land tenure system and the usages it sanctions give rise to forms of property that are no less essential to a decent living and dignity of the home than formal State-granted property rights are for others. These property rights are embraced and affirmed by Article XXIII of the American Declaration. Under the jurisprudence of the inter-American system, Canada is obligated to recognize and protect these rights through appropriate measures. Whatever the precise character of these rights or of the limitations that may reasonably be placed upon them, their existence cannot simply be ignored by Canada's public officials; otherwise they are not rights at all.

121. Canada has steadfastly refused to recognize, protect or provide restitution for the State's taking of these property rights and interests belonging to the Hul'qumi'num indigenous peoples. Canada even goes so far as to refuse to even discuss with HTG the property rights and interests of the Hul'qumi'num peoples in these lost traditional lands. So-called "private lands" are not discussed as part of the BCTC treaty process according to government officials responsible for administering the treaty process. Canada's actions in this case openly defy the decisions of this Commission and the Court which affirm the duty of the State to recognize, protect and provide restitution for the taking of "the ancestral right of the members of indigenous communities to their lands".[122]

The Right to Restitution

122. As the Court clearly explained in the recent *Case of Yakye Axa v. Paraguay* ("*Yakye Axa*"),[123] the state is obligated to recognize the property rights of indigenous peoples, even when their ancestral indigenous lands have been granted by the state to private individual owners. Otherwise, the Court warned, the state's failure to recognize and protect indigenous peoples' property rights in their lost traditional lands "could affect other basic rights such as the right to cultural identity and the very survival of the indigenous communities and their members."[124] Because of this over-riding human rights

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Declaration on the Rights of Indigenous Peoples, Article 26(2) specifically includes "the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration"), Article 26(2), *in* Report to the General Assembly on the First Session of the Human Rights Council on its First Session, A/HRC/1/L.10. On June 29, 2006 the Human Rights Council adopted by a roll-call vote of 30 in favour to 2 against and 12 abstentions a resolution adopting the Declaration on the Rights of Indigenous Peoples. HRC Res. 2006/2, June 29, 2006. The Declaration has now been forwarded to the UN General Assembly for final ratification and approval.

[121] *See* paras. 22-36, *supra*.

[122] *Yakye Axa*, *supra* note 2, para. 147 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 299 (App. 3)).

[123] *Supra* note 2.

[124] *Id.* at para. 147 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 299 (App. 3)) .

concern for the cultural survival of indigenous peoples, the Court held that when the State must determine whether communal ancestral land rights or current individual land rights held by private owners will prevail in the same property, it could be necessary to restrict the right to individuals' private ownership of property in order to preserve "the cultural identity of a democratic and pluralistic society."[125]

123. The jurisprudence of the inter-American system has thus clearly established and affirmed that the right to property belonging to indigenous peoples in their traditional lands includes the right to restitution, even when those lands have been confiscated and granted by the State to good faith third party purchasers.[126] Otherwise, the cultural survival of an indigenous community would be at risk until the State took effective measures to provide redress for its taking of the lands and resources belonging to these peoples. Canada, in clear violation of its obligations under the OAS Charter and accepted principles of international law as declared by the organs of the inter-American system, refuses to discuss, much less even offer restitution in the form of return, replacement or payment of just compensation for Hul'qumi'num traditional lands taken by the State, thus threatening the cultural survival of the member-First Nations of HTG. Nonetheless Canada is still obligated to provide a fair process to address the ongoing claims of the Hul'qumi'num people to a recognition of their right to restitution in their traditional ancestral lands.[127]

124. The State of Canada has violated the property rights of the Hul'qumi'num people by confiscating their traditional lands for the benefit of private third parties and without recognizing any right of restitution belonging to the Hul'qumi'num as established under the jurisprudence of the inter-American system and general principles of international law. Canada has repeatedly insisted that Hul'qumi'num aboriginal title and property rights in so-called "private lands" have been extinguished by the nature of fee simple grants from the State to third parties.[128] At a minimum, to make that extinguishment lawful, Canada must provide restitution for the expropriation of those lands belonging to

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[125] *Id*. at para. 148 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 284 (App. 3)).

[126] *Dann*, *supra* note 2, at para. 30; *Yakye Axa*, *supra* note 2, at para. 151; *Sawhoyamaxa*, *supra* note 2, at paras 131-34. In its decision in *Sawhoyamaxa*, the Court noted that when the members of indigenous peoples lose possession of their traditional lands for reasons outside their will, they still maintain their right to the property, even when they do not have legal title, except when the lands have been legitimately transferred in good faith to third persons. Even in that situation, however, the Court was careful to note that members of indigenous peoples that involuntarily lost possession of their lands which have been legitimately transferred to innocent third parties have the right to recover them or to obtain other lands of equal size and quality. *Sawhoyamaxa*, *supra* note 2, at para. 128. Consequently, possession is not a requirement that conditions the existence of the rights to the restitution of indigenous lands. *See* Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 322 (App. 3).

[127] At the very least, Canada is required to balance the right to communal ancestral indigenous lands against competing land claims in question in accordance with the analysis set forth in *Yakye Axa*, *supra* note 2, at para. 142 et seq.

[128] *See* paras. 65-68 *supra*. *But see* Committee on the Elimination of Racial Discrimination, 68th Sess., Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America, CERD/C/USA/DEC/1 (April, 11 2006), at para. 6 (stating that extinguishment of aboriginal title through privatization of lands is in derogation of international law).

the Hul'qumi'num. To date, no Canadian court has ever awarded any form of restitution or payment of just compensation to the Hul'qumi'num or any other First Nation in British Columbia for such extinguishments. Canada, despite repeated requests to do so, has refused to even consider discussing the issue of fair compensation for the taking of Hul'qumi'num aboriginal title and property rights in so-called "private lands" in treaty negotiations with HTG.[129]

125. The right to property affirmed in Article XXIII of the American Declaration includes the right to be free from unreasonable state interference with the enjoyment of property and from uncompensated takings thereof, and therefore requires restitution in the form of return, replacement or payment of just compensation by the State for the taking of Hul'qumi'num indigenous property rights. The general principle of international law that property rights and interests, including indigenous property rights based on customary tenure, cannot be taken by the State without restitution is reflected in Article 21(2) of the American Convention which states: "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."[130] In its recent *Yakye Axa* decision, which involved a claim by an indigenous petitioner to restitution for ancestral lands taken by the State and held by a private owner, the Court held that when a State cannot return ancestral land to indigenous peoples, it should, with the agreement of the interested people, attempt to find them alternative lands, taking into account their customs, values and intended use of the land.[131] The Court cited ILO Convention No. 169, which provides that whenever possible, if ancestral land cannot be returned to indigenous people through the agreement of the people and the State, or, if agreement cannot be reached, through appropriate procedures, the people shall be given "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."[132] If alternative land is not available or acceptable, with their agreement the people should be given compensation for the land. That compensation should principally take into account "the meaning that the land has for them."[133]

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[129] Letter from Robert Morales, Chief Negotiator, Hul'qumi'num Treaty Group, to Dan Goodleaf, Chief Federal Negotiator, Federal Treaty Negotiation Office, and Terry Clark, Provincial Negotiator, BC Treaty Negotiation Office, *supra* note 46 (App. 18(a)); Letter from Chiefs Harvey Alphonse, Terry Sampson, Lisa Shaver, Rick Thomas, James Thomas and Cyril Livingstone, *supra* note 47 (App. 18(b)); Letter from Dan Goodleaf, *supra* note 48 (App. 18(c)); Letter from Terry Clark *supra* note 48 (App. 18(d)). In the *Yakye Axa* decision, the Court stressed that when there is a conflict between private and collective land rights, the State must address the claims of indigenous peoples to their lost ancestral lands on a case-by-case basis. *Yakye Axa, supra* note 2, at para. 146. In its decision in *Sawhoyamaxa*, the Court stressed that efforts aimed at restitution cannot be dictated unilaterally by the State, but must be undertaken in a consensual manner with the members of the indigenous peoples, in accordance with their forms of consultation and decision-making. *Sawhoyamaxa, supra* note 2, at para. 135.

[130] OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

[131] *Yakye Axa, supra* note 2, at paras. 151, 217. *See also* Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System, supra* note 2, at 300 (App. 3).

[132] *Yakye Axa, supra* note 2, at para. 150 (quoting ILO Convention No 169, Article 16.4). *See also* Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System, supra* note 2, at 300 (App. 3).

[133] *Yakye Axa, supra* note 2, at para. 149 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System, supra* note 2, at 300 (App. 3)).

126. In the context of indigenous peoples' property rights under Article XXIII of the American Declaration, the general principle of a right to restitution and fair compensation belonging to indigenous peoples for takings of their property rights in their traditional lands was specifically recognized by this Commission in the *Dann* case:

> where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, [indigenous peoples have the right to] recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. *This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.*[134]

127. In its concluding observations on the United States' periodic report, the Committee on the Elimination of Racial Discrimination ("CERD") expressed concern at the taking of indigenous peoples' traditional lands without compensation.[135] On the very same issue this Commission addressed in the *Dann* petition, the CERD issued an "Early Warning and Urgent Action Decision," urging the United States to change its course of action with regard to the Western Shoshone people and their lands. The CERD stated that the United States' extinguishment of indigenous peoples' property rights under the facts at issue, where "the Western Shoshone Peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns," is in derogation of "contemporary human rights norms, principles and standards that govern determination of indigenous property interests."[136]

128. It is therefore well recognized in international law as interpreted by this Commission and other human rights bodies that indigenous peoples have a right to the restitution of their lands unlawfully taken, or alternatively, to just compensation for the taking of those lands, no matter how far in the past the taking began or occurred. The Human Rights Committee[137] and the CESCR,[138] have all applied the collective right of restitution, or in the alternative, the right to payment of just compensation, to indigenous peoples' traditional lands, as has this Commission. As recently adopted and approved by the Human Rights Council, the UN Declaration on the Rights of Indigenous Peoples, in Articles 28(1) and (2) states:

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[134] *Dann*, *supra* note 2, at para. 130 (emphasis added).
[135] Committee on the Elimination of Racial Discrimination, 59th Sess., *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America.* GENERAL 14/08/2001. A/56/18, paras. 380-407, at para. 400.
[136] Committee on the Elimination of Racial Discrimination, 68th Sess., Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America, CERD/C/USA/DEC/1 (April 11, 2006), at para. 6.
[137] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Guatemala*, UN Doc.CCPR/CO/72/GTM, 27 August 2001, para. 29.
[138] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Argentina*, U.N. Doc.E/C.12/1/Add.38, December 8, 1999, at para. 4.

> 1. Indigenous peoples have the right to redress, by means that can include restitution, or when this is not possible, of a 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.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.[139]

129. Consistent with these international approaches, this Commission has held that the application of the American Declaration to the situation of indigenous peoples requires "the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with *fair compensation.*"[140]

130. Canadian courts have repeatedly refused to recognize aboriginal title, indigenous peoples' property rights or their right to restitution or just compensation for the taking thereof where the land is held in fee simple by a private landowner, even when an indigenous group continues to use and hold the land in its traditional ways.[141]

131. Moreover, Canada has confiscated Hul'qumi'num traditional lands for the benefit of private third parties without providing for fair compensation in its courts, while insisting that the subject of compensation for the taking of HTG lands is not open for negotiation in the BCTC treaty process. The State has indicated that the BCTC treaty process is a "political" negotiation and will not be used to compensate for past wrongs.[142] This negotiating posture effectively means that the Hul'qumi'num peoples are left without any effective remedy for the illegal taking of their traditional territory by the State. The organs of the inter-American system have recognized, as has been stated by the Court in the *Yakye Axa* case, that "the merely abstract or juridical recognition of indigenous lands, territories and resources practically lacks sense if the property has not been established and physically delimited."[143] Canada is obligated to provide a fair process that can lead to an effective remedy for the taking of Hul'qumi'num traditional lands.

132. Under the jurisprudence of the Commission and general principles of international law, when indigenous peoples' property is taken by a State, restitution is owed. Canada has confiscated the vast bulk of Hul'qumi'num ancestral communal land and failed to consider, let alone offer, any form of restitution, adopting the position that

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[139] United Nations Declaration on the Rights of Indigenous Peoples, Article 28, *supra* note 120.
[140] *Dann*, *supra* note 2**,** at para. 131 (emphasis added).
[141] *See* notes 87-89 *supra*. *See generally, Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000) 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.).
[142] *See* para. 77, *supra.*
[143] *Yakye Axa*, *supra* note 2, at para. 143 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 301 (App. 3)).

extinguishment of aboriginal title to those lands has been accomplished through expropriation *without* compensation. The State's continuing refusal to pay, or at the very least to negotiate, restitution for expropriated Hul'qumi'num traditional territories is in direct contravention of Canada's international legal obligations.

The Right to Cultural Integrity

133. The international responsibility of Canada in this case is also a function of its obligation to protect the integrity of the Hul'qumi'num culture, of which Hul'qumi'num property rights are an essential part. Hul'qumi'num subsistence and other land use patterns are linked with familial and social relations, religious practices, and the very existence of Hul'qumi'num communities.[144] Several rights articulated in the American Declaration support the enjoyment of such critical aspects of Hul'qumi'num culture, including the right to property (Article XXIII), the right to religious freedom (Article III), the right to family and protection thereof (Article VI), and the right to the benefits of culture (Article XIII). The Commission has observed that, "[f]or indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."[145]

134. The American Declaration guarantees the Hul'qumi'num peoples the right to the benefits of culture.[146] The OAS Charter places cultural development and respect for culture in a position of supreme importance.[147] The American Convention also recognizes the importance of cultural freedom to human dignity in its protection of freedom of association[148] and progressive development.[149] Cultural rights are also protected in other major human rights instruments including the Universal Declaration of Human Rights,[150] the International Covenant on Civil and Political Rights ("ICCPR"),[151] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[152]

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[144] *See* paras. 22-36, *supra*.

[145] Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev., April 24, 1997, at 103 ("*Ecuador Report*").

[146] "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries": American Declaration, *supra* note 107 at Article XIII.

[147] Charter of the Organization of American States, Articles 2(f), 3(m), 30, 48, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9, (January 2003), *available at* <http://cidh.org/Basicos/charter.htm > (last accessed: January 25, 2007) (Member States are "individually and jointly bound to preserve and enrich the cultural heritage of the American peoples").

[148] American Convention, Article 16 *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9, (January 2003), *available at* <http://cidh.org/basic.eng.htm> (last accessed: January 25, 2007) ("Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes").

[149] *Id.* at Article 26 ("The States Parties undertake to adopt measures … with a view to achieving progressively… the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires").

[150] G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 72, U.N. Doc A/810 (1948), Article 27(1) ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.")

135. In the *Awas Tingni* case, the Court, in discussing the right to property belonging to indigenous peoples, acknowledged the link between cultural integrity and indigenous communities' lands: "[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[153]

136. In the *Dann* case, the Commission concluded that "by interpreting the American Declaration so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its Preamble, include recognition that '…it is the duty of man to preserve, practice and foster culture by every means within his power.'"[154]

137. In the *Maya Belize* case, this Commission acknowledged that interference with indigenous lands necessarily implicates the right to culture. The Commission acknowledged that international human rights law recognized that "the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities." [155]

138. In the *Case of Yanomami v. Brazil*, the Commission noted that the State had an obligation under the OAS Charter to give priority to "preserving and strengthening … the cultural heritage" of indigenous peoples, and determined that the granting of concessions to subsoil resources on indigenous land – "with all the negative consequences for their culture" – violated the Yanomami's rights.[156] The Commission also recognized that protection of ancestral lands is an essential component of indigenous peoples' right to culture in its Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin.[157]

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[151] Opened for signature December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976), Article 27 (members of minority groups "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language").

[152] Opened for signature December 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976), Article 15(1) ("The States Parties to the present Covenant recognize the right of everyone [t]o take part in cultural life").

[153] *Awas Tingni*, *supra* note 2, at para. 149.

[154] *Dann*, *supra* note 2, at para. 131 (*quoting* the American Declaration, Organization of American States (O.A.S.) Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/1.4 rev.8 (May 2001) at 16, Preamble).

[155] *Maya Belize*, *supra* note 2, at paras. 154-156.

[156] *Case of Yanomami v. Brazil* ("*Yanomami*"), Inter-Am. C.H.R., Case No. 7615, Res. No. 12/85 (March 5, 1985), at 5-6.

[157] "[S]pecial legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of the ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous": Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* ("*Miskito*") 76, OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983) at para. II.B.15.

139. The obligation of Canada to protect Hul'qumi'num culture and group identity arises particularly by virtue of its status as a party to the ICCPR. This Commission has on several occasions affirmed its competence to determine state responsibility by reference to international instruments other than the American Declaration and the American Convention, when such other instruments are relevant to a case that is properly before the Commission.[158]

140. Article 27 of the ICCPR states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

Relying especially on Article 27, this Commission repeatedly has affirmed that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities.[159] The Commission has held that, for indigenous peoples in particular, the right to the integrity of culture covers "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands."[160]

141. The UN Human Rights Committee has confirmed the Commission's interpretation of the cultural integrity norm and the importance of natural resources to indigenous peoples' right to the benefits of culture in particular:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them…. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[161]

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[158] *See, e.g.*, Case 11.137 (Argentina), Inter-Am. C.H.R. Report 55/97, OEA/Ser.L/V/II.98 doc. 7 rev., at 271, para. 157 *et seq.* (applying international humanitarian law). The Commission's practice of applying sources of international law, other than the American Convention or the American Declaration has been viewed with approval by the Court. *See "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982, Inter-Am Ct.H.R. (Ser. A) no. 1, para. 43 (1982).

[159] *See, e.g.*, *Miskito*, *supra* note 157, at 76-78, 81 (1983); *Yanomami*, *supra* note 156, at 24, 31; *Ecuador Report*, *supra* note 145 at 103-4.

[160] *Miskito*, *supra* note 157 at 81.

[161] Human Rights Committee General Comment No. 23, Article 27 (Fiftieth session, 1994), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 158 (2003), at paras. 7, 9.

The UN Human Rights Committee has made clear that indigenous peoples' traditional land use patterns are elements of culture that states are to take affirmative measures to protect under Article 27, apart from whether or not states recognize indigenous ownership rights over the lands and resources that are subject to traditional uses.[162]

142. Accordingly, the Human Rights Committee found Article 27 to be violated by Canada in circumstances virtually identical to those confronting the Hul'qumi'num indigenous peoples. In *Lubicon Lake Band*, which the Commission cited with approval in the *Maya Belize* decision,[163] the petitioners alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands.[164] The UN Human Rights Committee characterized the claim as being based on the right to enjoy culture under Article 27 of the ICCPR. It found that oil and gas exploitation, in conjunction with historic inequities, threatened the way of life and culture of the Band and that Canada had thus violated Article 27.[165]

143. The jurisprudence of the inter-American system has recognized that respect for the cultural integrity of indigenous peoples is directly related to protection of their property rights in their traditional lands, and where dispossessed of those lands, indigenous peoples are entitled to restitution to protect their cultural survival.[166] In its Proposed American Declaration on the Rights of Indigenous Peoples, the Commission once again articulated the obligation of states to respect the cultural integrity of indigenous peoples, expressly linking property rights and the right to restitution to the survival of indigenous cultures. Article VII of the Proposed American Declaration, entitled "Right to Cultural Integrity" states:

> 1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.
>
> 2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on the basis not less favorable than the standard of international law.[167]

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[162] *See*, *e.g.*, *J.E. Länsmann v. Finland* ("*Länsmann II*"), Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (Sami reindeer herding in certain land area is protected by Article 27 of the ICCPR, despite disputed ownership of land; however, Article 27 not violated in this case). *See also Lubicon Lake Band*, *supra* note 63, at para 32.2 (economic and social activities linked with territory are part of culture protected by Article 27); *Länsmann et al. v. Finland* ("*Länsmann I*"), Communication No. 511/1992, Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (reindeer herding part of Sami culture protected by Article 27); *Kitok v. Sweden*, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (Article 27 extends to economic activity "where that activity is and essential element in the culture of an ethnic community").

[163] *Maya Belize*, *supra* note 2, at para. 141.

[164] *Lubicon Lake Band*, *supra* note 63, at para. 27.

[165] *Id*. at para. 33.

[166] *Dann*, *supra* note 2, at para. 30; *Yakye Axa*, *supra* note 2, at para. 151; *Sawhoyamaxa*, *supra* note 2, at paras 131-34.

[167] Proposed American Declaration, *supra* note 120, Article VII.

144. The UN Declaration on the Rights of Indigenous People, as approved by the Human Rights Council, specifically assures the cultural rights of indigenous groups and links them to the natural environment and the obligation of States to provide redress for the dispossession of their lands:

> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> > (*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> > (*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources[.][168]

145. The Hul'qumi'num indigenous peoples' human right to enjoy the benefits of their unique culture is thus guaranteed under the American Declaration and affirmed by numerous other sources of international law. Canada's confiscation of Hul'qumi'num traditional lands and its refusal to even discuss restitution for those lands or the question of just compensation threatens to destroy the Hul'qumi'num indigenous communities by imperilling their close, intimate and ongoing connections with their land, their livelihood, their language, and their cultural survival and development as indigenous peoples.[169] By refusing to protect the Hul'qumi'num indigenous peoples' property rights and other interests in their traditional lands based on customary tenure, Canada has denied the right of the Hul'qumi'num to enjoy their culture and maintain its integrity, in violation of Article 27 of the ICCPR and related provisions of the American Declaration.

The Right to Consultation

146. Implicit in the rights to property and cultural integrity, which protect Hul'qumi'num interests in lands and natural resources, is the right to be consulted in a meaningful way about any decisions that may affect those interests. In the *Awas Tingni* case,[170] the Court held that the government of Nicaragua had violated the Awas Tingni's

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[168] UN Declaration on the Rights of Indigenous Peoples, *supra* note 120, at Articles 8(2)(a)-(b). As part of the right to the benefits of culture, the Declaration also includes the right to "revitalize, use, develop and transmit to future generations [indigenous peoples'] histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons." *Id.* at Article 13(1).

[169] *See* paras 45-64, *supra*.

[170] *Awas Tingni*, *supra* note 2, at para. 149. While *Awas Tingni* was decided by the Inter-American Court and interpreted the right to property belonging to indigenous peoples under Article 21 of the American Convention, this Commission has consistently relied on the Court's interpretation of the right to property in its decisions citing Article XXIII of the American Declaration respecting indigenous peoples' property rights. *See also Dann*, *supra* note 2, at para. 130; *Maya Belize*, *supra* note 2, at para. 132; *Garza*, *supra* note 108, at paras. 88, 89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

rights to property and judicial protection when it granted concessions to a foreign company to log on their traditional lands without consulting or acquiring the consent of the communities affected. This Commission's *Dann* case makes clear that extinguishment of aboriginal title without informed consent of the peoples involved is invalid.[171] Similarly instructive is the Commission's decision in the *Maya Belize* case.[172] There, the Commission held that Belize was obligated under Article XXIII of the American Declaration "to define and demarcate the precise territory to which Maya property rights extend," and clarified that "this is an obligation that must be fulfilled by the State in full collaboration with the Maya people and in accordance with their customary land use practices."[173] Referring to the decision of the Court in the *Awas Tingni* case,[174] the Commission explained this obligation of "full collaboration" imposed on OAS member states in their dealings with indigenous peoples in precisely defining their property rights in their traditional territories as follows:

> Accompanying the existence of the Maya people's communal right to property under Article XXIII of the Declaration is a correspondent obligation on the State to recognize and guarantee the enjoyment of this right. In this regard, the Commission shares the view of the Inter-American Court of Human Rights [in the *Awas Tingni* case] that this obligation necessarily requires the State to effectively delimit and demarcate the territory to which the Maya people's property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right. In the Commission's view, this necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land use practices and customary land tenure system be taken into account in this process.[175]

147. The Commission concluded in the *Maya Belize* case that the State's grants of logging and oil concessions to third parties on traditional lands claimed by the Maya violated Article XXIII of the American Declaration (the right to property), and that in failing to take appropriate or adequate measures to consult with the Maya people concerning these concessions, Belize further violated the right to property enshrined in Article XXIII.[176]

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[171] *Dann*, *supra* note 2, at para. 130.
[172] *Maya Belize*, *supra* note 2.
[173] *Id.* at para. 130.
[174] *Id.* at para. 132 n. 135:

> In its judgment in the *Awas Tingni Case*, the Inter-American Court determined that the failure of the State to effectively delimit and demarcate the collective property of the Mayagna Community of Awas Tingni had created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. *Awas Tingni Case*, [para. 153]. Although phrased in somewhat different terms, the right to property affirmed in Article XXIII of the American Declaration is essentially the same human right as that provided for in Article 21 of the American Convention. The value of coherence and consistency within the Inter-American system for the protection of human rights mitigates in favour of extending a similar interpretation to both instruments.

[175] *Id.* at para. 132.
[176] *Id.* at para. 194.

148. Other international human rights bodies have recognized the imperative necessity of ensuring indigenous peoples' effective participation in any decisions that may affect their traditional land and resource use. Within the framework of Article 27 of the ICCPR, the UN Human Rights Committee has recognized that this right of consultation relates to the right to participate in government which is found in Article XX of the American Declaration, and it derives, moreover, from the fundamental principle of self-determination.[177] Self-determination is a principle of general international law affirmed in multiple international instruments, including the ICCPR. At its core, self-determination means that human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality. For indigenous peoples, the principle of self-determination establishes a right to control their lands and natural resources and to be genuinely involved in all decision-making processes that affect them.[178]

149. Most pertinently with respect to the human rights situation confronting the Hul'qumi'num indigenous peoples in Canada, the UN Human Rights Committee in its concluding observations on Canada in April 1999 reinforced the relationship between the right to self-determination and the duty to consult with indigenous peoples regarding the disposition of their traditional lands and resources. Concerning the situation of indigenous peoples in Canada, "the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."[179] Thus, the Committee admonished against governmental acts by Canada that would unilaterally infringe on indigenous peoples' enjoyment of their rights to lands and natural resources, viewing such infringement as incompatible with the right of self-determination affirmed in Article 1 of the ICCPR.[180] The Committee, of course, as previously discussed, was referring specifically to Canada's actions taken under the comprehensive claims treaty process that is currently being applied to HTG in this case![181]

150. It is also recognized that the required consultations with indigenous peoples must be more than formalities or simply processes by which they are given information about development projects.[182] Clear, complete, and accurate information is necessary. But

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[177] Human Rights Committee General Comment No. 23, *supra* note 161, at para. 7. *Cf.* Committee on the Elimination of Racial Discrimination, General Recommendation XXI on Self-Determination, CERD/48/Misc.7/Rev.3, paras. 3, 5 (1996) ("CERD General Recommendation on Self-Determination") (linking the right of self-determination with the right to take part in public affairs and the right of ethnic groups to lead lives of dignity and to preserve their culture).

[178] *See* S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) 85-88.

[179] Human Rights Committee, *Concluding Observations: Canada*, UN Doc. CCPR/C/79/Add. 105 (1999), at 8.

[180] *Id.* The Human Rights Committee also has called upon Mexico and Norway to faithfully implement the right of self-determination in relation to indigenous peoples and their traditional lands. *See* Human Rights Committee, Concluding Observations: Mexico, U.N. Doc. CCPR/C/79/Add.109 (1999) at para. 19; Human Rights Committee, Concluding Observations: Norway, U.N. Doc. CCPR/C/79/Add.112 (1999) at paras. 10, 17.

[181] *See* paras. 81-85, *supra*.

[182] *See Maya Belize*, *supra* note 2, at paras 139 n. 139, 142.

while necessary, such information alone is not sufficient for effective participation in decision-making. Rather, in order to be truly effective, the consultations should also provide indigenous peoples a full and fair opportunity to be heard and to genuinely influence the decisions before them. ILO Convention No. 169 stipulates, for example, that consultations "shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[183]

151. For its part, the Commission's own Proposed American Declaration on the Rights of Indigenous Peoples affirms the right of self-determination and consultation belonging to indigenous peoples; "Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels with regard to matters that might affect their rights, lives and destiny."[184] The Proposed Declaration also affirms the right of indigenous peoples "to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it."[185]

152. Nothing even remotely approaching such required "good faith" consultations[186] has been provided for the Hul'qumi'num indigenous peoples by the State in regards to the taking and impairment of their property rights in their traditional lands confiscated for the benefit of private third parties. The State continues to permit the granting and regranting of Hul'qumi'num traditional lands within the E & N Railway grant without providing meaningful consultations with the indigenous communities affected. Canada refuses to take steps or enter into negotiations that would lead to effectively delimiting and demarcating the territory to which the Hul'qumi'num people's property right extends and to take the appropriate measures to protect their territory, including official recognition of that right. Without any pretense of a need to consult with the Hul'qumi'num, the State has also permitted the desecration of sacred ancestral burial grounds on Hul'qumi'num traditional lands despite vigorous protests and failed legal actions brought by Hul'qumi'num elders to protect these lands.[187] Logging, mining, and other development activities are accelerating in and around the traditional lands of the Hul'qumi'num, but the State continues to assert in court pleadings and litigation brought by indigenous peoples in British Columbia that it has no duty to consult with First Nations when it takes actions affecting or impairing their property rights and interests on

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[183] ILO Convention No. 169, *supra* note 120, Article 6.2 (emphasis added).
[184] Proposed American Declaration, *supra* note 120, at Article XV.2.
[185] *Id.* at Article XIII.2. These statements of rights to consultation and self-determination are consistent with ILO Convention No. 169, *supra* note 120, Article 15.2, which clarifies that indigenous peoples' right to consultation extends even to decisions about natural resources that remain under state ownership:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

[186] *See* ILO Convention No. 169, *supra* note 120, Article 6.2, (obligation of the State to engage in "good faith" consultations with indigenous peoples).
[187] *See* paras. 56-60 *supra*.

so-called "private lands." The State even refuses to discuss the issue of restitution or just compensation for the taking of these traditional lands belonging to the Hul'qumi'num peoples.

153. HTG has attempted repeated times to initiate a process of good faith dialogue and "full collaboration" with the government through the BCTC treaty process, but the State has steadfastly refused to consult with HTG regarding its actions impairing their rights in these lands. The State refuses to engage in discussions by which the member-First Nations of HTG could influence decision-making about the private development activities that engulf them and their traditional lands. The State also refuses to discuss co-management or revenue sharing respecting private development of the traditional lands of the Hul'qumi'num.[188]

154. By refusing to consult or engage in good faith negotiations with the Hul'qumi'num indigenous peoples' regarding their rights and interests in their traditional lands that have been granted to third parties by the State, Canada has blatantly and repeatedly denied the right of the Hul'qumi'num to effective and fully informed consultations regarding acts or decisions that may affect their traditional territories in violation of their property rights and other human rights protected by the American Declaration and under general principles of international law.

B. State Responsibility for the Failure to Provide Restitution and Redress for the Uncompensated and Non-consensual Taking of Territorial Rights

155. As the jurisprudence of the inter-American system recognizes, "the possession of traditional territory is indelibly marked in the historic memory" of indigenous peoples, and the relation they maintain with the land is of such a quality that actions by the State severing their connections with their lands "implies a certain risk of an irreparable ethnic and cultural loss with a consequent loss of diversity as a result."[189]

156. Recognizing the grave threat of harm to both the indigenous peoples affected by the loss of their traditional lands and to society as a whole, the organs of the inter-American system have noted that the right to property belonging to indigenous peoples in their traditional lands may require the State to return ancestral lands to indigenous peoples, even in situations where the lost ancestral lands are presently owned by private individuals. As the Court observed in its recent decision in the *Yakye Axa* case regarding this obligation of providing restitution, when the State is required to determine whether communal ancestral land rights or current individual land rights will prevail in the same property, it could be necessary to restrict the right to individuals' private ownership of property in order to preserve "the cultural identity of a democratic and pluralistic

[188] *See* paras. 64, 84 *supra*.
[189] *Yakye Axa*, *supra* note 2, at para. 216 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 303 (App. 3)).

society."[190] Furthermore, the State is not relieved of this obligation to provide restitution where, for objective and fundamental reasons, it is impossible "to adopt measures to return traditional lands and communal resources to the indigenous populations."[191] As the Court, citing its decision in *Yakye Axa*, held in the *Case of Sawhoyamaxa v. Paraguay*, the State is obligated to offer alternative lands of the same quality and size that will be chosen in a consensual manner with the members of the indigenous peoples, in accordance with their forms of consultation and decision-making.[192]

157. As stated earlier, the Hul'qumi'num indigenous peoples have maintained their ongoing historic relationship to their traditional lands and Canada has confiscated and granted these same lands and resources to private parties in violation of Hul'qumi'num rights and interests. Under the jurisprudence of the inter-American system and general principles of international law, the Hul'qumi'num thus have the right to restitution from the State in relation to those lost lands and natural resources. If Canada finds it impossible to return the lands taken from the Hul'qumi'num, then it is obligated to offer alternative lands, or, at the least, the payment of just compensation, in consultation and in a consensual manner with HTG, the duly chosen representatives of the member Hul'qumi'num First Nations that have brought this petition.

158. The conduct of Canada in this regard is substantially due to the historic failure of the State to recognize and secure Hul'qumi'num territorial rights in the first place, or to take steps to subsequently define, delimit and demarcate those rights. The legal system of Canada and its governing officials have steadfastly refused to recognize Hul'qumi'num customary land tenure as a source of property rights over so-called "private lands" that have been confiscated by the State from indigenous peoples and then granted to private third party development interests and others. Nor has Canada ever provided protection for the matrix of cultural and subsistence practices related to lands and resources now under private control. This absence of recognition and protection is itself a source of international responsibility on the part of Canada. Because of this responsibility, Canada is obligated under well-recognized principles of international law to engage in meaningful and effective consultations with the Hul'qumi'num peoples regarding restitution for property rights in their traditional lands, even where those lands have been granted by the State to private parties. At a minimum, therefore, Canada has the duty as a member State of the OAS to negotiate in good faith with the member-First Nations represented by HTG with a view toward restoring their rights and interests sufficient to secure their cultural survival as indigenous peoples. Canada's refusal to negotiate in good faith in the BCTC treaty process with HTG respecting redress and restitution of Hul'qumi'num traditional lands granted to private third parties is thus a source of international responsibility as well on the part of Canada.

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[190] *Id*. at para. 148 (translated from the original Spanish language version of the Court's judgment in Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, *supra* note 2, at 299 (App. 3)).

[191] *Id.* at 135 (unofficial translation of original Spanish language version of the Court's judgment by Professor Jo M. Pasqualucci of the University of South Dakota School of Law).

[192] *Sawhoyamaxa*, *supra* note 2, at 135, citing to *Yakye Axa*, *supra* note 2 at para. 149 (unofficial translation of original Spanish language version of the Court's judgment by Professor Jo M. Pasqualucci of the University of South Dakota School of Law).

The Right to Equality under the Law

159. Canada's failure to consummate measures that would recognize as legally valid the Hul'qumi'num people's own traditional systems of landholding and resource use and their right to restitution for the taking thereof by the State is a form of discrimination that violates the fundamental right to equality under the law. Various studies, reports, and recommendations by human rights bodies and experts within the UN and the OAS have concluded that indigenous peoples historically have suffered racial discrimination, and that one of the greatest manifestations of this discrimination has been the failure of state authorities to recognize and enact protections for indigenous customary forms of possession and use of lands. The UN CERD, for example, has observed:

> In many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and ... have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.[193]

160. This situation of discrimination and its historical origins were also examined during a seminar of experts convened by the United Nations to study the effects of racial discrimination on indigenous-state relations. The seminar concluded that "[i]ndigenous peoples have been, and still are, the victims of racism and racial discrimination". The seminar's report elaborates:

> Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as "primitive" and "inferior". The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand, attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.[194]

161. The Hul'qumi'num indigenous peoples are among the segments of humanity that have suffered from this history of state-sponsored discrimination. The CERD, in elaborating upon the non-discrimination norm in the context of indigenous peoples, admonished states to recognize and protect the rights of indigenous peoples to "own, develop, control and use their communal lands, territories and resources".[195]

162. Canada's internal land laws and negotiating mandates in the BCTC treaty process deny to the Hul'qumi'num indigenous peoples recognition and protection of their property rights in their traditional lands. Canada's acts and omissions in this regard

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[193] CERD General Recommendation XXIII, August 18, 1997, U.N. Doc. CERD/C/51/misc. 13/Rev. 4 (1997) at para. 3.

[194] *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Relations Between Indigenous Peoples and States*, E/CN.4/1989/22, HR/PUB/89/5 (1989) at 5.

[195] CERD General Recommendation XXIII, *supra* note 193 at para. 5.

accord negative differential treatment of indigenous customary land tenure, in violation of the principle of equality under the law. The entire administrative and formal legal apparatus of Canada fails to recognize Hul'qumi'num rights to land and resources on the basis of customary tenure in so-called "private lands". This failure impairs the human rights of the Hul'qumi'num, while leaving unimpaired the human rights of those whose rights in and over the State-sanctioned E & N Railway grants did not take their origins in customary Hul'qumi'num law and customs.

The Obligation to Effectively Secure Rights

163. Canada has failed in its obligation to uphold, protect and secure, on a non-discriminatory basis, Hul'qumi'num property, cultural and other rights in relation to lands and natural resources. International law generally requires states to adopt the legislative and administrative measures necessary to ensure the full enjoyment of the human rights they are obligated to uphold.[196] This includes the obligation to adjust the state governing apparatus to bring it in conformity with applicable human rights norms.[197] Canada, therefore, cannot escape international responsibility by reference to its domestic laws or administrative practices that fail to include recognition, protection and restitution of Hul'qumi'num human rights in relation to lands and resources.[198] Rather, Canada has the obligation to change its internal practices to recognize those rights and, moreover, to take affirmative steps to secure them.[199]

164. The Commission has stated that, because of their vulnerable conditions vis-a-vis majority populations, indigenous groups may require certain additional protections beyond those granted to all citizens, in order to bring about true equality among the nationals of a state.[200] The "prevention of discrimination, on the one hand, and the implementation of special measures to protect minorities, on the other, are merely two aspects of the same problem: that of fully ensuring equal rights of all persons."[201]

165. Thus, the Commission's Proposed American Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples "have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their

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[196] The obligation of effectiveness is implicit in the obligation to uphold human rights. *See* Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) at 139. The obligation of effectiveness is made explicit in Articles 1 and 2 of the American Convention, in relation to the rights affirmed in that Convention.

[197] *See Case of Velasquez Rodriguez*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, para. 166 (1988) (with particular regard to the obligations under the American Convention).

[198] See International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention), Advisory Opinion OC-14/94 of December 9, 1994, Inter-Am.Ct.H.R. (Ser. A) No.14 (1994).

[199] Referring specifically to indigenous peoples' rights to maintain customary land and resource uses, the United Nations Human Rights Committee has affirmed that "[t]he enjoyment of those rights may require positive measures of protection": Human Rights Committee General Comment No. 23, *supra* note 161, at para. 7.

[200] *Miskito*, *supra* note 157, at 76.

[201] *Ecuador Report*, *supra* note 145, at 106 (quoting F. Caportorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (U.N. Center for Human Rights, 1991), para. 585).

lands."[202] Additionally, the Proposed Declaration enjoins states to "give maximum priority to the demarcation and recognition of properties and areas of indigenous use."[203]

166. At a minimum, Canada is obligated, in a timely and effective manner, to adopt and implement affirmative measures of protection for the lands and natural resources that are central to the cultural and physical survival of the Hul'qumi'num indigenous peoples and to their enjoyment of human rights in general, and specifically to define the legal attributes of Hul'qumi'num land tenure and resource use, in accordance with Hul'qumi'num customary tenure. This obligation includes adopting measures to provide for restitution for the taking of their property rights in their traditional lands. Rather than adopt such measures, however, Canada has left the Hul'qumi'num vulnerable to encroachments by third parties onto their lands and to official land and resource management practices that altogether deny the existence of any rights or interests belonging to the Hul'qumi'num peoples in their lands confiscated by Canada and granted to those third parties. Furthermore, in refusing to recognize the Hul'qumi'num peoples right to restitution for the taking of their lands, Canada has failed in its responsibility to take measures sufficient to secure the cultural survival of the member-First Nations of the HTG.

The Duty to Negotiate in Good Faith with Indigenous Peoples Regarding Protection and Recognition of their Traditional Lands

167. HTG has attempted on repeated occasions, without success, to obtain redress and restitution through domestic avenues for the foregoing violations of rights regarding lands and resources.[204] For the past thirteen years, these efforts, at Canada's express urgings, have focused on securing a treaty agreement with the State through the BCTC treaty process. As stated by Canada's highest court and by Canadian government officials,[205] a treaty is the only truly effective means for recognizing and protecting the property rights and other interests based on customary tenure of the Hul'qumi'num in their traditional lands. This State-proscribed method of obtaining relief, however, has been completely ineffective in recognizing and protecting the property rights and interests of HTG's member-First Nations in their traditional lands granted to the E & N Railway. The State has continued to permit encroachments, private development activities and subdivisions on the E & N lands while steadfastly refusing to negotiate in good faith with HTG over the issues of recognition, restitution or payment of just compensation for the confiscation of these lands.

168. Canada, in refusing to discuss any of the issues arising from its confiscation of the traditional lands of the Hul'qumi'num indigenous peoples for the benefit of third parties in these treaty negotiations with HTG, has violated its duty to engage in effective consultations with indigenous peoples regarding recognition, protection and restitution for their property rights and interests in their lands based on customary tenure. All that the member-First Nations of HTG ask of Canada in this case is to provide a fair process

[202] Proposed American Declaration, *supra* note 120, at Article XVIII.4.
[203] *Id.*, at Article XVIII.8.
[204] *See* paras. 69-88 *supra*.
[205] *See* para. 90 *supra*.

by which to address their ongoing claims for restitution of their property rights in the form of return, replacement, or payment of fair compensation for the taking of their traditional lands, but the State steadfastly refuses to discuss any aspect of the E & N Railway grant with HTG.

169. This duty imposed on the State to engage in good faith consultations and dialogue with indigenous peoples respecting recognition, protection and restitution for their traditional lands arises under the decisions of this Commission upholding Article XXIII of the American Declaration and general principles of international law which affirm the right of property in traditional lands and the right of restitution for the taking thereof by the State belonging to indigenous peoples. As the Commission has previously recognized, indigenous peoples' right to property in their traditional lands necessarily includes the State's corresponding obligation to consult with them in a meaningful way about any decisions that may affect their rights and interests in their lands and resources.[206] This obligation of "full collaboration"[207] is particularly imperative where an indigenous group, such as HTG in this case, is involved in good faith treaty negotiations and has filed its claims accompanied by appropriate maps, with the State. Yet all the while, the State continues to permit development of indigenous peoples' claimed lands until a final treaty settlement is concluded.

170. At a minimum, this duty of good faith requires the State to engage in a process of consultation and dialogue with indigenous peoples involving the recognition and protection of their property rights and interests in their traditional lands in such treaty negotiations, including their claims to a right of restitution in these lands. Decisions about what will or will not be discussed by the State as part of this process must be reached through good faith negotiations with the indigenous communities involved in the consultations. All parties to the negotiations have the right to have their views expressed and voices heard, and to have the opportunity to influence the outcome of any decisions arising from the process. The State cannot unilaterally dictate what it will or will not negotiate over when it comes to recognizing and protecting indigenous peoples' property rights in their traditional lands, or impose pre-conditions without consulting the indigenous peoples involved. Otherwise, the obligation of the State in achieving an agreement in which indigenous peoples have been meaningfully consulted will be patently violated.[208]

171. The Commission has recognized the importance of appropriate measures taken by the State to protect the rights of indigenous people in their territory, including official recognition of that right, and engaging "in effective and fully informed consultations"

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[206] *See* paras. 146-147, *supra*, discussing *Maya Belize*, *supra* note 2, *Awas Tingni*, *supra* note 2 and *Dann*, *supra* note 2.

[207] *See Maya Belize*, *supra* note 2, at para. 130.

[208] *See, e.g.*, ILO Convention No. 169, *supra* note 120, Article 14.2–3.

> Governments shall take steps necessary to identify the lands which [indigenous] peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession….Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

with indigenous peoples concerning actions affecting their territory.[209] This process of State consultation, the Commission has also stated, must take into account the traditional land use practices and customary land tenure system of the indigenous communities involved. It is self-evident, therefore, that good faith negotiations on the part of the State, involving dialogue with the indigenous communities affected and "in depth consideration" of their traditional land use practices,[210] can be the only means by which this process of consultation can be made truly effective and meaningful in assuring protection and recognition of the rights of indigenous peoples in their traditional lands.

172. As the Commission has observed:

> one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.[211]

173. Given this obligation to ensure that "any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole,"[212] Canada has a duty to engage in good faith negotiations with HTG before making any unilateral declarations that the E & N

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[209] *See Maya Belize*, *supra* note 2, at para. 142 (citing *Awas Tingni*, *supra* note 2, at para. 153).

[210] *Id*. at para. 139, wherein the Commission stated; "The State has not denied the Petitioners' allegation that no effective consultations were held with the Maya people prior to the approval of the existing logging and oil concessions," and then went on to note:

> The Commission recalls in this regard that the Petitioners acknowledged the existence of meetings between forest officers from the Ministry of Natural Resources and Maya villagers prior to the approval of the management plan that governs the concession to Atlantic Industries Ltd. for logging in the Columbia River Forest Reserve, but have claimed that the meetings only provided the Maya with limited information on the planned logging, did not include in depth consideration of traditional Maya land uses, and did not afford Maya representatives the opportunity to influence the decision to grant the concession.

Id. at n. 139.

[211] *Id.* at para. 142 (citing the Commission's decision in *Dann*, *supra* note 2, at para. 140, and the Court's decision in *Awas Tingni*, *supra* note 2, at para. 153).

[212] *Id.*

Railway grant will not be considered or even discussed as part of the BCTC process and that the State will not recognize a right of restitution for the taking of those lands.

174. International bodies with special expertise in the area of indigenous rights have recognized the importance of the duty imposed upon States to negotiate in good faith in treaties and agreements which seek to secure and protect indigenous peoples' rights and interests in their traditional lands and resources. In order to fulfill its international responsibility in regard to indigenous peoples through its treaty negotiation process, the State must conduct that process in good faith and with heightened care to ensure fairness in all aspects of the process. Preconditions imposed on the negotiations and dictated "mandates" without any consultations occurring with the indigenous communities participating in the process obviously cannot be said to meet the State's obligation of effective consultation.

175. As has been recognized in the context of indigenous peoples, a process of negotiation that involves good faith dialogue toward achieving agreement helps to build mutual understanding and trust in what might otherwise be contentious and even volatile situations. Good faith dialogue makes it possible to accord to historically aggrieved groups the dignity they need and to identify shared interests and objectives. Negotiation itself may thus help to diffuse conflicts and discourage extreme positions. Moreover, an agreement resulting from good faith dialogue and mutual understanding, and ultimately approved by the relevant constituencies through mutual democratic procedures, is likely to be invested with a substantial sense of legitimacy on the part of all concerned.[213]

176. Canada's failure to negotiate in good faith with HTG over the issue of so-called "private lands" therefore constitutes a violation of the American Declaration and the principles it embodies, particularly in regard to its Article XXIII affirming the right to property belonging to indigenous peoples in their traditional lands and resources. This article affirms the right of the Hul'qumi'num indigenous peoples to the enjoyment of their property, cultural, and other human rights which are dependent on traditional patterns of land and resource use, the right to be consulted about decisions affecting their rights and interests in their traditional lands, and a right to redress should they be dispossessed of their lands. Despite repeated requests by HTG, the State refuses to negotiate over or even recognize any property rights, protected rights of access to these lands, or a right to restitution in the communities represented by HTG in the BCTC treaty process, all the while leaving the Hul'qumi'num peoples vulnerable to incursions by outside development interests onto their lands.

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[213] *See* S. James Anaya, *supra* note 178, at 130, 141 n. 9. "Such reasoning was invoked by the government of Australia in proposing to develop a compact or agreement with aboriginal people to settle historical grievances". *See also* "Foundations for the Future," Statement by Gerry Hand, Minister for Aboriginal Affairs (December 1987), reprinted in part in Heather McRae et al., *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Co, 1991) at 29, 31; Harvey Feit, "Negotiating Recognition of Aboriginal Land Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement," in Nicholas Peterson & Marcia Langton (eds), *Aborigines, Land and Land Rights*, (Canberra: AGPS, 1983) at 416, 421-2 (discussing the advantages of negotiated settlements over judicial determination for the handling of indigenous land claims in Canada).

177. Canada's refusal to engage in good faith negotiations with HTG in the BCTC treaty process is part of a larger pattern and practice on the part of the State in its dealings with indigenous peoples that has been repeatedly criticized by international human rights experts and official UN human rights bodies. Rodolpho Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the United Nations Economic and Social Council Commission on Human Rights, recently singled out for criticism Canada's treaty negotiating policies that effectively require indigenous communities like the member-First Nations of HTG to extinguish all aboriginal title and property rights claims as the cost of a treaty agreed to by the State. The Special Rapporteur made the following recommendation in his Report growing out of a visit to Canada in response to the situation endured by the HTG and other First Nations:

> It should be clearly established in the text and spirit of any agreement between an Aboriginal people and a government in Canada, and supported by relevant legislation, that no matter what is negotiated, the inherent and constitutional rights of Aboriginal peoples are inalienable and cannot be relinquished, ceded or released, and that Aboriginal peoples should not be requested to agree to such measures in whatever form or wording.[214]

178. Both the UN CESCR and the UN Human Rights Committee have recently criticized Canada's policy of requiring extinguishment of aboriginal rights as the cost of a negotiated treaty settlement with the State as being in violation of its obligations to indigenous peoples under Article 1 of the ICESCR and Article 1 of the ICCPR.[215] Previously, the CESCR has observed the "gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights."[216] The recent findings of these two bodies cited Canada's extinguishment policies to be the cause for these disparities. Both committees condemned Canada for the ongoing systemic dispossession of indigenous peoples from their lands and resources, and their resulting economic marginalization. Canada's own Human Rights Commission has stated that the situation of First Nations indigenous peoples remains "the most pressing human rights issue facing Canadians, and that failure to obtain a more global solution can only continue to tarnish Canada's reputation and accomplishments."[217]

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[214] UNESCO Commission on Human Rights, *Report of the Special Rapporteur*, *supra* note 77 at para. 99. *See also, e.g.*, UNESCO Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen*, submitted pursuant to Commission resolution 2005/51, E/CN.4/2006/78/Add.4, at para. 87; UNESCO Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen*, Addendum, E/CN.4/2006/78/Add.5, at paras. 38-40.

[215] *See* Human Rights Committee, *Concluding Observations: Canada*, *supra* note 179, at para. 8.

[216] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada, supra* note 75, at para. 17.

[217] Canadian Human Rights Commission, *Annual Report 1994* (Ottawa: Minister of Public Works and Government Services, 1995). *See also* UNESCO Commission on Human Rights, *Report of the Special Rapporteur*, E/CN/4/2005/88/Add.3, *supra* note 77, at paras. 19-20, 91 (recommending that Canada cease its practice of extinguishing aboriginal rights in modern treaties) and at para. 99 (recommending that "it should be clearly established in the text and spirit of any agreement between an Aboriginal people and a government in Canada, and supported by relevant legislation, that no matter what is negotiated, the inherent and constitutional rights of Aboriginal peoples are inalienable and cannot be relinquished, ceded or

179. The Hul'qumi'num communities do not have meaningful and effective recourse to the Canadian courts in order to pursue an effective remedy that would secure their rights as indigenous peoples in relation to their traditional lands and resources. Canada's stated negotiating policy is that any attempt by the HTG or any of its individual member-First Nations to litigate on a treaty-related issue justifies its termination or suspension of the treaty negotiation process.[218] The HTG also understands from statements and actions of the State that its liability for funds loaned by the State to date for HTG participation in the process is due upon the State's decision to unilaterally cancel treaty negotiations.[219] Canada's pattern of bad faith in the treaty negotiations has left the Hul'qumi'num traditional lands unprotected and deny the Hul'qumi'num indigenous peoples their rights to be consulted regarding their property rights and interests based on traditional tenure.

IX. Request for Relief

180. By reason of the foregoing, HTG, on behalf of the Hul'qumi'num indigenous communities of British Columbia named above, respectfully requests that the Commission prepare a report setting forth all the facts and applicable law, declaring that Canada is internationally responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other instruments of international law, and recommending that Canada take steps to:

(a) suspend all property sales and subdivision permits, licenses, and concessions for, residential, commercial and industrial development projects, including logging, oil, gas and mineral exploration or extraction, and any other natural resource development within lands traditionally used and occupied by the Hul'qumi'num indigenous peoples in British Columbia originally granted to the E & N Railway, and ensure that such development activity does not occur, until a mutually agreed upon suitable arrangement is negotiated between the government of Canada and the indigenous communities concerned;

(b) engage in dialogue with HTG to determine whether and under what circumstances any development activity on the traditional lands of the Hul'qumi'num indigenous peoples originally granted to the E & N Railway may go forward with the support of the Hul'qumi'num peoples on lands used and occupied by the Hul'qumi'num peoples;

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released, and that Aboriginal peoples should not be requested to agree to such measures in whatever form or wording.").

[218] *See* paras. 85-88, *supra*.

[219] *See* para. 104, *supra*.

(c) establish and institute a legal mechanism under domestic law, acceptable to the indigenous communities concerned and in conformity with the legal standards stated in this petition, that will result in the official recognition of Hul'qumi'num customary land tenure and resource use, provide specific guarantees therefore, and lead to the prompt demarcation of Hul'qumi'num traditional lands originally granted to the E & N Railway, or to a fair process for providing restitution in the form of return, replacement or payment of just compensation for the taking of those lands;

(d) suspend consideration of all property sales and subdivision permits, licenses, and concessions for, residential, commercial and industrial development projects, including logging, oil, gas and mineral exploration or extraction, and any other natural resource development within lands traditionally used and occupied by the Hul'qumi'num indigenous peoples in British Columbia originally granted to the E & N Railway, until the land tenure issues affecting the Hul'qumi'num indigenous communities have been resolved, or unless a specific written agreement has been reached between the government and the Hul'qumi'num community or communities affected by the proposed concession;

(e) establish and implement, in coordination with the affected Hul'qumi'num communities, a plan to mitigate and repair the environmental harm caused by the development activities on lands used and occupied by the Hul'qumi'num within the original E & N Railway Grant;

(f) pay moral and pecuniary damages incurred by the Hul'qumi'num communities as a result of the development activities on their traditional lands originally granted to the E & N Railway, and pay all costs the communities and HTG have incurred in defending the communities' rights; and

(g) provide any other relief that the Commission considers appropriate and just.

181. Pending this report and recommendations in this case, HTG also respectfully requests, pursuant to the Commission's role and unique expertise, that the Commission or members or a member thereof, with the consent of the government, conduct an on-site visit to the Hul'qumi'num indigenous communities in British Columbia, Canada pursuant to Articles 18(g) and 20 of the Commission's Statute, and to make recommendations to Canada and the province of British Columbia as to the steps that can be taken to assure that the State's policies and negotiating directives assure good faith in the negotiations respecting the aboriginal title and property rights of the Hul'qumi'num indigenous peoples in the BCTC treaty process.

X. Request for Precautionary Measures

182. HTG further requests that the Commission, pursuant to Article 25 of the Commission's Rules of Procedure, call upon Canada to adopt precautionary measures to avoid irreparable harm to the Hul'qumi'num communities and their members. Such precautionary measures should consist of the immediate suspension of all property sales and subdivision permits, licenses, and concessions for, residential, commercial and industrial development projects, including logging, oil, gas and mineral exploration or extraction, and any other natural resource development within lands traditionally used and occupied by the Hul'qumi'num indigenous peoples in British Columbia originally granted to the E & N Railway, and specific measures to ensure that the development activity in fact ceases and does not start again unless pursuant to a suitable arrangement negotiated with the affected Hul'qumi'num communities under the auspices of the Commission's good offices.

183. On at least three previous occasions the Commission has acted to urge precautionary measures of the kind requested here. On October 30, 1997, the Commission called upon the State of Nicaragua to adopt precautionary measures for the purpose of suspending the concession granted to a foreign timber company for logging on the traditional lands of the Awas Tingni indigenous community.[220] On June 28, 1999, the Commission issued precautionary measures in the *Dann* case, and requested that the United States take appropriate measures to stay the efforts of the Bureau of Land Management to impound their livestock.[221] Likewise, on October 20, 2000, the Commission granted precautionary measures on behalf of the Maya Indigenous Communities and their members, and requested the State of Belize to take the necessary steps to suspend all permits, licenses, and concessions allowing for the drilling of oil and any other tapping of natural resources on lands used and occupied by the Maya Communities in the District of Toledo.[222] The need for precautionary measures to guard against irreparable and potentially devastating and widespread harm to indigenous communal existence in the wake of the increasing pace of development in British Columbia in connection with the upcoming 2010 Winter Olympics and booming

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[220] *See* Case 11.577 (Nicaragua), *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.98, Doc. 6 rev. (1998), at Ch.III, II.A.1. para. 43.
[221] *See* Case 11.140 (United States), *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.106, Doc. 6 rev (1999), at Ch. III., A. para 67.
[222] *See* Case 12.053 (Belize), *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.111, Doc. 20 rev. (2000), at Ch. III, C.1. para. 11.

economic growth in the surrounding non-indigenous community is no less urgent for the Hul'qumi'num indigenous communities of British Columbia.

184. State "privatization" of Hul'qumi'num lands has already caused irreparable environmental harm, damaged forests and essential water supplies, strained plant and wildlife populations, and threatened access to and use of Hul'qumi'num sacred sites. If further sales and subdivisions of these Hul'qumi'num traditional lands that were granted without the consent of these indigenous communities and without restitution or payment of just compensation are permitted by Canada, pollution and noise from future planned private natural resource extraction operations and commercial and residential developments will inevitably affect and interfere with Hul'qumi'num hunting, fishing and gathering practices, which are essential to Hul'qumi'num cultural and physical survival.

185. This threat of invasion of Hul'qumi'num traditional lands, together with the ongoing and further potential damage to the natural environment upon which the Hul'qumi'num depend for their cultural and economic survival, constitute a real and substantial threat of irreparable harm to the Hul'qumi'num indigenous communities themselves.[223] Precautionary measures are needed to avoid such irreparable harm.

RESPECTFULLY SUBMITTED THIS _____ DAY OF May, 2007.

By_____
Robert A. Williams, Jr.
S. James Anaya
Angela C. Poliquin
Jacklyn Hartley
ATTORNEYS FOR PETITIONERS

[223] *See Ecuador Report*, *supra* note 145, at 114 (observing that "the situation of indigenous peoples of the Oriente [of Ecuador] illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other hand , the human rights violations which threaten when these lands are invaded and when the land itself is degraded").