

UN Human Rights Council (HRC) - UNIVERSAL PERIODIC REVIEW (UPR)

**RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS -
NOT EXTINGUISHMENT!**

Indigenous Network on Economies and Trade (INET) – Individual Indigenous Submission

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This report was prepared by Prof. June McCue, Nicole Schabus, Arthur Manuel, Amanda Miller, Karen Osachoff-Denham and Peggy Lee.

I. OVERVIEW AND SUGGESTED REMEDIES FOR INDIGENOUS PEOPLES' HUMAN RIGHTS VIOLATIONS BY CANADA

1. From 2004-2008, Canada continued to violate its human rights obligations to Indigenous Peoples contrary to observations and recommendations made during international oversight and review by UN treaty monitoring and complaint bodies, the Special Rapporteur on the situation of the human rights and fundamental freedom of indigenous people, and support from the UN Human Rights Council and UN General Assembly through respective adoption of the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*.¹ Despite monumental efforts by Indigenous Peoples to communicate such violations and express progressive means, best practices and methods for state action to promote, pledge, and commit to the protection of human rights, Canada continues to undermine Indigenous People's human rights including the right to self-determination. Canada fails to meet international standards applicable to Indigenous Peoples, as set out in United Nations instruments such as the *UN Charter*², *Universal Declaration on Human Rights*³, Human Rights Treaties and UNDRIP. INET's submission requests the Working Group for the 4th Session of the UPR to review Canada's violation of its human rights obligations to Indigenous Peoples by assessing Canada's UPR report, identifying problems regarding the non-implementation of UN recommendations, and suggesting questions and recommendations to Canada in relation to the following:

- a) Canada's refusal to endorse and implement the UNDRIP as a denial of Indigenous Peoples' right to self-determination and its failure to redress past and on-going human rights violations; and
- b) Canada's existing law, policy and negotiation mandates that structurally extinguish Indigenous Peoples land rights, prevent recognition and co-existence with Indigenous Peoples, deny self-determination and violate the UNDRIP;

Canada's clear and continuing violation of the human rights of Indigenous Peoples between 2004 and 2008 brings into question the legitimacy and status of Canada as a HRC member.

II. INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION⁴

2. Self-determination is the expression and life force of Indigenous Peoples' sovereignty. Through self-determination, Indigenous Peoples must freely develop their political, cultural, social, and economic status worldwide to remedy colonization, including the discriminatory treatment by states to not respect Indigenous Peoples as "peoples" with international legal status. Indigenous Peoples continue to assert that they have a fundamental and distinct role to exercise in relation to securing peaceful relations domestically and at the international level, fostering environmental stewardship for all peoples through the restoration of jurisdiction over indigenous lands, territories and resources, and improving ethical economic development in the global community.

¹ Human Rights Council, GA 60/251, 60th sess., Supp. No. 49, UN Doc.A/60/49, Vol. III (2007); UN GA Res 61/295 (annex), UN GAOR, 61st sess., Supp. No. 49, UN Doc. A/61/49, Vol. III (2008) 15 [UNDRIP] www.un.org/esa/socdev/unpfii/en/declaration.html

² *Charter of the United Nations (1945) amended 1965, 1968 and 1973*

³ *Universal Declaration on Human Rights, UNGA Res.217(III), UN GAOR, 3rd Sess., Supp. No.13, at 71, UN Doc.A/810 (1948)*

⁴ UNDRIP, *supra* note 1, arts 3, 19, and 38 (self-determination and consent)

3. The UNDRIP sets out a multitude of standards that can guide Canada to: cooperate with Indigenous Peoples through international consultation and by obtaining the free, prior and informed consent of Indigenous Peoples especially in relation to matters that specifically touch upon their lands, territories and resources; transit into relations of decolonization and non-discrimination, and with vigour - work with Indigenous Peoples to develop a new era of international relations where the self-determination of all peoples is truly a universal human right exercised without discrimination amongst the family of nations. The endorsement and implementation of UNDRIP by Canada is the first step in respecting the human rights of Indigenous Peoples. Such state action can create a sustainable bar for operationalizing the international human rights obligations Canada has under Article 1 of the ICCPR⁵ and ICESCR⁶ towards Indigenous Peoples as well as enforcing the international norm of non-discrimination as set out in ICERD⁷ and the *UN Charter*.

4. The UNDRIP can shape the evolution of federalism in Canada by garnering recognition for Indigenous Peoples' political status as an equal and symmetrical third order of government within Canada's constitutional democracy. UNDRIP can guide Canada and Indigenous Peoples in developing a constitutional process to enter the Canadian confederation and negotiate amendments to the Canadian constitution to divide powers in a manner that respects Indigenous Peoples' distinct expressions of self-determination in a spirit of recognition and co-existence. Current and historical human rights violations brought about by the unilateral jurisdiction over Indigenous peoples either at the federal or provincial levels can be remedied with a new constitutional re-alignment of powers that respects Indigenous Peoples as "peoples" with permanent sovereignty over the wealth of their traditional lands, territories and resources and effective participation in international relations.

5. Another model to incorporate the UNDRIP into the constitutional framework of Canada is to amend Interpretation statutes and include a clause that states all constitutional provisions, legislative and administrative measures applicable to Indigenous Peoples must be harmonious with UNDRIP. Canadian governments must "UNDRIP proof" all government laws, policies and programs that can affect Indigenous Peoples. These new models of recognition and co-existence for Canada and Indigenous Peoples would be consistent with international human rights obligations and in INET's view will yield best practices. Further, Canada, as guided by the standards and norms set out in UNDRIP and other international human rights instruments could eliminate one of the root causes of conflict between Indigenous Peoples and Canada: the coercive Canadian state practice of criminalizing Indigenous Peoples for exercising their sovereignty through self-determination. Peace and security is vital for all peoples. Canada and Indigenous Peoples could work together to assess and meet the challenges of achieving the endorsement and implementation of UNDRIP.

6. The adoption of the UNDRIP was one of the first substantive decisions of the newly established HRC. The HRC is the body that Indigenous Peoples look to for overseeing and ensuring the implementation of UNDRIP. Canada is the only country in the world to have twice voted against the UNDRIP. Canada's role in rejecting the UNDRIP continues to be a state barrier to the realization of the "recognition and co-existence" models mentioned above. During the UN General Assembly vote on the then draft UNDRIP, Canada listed concerns about the articulation of the indigenous right to self-determination and land rights as why it voted against the UNDRIP. As Human Rights are universal, Canada cannot pick and choose which rights they want to support. As long as Canada opposes recognition of Indigenous Peoples' rights at the national and international level, they are in a position of conflict of interest and should not remain a member of the UN Human Rights Council until they endorse UNDRIP.

⁵ *International Covenant on Civil and Political Rights* (1966) 999 U.N.T.S. 171, (ICCPR)

⁶ *International Covenant on Economic Social and Cultural Rights* (1966) 993 U.N.T.S. 3, (ICESCR)

⁷ *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) UNGA Res. 2106, 660 U.N.T.S. 195 (ICERD)

III. LANDS, TERRITORIES, RESOURCES AND ABORIGINAL TITLE⁸

7. In British Columbia, Indigenous Peoples historically had not signed treaties that extinguished indigenous land rights or ceded indigenous jurisdiction over indigenous territories and peoples. Canadian courts have recognized some aspects of these land rights as “Aboriginal Title”. While courts have defined Aboriginal Title as encompassing some form of decision-making regarding use and occupation by Indigenous Peoples, UNDRIP provides a more fulsome recognition of how we inherently relate to and make decisions about indigenous lands, traditional territories and resources within a self-determination framework and based upon the principle of free, prior and informed consent. UNDRIP can guide Canada in developing state practice based on the recognition of indigenous lands, territories and resources.

8. Indigenous Peoples’ have responsibility and jurisdiction to protect, access, and use the lands, waters and resources of territories for the benefit of Indigenous Peoples. Indigenous Peoples’ laws, languages and cultures flow from the lands, waters and resources of their traditional territories. Indigenous Peoples have struggled to maintain the integrity of their lands in the face of the continued colonization and settlement of their territories, and use and exploitation of their lands and resources. The recognition and incorporation of Indigenous Peoples’ laws into decisions over lands, waters and resources is necessary to ensure the preservation of living worlds for all future generations. Legal, political, economic and social obstacles generally preclude Indigenous Peoples from independently profiting from their territories.

9. While we have seen positive statements from the courts regarding the recognition of Aboriginal Title at common law, the doctrine of extinguishment still permeates within Canadian jurisprudence. For example, if an indigenous litigant has proven that an aboriginal or treaty right existed, Canadian governments can prove that such rights have been extinguished by clear and plain intent set out in statutes. Further, if the judiciary finds that based on evidence, the indigenous litigant has not proven that an asserted constitutional right exists, there will be no finding of rights recognition, leading to *de facto* extinguishment. Litigation is costly and thus a barrier for many Indigenous Peoples.

10. Canada’s policy of not recognizing indigenous land rights is manifested in its Comprehensive Claims Policy (CCP)⁹. The CCP is based on the “modified Rights model to achieve certainty”, meaning that Indigenous Peoples’ rights to land, territories, resources and Aboriginal Title are extinguished if not set out in a final agreement or in settlement legislation ratifying the agreement. The first “modern agreement” signed in British Columbia was the Nisga’a Final Agreement (2000). Since the 1990s, the CCP has framed negotiations in the British Columbia Treaty Commission (BCTC) Process. Only two agreements have been finalized under this process; the Tsawwassen Final Agreement (2007), which was legislated into force in 2008, and the Maa-nulth Final Agreement (2008). We have compiled the extinguishment provisions in those three modern agreements to provide the HRC with concrete evidence of wording that documents their incompatibility with international indigenous and human rights standards¹⁰.

11. The CCP policy and BCTC process do not meet the minimum standards for the protection of indigenous land rights as set out in UNDRIP. For these reasons, many Indigenous Peoples in BC have not engaged with treaty negotiations. Canada was asked by Indigenous Peoples to conduct a major review of the CCP in 2000, but declined to do so because it felt that the CCP was “flexible to accommodate the

⁸ UNDRIP, *supra* note 1, arts 25-30 (lands, territories and resources)

⁹ Canada devised its first Comprehensive Claims Policy in 1973 after the Supreme Court of Canada first considered recognition of Aboriginal Title in the *Calder* case. This first policy called for the blanket extinguishment of Aboriginal Title. Only one “modern agreement” was signed under this blanket extinguishment policy.

¹⁰ Please refer to Appendix: Extinguishment Provisions in Modern Land Claim Agreements in British Columbia.

concerns of First Nations.”¹¹ The extinguishment of Indigenous land rights through Canada’s CCP does not promote, nor protect Indigenous human rights. UNDRIP has made it abundantly clear that extinguishment of indigenous rights is not acceptable. UNDRIP even includes a limiting provision setting out that nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous Peoples have now or may acquire in the future¹². The CCP has not been amended to be consistent with UNDRIP and other international human rights instruments during the 2004-2008 period, despite serious concerns expressed by numerous UN Human rights bodies regarding the extinguishment provisions¹³.

IV. HUMAN RIGHTS VIOLATIONS AGAINST INDIGENOUS HUMAN RIGHTS DEFENDERS

12. During the 2004-2008 period, Indigenous Peoples in Canada have been criminalized for protecting their indigenous rights to self-determination and lands territories and resources. Indigenous Peoples are under constant and increased surveillance by Canadian law enforcement entities when exercising their rights. With negotiations being prejudiced by the Comprehensive Claims Policy and the courts not being an independent forum for hearing indigenous concerns, Indigenous Peoples have to stand up for their rights on the ground and at the international level. UNDRIP can guide Canada and Indigenous Peoples in establishing a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous Peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands territories and resources¹⁴.

V. PROPOSED RECOMMENDATIONS:

13. Indigenous peoples look to the HRC as an advocate for the recognition and implementation of their rights as enshrined in UNDRIP. By making the adoption of UNDRIP one of its first substantive decisions, the HRC, followed by the UN GA, has addressed the historic injustice and discrimination of Indigenous Peoples and has recognized that indigenous rights are human rights with universal application.

¹¹ Letter by Minister of Indian Affairs Robert Nault to Chief Arthur Manuel, Co-Chair of the AFN Delgamuukw Implementation Strategic Committee, December 22, 2000

¹² UNDRIP, *supra* note 1, art 45

¹³ In its 1998 Concluding Observations on Canada’s third periodic report (paragraph 18), the Committee on Economic, Social and Cultural Rights recommended that “policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.” Similar recommendations have been made by the Human Rights Committee (1999 & 2005), the Committee on the Elimination of Racial Discrimination (2002 and 2006), and the Committee on the Rights of the Child (2003).¹³ According to UN Special Rapporteur Rodolfo Stavenhagen in his Report on his Mission to Canada, some Aboriginal Peoples “consider releasing their constitutionally recognized and affirmed rights through a negotiated settlement as unacceptable.” In its Concluding Observations following its review of Canada in December, 2005, the Human Rights Committee stated: “The Committee, while noting with interest Canada’s undertakings towards the establishment of alternative policies to extinguishment of inherent Aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of Aboriginal rights. (Articles 1 and 27)”. The Human Rights Committee recommended that Canada “re-examine its policy and practices to ensure they do not result in extinguishment of inherent Aboriginal rights”.

¹⁴ UNDRIP, *supra* note 1, art 27

14. We invite the UN Human Rights Council to consider, as part of Canada's universal periodic review, to review recent treaty provisions regarding extinguishment, modification, release, and the non-assertion of Indigenous rights, question Canada about the underlying policy and rationale for these outcomes, and recommend Canada to transform its policies to be consistent with international law and the self-determination of Indigenous Peoples.

Recommendation 1:

Canada must recognize the unqualified right to self-determination of Indigenous Peoples at international law without discrimination.

Recommendation 2:

Canada must recognize and implement indigenous rights at the international and national levels, including the *UN Declaration on the Rights of Indigenous Peoples* or no longer be allowed to continue to serve as a member on the UN Human Rights Council.

Recommendation 3:

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

Recommendation 4:

Canada must abandon the “modified rights model and non-assertion model” which, de facto, amounts to an extinguishment and surrender approach. Canada must change its policy on indigenous land rights and base it on recognition of indigenous land rights as stipulated in the UNDRIP articles 25-30, and 45.

Recommendation 5:

Canada must endorse the UNDRIP as the principal framework for negotiating any matters with Indigenous Peoples in British Columbia.

Recommendation 6:

Canada must refrain from criminalizing Indigenous Peoples for exercising their self-determination and sovereignty. Canada must, in conjunction with Indigenous Peoples, establish a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous Peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands territories and resources.

APPENDIX – EXTINGUISHMENT PROVISIONS IN MODERN LAND CLAIM AGREEMENTS in BRITISH COLUMBIA

A. RESTRICTION OF SECTION 35 RIGHTS – “CERTAINTY”

Section 35 Rights provides indigenous peoples in Canada the opportunity to reconcile Aboriginal Rights with the powers exercised by the federal and provincial governments in a peaceful and responsible manner. The following provisions restrict and exhaustively extinguish any life in Aboriginal Rights.

Nisga’a Final Agreement

23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:

- a) the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
- b) the jurisdictions, authorities, and rights of Nisga'a Government; and the other Nisga'a section 35 rights.

Tsawwassen Final Agreement

12. This Agreement exhaustively sets out the Section 35 Rights of Tsawwassen First Nation, their attributes, the geographic extent of those rights, and the limitations to those rights to which the Parties have agreed, and those rights are:

- a. the aboriginal rights, including aboriginal title, modified as a result of this Agreement, in Canada, of Tsawwassen First Nation in and to Tsawwassen Lands and other lands and resources in Canada;
- b. the jurisdictions, authorities and rights of Tsawwassen Government; and
- c. the other Section 35 Rights of Tsawwassen First Nation.

Maa-nulth Final Agreement

Full and Final Settlement

1.11.1 This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, of each Maa-nulth First Nation.

Exhaustively Set Out Rights

1.11.2 This Agreement exhaustively sets out the Maa-nulth First Nation Section 35 Rights of each Maa-nulth First Nation, their attributes, the geographic extent of those rights, and the limitations to those rights to which the Parties have agreed, and those rights are:

- a. the aboriginal rights, including aboriginal title, modified as a result of this Agreement and the Settlement Legislation, of that Maa-nulth First Nation in and to its Maa-nulth First Nation Lands and other lands and resources;
- b. the jurisdictions, authorities and rights of its Maa-nulth First Nation Government; and
- c. the other Maa-nulth First Nation Section 35 Rights of that Maa-nulth First Nation.

B. EXTINGUISHMENT THROUGH MODIFICATION

Modification or the Modified Rights Model has been given attention by some of the United Nations Human Rights Bodies but it is not the only provision that extinguishes Aboriginal Title and Rights but is part of larger strategic plan of Canada and British Columbia. The Modified Rights Model restricts Aboriginal Title and Rights to mean only what is contained in the modern day treaty document. If a matter is not contained in the modern day treaty agreement it will not be considered as a part of Aboriginal Title or Right from the effective date of the Treaty. The Modified Rights Model is just an underhanded way of extinguishing Aboriginal Title. This model prevents the progressive development of Aboriginal Rights and the Ethical and Natural Evolution of Aboriginal societies. It effectively prohibits dynamic traditional indigenous processes of developing their laws and developing control over their territories through their original governments.

Nisga'a Final Agreement

“24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, **are modified, and continue as modified, as set out in this Agreement.**”⁴⁰

Tsawwassen Final Agreement

13. Despite the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of Tsawwassen First Nation, as they existed anywhere in Canada before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

14. For greater certainty, the aboriginal title of Tsawwassen First Nation anywhere that it existed in Canada before the Effective Date, including its attributes and geographic extent, is modified and continues as modified as the estates in fee simple to those areas identified in this Agreement as Tsawwassen Lands and Other Tsawwassen Lands.

Maa-nulth First Nation Final Agreement

1.11.3 Notwithstanding the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of each Maa-nulth First Nation, as they existed anywhere before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

1.11.4 For greater certainty, the aboriginal title of each Maa-nulth First Nation anywhere that it existed before the Effective Date, including its attributes and geographic extent, is modified and continues as modified as the estates in fee simple to those areas identified in this Agreement as the Maa-nulth First Nation Lands and other Maa-nulth First Nation Lands of that Maa-nulth First Nation.

C. EXTINGUISHMENT BY RELEASE AND INDEMNITY

Under the Release provisions the indigenous nations give Canada, British Columbia and others a release from any liability for the travesties of justice and human rights violations that occurred and caused such devastating problems for indigenous peoples. Indigenous peoples have been prevented through law and policy from earning a living off their traditional lands. They were also forced to Indian Residential schools which has caused tremendous damage to all indigenous families. It is wrong to treat these terrible events so casually and to allow Canada and British Columbia from liabilities from the most serious human rights violations, including genocide, assimilation and cultural degradation. These modern agreements will prevent possible redress for such human atrocities and perpetuate their terrible consequences into the future. Even worse, the release provision in more recent agreements is followed by an indemnity provision, foreseeing that Aboriginal peoples having entered into the agreement would have to indemnify other parties if they took legal action against them.

Nisga'a Final Agreement

26. If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement, **the Nisga'a Nation releases that aboriginal right to Canada** to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement.
27. The **Nisga'a Nation releases Canada, British Columbia and all other persons** from all claims, demands, actions, or proceedings, of whatever kind, and whether known or unknown, that the Nisga'a Nation ever had, now has or may have in the future, relating to or arising from any act, or omission, before the effective date that may have affected or infringed any aboriginal rights, including Aboriginal Title in Canada of the Nisga'a.

Tsawwassen Final Agreement

Release of Past Claims

16. Tsawwassen First Nation releases Canada, British Columbia and all other Persons from all claims, demands, actions or proceedings, of whatever kind, whether known or unknown, that Tsawwassen First Nation ever had, now has or may have in the future, relating to or arising from any act or omission before the Effective Date that may have affected, interfered with or infringed any aboriginal right, including aboriginal title, in Canada of Tsawwassen First Nation.

Indemnities

17. Tsawwassen First Nation will indemnify and forever save harmless Canada or British Columbia, as the case may be, from any and all damages, losses, liabilities, or costs excluding fees and disbursements of solicitors and other professional advisors, that Canada or British Columbia, respectively, may suffer or incur in connection with or as a result of any suit, action, cause of action, claim, proceeding or demand initiated or made before or after the Effective Date relating to or arising from:

- a. the existence in Canada of an aboriginal right, including aboriginal title, of Tsawwassen First Nation, that is determined to be other than, or different in attributes or geographic extent from, the Section 35 Rights of Tsawwassen First Nation set out in this Agreement; or

b. any act or omission by Canada or British Columbia, before the Effective Date, that may have affected, interfered with or infringed any aboriginal right, including aboriginal title, in Canada of Tsawwassen First Nation.

Maa-nulth Final Agreement

Release of Past Claims

1.11.6 Each Maa-nulth First Nation releases Canada, British Columbia and all other persons from all claims, demands, actions or proceedings, of whatever kind, whether known or unknown, that that Maa-nulth First Nation ever had, now has or may have in the future, relating to or arising from any act or omission before the Effective Date that may have affected, interfered with or infringed any aboriginal right, including aboriginal title, of that Maa-nulth First Nation.

Indemnities

1.11.7 Each Maa-nulth First Nation will indemnify and forever save harmless Canada and British Columbia from any and all damages, costs excluding fees and disbursements of solicitors and other professional advisors, losses or liabilities, that Canada or British Columbia, respectively, may suffer or incur in connection with or as a result of any suit, action, cause of action, claim, proceeding or demand initiated or made before or after the Effective Date relating to or arising from:

- a. the existence of an aboriginal right, including aboriginal title, of that Maa-nulth First Nation that is determined to be other than, or different in attributes or geographical extent from, the Maa-nulth First Nation Section 35 Rights of that Maa-nulth First Nation set out in this Agreement; or
- b. any act or omission by Canada or British Columbia, before the Effective Date, that may have affected, interfered with or infringed any aboriginal right, including aboriginal title, of that Maa-nulth First Nation.

D. EXTINGUISHMENT THROUGH LAND SELECTION

The land selection aspect of these agreements proves that Aboriginal Title will be extinguished and turned into so-called provincial crown land. The Land Selection Process is what has been happening to indigenous peoples throughout North America. It is the process where settler or foreign populations force indigenous peoples to choose small pieces of their traditional territories as Indian Reserves and allocate the rest of the indigenous peoples' territories to national and provincial/state governments for the purposes of settlement and economic development.

Nisga'a Final Agreement

2. On the effective date, Nisga'a Lands comprise 1,992 square kilometres, more or less, of land in the lower Nass Valley, consisting of:
 - a. **1,930 square kilometres**, more or less; and
 - b. **62 square kilometres**, more or less, of lands identified as former Nisga'a Indian reserves in Appendix A-4, and which cease to be Indian reserves on the effective date.

Tsawwassen Final Agreement

LANDS SECTION

1. On the Effective Date, Tsawwassen Lands consist of those lands set out in Appendix C-4 including, subject to clause 96, the Former Tsawwassen Reserve and all Subsurface Resources on or beneath the surface of Tsawwassen Lands¹⁵.

Maa-nulth Final Agreement

LANDS SECTION

2.1.1 On the Effective Date, Maa-nulth First Nation Lands consist of the following:

- a. for Huu-ay-aht First Nations:
 - i. 1077 hectares, more or less, of Former Indian Reserves, identified for illustrative purposes in Appendix B-1, Part 1 as “Former Huu-ay-aht First Nations Indian Reserves”, and described in Appendix B-1, Part 1(a); and
 - ii. 7,181 hectares, more or less, of additional lands identified for illustrative purposes in Appendix B-1, Part 2 and described as “Subject Lands” in Appendix B-1, Part 2(a);
- b. for Ka:’yu:’k’t’h’/Che:k’les7et’h’ First Nations:
 - i. 379 hectares, more or less, of Former Indian Reserves, identified for illustrative purposes in Appendix B-2, Part 1 as “Former Ka:’yu:’k’t’h’/Che:k’les7et’h’ First Nations Indian Reserves”, and described in Appendix B-2, Part 1(a); and
 - ii. 5,920 hectares, more or less, of additional lands identified for illustrative purposes in Appendix B-2, Part 2 and described as “Subject Lands” in Appendix B-2, Part 2(a);
- c. for Toquaht Nation:
 - i. 196 hectares, more or less, of Former Indian Reserves, identified for illustrative purposes in Appendix B-3, Part 1 as “Former Toquaht Nation Indian Reserves”, and described in Appendix B-3, Part 1(a); and
 - ii. 1,293 hectares, more or less, of additional lands identified for illustrative purposes in Appendix B-3, Part 2 and described as “Subject Lands” in Appendix B-3, Part 2(a);
- d. for Uchucklesaht Tribe:
 - i. 233 hectares, more or less, of Former Indian Reserves, identified for illustrative purposes in Appendix B-4, Part 1 as “Former Uchucklesaht Tribe Indian Reserves”, and described in Appendix B-4, Part 1(a); and
 - ii. 2,834 hectares, more or less, of additional lands identified for illustrative purposes in Appendix B-4, Part 2 and described as “Subject Lands” in Appendix B-4, Part 2(a); and
- e. for Ucluelet First Nation:
 - i. 199 hectares, more or less, of Former Indian Reserves, identified for illustrative purposes in Appendix B-5, Part 1 as “Former Ucluelet First Nation Indian Reserves”, and described in Appendix B-5, Part 1(a);
 - ii. 5,147 hectares, more or less, of additional lands identified for illustrative purposes in Appendix B-5, Part 2 and described as “Subject Lands” in Appendix B-5, Part 2(a); and
 - iii. 92 hectares, more or less, of lands acquired by Canada and British Columbia identified for illustrative purposes in Appendix B-5, Part 3 and legally described in Appendix B-5, Part 3(a).

2.1.2 On the Effective Date, an indefeasible title to those parcels of Maa-nulth First Nation Lands listed in Part 3 of Appendices B-2 to B-4 and Part 4 of Appendix B-5 will be registered in the name of the applicable Maa-nulth First Nation under the *Land Title Act*.

¹⁵ Tsawwassen Lands will consist of: the Tsawwassen Reserve; and approximately 365 hectares of provincial Crown lands, which will cease to be Crown lands on the Effective Date, including Subsurface Resources.

E. TERMINATION OF INDIAN RESERVES

Indigenous peoples have an ambivalent relationship with Indian Reserves. On the one hand they are local “villages” but they are also “reserves” that were created so settlers could exploit the rest of the traditional territories for their economic benefit. Indian Reserves were not created under treaty like other Indian Reserves in Canada but more like “concentration camps”. We are forced to live these concentration camps despite the fact that we have legal interest in our judicially recognized and constitutionally protected Aboriginal Title Territories. The federal government in 1969 under the White Paper on Indian Affairs wanted to abolish Indian Reserves. The following provisions finally deliver this 1969 White Paper objective and make Indian Reserve Lands subject to provincial land law taking away federal protections and tax exemptions.

Nisga’a Final Agreement

10. There are no "lands reserved for the Indians" within the meaning of the *Constitution Act, 1867* for the Nisga'a Nation, and there are no "reserves" as defined in the *Indian Act* for the use and benefit of a Nisga'a Village, or an Indian band referred to in the *Indian Act* Transition Chapter, and, for greater certainty, Nisga'a Lands and Nisga'a Fee Simple Lands are not "lands reserved for the Indians" within the meaning of the *Constitution Act, 1867*, and are not "reserves" as defined in the *Indian Act*.⁶⁸

Tsawwassen Final Agreement

10. There are no “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Tsawwassen First Nation, and there are no “reserves” as defined in the *Indian Act* for Tsawwassen First Nation, and, for greater certainty, Tsawwassen Lands and Other Tsawwassen Lands are not “Lands reserved for the Indians” within the meaning of the *Constitution Act, 1867*, and are not “reserves” as defined in the *Indian Act*.

Maa-nulth Final Agreement

12. After the Effective Date, there will be no “lands reserved for the Indians” within the meaning of the *Constitution Act, 1867* for Maa-nulth First Nations and there will be no “reserves” as defined in the *Indian Act* for Maa-nulth First Nations.

F. ABORIGINAL TITLE CONVERTED TO FEE SIMPLE

Fee Simple interests in land are the largest estate known in BC Land Law. This is different from Indian Reserve Land which is inalienable and held by the federal Crown in a fiduciary relationship with indigenous peoples. Provincial land and future treaty lands are subject to taxation and can be bought and sold in the open land market in British Columbia. This means that the different settlement lands will be governed like local or regional municipal governments. The land will always stay inside the settlement area but can be owned by indigenous or non-indigenous persons without any distinction. Each settlement group will be extinguishing their “Collective Aboriginal Title” under the “Land

Selection Policy” for “Provincial Government Fee Simple Title”. If indigenous peoples are unable to pay the land and property taxes they will owe their land holdings can be sold, similarly other debtors will be able to take action against property which was not possible on Indian reserves.

Nisga’a Final Agreement

25. For greater certainty, the aboriginal title of the Nisga’a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in **fee simple** to those areas identified in this Agreement as Nisga'a Lands or Nisga'a Fee Simple Lands.

Tsawwassen Final Agreement

2. On the Effective Date, subject to clauses 10 and 11, Tsawwassen First Nation owns Tsawwassen Lands in fee simple, being the largest estate known in law. That estate of Tsawwassen First Nation is not subject to any condition, proviso, restriction, exception or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law. No estate or interest in Tsawwassen Lands may be expropriated except as permitted by, and under, this Agreement.

3. Under this Agreement, the Tsawwassen Constitution and Tsawwassen Law, Tsawwassen First Nation may:

- a. Dispose of the whole of its estate in fee simple in any parcel of Tsawwassen Lands to any Person; and
- b. from the whole of its estate in fee simple, or its interest, in any parcel of Tsawwassen Lands, create or Dispose of any lesser estate or interest to any Person, including rights of way and covenants similar to those in sections 218 and 219 of the *Land Title Act*, without the consent of Canada or British Columbia.

4. Where Tsawwassen First Nation Disposes of its estate in fee simple in a parcel of Tsawwassen Lands, that parcel of land does not cease to be Tsawwassen Lands.

5. All methods of acquiring a right in or over land by prescription or adverse possession, including the common law doctrine of prescription and the doctrine of the lost modern grant, are abolished in respect of Tsawwassen Lands.

6. If, at any time, any parcel of Tsawwassen Lands, or any estate or interest in a parcel of Tsawwassen Lands, finally escheats to British Columbia, British Columbia will transfer, at no charge, that parcel, estate or interest to Tsawwassen First Nation.

7. An estate, interest, reservation or exception held by Tsawwassen First Nation or by a Tsawwassen Public Institution in any parcel of Tsawwassen Lands:

- a. the title to which is not registered in the Land Title Office; or
- b. in respect of which title no application for registration in the Land Title Office has been made, is not subject to attachment, charge, seizure, distress, execution or sale under a Writ of Execution, order for sale or other process unless the attachment, charge, seizure, distress, execution or sale under a Writ of Execution, order for sale or other process is:
- c. made or issued for the purpose of enforcing, in accordance with its terms, a security instrument granted by Tsawwassen First Nation or by a Tsawwassen Public Institution;
- d. allowed under Tsawwassen Law; or
- e. made or issued for the purpose of enforcing a lien in favour of Canada or British Columbia.

8. An estate, interest, reservation or exception held by Tsawwassen First Nation or by a Tsawwassen Public Institution in any parcel of Tsawwassen Lands:
- a. the title to which is registered in the Land Title Office; or
 - b. in respect of which title an application for registration in the Land Title Office has been made, is not subject to seizure or sale under a Writ of Execution, order for sale or other process unless the Writ of Execution, order for sale or other process is:
 - c. made or issued for the purpose of enforcing, in accordance with its terms, a security instrument granted by Tsawwassen First Nation or by a Tsawwassen Public Institution;
 - d. allowed under Tsawwassen Law;
 - e. made or issued for the purpose of enforcing a lien in favour of Canada or British Columbia; or
 - f. by leave of the Supreme Court of British Columbia under clause 165 of the Governance chapter.

Maa-nulth Final Agreement

2.3.1 On the Effective Date, each Maa-nulth First Nation owns the estate in fee simple in its Maa-nulth First Nation Lands, and such estate is not subject to any condition, proviso, restriction, exception or reservation, under the *Land Act*.

2.3.2 A Maa-nulth First Nation may, in accordance with this Agreement, its Maa-nulth First Nation Constitution, and Maa-nulth First Nation Law of the applicable Maa-nulth First Nation Government, Dispose of Interests in its Maa-nulth First Nation Lands without the consent of Canada or British Columbia.

G. ELIMINATION OF SECTION 87 TAX EXEMPTION

Section 87 of the Indian Act provides tax exemption for Indian people. This provision was meant to protect Indian property and contained a silent recognition of the special status of Indian people. It has been a long-term stated objective of the federal government to phase out his aspect of Indian Rights in any land claims negotiations.

Section 87 of the Indian Act reads as follows¹⁶:

- (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely, the interest of an Indian or a band in reserve lands or surrendered lands; and the personal property of an Indian or a band situated on a reserve.
- (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
- (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian. 82

Nisga'a Final Agreement

6. Section 87 of the *Indian Act* will have no application to Nisga'a citizens:

- a. in respect of transaction taxes, only as of the first day of the first month that starts after the eighth anniversary of the effective date;
- b. in respect of all other taxes, only as of the first day of the first calendar year that starts on or after the twelfth anniversary of the effective date.

¹⁶ Canada Statutes, Indian Act, R.S., c. I-6, s. 87; 1980-81-82-83, c. 47, s. 25.

Tsawwassen Final Agreement

16. Section 87 of the *Indian Act* will have no application to a Tsawwassen Member:
- a. in respect of Transaction Taxes, as of the first day of the first month following the eighth anniversary of the Effective Date; and
 - b. in respect of all other taxes, as of the first day of the first calendar year starting after the 12th anniversary of the Effective Date.
17. Subject to subclauses 1.a and 4.a and clauses 18 to 21, as of the Effective Date, the following is exempt from taxation:
- a. the interest of an Indian in Tsawwassen Lands that were Reserve lands or Surrendered Lands on the day before the Effective Date;
 - b. the personal property of an Indian situated on Tsawwassen Lands that were Reserve lands on the day before the Effective Date; and
 - c. an Indian in respect of the ownership, occupation, possession or use of any property referred to in subclause 17.a or 17.b.
18. Clause 17 will cease to be effective:
- a. in respect of Transaction Taxes, as of the first day of the first month that starts after the eighth anniversary of the Effective Date; and
 - b. in respect of all other taxes, as of the first day of the first calendar year that starts after the 12th anniversary of the Effective Date.
19. Clause 17 will be interpreted to exempt an Indian in respect of a property or interest, or in respect of the ownership, occupation, possession or use thereof, in the same manner and under the same conditions in which section 87 of the *Indian Act* would have applied, but for this Agreement, if the property were situated on, or the interest were in, a Reserve.
20. Clause 17 only applies to an Indian during the period that section 87 of the *Indian Act* applies to the Indian.
21. If Tsawwassen First Nation imposes a tax within Tsawwassen Lands and concludes a tax agreement for that purpose with Canada or British Columbia as contemplated in clause 4, clause 17 does not apply to the extent that the Tsawwassen First Nation, Canada or British Columbia, as the case may be, imposes a tax that the particular taxation agreement specifies is applicable to Tsawwassen Members and other Indians within Tsawwassen Lands.

Maa-nulth Final Agreement

- 19.5.1 Section 87 of the *Indian Act* will have no application to a Maa-nulth-aht:
- a. in respect of transaction taxes, as of the first day of the first month following the eighth anniversary of the Effective Date; and
 - b. in respect of all other taxes, as of the first day of the first calendar year starting after the twelfth anniversary of the Effective Date.