

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Presentation to

James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples

10 October 2013

My comments are focused on past, continuing and present violations of the rights of First Nations people to equality and non-discrimination and the need for remedies that acknowledge the wrongful seizure of their lands and resources and return lands, resources and decision making powers.

Canada has failed and is failing to comply with domestic and international law obligations to ensure First Nations' rights to equality before and under the law, to equal protection and equal benefit of the law without discrimination and access to effective remedies for past and present violations and denials of those rights.

My remarks today are restricted to three categories of historic, systemic and current discrimination and inequality:

- I. The inequality and direct discrimination of the wrongful appropriation of First Nations lands and resources without consent or compensation;
- II. The inequality and discrimination imposed by discriminatory laws and practices instituted by Canadian governments over a period of more than 150 years that denied First Nations people the right to exercise the economic, political, civil, and cultural rights and access to judicial remedies enjoyed by others;
- III. Unequal and discriminatory current practices resulting in unequal access to food, water, housing, education, health care and justice.

Underlying all three categories of discrimination and enforced inequality runs the belief that First Nations people are not entitled to equal treatment or fair remedies.

I. Discriminatory seizure of lands and appropriation of resources traditionally owned by First Nations peoples.

It is a fact that Canada seized lands and resources traditionally owned and occupied by First Nations peoples, without consent or compensation, for the benefit and enrichment of non-Indigenous colonial settlers. It is a fact that the settlers were given preferential treatment and

First Nations people were not considered or treated as equals. It is a fact that they were excluded from protection of the laws in place at the time of seizure on the basis that, as savages, they were not entitled to the benefit of laws applicable to European. It is a fact that no recognition or accommodation was made, or has been made since, to the First Nations' own laws and customs by which the occupation and use, stewardship and sharing of their lands and resources was protected and maintained.

First Nations' rights to the lands and resources that were indisputably theirs, were not recognized or protected at seizure and are not either recognized or protected today.

Following seizure, Canada unilaterally created laws that secured the settlers ownership over the seized lands and prevented First Nations people from making successful claims either for the return of the lands or compensation. A system of registration of land ownership was legislated and the courts treated registration as the only way of definitively establishing rights to ownership, occupations, use or stewardship.

II. Historic Discriminatory laws and practices

Over the course of the next hundred and fifty years First Nations people were subjected to further oppression through discriminatory laws created unilaterally by the settlers to secure and maintain their dominion over First Nations lands. Such laws denied legal personhood to First Nations people, denied the right to vote, criminalized cultural and religious practices, denied rights to family and education and cut off access to judicial remedies.

II.1 Denial of personhood

In 1876, the *Indian Act* defined a "person" as "an individual other than an Indian," a provision that was not repealed until 1951.

II.2 Denial of right to vote

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 First Nations.¹ In 1875, BC legislation stipulated that "no Chinaman or Indian" could vote in provincial elections.² In 1885, the *Electoral Franchise Act* extended the federal franchise to certain First Nations peoples amid fierce debate in the House of Commons that saw opponents arguing that First Nations people were incapable of civilization, and that extending the vote represented an encroachment on the rights of white men.³ That act was repealed four years later in 1889.

¹ 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".

²*Ibid.* *An Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2 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.

³ 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.

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.⁴ In 1938, the *Dominion Elections Act* was revised, but continued to stipulate that race could form grounds for exclusion from federal voting rights.

Although Canada repealed the race-based exclusion from voting in 1948, it was not until 1960 that “Indians” could vote without losing their status or treaty rights when the *Canada Elections Act* was amended.⁵

II.3 Denial of rights to culture and religion

The 1884 *Indian Act* amendment that outlawed Indigenous social and religious ceremonies⁶ and imposed imprisonment for “not more than six nor less than two months” was in force until 1951.

II.4 Denial of right to family and education

In 1876 *Indian Act* authorized the establishments of schools for Indians. 1894 amendments gave the Department of Indian Affairs authority to implement regulations for the mandatory attendance of First Nations children in residential schools.⁷ Many children living on reserves were involuntarily removed from their families and placed in residential schools where Indigenous language and cultural practices were forbidden and children were severely neglected and abused.⁸ As conceded by Canada, underlying this assimilation policy was that belief that First Nations peoples were inferior and unequal.⁹ Mandatory attendance was repealed in 1948 and the last residential school was closed in 1996.

II.5 Denial of Legal Representation and access to remedies

- 1927 amendment to the *Indian Act* to prohibited “Indians” from hiring lawyers,¹⁰ thereby

⁴ *An Act to Amend the Indian Act*, (1920) c 50 (10-11 Geo V) s 3.

⁵ 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.

⁶ *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”.

⁷ *Act to further Amend the Indian Act*, S.C.1894 c 32, (57-58 Vict) s 137.

⁸ 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.”

⁹ 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.

¹⁰ *Indian Act*, RSC 1927, c 9, s 141.

thwarting attempts to seek judicial remedies.¹¹ Access to remedies was further denied by a 1977 amendment to the *Canadian Human Rights Act* which excluded “Indian” people living on reserves from filing a complaint with the Canadian Human Rights Commission, making them the only people in Canada unable to seek rights protection under the legislation. The impugned¹² section was not repealed until 2008. Indians were not allowed to be lawyers in British Columbia until 1961. Alfred Scow was called to the Bar in British Columbia in 1962.

III. Current Discriminatory Laws and Practices

The devastation wrecked by the seizure of lands, followed by over 150 years of discriminatory laws and regulations cannot be exaggerated. The extent of the disadvantages suffered by First Nations people as a consequence of this historic and systemic inequality and discrimination is reflected in the following conditions:

- shorter life expectancy than that of non-Indigenous people (7 years less for men and 5 for women);¹³
- suicide rates 5 to 7 times the national average;¹⁴
- incarceration rates 4 times the national average;¹⁵
- higher incidence of preventable diseases: rate of diabetes is 4 times higher and rate of tuberculosis is 6 times higher than the national average;¹⁶
- disproportionate rates of violence against First Nations women and girls

Despite more than a decade of demands for government action to address the crisis numbers of missing and murdered First Nations women and girls, there is still no national or provincial plan to improve either police response or the conditions that place First Nations women and girls at heightened risk. Since 2003, United Nations treaty bodies have called on Canada to take concrete steps to address the high rates of violence, to remedy the social and economic inequality of First Nations women and girls, to provide equal access to the protection of the law and to remedies for violations. When a commission of inquiry was established in BC to investigate allegations of inadequate police and criminal justice branch response to the disappearance and murder of dozens of women in the downtown eastside of Vancouver, BC refused legal aid for most of the groups representing First Nations and other women at risk and as a consequence 18 of the groups with standing withdrew. In refusing to provide legal aid to groups representing women at risk, BC ignored international law obligations and again violated equality rights.

¹¹ 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/>.

¹² 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.

¹³ 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>>.

¹⁴ *Ibid.*

¹⁵ *Mission to Canada*, *supra* note 108 at para 53.

¹⁶ *Ibid* at para 40.

IV. Remedies

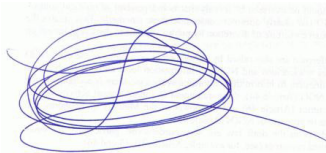
Past and continuing wrongs cannot be properly remedied by piecemeal apologies in the absence of acknowledgement of the continuing wrong done to First Nations peoples—the forced appropriation of the lands and resources upon which their culture and lives depended. Neither can such wrongs be compensated by token consultation that allows neither the power of veto to First Nations or the right to exercise responsible stewardship over the lands, air, water, habitats and resources taken from them, or the power to take action to prevent unreasonable degradation.

Remediation must begin by Canada acknowledging that the lands and resources were stolen from First Nations peoples without legal justification to benefit European settlers and that the seizure was justified by grossly discriminatory beliefs, now rejected.

The foundation of proper remediation must also include:

- Prior informed consent to development or transfers affecting lands and resources subject to claims by First Nations people;
- Consultation that includes the right of First Nations to veto--on conservation grounds or other grounds relating to protecting community interests--commercial developments or transfers of lands subject to their claims;
- a return to First Nations of rights of ownership, use, occupation and stewardship over seized lands and resources
- Inclusion of First Nations in democratic decision making regarding land and resources use on lands not returned to them.

Respectfully submitted



Gail Davidson, Executive Director, LRWC

Encl:

LRWC Work on Indigenous Rights in Canada

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LRWC Work on Indigenous Rights in Canada

Letters to Governments of Canada

[Canada: Governor General's Attendance at First Nations Meeting 11 January 2013 | Letter](#)
January 9, 2013

[Canada: Arrange meeting requested by Chief Spence | Letter](#)
December 29, 2012

[Canada: Implementation of CERD and CAT recommendations regarding murders and disappearances of Aboriginal women and girls | Letter](#)
November 4, 2012

[British Columbia: Missing Women Commission of Inquiry | Letter](#)
October 22, 2011

[British Columbia: Legal funding for groups with standing at the Missing Women Commission of Inquiry | Letter](#)
September 19, 2011

Joint Letters to Canada with other Canadian Organizations

[Canada: The Campaign to Erode Aboriginal and Treaty Rights | Joint open letter](#)
January 29, 2013
Endorsed by LRWC and numerous other experts and organizations

[Groups call for apology from Prime Minister to UN Special Rapporteur on right to food | Joint open letter](#)
May 30, 2012

Olivier De Schutter subjected to attacks on his integrity and professionalism... James Anaya, UN Special Rapporteur on the rights of indigenous peoples, received similar treatment in 2011.

Statements in the UN Human Rights Council

[Canada: Oral Intervention at the 21st Session of the Human Rights Council: Access to Justice for Indigenous Women and Girls](#)
September 18, 2012

Canada: Oral Intervention at 23rd Session of the UN Human Rights Council on Legal Aid in Canada

May 30, 2013

Report to Treaty Body

Canada: Report to the CERD on Missing Women & Murdered Women in BC & Canada

January 19, 2012 (pdf)

Lawyers' Rights Watch Canada and the B.C. CEDAW Group.

Inter-American Human Rights Commission

Canada: Amicus Brief to the Inter-American Commission on Human Rights: Hul'qumi'num Treaty Group (on the merits) | Petition, June 2011. The amicus brief

examines the historic and systemic inequality and Canada's failure to remedy violations and ameliorate the consequence disadvantages. Prepared by Gail Davidson, Heather Neun and Grace Woo.

Research Reports and Papers

International Right to Legal Aid in Relation to the British Columbia Missing Women Commission of Inquiry | Report

September 2, 2013

Prepared by J. Grant Sinclair, Q.C. B.Com LLB LLM

Canadian Jurisprudence Regarding the Right to Legal Aid | Report

September 2, 2013

Prepared by Erika Heinrich, B.Com., J.D.

Canadian courts have rejected arguments that there is a general constitutional right to legal aid. In coming to this conclusion, there has been very little or no consideration of or reference in the jurisprudence to Canada's obligations under international human rights law of right to legal aid.

Canada: International Obligations to Provide Legal Aid | Report

October 25, 2010

Prepared by Gail Davidson, Catherine Morris, Heather Neun. Legal aid should be provided for all criminal, family, administrative law and other civil matters in which people, including women, children, elderly people, minorities or indigenous peoples cannot afford to access courts and other bodies to seek rights to which they are entitled. <http://www.lrwc.org/ws/wp-content/uploads/2012/03/Legal-Aid-LRWC-Oct-25-2010.pdf>

Canada's Failure to Support the United Nations Declaration on the Rights of Indigenous Peoples | Research report

January 15, 2009

Prepared by Heidi Fraser-Kruck. Analysis of repercussions to women's rights, environmental rights, and poverty alleviation.

[The Right to Know Our Rights: International law obligations to ensure international human rights education and training | Research report](#)

May 17, 2012

Prepared by Catherine Morris and Gail Davidson. International law obligations on States to ensure that everyone has access to education about their international human rights. Includes discussion of UNDRIP and examples of application of treaties to indigenous peoples.

Op Eds and Press Releases

[Op Ed: Denial of justice at the Missing Women Commission more than a shame to the country](#)

September 14, 2011

by Catherine Morris and Gail Davidson. Vancouver Sun, and Victoria Times Colonist.

[Press release: Canada Won't Deal With Women's Human Rights Crisis At Home](#)

February 22, 2012

Re: UN CERD Report from LRWC and BC CEDAW Group.

Public Education about First Nations Rights

First Nations Rights: The Gap between Law and Practice

Co-hosted by LRWC, Amnesty International and the Hul'qumi'num Treaty Group with the support of the Vancouver Public Library, this series offers free public talks by First Nations specialists on historical and current law and practice regarding the rights of First Nations people in Canada with a particular emphasis on international law.

Topics include:

[Savage Anxieties](#) with Rob Williams

May 9 2013

Robert A. Williams, Jr. is lead Counsel in the case of the Hul'qumi'num Treaty Group v. Canada presently, before the Inter-American Commission on Human Rights. He explores the history of the denial of indigenous peoples' rights to lands and resources in the West from the time of the ancient Greeks and Romans up through Canada's 21st century treaty negotiations with First Nations in British Columbia.

[Indigenous Law as a Solution to Resource Conflict in Treaty 8](#) with Caleb Behn,

February 28, 2013

Caleb Behn, Eh-Cho Dene and Dunne Za/Cree from the Treaty 8 Territory, examines the conflict generated by fracking in northeastern BC and explains the potential of indigenous laws and legal traditions to ensure preservation of the environment as a condition of energy development and to effect reconciliation.

[Debunking the Doctrine of Discovery](#) with Robert Morales,

January 24, 2013

Medieval European law allowed a monarch to claim any land discovered by one of his subjects if it was occupied by non-Christians. Robert Morales, chief negotiator for the Hul'qumi'num Treaty Group will unveil the continuing effects of this archaic doctrine which surfaced in a 2012

B.C. Court of Appeal reasoning.

Conquest or Cooperation: Legal Pluralism with Sarah Morales

May 17, 2012

Cowichan Tribes member Sarah Morales, J.D., LL.M. explained Coast Salish legal traditions — snuw'uyulh— and their displacement during and after the colonial period. She also examined legal pluralism and the potential for such a system today in Canada.

First Nations Child and Family Caring Society with Dr. Cindy Blackstock,

April 24, 2012

Cindy Blackstock is the Executive Director of First Nations Child and Family Caring Society and Associate Professor, University of Alberta. She discusses the landmark cases, First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada, 2010 CHRT 7 and the implications for First Nations children, for minority groups and for the moral fabric of Canada.

Indigenous Rights in the UN System with Kenneth Deer,

March 19, 2012

Kenneth Deer, of the Mohawk Nation at Kahnawake, is an internationally recognized journalist and educator promoting the recognition and protection of Indigenous Peoples' rights. Mr. Deer attended the CERD Committee review of Canada's compliance with the Convention on the Elimination of all forms of Racial Discrimination.

Hul'qumi'num Treaty Group v. Canada before the Inter-American Commission of Human Rights with Robert Morales

February 23, 2012

Robert Morales, Tl'ul'thut, Chief Negotiator and lawyer for the Hul'qumi'num Treaty Group speaks about the Hul'qumi'num Treaty Group land claim case before the Inter-American Commission of Human Rights

Ghost Dancing with Colonialism with Grace Woo

January 12, 2012

Dr. Grace Woo takes a hard look at Anglo-Canadian legal history, international law, and Supreme Court of Canada reasoning. She explains how her research can be used to diagnose the remnants of colonialism that continue to haunt Indigenous and other Canadians alike.

To date 14 public talks have been given. **Podcasts, webcasts of the talks are posted online** and distributed.