



**KAIROS - Canadian  
Ecumenical Justice  
Initiatives**

**NUXALK NATION**



**PILALT NATION**



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**INDEPENDENT INDIGENOUS SUBMISSION TO THE UNITED  
 NATIONS COMMITTEE ON ECONOMIC SOCIAL AND  
 CULTURAL RIGHTS IN RESPONSE TO  
 CANADA'S PERIODIC REPORTS – MAY 2006**

**Joint Submission**  
**to the**  
**United Nations**  
**Committee on Economic, Social and Cultural Rights**

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Note to Committee: The boxes on the following pages contain suggested questions and recommendations for consideration by the Committee when formulating its observations regarding the periodic reports of the Government of Canada.

## **Article 1: The right of self-determination**

Indigenous Peoples have the unqualified right to self-determination at international law. This collective human right continues to provide one of the foundations for Indigenous Peoples' status as part of the human family of nations. Self-determination is the expression of Indigenous Peoples making decisions freely about the development of their respective peoples and territories, without state/corporate coercion, duress or limitations. Self-determination is broader than self-governance within a state. Self-determination is a sister power to sovereignty, which Indigenous Peoples inherently possess as the original nations of what is now called Canada. State practice has historically denied the recognition of this right in relation to Indigenous Peoples. There has been no elimination of this discriminatory state practice. Canada recognizes a limited form of self-determination – self-government of Aboriginal peoples. Canada will respect and honour the economic, social and cultural rights of Indigenous Peoples when it fully recognizes and respects the right to self-determination of Indigenous Peoples as stated in Article 1 of the ICESCR. Canada has failed to meet this obligation.

### **Recommendation:**

**Canada must recognize the unqualified right to self-determination of Indigenous Peoples at international law.**

Self-determination is the expression and life force of Indigenous Peoples' sovereignty. Canada has failed to recognize this right enshrined in Article 1 of the ICESCR and has yet to recognize Indigenous Peoples as possessing third order of government status and has failed to negotiate with Indigenous Peoples regarding their entry into the Canadian confederation and/or negotiate amendments to its constitution to include Indigenous governments in the division of powers. The self-determination of Indigenous Peoples is violated when the Canadian state exercises unilateral jurisdiction over Indigenous peoples either at the federal or provincial levels. In addition it is Canadian state practice to criminalize Indigenous Peoples for exercising their sovereignty and jurisdiction.

### ***A. Criminalization of Indigenous Human Rights Activists***

Canada and British Columbia's denial of Indigenous Peoples' Original Title and the rights that flow from it are clearly evidenced in the continued criminalization of Indigenous peoples who exercise their inherent rights to access, use or defend their lands and resources. There exist numerous examples of Indigenous Peoples charged and forced to defend in Canadian courts their Title and rights to hunt, fish, log or to prevent activities which would undermine these rights. Federal and provincial management and policies related to lands and resources are wholly inadequate to preserving Indigenous economic, social and cultural rights. Federal management of the commercial fishery, for example, is often based on the exclusion of Indigenous Peoples' values, rights and traditions. Despite Canadian jurisprudence recognizing Aboriginal rights to the fishery subject only to conservation, federal Department of Fisheries and Oceans policies and decisions often make it difficult for Indigenous Peoples to exercise these rights by over

allocating to non-Indigenous commercial fisheries access to the fisheries resource. Indigenous Peoples are under constant and increased surveillance by Canadian law enforcement entities when exercising their rights. Monture-Angus has proposed a national moratorium on quasi-criminal prosecution of Indigenous hunting and fishing infractions.<sup>1</sup> Such a moratorium may help to prevent some Indigenous Peoples from being criminalized by the colonial system, but this would only constitute a temporary solution. Donohue suggests that Indigenous Peoples must be allowed to define their own place in Canada and not have an alien conception of justice foisted upon them.<sup>2</sup>

**Recommendations:**

**The colonial legal system must refrain from criminalizing Indigenous Peoples for exercising their sovereignty.**

**Until *Indian Act* administrations are dismantled in Canada, the *Indian Act* band council system must be limited to municipal duties. Band Councils must refrain from overstepping their contested reserve-based jurisdiction.**

**The United Nations must recognize Indigenous nations as independent from states, and make the appropriate space so that as independent nations, Indigenous Peoples can raise their concerns at international, regional and domestic levels.**

**B. Sovereignty and Jurisdiction**

Indigenous Peoples possess sovereignty equal to nations and states. The sovereignty of Indigenous Peoples manifests itself in Indigenous institutions of government; legal, economic, proprietary, social, cultural, peace and spiritual systems; and fundamentally in the inherent relationship Indigenous Peoples have with their territories. Indigenous Peoples’ sovereignty is inalienable, indivisible and infinite. Canadian state practice is to unilaterally assert crown sovereignty over Indigenous territories and Peoples without establishing the legitimacy of such assertions. Such practice violates the economic, social and cultural human rights of Indigenous Peoples.

**1. Representation**

Indigenous Peoples’ have the inherent jurisdiction and responsibility to govern all aspects of their relations to their territories, citizens and other peoples. The Canadian government prefers to deal with *Indian Act* Band Council representatives or Aboriginal organizations as opposed to Hereditary Chiefs, traditional territorial owners, or leaders. This is questionable because Band Councils are the creation of the federal government and serve as a tool of the colonial government’s regulation of “Indians” and “lands reserved for Indians”.

<sup>1</sup> P. Monture-Angus, *Journeying Forward: Dreaming First Nations Independence*, (Halifax: Fernwood Press, 1999) at 113. [Monture-Angus]

<sup>2</sup> B. Donohue, “The Third Solitude: Making a Place for Indigenous Justice” (1997) 17(2) *The Canadian Journal of Native Studies* 315 at 327.

Canada negotiates political accords and new relationships with leaders of Aboriginal organizations rather than directly with Indigenous Peoples creating top down policies and structures for agreements. These organizations do not speak for Indigenous Peoples and undermine their inherent authority, sovereignty and self-determination.

Colonial agents infiltrate the band council system in a number of ways:

1. Influencing the composition of community leadership: through legitimizing desirable people by giving them formal recognition or legal status, ignoring certain individuals, labeling certain groups or perspectives as extremist, diverting attention away from addressing core issues.
2. Divide and conquer: the state plays on and amplifies existing social, political, and economic divisions within the community.
3. Generating dependency: the state prevents the development of an economic base for Indigenous communities and encourages dependency on the state.
4. Incorporation: exploiting the misperception that the system can be changed from within.<sup>3</sup>

The jurisdiction and self-determination of Indigenous Peoples is undermined when Canada does not engage with the traditional leadership and representatives of Indigenous Peoples. Such state practice leads to the erosion of ancestral decision-making processes and practices, and therefore violates the capacity of traditional representatives to voice the will of the people or protect their territories.

## 2. Consent

The free and prior informed consent of Indigenous Peoples' is an essential attribute of the Indigenous Peoples' right to self-determination. This principle finds expression at international law. Canadian state practice is to selectively consult (see below) Indigenous Peoples rather than obtain their free and prior informed consent in relation to matters that affect Indigenous Peoples' territories or economic, social and cultural rights. Consultation is one of the weakest forms of civil engagement. Effective participation by Indigenous Peoples transpires through the strongest form of expression: consent. Without such participation, Canada is violating Article 1 of the ICESCR in relation to Indigenous Peoples. Canada will respect and honour the right to self-determination of Indigenous Peoples when federal and provincial governments develop state practice to obtain the free and prior consent of Indigenous Peoples regarding in all state-Indigenous Peoples' relations.

Article 1 of the Covenant includes as part of the right of self-determination, the right to freely dispose of natural wealth and resources, and a right not be deprived of the peoples' means of subsistence. Self-determination means the right to determine your own future, and the future of your land. This means a right to not have your lands and resources harmed or disposed of without free prior informed consent.

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<sup>3</sup> T. Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999) at 75-76. [Alfred]

Several international law bodies have held that Indigenous Peoples' free and informed consent is required before developments take place. For example, the Inter-American Commission on Human Rights, in 2000, concluded that Belize had violated the Maya Peoples' rights to property and equality under the *American Declaration of the Rights and Duties of Man*, by failing to recognize the Maya Peoples' communal property right to their traditional lands, and by granting logging and oil and gas interests to third parties without consultation, accommodation, and the informed consent of the Maya.

In 2002, the same Commission considered a petition presented on behalf of members of the Western Shoshone against the United States for violating the American Declaration of the Rights and Duties of Man. The Commission concluded that the US has failed to ensure the petitioners' right to property under conditions of equality, contrary to the Declaration. The Commission found that special measures were required 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."

The United Nations Committee on Elimination of Racial Discrimination, the body responsible for the Convention on the Elimination of All Forms of Racial Discrimination, made a General Recommendation in 1997, that state parties "ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent." In March of 2006, the Committee considered a request by the Western Shoshone and found that the US is not respecting its obligations under the Convention. The Committee urged the United States to take immediate action, including freezing any plans to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers and desisting from all activities or plans concerning their ancestral lands or in relation to their natural resources.

### **3. The New Relationship**

British Columbia points to the "New Relationship" document as an example of a progressive policy to deal with Indigenous rights. In the New Relationship document, the First Nations Summit, the Union of British Columbia Indian Chiefs, the British Columbia Assembly of First Nations, and the Province of British Columbia agree to establish a new government-to-government relationship based on respect, recognition and accommodation of Aboriginal Title and Rights. However, the Province refuses to call the New Relationship an agreement. This is indicative of the Province's reluctance to be bound by the New Relationship. The New Relationship is only an agreement to agree. It is not binding, but rather a list of political platitudes that will not meet the international standard of free and informed consent. Consultation since the New Relationship Document was released has not been aimed at obtaining Indigenous Peoples' consent. Actions speak louder than words.

The Province of British Columbia unilaterally developed an Aboriginal consultation policy called the *Provincial Policy for Consultations with First Nations*<sup>4</sup> (the “Provincial Policy”), without any input from Indigenous Peoples. The Provincial Policy fails to meet international requirements for free and informed consent in a number of ways.

In the List of Issues regarding Canada’s fourth report, the Committee asks Canada what consultation measures are in place to negotiate with Indigenous Peoples when mining, logging or other industrial use of unceded lands is planned. The plethora of cases that have gone before the courts on the issue of consultation over the last few years reveals that Canada and British Columbia have yet to implement meaningful consultation measures. The List of Issues asks about negotiation when use of unceded lands is planned. While there are some discussions in the province related to land use planning, consultation with respect to planned uses is not based on negotiation and recognition of the right of self-determination. Rather, the usual process is for the provincial decision maker to notify Indigenous Peoples of a pending decision regarding a development, and then require the Indigenous Peoples to show how their rights will be affected. Rather than require negotiation seeking consensus, the province’s policy then contemplates the provincial decision maker making a unilateral decision. There is a very strong resistance to moving towards joint or shared decision making and no consideration of Indigenous Peoples having authority to make decisions outside of reserve lands. While the First Nations-Federal Crown Political Accord recognized the right to make decisions respecting land, there has been no implementation of this right and the Crown continues to alienate Indigenous Peoples’ lands and resources without regard to the right of the Indigenous Peoples to make decisions respecting land and resources. Canada will not interfere with provincial decisions, and the province makes most land and resource decisions on Indigenous Peoples’ lands in British Columbia.

The Provincial Policy reflects a risk-management approach, aimed not at preventing infringement or impacts on Indigenous Peoples, but rather on avoiding legal action. To that end, the Provincial Policy is focused on process, not on actually responding to Indigenous concerns. The Provincial Policy is designed to provide justification when projects proceed that infringe upon Indigenous rights. This falls short of the international standard of free and informed consent.

The Provincial Policy anticipates that when consultation warrants it, government will offer some form of accommodation or other benefits to placate Indigenous Peoples about the proposed development. In practice, accommodation under the Provincial Policy has been primarily economic and has not recognized Indigenous Peoples’ jurisdiction, nor protected Indigenous Title, Rights and Treaty Rights where it would require halting or making significant changes to a project. Indigenous Peoples’ social and cultural development is diminished when they cannot maintain the ecological integrity of their territories due to state consultation practices and the avoidance of obtaining the consent of Indigenous Peoples.

The Provincial Policy seems geared toward low-level consultation (e.g. site specific permitting) instead of consultations at the strategic level (e.g. location, rate, and method of resource extraction). The Provincial Policy sets out a pre-determined process. As mentioned earlier,

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<sup>4</sup> Province of British Columbia, *Provincial Policy for Consultation with First Nations*, October 2002. On line at: [http://www/gov.bc.ca/bcgov/content/docs/@2QS7M 0YqtuW/consultation\\_policy\\_fn.pdf](http://www/gov.bc.ca/bcgov/content/docs/@2QS7M 0YqtuW/consultation_policy_fn.pdf)



Indigenous Peoples were not involved in the creation of the process. According to the Provincial Policy, “consultation processes should be clearly defined to the First Nations in question.”<sup>5</sup> However, “the first step in the consultation process is to discuss the process itself.”<sup>6</sup>

Indigenous Peoples must participate in consultations.<sup>7</sup> As suggested in *Halfway River v. British Columbia*<sup>8</sup>:

The First Nation is required to cooperate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The First Nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate.<sup>9</sup>

Indigenous Peoples are being coerced into consultation, because if they fail to participate in consultation, infringements of their rights will be justified. Again, this is contrary to the international law standard of free and informed consent. State and provincial governments consult with *Indian Act* Band Council representatives rather than Indigenous governance leaders. As mentioned above, that is problematic.

Even when Indigenous Peoples oppose proposed developments, infringements on their rights are permitted if there is a “valid legislative objective” that is “consistent with the honour of the Crown”.<sup>10</sup> The definition of “valid legislative objectives” that are “consistent with the honour of the Crown” is unclear, but the terms have been used liberally by British Columbia or Canada to allow for more “justifiable” infringements on Aboriginal rights. When non-Indigenous economic rights notoriously override Indigenous rights, Canada discriminates against Indigenous Peoples and violates the ICESCR.

Obtaining Indigenous Peoples’ consent is not an objective of the British Columbia Provincial Consultation Policy. Canada’s courts also have not given effect to the international law standard of free prior informed consent. The Supreme Court of Canada has held that prior to “proof” of rights, the duty to consult does not include a duty to obtain Indigenous Peoples’ consent. With respect to “proven” rights, the Court held that consent will be required in some circumstances (it remains unclear what those circumstances are). The Court has failed to ensure that domestic jurisprudence complies with international customary law which includes the free and prior informed consent of Indigenous Peoples regarding their lands, knowledge and governance.

The principle of free and prior informed consent is part of customary international law and through self-determination, a foundational right under the ICESCR for all peoples, including Indigenous Peoples. Canada has failed through its institutions, laws and policies to meet this international standard and has not met its obligations under Article 1 of the ICESCR to respect the consent dimensions of Indigenous Peoples’ rights to self-determination.

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<sup>5</sup> *Ibid.*, at 19.

<sup>6</sup> *Gwasslam v. British Columbia*, 2004 BCSC 1734, at para. 8, [“*Gwasslam*”], and *Huu-ay-aht First Nation v. Minister of Forests*, 2005 BCSC 697, at para. 113, [“*Huu-ay-aht*”].

<sup>7</sup> *Ryan et al v. Fort St. James Forest District*, s. 40 B.C.A.C. 91 (B.C.C.A.).

<sup>8</sup> *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 9 W.W.R. 645 (B.C.C.A.).

<sup>9</sup> *Ibid.*, at para. 185.

<sup>10</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 399.

**Recommendation:**

**Canada must reform its institutions, laws and policies to meet the international standard of free and prior informed consent of Indigenous Peoples in order to comply with its obligations under Article 1 of the ICESCR and to further respect the consent dimensions of Indigenous Peoples' rights to self-determination.**

***C. Original title: Lands, Territories and Resources***

From an Indigenous perspective, Rights flow from relationships with and responsibility for our territories. Rather than “Aboriginal Title” Indigenous Peoples’ understanding of their relationships with their traditional territories is better understood as “Original Title”. Original Title is the sacred relationship between Indigenous Peoples and their respective territories. Original Title encompasses a right of self-determination, and includes the responsibility and jurisdiction to protect, access, and use the lands, waters and resources of territories for the benefit of Indigenous Peoples. Indigenous Peoples’ laws, languages and cultures flow from the lands, waters and resources of our traditional territories. The Indigenous Peoples’ struggle to protect their homelands and waters is the struggle to survive as Nations and as Peoples. Indigenous Peoples have struggled to maintain the integrity of their lands in the face of the continued colonization and settlement of our territories, and use and exploitation of our lands and resources. The steadily increasing pressures on their Original Title territories threaten the integrity of the environment, and all Peoples. The recognition and incorporation of Indigenous Peoples and Indigenous Peoples’ laws into land, water and resource use decisions is necessary to ensure the preservation of living worlds for all future generations, both Indigenous and non-Indigenous. Economic disparities exist between Indigenous and non-Indigenous Peoples. The disparities are largely due to the lack of acknowledgement of Original title possessed by Indigenous Peoples. This in turn prevents Indigenous Peoples from exercising autonomy over their lands and resources. Legal, political and social obstacles generally preclude Indigenous Peoples from independently profiting from their territories. Indigenous Peoples have for millennia sustained food security through their use of Original title. State practice to not recognize the Original title of Indigenous Peoples impoverishes this capacity.

**1. The Delgamuukw<sup>11</sup> Test**

The *Delgamuukw* test for Aboriginal is troublesome for many reasons. In the court’s reasoning, “title” does not mean “ownership”<sup>12</sup>. Further, Indigenous title protects only those activities and aspects of the Indigenous culture that Canadians have determined are pre-European in nature.<sup>13</sup> This locks Indigenous rights in the past, and denies Indigenous cultures the right to adapt to the changing world around them. A lot of time and energy has been expended to prove Indigenous title, but to date, no Indigenous Peoples within the area now commonly known as Canada has proven Indigenous title using this test. This is because the test requires a high evidentiary burden, and the burden is on Indigenous nations to prove Indigenous title.

<sup>11</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*]

<sup>12</sup> *Alfred* supra note 3 at 120.

<sup>13</sup> *Ibid.*, at 121.

Arguably, the burden should be on the state to prove that Canada legitimately obtained title from Indigenous nations through purchase or consent. Canadian judges tend to engage in exercises to limit Indigenous title accepting that the state owns the land and has sovereign jurisdiction. However, the state's ownership and jurisdiction over Indigenous Peoples and territories is not automatic. The state should be required to prove it has legitimate title (i.e. via purchase or consent,) and if the state cannot do so, presumptive title should lie with Indigenous Peoples. Canada and British Columbia have consistently failed in their reports and responses to address Article 1 of the Covenant. Canada's approach to their reports reflects Canada's and British Columbia's approach domestically – i.e., avoidance and denial. The failure to implement Article 1 is apparent in legislation, policy and jurisprudence. Existing policies and legislation, and some of the existing Canadian jurisprudence, fail to recognize and respect the right of self-determination, and likewise fail to promote the realization of this right. On the contrary, Canada and British Columbia deny the existence of this right and hamper the ability of Indigenous Peoples to realize this right.

## 2. Economic, social and cultural impacts on the self-determination of Indigenous Peoples

Economic disparities exist between Indigenous and non-Indigenous Peoples. The disparities are largely due to the lack of acknowledgement of Indigenous Title which in turn prevents Indigenous Peoples from exercising autonomy over their lands and resources. Legal, political and social obstacles generally preclude Indigenous Peoples from independently profiting from their territories. Indigenous peoples are often coerced into compromises or negotiations of their laws or rights. Chief Qwatsinas contends that:

The economic and social needs of our people have been used as a legalized form of blackmail, coercion and extortion to force them to negotiate away or sell their land and rights. There has been traditional economic ruin, and traditional social disruption on the lives of our peoples; yet no amount of compensation could suffice to replace our lands and way of life.<sup>14</sup>

Self-determination is a people's right to determine their own future. However, government policy, and for the most part Canadian jurisprudence, relegates Aboriginal Rights and Title to history. Thus, for example, Indigenous Peoples may have rights to trade in natural resources within Canada, but those trading rights are limited to earning a "moderate livelihood". The rationale behind this limitation is that at the time of contact with Europeans, or the time of entering into the historical treaties in the 1700s, the Indigenous Peoples traded and thereby earned a moderate livelihood. By the standards of the time, Indigenous Peoples were wealthy because they had an excess of resources. An example is provided by the 1999 Supreme Court of Canada decision in *R. v. Marshall*.<sup>15</sup> In this case, a Mi'kmaq individual was charged with offences under the *Fisheries Act* for fishing without a licence. He claimed a treaty right to catch and sell fish. The Court held that the treaty right was "limited to securing 'necessaries' (which I construe in the modern context, as equivalent to a modern livelihood), and do not extend to the

<sup>14</sup> Chief Qwatsinas, quoted in *Greenpeace Press Release: Nuxalk Chief and Protestors Sentenced* (Vancouver: February 12, 1999).

<sup>15</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456

open-ended accumulation of wealth.”<sup>16</sup> To arrive at such conclusions, the Indigenous Peoples’ level of earnings from trading resources either at the time of contact or when a treaty was entered into, are compared to today’s standards of living. No one, Indigenous or European, lived at these levels in the 18<sup>th</sup> and 19<sup>th</sup> centuries. This limitation is clearly inconsistent with a right to determine one’s own future. For Aboriginal Title in Canadian law to be consistent with Article 1 and void of economic racism, the focus must shift from the past to the present and future.

**Recommendation:**

**Canada must meet its international obligations to Indigenous Peoples to respect their rights of ownership and possession of Indigenous lands, territories and resources.**

***D. Colonialism***

Self-determination’s main purpose is to rid this world of conquest and violent or despotic state action against peoples. Self-determination has been used to remedy acts of state colonization and racial oppression of Indigenous Peoples such as in Africa and India. Indigenous Peoples in Canada and British Columbia continue to be colonized by the Canadian state. Colonization violates all forms of human rights, including those rights enshrined under the ICESCR. Canadian jurisprudence and policy perpetuates the inhumane existence of colonized relations through racist doctrines such as discovery, conquest, civilization, effective control, terra nullius and settlement. As rationales and justifications for the assertion of Canadian sovereignty and control over Indigenous Peoples and lands, these doctrines must be reviewed and systemically eradicated from Aboriginal rights jurisprudence and state policy. The economic, social and cultural rights of Indigenous Peoples are sterilized through the operation of these doctrines. Indigenous Peoples are unable to enjoy their human rights under the ICESCR due to on-going colonization. The preambular paragraphs of the United Nations Draft Declaration on the Rights of Indigenous Peoples offers sound direction in this regard:

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Affirming* further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are, racist, scientifically false, legally invalid, morally condemnable and socially unjust.

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<sup>16</sup> *Ibid.*, at para. 7.

## 1. Doctrines that Deny Indigenous Peoples' Self-Determination

### *Discovery*

In order to fully understand the absurdness of Canada and British Columbia's positions and approaches with respect to Indigenous Peoples' rights and in particular the right of self-determination, a brief history of the relationship is useful. Before Europeans "discovered" what is now known as British Columbia and Canada, Indigenous Peoples lived on these lands. These Peoples were socially and politically organized, having their own legal systems and laws and land and resource ownership. These Peoples sustained themselves from the land for millennia and acted as "stewards" or caretakers of the lands, responsible for maintaining the integrity and well being of the lands so that future generations could continue to sustain themselves. When Europeans first arrived, they relied on the expertise and knowledge of Indigenous Peoples in order to survive. Relationships between the Europeans and Indigenous Peoples were for the most part based on mutual respect and power. In allowing Europeans to live in their territories and share their resources, Indigenous Peoples did not contemplate that those with whom they shared would later unilaterally claim sovereignty and ownership to the exclusion of Indigenous Peoples. Canada's colonial predecessors asserted sovereignty over Canada on the basis of many doctrines including discovery. The fact that lands inhabited by sovereign Indigenous Peoples can be "discovered" and thereby become subject to the colonial powers' assertion of sovereignty is a mystery to Indigenous Peoples. This acquisition doctrine does not accord with Indigenous legal and political systems. According to European worldviews, the "discovery title" that European nations attained when they first came to this land meant that they (and later Canada) could only acquire full title to Indigenous Peoples' lands, in three situations:

1. Voluntary sale;
2. Voluntary cession (*i.e.*, through treaties); or
3. Conquest.

The governments of the colonies were forbidden to grant to settlers Indigenous lands unless they first had been purchased by the Crown (with the Indigenous Peoples' consent) in a public assembly of the Indigenous Peoples. Canada and her predecessors did not uniformly adhere to the discovery doctrine and in British Columbia, Canada has unilaterally asserted sovereignty without the consent of Indigenous Peoples or seeking voluntary cession through agreement. In other words, Canada has occupied and settled British Columbia based on the doctrine of discovery. The effect is that Indigenous Peoples full self-determination is limited and their capacity to exercise their economic, social and cultural rights are controlled by the state. Further, Indigenous Peoples' capacity to create and sustain external relations through development is undermined by Canada's unilateral assertion of sovereignty over Indigenous Peoples. Canadian jurisprudence has adopted the discovery doctrine as interpreted by the US courts in the Marshall trilogy in most of the major Aboriginal rights cases including: *St. Catherine's Milling*; *Calder*, *Guerin*, *Sparrow*, *Van der Peet*, *Delgamuukw* and *Haida Nation*. Canadian courts have used the discovery doctrine to not recognize Aboriginal rights and treaty rights and jurisdiction, narrowly define Aboriginal rights and treaty rights to practice or use rights, and allow the infringement of Aboriginal and treaty rights by Canada or provinces without compensation or restitution. These legal precedents containing the doctrine of discovery must be overturned to comply with the ICESCR because the use of this doctrine violates the Indigenous Peoples' rights to self-determination.

### *Terra Nullius*

Canadian jurisprudence has on paper rejected the doctrine of terra nullius, however, state and provincial practice has been to continue its use. It was not until the 1970s that Canadian courts began to recognize that Aboriginal Peoples with organized societies and legal systems occupied Canada prior to Europeans. In 1973, the Supreme Court of Canada, in the *Calder* case, confirmed that Aboriginal Title survived the Crown's assertion of sovereignty. Canadian law now rejects the assertion of *terra nullius* and recognizes that although Indigenous Peoples' legal and political systems differ from those of European nations, they cannot be ignored.<sup>17</sup> However, Indigenous Peoples continue to be deprived of the ability to exercise and benefit from these rights. Canada and British Columbia to date have not recognized the Original title and jurisdiction (political, legal, economic, social and cultural) of Indigenous Peoples. According to European legal systems, a colonial power could acquire foreign territory if it could show that lands were empty (*terra nullius*), and not owned and occupied by any other peoples. The principle of *terra nullius* was extended to include land with no colonially recognized legal order. Under the expanded notion of *terra nullius*:

*territory occupied by a barbarous or wholly uncivilized people may be rightfully appropriated by a civilized or Christian nation.*<sup>18</sup>

Although Indigenous laws have always existed, and continue to exist, in the area commonly known as British Columbia, Canada fails to recognize the pre-existing legal orders in Indigenous territories to be recognized. Because their laws and governments differed from those of the Europeans, the colonizers believed that they did not have to respect Indigenous Peoples' laws or governments, and could treat the lands as if they were empty.<sup>19</sup> Another justification for not entering into treaties was that Aboriginal Title was extinguished when the Colony placed Indigenous Peoples on reserves.<sup>20</sup> Canada and British Columbia continue to assert that when they placed Indigenous Peoples on reserves, this ended the ability of Indigenous Peoples to exercise and enforce their rights in the rest of their traditional territories or waters. The legal and policy sanctioning of the terra nullius doctrine by Canada and British Columbia in relation to Indigenous Peoples violates the ICESCR because it is used to justify Canadian state practice to extinguish infringe Indigenous Peoples' rights.

In the majority of the Indigenous territories in the area now commonly known as British Columbia, no purchases of title occurred, nor were there voluntary transfers of title. Until 1859, it was the practice of Governor Douglas (then the Governor of the colony) to continue to enter into treaties to purchase lands from Indigenous Peoples before allowing settlement. In 1861, after the colony had run out of funds for purchasing lands, Governor Douglas asked the British

<sup>17</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 268-275.

<sup>18</sup> *The British Columbian*, 1 June 1869.

<sup>19</sup> C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation", in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 45-47 [Bell and Asch]; and Royal Commission on Aboriginal Peoples, *Renewal, a Twenty Year Commitment* (Canada: Ministry of Supply and Services Canada, 1996) Vol. 5, p. 141.

<sup>20</sup> See *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at 334-336 [Calder]. Reserves were established by British Columbia unilaterally, and then by the McKenna-McBride Commission in British Columbia. Aboriginal Peoples did not agree to the establishment of these reserves. See T. R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas* (Vancouver: Douglas & McIntyre, 1992) at pp. 145-149

government for funds and was refused.<sup>21</sup> The colony then began to grant lands without first purchasing the Indigenous interest. Most Indigenous Peoples in British Columbia have never entered into a treaty with the Canadian Crown. Regardless, the doctrines of discovery and terra nullius have resulted in the following judicial presumptions, which continue to influence Canadian colonial courts:

- (1) Sovereignty and legislative power is vested in the British Crown and its successors;
- (2) Ownership of Indigenous lands accompanies sovereignty over Indigenous territory;
- (3) Indigenous Peoples have an interest in land arising from original occupation that is less than full ownership;
- (4) The British Crown obtained the sole right to acquire the Indigenous interest; and
- (5) Indigenous sovereignty was necessarily diminished.<sup>22</sup>

Indigenous Peoples do not accept these presumptions. They continue to violate Indigenous Peoples' self-determination and Article 1 of the ICESCR.

### ***Conquest and Cession***

Conquest has been used by European nations to acquire other peoples' territories. Conquest has always been violent, continues to exist and has on-going effects. Based on British property thought, Indigenous lands have been categorized as conquered, ceded or settled colonies. These designations are unacceptable because each designation confers different forms of jurisdiction to the colonizing power and limited, delegated or no power to Indigenous Peoples that can be unilaterally altered at Canada's political or judicial whim. Conquest rationales exist in Canadian state practice and jurisprudence through the application of extinguishment justifications, treaty-making processes of cession including the B.C. Treaty Commission Process and the doctrines of continuity and sovereign incompatibility (see below). These modern formulations of conquest and cession doctrines will be examined below. Such doctrines violate Indigenous Peoples' unqualified self-determination rights under Article 1 of the ICESCR. Canada does not meet its obligations under the ICESCR if its state practice amounts to acts of conquest. Conquest is no longer legal at international law. State acts of cession also violate the inherent sovereignty and self-determination of Indigenous Peoples.

### ***Settlement***

The doctrine of settlement is used to justify the acquisition of sovereignty over Indigenous lands in Canada too. Under this doctrine, Indigenous lands are categorized as settled colonies. In such colonies, the Indigenous proprietary, political and legal systems do not apply to settlers or colonial administrators. Rather, British law applies automatically. A settled colony was regarded "as desert, uninhabited land where English law applied automatically as a "birthright" of the English colonizers. If the local law in the foreign territories was unsuitable for Christian Europeans, the Victorian common law held that British colonizers were regarded as living under the laws of England."<sup>23</sup> This doctrine is rooted in the civilization doctrine and is racist. It presumes that the Canadian Crown has underlying title to all lands in Canada and that

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<sup>21</sup> *Calder, ibid.*, at 329-331.

<sup>22</sup> *Bell and Asch, supra* note 19 at 47.

<sup>23</sup> S. Henderson, et.al., *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 295 [*Henderson*]

Indigenous Peoples had no comparable systems of organization to govern non-Indigenous Peoples. Recently, in the *Bernard and Marshall*<sup>24</sup> cases, the Supreme Court of Canada held that all lands yet to be unceded in Canada pursuant to the Royal Proclamation of 1763, are not Indigenous lands, but rather lands for future settlement. Settlement has also been used by Canada to justify its effective control of Indigenous territories and peoples and has been held by the Supreme Court of Canada to be the sole purpose of treaty-making in the *Mikisew*<sup>25</sup> case. Treating Indigenous territories as “settled colonies” denies Indigenous self-determination and therefore violates Article 1 of the ICESCR.

### *Effective Control*

Another doctrine used by the Supreme Court of Canada to found the unilateral assertion of Canadian sovereignty over Indigenous Peoples and their territories is “effective control” or the principle of effectivity as discussed in the *Re Quebec Secession Reference*<sup>26</sup> case. At international law, a state will be recognized when it has effective control over a territory and population and the international community recognizes such acts. This doctrine was first articulated in the *Islands of Palmas*<sup>27</sup> case, which involved a dispute over who had sovereignty over the island between the United States and the Netherlands. The Netherlands was successful in demonstrating that their colonial administrations were more stable and regular than Spain, the United States predecessor. Interestingly, the Netherlands based their claims to the island on agreements made with local Indigenous leaders. In this case, the Court held that the Indigenous Peoples of the island did not have proprietary rights in their traditional territories, so the Netherlands’ source of their claims was not the consent of Indigenous Peoples but rather its ability to demonstrate effective administrative control of the area. In other words, another technique was fashioned to facilitate the colonization of Indigenous lands and peoples.

The ramifications of this 1928 decision are taking shape in Canadian Aboriginal rights jurisprudence. In 2003, the Supreme Court of Canada case of *R. v. Powley*<sup>28</sup> held that the Metis rights to hunting has to be proven at the time that Canada had “effective control” of the area in question. In 2004, the Court held in the *Haida Nation*<sup>29</sup> case that the reconciliation process between Aboriginal peoples and the Crown “flows from the Crown’s duty of honourable dealing toward Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.” In 2005, in the *Bernard and Marshall* cases, the Court now requires Indigenous Peoples to establish exclusive occupation of their traditional territories through modes or exercises of “control”.<sup>30</sup> Again colonial doctrines are being used by Canada to shape the recognition of Indigenous land rights. Indigenous Peoples’ relationships to their territories are not based on conquest, colonization, discovery, settlement or effective control. The indicia to establish Indigenous relationships to their lands and waters are found in their languages, legal

<sup>24</sup> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 [*Bernard and Marshall*]

<sup>25</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC

<sup>26</sup> *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec*, [1998] 2 S.C.R. 217.

<sup>27</sup> *Island of Palmas Case (Netherlands v. United States)* (1938) Reports of International Arbitral Awards, TIAS ii 829.

<sup>28</sup> *R. v. Powley*, [2003] 2 S.C.R. 207 at para.40.

<sup>29</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at para. 32.

<sup>30</sup> *Bernard and Marshall*, *supra* note 24 at para. 62.



systems and teachings and stories. Even though section 35(1) of the *Constitution Act, 1982* presents an option in the legal arsenal<sup>31</sup> of Indigenous Peoples, it is plagued by colonialism. It subsumes Indigenous rights into the realm of the Canadian Constitution, thus subjecting these rights to definition and interpretation by the colonial courts. Further, colonial judges have used section 35(1) to narrow the scope of Indigenous rights by inventing arbitrary tests which lock Indigenous rights in the past. The tests and the doctrines that shape Aboriginal rights litigation systemically violates the rights to self-determination of Indigenous Peoples. Indigenous jurisdiction never factors into judicial deliberations. Also, the burden is on Indigenous Peoples to prove their rights continue to exist. Section 35(1) allows the Canadian federal government to unilaterally extinguish those rights where there is a “valid legislative objective” that is “consistent with the honour of the Crown”.

Indigenous Peoples have been forced to:

prove their ancestral organization in societies, the nature of their institutions, and the existence of the particular institutional rights claimed (e.g., lawmaking powers) to rebut the presumption that English institutions were automatically received in a lawless and politically barren land.<sup>32</sup>

Even so, the court does not seem to be aware that it is part of the colonial experience of Indigenous Peoples in this country.<sup>33</sup> Canadian jurisprudence regarding Indigenous Peoples rights do not comply with Article 1 of the ICESCR. Law reform is critical in order for Canada to meet its obligations under the Covenant.

**Recommendation:**

**Canadian jurisprudence regarding Indigenous Peoples’ rights does not comply with Article 1 of the ICESCR. Law reform is critical in order for Canada to meet its obligations under the Covenant. The doctrines of discovery, conquest (cession treaty making processes, extinguishment powers, continuity and sovereign incompatibility), terra nullius, settlement, and effective control are not acceptable. Canadian state practice and her courts must eradicate the application of these doctrines in relation to Indigenous Peoples’ rights and Indigenous Peoples-Canadian relations. Lack of state action to comply with this recommendation will lead to the continuing colonization of Indigenous Peoples and corresponding violation of Indigenous Peoples’ rights to self-determination.**

Canada (and British Columbia) should be required to report on what actions if any they have taken to recognize Indigenous Peoples’ rights under Article 1. Documents or words with no implementation should not suffice. Canada should be required to respond directly to Article 1: how are Indigenous Peoples able to freely determine their futures and pursue their development; how are Indigenous Peoples able to freely dispose of their natural wealth and resources; how is Canada ensuring that Indigenous Peoples are not deprived of their means of subsistence; and how does Canada/British Columbia promote and respect the realization of the right of self-determination? Canada has yet to implement any aspects of Article 1. Canada must recognize Indigenous Peoples’ inherent right to self-determination, including the right to govern our lands and resources.

<sup>31</sup>*Monture-Angus* supra note 1 at 111.

<sup>32</sup>*Ibid.*, at 50.

<sup>33</sup>*Ibid.*, at 107.

### ***E. Extinguishment and de facto Extinguishment***

In Canada's responses to the list of issues taken up in connection with the consideration of the fourth periodic report of Canada concerning the rights referred to in articles 1-15 of the Covenant, Canada claims that there is no longer an extinguishment requirement in the settlement of claims. While Canada and British Columbia may no longer use the word "extinguishment", the effects of the current policy or approach are the same. For example, Indigenous Peoples' rights and title may continue to "exist" after signing a treaty such as those signed by the Nisga'a and Tlicho, but those peoples can no longer exercise those rights. How is this not the same as extinguishment? Why must Indigenous Peoples agree to give up their Rights and Title, so integral to continuation of their cultures, identities, and economies in order to be part of the Canadian federation? There is no reason that Indigenous Peoples' jurisdiction over their territories cannot be recognized and given effect to in a manner similar to the division of powers between the federal and provincial governments in Canada's Constitution. The need to somehow prevent Indigenous Peoples from "interfering" with development by requiring some form of extinguishment of their rights flows directly from the approach that treats Indigenous Peoples as a minority group rather than the original peoples of these lands. As noted Canada's fourth report at paragraph 17, "The Constitution confers legislative and executive powers on two levels of government, each of them sovereign in their own sphere." Why can Indigenous Peoples' powers not be recognized in the same way?

That the current federal and provincial approach is ineffective and inappropriate is evidenced by the lack of agreements in the province of British Columbia. One need only look to Canada's fourth report. Canada reports that 14 comprehensive claims agreements have been signed since 1973. Only one of these is in British Columbia. In British Columbia, 125 First Nations are participating in the treaty process, and another 75 are not part of that process. So far the BC Treaty Process has produced no agreements. Compared to BC's process the comprehensive claims process is speedy. But even if claims in British Columbia proceed at the pace of the comprehensive claim settlements noted by Canada in its report, we have another 400 years of negotiations ahead of us. Many Indigenous Peoples in British Columbia do not support the B.C. Treaty process because of its cession foundation and the extinguishment policy that continues to shape negotiations. Through extinguishment and the legally sanctioned infringement of Aboriginal rights, Indigenous economic, social and cultural rights are diminished or not recognized. Indigenous territories are not recognized through land selection models used in the B.C. Treaty process that would extinguish up to 95% of the traditional territories of Indigenous Peoples. The courts have understandably found that Indigenous Peoples are justified in pursuing their claims in court given the ineffectiveness of the treaty process. The extinguishing power of the Canadian state still receives judicial sanction however, and Indigenous Peoples have to weigh this factor in seeking redress for their human rights violations in Canadian courts. The *Delgamuukw*<sup>34</sup> case is important for its holding that provinces do not have powers to extinguish Aboriginal rights, however, this significance is hollow given the provincial infringing powers that the Court recognized which authorize past and on-going colonialism. The Supreme Court of Canada did not denounce the federal power to extinguish Aboriginal rights rather it stated that Canada can extinguish Aboriginal rights through the demonstration of a clear and plain intention. Extinguishing Indigenous rights is antithetical to Indigenous Peoples' rights to self-determination and violates Article 1.

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<sup>34</sup> *Delgamuukw*, *supra* note 11.

## 1. The Doctrines of Civilization, Continuity, and Sovereign Incompatibility – de facto extinguishment

Acts of conquest over Indigenous territories and Peoples by European nations were facilitated by doctrines of civilization which held non-Christian nations to be uncivilized or uncultivators and not capable of possessing sovereignty, social organization or laws. To this day, Canada requires Indigenous Peoples to prove their degree of social organization before recognizing Aboriginal rights such as title, which can continue after sovereignty assertion. Such rights do not continue in their inherent Indigenous form but must be converted to common law rights before the courts will recognize such rights as existing. Subsequent state laws can also infringe these rights. Extensive regulation of Indigenous rights is tantamount to de facto extinguishment. In order to understand how this state power can undermine Indigenous self-determination, there must be an overturning of judicial precedent and change in state practice that allows for the selective use of the doctrine of continuity and its root in conquest acquisition of Indigenous territories and jurisdiction.

The doctrine of continuity was originally a common law principle related to the continuity of local laws upon arrival of colonizers. Under the doctrine of continuity, European nations did not become the owners of lands and waters that were already inhabited by the previous sovereign. Instead, the conquered had the right to remain in possession of our lands under our own laws and customs. For example, it was held in *The Case of Tanistry*<sup>35</sup> that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in *Re Southern Rhodesia*,<sup>36</sup> "it is to be presumed, in the absence of express confiscation or of subsequent expropriator legislation, that the conqueror has respected [pre-existing Indigenous rights] and forborne to diminish or modify them"<sup>37</sup>. In *Mitchel v. U.S.*,<sup>38</sup> the U.S. Supreme Court held that:

according to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign.<sup>39</sup>

In territories acquired by conquest or cession (treaties), the Crown could alter local law, but until this power was exercised, local laws, institutions, customs, rights, and possessions remained in force. Where no conquest or cession has occurred, Indigenous laws and title (ownership and jurisdiction) remain in force. In British Columbia, Indigenous Peoples have never been conquered<sup>40</sup>, so the power to determine which rights continue the Canadian assertion of sovereignty has no legitimacy. Those rights that do not continue are de facto extinguished. In place of inherent Indigenous rights, territories and jurisdiction are imposed colonial laws and the nonconsensual completion of Canadian sovereignty over Indigenous Peoples and their lands.

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<sup>35</sup> *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516.

<sup>36</sup> *Re Southern Rhodesia* [1919] A.C. 211.

<sup>37</sup> *Ibid.*, at p. 233.

<sup>38</sup> *Mitchel v. U.S.*, 34 US 711 (1835).

<sup>39</sup> *Ibid.*, at 748-49.

<sup>40</sup> *Haida Nation*, *supra* note 29 at para. 25.

In British Columbia, rather than recognizing the self-determination, sovereignty and Original title of Indigenous Peoples upon contact, Europeans (and Canada) asserted sovereignty over lands that were already inhabited by Indigenous Peoples. For most of British Columbia's history, Indigenous Peoples' self-determination has been denied and attempts have been made to extinguish correlating rights.

The recent common law development that recognizes the doctrine of Aboriginal rights is a codification of the juridical effect of acquiring territory or jurisdiction conquest without having to go to war. Through the doctrine of continuity, Canada, through her courts, unilaterally decides which Aboriginal rights will continue to exist today. Such determination now also depends on how organized Indigenous societies were. Instead of the Crown proving how it acquired sovereignty legitimately from Indigenous Peoples, Indigenous Peoples are placed with the burden of "proving" their Title and Rights. Canadian jurisprudence has morphed the doctrine of continuity of Indigenous laws (which presumed Indigenous occupation) into a requirement of factual continuity of Indigenous occupation (which requires factual proof of occupation). This shift has resulted in increasingly higher standards of proof for Indigenous continuity of occupation sufficient to establish Indigenous title in the colonial court system. Aboriginal title rights have been de facto extinguished by the Supreme Court of Canada recently in the cases of *R. v. Bernard* and *R. v. Marshall*.<sup>41</sup> This has potential negative impacts for Indigenous Peoples in British Columbia who are seeking recognition of their title rights.

The cases originated on the east coast of Canada, when Indigenous Peoples, exercising their rights under Article 1 of the Covenant to use and dispose of their natural wealth and resources, engaged in logging activities without authorization from the provincial governments who claim to own their lands (New Brunswick and Nova Scotia). As a defense to the charges, the defendants claimed that they were acting under the authorization of their Aboriginal Title and Treaty Rights.

Rather than require the Crown to demonstrate how it has acquired Indigenous Peoples' lands and resources, Canadian jurisprudence requires Indigenous Peoples to prove that they had exclusive occupation and control of their lands when the Crown asserted sovereignty. Not only do the courts fail to understand that Indigenous Peoples' lands are territories and not resource use or village sites, but with this decision, the courts in effect placed Indigenous Peoples in the same legal position as trespassers claiming adverse possession. This is absurd. Indigenous Peoples were here first and should not have to meet a "standard of occupation" test designed for trespassers to have dispossessed the "true" owner.

The Court fails in this decision to give effect to Indigenous Peoples' laws. Paying lip service to the "Aboriginal perspective", the Court held that its task is to look at pre-sovereignty Indigenous practices from the Indigenous Peoples' perspective, and translate those practices into common law rights. It is through this approach that the court arrives at an analysis similar to that in cases where a trespasser claims to now own the lands he has trespassed upon through adverse possession. No effect is given to Indigenous Peoples' own laws.

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<sup>41</sup> *Bernard and Marshall, supra* note 24.

In this case, the end result was that the Indigenous Peoples failed to “prove” physical occupation of the cutting sites when the Crown asserted sovereignty over their lands. While the Crown magically acquired ownership of the vast lands referred to as Canada, Indigenous Peoples can only establish Aboriginal Title if they can meet a test requiring them to prove regular occupancy or use of the cutting sites for hunting, fishing or the exploitation of resources at the time of the Crown’s assertion of sovereignty. This decision places Indigenous Peoples in the position of the trespasser claiming possession and having to meet a test of occupation at the time of the Crown’s assertion of sovereignty sufficient to dispossess the Crown. If Indigenous Peoples are not able to meet these tests, their rights do not continue. In these cases, Indigenous Peoples had no land recognition and their economic rights to develop these lands were denied by the Supreme Court of Canada. De facto extinguishment also occurs when Canada, through her courts, denies the existence of Indigenous rights to cross borders and trade duty free based on the doctrine of sovereign incompatibility. In the *Mitchell*<sup>42</sup> case, the Supreme Court of Canada refused to recognize that the goods brought over the Canada –United States border but through Mohawk traditional territories as duty free. It further held that Mitchell did not have a right to trade in general and the Court denied Mitchell’s Mohawk sovereignty and citizenship. This matter has now gone to the international arena for resolution. The use of sovereign incompatibility is one way that Canada extinguishes inherent Indigenous rights. Use of this doctrine violates Article 1 of the ICESCR.

While extinguishment powers within common law states may be an acceptable form of practice to eliminate property interests within its territory, this colonial form of control is not acceptable in relation to Indigenous territories and jurisdiction. As Sajek Henderson states: “[T]his vestige of colonial law combined with the modern ideal-type of land as commodity permits the Crown to act as predator against, rather than protector of, Aboriginal tenure...Colonial self-interest expressed in colonial legislation, rather than sovereign acts, created the extinguishment theory and refused to place Aboriginal tenure as the starting point of the land recording system”.<sup>43</sup> Indigenous Peoples continue to be victims of such colonial self-interest through extinguishment techniques originally based on conquest doctrines. The ICESCR will be upheld when Canada no longer has a federal extinguishing power and treaty policies are void of extinguishing directives to federal and provincial negotiators.

## **2. Canada’s Policy of Extinguishment violates international obligations**

In its 1998 Concluding Observations on Canada’s third periodic report (paragraph 18), the Committee on Economic, Social and Cultural Rights recommended 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.” Similar recommendations have been made by the Human Rights Committee (1999 & 2005), the Committee on the Elimination of Racial Discrimination (2002), and the Committee on the Rights of the Child (2003).<sup>44</sup>

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<sup>42</sup> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

<sup>43</sup> *Henderson*, *supra* note 23 at 371.

<sup>44</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN CESCR, 1998, UN Doc. E/C.12/1Add.31, paragraph 18. *Concluding Observations of the Committee the Elimination of Racial*

In its fourth periodic report (paragraph 108), the Government of Canada states that it “has withdrawn the requirement for an express reference to extinguishment of Aboriginal rights and title either in a comprehensive claim agreement or in the settlement of legislation ratifying the agreement.” In its responses to the Committee’s list of issues in connection with its fourth periodic report, Canada goes on to explain that “Under this approach, Aboriginal rights and title are continued and modified to become the rights and title as set out in the final treaty... In other words, certainty is achieved by modifying the Aboriginal rights to be the rights set out in the treaty, rather than by surrendering these rights.” This echoes Canada’s position in its fifth periodic report to the Human Rights Committee (paragraph 186), wherein Canada explains that “new approaches to achieving certainty have been developed as a result of comprehensive land claims negotiations”, including the “modified rights model” and the “non-assertion model”. According to Canada, under the “modified rights model”, Aboriginal rights “are not released, but are modified into the rights articulated and defined in the treaty.” Similarly, “Under the non-assertion model, Aboriginal rights are not released, and the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to assert no other Aboriginal rights.”

According to UN Special Rapporteur Rodolfo Stavenhagen in his Report on his Mission to Canada, some Aboriginal Peoples “consider releasing their constitutionally recognized and affirmed rights through a negotiated settlement as unacceptable.” Mr. Stavenhagen adds that notwithstanding assurances from the Government of Canada that land rights agreements (modern treaties) do not imply the extinguishment of rights, “a number of Aboriginal representatives who met with him consider that the modern treaties approach does in fact continue to lead to the ‘release’ or extinguishment of rights.”<sup>45</sup>

Notably, the Human Rights Committee also was not reassured by Canada’s response. In its Concluding Observations following its review of Canada in December, 2005, the Committee stated: “The Committee, while noting with interest Canada’s undertakings towards the establishment of alternative policies to extinguishment of inherent Aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of Aboriginal rights. (Articles 1 and 27)”

The Human Rights Committee recommended that Canada “re-examine its policy and practices to ensure they do not result in extinguishment of inherent Aboriginal rights. The Committee would like to receive more detailed information on the comprehensive land claims agreement that Canada is currently negotiating with the Innu people of Quebec and Labrador, in particular regarding its compliance with the Covenant.”<sup>46</sup>

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*Discrimination*, UN CERD, 2002, A/57/18, paragraphs 330-331. *Concluding Observations of the Committee on the Rights of the Child*, UN CRC, 2003, CRC/C/15/Add.215, paragraph 59.

Concluding Observations of the Human Rights Committee, UN HRC, 2005. CCPR/C/CAN/CO/5, paragraph 8.

<sup>45</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 20 & 91 [Mission to Canada]

<sup>46</sup> *Concluding Observations of the Human Rights Committee*, UN HRC, 2005. CCPR/C/CAN/CO/5, paragraph 8.

In their presentation to the UN Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance (Sept. 2003), the Grand Council of the Crees condemned the federal policies of extinguishment of Aboriginal and treaty rights as “an enduring bed-rock legislative and executive practice of the Canadian crown, fundamentally based on the discriminatory denial of our rights...Aboriginal peoples are the only segment of society in Canada whose constitutionally-affirmed rights are subject to conclusive termination.” In June 2003, at an international Commonwealth Indigenous Peoples' summit in Georgetown, Guyana, the Grand Council of the Crees called for the abandonment of ongoing federal policies of extinguishment of Aboriginal rights. The Grand Council's submission -- based on analysis of all land claims agreements signed in Canada since 1975 and a number of secret Cabinet documents - established that the federal government is still aggressively extinguishing constitutionally-protected Aboriginal rights in all modern land claims agreements it signs.<sup>47</sup>

In July, 2004 the Innu Council of Nitassinan issued a statement entitled “Canada’s Policies of Extinguishment and the Innu of the Labrador-Quebec Peninsula” to coincide with their presentation to the Working Group on Indigenous Populations. In their statement the Innu say Canada has “recently intensified its dishonest and widely condemned policy of extinguishment towards Aboriginal Peoples such as the Innu.” The statement goes on to say that Canada’s Comprehensive Land Claims process “remains rooted in the extinguishment principle” and requires that Aboriginal People “exchange their ‘Aboriginal title’ to the land for cash compensation and particular hunting, fishing and self-government rights.” The Innu acknowledge that Canada, in response to “the international outcry”, amended its “extinguishment provision” and deleted the words “surrender” and “extinguishment” in some treaties. However, the Innu explain, in return “the Aboriginal party would have to agree that the Treaty itself defined the totality of their rights and that they could never assert their rights granted from any previous treaties or from any violations of Aboriginal title that may have occurred in the past. Under this arrangement, the Canadian government is indemnified against all violations of Aboriginal or treaty rights in perpetuity

In its responses to the Committee’s list of issues in connection with its fourth periodic report, Canada explains that it was “within the context of the Tlicho negotiations [that] the non-assertion certainty technique was developed” and states that “the Tlicho nation does not surrender Aboriginal rights, rather they agree not to exercise or assert any land or natural resource rights other than those set out in the agreement. With respect to Aboriginal rights other than land rights, the Tlicho agreement provides an orderly process for bringing additional rights into the treaty by agreement or as a result of a court decision.” The *Tlicho Land Claims and Self-Government Act* (Bill C-14) received Royal Assent on February 15, 2005. Section 2.6.1 of the *Act* says the Tlicho “will not exercise or assert (a) any Aboriginal right, other than any right set out in the Agreement; (b) any Treaty 11 right, other than the right respecting annual payments to the Indians or the right respecting payment of the salaries of teachers...; (c) any right under another treaty concluded before 1975; or (d) any right...in relation to Métis or half-breed scrip or money for scrip.”

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<sup>47</sup> *A Study in Contrasts: A New Vision of Aboriginal Inclusion in Québec and the Continuing Federal Government Imposition of Extinguishment of Aboriginal Rights across Canada*. Submission of the Grand Council of the Crees (Eeyou Istchee) to the Indigenous Rights in the Americas Project, Americas & Caribbean Regional Experts Meeting, Georgetown Guyana, June 23-25, 2003.  
Online: <http://www.gcc.ca/archive/results.php>

Section 2.6.2 states the purpose of 2.6.1 is to enable the Tlicho (a) to exercise and enjoy all their rights...that are set out in the agreement; and (b) to release all other persons and governments of any obligation in relation to any right that, under 2.6.1, the Tlicho First Nation and the persons who comprise it agree not to exercise or assert and to enable all other persons and governments to exercise and enjoy all their rights...as if the rights, that under 2.6.1 the Tlicho First Nation and persons who comprise it agree not to exercise or assert, did not continue to exist.” In addition, the Agreement forces the Tlicho Nation “to release government and all other persons from all claims...in relation to (a) any land right that is an Aboriginal right; (b) any land right that is a treaty right and that, under 2.6.1, they agree not to exercise or assert; or (c) any right that is described in 2.6.1 (d).”<sup>48</sup>

**Explain how new approaches to achieving “certainty” in land rights negotiations with Aboriginal Peoples, namely the “modified rights model and the “non-assertion model”, differ from the extinguishment and surrender approach.**

**Canada’s recent encouraging and useful position on self-determination at the final session of the Working Group on the Draft Declaration is not reflected in its domestic Aboriginal policy. How does Canada explain this contradiction between its international position on self-determination and its domestic policy, which continues to undermine and limit the inherent right to self-determination? Further, will Canada provide written explanation of its concept of self-determination as applied by Canada to Aboriginal Peoples, as requested by the HRC in its 1999 Concluding Observations on Canada’s fourth periodic report (paragraph 7)?”**

## ***F. International Trade Agreements Undermine Indigenous, Social, Cultural and Economic Rights***

The following section is in response to the Committee’s request for information on the impact of the North American Free Trade Agreement (NAFTA) on the enjoyment of the rights recognized in the Covenant in the State party. It will also point to other free trade agreements that promote deregulation and corporate control and thereby directly undermine the objectives of the Covenant.

### **1. NAFTA – Corporate Interests before Peoples’ Rights**

The Canadian constitution recognizes Aboriginal and Treaty Rights, in Section 35, making them the only constitutionally protected proprietary interest in Canada. In addition to that the Canadian courts have given our Aboriginal rights priority over commercial-industrial interests. Yet the Canadian government keeps negotiating free trade agreements that promote corporate interests over Indigenous rights. NAFTA is probably one of the most invasive trade agreements, as it not only contains a dispute settlement mechanism between states in Chapter 19, but also an Investor-State mechanism in Chapter 11.

<sup>48</sup> *Land Claims and Self-government Agreement Among the Tlicho First Nation as Represented by the Dogrib Treaty 11 Council and the Government of the Northwest Territories and Government of Canada*, pages 25-27. Initialled September 4, 2002. Online: [http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr_e.html)



One of the longest-standing trade disputes under NAFTA is the US-Canada Softwood Lumber Dispute, which has also been dealt with in parallel by numerous WTO tribunals. It deals with the extraction of Softwood Lumber from Indigenous territories in Canada to the US. Canadian government administer merely administrative stumpage schemes that give large integrated wood-processing entities a competitive advantage, in addition to that the government of Canada does not require them to remunerate the Indigenous owners of the natural resources. Canada even went so far as to argue that corporations have quasi-proprietary interests in public and parallel Aboriginal Title lands and the resources extracted from them. Indigenous Peoples decided to make their opposition to the Canadian government advocating free corporate access to natural resources without taking into account the social-cultural and economic rights of peoples known.

As Indigenous Peoples we have standing both in national and international tribunals and their rights have been recognized at the national and international level and include a human rights, environmental, social, cultural and economic dimension. Therefore an Indigenous organization, the Indigenous Network on Economies and Trade (INET) successfully submitted *amicus curiae* briefs in the US-Canada Softwood Lumber Dispute, both before NAFTA and WTO panels. In their submission Indigenous Peoples from across Canada argued that the non-recognition of Indigenous rights constituted a subsidy to large corporations who do not have to consult and remunerate Indigenous Peoples. They also showed that Canada's position to promote corporate interests over peoples' rights violated both Indigenous rights and Canada's international commitments, such as under the ICESCR.

The threat that NAFTA poses to international standards and national regulation to do with Indigenous, human and social, cultural and economic rights is even intensified by NAFTA's provisions on investment. Chapter 11 grants national treatment to foreign investors and guarantees them the right to invest despite domestic laws and regulations. If the latter stand in the way of commercial industrial developments corporations now have the ability to sue countries directly where they have lost profits or been prohibited from investing in the first place – even when domestic companies are prohibited as well.

Whilst multinational firms now can even sue for the expropriation of profits, Indigenous Peoples are increasingly threatened by the ongoing illegal expropriation of their lands by multinational companies without being compensated. With the threat of litigation through these agreements for billions of dollars, national governments, such as Canada are becoming reluctant to legislate in the public's interest. There is also the threat the multi-national corporations will sue governments if they protect Indigenous rights. One example is the NAFTA Chapter 11 action, Glamis, a Canadian mining company brought against the United States government because it prohibited them from mining a sacred site of the Quechan Nation in California<sup>49</sup>. An independent federal agency had found that if the mine were built, "the Quechan tribe's ability to practice their sacred traditions as a living part of their community would be lost." Glamis has filed a legal claim saying environmental restrictions and the sacred site protection have destroyed the value of the mine.

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<sup>49</sup> <http://www.latimes.com/news/nationworld/nation/la-na-judge17mar17,1,5221>, 303, The Nation, Tribe Opposes Appeals Court Nominee

## 2. GATS – New Disciplines and Deregulation

Another ever-growing threat to Indigenous, social, cultural and economic rights are the current negotiations on domestic regulation under the General Agreement on Trade in Services (GATS). The Canadian government is actively participating and promoting in negotiations to expand the WTO services agreement GATS which would impose very severe restrictions on how governments can regulate that they would inevitably lead to deregulation. The provisions would significantly undermine Indigenous rights to manage their lands and resources. Indigenous rights stand in the way of the basic principles of free trade and trade liberalization as codified through international trade, investment and service agreements. These agreements erase the concept of national or communal resources and replace it with an open commodities market. In doing so they sweep aside the fundamental rights guaranteed through treaties or the concept of inherent rights recognized in universal charters, such as the present Covenant, or through hard fought litigation.

The service regulations that would be covered are exactly those where Indigenous rights have tended to conflict with commercial interests – eg. licensing of recreation projects such as ski resorts, permits for housing development, and standards for resource extraction services such as the construction of logging roads and oil drilling. Indigenous Peoples across Canada have actively opposed such developments because they violate their human and Indigenous rights. The opposition of the Secwepemc people against the expansion of Sun Peaks Ski Resort, near Kamloops, British Columbia; the ongoing stand-off in Caledonia, Ontario, where a housing development is proposed in land granted to the Iroquois Confederacy; the opposition of Thaltan Elders against mining in their traditional territories and Indigenous opposition to large-scale integrated logging and wood processing industries across the country, serve as a few examples.

The scope of the GATS (Article I) means that the new provisions will apply to all levels of government, including all First Nations governments with delegated governmental authority. Our people would be affected by the new GATS regulatory restrictions in a number of key ways:

- 1) Our elected leaders would be limited in how they can regulate even in areas acknowledged to be under their legitimate authority.
- 2) Indigenous Peoples who collectively hold their indigenous rights will be actively sidelined as deregulation and corporate control takes more and more root in our territories.
- 3) Federal, provincial, and municipal governments responsible for regulating developments that impact Indigenous Peoples would be constrained in how they consult with our peoples and how they can take into account our Indigenous rights.

The formal GATS negotiating mandate is to discipline "qualification requirements and procedures, licensing requirements and procedures, and technical standards"<sup>50</sup>. These categories are being defined so broadly that there is no aspect of service regulation that would not potentially be affected. Licenses are being defined extremely loosely as anything that provides formal permission to supply a service. For example, tourism, mining development, and forestry licenses that required special action to be taken to mitigate the impact on Indigenous Peoples and

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<sup>50</sup> General Agreement on Trade in Services, Article VI. 4.  
Available at: [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.doc](http://www.wto.org/english/docs_e/legal_e/26-gats.doc)

territories could be ruled unnecessarily burdensome and/or unreasonable. Licensing procedures would cover the process leading up to approval of a permit for development, and would impact the consultative process Canadian governments are obligated to engage in with Aboriginal peoples. Governments would be obligated to make decisions that were "objective" and "impartial with respect to all market participants", so that no special consideration could be given to Indigenous Peoples in the granting of licenses. Decisions would also have to be made "promptly", only allotting a fixed, pre-established time for consultation. If these consultation processes required extra time because of Indigenous concerns, governments could be challenged at the WTO for creating an unnecessary barrier to trade.

Should the new restrictions be imposed as planned, the process for gaining approval for commercial development of an area will be governed by WTO requirements not to be "unnecessarily" or "unreasonably" burdensome to corporations. Despite the conflict these new international trade rules would have with Canada's legal obligations towards Indigenous Peoples, in GATS negotiating meetings Canadian trade negotiators have not informed other WTO delegations of this conflict. GATS negotiators are bound by international law and national regulation, which in many countries now broadly recognizes Indigenous rights and should be required to make clear that they cannot agree to these new GATS provisions because they conflict with national and international obligations towards Indigenous Peoples. Canada is bound by the provisions of the ICESCR and we ask the Committee to request Canada to maintain international standards guaranteeing Indigenous, human and environmental rights in international trade negotiations. We further ask that Canada correct the omission of Indigenous rights and ensure that they are appropriately taken into account and prioritized over corporate interests.

**Recommendations:**

**The Committee should request Canada to recognize the paramouncy of human rights, including the indigenous right to self-determination and indigenous rights and that they are inseparable from fair trade and must be recognized as the basis for any negotiation of free trade agreements. Trade and Development must be environmentally, socially and culturally sustainable and equitable from the viewpoint of Indigenous Peoples. Indigenous Peoples must have full, fair, adequate and effective participation at all stages of the negotiation of free trade agreements.**

**Future Free Trade Agreements must also provide mechanisms for the full implementation, monitoring and enforcement of environmental protection and the human rights of Indigenous Peoples. Free and Fair Trade must historically benefit Indigenous Peoples in accordance with their world view and aspirations and unique spiritual relationship, and include active measures to reduce inequalities, particularly the extreme impoverishment and socio-economic marginalization suffered by Indigenous Peoples.**

**The rights of Indigenous Peoples and obligations that state parties such as Canada have committed to under the UN Covenant on Economic Social and Cultural rights and under multi-lateral environmental agreements have not been taken into consideration in the negotiations to develop GATS disciplines on domestic regulation. Canada should call for a halt to these negotiations in recognition of the clear harm they would cause to Indigenous, social, cultural and economic rights.**

### ***G. Control over natural wealth and resources, deprivation of means of subsistence***

In its 1998 Concluding Observations (paragraph 43), the Committee on Economic, Social and Cultural Rights called upon Canada “to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture.”

In its 1999 Concluding Observations, the Human Rights 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 (article 1, paragraph 2)”. One of the pre-eminent recommendations of the *Royal Commission on Aboriginal Peoples* (1996) was that governments provide Aboriginal peoples with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.<sup>51</sup>

In *Gathering Strength - Canada's Aboriginal Action Plan* (1998), the federal government's official response to the Royal Commission, specific action and commitments on this key element of the report are conspicuously absent. There is no mention of the need for extensive reform of the land rights settlement process, or commitment to establish an effective process to resolve land rights disputes.

In his Report on his Mission to Canada, Special Rapporteur Rodolfo Stavenhagen points out that the land allocated for Aboriginal communities is miniscule and amounts to “less than one-half of one per cent of the Canadian land mass.” Some Aboriginal nations have no land, and there are “few mechanisms to allow for the extension of the land and resource base of First Nations”, whose population is growing at a rate faster than that of any other group in the country. In other cases, natural resources are being extracted before Aboriginal Peoples' land rights can be resolved and Aboriginal communities can benefit.<sup>52</sup>

**How does the government of Canada plan to address the recommendations of the Human Rights Committee's (1999), and the Committee on Economic, Social and Cultural Rights (1998) that it take “decisive”, “urgent” and “concrete” action towards ensuring that Aboriginal peoples in Canada have a land and resource base is adequate to achieve a sustainable economy and culture?”**

<sup>51</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply & Services Canada, 1996), Vol. 2, p. 574.

Online: [http://www.ainc-inac.gc.ca/ch/racp/rpt/index\\_e.html](http://www.ainc-inac.gc.ca/ch/racp/rpt/index_e.html).

<sup>52</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 46 [*Mission to Canada*]

## ***H. Justice delayed is justice denied - lack of progress on land rights negotiations***

In paragraph 187 of its fifth periodic report Canada says “sixteen comprehensive claims have been settled in Canada since the announcement of the Government of Canada’s claims policy in 1973.” Canada does not mention that there are over 60 negotiation processes underway across the country.<sup>53</sup> If settlements proceed at the current rate - 16 in 32 years, or one every two years – three or four generations will pass before the current negotiations are resolved. In paragraph 190, Canada refers to the BC Treaty Commission’s 2004 Annual Report, which states that there are “55 First Nations participating in the BC treaty process.” It is important to note that in the 13 years since its establishment, no treaties have been signed under this process, notwithstanding the expenditure of more than 500 million dollars.

**How does the government of Canada plan to address this significant delay in resolving Aboriginal Peoples’ land rights issues?**

### **1. Resolution of Specific Claims**

In paragraph 191 of its fifth periodic report to the Human Rights Committee, Canada states the *Specific Claims Resolution Act*, which received Royal Assent in November, 2003, “will lead to the establishment of a new independent claims body, known as the Canadian Centre for the Independent Resolution of First Nations Specific Claims (the Centre). The Centre will help First Nations and Canada reach resolution on specific claims and bring greater transparency, efficiency and fairness to the current process.”

The need for an effective, independent claims body is indisputable. According to the Special Rapporteur, “Of about 1,300 claims filed, only 115 are being negotiated and 444 have been resolved, while 38 are being reviewed by the Indian Specific Claims Commission... Aboriginal critics indicate that at the current rate, outstanding land claims will take many centuries to be addressed.”<sup>54</sup> The *Specific Claims Resolution Act* received Royal Assent amidst controversy from many Aboriginal Peoples who said the new claims body would cause more problems and lead to more delays in resolving claims. The Assembly of First Nations, which represents over 630 First Nations communities in Canada, “is consistently and actively advocating against the SCR Act coming into force, which is in the control of the INAC Minister and Cabinet. The AFN hopes that its advisory process will persuade Minister Scott to take decisive action to amend the SCRA.”<sup>55</sup>

**Please explain how the Government of Canada plans to amend the Specific Claims Resolution Act in order to adequately address the concerns of First Nations.**

<sup>53</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 44 [*Mission to Canada*]

<sup>54</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 45 [*Mission to Canada*]

<sup>55</sup> Assembly of First Nations. Online: <http://www.afn.ca/article.asp?id=127>

## 2. Lubicon Cree

The Lubicon Lake Cree, an Indigenous Nation of approximately 500 people in northern Alberta, Canada, have never surrendered their rights to their traditional Territory. In the past 25 years multi-billion dollar resource exploitation activities on Lubicon Territory have decimated the traditional Lubicon economy and way of life, imperiling the continued existence of the Lubicon Lake Cree Nation as a distinct Indigenous society.

Unable to achieve legal or political redress in Canada, in 1984 the Lubicon Lake Indian Nation called on the United Nations Human Rights Committee to assist them in defending their human rights. In March 1990, the Committee concluded that “historical inequities ... and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band”. The UNHRC commented that “so long as they continue” these threats are a violation of the Lubicon’s fundamental human rights under Article 27 of the International Covenant on Civil and Political Rights.<sup>56</sup>

In response, the Canadian government assured the Committee it was seeking to negotiate a settlement that would protect the rights of the Lubicon people. In the intervening years, three lengthy rounds of negotiations have failed to produce a settlement. According to the Lubicon, one current obstacle to a negotiated settlement is Canada’s position on the Lubicon right to self-government, which insists it can be negotiated only post-settlement of Lubicon land rights. This is in violation of the right to control over lands and resources that is a key component of a peoples’ self-determination.

The Lubicon also have obtained classified “guidelines”, drafted by Canada, which instruct federal negotiators to negotiate self-government agreements which are not legally binding on the Canadian government. The Lubicon believe this raises serious questions about whether Canada is prepared to engage in good faith negotiations with Indigenous Peoples. Another Lubicon concern is that Canada has not provided its negotiators with a full mandate to negotiate key outstanding issues towards a final settlement, and that this constitutes a failure to rectify the violation identified by the UNHRC in 1990.

**What are the guidelines that Canada is providing to negotiators working towards settlements with Aboriginal Peoples? What is the domestic policy that informs those guidelines? Do those guidelines direct negotiators to negotiate agreements that undermine the self-governing rights of Aboriginal Peoples? How do those guidelines conform to Canada’s obligations to Aboriginal Peoples under its commitments at international human rights law?**

**Pursuant to the Human Rights Committee’s decision of March 28, 1990, what mandate have federal government negotiators been given to resolve all outstanding issues – including self-government and financial compensation – with the Lubicon Lake people? How can Canada demonstrate its willingness to resume negotiations towards a resolution of all outstanding issues in good faith?**

<sup>56</sup> *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, paragraph 33. UN HRC, CCPR/C/38/D/167/1984 (Jurisprudence). (Meeting on 26 March 1990).

## Article 2: Non-Discrimination

### A. Aboriginal Women

On June 28, 2005 the Native Women's Association of Canada (NWAC) and the Quebec Native Women Inc. (QNW) held a demonstration at the Human Rights monument in Ottawa, Canada's capital, "to mark the 20<sup>th</sup> anniversary of the continued discrimination of Bill C-31."<sup>57</sup> On the same day, the Assembly of First Nations issued a statement saying Bill C-31 "has failed Canada and it has failed First Nations."<sup>58</sup>

Although Bill C-31 was originally responsible for an increase in the number of "status" First Nations people in Canada by providing for the reinstatement of status for some women, the legislation now threatens to eliminate the number of First Nations people with Indian status by creating a two-tiered system of entitlement to status, which contains residual discrimination against women reinstated under Bill C-31 and their descendants. Where both parents are not identified as status, their descendants are less likely to qualify for status or to pass their status on to their descendants.

Another concern with Bill C-31 is the provision that First Nations women must state the status of the father when registering their children. According to the legislation, if the mother refuses to state the child's paternity Canada assumes the father is non-status and the child risks being denied Indian status.

It is important to note that the above-mentioned Tlicho Agreement states "The *Indian Act* ceases to apply to Tlicho Citizens except for the purpose of determining 'Indian' status (s. 2.2.7)."<sup>59</sup>

**How does Canada plan to amend the *Indian Act* so as to end the continuing discrimination against Aboriginal women and their children, and in order to bring the government into compliance with its own *Charter of Rights and Freedoms*, and with the International Human Rights Instruments it has ratified, including the International Covenant on Economic, Social and Cultural Rights?**

<sup>57</sup> Native Women's Association of Canada. Online: <http://www.nwac-hq.org/billc31.htm#billc31>

<sup>58</sup> *Bill C-31 Twenty Years Later: AFN National Chief Calls for First Nations Control of First Nations Citizenship*. 28 June 2005. Online: <http://www.afn.ca/article.asp?id=1548>

<sup>59</sup> *Land Claims and Self-government Agreement Among the Tlicho First Nation as Represented by the Dogrib Treaty 11 Council and the Government of the Northwest Territories and Government of Canada*, page 25. Initialled September 4, 2002. Online: [http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr_e.html)

## Article 3: Equal rights of men and women

### *A. Women and Poverty*

In its exhaustive research paper “Aboriginal Women’s Rights are Human Rights,” the Native Women’s Association of Canada concludes “Aboriginal women are among the most disadvantaged people in Canada.”<sup>60</sup>

According to the UN Platform for Action Committee in Winnipeg, Manitoba, Aboriginal women in Canada are over represented among the poor. According to 1995 Statistics Canada data, 42.7% of Aboriginal women live in poverty, double the percentage of non-Aboriginal women and significantly more than the number of Aboriginal men. The average annual income of an Aboriginal woman is \$13,300, compared to \$19,350 for a non-Aboriginal woman and \$18,200 for an Aboriginal man.

**How does the government of Canada plan to address poverty amongst Aboriginal peoples in general, and Aboriginal women in particular?**

### *B. Matrimonial Property Rights*

At paragraph 29 of Canada’s report, it identifies that an issue for Aboriginal women and children, still outstanding from Bill C-31, includes matrimonial property rights or “the gap in law with respect to matrimonial real property on reserve lands.” Canada continues by stating that “At present, people living on a reserve have fewer rights regarding their matrimonial home when a marriage or common-law relationship ends than do people living off a reserve.” Several reports, including those completed by two Parliamentary Committees, have been completed by Canada regarding the lack of matrimonial property rights protections on reserve having a particularly negative impact on First Nations women. The Government of Canada notes in paragraph 31 of its report that it is “now studying” the November 2003 report completed by the Senate Standing Committee on Human Rights. In the Senate Standing Committee’s May 2005 report, it called on the Minister of Indian and Northern Affairs Canada to take “immediate action” in remedying this human rights violation, noting that the problem had been the subject of much study. We note with approval that the Government of Canada has undertaken to consult with two national Aboriginal organizations, the Native Women’s Association of Canada and the Assembly of First Nations. We encourage Canada to carry out these consultations, as well as consultations with other relevant Aboriginal representative organizations, particularly Aboriginal women’s organizations, in a timely fashion.

**Will Canada commit to a timeframe of no longer than 3 years for implementing policy and legislative reforms that will remedy this human rights problem that has existed for far too long? In that regard, what concrete steps is Canada planning to take to resolve this equality issue? What legislative and policy reforms will be necessary to ensure women have equal rights to economic and social resources, including matrimonial property?**

<sup>60</sup> Native Women’s Association of Canada. *Aboriginal Women’s Rights are Human Rights.*, page 18. Online: <http://www.nwac-hq.org/reports.htm>



## **Article 10: protection and assistance to the family, children and young persons**

### **Righting a Wrong: The destiny of Aboriginal Children is with their Aboriginal Nations**

In British Columbia there are two child welfare models available to Aboriginal Peoples:

- 1) the delegated model, in which the province delegates but ultimately retains control over child welfare services; and
- 2) the Spallumcheen model, where one Indian band has created a by-law regarding band jurisdiction over child welfare issues.

Unfortunately the first predominant systems fails to vest meaningfully, in practice and intent, the Aboriginal right of Self-Determination as manifested in the inherent jurisdiction of Aboriginal Peoples over their children and families. The Draft Declaration on the Rights of Indigenous Peoples states in Article 6 that:

Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of Indigenous children from their families and communities under any pretext. (emphasis added)

A central tenet of Self-Determination is for Aboriginal Peoples to uphold their responsibilities to care for and protect their children. The current state of the child welfare system in British Columbia is inimical to supporting Self-Determination with respect to Aboriginal child welfare. As of December 31, 2004, 48 percent out of the total number of children in state care in British Columbia was Aboriginal.<sup>61</sup> This represents a marked increase of the number of Aboriginal children in care reported by the Royal Commission on Aboriginal Peoples in 1996, which estimated between 35-40% of all children in care at any given time were Aboriginal, despite that Aboriginal Peoples only officially represent 4.4 % of the overall population.<sup>62</sup> The provincial child welfare system is increasing. An illustration of this trend can be seen in Figure 1. The overrepresentation and increased apprehension of Aboriginal children by British Columbia contravenes Indigenous Peoples rights to freely determine their political, social, economic and cultural development.

### ***A. Delegated Model***

The provision of child welfare services through Delegated Aboriginal Agencies does not eliminate the threat to Aboriginal Peoples' social and cultural rights. Rather, this model has perpetuated and compounded the problem through the continued imposition of non-Indigenous values, concepts and laws of delegated aboriginal agencies rather than recognition of Aboriginal Peoples inherent right to self-determination over child welfare.

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<sup>61</sup> Canada's Responses, List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social, and Cultural Rights (E/C.12/4/Add.15) (online: [http://www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2006.CAN\\_En.pdf](http://www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2006.CAN_En.pdf) date accessed May 2, 2006)

<sup>62</sup> [http://www.statcan.ca/english/freepub/82-221-XIE/00604/tables/html/45\\_01.htm](http://www.statcan.ca/english/freepub/82-221-XIE/00604/tables/html/45_01.htm); see also: <http://www.bcstats.gov.bc.ca/data/cen01/facts/cff0108.PDF>

Kith and kin agreements, and out of care placements with extended family members without recognition of Aboriginal values, traditions and laws, do not eliminate the root causes or reverse the overrepresentation of Aboriginal children in care, or prevent Aboriginal children from suffering. The shocking death of 19-month-old aboriginal toddler, Sherry Charlie, was an extreme example of the failure of the British Columbia provincially approved Aboriginal child care program. Her tragic death underscored fundamental failings which are endemic to a system fraught with problems.

**To realize Aboriginal Self-Determination, a new model of Aboriginal jurisdiction over child welfare must be established in accordance with the economic, social and cultural priorities and values of Aboriginal peoples.**

The delegated model places Aboriginal children with families through a federal system designed to work in Aboriginal communities for Aboriginal children but which is under the control of the federal government. Aboriginal Peoples are not able to exercise the direct responsibility over the operation and delivery of child welfare services. A survey of 12 First Nations “child and family service agencies indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident”.<sup>63</sup> Former judge, Ted Hughes, examined child welfare in British Columbia following the death of Sherry Charlie and confirmed that jurisdictional issues were a major problem as well as the inadequacies of child welfare services:

The federal government’s funding for 14 reserve based child welfare services was developed at a time when there was not so much emphasis on prevention as there is today, and is calculated largely on the basis of the number of children taken into care. It provides little or no funding for the kinds of family support services that might enable a child to be kept safely at home. This funding formula has been debated for some years and recommendations for change have been accepted but not yet implemented. It is time for the federal government to change this formula. This has been the provincial government’s position and I encourage them to pursue the matter vigorously.<sup>64</sup>

While child welfare is handled by the federal government, child welfare for non-Aboriginal children is a provincial responsibility. There is an alarming funding disparity between the federal and provincial schemes on a per child basis. According to a joint policy review between the Department of Indian and Northern Development (INAC) and the Assembly of First Nations, there was “22 per cent less funding per child to First Nations child and family service agencies than the average province.”<sup>65</sup> Blackstock, Prakash, Loxley and Wein<sup>66</sup> have argued that funding for Aboriginal child and family services agencies has not increased at a level commensurate with

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<sup>63</sup> Ibid.

<sup>64</sup> BC Children and Youth Review, Honourable Ted Hughes OC, QC, LL.D. (Hon.s) An Independent Review of BC’s Child Protection System, April 7, 2006, Submitted to the Minister of Children and Family Development, by the Honourable Ted Hughes.

<sup>65</sup> The Struggle for Equal Rights for First Nations Children and Child Welfare. Briefing to the UN committee on Economic, Social and Cultural Rights on the occasion of the review of Canada’s fourth and fifth periodic reports. Submitted April 11, 2006. First Nations Child & Family Caring Society of Canada

<sup>66</sup> Blackstock, C., Prakash, T., Loxley, J., & Wien, F. (2005) *Wen: de – we are coming to the light of day*. Ottawa: First Nations Child and Family Caring Society of Canada.

inflation. Compounding problems of jurisdiction, resourcing and training<sup>67</sup> is that of no right of appeal for child welfare decisions made concerning Aboriginal children. Since Aboriginal child welfare is administered through the federal government Aboriginal children on reserves cannot use provincial child advocates to address funding issues or rights violations. The court system, while available, is prohibitively expensive for Aboriginal families especially when 53% of these families live below the poverty line.<sup>68</sup>

Mr. Hughes also recommends more efforts directed at recruitment and retention of Aboriginal employees and that regional Ministry offices deal directly with Aboriginal delegated agencies instead of having them deal with Victoria. Federal policy in the area of child welfare is set out in Directive 20-1. Directive 20-1 was originally adopted in 1991 and makes provision for the administration and funding of child and family programs on reserve. Directive 20-1 requires that Indigenous Peoples have delegated authority from the province in order to be eligible to receive federal funding. The AFN-DIAND Joint Review characterizes the system established under Directive 20-1 as “agencies had to be provincially mandated, were federally funded and services had to be First Nation delivered.” The lack of choice that the federal government allows Indigenous Peoples with respect to child welfare under Directive 20-1 (with its requirement that Indigenous Peoples must acquire a form of delegated authority from the province in order to be eligible for federal funding) violates the rights of Indigenous Peoples to Self Determination. The current child welfare system is structured so that it looks as though the Indigenous Peoples agree with provincial legislation and ultimate authority. In reality, if Indigenous Peoples want even a superficial level of involvement or control of child welfare, federal policy forces Indigenous Peoples to accept the delegation of provincial authority. Federal policy in the area of child welfare is governed by a refusal to recognize, adequately fund, and support Indigenous Peoples jurisdiction. At the same time, the federal government works actively to promote and enhance provincial authority over Indigenous Peoples and children. Section 88 serves two purposes for the federal government:

- (1) Allows the federal government to abdicate its responsibilities to Indigenous Peoples by placing social and legal responsibility for the provision of child welfare on the Provinces; and, (2) Reduces the federal fiduciary to mean simply fiscal responsibility.

### ***B. The Royal Commission on Aboriginal Peoples***

The federal government struck the Royal Commission on Aboriginal Peoples in order to examine a broad range of issues impacting Indigenous Peoples. Included in the RCAP is a lengthy discussion of the devastating social impacts that Canadian government policy has had on Indigenous Peoples. Volume Three, *Gathering Strength*, contains the main recommendations on the issue of jurisdiction in the area of Indigenous Peoples child welfare issues. Some of the main recommendations addressing the issue of jurisdiction are listed below. The Commission recommends *inter alia* that:

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<sup>67</sup> Ted Hughes reports that delegated Aboriginal agencies are “requiring office management systems and skills, computer equipment and internet access so they can track cases, share information, and communicate quickly and effectively with other agencies, and they need access to the same training opportunities provided to Ministry staff, as well as special training directed to their particular needs”. *Supra* note 3.

<sup>68</sup> *Supra* note 2, at 8.

3.2.1 The government of Canada acknowledges a fiduciary responsibility to support Aboriginal Nations and their communities in restoring Aboriginal families to a state of health and wholeness.

3.2.10 Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal Nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.

3.2.11 Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.

For the most part, RCAP recommendations promote the assertion of Indigenous jurisdiction within the existing federal/provincial framework and have not moved beyond this to a recognition of Indigenous Peoples inherent jurisdiction flowing from our right of Self Determination. The federal response to the RCAP recommendations was the *Gathering Strength* initiative which does not recognize the inherent rights of Indigenous Peoples, but rather continues the historic assimilationist policies.

### ***C. Spallumcheen Model***

The example afforded by Spallumcheen is unique within Canada because it represents the only instance where Indigenous Peoples jurisdiction over their own children has been recognized by the federal government, both on and off reserve, and not subject to provincial laws or standards. The Spallumcheen model is an arrangement unique to the Spallumcheen band that used Section 81 of the *Indian Act* to create a by-law that gave them jurisdiction over their children's welfare. The by-law recognizes the portability of the Spallumcheen's rights which inhere in band members whether they reside on and off reserve. Article 3 (a) of the by-law sets this out: "The Spallumcheen Indian Band shall have exclusive jurisdiction over any child custody proceeding involving an Indian child, notwithstanding the residence of the child."

The Spallumcheen bylaw makes chief and council guardians of the first instance for a Spallumcheen child deemed in need of protection, and contains provisions setting out the process that the Band will follow in determining a placement of a child apprehended under the bylaw. The bylaw contains strong provisions intended to maintain Spallumcheen children's connection to their families and community, including preferences for placements within extended families and a requirement to keep the child connected with the community. The Spallumcheen bylaw has been challenged numerous times before the Canadian courts. As a general rule, the Courts have upheld the jurisdiction of the Band and confirmed that the bylaw operates to exclude provincial jurisdiction. To date, the Spallumcheen bylaw is the only band bylaw of its type which the Minister of Indian Affairs has not disallowed.

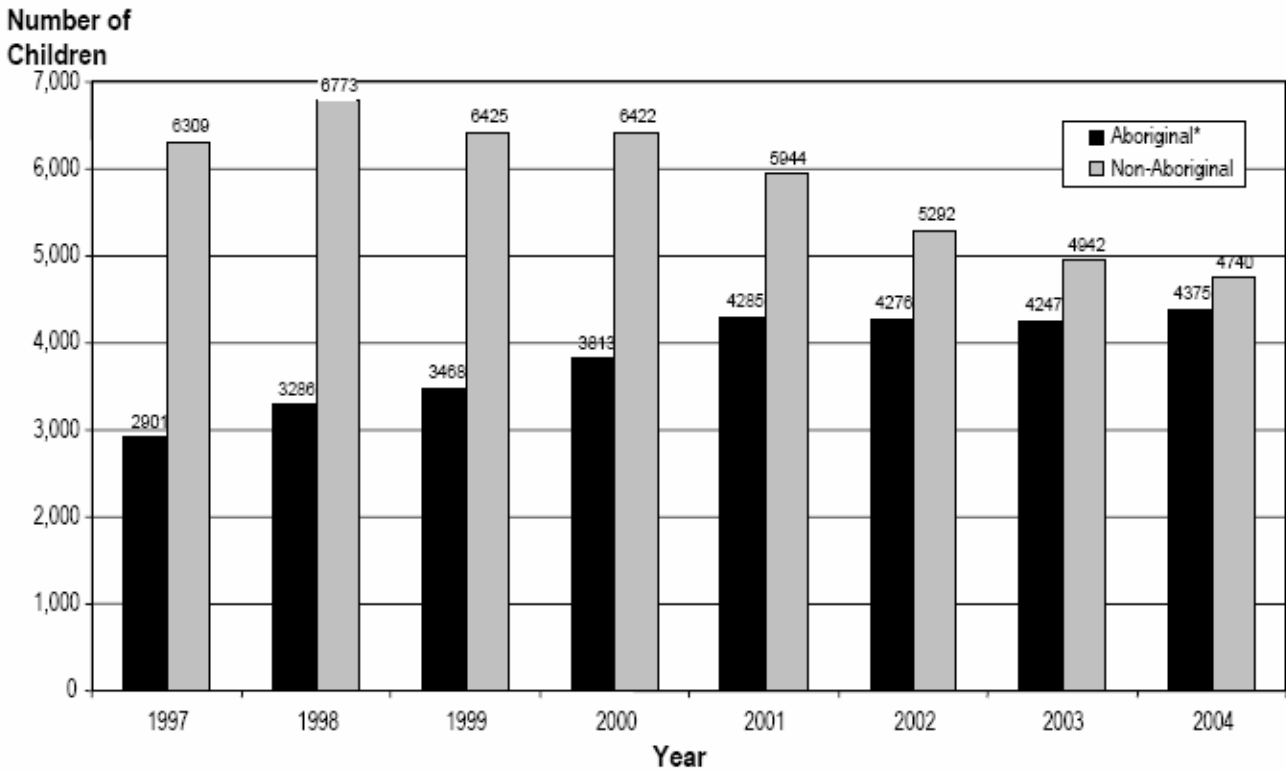
The Spallumcheen model is unique in that intensive lobbying was required by them to get the Ministry to approve the by-law, but no similar approval has been given to any other band in Canada. Despite local control over child welfare services on reserve, a surprising number of disputes have ended up in the court system. Recourse to non-Aboriginal resolution mechanisms compounded with ultimate control over child welfare vesting in the federal government makes it difficult to meet the self-determining goals of Aboriginal Peoples who are working towards rebuilding their nations, families and healthy children.

***D. Development of an all-encompassing Aboriginal Model***

The Aboriginal model envisions Aboriginal Peoples exercising jurisdiction to meet the family and child welfare needs of their citizens. The source of this authority must be coordinate to federal government powers in order to respect the goal of nation-building. Subordinate relationships, such as those set out in the models outlined above, will not protect the rights of Aboriginal children. Those systems are founded on laws, traditions and the value systems of non-Aboriginal society. For a functional Aboriginal child welfare system to exist, an Aboriginal child cannot be seen as separate and apart from their nation. Through the exercise of self-determination, Aboriginal children can be cared for according to their nations’ own laws, traditions, and values.

**Recommendation:** to establish Aboriginal child welfare models based on the right to self-determination of Indigenous Peoples which coordinate jurisdiction with Canada at the federal level.

**Fig 1. - Numbers of Children and Youth in Care in BC, by Aboriginal Status**



## Article 11: Adequate Standard of Living

### Housing

In paragraph 53 of its fifth periodic report, Canada states: “Canadians are among the best-housed people in the world.” Canada does not mention that according to the Canadian Mortgage and Housing Corporation, “Aboriginal households are 1.6 times more likely to have housing needs (i.e. repair, space or sanitation) than non-Aboriginal households.”<sup>69</sup> In addition, while Aboriginal people living off-reserve (approximately 70% of the Aboriginal population) have a core housing need 76% higher than non-Aboriginal peoples,<sup>70</sup> housing need is even greater among Aboriginal peoples living on-reserve and in the North. For example, on-reserve there is an estimated shortage of nearly 35,000 housing units, which is expected to rise by 2,200 annually.<sup>71</sup>

The issue of Aboriginal housing is not simply a matter of difference in living standards. Overcrowded and dilapidated houses pose a significant threat to the physical health of Aboriginal people, increasing their susceptibility to TB, diabetes and obesity.<sup>72</sup> Psychologically, inadequate housing among Aboriginals reinforces a sense of marginalization and hopelessness.<sup>73</sup> Furthermore, adequate and affordable housing is essential for the stability children need to perform well in school; the need to move frequently hurts a child’s social and academic development.<sup>74</sup>

In late November 2005, First Ministers and Aboriginal leaders met to discuss and develop strategies to improve the quality of life for Aboriginal peoples in Canada in four areas – health, education, housing and economic development. With regard to housing, the former Liberal government committed itself to over \$1.6 billion over the next five years towards Aboriginal housing.<sup>75</sup> In April, Jim Prentice, Canada’s current Minister of Indian Affairs and Northern Development stated publicly that he supported the “targets and objectives” discussed in November, considered them “laudable” and “optimistic,” but refused to make the same commitment saying he needed time to “assess” the situation since “there was never a specific plan with concrete measures that was adopted and financed at that time.”

<b>How does the government of Canada plan to address the current housing situation of Aboriginal peoples?</b>
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<sup>69</sup> Canadian Mortgage and Housing Corporation, *Canadian Housing Observer 2004* (Ottawa: CMHC, 2004), 49. See publication for a definition of “core housing need.”

<sup>70</sup> Office of the Prime Minister, *FMM – Government of Canada Invests in Immediate Action*, 25 November 2005. On-line: [http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=archivemartin&Sub=newscommuniques&Doc=news\\_release\\_20051125\\_661\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=archivemartin&Sub=newscommuniques&Doc=news_release_20051125_661_e.htm).

<sup>71</sup> *Ibid.*

<sup>72</sup> Roselle Miko and Shirley Thompson, “Pay the Rent or Feed the Kids? Tough Choices,” *Women & Environments International Magazine* 62/63 (2004): 9.

<sup>73</sup> Royal Commission on Aboriginal Peoples, *Gathering Strength from Report of the Royal Commission on Aboriginal Peoples*; On-line: [http://ainc-inac.gc.ca/ch/rcap/rpt/gs\\_e.html](http://ainc-inac.gc.ca/ch/rcap/rpt/gs_e.html).

<sup>74</sup> Miko and Thompson, 9.

<sup>75</sup> Office of the Prime Minister.

## Appendix A: Compilation of Suggested Questions and Recommendations

### Article 1: The right of self-determination

**Recommendation:** Canada must recognize the unqualified right to self-determination of Indigenous Peoples at international law.

#### Consent

**Recommendation:**

Canada must reform its institutions, laws and policies to meet the international standard of free and prior informed consent of Indigenous Peoples in order to comply with its obligations under Article 1 of the ICESCR and to further respect the consent dimensions of Indigenous Peoples' rights to self-determination.

#### Criminalization of Indigenous Human Rights Activists

**Recommendations:**

The colonial legal system must refrain from criminalizing Indigenous Peoples for exercising their sovereignty.

Until the *Indian Act* administrations are dismantled, the *Indian Act* band council system must be limited to municipal duties. Band Councils must refrain from overstepping their contested reserve-based jurisdiction.

The United Nations must recognize Indigenous nations as independent from states, and give them the appropriate space (as nations independent from their colonial oppressors) to raise their concerns.

#### Economic, social and cultural impacts on the self determination of Indigenous Peoples

**Recommendation:**

Canada must meet its international obligations to Indigenous Peoples to respect their rights of ownership and possession of Indigenous lands, territories and resources.

#### Doctrines that Deny Indigenous Peoples' Self-Determination

**Recommendation:**

Canadian jurisprudence regarding Indigenous Peoples' rights does not comply with Article 1 of the ICESCR. Law reform is critical in order for Canada to meet its obligations under the Covenant. The doctrines of discovery, conquest (cession treaty making processes, extinguishment powers, continuity and sovereign incompatibility), terra nullius, settlement, and effective control are not acceptable. Canadian state practice and her courts must eradicate the application of these doctrines in relation to Indigenous Peoples' rights and Indigenous Peoples-Canadian relations. Lack of state action to comply with this recommendation will lead to the continuing colonization of Indigenous Peoples and corresponding violation of Indigenous Peoples' rights to self-determination.

### **Canada's Policy of Extinguishment**

Explain how new approaches to achieving “certainty” in land rights negotiations with Aboriginal Peoples, namely the “modified rights model and the “non-assertion model”, differ from the extinguishment and surrender approach. Canada’s recent encouraging and useful position on self-determination at the final session of the Working Group on the Draft Declaration is not reflected in its domestic Aboriginal policy. How does Canada explain this contradiction between its international position on self-determination and its domestic policy, which continues to undermine and limit the inherent right to self-determination?

Further, will Canada provide written explanation of its concept of self-determination as applied by Canada to Aboriginal Peoples, as requested by the HRC in its 1999 Concluding Observations to Canada’s fourth periodic report (paragraph 7)?”

### **International Trade Agreements Undermine Indigenous, Social, Cultural and Economic Rights**

#### **Recommendations:**

The Committee should request Canada to recognize the paramouncy of human rights, including the Indigenous right to self-determination and Indigenous rights and that they are inseparable from fair trade and must be recognized as the basis for any negotiation of free trade agreements. Trade and Development must be environmentally, socially and culturally sustainable and equitable from the viewpoint of Indigenous Peoples. Indigenous Peoples must have full, fair, adequate and effective participation at all stages of the negotiation of free trade agreements.

Future Free Trade Agreements must also provide mechanisms for the full implementation, monitoring and enforcement of environmental protection and the human rights of Indigenous Peoples. Free and Fair Trade must historically benefit Indigenous Peoples in accordance with their world view and aspirations and unique spiritual relationship, and include active measures to reduce inequalities, particularly the extreme impoverishment and socio-economic marginalization suffered by Indigenous Peoples. The rights of Indigenous Peoples and obligations that state parties such as Canada have committed to under the UN Covenant on Economic Social and Cultural rights and under multi-lateral environmental agreements have not been taken into consideration in the negotiations to develop GATS disciplines on domestic regulation. Canada should call for a halt to these negotiations in recognition of the clear harm they would cause to Indigenous, social, cultural and economic rights.

### **Control over natural wealth and resources**

How does the government of Canada plan to address the recommendations of the Human Rights Committee’s (1999), and the Committee on Economic, Social and Cultural Rights (1998) that it take “decisive”, “urgent” and “concrete” action towards ensuring that Aboriginal peoples in Canada have a land and resource base is adequate to achieve a sustainable economy and culture?”

### **Lack of progress on land rights negotiations**

How does the government of Canada plan to address this significant delay in resolving Aboriginal Peoples’ land rights issues?



### **Lubicon Cree**

What are the guidelines that Canada is providing to negotiators working towards settlements with Aboriginal Peoples? What is the domestic policy that informs those guidelines? Do those guidelines direct negotiators to negotiate agreements that undermine the self-governing rights of Aboriginal Peoples? How do those guidelines conform to Canada's obligations to Aboriginal Peoples under its commitments at international human rights law?

Pursuant to the Committee's decision of March 28, 1990, what mandate have federal government negotiators been given to resolve all outstanding issues – including self-government and financial compensation – with the Lubicon Lake people? How can Canada demonstrate its willingness to resume negotiations towards a resolution of all outstanding issues in good faith?

### **Resolution of Specific Claims**

Please explain how the Government of Canada plans to amend the Specific Claims Resolution Act in order to adequately address the concerns of First Nations.

### **Article 2: Non-Discrimination - Aboriginal Women**

How does Canada plan to amend the *Indian Act* so as to end the continuing discrimination against Aboriginal women and their children, and in order to bring the government into compliance with its own *Charter of Rights and Freedoms*, and with the International Human Rights Instruments it has ratified, including the International Covenant on Economic, Social and Cultural Rights?

### **Article 3: Equal rights of men and women - Women and Poverty**

How does the government of Canada plan to address poverty amongst Aboriginal peoples in general, and Aboriginal women in particular?

### **Matrimonial Property Rights**

Will Canada commit to a timeframe of no longer than 3 years for implementing policy and legislative reforms that will remedy this human rights problem that has existed for far too long? In that regard, what concrete steps is Canada planning to take to resolve this equality issue? Specifically, what legislative and policy reforms will be necessary to ensure women have equal rights to economic and social resources, including matrimonial property?

### **Article 10: Protection and Assistance to the Family, Children and young Persons**

Recommendation: to establish Aboriginal child welfare models based on the right to self-determination of Indigenous Peoples which coordinate jurisdiction with Canada at the federal level.

### **Article 11: Adequate Standard of Living**

How does the government of Canada plan to address the current housing situation of Aboriginal peoples?

## Appendix B: Specific Cases of Violations of the Covenant

### *A. Secwepemc Opposition to the Expansion of Sun Peaks Ski Resort*

Since 1998, the Secwepemc people in the interior of British Columbia have been asserting Aboriginal title to their traditional territories around Skwelkwek'welt on the basis of the *Delgamuukw* decision (1997), in opposition to the expansion of the Sun Peaks Ski Resort to 6 times its present size. Land and Water B.C. (formerly BCAL), a Crown Corporation, has repeatedly granted leases to accommodate Sun Peaks expansion plans, acting on the basis of the outdated Land Act, which does not recognize Aboriginal Title, and without consulting Indigenous People.

The Secwepemc people have responded by setting up the Skwelkwek'welt Protection Centre, including year round camps in the disputed territories. Land and Water B.C. subsequently extended Sun Peaks lease to the Crown lands on which the camps were located, forcing Indigenous people out by injunction. Thirty-eight arrests of Indigenous people from the camps took place from June to December of 2001, with charges ranging from “criminal contempt” to “mischief” to “intimidation and obstruction of a peace officer.” In a further effort to protest the denial of their Indigenous rights, members of the Native Youth Movement occupied Land and Water B.C. corporate offices, under the direction of Secwepemc elders; 16 people were charged with contempt, with a number of convictions, including prison sentences.

In all cases against Secwepemc people, Sun Peaks and the Province of British Columbia have sought to prohibit Secwepemc people from entering the resort. Some community members have been given 2, 5 or 10 km prohibitions from entering Sun Peaks. Secwepemc people from Neskonalith Indian reserve have also been served tickets for camping in a provincial park on Neskonalith Lake, on a shore opposite their reserve and in the heart of their traditional territories. The Skwelkwek'welt Protection Centres and the cord-wood house on MacGillvray Lake were erected on the basis of Aboriginal title permits issued by the Secwepemc People. Those receiving the permits did not want to be confined to their reserves, where dire social and economic conditions prevail, including inadequate housing for all band members. When the cord-wood house was ordered destroyed by the provincial government and demolished by Sun Peaks workers on December 10<sup>th</sup>, 2002, the family's right to housing was violated.

In the struggle to stop the expansion of Sun Peaks Resort in Secwepemc territory near Kamloops, British Columbia over 50 people<sup>76</sup> have been charged by the British Columbia government and Sun Peaks Resort and were arrested by the Royal Canadian Mounted Police (RCMP). This political effort is to stop the existing six thousand bed-unit resorts from expanding to twenty-four thousand bed-units because of the damage it will have on the culture of the Secwepemc peoples. For example, Irene Billy, an elder was arrested in July 2002 and charged with Contempt of Court but she was found not guilty because the court found that neither a criminal mind nor criminal acts were prove by the Crown prosecutor.<sup>77</sup>

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<sup>76</sup> Provide a list of the arrested people

<sup>77</sup> *British Columbia v. Billy, Sauls, Manuel Jr., and Willard* 2003 BCSC 55

The last three people who were arrested were arrested because the province of British Columbia and Sun Peaks Resort used a press release by the local tribal organization as evidence that the local leadership did not support the establishment of camp in the Sun Peaks Resort area. The local tribal organization later recanted on the press release, still Henry Sauls, George Manuel Jr. and Arnold Jack were arrested in September 2004. The cases against them were later stayed, because of the precedent decision made by the Supreme Court of British Columbia quoted above. In that particular case the RCMP dropped the charges against these three Secwepemc men because the legal documents were not properly prepared and the Crown prosecutor felt the charges of Contempt of Court would be dismissed once again. In meeting in December 2004 requested by the RCMP with the Skwelkwew'welt Protection Society, the executive force made it clear if another camp was established at Sun Peaks Resort arrests would be made again. It was explained that the camps were not demonstrations camps but the effort of the Secwepemc peoples to protect their Aboriginal Rights. When Janice Billy, Spokesperson for the Skwelkwew'welt Protection Center asked where are we to go if we could not go to the Sun Peaks Resort area, one of the RCMP Inspectors said you should just stay on your Indian Reserve.

### ***B. Sutikalh – St'at'imc Opposition to Development of a New Ski Resort***

In 1990, the Lil'wat, staged a road blockade in Mt. Currie in opposition to a plan to pave logging roads that run through our community. The Lil'wat community is a band of the St'at'imc people, who are often referred to as the Lillooet Nation, we have lived in the coastal mountains for thousands of years, and we have never ceded or surrendered any of our territory. As a result of our action, 67 protesters were arrested. We refused to give our names or co-operate with authorities. In the following years the resort development firm, NGR Consultants Inc., proposed to build a ski resort in our last remaining untouched valley, the natural habitat of the grizzly bear, mountain goat, and wolverine and many of the natural medicines and berries that we use in this area. NGR would sell our water and destroy the last untouched watershed within our St'at'imc territory. By Spring 2000, it became clear that the ski resort would probably be approved within the year. In response, the women of Lil'wat sent the men into the mountains to set up a blockade and protest camp to stop this resort from being built.

The Sutikalh camp—named for the St'at'imc “Winter Spirit” who dwells in the mountains—was set up on May 2, 2000. On June 11, 2000,—chiefs, elders and members of all 11 St'at'imc communities—gathered at Sutikalh and collectively decided to stand together to stop the proposed ski development. The camp has had opposition from loggers, hikers, bikers, hunters, skidoo riders, ATV riders, tourists going as far as death threats and shots fired at the camp. On August 14, 2000, the Environmental Assessment Office approved the Cayoosh Ski Resort. Years have passed, and the camp has endured. On July 27, 2005, NGR Consultants applied for an extension on its development permit, which was due to expire on August 14. All of the St'at'imc should have been notified and asked for comment. In the original permit from 2000, it was stated that in order to get an extension, construction had to be substantially started within five years. Al Raine said that the Indian problem is in the hands of the government. The Sutikalh camp has been up for 65 months now, plans to remain to stop the development. The St'at'imc people have said from day one that there will never be a ski resort in Sutikalh, and they say that still, today. On August 11<sup>th</sup>, 2005 the provincial government granted NGR Consultants an extension. The St'at'imc people continue to man the camp in their territory and are ready to sacrifice their personal freedom to protect their last remaining valley.

### ***C. Tahltan Elders Arrested***

In September 2005 Tahltan Elders and native youth were arrested in northern British Columbia for standing up for their Aboriginal Rights by establishing a road block protect their sacred headwaters. The Tahltan Elders have declared a moratorium on resource development in their traditional territory until they are consulted and give prior informed approval to all development. The Elders also asked Shell Canada to leave the Tahltan Territory and stop drilling for coal bed methane. Nevertheless, Fortune Minerals was given an Injunction and Enforcement Order to have the blockade removed so they can move equipment to destroy Skeena headwaters of the Tahltan peoples. The Canadian and provincial governments continuously present the view that these political initiatives by Indigenous Peoples to stop development are illegal measures. They use Injunctions and other legal measures that do not take into consideration Aboriginal and Treaty Rights and purely impose settler, commercial and industrial based criterion for making decisions. The main purpose of this kind of legal tactic is to get the Indigenous Peoples off the land and in the courts. This allows the government to continue to exploit and earn revenue off Indigenous lands. There is no question that Indigenous Peoples do have legally recognized and constitutionally protected land rights but practically speaking Aboriginal and Treaty Rights are not recognized on the ground. Simultaneously to this blunt effort to break the political spirit of the Indigenous Peoples to protect their lands, the government engages in negotiation process that have as their underlying policy the assimilation of Indigenous Peoples and the extinguishment of Aboriginal and Treaty Rights.

The governments together with the corporations have influenced the Indian band and especially the Chief Jerry Asp, to support mining, although his own people and elders oppose it. Adding further insult to injury, a Canadian mining corporation has invited the chief to Guatemala to promote mining in Mayan Indigenous territories. Both the companies and the governments use such visits to promote Canadian policies and of course no mention is made of the opposition of the Tahltan people themselves to mining their territories and the further violation of their rights when they were arrested for trying to stop the development.

### ***D. Nuxalk Nation***

The traditional territories of the Nuxalk Nation, are situated along the Central Coast of British Columbia, they cover many smayustas or fjords, each the responsibility of a traditional family, that in turn is headed by a traditional chief. They are all connected by their deep belief in the sovereignty and traditional ownership of the Nuxalk Nation. These chiefs have important obligations towards their people and in turn towards their territories which they have to protect. The threats to their lands and waters are many from logging, to mining and fish farming. The House of Smayusta of the Nuxalk Nation has struggled against industrial forestry, fish farming and mining.

Forestry is still a pressing issue in Nuxalk territory. The reckless clear cutting and removal of the forests impacts Nuxalk economic, cultural and subsistence rights. Forestry activities destroy Nuxalk berry and mushroom patches, traditional medicines, and hunting grounds. Forestry activities also threaten Nuxalk fisheries because they impact the quality of Nuxalk freshwaters for the salmon, the integrity of the salmon habitat, and the spawning grounds. Industrial over

harvesting of timber has diminished the availability of timber for Indigenous cultural uses. British Columbia continues to make forest management decisions without free and informed prior consent from Indigenous Peoples. In the case of Nuxalk opposition to logging in the Valley of Ista, in the Great Bear Rain Forest, 6 band councillors opposed the forestry operations and 5 endorsed them, but the federal department for Indian and Northern Affairs (DIAND) backed the minority decision endorsing the logging plans. DIAND and the minority band council even laid charges against Nuxalks exercising their Aboriginal Title and rights. Often DIAND policy and practices exacerbate, or even promote, divisions between Indigenous People prioritizing short-term program monies and those seeking to protect long-term Aboriginal title interests. This was a deliberate attempt to undermine traditional Indigenous leadership and with it the inherent rights that these families hold. Still the traditional chiefs and the people went and stopped road construction for over one month. There were 22 arrests and all were charged with criminal contempt because they tried to protect one of their last remaining valleys. The logging went on while some of the chiefs were in jail and while the trials went ahead and stringent conditions were imposed on the Nuxalk. Still they returned the following year, again to stop the logging and this times the resulting trials went on for 3 years.

The Nuxalk Nation's livelihood is being impacted by salmon fish farming in and around Nuxalk territory. The fish farms are a source of disease, parasites and waste. Also, a recent study has found that wild salmon near fish farms have higher levels of mercury.<sup>78</sup> The Nuxalk Nation is located on the inner central coast of British Columbia. There are fish farms on the outer coast. Wild salmon migrate through these outer coastal waters to get back to the spawning grounds within Nuxalk territory. The wild salmon swim through fish farm contaminants on the outer coast and bring the contamination to the salmon spawning grounds and habitat in Nuxalk territory. Farmed salmon escapes are also dangerous also pose a threat of colonizing rivers and competing with wild salmon species. Nutreco fish farms are using Chinook stocks which are far more dangerous than Atlantic stocks in terms of colonizing and competing with wild salmon. All of these factors pose serious threats to the wild fisheries that the Nuxalk rely on for subsistence and trade. Beyond the impacts to wild fisheries, the fish farm pens are also an impediment to Nuxalk ocean travel and interfere with Nuxalk peoples' access to their territories and resources. Fish farming is being forced in and around Nuxalk territory. For example, a fish farm hatchery was constructed at Ocean Falls which is in Nuxalk territory, and fish farm companies continue to transport fish farmed salmon through Nuxalk territory, despite Nuxalk opposition, and without consent from the Nuxalk people. Nuxalk people have not been notified about the impacts and the threats that fish farms pose against wild fisheries. The Nuxalk Nation continues to oppose fish farm developments and activities in and around Nuxalk territory, but is continuously ignored. The Nuxalk Nation has not given free and informed consent to fish farm developments in and around Nuxalk territory.

A central ingredient of Nuxalk culture and traditional economies is the eulachon. The eulachon has huge medicinal, cultural, social, and economic values to Indigenous Peoples. Nuxalk people have always used the eulachon for many generations. It is their human rights to live by the eulachon from the ocean water. The Nuxalk people always maintained, protected the eulachon, because Nuxalk laws and survival recognize its full value to our people, tradition and culture.

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<sup>78</sup> deBruyn, A. M. H.; Trudel, M.; Eyding, N.; Harding, J.; McNally, H.; Mountain, R.; Orr, C.; Urban, D.; Verenitch, S.; Mazumder, A., "Ecosystemic Effects of Salmon Farming Increase Mercury Contamination in Wild Fish," *Environ. Sci. Technol.*; (Article); 2006; ASAP Article; DOI: [10.1021/es0520161](https://doi.org/10.1021/es0520161).

The eulachon is under threat of extinction today. Canadian mismanagement of fisheries has contributed to this dire situation. The eulachon is central to Indigenous Peoples' economies, but is not valuable to the mainstream Canadian economy. The imminent eulachon extinction appears to be a low priority for the Canada. The Canadian government has not taken action to rectify the problem. If there are no eulachon to fish, then the Nuxalk right to fish for eulachon will be extinguished as a matter of fact. The loss of this valuable species of fish will create a very large social, cultural and economic vacuum for Indigenous Peoples throughout the British Columbia coast. For the Nuxalk Nation to continue as a people into the future, the Nuxalk people need Canada and British Columbia to be proactive in the protection of Nuxalk lands, waters, and ecosystems. Canada and British Columbia must also ensure that Nuxalk economic, social, and subsistence rights are protected.

### ***E. Pilalt Nation at Cheam***

The Pilalt people, live in the Cheam community along the Fraser River and for many years they have been a target for the federal Department of Fisheries and Oceans (DFO) because they continue to maintain and exercise their inherent right to fish. Fisheries officer have been aggressively provoking Pilalt fishers, ramming their boats and trying to swamp boats. Then they go to the police and press charges against the Aboriginal fishers who are only defending themselves. The Pilalt people have also been subject to racial profiling and propaganda to give the general public the impression that Aboriginal fishermen deplete the fish stocks rather than large-scale commercial industrial fisheries. DFO have taken Pilalt people right off the river to jail, they have seized their boats and have even tried to pull one fisher out of his boat while he was still at the controls of his boat, thereby putting his life at risk. During another instance they worked in concert with the RCMP, went to the beach to arrest someone, and although they had the fellow in handcuffs, they still threw him on the ground and pepper sprayed him. Aboriginal fishermen in turn have had to go to court for at least six years in big numbers. Trials have been drug out for months to keep imposing stringent release and bail conditions on the fishermen.

Cheam Nation of the Pilalt Tribe has been attending the courts for many years in regards to action taken to protect the rights of the Aboriginal peoples of the Pilalt Tribe. One of the most common statements made by the courts when they have been to convict our people is that they have to make examples of our People. It is not really based on the law that decisions are made, but rather based on systemic and economic racism. Indigenous rights to fish are often ignored and Aboriginal fishermen get criminalized. Currently there is a big push for Aboriginal fishers to go to jail for practicing what they have been taught to do by generations of elders.

Fishing is a way of life for the Pilalt people, it is an integral part of their culture and way of life, and contributes to the overall physical and spiritual health of the community. The federal Department of Fisheries and Oceans (DFO) Management has proven to be unable to manage or conserve the fish, rather they continue to prioritize commercial fisheries. As a result entire salmon runs have become extinct and Aboriginal fishermen lose their fish due to openings for the non native commercial fishery. Research shows that the DFO has constantly over estimated the runs and therefore when it comes to Aboriginal fishing they apologize and say they overestimated the run when they disallow Aboriginal fisheries. It is essential that the Committee help secure the social, cultural and economic rights of Indigenous Peoples, such as the Pilalt.

## Appendix C: Information on Submitters

This submission has been prepared by Indigenous Peoples and supporters from across Canada. The majority of the nations involved have their territories coincide with what is also known as the Province of British Columbia. From the islands, to the coast, over the coastal mountains into the Interior and all the way to the Rocky Mountains, it is the largest area where historically no treaties have been signed. Our people have a history of calling for the recognition of our nationhood and our Aboriginal Title to our lands and resources. This explains why many of the struggles related to Indigenous sovereignty and land rights explained in the following engage the province of British Columbia. Yet, we also share in the experience of peoples from across Canada who historically signed treaties, rooted in their nationhood and custodianship of the land. Our submission is backed by a long history of struggling for the recognition of Aboriginal and Treaty Rights from the local to the international level.

***INET: The Indigenous Network on Economies and Trade*** brings together Indigenous nations from across Canada and presented the first ever substantive Indigenous submissions to the World Trade Organization and the North America Free Trade Agreement. Panels of both organizations officially accepted the Indigenous submissions. In them INET argued that the failure of the Canadian government to recognize legitimate Aboriginal and Treaty Rights was a subsidy to the Canadian forest industry. These submissions were made to oppose free corporate access to Indigenous resources and increased clear-cutting of Indigenous forests. INET promotes Indigenous peoples as the traditional owners of their territories to become equal players in macro-economic decision making regarding their lands and resources. Increased Indigenous control over their territories will help ensure both environmental and cultural sustainability and local control of economies, in a time when other governments cede more and more control to multi-national corporations and give up their sovereignty under free trade agreements. Indigenous Peoples have never ceded their sovereignty over their lands and resources and only by working with them environmental groups and concerned citizens can regain control over local economies and environmental protection matters that their governments have long ceded.

***KAIROS: Canadian Ecumenical Justice Initiatives*** – KAIROS unites eleven churches and religious organizations in work for social justice with partners in Canada and around the world. KAIROS is formed by the Anglican Church of Canada, Canadian Catholic Organization for Development and Peace, Canadian Conference of Catholic Bishops, Canadian Religious Conference, Christian Reformed Church in North America, Evangelical Lutheran Church in Canada, Mennonite Central Committee Canada, The Presbyterian Church in Canada, The Primate's World Relief and Development Fund (PWRDF), Religious Society of Friends (Quakers), and The United Church of Canada. KAIROS is committed to promoting principles of justice, peace and the protection of human rights, and advocates for social change. For three decades KAIROS' member churches have worked to improve the relationship between Aboriginal and non-Aboriginal peoples in Canada by calling for: (1) recognition of Aboriginal title and nationhood; (2) implementation of Aboriginal land, treaty and inherent rights; and (3) affirmation of the historic rights of Aboriginal peoples as they are recognized in international law and the Canadian constitution, including the right to exercise their autonomy, structure their own solutions, and have access to sufficient land and resources.