PETITION NO. P-592-07

before the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
of the
ORGANIZATION OF AMERICAN STATES

THE HUL’QUMI’NUM TREATY GROUP
against
CANADA

AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER

Submitted by
NUNAVUT TUNNGAVIK INCORPORATED

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I. INTRODUCTION

1. Nunavut Tunngavik Incorporated (NTI) submits this brief as *amicus curiae* in the petition of the Hul’qumi’num Treaty Group (HTG) to the Inter-American Commission on Human Rights. NTI is a non-profit organization which represents the 25,000 Inuit of Nunavut, Canada. NTI is responsible for implementing the *Nunavut Land Claims Agreement*, a comprehensive land claims agreement, or modern treaty, under section 35 of Canada’s *Constitution Act, 1982*.

2. This case concerns the claim of the Hul’qumi’num indigenous peoples of British Columbia, Canada, represented by the HTG, to rights to lands and natural resources in its traditional territory. Similar to NTI’s predecessor organization, the HTG was founded for the purpose of negotiating a comprehensive land claims agreement with Canada. The HTG asserts that Canada has failed and continues to fail to secure and safeguard Hul’qumi’num rights over their traditional lands and resources by, among other things, granting Hul’qumi’num traditional lands to private owners while at the same time refusing to negotiate with HTG to settle Hul’qumi’num claims to lands and resources and related rights.

3. NTI respectfully requests that the Inter-American Commission of Human Rights accept NTI’s intervention as *amicus curiae* in this case and that the Commission consider the points made herein.
II. INTEREST OF AMICUS CURIAE

4. NTI’s purpose is to safeguard, administer and advance Inuit rights and benefits as an Aboriginal people of Canada, so as to promote their economic, social and cultural well-being through succeeding generations. NTI is charged with implementing, on behalf of Nunavut Inuit, the terms of any land claims agreements between Nunavut Inuit and Canada, and in particular, is the Inuit party to implement the Nunavut Land Claims Agreement (NLCA), which was signed in 1993, and is a treaty under the Constitution Act, 1982. NTI holds and manages the rights and benefits flowing to Inuit through the NLCA, ensuring that such rights and benefits are secured and defended in law. NTI is also charged with promoting, enhancing, encouraging and supporting the rights, benefits and opportunities of the Inuit of Nunavut as an Aboriginal people through whatever avenues and mechanisms are available at the international, national and regional levels.

5. Since 1993, NTI has represented and continues to represent the Inuit of Nunavut in their negotiations, lobbying efforts and litigation with Canada, seeking to implement the NLCA.

6. In this matter, NTI is interested in the serious threats to the rights and interests of the Aboriginal peoples of Canada resulting from Canada’s failure to adequately recognize, protect and implement the aboriginal, treaty and other human rights of Canada’s Aboriginal peoples. The Commission’s decision in this matter will reverberate within Canada and affect Canada’s posture and position respecting not only Hul’qumi’num rights but the rights of all Aboriginal peoples in Canada, including those with settled land claims agreements such as the Inuit of Nunavut.
III. ARGUMENT

A. Canada insisted and continues to insist on finality provisions in treaties with Canada's Aboriginal peoples, notwithstanding that such provisions are contrary to Aboriginal worldviews, the spirit of reconciliation, and the human rights of Aboriginal peoples.

7. The Nunavut Land Claims Agreement was signed in 1993 between Her Majesty the Queen in Right of Canada and the Inuit of the Nunavut Settlement Area, after almost twenty years of negotiating efforts by the Inuit.

8. Canada's unyielding position in the negotiations leading to the NLCA was that, in exchange for the rights and benefits contained in the NLCA, Inuit must agree to cede, release and surrender their rights to lands and waters in Canada. This resulted in the inclusion in the NLCA of the following provision:

2.7.1 In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:

(a) cede, release and surrender to Her Majesty The Queen in Rights of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada; and

(b) agree, on their behalf, and on behalf of their heirs, descendants and successors not to assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty. The Queen in Right of Canada or any province, the government of any territory or any person based on any aboriginal claims, rights, title or interests in and to lands and waters described in Sub-section (a).

9. Section 2.7.1 is similar to the surrender provisions demanded by the Crown in old and modern treaties throughout Canada. Today, notwithstanding unabated opposition by Aboriginal peoples and criticism from various international bodies, Canada has not fundamentally replaced its 1987 Comprehensive Claims Policy providing for cession and surrender of Aboriginal title, and continues to insist that land claims agreements exhaustively define Aboriginal peoples' Constitutional rights to lands and waters, releasing or rendering unenforceable unwritten rights to lands and waters derived from aboriginal use and occupation.
10. Canada's Aboriginal peoples are typically reluctant to agree to these provisions, but are faced with significant economic pressure of forestry, mining or other development activities on their land, while they are excluded from sharing in wealth extraction.

11. In the case of Nunavut Inuit, throughout the long course of negotiations, there continued a steady creation of third party subsurface rights by the Crown in the form of licences, permits, leases, etc. These third party instruments did not acknowledge the rights being asserted, and being negotiated, by Inuit in competition with the claims of the Crown. Nor was any portion of Crown royalties shared with Inuit asserting Aboriginal rights either in the form of current payments or contributions into some kind of longer term trust. This Crown practice continues in Canada today.

12. The Supreme Court of Canada and other Canadian courts have recognized the importance of respecting Aboriginal perspectives in achieving reconciliation between native and non-native Canadians. As is the case with other Aboriginal peoples, the Inuit have a uniquely spiritual, ecological and social relationship with the land, waters, ice, animals and nature. Indeed the very word “Nunavut,” in the Inuit language, can be interpreted to mean not only “our land,” but also “our home.” Attempting to sever this relationship with traditional lands is a fundamental rejection of the Aboriginal worldview.

13. Canada also implicitly rejects the Aboriginal position that the rights flowing from traditional use and occupation of lands and waters are a human right, and, therefore, should never be seen as appropriate targets of acquisition or removal through the mechanisms typical of purely commercial transactions.

14. In continuing to insist on similar terms in current negotiations with Aboriginal peoples, including the Hul’qumi’num, Canada further implicitly rejects the recognition by this Commission and the Inter-American Court that Indigenous peoples’ right to land is based on Indigenous laws, legal traditions and customs. See, e.g., Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001), Inter-Am.Ct.H.R. (Ser. C.) No. 79, holding that the right to property should not be restricted by the state’s conceptualization

15. As stated by Canadian aboriginal law expert Peter Hutchins: “No suggestion of reconciliation, so cherished by the Supreme Court of Canada, is possible until it [the surrender provision] is expunged.”¹ Notwithstanding the illegitimacy of the cede, release and surrender provision, the Supreme Court of Canada has not rejected it.

16. Canada’s requirement for the above-described finality provisions in its land claims agreements with Aboriginal peoples, the continuing practice of the Crown of granting rights and interests to third parties in the face of assertions of Aboriginal rights and title, and the Canadian courts’ continuing recognition of surrender provisions, are evidence of a persistent coercive attitude in Canada, and of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

**B. Canada has failed and continues to fail to properly implement the Nunavut Land Claims Agreement**

17. The Government of Canada sees the finality provisions discussed above as a means of removing a barrier to economic development.²

18. Once the Crown has achieved its goal of securing certainty for developers in treaties, in exchange for which Aboriginal Peoples have surrendered or agreed not to assert their

¹ Hutchins, Peter, W. “Cede Release and Surrender”: Treaty-Making, the Aboriginal Perspective and the Great Juridical Oxymoron or Let’s Face It – It Didn’t Happen Here” (Pacific Business and Law Institute 2008).

Aboriginal rights and title, the Crown’s motivation to fulfill its treaty promises has proven to be considerably diminished.

17. The experience of the Inuit of Nunavut, as revealed by a number of studies and reports detailed below, is that Canada has failed and refused, and continues to fail and refuse, to properly implement its land claims agreements with Aboriginal peoples of Canada.


18. The NLCA obligates Canada to periodically review implementation of the NLCA and negotiate with NTI renewed funding levels for implementing the NLCA. In May 2001, Canada and NTI commenced negotiations for the first ten-year renewal of funding levels and to review the adequacy of the implementation of the NLCA.

19. A principal element of the negotiations was Article 23 of the NLCA, which addresses Canada’s obligations to fulfill the objective of a Nunavut workforce that is representative at all levels of the Inuit population, that is, 85% Inuit employment. Nunavut’s Inuit employment level approximates 50%, mostly at clerical and lower administrative levels.

20. Canada unilaterally terminated the implementation negotiations in November 2004, by withdrawal of its negotiator, and has since refused to appoint a negotiator to conclude the negotiations.

21. In 2005, Canada and NTI agreed to the appointment of a neutral conciliator, Thomas Berger, an Aboriginal law expert and respected former jurist, to resolve the impasse. Mr. Berger’s Final Report concluded that Nunavut is in a state of social and economic crisis. Mr. Berger specifically targeted Canada’s Article 23 obligations, recommending near-term training initiatives and longer-term education initiatives aimed
at providing Inuit children with a bi-lingual education, which Mr. Berger found to be a necessary precursor to 85% Inuit employment levels.3

22. NTI endorsed Mr. Berger’s Report. Canada, however, has failed and refused to endorse or implement Mr. Berger’s recommendations for near-term and longer term initiatives, and continues to fail and refuse to appoint a negotiator to conclude the implementation negotiations. Consequently, the NLCA’s obligations respecting renewed funding for the NLCA for the period beginning in 2003 remain largely unfulfilled.

23. Canada’s unwillingness to follow the recommendations of the neutral conciliator to resolve its dispute with NTI under the NLCA is further evidence of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

ii. Canada’s refusal to arbitrate

24. The NLCA provides for an Arbitration Board to resolve disputes arising under the NLCA. Over an extensive period of time, NTI has identified 17 disputed issues that it would be prepared to take to arbitration and has requested Canada’s agreement to arbitrate these disputed issues. Canada has not agreed to any of these arbitration requests.

25. NTI has been advised that Canada will not agree to any issues involving potential financial awards going to arbitration. As Mr. Berger pointed out in an interim Conciliator’s Report, it is not defensible to negotiate the inclusion of an arbitration article in a land claims agreement and then to refuse to make practical use of it.

26. Canada’s refusal to utilize the Arbitration Board, to which it agreed in the NLCA, or to follow the recommendations of the neutral conciliator to resolve disputes with NTI

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through arbitration under the NLCA is further evidence of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

iii. **Nunavut Tunngavik v. Attorney General (Canada)**

27. In December 2006, NTI launched a court case in the Nunavut Court of Justice seeking, among other things, $1 billion in damages to compel Canada to meet its unfulfilled NLCA obligations. The matters detailed in NTI’s Statement of Claim are further evidence of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

iv. **Other Failures to Fulfill Canada’s Obligations under the NLCA.**

28. By way of additional examples, described below are descriptions of two of Canada’s failures to properly implement key provisions of the NLCA, which deny Inuit many of the rights and benefits promised in the Agreement.

*Inuit commercial fishing rights in adjacent fisheries*

29. Article 15.3.7 of the NLCA provides, in part, that:

15.3.7 Government recognizes the importance of the principles of adjacency and economic dependence of communities in the Nunavut Settlement Area on marine resources, and shall give special consideration to these factors when allocating commercial fishing licence.

30. In all other parts of Canada, “the principles of adjacency” are interpreted such that fishing interests in adjacent jurisdiction receive 80-95% of the quota in their adjacent waters. In Nunavut, however, fishers have access to only 27% of the total allowable catch for turbot, the primary commercial species, in Division OB, their adjacent waters.

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31. For 15 years, NTI has engaged in extensive and ultimately unsuccessful lobbying efforts in an attempt to convince Canada to respect the adjacency principles recognized in Article 15.3.7 of the NLCA on par with non-Native fishers elsewhere in Canada.

32. Recourse to Canadian courts has proved futile, as shown by three separate court cases, including two appeals to the Federal Court of Appeals and a request for a hearing before the Supreme Court of Canada on this issue. In its decisions, the Federal Court of Appeals has required Inuit to show, not that the Minister of Canada’s decisions were “incorrect” under the NLCA, but rather that they were “patently unreasonable,” which it held that the Inuit failed to do. The Supreme Court of Canada denied leave to appeal, leaving the Inuit without an effective remedy for redress.

33. In January of 2008, Canada continued to favour southern Canadian interests in Nunavut adjacent waters, approving the transfer of the greater part of the total allowable catch for commercial turbot in Division 0B to southern commercial fishers. This decision was taken without consultation with the Nunavut Wildlife Management Board (a co-management body created under the NLCA, on which the Inuit hold ⅕ of the seats), in direct contravention of Article 15 of the NLCA.

34. The failure of Canada and Canadian courts to provide redress to the Inuit in these circumstances is further evidence of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

**Inuit Impact and Benefit Agreements for Protected Areas**

35. Articles 8 and 9 of the NLCA require Canada to negotiate Inuit Impact and Benefit Agreements (IIBAs) for all existing protected areas in Nunavut by 1998, and for all proposed protected areas before they are designated. IIBAs are required to include “all matters that could reasonably confer a benefit” on Inuit, such as tourism training and seed capital.
36. Through tactics of delay, ignoring its constitutionally-protected obligations and withholding funding, Canada has failed to fulfill its obligations to conclude and fund IIBAs.

37. Canada established two National Historic Sites in 1995 without entering into IIBAs with Inuit.

38. An Umbrella IIBA for all existing Territorial Parks in Nunavut was completed in 2002, but Canada has not provided funding for this IIBA, and so it is unimplemented.

39. Canada began discussing an Umbrella IIBA for National Wildlife Areas and Migratory Bird Sanctuaries with Inuit in 1998 – the year by which the NLCA provided that the IIBAs must be concluded. Although negotiations to conclude the IIBA were substantially completed in about two years, Canada failed to identify and commit funding for the IIBA until 2008.

40. IIBAs for other protected areas, including Canadian Heritage Rivers and National Historic Sites, remain outstanding and unfunded.

41. Canada’s failure to fulfill its obligations to Inuit under the NLCA are further evidence of the lack of effective and adequate domestic remedies for the Hul’qumi’num.

C. Canada has failed and continues to fail to properly implement other modern treaties with Canada’s Aboriginal peoples

i. Submission of the Land Claims Coalition (LCAC) to the United Nations Human Rights Council

42. In 2003, the Aboriginal signatories to all modern treaties in Canada (comprehensive land claims and self-government agreements) established a Land Claims Coalition. The
Coalition is a reaction to Canada’s continuing failures to properly implement its modern treaties.  

43. The submission of the LCAC attests to the similar experience of Aboriginal signatories to modern treaties. Having achieved the finality it sought, Canada for the most part lacks the motivation to fulfill the obligations and objectives of modern treaties.

ii. Standing Senate Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes*

44. The Parliament of Canada’s Standing Senate Committee on Aboriginal Peoples recently conducted an in-depth review of Canada’s implementation of modern treaties and found that Canada has failed to properly implement the provisions of modern treaties, resulting in the Government of Canada’s “failure to make measurable and meaningful progress on issues affecting Aboriginal Canadians.”

iii. Special Rapporteur for the United Nations Commission on Human Rights

45. Canada’s failure to deliver on the economic and social benefits promised in modern treaties agreements in exchange for finality respecting title was highlighted in the 2005 Report of the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, which found that, in spite of the land claims settlements, if Canada’s Aboriginal peoples comprised a country, it would rank 48th on the UN Human Development Index. Canada itself currently ranks 8th.

46. The Report identified the flaw at the heart of the land claims agreements. It recommended that:

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...no matter what is negotiated, the inherent and constitutional rights of Aboriginal peoples are inalienable and cannot be relinquished, ceded or released, and ... Aboriginal peoples should not be requested to agree to such measures in whatever form or wording.

47. Surrender of rights is precisely what Aboriginal people have been forced into by these settlements.7


48. In 2003, the Auditor General of Canada reported to Parliament’s House of Commons on the implementation of two modern land claims agreements, the NLCA and the Gwich’in Comprehensive Land Claims Agreement.8

49. In both cases, the Auditor General reported that Canada has failed to fulfill the spirit of these treaties. The Auditor General found that there had been no change in important areas of land claims obligation mismanagement since 1998, when the Auditor General had first reported to Canada on these inadequacies.9

50. Significantly, a 2007 Report by the Auditor General on Canada’s land claims agreement with the Inuvialuit of the Northwest Territories found the same inadequacies.

51. In short, notwithstanding repeated and consistent poor reports from the Auditor General, Canada’s failure to properly implement modern treaties has not changed significantly since 1998.

9 Id. at para. 8.59.
52. Canada's unwillingness to fulfill its solemn obligations to Canada's Aboriginal peoples in its modern treaties is further evidence of the lack of effective and adequate domestic remedies for the Hul'qumi'num.

IV. CONCLUSION

53. Perceiving that it has achieved finality through modern land claims agreements, Canada has a demonstrated practice of failing to fulfill its ongoing constitutional, statutory and contractual obligations, as well as its moral and ethical obligations, in relation to the aboriginal and treaty rights of its Aboriginal peoples. This practice makes the conclusion of land claims agreements ineffective as a means for Aboriginal peoples to achieve self-sufficiency, undermining their cultural survival and integrity.

54. Domestic legal and other remedies have proved inadequate to address these failings, leading Canadian Aboriginal peoples, including the Hul'qumi'num, to seek redress before this Commission and other international bodies.

55. NTI urges the Commission to use its full authority to protect the land and resource rights of the Hul'Qumi'Num, which will send a strong message to Canada that disregard of the human rights of Aboriginal peoples will not be countenanced.

Respectfully submitted,

[Signature]

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Dated: February 03, 2009
V. LIST OF APPENDICES


APPENDIX D: Standing Senate Committee on Aboriginal Peoples, Honouring the Spirit of Modern Treaties: Closing the Loopholes (May 2008).