TO THE

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

ON THE MERITS OF THE PETITION

OF THE HUL'QUMI'NUM TREATY GROUP

Case No. 12.734

BRIEF OF LAWYERS' RIGHTS WATCH CANADA AS AMICUS CURIAE

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I. INTEREST OF THE *AMICI*

1. Lawyers Rights Watch Canada (LRWC) respectfully submits this *amicus curiae* brief for the benefit of the Inter-American Commission on Human Rights (Inter-American Commission) in its consideration of the issues raised by the above-referenced matter. LRWC is a committee of Canadian lawyers who promote the implementation and enforcement of international human rights standards, conduct legal research concerning the integrity of legal systems, provide public legal education on human rights issues and work in cooperation with other human rights organizations. As a volunteer organization, LRWC is funded by membership fees and donations from individuals. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.

2. LRWC submits this brief in support of the Hul'qumi'num Treaty Group's (HTG) petition to the Inter-American Commission because of the past and present unequal and discriminatory treatment of the Hul'qumi'num people's right to property and the right to effective judicial protection and remedies for violations (i.e. access to justice).

3. The focus of this *amicus curiae* brief is on Canada's failure to comply with its obligation under domestic and international human rights law to ensure the rights of Hul'qumi'num people to equality before and under the law, to equal protection and equal benefit of the law without discrimination and to ensure timely access to effective remedies for the violations and denials of those rights. This brief supplements the HTG's Observations on the Merits of the Case dated January 22, 2010 (HTG Observations)[1], by demonstrating the:

a. Unequal and discriminatory treatment of the Hul'qumi'num people's property rights; and
b. Unequal and discriminatory access to justice and effective remedies for the violation of their rights.

II. SUMMARY OF BRIEF

4. This *amicus curiae* brief reviews the following areas:

(i) the peremptory nature of the right to equality and non-discrimination, and the inter-relationship of these two concepts;
(ii) the history of *de jure* inequality and direct discrimination perpetrated against the Hul'qumi'num by the appropriation of their traditionally owned lands and resources; by the unequal and discriminatory treatment of their customary land tenure system; and by the laws and practices instituted by successive Canadian governments that restricted and impaired the economic, political/civil, and cultural rights of Indigenous peoples;
(iii) the real inequality experienced by the Hul'qumi'num as a direct consequence of this historical discrimination; and
(iv) the State's substantive equality obligation to institute affirmative measures to remedy current and ongoing indirect discrimination and to address the conditions that impede the

[1] Hul'qumi'num Treaty Group Observations on the Merits of the Petition, Case No. 12.734, January 22, 2010 [HTG Observations].

ability of historically disadvantaged groups such as the Hul'qumi'num to exercise protected rights on an equal footing with others.

5. The right to equality is set out in Article II of the *American Declaration of Rights and Duties of Man* (*American Declaration*),[2] which also protects property rights (Article XXIII) and the right to a fair trial (i.e. effective judicial protection: Article XVIII). Canada must guarantee all *American Declaration* rights in accordance with the right to equality and non-discrimination. In this sense, Canada's Submission is correct in stating that the HTG's allegations under Article II are "inextricably linked" to its claims under Article XXIII,[3] and under Article XVIII. Canada has violated and continues to violate the Hul'qumi'num's rights to property and to effective judicial protection in accordance with the peremptory norm of equality and non-discrimination.

6. The fundamental character of the right to equality is reflected by its inclusion in many other human rights instruments to which Canada is a party. These include the *Charter of the United Nations;* the *Universal Declaration of Human Rights*; the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of all Forms of Racial Discrimination* and, most notably, the *United Nations Declaration on the Rights of Indigenous Peoples*.

7. The principle of equality is fundamental to Canadian legality. Since ancient times, the *Coronation Oath* has obliged the monarch to protect the laws and customs of the people. It has long been established that the rule of law means that everyone, including the monarch, is subject to the laws of the land. These ancient principles of equality and the rule of law are affirmed in Canada's *Constitution Act, 1982*.

8. The concept of equality cannot be separated from the concept of non-discrimination. Together, equality and non-discrimination are so basic to international law that this principle has become a peremptory norm or *jus cogens.* Several judgments of the Inter-American Court of Human Rights (Inter-American Court) have affirmed this, including *Yatama vs. Nicaragua.*

9. States are obligated to provide formal or *de jure* equality by ensuring that their laws do not discriminate through distinctions, exclusions, restrictions or preferences, based on grounds such as race. States are further obligated to establish substantive equality and eliminate the indirect discrimination that arises when laws have unequal and adverse effects on particular individuals or groups.

10. The obligation to establish substantive equality requires States to institute ameliorative measures and extend special or preferential treatment to ensure the full exercise of all rights by groups that are weak or suffer from historic disadvantage. Indigenous peoples have been recognized as one such group. The Inter-American Commission and the Inter-American Court have advanced this principle, as has the European Court of Human Rights (ECtHR). This accords with the *United Nations Declaration on the Rights of Indigenous Peoples*, which establishes that

[2] *American Declaration on the Rights and Duties of Man*, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) [American Declaration] at 17: Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.
[3] Submission of Canada to the Inter-American Commission on Human Rights on the Merits of the Petition of the Hul'qumi'num Treaty Group, Case No. 12.734, August 26, 2010, Executive Summary [Submission of Canada] at para 266.

remedies must be provided to Indigenous people for the historical injustices resulting from the dispossession of their lands and resources.

11. The history of relations between Canada and the Hul'qumi'num people reveals innumerable violations of the right to *de jure* and *de facto* equality and non-discrimination. Canada has consistently failed to acknowledge, respect and protect the Hul'qumi'num's laws. It has also failed to protect their rights to property and to judicial protection on an equal and non-discriminatory basis. During the 1880s, Canada seized Hul'qumi'num lands and resources for the benefit and enrichment of non-Indigenous colonial settlers. During the late 19th and early to mid 20th centuries, Canada instituted many laws that overtly discriminated against Indigenous peoples on the basis of race. These laws politically and economically marginalized Indigenous peoples and expressly prevented them from seeking redress in Canadian courts.

12. Although Canada has since rectified the *de jure* or formal inequality that governed the early post-contact era, it has failed to redress the resulting real inequality and disadvantages experienced by Indigenous peoples. The Hul'qumi'num are now among the poorest people in British Columbia, while those using, occupying and developing their ancestral lands and traditional resources are among the wealthiest. The bulk of the Hul'qumi'num people's traditional territories are in the hands of private third party title holders.

13. Canada's property laws give preferential protection to the third party title holders over the property rights of the Hul'qumi'num and Canada has taken the position that these lands cannot be included in negotiations unless there are "willing sellers". Canada's laws have also failed to protect the Hul'qumi'num people's traditionally owned lands and resources from development and environmental devastation. Even after the filing of the HTG's petition before the Inter-American Commission, Canada has continued to allow third parties to clear-cut the subject lands without consulting the Hul'qumi'num or obtaining their consent. As the HTG has submitted by means of an application for precautionary measures, Canada has also ignored opportunities to provide restitution by failing to purchase parts of the subject lands that have been offered for sale by some of the third party title holders.

14. The evidence thus demonstrates that the direct discrimination historically committed by Canada against the Hul'qumi'num has been succeed by indirect discrimination, in violation of their right to equality before the law, to equal protection and benefit of the law and to freedom from discrimination. Canada has done this by:

a. seizing the lands and resources that once sustained the Hul'qumi'num and their culture;
b. failing to give legal recognition and protection to the laws and customs of the Hul'qumi'num people, including their land tenure systems by which Hul'qumi'num ownership, occupation and use of the subject lands and resources were traditionally protected and maintained;
c. extending preferential recognition and effective protection of non-Indigenous rights to property within the Hul'qumi'num people's traditional territories without consulting the Hul'qumi'num or obtaining their consent;

d. enacting and enforcing discriminatory laws that further restricted the rights of the Hul'qumi'num, including their access to remedies for the seizure of their lands and resources; and
e. failing to redress or otherwise compensate the Hul'qumi'num for their losses.

15. Canada opposes the HTG's petition on the ground that the State is not required to remedy historic wrongs. It argues that the Inter-American Commission lacks jurisdiction to address or even consider historic facts, and that the historic "taking up" of lands and subsequent transactions cannot be regarded as a continuing violation or a violation with continuing effects. These positions are not supported by the case law Canada cites and are contrary to the well established principles of the Inter-American Human Rights System (IAHRS), international law and Canadian domestic law.

16. In view of Canada's historic and on-going violations of the equality rights of the Hul'qumi'num, LRWC urges the Commission to find in favour of the HTG's petition.

III. INTERNATIONAL LAW OF EQUALITY AND NON-DISCRIMINATION

17. This section covers: (A) the sources of international equality law; and (B) the basic juridical principles, in terms of the nature of equality and non-discrimination, and the scope of State obligations to achieve compliance.

18. The right to equality without discrimination is *jus cogens* and the foundation on which all other rights depend. The entire juridical framework of national and international public order rests on the fundamental principle of equality,[4] which has been eloquently described in the IAHRS as follows:

> …[the right to equality] springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences that are inconsistent with their unique and congenerous character.[5]

A. Sources of Equality Law

1. Equality Rights in the Inter-American Human Rights System (IAHRS)

19. As a member of the Organization of American States (OAS), Canada has agreed to

[4] I/A Court H.R. *Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 23, 2005. Series C No. 127 [Yatama] at para 184.
[5] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OR OEA/Ser.L./V/II.116 Doc.5 rev.1 corr. (2002) [Report on Terrorism] at para 335, cited in *Maya Indigenous Communities of the Toledo District v. Belize,* Report No. 40/04, Case No.12.053, at para 163. This excerpt was a finding of the Inter-American Court concerning the notion of equality under the provisions of the *American Convention*.

uphold the equality rights provisions of the *Charter of the OAS*,[6] and Article II of the *American Declaration*[7] provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor". On the express wording of Article II, State Parties are obliged to uphold all other *American Declaration* rights (such as the right to property), in accordance with the principle of equality and non-discrimination.

20. Article 24 of the *American Convention on Human Rights* (American Convention)[8] guarantees that "...all persons are equal before the law" and "...are entitled, without discrimination, to equal protection of the law". Article 1.1 requires States to ensure "the free and full exercise" by all persons of the rights and freedoms recognized by the *American Convention* "without any discrimination for reasons of race…", by establishing domestic laws and practices that "give effect" to those rights or freedoms (Article 2).[9]

21. Although Canada is not a State Party, the Inter-American Commission has ruled that the *American Declaration* must be interpreted in light of developments in the *corpus juris gentium* of international human rights law, including the IAHRS and specifically, the *American Convention* and jurisprudence of the Inter-American Court.[10] The Inter-American Commission has described the *American Convention* as representing "an authoritative expression of the fundamental principles set forth in the *American Declaration*".[11]

2. Equality Rights in the United Nations System

22. The obligation to guarantee equality and non-discrimination is confirmed by many instruments and treaties that bind Canada and clearly establish that Canada has accepted the peremptory nature of equality, including the:

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[6] *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3 at Preamble and Article 3(l): Appendix A, No 1.

[7] *American Declaration*, *supra* note 2 at Preamble and Article II: Appendix A, No 2.

[8] *American Convention on Human Rights*, 22 November 1969, OASTS No 36, 1144 UNTS 123 [American Convention] at Articles 24, 1.1 and 2: Appendix A, No 3.

[9] See Appendix A, No 3.

[10] *Mary and Carrie Dann v United States* (2002), Case No 11.140, Report No 75/02, at paras 96-97, Annual Report of the Inter-American Commission on Human Rights: 2002, [*Dann*]:

> 96. In addressing the allegations raised by the Petitioners in this case, the Commission also wishes to clarify that in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. The Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions.
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> 97. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. This includes in particular the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.

[11] *Ibid* at para 97.

- Preamble of United Nations *Charter;*[12] *Universal Declaration of Human Rights*;[13] and the *International Covenant on Civil and Political Rights* (ICCPR);[14]

- *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[15] with its expansive definition of racial discrimination and the extensive scope of State obligations to protect and remedy actions that are discriminatory or have the effect of creating or perpetuating such discrimination (Article 6); and

- *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[16], which affirms that "Indigenous peoples are equal to all other peoples" and remedies must be provided for the historical injustices resulting from the dispossession of their land and resources. UNDRIP was endorsed by Canada in November 2010, as one of only four states that originally voted against it.[17]

3. Equality Rights in Canada

23. From historic times to the present, Canada's legal framework has provided for the equal and non-discriminatory treatment of all peoples, including the Hul'qumi'num. Well before the 1880s, the rule of law was recognized as a set of fundamental constitutional principles. Those principles that everyone is equal before the law and no one is above the law coupled with a system of courts independent of every other institution of the state, to interpret and apply the law and determine remedies for violations of the law, provide the necessary safeguards against arbitrariness by the State.[18]

24. This concept of legality was reflected in the *Coronation Oath*, by which the British monarch is bound to protect the laws and customs of the people governed.[19] Although the monarch had prerogative powers, these were traditionally limited to upholding the will of the people.[20] This principle was affirmed by the recogntion and protection of Indigenous territorial

[12] *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7: Appendix A, No 4.
[13] *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948), Articles 1, 2, 7 & 8: see Appendix A, No 5.
[14] *International Covenant on Civil and Political Rights*, 19 December 1966, Can TS 1976 No 47, 999 UNTS 171, [ICCPR], Articles 2, 3, & 26: Appendix A, No 6.
[15] *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, [CERD], Articles 1.1, 2.1 and 6: Appendix A, No 7.
[16] *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295, (2007) [UNDRIP]: Appendix A, No 8.
[17] Canada is one of four states that voted against UNDRIP and only endorsed it November 12, 2010: *Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples* (12 November 2010), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp>
[18] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford : All Souls College, 1885 – 8th ed 1914) at ch XV.
[19] *Coronation Oath Act 1688,* 1 Will & Mar, c 6 (UK).
[20] Dicey, *supra,* note 18 at ch XV.

rights in the *Royal Proclamation 1763*, which has since been incorporated into Canada's Constitution.[21]

25. The primacy of equality rights is confirmed in the Preamble to the *Constitution Act, 1982*,[22] which provides that "Canada is founded upon principles that recognize the supremacy of…the rule of law". It is also confirmed in the constitutional guarantee of equality under section 15 of the Canadian *Charter of Rights and Freedoms* (Charter),[23] and through the recognition and affirmation of "existing aboriginal and treaty rights", under section 35 of the *Charter*.[24]

> Section 15(1) provides that, "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".
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> Section 15(2) expressly provides for the possibility of measures designed to counter systemic discrimination and ameliorate the conditions of groups that are historically disadvantaged, due to race or other prohibited ground: "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".
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> Section 35(1) provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

26. Canada's Constitutional protection for the right to equality and non-discrimination conforms with international equality law and further answers Canada's argument that it cannot be compelled to correct the adverse effects of contemporary policies that are discriminatory as a result of historic wrongs.[25]

27. Canada's domestic legal framework has historically provided and continues to provide for the equal and non-discriminatory treatment of Hul'qumi'num property and other rights, as well as the right to adequate remedies for violations. As illustrated by the facts set out in Section IV, the reality has been otherwise. The Hul'qumi'num have been subjected not only to a history of direct or overt discrimination, but to continuing indirect discrimination, as well as real inequality, as evidenced in Indigenous peoples' poverty and marginalization relative to non-Indigenous Canadians.

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[21] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Constitution Act, 1982*], at s 25(a): The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal , treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[22] *Constitution Act, 1982*, *supra* note 21 (see preamble): Appendix A, No 9.

[23] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, at s 15: Appendix A, No 10.

[24] *Constitution Act, 1982*, *supra* note 21, at s 35: Appendix A, No 11.

[25] Submission of Canada, *supra* note 3 at paras 95-97.

B. Key Juridical Principles of International Equality Law

28. This section reviews key juridical principles drawn from the IAHRS and other supra-national systems regarding the nature of equality and the scope of State obligations.[26]

1. Fundamental *Jus Cogens* Nature of Equality and Non-Discrimination

29. Developments in modern international equality law confirm that freedom from discrimination lies at the heart of the equality guarantee, permeating the guarantee of all other rights and freedoms under domestic and international law.[27]

30. The IAHRS has further confirmed that equality before and under the law is a right that must itself be guaranteed without discrimination. In its foundational Advisory Opinion on Migration,[28] the Inter-American Court held that non-discrimination, together with equality before the law and equal protection of the law for all persons, "are constituent elements of a basic and general principle related to the protection of human rights".[29] The Court emphasized that equality and non-discrimination are inextricable and that equality before the law "must be guaranteed without any discrimination".[30]

31. The principle of equality and non-discrimination is a peremptory norm from which no derogation is permitted. The Inter-American Court characterized the principle as "fundamental for the safeguarding of human rights in international law, as well as internal law", and further held:

> 4. That the fundamental principle of equality and non-discrimination constitute a part of general international law, which is applicable to all states, independent of whether or not they are a party to a particular international treaty. In the present stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*
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> 5. That the fundamental principle of equality and non-discrimination, given its imperative character, gives rise to *erga omnes* obligations of protection that bind all states and generates effects to third parties, including private persons.[31] [emphasis added]

32. The Inter-American Court has affirmed the foregoing in several judgments[32], including its most extensive interpretation of Article 24 in *Yatama vs. Nicaragua,*[33] concerning an Indigenous people's claim to the effectively equal and non-discriminatory exercise of their political rights:

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[26] Inter-American Commission, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II/Doc.68 (20 January 2007) [*Access to Justice Report*] at paras 87-92.
[27] *Maya Indigenous Communities of the Toledo District v. Belize* (2004) Case No. 12.053, Report No. 40/04 [*Maya Indigenous Communities*] at para163.
[28] I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18 at para 83, cited in *Maya Indigenous Communities*, *supra* note 27 at para 164.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid* at paras 173(3), (4) and (5), cited in *Maya Indigenous Communities*, *supra* note 27 at para 165.

> The principle of the equal and effective protection of the law and of non-discrimination constitutes an outstanding element of the human rights protection system embodied in many international instruments and developed by international legal doctrine and case law. At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it and it permeates the whole juridical system.[34] [emphasis added]

33. The CERD Committee[35] and the UN Human Rights Committee (Committee) have affirmed that "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights".[36]

2. Scope and Nature of State Obligations

34. The Inter-American Court described the tie between the *erga omnes* obligations to respect and guarantee human rights and the principle of equality and non-discrimination, as "unbreakable". The Court held that the obligation "impregnates all actions by State power, in all its expressions".[37]

35. State obligations to ensure equality and non-discrimination range from the duty to guarantee formal (or *de jure*) equality and prevent direct discrimination, to the duty to eliminate indirect discrimination and ensure that substantive equality is effectively guaranteed for all persons, and in relation to all rights.

i. *De jure* inequality and direct discrimination[38] arises when a State creates distinctions and differential treatment based on prohibited grounds like race.[39] The obligation to

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[32] I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia.* Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134 [*Mapiripán*] at para 178; and *Case of the Girls Yean and Bosico v. Dominican Republic.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130 [*Bosico*] at para 141. These principles are also found in the following Advisory Opinions of the Inter-American Court: (1) I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18 at para 88; (2) I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17 at para 44; (3) *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4 at para 54.

[33] *Yatama, supra* note 4.

[34] *Ibid* at para 184.

[35] CERD General Recommendation XIV (Forty-second session, 1993): On Article 1, Paragraph 1, of the CERD Convention, UN Doc A/48/18 (1993) 114, at paras 1-3: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights."

[36] ICCPR General Comment 18 (Thirty-seventh session, 1989): Non-Discrimination, UN Doc A/45/40 vol I (1990) 173, at paras 1 and 3.

[37] *Mapiripán*, *supra* note 32 at para 178.

[38] The term *de jure* equality refers to the principle that discrimination can stem from law (*de jure*), as opposed to from practice or outcome (*de facto*).

[39] *Yatama*, *supra* note 4 at para 188.

eliminate this form of discrimination is uncontroversial.

ii. *De facto*[40] or substantive equality requires States to eliminate indirect or "adverse effect" discrimination, as well as structural discrimination, and create the conditions required to effectively guarantee that all individuals and groups can exercise the same rights/freedoms, on an equal footing and without discrimination.[41]

36. This analysis of the development of equality law clarifies that States must go beyond eliminating all forms of direct discrimination. Discrimination is not confined to distinctive and adverse treatment of groups and individuals and it is not avoided by offering the same treatment. Rather to ensure against or remedy discrimination, a State must adopt measures that guarantee the equal protection of all rights.

37. Discrimination encompasses exclusions, restrictions and preferences that have the effect of imposing disadvantages,[42] or 'nullifying benefits and advantages'. CERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[43]

38. The linchpin of modern equality law is the concept of substantive equality, and the principle that in order to guarantee the equal protection for all, States must do much more than ensure the same treatment of groups or individuals. Substantive equality requires that:

(i) the guarantee of equality be effective;
(ii) States eliminate indirect discrimination;
(iii) States institute affirmative measures to address real (*de facto*) inequality and the structural conditions that impede the effective exercise of protected rights by certain groups on an equal footing with others.[44] The latter is sometimes referred to as structural discrimination;
(iv) States owe a special duty of protection to certain groups due to their differentiated situation and conditions of historic vulnerability and weakness vis-a-vis third parties; and,
(v) States must extend preferential treatment to ameliorate such conditions.

39. The concept of effectiveness requires States to ensure the actual enjoyment of these rights

[40] The term *de facto* equality refers to the concept that inequality and discrimination can stem from practice, and refers to equality of outcome. The concept of substantive equality (or equality in substance) arose out of the recognition that formal or *de jure* equality may not lead to the enjoyment by different groups of the same rights. Ostensibly neutral policies that do not expressly exclude certain groups may nonetheless result in *de facto* discrimination. As a result of historical and actual vulnerability and disadvantage, certain groups may result in an asymmetrical experience of disadvantage or disparity. The assumption that underlies substantive equality is that historically disadvantaged groups may need to be treated differently, through the use of appropriate measures, in order to achieve the legal standard of effective equality in substance: Drawn from *The Principle of Equality*, online: International Women's Rights Action Watch <http://www.iwraw-ap.org/convention/equality.htm>.
[41] *Yatama*, *supra* note 4 at para 189.
[42] *Access to Justice Report*, *supra* note 26 at para 93.
[43] CERD, Article 1.1: Appendix A, No 7.
[44] *Yatama*, *supra* note 4 at paras 201-202, 224.

through legislative, policy or other necessary measures.[45] Beyond legislation, States must review the norms, practices and policies of public bodies at all levels. They may need to institute measures that eliminate barriers and create conditions that enable certain groups to enjoy their fundamental rights and freedoms on an equal footing with others.[46]

40. Indirect discrimination is based on the recognition that "identical treatment" of differently situated groups, through the application of apparently neutral laws, policies, norms or practices, can have disproportionately adverse and discriminatory effects on certain groups and may effectively constitute an exclusion or preference. As a result, such laws or policies can "…nonetheless afford different degrees of protection to different people", preventing some from effectively enjoying the same rights, freedoms and opportunities as others.[47] The Inter-American Commission has examined the concept of achieving substantive and effective equality before and under the law, and recognized that the identical treatment of individuals or groups "may frequently produce serious inequality".[48]

41. Affirmative measures are a particularly prominent equality concept in the IAHRS. In *Yatama v. Nicaragua*, the Inter-American Court recognized that real inequality and conditions that prevent or impede a group's exercise of other rights and freedoms require affirmative measures. Taking account of the contemporary indices of vulnerability and inequality affecting the instant Indigenous population, the Court considered their effect on the exercise of political rights at issue:

> […] It is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination.
> [...]
> This obligation to guarantee is not fulfilled merely by issuing laws and regulations that formally recognize these rights, but requires the State to adopt the necessary measures to guarantee their full exercise considering the weakness or helplessness of the members of certain social groups or sectors.[49]

42. In *Yatama*, the Court recognized that the historical disadvantage and discrimination against an Indigenous people had created a situation in which the 'same treatment' and application of facially neutral policies and processes in the political realm produced indirect discrimination.

43. The requirement for ameliorative laws and programs recognizes that real inequality and discrimination are the result of systemic patterns or problems experienced by a particular group due to historically discriminatory treatment. As a result, States must institute programs that

[45] *Maya Indigenous Communities, supra* note 27.
[46] *Yatama, supra* note 4; *Bosico, supra* note 32 at para 141.
[47] *Access to Justice Report, supra* note 26 at paras 89-90: supporting the reasoning of the Supreme Court of Canada in *Andrews v Law Society*, [1989] 1 SCR 143 at para 280, and of Colombia's Constitutional Court in judgments C-673, C-507 and C-534/05, reviewed at paras 94-97.
[48] *Access to Justice Report, supra* note 26 at para 93.
[49] *Yatama, supra* note 4 at paras 195 and 201.

specifically address the consequences of this historic disadvantage.[50]

44. The obligation to provide preferential treatment and the special duty of protection for the rights and freedoms of Indigenous peoples is well established in the IAHRS. The concept emerged in response to the persistent adverse consequences of colonization and the colonial practices of many States, including Canada: practices that violated the rights of the colonized to equality and non-discrimination.[51] As the jurisprudence of the IAHRS recognizes, States must effectively redress the resulting conditions that impede or prevent the full and effective participation of Indigenous peoples in the exercise of all of their rights, including political and other rights within domestic political systems.[52] In *Yatama*, the Inter-American Court focused on the need to reduce or eliminate real barriers to the effective and full exercise of political rights on an equal and non-discriminatory footing.[53] This was also the basis of the Court's decision regarding effective protection given the particular conditions and special vulnerability of Indigenous peoples in *Sawhoyamaxa v. Paraguay*.[54] Similar analysis motivated the Inter-American Commission's decisions to affirm Indigenous peoples' rights to property and land ownership in the cases of *Dann* and *Maya Indigenous Communities*.[55]

45. In addition to the proscription against producing laws and practices with discriminatory effects on certain groups, States must adopt affirmative remedial measures that ensure the effective right to equal protection of the same rights for all.[56] In *Maripirán v. Columbia*, the Inter-American Court reiterated this obligation in relation to displaced persons, due to their conditions and experience of real inequality and continuing discrimination:

> [...] States …must also take positive steps to reverse or change existing discriminatory situations in their societies, to the detriment of a given group of persons. This entails the special duty of protection that the state must provide in connection with actions and practices of third parties who, under its tolerance or acquiescence, create, maintain, or foster discriminatory situations.[57] [emphasis added]

The Court went further in framing this obligation towards historically disadvantaged persons as "preferential treatment":

> Under the terms of the *American Convention*, the differentiated situation of displaced

[50] *Bosico*, *supra* note 32 at para 141; *Yatama*, *supra* note 4 at paras 201, 224, 225.
[51] For example, British colonization of North America began with the Cabot Charter of 1496, which authorized the plundering and subjugation of non-Christian peoples: *Cabot Charter, 1496*, The Avalon Project, Yale Law School [*Cabot Charter*]. Evidence submitted to the Privy Council in *St. Catherine's Milling and Lumber Co v the Queen on Information of the Attorney General of Ontario* (1889), HL Vol XVI 46 JC, UBC Law Library KG42 P748 1888 No 69.
[52] *Yatama*, *supra* note 4.
[53] *Ibid*.
[54] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146 [*Sawhoyamaxa*] at para 83.
[55] *Dann*, *supra* note 10 and *Maya Indigenous Communities*, *supra* note 27.
[56] *Bosico*, *supra* note 32 at para 141: "[…]Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals."
[57] *Mapiripán, supra* note 32 at para 178.

persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defenselessness, including those vis-à-vis actions and practices of private third parties.[58] [emphasis added]

a. Substantive Equality

46. The adoption of a substantive equality approach is evident in other international human rights systems. The CERD definition of "racial discrimination" encompasses measures that are discriminatory both in fact and effect, and amount to indirect discrimination. The United Nations Human Rights Committee (Committee) has similarly held that discrimination may result from the failure to treat different situations differently: "[...]if the negative results of such failure exclusively or disproportionately affect persons of a particular race or other status".[59] The Committee's General Comment No. 18 on the ICCPR clearly articulates the duty to provide affirmative actions and preferential treatment to correct indirect and structural discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[60] [emphasis added]

47. The ECtHR has also determined that discrimination may arise in situations other than direct discrimination, including: (1) where a general policy or measure has disproportionately prejudicial effects on a particular group, notwithstanding that it is not specifically aimed at the group (i.e. indirect discrimination); and (2) resulting from a *de facto* situation.

48. In a case challenging whether access to education by children of the historically disadvantaged Roma population complied with the Article 14 equality provision of the *European Convention on Human Rights*,[61] the ECtHR held that the Czech Republic's policies were discriminatory. The ECtHR found that if a policy or measure has disproportionate (or exclusive) and adverse effects on a group, it may be discriminatory, even though not directed at the group.[62] The petitioners had alleged that children of Roma origin were treated less favorably than non-

[58] *Ibid* at para 179.
[59] ICCPR. *G Pohl et al v Austria*, 9 July 2004, UN Doc CCPR/C/81/D/1160/2003 at para 9.4.
[60] ICCPR. General Comment 18 (Thirty-seventh session, 1989): Non-Discrimination, UN Doc A/45/40 vol I (1990) 173 at para 10.
[61] Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
[62] The ECtHR set out the same principle in *DH and Others v The Czech Republic* (Grand Chamber), Application No. 57325/00, Judgment 13 November 2007 [DH v Czech Republic] at paras 86-91.

Roma children in a comparable situation. The evidence demonstrated that a Roma child was more likely than a similarly situated non-Roma child to be placed in a school for the mildly mentally disabled. School placement tests resulted in effective discrimination due to the lack of objectivity and fairness. The ECtHR held that discrimination could arise where regulatory provisions are couched in neutral terms, but due to systemic problems and patterns rather than individual measures clearly targeted at specific individuals or a group. The Court also confirmed the principle that States must pay "special attention" to "historically vulnerable and disadvantaged groups".[63]

b. Requirement of Special Protection for Indigenous Peoples in the Americas

49. The latter principle was derived from the Western European context, even though colonization was not practiced in that part of the continent. Its application is even clearer in the Americas, where colonization took place across the hemisphere. Canada's historical and contemporary realities are similar to that of Indigenous peoples dispossessed of their traditional lands and resources throughout the Americas. What flows from this shared history is the modern Indigenous law principle of "special protection": the requirement that rejects the sufficiency of identical treatment and formal equality, and reflects the reality that equality and non-discrimination will only be achieved when States come to to terms with and remedy Indigenous peoples' historic and continuing experience of discrimination and its consequences.

50. The Inter-American Commission's 1972 Resolution on *Special Protection for Indigenous Populations: Action to Combat Racism and Racial Discrimination*, proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[64]

51. The historic dispossession of traditionally occupied and owned lands and resources and the continuing nature and consequences of that dispossession have been identified by the IAHRS as triggering the requirement of special protection and preferential treatment. The Inter-American Commission's decisions and reports reflect this approach to the property claims of Indigenous peoples as well as their unequal access to effective judicial protection and remedies to address their historic treatment.[65]

IV. FACTS/EVIDENCE

52. This section focuses on three factual areas:

(1) the distinctive and race-based treatment of the Hul'qumi'num, in terms of their land and resources, through:
   (a) the seizure of Hul'qumi'num lands and subsequent grants and transactions to non-Indigenous settlers; and

[63] *Ibid* at para 182.
[64] Cited in *Dann*, *supra* note 10 at para 126.
[65] See for example: Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II., Doc.56/09, (30 December 2009) [Indigenous People's Rights over Ancestral Lands Report] at para 49.

(b) the overtly discriminatory laws and practices that marginalized and excluded the Hul'qumi'num and other Indigenous people from political participation and from enjoying the same rights as others.

(2) the real inequality that resulted for the Hul'qumi'num and other Indigenous peoples due to past and continuing violations of their fundamental rights; and

(3) the past and continuing lack of recognition of and legal protection for the Hul'qumi'num's land tenure system and the preferential treatment of the 'non-Aboriginal title holders' to the lands and resources seized.

A. Direct Discrimination

1. Colonial Seizure of Hul'qumi'num Lands and Resources

53. Canada has conceded that the "historic taking up" and land grant in the 1880s occurred without the Hul'qumi'num people's agreement or compensation. Canada maintains that this "taking up" was "justifiable as the grant was awarded subject to established law... ".[66] The laws to which Canada refers were not "established". They were extra-legal measures unilaterally imposed for the purpose of appropriating Indigenous lands and resources to enrich colonial settlers. The rights of the colonial settlers who received portions of Hul'qumi'num land and resources through grant or purchase were and are protected by Canadian law. The rights of the Hul'qumi'num to the lands and resources that were indisputably theirs, were not recognized or protected at seizure and are not either recognized or protected today.

54. British claims to the right of seizure began with the *Cabot Charter of 1496*, when King Henry VII of England purported to authorize the taking of all lands yet to be discovered that belonged to non-Christian peoples.[67] By contrast, the *Royal Proclamation, 1763,*[68] which was affirmed by Canada's *Constitution Act, 1982,*[69] recognized that land in western North America that had not been ceded by or purchased from the "Indians" still belonged to them. However, in 1849, contrary to the *Royal Proclamation*, the *Oregon Treaty*, to which the HTG were not a party, purported to attribute all territory north of the 49th parallel to Britain.[70] In 1849, the colony of Vancouver Island was established by a statute of Britain's Parliament[71], and in 1854 Governor Douglas directed surveyors to mark out "Indian Reserves".[72] In 1858, the Governor of British Columbia proclaimed the reception of English law.[73] At that time, title to land in England was based on use and occupation.[74] Although lands in the new colony of Vancouver Island—

[66] Submission of Canada, *supra* note 3 at para 308.
[67] *Cabot Charter*, *supra* note 51.
[68] *Royal Proclamation, 1763* (UK), RSC 1970, Appendix II, No 1.
[69] *Constitution Act, 1982*, *supra* note 21.
[70] *Treaty between Great Britain and the United States of America for the Settlement of the Oregon Boundary, British State Papers*, vol 34 at 14, cited in Brian Egan, "A Short History of the Colonization and Dispossession of the Hul'qumi'num Peoples by Canada, and their Efforts at Resistance to the State's Uncompensated Taking of their Traditional Lands" (PhD Thesis 2010, Carleton University, Ottawa, Canada) at 104.
[71] *Administration of Justice in Vancouver Island Act, 1849* (UK) 12 & 13 Vict c 48.
[72] See e.g. Egan, *supra* note 70 at 118; Cole Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia* (Vancouver: UBC Press, 2002).
[73] Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 32.
[74] Bruce Ziff, *Principles of Property Law*, 3d ed (Toronto: Carswell, 2000), 120 *et seq.*

including those of the Hul'qumi'num—were granted to non-Indigenous settlers on the basis of use and occupation for as little as a year, colonial officials did not recognize Hul'qumi'num rights to the land and resource they had used and occupied for thousands of years.

55. For example, in 1858, colonial officials began issuing permits allowing colonial non-Indigenous settlers to purchase portions of the land occupied and used by the Hul'qumi'um for five dollars per acre. This was paid to colonial authorities who were to grant title to the settlers after the land was surveyed and the question of Indigenous title was resolved.[75] In practice, title was granted even though the issue of Indigenous title was never resolved. In 1859, a survey of 45,000 acres of superior agricultural land in the Cowichan Valley encouraged further incursions into the prime areas used by the Hul'qumi'num for agriculture and food collection. Non-Indigenous settlers continued to be allowed the privilege of pre-empting between 160 and 480 acres although the same rights were not extended to the Hul'qumi'num or other "Indians".[76]

56. The Hul'qumi'num resisted the appropriation of their traditionally owned lands and in 1860, Governor Douglas estimated it would cost 3000 pounds to extinguish the Hul'qumi'num's title to all of their lands. In 1862, after British authorities rejected the request for funds, Douglas led a party of over 100 settlers accompanied by a gunboat to take possession of the land by force.[77] The reserves established for the Hul'qumi'num were situated in less desirable locations and allocated according to a formula of only ten acres per family.[78]

57. In 1866, Britain's Parliament passed a statute amalgamating the Vancouver Island colony with the colony of British Columbia.[79] In 1867, the Dominion of Canada was established through a consolidation of British colonies.[80] In 1872, British Columbia became part of Canada by an imperial order in council, which also replaced the appointed legislature with one elected by the settlers.[81] There was no Hul'qumi'num participation or consultation in any of these processes.

58. Following British Columbia's Confederation with Canada, incursion on the land traditionally owned and occupied by the Hul'qumi'num intensified. In 1884, Robert Dunsmuir, a wealthy Scotsman and a member of the British Columbia Legislature, established the Esquimalt and Nanaimo (E&N) Railway Company with the object of building a rail line between Victoria and Nanaimo, where he operated coal mines.[82] To subsidize construction, the government of British Columbia agreed to transfer land to the government of Canada, and once the line was complete, this land was transferred to the E&N Railway.

59. The terms of the grant protected the land rights of non-Indigenous colonial settlers who had squatted on the land for only a year and provided no comparable protection for the land rights of the Hul'qumi'num. The land granted to the E&N Railway incorporated almost all of the land traditionally occupied and used by the Hul'qumi'num, and specifically included the

[75] Egan, *supra* note 70 at 164.
[76] Egan, *supra* note 70 at 200.
[77] Egan, *supra* note 70 at 163-189.
[78] Egan, *supra* note 70 at 199.
[79] *Union of Vancouver Island with British Columbia Act, 1866* (UK) 29 & 30 Vict 67.
[80] *British North America Act, 1867*, 30-31 Vict c 3 (UK), renamed in 1982 as the *Constitution Act, 1867*.
[81] Hogg, *supra* note 73 at 33.
[82] Egan, *supra* note 70 at 242.

foreshore and "the privilege of mining",[83] even though these rights were normally excluded from title under English law.[84] Although easements and gathering rights or *profits à prendre* are traditionally recognized under English common law,[85] no such rights were extended to the Hul'qumi'num. Thus, once again, English property laws were applied unequally to create and then protect property rights of the non-indigenous settlers by divesting the Hul'qumi'num of their traditionally owned lands and resources and denying any protection of their right to own and use the lands and its resources.

60. Despite the generosity of the land grant, the E&N Railway proceeded to expropriate reserved land from the Hul'qumi'num during its construction. In doing so, it relied on Canada's *Consolidated Railroad Act, 1879* and on section 31 of the *Indian Act, 1880*.[86] Moreover, the payments required by statute were not always forthcoming.[87]

2. Legislated Exclusion and Marginalization

61. Following the confederation of British colonies that formed Canada, Parliament began to legislate overtly discriminatory and unequal treatment of Indigenous peoples through the *Indian Act* that stripped "Indians" of a range of basic rights on the basis of their race, according increasing discretionary power over the lives of Indigenous peoples to non-Indigenous government officials.[88] The following summarizes key legislative developments during this early period:

i. At Confederation, federal voting rights depended on provincial voting rights, which were based upon sex and land ownership. The dispossession of their property, effectively denied voting rights to the Hul'qumi'num and other Indigenous people. [89]
ii. In 1875, under *An Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2, British Columbia became one of the first provinces to expressly deny voting rights on the grounds of race. The legislation stipulated that "no Chinaman or Indian" could vote in provincial elections.[90]
iii. In 1876, Canada's first consolidated *Indian Act* defined a "person" as "an individual other than an Indian."[91] The Act also authorized the establishments of schools for Indians.
iv. In 1884, the *Indian Act* was amended to outlaw Indigenous social and religious

[83] Egan, *supra* note 70 at 249.
[84] Ziff, *supra* note 74 at 343-4.
[85] *Ibid*.
[86] Egan, *supra* note 70 at 257.
[87] Robert Morales, *The Great Land Grab in Hul'qumi'num Territory*, online: Hul'qumi'num Teaty Group <http://www.hulquminum.bc.ca/pubs/HTGRailwayBookSpreads.pdf> at 16-17; Egan, *supra* note 70 at 257-260.
[88] *The Historical Development of the Indian Act* (Policy, Planning and Research Branch, Department of Indian and Northern Affairs, Canada, January 1975) at 58.
[89] Wendy Moss, Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Canada, Law and Government Division, 1987, rev 1991) under "The Federal and Provincial Franchise".
[90] *Ibid.* This discrimatory legistlation was upheld by the Judicial Committee of the Privy Council in *Cunningham and A-G for BC v Tomey Homma and A-G for Canada*¸ [1903] AC 151 at 155-156.
[91] *Indian Act, 1876,* SC 1876, c 18 (39 Vict), s 12.

ceremonies.[92]

v. In 1885, the *Electoral Franchise Act* extended the federal franchise to certain Indigenous peoples. The passing of this legislation led to fierce debate in the House of Commons, with opposition to the bill arguing that Indigenous people were incapable of civilization, and that extending the vote represented an encroachment on the rights of white men.[93] The *Electoral Franchise Act* was repealed in 1889.

vi. In 1894, the *Indian Act* was amended to permit the Department of Indian Affairs to implement regulations for the mandatory attendance of Indigenous children in Canadian residential schools.[94] Indigenous children living on reserves had to attend a school designated by a government official, which typically resulted in children being involuntarily removed from their families, placed in residential schools where Indigenous language and cultural practices were forbidden, and where children were exposed to severe abuse and neglect.[95] As recently conceded by Canada, the underlying assumption of this assimilation policy was that Indigenous peoples were inferior and unequal.[96]

vii. In 1900, the *Dominion Elections Act,* S.C. 1900 c. 12, stipulated that only those eligible to vote in provincial elections could vote in federal elections, thereby excluding the Hul'qumi'num and other Indigenous people in British Columbia.[97]

viii. In 1920, the *Indian Act* was amended to allow compulsory "enfranchisement", making it possible for the Department of Indian Affairs to deprive people of "Indian status" without their consent.[98]

ix. In 1927, Canada amended the *Indian Act* to prevent "Indians" from hiring lawyers,[99] thereby thwarting attempts by Indigenous peoples to surmount these formal legal obstacles and obtain redress by using Canadian and international tribunals to assert

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[92] *An Act to further Amend the Indian Act, 1880,* SC 1884 c 27 (47 Vict) s 3. The amendment outlawed the Potlatch and the Tamanawas dance, imposing imprisonment for "not more than six nor less than two months in any gaol or other place of confinement".

[93] Wendy Moss, Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Canada, Law and Government Division,1987, rev. 1991) The Federal and Provincial Franchise(txt) : within the above article, this is taken from : Bartlett (1980); Malcolm Montgomery, "The Six Nations Indians and the Macdonald Franchise," Ontario History, Vol 57, No 1, March 1965, at 175.

[94] *Act to further Amend the Indian Act,* S.C.1894 c 32, (57-58 Vict) s 137.

[95] CBC News/Canada, *Prime Minister Stephen Harper's statement of apology* (11 June 2008), online: Canadian Broadcasting Corporation <http://www.cbc.ca/news/canada/story/2008/06/11/pm-statement.html> [*Apology*]: In its official statement of apology, the government of Canada acknowledged that many of these children "…were inadequately fed, clothed and housed….some of these children died while attending residential schools and others never returned home. The [Canada's] government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language."

[96] Canada also admitted in the statement of apology that, "[t]wo primary objectives of the residential schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture." Prime Minister Harper stated that, "[t]hese objectives were based on the assumption that aboriginal cultures and spiritual beliefs were inferior and unequal."*Ibid*; See also Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), ch 5. Innumerable books have been published chronicling the "residential school" experience.

[97] *Human Rights in Canada : a Historical Perspective : Voting Rights*, online: Canadian Human Rights Commission <http://www.chrc-ccdp.ca/en/browseSubjects/votingRights.asp>.

[98] *An Act to Amend the Indian Act,* (1920) c 50 (10-11 Geo V) s 3.

[99] *Indian Act,* RSC 1927, c 9, s 141.

their rights.[100]

x. In 1938, the *Dominion Elections Act* was revised, but continued to stipulate that race could form grounds for exclusion from federal voting rights. As a result, the Hul'qumi'num and other Indigenous peoples were still unable to vote in federal elections.

62. The adverse effects of this discriminatory regulatory history cannot be exaggerated. It unquestionably impaired the ability of the Hul'qumi'num to assert their rights, to advance claims for the return of their ancestral lands and resources, and to resist the discriminatory practices that further impaired their economic, social and political rights.

63. Paradoxically, as the twentieth century unfolded and Canada emerged as an independent state, it established a reputation as a leading proponent of international human rights. At the same time, Canada resisted the extension of these rights to the Hul'qumi'num and other Indigenous peoples in significant ways. For example:

i. In 1948, Canada repealed the race-based exclusion from voting, yet it was not until 1960 that "Indians" could vote without losing their status or treaty rights when the *Canada Elections Act* was amended.[101]

ii. In 1951, the new *Indian Act* implemented removed the exclusion of "Indians" from the definition of a "person" and rescinded the prohibition of traditional ceremonies, but the assimilation policy remained intact and the Department of Indian Affairs retained veto power so that Indigenous peoples continued to be denied real decision-making authority.[102]

iii. Although Canada supported the 1951 *Convention on the Prevention and Punishment of the Crime of Genocide*,[103] it continued to remove Indigenous children from their homes and force them to attend residential school, in contravention of Article 2 of the *Convention.*

iv. In 1982, the *Constitution Act, 1982* proclaimed Canada was a "free and democratic society",[104] but no provision was made for Indigenous participation in the processes that formalized Canada's independence from Britain. Moreover, it was only *after* the new constitutional regime of 1982 was implemented that some Indigenous representatives chosen by the Canadian government were invited to a conference with provincial

[100] For example, the Haudenosaunee or Six Nations Iroquois applied for membership in the League of Nations. See e.g. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) at ch 7; Grace Li Xiu Woo, "Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations", online: (2003) 1 LGD, Journal of Law, Social Justice and Global Development <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/>.

[101] SC 1960, c 39. The right to vote was extended to First Nations people when the *Act to Amend the Canada Elections Act* passed into law, removing the discriminatory aspects of Section 14 of the Act. The amendment received Royal Assent on March 31, 1960 and came into effect on July 1, 1960.

[102] *Indian Act*, RS 1951 c I-5. See e.g. Jean Goodwill, Norma Sluman, *John Tootoosis* (Winnipeg: Pemican Publications, 1984) at 195.

[103] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951).

[104] *Constitution Act, 1982*, *supra* note 21 at s 1.

premiers.[105]

v. In 2008, Section 67 of the *Canadian Human Rights Act* was repealed. That section, enacted in 1977 excluded "Indian" people living on reserves from filing a complaint with the Human Rights Commission, making them the only people in Canada unable to seek rights protection under the legislation. In 2006, the Committee noted that section 67 allowed "…discrimination to be practised as long as it can be justified under the Indian Act,"[106] and recommended the section be repealed. Section 67 was finally repealed in 2008.

64. In contrast to New Zealand,[107] there is no provision for Indigenous representation in Canada's federal or provincial legislatures.

B. Real Inequality and Structural Discrimination as the Legacy of Historic Discrimination

65. The consequences of historic discrimination and the denial of formal equality to Indigenous peoples have been far-reaching and devastating for the Hul'qumi'num. As a result of the direct forms of discrimination that were perpetrated since contact, the economic, social and cultural situation of the Hul'qumi'num and other Indigenous people in Canada is dramatically unequal. This real inequality is the direct legacy of colonial practices. The appropriation of the Hul'qumi'num's lands and resources without consent or compensation, coupled with the other racist laws and treatment, perpetuated the disadvantage occasioned by the land seizure and helped maintain the current conditions of marginalization. This structural discrimination has compounded the barriers to the Hul'qumi'num's effective exercise of all of their rights on an equal and non-discriminatory basis.

66. In 2004, the United Nations Special Rapporteur on the Rights of Indigenous Peoples reported:

> Economic, social and human indicators of well-being, quality of life and development are consistently lower among Aboriginal people than other Canadians. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among Aboriginal people than in any other sector of Canadian society, whereas educational attainment, health standards, housing conditions, family income, access to economic opportunity and to social services are generally lower. Canada has taken up the challenge to close this gap. Ever since early colonial settlement, Canada's Indigenous peoples were progressively dispossessed of their lands, resources and culture, a process that led them into destitution, deprivation and dependency, which in turn generated an assertive and, occasionally,

[105] René Dussault, Georges Erasmus co-chairs: *Royal Commission on Aboriginal Peoples (RCAP): v.1 Looking forward, looking back* (Ottawa: Minister of Supply and Services, 1996) at 208.

[106] UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: Canada*, UNHRCOR, 85th Sess, UN Doc CCPR/C/CAN/CO/5, (2006) at para 22.

[107] In 1868 New Zealand granted the Maori the same voting rights as the settlers as well as four parliamentary seats of their own: *Quick History – House of Representatives* (14 June 2005) online: New Zealand History online <http://www.nzhistory.net.nz/politics/history-of-parliament/quick-history>.

militant social movement in defence of their rights, restitution of their lands and resources and struggle for equal opportunity and self-determination.[108]

67. According to the United Nations Human Development Index, the Hul'qumi'num communities ranked 4th and 38th from the bottom of a list of 486 communities in British Columbia, while many non-Indigenous communities in the Cowichan Valley, ranked near in the top.[109] This statistic demonstrates the persistence of the economic disadvantages resulting from the seizure of the Hul'qumi'num lands and the subsequent discriminatory treatment that effectively prevented access to judicial remedies and stripped them of the resources needed to engage in effective self-help. It also illustrates the rising fortunes of non-Indigenous people who have directly benefitted from those historic wrongs.

68. In a 2009 report, Canada acknowledged the persistence of real inequalities in contemporary Canadian society. Indigenous people are "statistically more likely to be recipients of social assistance, to be unemployed, to be incarcerated, to live in poverty, to face increased health risks and to commit suicide".[110] In other words, little has changed since 1996 when Canada's Royal Commission on Aboriginal Peoples concluded that Indigenous peoples "are at the bottom of almost every available index of socio-economic well-being, whether [they] are measuring education levels, employment opportunities, housing conditions, per capita incomes or any of the other conditions that give non-Aboriginal Canadians one of the highest standards of living in the world".[111]

69. Indian and Northern Affairs Canada, the UN Special Rapporteur on the situation of human rights, and UNICEF have found that the Aboriginal peoples of Canada have:

- shorter life expectancy than that of non-Indigenous people (7 years less for men and 5 for women);[112]
- suicide rates 5 to 7 times the national average;[113]
- incarceration rates 4 times the national average;[114]
- higher incidence of preventable diseases: rate of diabetes is 4 times higher and rate of

[108] UN Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum, Mission to Canada*, UNCHROR, 61st Sess, UN Doc E/CN.4/2005/88/Add.3, (2004) [*Mission to Canada*] at 2.

[109] Martin Cooke, Daniel Beavan, and Mindy McHardy, *Measuring the Well-Being of Aboriginal People: An Application of the United Nations Human Development Index to Registered Indians in Canada, 1981-2001* (Ottawa: Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada, 2004). The bottom 100, whose scores ranged from .49 to .73, were all First Nations, except two. Of the top 100, whose scores ranged from .87 to .97, only three were First Nations.

[110]UN Human Rights Council, Working Group on Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Canada*, UNHRCOR, 4th Sess, UN Doc A/HRC/WG.6/4/CAN/1, (2009) at para 65.

[111] Royal Commission on Aboriginal Peoples. "Choosing life: Special report on suicide among Aboriginal people". Ottawa: Supply and Services, 1995.

[112] Aboriginal Health, *The Status of Aboriginal Health in Canada* (October 2006), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/mr/is/abhl-eng.asp>.

[113] *Ibid.*

[114] *Mission to Canada, supra* note 108 at para 53.

tuberculosis is 6 times higher than the national average;[115]
- teenage pregnancy rates 7 times the national average;[116]
- higher numbers of children living below the poverty line.[117]

Further evidence of the pervasive and appalling indices of real inequality experienced by the Hul'qumi'num and other Indigenous peoples in Canada is set out in Appendix B.

C. Indirect Discrimination: Preferential Protection of Non-Indigenous Property Rights

70. The facts that support a claim of indirect discrimination are based on Canada's continuing failure to provide effective recognition and protection of the Hul'qumi'num's property rights. Although the Supreme Court of Canada affirmed in 1971 that "aboriginal title" exists[118] and then elaborated on what constitutes aboriginal title in 1997,[119] neither the Court nor the Canadian government has recognized its existence in reference to a single section of land. This is indirectly conceded by Canada.[120] The laws instituted since the original seizures have given effective legal recognition and protection to non-Hul'qumi'num property holders, in preference to a group that is entitled both to equal protection and special and preferential treatment.

71. Canada proffers two methods for redressing the historic wrongs done to the Hul'qumi'num people: negotiation through the B.C. Treaty process and litigation.

72. The facts relevant to Canada's position regarding litigation are that most of the Hul'qumi'num's lands were forcibly seized without a treaty or compensation, and were sold to (non-Hul'qumi'num) third party 'purchasers for value'. Canada does not deny these facts. Nor does Canada deny that the current legal status of the Hul'qumi'num's lands and resources was defined by these historical and contemporary facts. Indeed, Canada agrees that the Hul'qumi'num's circumstances are unique and significant,[121] and that because there was no treaty, "the bulk of their Aboriginal rights remain undefined"[122] under Canada's property law system. Canada argues that their rights are protected, but in reality, the Hul'qumi'num's rights are unprotected by Canadian law because it gives preferential protection to non-Indigenous property title owners.

73. With respect to negotiations and Canada's optimism that the B.C. Treaty Process will be effective in resolving the Hul'qumi'num's land claims,[123] Canada acknowledges that most of the HTG's ancestral lands are "private lands." This differs from the more typical situation where

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[115] *Ibid* at para 40.
[116] *Canadian Supplement to the State of the World's Children 2009: Aboriginal Children's Health: Leaving No Child Behind* (2009), online: UNICEF <http://www.unicef.ca/portal/Secure/Community/502/WCM/HELP/take_action/Advocacy/Leaving%20no%20child%20behind%2009.pdf> at 3.
[117] *Ibid* at iv.
[118] *Calder et al v Attorney General of British Columbia*, [1973] SCR 313.
[119] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.
[120] Submission of Canada, *supra* note 3 at para 156.
[121] *Ibid* at para 119.
[122] *Ibid* at para 179.
[123] *Ibid* at 3.

most of the Indigenous lands at issue are held by the Crown. Canada further acknowledges that the current holders of fee simple title to the Hul'qumi'num peoples' lands are recognized and protected by Canada's land title system. Canada characterizes these facts as making negotiations "difficult"[124]and agrees that these "private lands" will only be included in the negotiations if and when there are "willing sellers".[125] In addition to this "difficulty", it is noteworthy that approximately one third of the E&N Railway lands were recently put up for sale, yet Canada has not made an offer to settle Hul'qumi'num's legitimate and long-standing claims to ownership of those lands.

V. ANALYSIS OF VIOLATIONS OF ARTICLE II EQUALITY RIGHTS

A. Unequal and Discriminatory Protection and Treatment

74. Canada has violated the equality rights of the Hul'qumi'num people through omission and commission. Its unequal and discriminatory treatment of their property and judicial protection rights is not only the "result" of discrimination,[126] it constitutes a violation of the right to equality in and of itself.

75. There are two components of Canada's violation of Article II. The first is the lack of equal protection of rights. The second is the failure to provide special and preferential treatment to the Hul'qumi'num, as a historically disadvantaged group, necessary to enable them to enjoy protected rights on an equal footing with people not similarly disadvantaged.

1. Unequal Protection of Property Rights and Judicial Protection

76. The first aspect of Canada's discriminatory conduct is its failure to accord the same (i.e. equal), or indeed any, degree of recognition and effective legal protection of the Hul'qumi'num property rights arising from their own land tenure system. The lack of protection contrasts with Canada's preferential and effective protection of the rights of non-Indigenous individuals to property within Hul'qumi'num ancestral lands. Canada suggests that the HTG seeks the same treatment as accorded non-Indigenous property rights claimants.[127] However, the HTG is seeking the same degree of protection, that is, the effective and equal protection of their right to property and to judicial protection.

77. The HTG's claim that Canada has failed to extend "the same degree of protection"[128] to its property rights is amply demonstrated by the historic seizure and by Canada's post-seizure treatment of the Hul'qumi'num's claims to the seized lands, which discriminatory treatment continues. In appropriating the territories traditionally used and occupied by the Hul'qumi'num, Canada ignored their Indigenous land tenure system and then failed to accord to the Hul'qumi'num the same land rights under English common law as were extended to the non-Indigenous colonial settlers. This failure to extend equal and effective recognition and protection to HTG property rights has continued to the present date. Canada continues to maintain that

[124] *Ibid* at para 50.
[125] *Ibid* at para 67.
[126] HTG Observations, *supra* note 1 at para 147.
[127] Submission of Canada, *supra* note 3 at paras 263-264.
[128] *Ibid.*

because the Hul'qumi'num land claims have not been 'established' or 'clarified' under the system of land ownership laws used to grant ownership of Hul'qumi'num lands to others, the property rights of the Hul'qumi'num do not yet have constitutional protection. This argument is advanced in the face of Canada's admissions: to forcibly seizing the subject lands, "for…a railway line and… future development";[129] and that the Coast Salish people were occupying and using these lands and resources for their economic, social and cultural development,[130] which included, "traditional practices of hunting, gathering, ceremonial and spiritual practices."[131] Canada further admits that the seized land then passed into private ownership protected by "the land registry system used for non-Aboriginal title."[132] Canada does not deny that the sale and resale and the development of the Hul'qumi'num's traditionally owned lands and resources did and continues to generate tremendous wealth for the corporations and individuals who obtained ownership post-seizure. The consequent poverty and inequality that impaired the Hul'qumi'num's capacity to either protect and develop their own culture or equally participate and benefit from the non-indigenous culture, has never been adequately remedied and persists to the present.

78. The foregoing analysis applies to Canada's unequal and discriminatory treatment of the Hul'qumi'num people's right to judicial protection (Article XVIII). Through the historic direct and then indirect forms of discrimination, the Hul'qumi'num have been denied access to a simple, effective process to remedy the lack of legal protection of their property rights on an equal basis, as required by the *American Declaration*.

2. Failure to Extend Special and Preferential Treatment

79. The second aspect of Canada's discriminatory conduct is its failure to fulfill the modern international Indigenous law requirement of extending the special or preferential treatment necessary to enable the Hul'qumi'num to enjoy protected rights on an equal footing with other people in Canada. Canada's failure to remedy the historic wrongs and consequential disadvantages of the present situation violates obligations established by the IAHRS and under United Nations instruments. As Canada appears to acknowledge,[133] States have substantive corrective obligations under the equality rights rubric towards groups (including Indigenous peoples) that have experienced historic disadvantage and discrimination. The scope of these obligations extends beyond *de jure* or formal equality and encompasses positive and affirmative measures that address discrimination in effect (i.e indirect discrimination or "adverse effect discrimination"[134]), and discrimination in fact or substance (*de facto* discrimination). States must take measures to effectively ameliorate the current conditions and systemic barriers that impede a group's full and effective exercise of other fundamental rights and freedoms without discrimination.

[129] *Ibid*, Executive Summary at p 1.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid* at para 70.
[133] *Ibid*, at para 264.
[134] Over 25 years ago, the Supreme Court of Canada recognized the "adverse effect discrimination" framework of analysis in *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536.

80. Canada has failed to ensure this second measure of equality protection as well, and this failure is ongoing. As such, the violations are both continuing and with continuing effects.

B. Application of Law to Facts

1. History of Direct Discrimination and Formal Inequality

81. Although the roots of modern equality rights law in Canada can be traced to the pre-contact British traditions of equality before the law and the monarch's duty to protect the governed, these rights were not extended to the Hul'qumi'num. The Indigenous land tenure systems for regulating social relations and land use was, and is not acknowledged, much less protected. No treaty was ever concluded with the Hul'qumi'num and in addition to the forcible seizure of their traditionally owned and occupied lands and resources, the Hul'qumi'num and other Indigenous people were: (a) denied status as persons; (b) subjected to an assimilation policy that stripped them of significant civil, political, cultural, religious and social rights and forced their children to attend residential schools; (c) prohibited from retaining lawyers to defend their rights; and (d) excluded from access to political and other decision-making systems that protected in-migrating settlers.

82. The HTG's Petition was filed in response to systematic and sustained direct discrimination and the denial of even *de jure* equal treatment and protection to the Hul'qumi'num from the time of contact to the present. The emblem of this pattern of conduct was the uncompensated seizure of most of the lands and resources traditionally owned and occupied by the Hul'qumi'num.

83. Contrary to Canada's submission, the historic land grant was not done in accordance with "established law".[135] Rather, the seizure was effected by force and justified on the basis that as "Indians", the Hul'qumi'num did not have the 'right' to continued occupation, use and ownership of their own lands.[136] There were no laws legitimizing the forcible and uncompensated seizure of lands and resources belonging to another people, just as there are none today. While Canada relies on the unsubstantiated defence of "nation building", that claim is challenged by the inclusion of additional land and resources in the grant far in excess of the requirements for the railway. Furthermore, when the E&N Railway seized reserve land outside the original grant, the Hul'qumi'num were not included in negotiations for compensation and payments were made to Canada's Department of Indian Affairs. The Department delivered only part of these assets to the benefit of the Hul'qumi'num.

84. The historic land grant also exceeded what the English common law provided for private ownership. The grant included rights to foreshore and mineral deposits, which prevented the Hul'qumi'num from accessing traditional resources comparable to those protected by easements and rights of *profit á prendre* for non-Indigenous people under English law. Another protection extended to non-Indigenous settlers was the grant of title based on occupancy and use. Ironically,

[135] Submission of Canada, *supra* note 3 at para 308.

[136] Presumably, the underlying assumption for this was similar to that articulated in Prime Minister Stephen Harper's June 2008 statement of apology regarding residential schools, namely, that "[t]hese objectives were based on the assumption that aboriginal cultures...were inferior and unequal": *Apology*, *supra* note 95.

this was applied to non-Indigenous squatters after only a year of occupancy on Hul'qumi'num lands.

85. A second category of direct discrimination occurred after British Columbia became part of Canada, and continued into the 21st century, with a series of directly discriminatory laws including amendments of the *Indian Act*, the *Canada Elections Act* and the *Canadian Human Rights Act.* . These provisions severely restricted Indigenous peoples' effective enjoyment of many other rights, including economic, social and cultural opportunities available to non-Indigenous people. At the expense of the Hul'qumi'num, the riches of their lands and resources were exploited by the incoming colonial settlers and have formed the basis of wealth accumulation ever since.

2. Current Situation of Indirect Discrimination and Real Inequality (Structural Discrimination)

86. Turning to the present day, Canada's obligation to uphold the Hul'qumi'num peoples' right to equality before the law is based on domestic and international law. Canada's Constitution affirms the principles of equality and the rule of law, as do the international treaties and accords to which Canada is a party. The principle of equality is *jus cogens*. Substantive equality is the linchpin of the modern international equality law framework and the principle upon which meaningful implementation of equality rights depends.

87. Canada's continuing failure to provide any degree of protection for Hul'qumi'num property rights violates the Article II guarantee in the *American Declaration*. Specifically, Canada has failed to meet the standards defined by the IAHRS with regard to similarly situated Indigenous peoples in other countries in the hemisphere. Canada has failed to recognize and redress the disproportionately adverse effects for the Hul'qumi'num caused by the application of Canadian law to protect those holding title to HTG lands under "the land registry system used for non-Aboriginal title" in preference to the property rights of the HTG.

88. The preference in Canada's property law system for the protection of the property rights of third party property holders constitutes indirect discrimination and a violation of the Hul'qumi'num's substantive equality rights. Similarly, the failure to provide effective mechanisms to address this fundamental inequity, with its significantly adverse effects on the Hul'qumi'num, is a further violation of Article II. The violations of Articles XXIII and XVIII, through the failure to respect those rights in accordance with the equality principle, represent ongoing violations of Article II.

89. Canada's application of facially neutral property laws that favour the interests of third party purchasers for value, has had and continues to have disproportionately adverse and discriminatory effects on the Hul'qumi'num. Applying the CERD formulation of racial discrimination,[137] this preference or distinction, exclusion or restriction has the effect of nullifying or impairing the Hul'qumi'num people's enjoyment and exercise of their property rights and access to judicial protection on an equal footing with others.

[137] Appendix A, No 7.

90. The result of this preference is that a different and lesser degree of legal protection is being provided to the Hul'qumi'num as compared to other groups. As a result, the Hul'qumi'num are prevented from effectively enjoying the same economic, social, political and cultural rights and opportunities as others. The situation is one where serious inequality is being created and maintained through the application of an apparently neutral law. Canada is thus ignoring the requirement to eliminate indirect discrimination and its special duty of protection and preferential treatment that is owed in these circumstances.

C. Canada's *Ratione Temporis Defence*

91. Canada's major defence against the HTG's equality claim is that historic wrongs committed against the Hul'qumi'num people cannot be considered in these proceedings. Canada argues that not only are the historic facts beyond the Inter-American Commission's competence,[138] all allegations of violations that "flow from" that historic "taking up" of land are also excluded from the proceedings.[139] Canada claims that because the Inter-American Commission's competence *ratione temporis* is limited to the facts that took place after Canada's obligations under the *American Declaration* were in force, allegations directly related to the E&N Railway land grant or subsequent land transactions flowing from that historic grant are not "properly before the Inter-American Commission.[140] Canada also argues that the historic taking up cannot be seen as a "continuing violation" or as a "violation with continuing effects".[141]

92. Canada's failure to comply with the required standard of equality protection is not only historic, but also ongoing and continues to date. As such, the violations of Article II are both continuing, and with continuing effects. As elaborated below, Canada's limitations argument is not supported by the decisions cited. Moreover, Canada's position that modern human rights instruments without explicit text to this effect do not seek to remedy historic wrongs,[1] is out of step with the international consensus and the IAHRS's direction. Such an interpretation would render nugatory the entire sytem of ensuring the equal and non-discriminatory enjoyment of protected rights by all.

93. The decisions cited can be distringuished on the bases that none involved the forcible and uncompensated seizure by colonizers of lands belonging to others and none involved collective rights. Those factors alone make their ratios inapplicable to the instant petition.

94. Canada's submissions also misconstrue the case law by suggesting that the cited decisions of the Committee and ECtHR stand for the proposition that deprivations of property rights are instantaneous acts that do not produce a "continuing situation". While tribunals have undoubtedly treated expropriation as an instantaneous act, without continuing effects,[142] the cited decisions do not preclude a contrary finding in <u>different circumstances</u>. Indeed *Von Maltzan v. Germany* is distinguishable in any event because the Court lacked competence *ratione personae*

[138] Submission of Canada, *supra* note 3 at para 96.
[139] *Ibid* Executive Summary at 2.
[140] *Ibid* at para 96.
[141] *Ibid* at para 103.
[142] *Von Maltzan v Germany* (2005), ECtHR (Grand Chamber), No 71916/01 [*Von Maltzan*]; *Malhous v The Czech Republic* (2000), ECtHR (Grand Chamber), No 33071/96 [*Malhous*].

and referred to that possibility.[143] The same is true of *Malhous v. The Czech Republic*, where although the original seizure of property was found to be time barred, the Court was competent *ratione temporis* to deal with the associated proceedings that commenced after entry into force of the Convention.[144] This was the result even though the complainant's claim "flowed from" the historic taking of his father's land.

95. If the rule under the Optional Protocol of the ICCPR is that a continuing violation by a state party can confirm a previous violation (even though a lack of compensation under the Optional Protocol has not been found to constitute an affirmation),[145] continuing violations can still be found to arise. In fact, pursuant to the reasoning in *Anton v. Algeria*, the Committee has jurisdiction if the dispute arises after entry into force, even if the disputed facts or situation arose at an earlier date or if there is a modification of a situation created earlier.[146] On either analysis, the Inter-American Commission has jurisdiction in the instant case: because measures taken by Canada prior to 1990 continue to produce effects which, in themselves, constitute a violation of rights in the *American Declaration*; or, alternatively, acts taken since 1990 constitute a modification of the situation created earlier.

96. Decisions of the Committee/ECtHR also clearly establish that adjudicative bodies may consider historic facts, and facts prior to ratification of the instrument at issue, inasmuch as they could be considered to have created a continuing situation extending beyond that date or may be relevant for the understanding of facts occurring after that date. The ECtHR has taken this position in *Slovenia*: [147]

> […]It may, however, have regard to the facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring after that date[…]

97. This judgment contradicts Canada's position that the IAHRC cannot consider the facts reviewed in the HTG's Petition or this *amicus* brief, including the "taking up" of the land and subsequent transactions, or any of the historical facts that have led to the Hul'qumi'num's present disadvantaged position.

98. Indeed, the "adverse effect" and indirect discrimination analysis, as well as the substantive equality framework does not make sense unless there is regard for relevant historical and contextual facts that result in adverse effects arising from the application of facially neutral policies.[148] The ineluctable nature of this conclusion is demonstrated in the ECtHR decision

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[143] The Court in *Von Maltzan* held that because the expropriations were committed by Soviet occupying forces, it could not impute liability, including for a continuing violation, to the FRG (even as a successor to the GDR): *Von Maltzan, supra* note 142 at paras 81-83.
[144] *Malhous, supra* note 142 at 16.
[145] UN Human Rights Committee, *Armand Anton v Algeria*, Communication No 1424/2005, UNHRCOR, 88th Sess, UN Doc CCPR/C/88/D/1424/2005, (2006) [*Anton*]; UN Human Rights Committee, *E and AK v Hungary*, UNHRCOR, 50th Sess, UN Doc CCPR/C/50/D/520/1992 (1994).
[146] *Anton, supra* note 145 at para 7.
[147] *Kuric and Others v Slovenia*, ECtHR (Grand Chamber) No 26828/06 (2010) [Kuric] at para 304.
[148] See Indigenous People's Rights over Ancestral Lands Report, *supra* note 65 at para 49.

concerning Roma children.[149] The ECtHR's analysis is rooted in the historic experience of that particular persecuted ethnic group within Europe. A similar observation applies to the Inter-American Court's analysis of the Indigenous people in *Yatama v. Nicaragua*.

99. Hence, an 'adverse effect' and indirect discrimination analysis of the HTG's equality claim and the current property law regime in Canada demands that regard be given and meaning attached to important historic facts that have determined the HTG's current and untenable position.

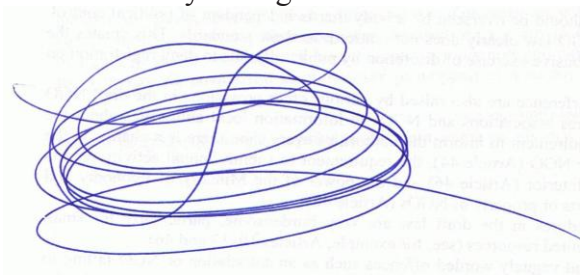
100. Canada's position must be rejected for another important reason. Its argument that modern human rights instruments without explicit text to this effect do not seek to remedy historic wrongs[150] is contrary to international consensus. As reflected, *inter alia* in UNDRIP, this consensus expressly requires remediation for historic injustices, including dispossession of land and resources and lack of access to justice. Canada's position is also contrary to the direction of the IAHRS and other international human rights frameworks to which Canada is party. Canada's unwillingness to extend effective equal protection to the Hul'qumi'num's property and access to justice rights is contrary to these commitments. It is also contrary to the Inter-American Commission's 1972 Resolution on Special Protection for Indigenous Populations: Action to Combat Racism and Racial Discrimination[151]and the Inter-American Court's judgments, that States must institute affirmative measures to redress historical injustices, by minimizing or removing the conditions and barriers that impede the full and equal exercise of all rights by historically disadvantaged peoples.

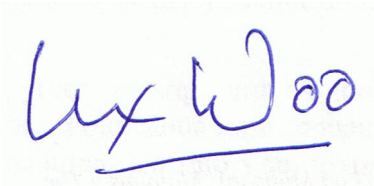
VI. CONCLUSION

101. In view of Canada's wilful disregard for well established legal principles and its ongoing violation of the equality rights of the Hul'qumi'num, LRWC urges the Inter-American Commission to support the application of the Hul'qumi'num Treaty Group and grant the relief claimed in its entirety.

All of which is respectfully submitted.

For Lawyers Rights Watch Canada





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[149] *DH and Others*, *supra* note 62.
[150] Submission of Canada, *supra* note 3 at para 97.
[151] See also: Indigenous People's Rights over Ancestral Lands Report, *supra* note 65.

Appendix A

Equality Provisions in International and Canadian Instruments

1. *Charter of the Organization of American States*:

> Preamble: All men are born free and equal, in dignity and in rights … and should conduct themselves as brothers to one another.
> Article 3(l): The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.

2. *American Declaration on the Rights and Duties of Man*:

> Preamble: All men are born free and equal, in dignity and in rights … and should conduct themselves as brothers to one another.
>
> Article II: [a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor.

3. *American Convention on Human Rights* (San José, 1969):

> Obligation to Respect Rights - Article 1.1: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> Domestic Legal Effects - Article 2: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
>
> Right to Equal Protection - Article 24 : All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

4. *Charter of the United Nations*, CTS 1945/7:

> Article 1.2 The Purposes of the United Nations are: …To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

5. *Universal Declaration of Human Rights*, A.G. Res. 217A(III), U.N.Doc.A/810(1948):

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has a right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted him by the constitution or by law.

6. *International Covenant on Civil and Political Rights* [1976] R.T. Can. 47, UNTS vol. 999 p.171:

Article 2.1: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2.2: Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 3: Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7. *Convention on the Elimination of Racial Discrimination* (CERD):

Article 1.1: In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2.1: States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; […] (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; […]

Article 6: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

8. *United Nations Declaration on the Rights of Indigenous People*, G.A. Res.61/205, 13 September 2007:

Preamble
Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Article 2
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 24
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 28

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

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 46.3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

9. *Constitution Act, 1982* enacted by the *Canada Act, 1982* (U.K.) 1982 c.11, Sched. B:
Preamble : Whereas Canada is founded upon the principles that recognize the supremacy of...the rule of law

10. *Charter of Rights and Freedoms*, *Constitution Act, 1982* (*Canada Act, 1982*):
15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [emphasis added]

11. Part II of the *Constitution Act, 1982:*
35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Appendix B

Quality of Life Measurements for Indigenous People in Canada

B.1: Human Development and Economic Development

Although Canada consistently sits near the top of the United Nations Development Index, indigenous people living on Canadian reserves rank 68th and those living off reserve rank 36th. "Half of all First Nations communities score in the lower range of the index compared with 3% of other Canadian communities. One First Nation appears in the top 100 Canadian communities, while 92 appear in the bottom 100."[152]

These low Development Index rankings reflect other disturbing statistics. For example, the income of indigenous males is approximately half that of non-indigenous Canadian males and 25% of children in indigenous communities live in poverty, which is more than double that of non-indigenous children on average.[153] Moreover, as an indicator of the broader social concerns on many reserves (such as poverty, poor housing conditions, substance abuse and exposure to family violence), in 2006-2007, a disproportionately high number of First Nations children were in government sponsored care (8,282).[154]

B.2: The Relationship between Poverty and Poor Health

The link between socio-economic factors such as poverty and health has been clearly drawn[155], with the health of indigenous peoples registering as significantly worse than that of the general Canadian population. Infant mortality is almost twenty percent higher and the incidence of diseases such as tuberculosis is much more prevalent.[156] Tuberculosis rates in First Nations communities living on-reserve continue to be 8 to 10 times higher than the Canadian average. [157] As an indicator of health, Health Canada reports a 6.4 year gap in life expectancy between 'Registered Indians' and other Canadians. These conditions are recorded in the December 2004

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[152] "The Importance of Measuring First Nations Well-Being": http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2004/02520abk-eng.asp

[153] UNICEF, Canadian Supplement to the State of the World's Children, Aboriginal children's health: Leaving no child behind, 2009, p. 6. In fact, one in four children in First Nations communities, lives in poverty, a rate more than double that of Canadian children on average.

[154] U.N. Human Rights Council Working Group on Universal Periodic Review, National Report of Canada, A/HRC/WG.6/4/CAN/1 (5 January 2009), para. 67

[155] UNICEF, *Canadian Supplement to the State of the World's Children, Aboriginal children's health: Leaving no child behind*, 2009, p. 2: "Statistics show that a range of socio-economic factors, such as poverty, lower education attainment and substandard housing, challenge the health of Aboriginal people. As a result, they experience higher infant mortality rates, lower child immunization rates, poorer nutritional status and endemic rates of obesity, diabetes and other chronic diseases. Aboriginal people also suffer higher rates of suicide, depression, substance abuse and fetal alcohol spectrum disorder, and their representation in the welfare and justice systems is generally higher than in the non-Aboriginal population."
http://www.unicef.ca/portal/Secure/Community/502/WCM/HELP/take_action/Advocacy/Leaving%20no%20child%20behind%2009.pdf (Accessed May 16, 2011).

[156] Paul Webster, *Canadian Aboriginal people's health and the Kelowna deal*, July 2006, The Lancet, vol.368, Issue 9532, 275-6.

[157] Indian and Northern Affairs Canada website, "Aboriginal Health" at http://www.ainc-inac.gc.ca/ai/mr/is/abhl-eng.asp (last accessed, May 26, 2011).

report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the United Nations Human Rights Council**.**[158]

Another alarming indicator is the overall suicide rate among indigenous youth, which is five to seven times higher than the national average[159], and suicide is the leading cause of death among aboriginal youth and children.[160]

B.3: Rates of Incarceration

Another symbol of the consequences of Canada's treatment of indigenous peoples is the high and disproportionate rates of incarceration. The Royal Commission on Aboriginal Peoples reported that, despite being about two percent of the population, ten percent of inmates in federal prisons for men and thirteen percent in federal prisons for women were aboriginal.[161] Incarceration rates in federal prisons increased 22% between the end of the Royal Commission in 1996 and 2004.[162] The rate of incarceration of indigenous peoples is four times the national average.[163]

[158] INDIGENOUS ISSUES, Human rights and Indigenous issues Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen Addendum MISSION TO CANADA, E/CN.4/2005/88/Add.3 2 December 2004 at 2.
[159] Indian and Northern Affairs Canada, *Supra* note 6.
[160] 2004 report of UN Special Rapporteur, Supra note 7, at pp. 2 & 3 and paras. 39, 40, 61, 82, 90, 102,& 106.
[161] Erasmus, Dussault, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: Report on Aboriginal People and Criminal Justice in Canada*, Minister of Supply and Services Canada, 1996.
[162] Janice Tibbetts, "Watchdog slams prison system", *The [Montreal]Gazette* (17 Oct., 2006) A12; Rémi Savard, "Les peuples américains et le système judicaire canadien : Spéléologie d'un trou de mémoire" (2002) *Can. J. L. & Soc*. 123.
[163] 2004 report of UN Special Rapporteur, *supra* note 7 at paras 53 & 55.