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, 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, even where those lands have been transferred to third persons.2


See also Hul’qumi’num Treaty Group, Getting to 100% (Ladysmith, B.C.:

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, 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. Striking 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 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, and is presently 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 toward 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 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 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

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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 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. The judicial system has 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 their claims, yet Canada refuses to even discuss with HTG the claims of the Hul’qumi’num people 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.

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.

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III. The Victims and the Petitioner

15. 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.

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16. The six individual First Nations who comprise the HTG have a combined population of approximately 6,400 individuals. 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.

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IV. Facts

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

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

17. 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.  

18. 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.

19. 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 Hwsalu’utsun (Koksilah Ridge), Skw’aawk’num (Mount Sicker), Swuq’us (Mt. Prevost) and Silaqwa’ulh (the mouth of the Chemainus River).

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5 Getting to 100%, supra note 1 at 2 (App. 2).
6 Robert Morales, Canada’s British Columbia Treaty Process, supra note 1 at 2 (App. 1).
20. 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.7

21. 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.8 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.9

22. 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.10

23. 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.11 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.12

24. 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

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7 Getting to 100%, supra note 1 at 2 (App. 2).
8 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 Suleluxwist: 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).
9 Id. at 16. (App. 5).
10 See id. (App. 5).
11 Getting to 100%, supra note 1, at 32 (App. 2).
12 Robert Morales, Canada’s British Columbia Treaty Process, supra note 1 at 5 (App. 1).
Hul’qumi’num First Ancestors descended from the sky or where Xeel’s (the “transformer”) marked the land. 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**

25. 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.

26. 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.

27. 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. 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.

28. 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; they are largely places for procurement of productive resources, often close to or in the vicinity of major seasonal camps of the community.

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13 Id. at 3 (App. 1).
15 Id. at 273 (App. 6).
16 Id. at 278 (App. 6).
29. 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.17

30. 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.18 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.

31. 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.*19

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

32. 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.

33. 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.20 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 communities.21 These tiny reserve lands were forced upon the Hul’qumi’num

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17 Id. at 280-83 (App.6).
18 Id. at 357 - 382 (App. 6).
19 Interim Strategic Land Plan, supra note 8, at 108-113 (App. 5).
communities without any regard for the Hul’qumi’num way of life, political institutions, familial organizations, property rights or customary land tenure laws.

34. 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 …

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.’”

35. The traditional territories, customary land tenure laws and subsistence patterns of the Hul’qumi’num peoples extend well beyond the tiny reservation 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.

36. 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

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22 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.

23 *Id.* at 39 (App. 10).

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.\(^{25}\)

37. 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*),\(^{26}\) 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.

38. 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.

39. 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.

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

40. 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.

\(^{25}\) An Act Relating to the Island Railway, the Graving Dock and Railway Lands of the Province (Settlement Act), S.B.C. 1884, c. 14.

41. 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.27

42. 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.28

43. 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.29

44. 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.30

45. 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,

28 Thom Chapter 2, supra note 27, at 67-72 (App. 11). See also Interim Strategic Land Plan, supra note 8, at 19, 42 (App. 5).
29 Thom Chapter 2, supra note 27, at 67-72 (App. 11). See also Interim Strategic Land Plan, supra note 8, at 31, 42, 43 (App. 5).
30 Canada’s British Columbia Treaty Process, supra note 1 at 5 (App. 1).
private forest owners may harvest their timber and manage their lands as they wish,\(^{31}\) 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!\(^{32}\)

46. 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.\(^{33}\)

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

48. 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

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\(^{32}\) See note 24 supra.

\(^{33}\) 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).
prohibited entirely once the State allows these lands to fall into the hands of numerous, smaller parcel individual land owners.\textsuperscript{34}

49. 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.\textsuperscript{35} 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.\textsuperscript{36} The protection of Hul’qumi’num sacred sites is essential to the preservation and perpetuation of Hul’qumi’num culture.

50. 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.

51. 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.

52. One urgent example that HTG seeks to bring to the attention of the Commission concerns Walker Hook, known as \textit{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 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.

53. 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

\textsuperscript{34} 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” \textit{The Vancouver Sun} (August 14, 2006) A3 (App. 15).


\textsuperscript{36} \textit{Getting to 100%}, supra note 1 at 33 (App. 2).
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 indigenous peoples 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.37

54. 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.38

55. 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 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.39 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.40 The elders have no money left to pursue further fruitless appeals in a hostile Canadian legal system.41

56. 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.

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

38 Id at para. 194 (App. 16).
39 Id. at para. 219 (App. 16).
40 Id. (App. 16).
41 Affidavit of Renee Racette, lawyer for the Penelakut Elders (App. 17).
highest and 486 being the lowest, six Hul’qumi’num communities scored between 448th and 482nd.42

58. 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.43 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.

59. 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 parcelled out to third parties by the State are “off the table” in the BCTC treaty negotiation process.44 HTG’s latest effort to initiate discussions with Canada on the issue of the Hul’qumi’num peoples’ property rights in their traditional lands taken by the State 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.45 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.46 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.”47 British Columbia’s letter of January 19, 2007 stated that the issue of compensation for the E & N land grant is “on the table” because it has been raised by HTG. However, the Province reiterated that it “does not approach land

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negotiations as a matter of compensating First Nations for past dispositions of Crown land.\(^48\) 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.\(^49\)

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

60. 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.

61. “Aboriginal title” is the term commonly used in Canadian law to refer to indigenous peoples’ property rights of ownership in their traditional lands.\(^50\) 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:

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

\(^{48}\) Letter from Dan Goodleaf, \textit{supra} note 47.

\(^{49}\) 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. \textit{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.”).}

\(^{50}\) See generally B. Slattery, \textit{Understanding Aboriginal Rights}, \textit{supra} note 26, at 729.
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.51

62. 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.52 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.53

63. 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.54 In addition, the State has asserted that any occupation by indigenous peoples has not been continuous, due to overlapping traditional territories.55 The State consistently argues that aboriginal title is incompatible with Crown sovereignty56 and fee simple private lands.57 Finally, and perhaps most damaging in terms of revealing the State’s bad 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.58 In other words, the State’s official legal 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!

53 See P. Tennant, Aboriginal Peoples and Politics, supra note 22, at 52 (App. 10).
55 Id. at 2 (App. 22).
56 Id. at 3 (App. 22).
57 Id. (App. 22).
58 Id. at 5 (App. 22).
E. Hul’qumi’num Efforts to Protect their Traditional Territory

64. 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. 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 14, at chapter 6 (App. 6). Their human rights struggle for recognition of their rights in their traditional lands and protection of their cultural survival as indigenous peoples continues today.60

65. Between 1927 and 1951, under the terms of Canada’s national legislation called the Indian Act,61 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.

66. 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”)62, 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.63

67. 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.64 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 use and occupancy, or “aboriginal title and rights” in the domestic legal terminology, with First Nations groups.

59 Id.
60 Id.
61 See supra note 59.
63 Id. at para. 31.1.
In December 1990, British Columbia finally agreed to participate in tripartite treaty negotiations between First Nations, the province, and the federal government, 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

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 portion of what was illegally taken from them by Canada in the nineteenth century colonial period!

HTG has now borrowed over $13 million in outstanding loans from the State to participate in the BCTC treaty process! 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.

The State’s officially declared negotiating policy, repeated in numerous statements to the First Nations participating in the BCTC treaty process, is that so-called “private lands” granted to third parties are not on the table for discussion. 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 Hul’qumi’num traditional lands granted to the E & N Railway is not open to negotiation.

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.”

“The BC treaty process has always been guided by the principle that private property (fee simple land) is not on the negotiation table.”

73. 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.

74. 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. 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.

75. Canada’s failure to negotiate in good faith in the BCTC treaty process is further evidenced by its enforcement of a “full & 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 claim.

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70 Id. at 11 (App. 25).
challenge or cause of action relating to, for example, the illegal taking of the E & N Railway lands.\footnote{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:}

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.

76. Significantly, Canada has been repeatedly admonished within the United Nations (“UN”) human rights system for nearly a decade for pursuing precisely this type of forced extinguishment policy with respect to indigenous peoples’ property rights in their traditional lands.\footnote{See infra, paras. Error! Reference source not found.-Error! Reference source not found.} 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 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.

\footnote{See infra, paras. Error! Reference source not found.-Error! Reference source not found.}
The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.74

77. 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.75

78. 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.76 Yet it continues to demand that HTG surrender the rights of the Hul’qum’i’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.

79. 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’qum’i’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.77

80. 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

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76 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, Rodolfo 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.").
77 Affidavit of Robert Morales, Chief Negotiator, Hul’qumi’num Treaty Group, supra note 44 (App. 19).
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.”

81. 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. 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.

82. 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.

83. 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 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.

78 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.
V. Exception to Exhaustion of Domestic Remedies

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

84. 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. 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.

85. 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.

86. 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.

79 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.14 Rev. 9, (January 2003), available at <http://cidh.org/Basicos/basic3.htm> (last accessed: January 25, 2007).
IX. Request for Relief

87. 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;

(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.

88. 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

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RESPECTFULLY SUBMITTED THIS _________ DAY OF _________, 2007.