INTERNATIONAL INDIAN TREATY COUNCIL

2390 Mission St., Suite 301
San Francisco, CA. 94110

Telephone (415) 641-4482
Fax (415) 641-1298
email: danika@treatycouncil.org

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Ms. Gabriella Habtom
Secretary
UN Committee on the Elimination of Racial Discrimination
UNOG-OHCHR
1211 Geneva 10
Switzerland

c.c. Special Rapporteur on the Rights of Indigenous Peoples, Mr. James Anaya

The Situation of the Mushkegowuk People of Attawapiskat First Nation in Canada: A Request for Consideration under the Early Warning and Urgent Action Procedures of the United Nations Committee on the Elimination of Racial Discrimination (Eighty-Second Session)

Please receive our respectful greetings. The International Indian Treaty Council, in ECOSOC Consultative Status since 1974, now in General Consultative Status, and the Mushkegowuk People of Attawapiskat First Nation, submit this request under the CERD's Urgent Action/Early Warning Procedures based on the following information:

On June 29, 2012, omnibus Bill C-38 "*An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012, and Other Measures* – Short Title: *Jobs, Growth and Long-term Prosperity Act*" received Royal Assent and became law in Canada. Then, on December 14, 2012, as a follow-up to C-38, omnibus Bill C-45 "*A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* – Short Title: *Jobs and Growth Act, 2012*" received Royal Assent and became law in Canada.[1]

The sweeping changes under both legislative acts [combined with the historical legacy of racism and discrimination], include direct violations of Treaty rights[2] held by Indigenous Peoples in Canada, leading to a **45 day-long Hunger Strike** by Chief Theresa Spence of Mushkegowuk

[1] For analysis of these legislations from a First Nations perspective, please see the following documents from the Assembly of First Nations: http://www.afn.ca/uploads/files/12-06-19_nc_letter_re_c-38.pdf and http://www.afn.ca/uploads/files/12-11-21_nc_letter_re_c-45.pdf as well as http://www.afn.ca/uploads/files/12-12-18_omnibus_summary_next_steps_fe.pdf Please also see a chronology of the legislative process of these Bills: http://www.afn.ca/uploads/files/omnibus_bills_chronology.pdf

[2] The rights held pursuant to Treaties by Indigenous Peoples in Canada have been extensively canvassed in the 80th Session Joint Alternative Report submission by International Indian Treaty Council et al., found at: http://www2.ohchr.org/english/bodies/cerd/cerds80.htm which can be referenced by the Committee for consideration of this urgent action. The concern of the submitting organizations is that the legislative developments are the most significant attack on rights held pursuant to Treaty in recent history, and reflect a larger and long history.

People of Attawapiskat First Nation (from December 11, 2012 until January 23, 2013) as well as a multitude of protests, marches, flashmobs, and organized civil and Indigenous opposition to Bills C-38 and C-45, widely known as the "*Idle No More*" movement, which began on November 10, 2012 and continues to the date of this submission. In an interview conducted on January 21, 2012 for this submission, Chief Spence stated:

> All we want is a nation-to-nation meeting between Indigenous Peoples and the Canadian government. Since the Crown-First Nations Gathering held January 24, 2012[3], they said the relationship would be "strengthened" but it got worse. We have seen severe funding cutbacks and detrimental legislation passed. How could the Crown and the Governor General close their eyes to the blatant violations of Treaty? We are giving them the opportunity to correct those actions and move forward in the true spirit and intent of Treaty, and they [the Canadian Government] cannot even meet us halfway. In fact, they respond to us as though we are committing a criminal act for demanding the fulfillment and implementation of our rights – this is discrimination. Indigenous leaders are afraid to challenge the Government because most of the basic funding (for programs and services, infrastructure etc.) is from the Government – they don't want to jeopardize their funding. They cave in every time.

The two legislative acts, which shall be referred to in this Urgent Action as Bill C-38 and Bill C-45, have the effect of the following specific violations requiring Urgent Action:

1. No prior consultation was held with First Nations in the legislative processes related to Bills C-38 and C-45. This is a direct violation of the **duty to consult** with First Nations, Metis and Inuit peoples in Canada owed further to Section 35 of the Canadian *Constitution Act, 1982* wherein it is recognized and affirmed the existing aboriginal and treaty rights of aboriginal peoples, and guaranteed these rights at an elevated constitutional status. The Duty to Consult is also found in the principle of Free, Prior and Informed Consent (**FPIC**), Article 19 of the *UN Declaration on the Rights of Indigenous Peoples*, which has been endorsed by the Government of Canada. It is also affirmed in CERD General Recommendation XXIII. The CERD expressed concern about the limitations placed on consultation and FPIC in their recent review of Canada in paragraph 20.[4]
2. Bill C-38 passed amendments to over 70 federal Acts without any debate, and without consultation with Indigenous Peoples. This included changes to federal environmental legislation, removing protection to water, fish and the environment, under Part 3 of Bill C-38.[5] This Bill guts environmental legislation and 'streamlines' the environmental

[3] Of the 5 commitments made at this Gathering by Prime Minister Stephen Harper, the Third Commitment was to advance Treaty implementation. See Crown – First Nations Gathering Outcome Statement at: http://pm.gc.ca/eng/media.asp?id=4600

[4] CERD.C.CAN.CO.19-20, online at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf

[5] Since the release of Bill C-38, the Assembly of First Nations (AFN) and many other First Nations have called upon the Government of Canada to undertake engagement and consultation with First Nations rights holders. This call for action has been put forward by National Chief Shawn A-in-chut Atleo to the Subcommittee on Bill C-38 (Part 3) of the Standing Committee on Finance and by Regional Chief Morley Watson to the Senate Standing Committee on Energy, the Environment and Natural Resources. The AFN recommended that the Government withdraw Part 3 of Bill C-38 and engage in robust consultation with First Nations before altering Canada's environmental legislation.

review process to pave the way for rapid approval of industrial mega-projects like the Enbridge Northern Gateway Pipeline in northern BC, the Alberta tar sands, and Quebec's Plan Nord. The changes to the environmental assessment review process violate the federal governments obligation to consult with First Nations and accommodate First Nation Treaty and Aboriginal rights.

3. Similarly, Bill C-45 made changes to 44 federal laws, again without debate or consultation with Indigenous Peoples.
    a. C-45 removed fish habitat protections, and failed to recognize Aboriginal commercial fisheries.
    b. The Bill changed the *Navigable Waters Protection Act* to a new format called the *Navigation Protection Act,* removing protection for 99.9 per cent of lakes and rivers in Canada. Under this new amendment, major pipeline and power line advocates are not required to prove their project won't damage or destroy a navigable waterway it crosses, unless the waterway is on a short list prepared by the transportation minister.
    c. The Bill also makes controversial changes to the *Indian Act* RSC 1985 ch.I-5, amending it to change the rules around what kind of meetings or referenda are required to lease or otherwise grant an interest in designated reserve lands. The Aboriginal Affairs Minister would be given the authority to call a band meeting or referenda are required to lease or otherwise grant an interest in designated reserve lands. The Aboriginal Affairs Minister would also be given the authority to call a band meeting or referendum for the purpose of considering an absolute surrender of the band's territory. In addition, decisions under such referendum can now be made without a majority of the members of the First Nation who are present to vote – in other words, a referendum decision on land surrender could be made by a small handful of people who happen to vote on that day, as opposed to a normal requirement for a simple majority of 50% + 1 of the total voting membership of a particular First Nation / Indian Band.

Exhaustion of Local Remedies

On January 8, 2013 On January 8, 2013, Frog Lake First Nation and Mikisew Cree First Nation, through their respective Chiefs, launched judicial review cases in the Federal Court. They are challenging the passage of the Bills C-38 and C-45. However, this form of justice is slow and expensive and inaccessible for many other First Nations or Aboriginal peoples in Canada. Frog Lake and Mikisew take the position that the federal government did not meet its duty to consult, and "knew or ought to have known that the new environmental policy would significantly and adversely affect the assessment of how proposed development will impact treaty harvesting rights and how those impacts are accounted for in the planning and conduct of such development. ... [they] knew or ought to have known that the new environmental policy would ... significantly reduce the degree to which ... First Nations could consult with Canada." Frog Lake and Mikisew seek a remedy which "gives meaningful and substantive relief... designed to require Canada to ensure that it maintains its ability to properly carry out and perform the terms of the Treaty ... to the extent possible using Canada's legislative and executive powers."

On January 11, 2013 a meeting was held between the Prime Minister of Canada and a select number of Chiefs including the AFN National Chief Atleo regarding the hunger strike of Chief

Spence and the civil unrest regarding C-38 and C-45. The Prime Minister refused to allow the Governor General of Canada to attend this meeting, in spite of the request of both Chief Spence and many others for him to attend as a representative of the Crown as an original party to Treaty. Unfortunately, this meeting took place without the participation or consent of Chief Spence and numerous other Indigenous representatives, and came up with a "work plan" that includes addressing some rights violations. However, there was no commitment made by the Prime Minister or Canadian government to engage in appropriate consultative processes with First Nations. In fact, the content of the Bills would suggest that there are now severe limitations placed on the ability of Indigenous Peoples in Canada to be consulted, intervene or participate in decisions affecting them, based on those amendments.

On January 23, 2013 Chief Theresa Spence ended her Hunger Strike. Her initial request to end her hunger strike was simply a meeting with Prime Minister Harper and the Governor-General of Canada David Johnston as a representative of the Crown, the original party to Treaty 9 where Attawapiskat is located. This request was never fulfilled. Living without solid food for 45 days, Chief Spence worked with the Leader of the Liberal Party of Canada Mr. Bob Rae, Deputy Grand Chief Alvin Fiddler of the Nishnawbe Aski Nation and others to issue a Declaration on January 23rd marking the end of her Hunger Strike, entitled "First Nations: Working Towards Fundamental Change."[6] This Declaration outlines the most urgent next steps, a 13 point plan of action, in addressing the crises facing First Nations and their Treaty rights in Canada. The Declaration has been signed on to by the Assembly of First Nations, Leader Elizabeth May of the Green Party of Canada as well as the Official Opposition party, Leader Thomas Mulcair of the New Democratic Party of Canada.

The International Convention on the Elimination of all forms of Racial Discrimination (ICERD)

The Conclusions and Recommendations of CERD regarding Canada, 80th session

Paragraph 19 of the CERD review of Canada outlined specific issues that Canada was to report on within one year of the release of the Conclusions and Recommendations of the CERD. What follows is an update from the submitters of this Urgent Action demonstrating the failure of Canada in meeting this deadline as required under paragraph 29 of the CERD review. In fact with regards to the issues outlined in this submission, in particular the adoption of the Bills C-38 and C-45, Canada has taken actions which are in direct contradiction to several of the specific recommendations made by CERD, creating the urgent situation which has been described above. The CERD concluded, under paragraph 20:

> In light of its General Recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party, in consultation with Aboriginal peoples:
> (a) Implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party's legislation

[6]The text of the Declaration has been attached hereto, and can also be found online at: http://www.afn.ca/index.php/en/news-media/latest-news/declaration-of-commitment-january-23-2013

(b) Continue to seek in good faith agreements with Aboriginal peoples with regard to their lands and resources claims under culturally-sensitive judicial procedures, find means and ways to establish titles over their lands, and respect their treaty rights;

There are urgent violations to human rights that are occurring and worsening as a result of the passage and immediate implementation of Bills C-38 and C-45. As outlined above on pages 2 and 3 of this submission, the content of the Bills include intentional violations of Aboriginal and Treaty Rights, which are supposed to be protected by the Constitution of Canada.

With respect to paragraph 19(a) of CERD review of Canada regarding drinking water and Article 2 of the ICERD:

Indigenous Peoples in Canada are continuing to face third world conditions in a first world country regarding access to or provision of safe drinking water creating urgent health threats which continue to deteriorate. Canada has introduced legislation, Bill S-8 (currently in Second Reading in the House of Commons) to address this issue, but the content of the legislation is designed to off load future liabilities for contaminated water or health consequences on First Nations instead of the Canadian government – without any explicit provision of funds to ensure capacity and training of First Nations communities to take on such liabilities. Bill S-8 also actively violates the aboriginal and treaty rights of First Nations in order for them to access safe drinking water.

Bill S-8 creates a situation where a First Nation will have to give up their rights in order to access water.

Section 35 of the Canadian Constitution Act, 1982 recognizes and affirms existing Aboriginal and Treaty Rights – since this section is not included under the *Charter of Rights and Freedoms*, it is not subject to limitations under section 1 of the Charter. Until 1995, federal legislation routinely contained "non-derogation/non-abrogation" clauses, which guaranteed that legislative developments would not derogate or abrogate from the Constitutionally protected rights held under section 35. Since 1995, the federal government has been increasingly proposing watered down versions of these clauses. This legislation, proposed to provide clean drinking water for First Nations, contains an "abrogation / derogation" clause, for the first time in Canadian history "the proposed law explicitly states that aboriginal and treaty rights deemed to be in conflict with the law's stated objective will not be respected. And for the first time, a new law would contradict promises made to aboriginal peoples in treaties as to the interpretive primacy of those treaties."[7] This legislation must not pass and thereby set a dangerous precedent for the current and ongoing violations of the rights of Indigenous Peoples in Canada, rights that are supposed to be protected by the Canadian Constitution, jurisprudence and international law including the ICERD and the UN Declaration on the Rights of Indigenous Peoples.

With respect to paragraph 19 (c) of CERD review of Canada and Article 5 (e) (iii) of the ICERD:

The community of Attawapiskat First Nation continues to the date of this submission to face a crisis respecting housing.

[7] https://www.itk.ca/front-page-story/legislation-must-not-erode-aboriginal-rights

They have been refused additional housing under the Canadian Mortgage and Housing Corporation (CMHC) because the First Nation could not demonstrate "financial hardship." CMHC is the primary vehicle of providing housing on reserve in Canada[8], and the refusal was made in spite of the fact that the First Nation was in good standing with existing agreements with CMHC. At the time of the evacuation of Attawapiskat First Nation due to the housing crisis in 2010, the community faced **three deaths**, including the brother of Chief Spence. At that time, there was a sewage back up that persisted for 9 days without resolution by the Government of Canada who at that time had a duty to address this problem. Instead, Chief Spence and the Attawapiskat community were told to "open windows" to deal with ongoing sewage back up, which was not considered an "emergency".

After the evacuation, there were donations of 5 trailers that were supposed to be temporary, but are still serving as permanent shelters after two full years.

Attawapiskat was put into "Third Party Management"[9] by the Government of Canada, which was clearly an attempt to send a message to the public that the leadership of the community was incompetent. The Chief of Attawapiskat took the federal government to court for this action, and won the case. The Judge stated that it was not a case of "mismanagement" but rather a case of a lack of capacity to build new housing,[10] in spite of the fact that a diamond mine is operational within 100 kms of the community.[11]

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[8] Canada Mortgage and Housing Corporation (CMHC) is Canada's national housing agency. Established as a government-owned corporation in 1946 to address Canada's post-war housing shortage, the agency has grown into a major national institution. CMHC is Canada's provider of mortgage loan insurance, mortgage-backed securities, housing policy and programs, and housing research. CMHC offers programs, financing techniques, training tools and information to increase building capacity and address housing needs in First Nations communities. Band Councils or Aboriginal persons may access CMHC insured financing for the construction, purchase or renovation of single-family homes or multiple residential rental properties. See online at: http://www.cmhc-schl.gc.ca/en/ab/onre/index.cfm

[9] In June 2011, Aboriginal Affairs and Northern Development Canada (AANDC) implemented a new Default Prevention and Management Policy (DPMP), which was developed to maintain continuity in the delivery of departmentally funded programs and services to Aboriginal communities while a First Nation is in default. Appointment of a third-party manager is one of the actions available to the Department under the DPMP. Third-party management is a temporary measure to ensure the continued delivery of programs and services to community members, and is applied by the department only as a last resort. Upon appointment, the administration of all funds allocated by the funding agreement between the Department and the First Nation is transferred to the third-party manager. **Third party management has the effect of portraying the First Nation leaders and managers as incompetent, and generates stigma and discrimination against First Nations in the eyes of the Canadian public.**

[10] Find a news story about the ruling here: http://www.cbc.ca/news/politics/story/2012/08/01/pol-attawapiskat-court-ruling.html Find a copy of the judgment here: http://decisions.fct-cf.gc.ca/en/2012/2012fc948/2012fc948.html

[11] From February 4th until February 9th, 2013, the Attawapiskat First Nation protested by blockading a road into the De Beers diamond mine (also known as "Victor Mine"). The reasons for the blockade include unfair resource revenue sharing, racism and discrimination at the mine site, lack of employment and training opportunities for First Nations, compensation for lost traplines and a clause in the impact benefit agreement between De Beers and Attawapiskat that absolves the company from having to fork over compensation for "unpredictable impacts" the mine could have on the environment. See news story online: http://aptn.ca/pages/news/2013/02/06/attawapiskat-diamond-mine-blockade-continues-protesters-eye-de-beers-airport/

Chief Theresa Spence has been the target of press and media releases that attempt to discredit her, disparage her character, make racist and discriminatory attacks upon her and undermine her ability to function as a leader in her community. Many of the press and media has resulted from information released by the Government of Canada regarding the "mismanagement" of the funds made available to the First Nation for housing and other infrastructure needs, as well as a incomplete and lacking audit of the financial situation of the First Nation, carried out without the full participation of the leadership of the First Nation.

Conclusion

We respectfully request that the CERD consider making the following recommendations to Canada:

1) An immediate meeting to be arranged between the Crown, Federal Governments, Provincial Governments and all First Nations to discuss outstanding issues regarding the Treaty Relationship, as well as for non-Treaty area relationships.
2) That Canada develop, with the full participation of First Nations, clear work-plans that shall include deliverables and timelines that outline how commitments will be achieved, including immediate action for to address the housing crisis within Attawapiskat First Nation community and other First Nations communities facing similar circumstances.
3) That Canada develops frameworks and mandates for the implementation and enforcement of Treaties between Treaty parties on a Nation-to-Nation basis.
4) That Canada expresses a commitment towards resource revenue sharing, requiring the participation and involvement of provinces and territories and industry currently benefiting from resource development from traditional lands.
5) That Canada makes a commitment towards ensuring a greater collective oversight and action towards ensuring the sustainability of the land through a sustained environmental oversight.
6) That Canada, as an urgent matter, conduct a comprehensive review and meaningful consultation in regards to Bill C-38 and C-45 to ensure it is consistent with Section 35 of the Constitution Act (1982), and to repeal such aspects of Bills C-38 and 45 which violate the rights of Indigenous Peoples held pursuant to Treaty, the UN Declaration on the Rights of Indigenous Peoples (in particular the right to Free, Prior and Informed Consent), the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights and the recommendations of the CERD.

DECLARATION OF COMMITMENT - January 23, 2013

First Nations: Working Towards Fundamental Change

In the true spirit of commitment to initiate dialogue to discuss both Treaty and non-Treaty Indigenous issues on behalf of our First Nations Peoples of Canada, Chief Theresa Spence of Attawapiskat First Nation and Mr. Raymond Robinson of Cross Lake, Manitoba will continue their Hunger Strike, pending outcome of this written Declaration. We also like to acknowledge Mr. Jean Sock of Elsipogtog, New Brunswick and all other Fasters who have shown their deep dedication and courage in support of protecting and honouring both Treaty and non-Treaty obligations as written, entered into or understood by all Peoples, with the Federal Government of Canada including each Provincial/Territorial signatory.

Further, we agree the self-sacrifice and the spiritual courage of Chief Theresa Spence, along with Elder Raymond Robinson and all other fasters have made clear the need for fundamental change in the relationship of First Nations and the Crown. We fully commit to carry forward the urgent and coordinated action required until concrete and tangible results are achieved in order to allow First Nations to forge their own destiny.

Therefore, we solemnly commit to undertake political, spiritual and all other advocacy efforts to implement a renewed First Nations – Crown relationship where inherent Treaty and non-Treaty Rights are recognized, honoured and fully implemented as they should be, within the next five years.

This Declaration includes ,but is not limited to, ensuring commitments made by the Prime Minister of Canada on January 11th, 2013 are followed through and implemented as quickly as possible as led by First Nation on a high-level priority with open transparency and trust. Furthermore, immediate steps are taken working together to achieve the below priorities:

1. An immediate meeting to be arranged between the Crown, Federal Governments, Provincial Governments and all First Nations to discuss outstanding issues regarding the Treaty Relationship, as well as for non-Treaty area relationships.
2. Clear work-plans that shall include deliverables and timelines that outline how commitments will be achieved, including immediate action for short, medium and long-term goals. Addressing the housing crisis within our First Nation communities shall be considered as a short-term immediate action.
3. Frameworks and mandates for the implementation and enforcement of Treaties between Treaty parties on a Nation-to- Nation basis.
4. Reforming and modifying the comprehensive claims policy based on inherent rights of First Nations.
5. A commitment towards resource revenue sharing, requiring the participation and involvement of provinces and territories currently benefiting from resource development from traditional lands.
6. Commitment towards ensuring a greater collective oversight and action towards ensuring the sustainability of the land through a sustained environmental oversight.
7. A comprehensive review and meaningful consultation in regards to Bill C-38 and C-45 to ensure it is consistent with Section 35 of the Constitution Act (1982).

8. Ensure that all federal legislation has the free, prior and informed consent of First Nations where inherent and Treaty rights are affected or impacted.
9. A revised fiscal relationship between First Nations and Canada that is equitable, sustainable and includes indexing and the removal of arbitrary funding caps.
10. A National Public Commission of Inquiry on Violence Against Indigenous Women of all ages.
11. Equity in capital construction of First Nation schools, including funding parity with Provincial funding formulas with additional funding support for First Nation languages.
12. A change in how government operates that would include direct oversight, a dedicated Cabinet Committee and Secretariat within the Privy Council Office with specific responsibility for the First Nation-Crown relationship to ensure implementation.
13. The full implementation of the United Nations Declaration of the Rights of Indigenous Peoples – UNDRIP.

As expressed from time to time by Chief Theresa Spence, "Our Treaty Rights continue to be violated and ignored". Elder Raymond Robinson says, "Treaties were entered into on a Nation to Nation basis and we need to do our best to re-bridge that balance to walk and work together as was the original intent of the treaties". Far too long, we have been denied an equitable stature within Canadian Society. The time is ours and no longer will we be silenced and idle. We will continue to call upon the insistence of truth, justice, fairness for all our First Nation Peoples.

As fully endorsed and supported by:
Assembly of First Nations National Executive Committee
Native Women's Association of Canada
Liberal Party of Canada Parliamentary Caucus
New Democratic Party National Caucus
Green Party of Canada Leader and MP for Saanich–Gulf Islands Elizabeth May