Court File No. A-435-15

FEDERAL COURT OF APPEAL

B E T W E E N:

PROPHET RIVER FIRST NATION and
WEST MOBERLY FIRST NATIONS

APPELLANTS

- and -

ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT and
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

RESPONDENTS

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER AMNESTY INTERNATIONAL

- Motion for Leave to Intervene brought by Amnesty International -

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PART I – FACTS.

A. Overview

1. Amnesty International (AI) seeks leave to intervene in the Appellants' appeal of the decision of the Federal Court dismissing their application for judicial review of the determination made by the Governor in Council ("GIC") pursuant to s. 52(4) of the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*"),[1] that the significant adverse environmental effects that will be caused by the Site C hydroelectric project (the "Site C Project") are "justified in the circumstances".

2. AI is an international, non-governmental human rights organization with decades of experience and a longstanding interest in ensuring that the rights of Indigenous peoples are protected in accordance with Canada's international legal obligations and commitments. AI has worked towards this goal through a variety of means, including interventions in judicial proceedings before this Court and others.

3. The Appellants in this case, who are beneficiaries of Treaty 8, argue, as they did before the GIC and the Federal Court, that the Site C Project will infringe their treaty rights to hunt, fish and trap, and that the lands within the Peace River Valley that will be altered or flooded by the Project constitute one of the last remaining areas available to them for the meaningful exercise of their treaty rights and to sustain their way of life. The Appellants also argue, as they did before the Federal Court, that the GIC's constitutional obligations required it to go beyond consultation, to consider this infringement question in rendering its discretionary decision under s. 52(4) of *CEEA 2012.*

4. AI was granted leave to intervene by the Federal Court in the judicial review application that gave rise to the present appeal. AI now seeks leave to intervene to provide this Honourable Court with an international human rights law perspective on the issues which arise in this appeal. If granted leave to intervene, AI will assist this Court by making submissions on how international human rights law informs: (i) the need for the Crown to ensure a high standard of protection in order to uphold Indigenous peoples' procedural rights and substantive rights

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[1] *Canadian Environmental Assessment Act*, 2012, SC 2012, c. 19, s. 52, as am.

relating to their land and culture in the context of decisions about resource development that will have significant adverse effects on the exercise of these rights; (ii) the interpretation of the GIC's statutory powers and obligations under *CEAA 2012* in cases in which serious adverse effects to Indigenous peoples' rights are anticipated; and (iii) the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown.

5. Questions concerning justification necessarily require a purposeful balancing of Indigenous rights against other societal interests, including the broad societal interest in reconciliation and respect for the rights of all, while taking into account the unresolved legacy of past violations and the heightened risk of further disempowerment, marginalization and impoverishment of Indigenous communities. AI will submit that according to international human rights law, where such projects seriously threaten the lands, resources, culture, and livelihoods of Indigenous peoples, operations should only proceed with the free, prior and informed consent of the affected Indigenous peoples.

6. AI's perspective in this case is unique: none of the other parties' submissions focus upon the international human rights law perspective that AI proposes to bring to the issues that arise in this appeal, nor do they share AI's extensive expertise in this area. AI's proposed intervention will assist this Court in effectively determining the issues arising in this appeal, it will not raise new issues nor delay the proceedings, and it is in the interests of justice. AI respectfully submits that its proposed participation in this case meets the test for intervention, and requests that this motion for leave to intervene be granted.

B. The Appeal

7. The Appellants appeal Justice Manson's August 28, 2015 decision to dismiss their underlying application for judicial review challenging the decision of the GIC pursuant to s. 52(4) of *CEEA 2012*, that the significant adverse environmental effects that will be caused by the Project are "justified in the circumstances".

8. More particularly, the Appellants argue, among other things, that the Federal Court erred by wrongly identifying the issue before it, and thus incorrectly concentrating on the jurisdiction of the GIC to decide a question of the potential infringement of the Appellants' treaty rights, and in turn, on the Court's jurisdiction to do so on judicial review. The central issue raised by the

Appellants, which was not addressed in the Federal Court's decision, related to the constitutional limits applicable to the GIC's statutory decision under s. 52(4) of the *CEAA 2012* in a case in which the potential for serious negative effects on established treaty rights has been acknowledged.[2] The Appellants also submit that in this case, the Crown's obligations arising from s. 35(1) of the *Constitution Act, 1982* extended beyond the requirement to ensure compliance with the duty to consult, and required the GIC to also consider the adverse impacts of the Site C Project on their treaty rights. According to the Appellants, in failing to consider whether the Site C Project would infringe their treaty rights and whether such an infringement could be justified pursuant to the *Sparrow* standard, the GIC breached its constitutional obligations.[3]

C. AI Canada's background and purpose

9. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of internationally recognized human rights. It is impartial and independent of any government, political persuasion, or religious creed. AI Canada is the English Branch of the international organization's Canadian Section. AI currently has over three million members in over 162 countries, including 300,000 supporters across Canada. AI envisions a world in which the human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments are enjoyed by all. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, economic, social, and cultural. In 1977, AI was awarded the Nobel Peace Prize for its work.[4]

D. AI's expertise and experience

10. AI's research is recognized in Canada and globally as accurate, credible, and unbiased, and its reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.[5] The organization has made submissions regarding human rights to courts, legislatures, and international bodies in Canada and around the world. AI's

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[2] Prophet River et al, Memorandum of Fact and Law on appeal, dated February 17, 2016, at paras. 46-79 ["Appellants' Memorandum of Fact and Law"].
[3] Appellants' Memorandum of Fact and Law, paras. 43-45.
[4] Affidavit of Alex Neve sworn 8 March 2016 at paras. 8-15 ["Neve Affidavit"].
[5] Neve Affidavit at paras. 17-19.

documentation has been relied upon by Canadian courts and tribunals. Further, AI Canada has been granted intervener status on numerous occasions in judicial proceedings at different levels of court, including the Supreme Court of Canada and this Court.[6] AI Canada has also sought to advance international human rights law directly through the legislative process,[7] and through engagements with various international bodies.[8]

E. AI's experience in Indigenous human rights issues at the international level

11. AI regularly makes submissions to various international bodies, including Special Rapporteurs, UN working groups, treaty bodies, and the Inter-American Commission on Human Rights, in which it has raised concerns about Canada's compliance with its international obligations in respect of the human rights of Indigenous peoples. These submissions have addressed, amongst other subjects, the widespread removal of First Nations children from their families due to systemic underfunding of child welfare services on reserves, Canada's refusal (until recently) to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls, and Canada's failure to respect and protect Indigenous land and resource rights.[9]

12. AI also played an active role in the UN processes leading to the finalization and adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*). AI was present at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI co-hosted a symposium in Ottawa on the national implementation of international norms for Indigenous rights that was attended by the UN Special Rapporteur on the Rights of Indigenous Peoples. Prior to November 2010, AI engaged with the federal government to urge it to adopt the *UN Declaration* through co-organizing a briefing to Parliamentarians, and issuing a number of public statements. Now that the *UN Declaration* has been endorsed by Canada, AI's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous peoples. This work has included presentations to federal and provincial human rights

[6] Neve Affidavit at paras. 20-24.
[7] Neve Affidavit at para. 25.
[8] Neve Affidavit at paras. 26-28.
[9] Neve Affidavit at para 27, 30-33.

commissions, Parliamentarians and government staff.[10]

13. Finally, AI engages with a broad range of international and inter-governmental organizations: AI has consultative status with the UN Economic and Social Council, the UN Educational, Scientific and Cultural Organization, and the Council of Europe; it has working relationships with the Organization of American States and the African Union; and it is registered as a civil society organization with the Inter-Parliamentary Union. These international bodies recognize and trust AI's experience and objectivity, and value AI's unique perspective.[11]

F. AI's experience in protecting the human rights of Indigenous peoples in Canada

14. In addition to its international activities, AI has a varied and long-standing history of working to advance and protect the human rights of Inuit, First Nations, and Métis peoples in Canada. AI's work has focused on its concern that Canada has failed to uphold both Canadian law and international human rights standards with respect to Indigenous peoples, leading to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous peoples in Canada.[12]

15. AI has addressed these issues by providing submissions to inquiries such as the Ipperwash Inquiry in 1995, to Parliamentary Committees such as the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on the epidemic of violence against Indigenous women and girls in Canada, and to Canadian courts and tribunals in several proceedings which have engaged human rights issues with a particular impact on Indigenous peoples.[13]

16. AI has also made submissions on the imperative that environmental impact assessments uphold international human rights standards, including those set out in the *UN Declaration*, at the public review of the proposed New Prosperity Gold and Copper Mine in central British

[10] Neve Affidavit at para. 34.
[11] Neve Affidavit at para. 26.
[12] Neve Affidavit at paras. 29-37.
[13] Neve Affidavit at para. 32-33.

Columbia.[14] In this review, the panel cited AI's submissions as an important consideration in reaching its conclusions.[15]

17. Before the courts, AI intervened in *Tsilhqot'in Nation v. British Columbia*[16] to provide submissions on international human rights standards surrounding Indigenous land and resource rights. In that case, the Supreme Court recognized the right of the Tsilhqot'in people to own, control, and enjoy the benefits of their traditional territory in central British Columbia.[17]

18. AI also participated in proceedings before the Federal Court in *Canadian Human Rights Commission v. Attorney General of Canada*,[18] affirmed by this Court, making submissions on Canada's international human rights obligations in the context of a human rights challenge brought by the First Nations Child and Family Caring Society of Canada.[19] More recently, in the successor to this case, the Canadian Human Rights Tribunal recognized AI's expertise with respect to the international human rights standards applicable to the domestic rights of Indigenous peoples in Canada. The Tribunal adopted or concurred with AI's argument in that case, to find that substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services comparable to those provided to off-reserve Canadians.[20]

19. In addition, this Court granted AI leave to intervene in *Gitxaala Nation v. Canada*,[21] in which AI made submissions regarding Canada's international human rights obligations in respect of Indigenous peoples' rights in the context of a case in which several First Nations challenged

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[14] Neve Affidavit at para. 20g).
[15] *Report of the Review Panel: New Prosperity Gold-Copper Mine Project* (British Columbia, 31 October 2013) at 210-211, 213 online: <http://www.ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>.
[16] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ["*Tsilhqot'in*"].
[17] Neve Affidavit at para. 20c).
[18] *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75 ["*Canada (Human Rights Commission)*"].
[19] Neve Affidavit at para 20c).
[20] Neve Affidavit at paras. 20a), 35; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, especially at paras. 428-455.
[21] *Gitxaala Nation v. Canada*, 2015 FCA 73, judgment under reserve ["*Gitxaala"*].

decisions of the GIC, the National Energy Board and a Joint Review Panel concerning the Northern Gateway Pipeline Project.[22]

20. More generally, AI has documented and helped draw attention to various violations of the rights of Indigenous peoples in Canada, including unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities. AI's work within Canada has also included investigating complaints of systemic patterns of mistreatment; working with specific communities involved in land rights disputes; collaborating with the Native Women's Association of Canada and other organizations in a long-term campaign against violence against Indigenous women; and engaging in public education activities to promote existing and emerging standards in domestic and international law.[23]

G. AI's specific interest in protecting the human rights of Indigenous peoples in Canada

21. AI has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples abroad and in Canada. AI has repeatedly researched and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada. These issues are of deep concern to AI because of the individual and collective hardship, suffering, and injustice they represent, as well as the lost opportunity to set positive examples that are desperately needed in the international community.[24] AI is particularly concerned that these injustices continue to occur despite domestic and constitutional protections, and despite Canada's ratification or endorsement of international human rights instruments, including the *UN Declaration*.[25]

PART II – ISSUES

22. The sole issue to be determined in this motion is whether AI should be granted leave to intervene in this appeal.

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[22] Neve Affidavit at para. 20d).
[23] Neve Affidavit at paras. 29-35.
[24] Neve Affidavit at paras. 36-37.
[25] Neve Affidavit at para. 38.

PART III – SUBMISSIONS

A. The test for determining whether leave to intervene should be granted

23. This Court has held that in determining whether leave to intervene should be granted pursuant to Rule 109, the most important consideration is whether the proposed intervener is able to assist the Court by bringing a distinct perspective and expertise to bear on the issues in dispute.[26] As the Federal Court observed, the "overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue" by "add[ing] to the debate an element which is absent from what the parties before the Court will bring".[27] Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.[28]

24. In considering AI's motion to intervene in *Pictou Landing*, Justice Stratas of this Court set out a modified list of factors to consider when determining whether to grant a party intervener status, particularly in cases that involve public law matters,[29] as follows:

a. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)?

b. Does the proposed intervener have a genuine interest in the matter before the Court, such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

c. In participating in this proceeding in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

d. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

e. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

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[26] *Globalive Wireless Management Corp v. Public Mobile Inc et al*, 2011 FCA 119 at para. 5(c) ["*Globalive*"].
[27] *Canada (Attorney General) v. Sasvari*, 2004 FC 1650 at para. 11.
[28] *Canadian Pacific Railway Company v. Boutique Jacob Inc*, 2006 FCA 426 at para. 21.
[29] *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 at para. 11 ["*Pictou Landing*"]. The *Pictou Landing* intervention test was also applied in *Gitxaala Nation*, *supra* at paras. 4-5.

25. For the reasons set out below, AI submits that its proposed intervention in the present case satisfies all of these criteria, and that it ought to be granted intervener status.

B. AI satisfies all of the criteria for being granted intervener status

1) Compliance with the requirements of Rule 109(2)

26. In bringing this motion to intervene, AI complies with Rule 109(2) of the *Federal Courts Rules.* In particular, these written representations set out how AI proposes to participate in these proceedings, in order to assist the court in determining the legal issues raised by this appeal.[30]

2) AI has a genuine interest in ensuring respect for international human rights principles and associated Indigenous rights in state decision-making regarding resource development projects

27. The Appellants' arguments in this appeal raise important questions of public law, relating to the content of the Crown's obligations to ensure proper protection of Indigenous rights within its decision-making regarding resource development projects under the statutory regime established under *CEAA 2012*.

28. Federal Court jurisprudence establishes that in public interest cases involving important questions of public law, the requirement of a "genuine interest" is satisfied if the organization seeking to intervene has a demonstrated commitment to the issues raised in the case and possesses special knowledge and expertise with respect to these issues.[31]

29. AI submits that it satisfies the genuine interest requirement in the present case. As this Court recognized in *Pictou Landing*, and more recently in *Gitxaala Nation*, AI has a genuine interest in ensuring respect for the international human rights of Indigenous peoples in Canada, and a particular interest in protecting the land and resource rights of Indigenous peoples, which are inextricably tied to the exercise of their traditional and contemporary cultures and livelihoods. AI also has a demonstrated interest in ensuring that Canadian domestic law develops

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[30] *Federal Courts Rules*, SOR/98-106, Rule 109(2).
[31] *Globalive*, *supra* at para 5(c); *Pictou Landing*, *supra* at para 9; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 1990 at para 3 (FCA).

and is applied in a manner that is consistent with Canada's international legal obligations in regards to Indigenous peoples.[32]

30. These interests on the part of AI are evident from AI's long track record of working to ensure that the human rights of Indigenous peoples in Canada are protected in accordance with international human rights law – before domestic courts, legislatures, tribunals and public inquiries, as well as before international bodies. These interests are also demonstrated by AI's other advocacy, education, and reporting efforts on these issues.[33] In addition, AI has the necessary knowledge, skills, and resources to assist the Court in determining these issues.[34]

31. With respect to the Site C Project in particular, both before and after the federal approval of the Project, and more recently, AI issued a number of public statements, including an open letter to Prime Minister Trudeau and British Columbia Premier Christie Clark, concerning the need to protect the Indigenous land and culture threatened by the flooding that the Project would cause in the Peace River Valley. AI has also drawn attention to these concerns in submissions to the United Nations Committee on Economic, Social and Cultural Rights in advance of its February 2016 review of Canada's compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*.[35]

32. Significantly, AI was granted leave to intervene in the judicial review before the Federal Court underlying this appeal,[36] to provide the Court with an international human rights law perspective regarding the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown.[37] These issues remain at play in this appeal, and AI should again be granted leave to intervene to present these arguments.

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[32] Neve Affidavit at paras. 20, 26, 29-37.
[33] See paras. 10-21 of these Written Representations.
[34] *Pictou Landing*, *supra*; *Gitxaala Nation*, *supra*, especially at para. 21.
[35] Neve Affidavit at paras. 41-43, and Exhibits A, B and C.
[36] *Doig River et al. v. Attorney General of Canada et al*, 2015 FC 754.
[37] *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030, at para. 71 ["*Prophet River*"].

3) AI can make a unique, important, and useful contribution to this case that will further the court's determination of this matter

33. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. None of the parties will address the issues raised in this judicial review from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation. Nor do any of the parties share AI's experience, expertise, and knowledge in matters related to international human rights law, both generally and in the particular context of Indigenous peoples.[38]

34. The GIC's discretionary determination under s. 52(4) of *CEAA 2012* in this case – that the significant adverse environmental effects that are likely to be caused by the Site C Project are "justified in the circumstances" – was admittedly made without any consideration of whether the Appellants' rights under Treaty No. 8 would be infringed.[39] The Appellants argue that, given the adverse effects of the Project on the their treaty rights and the notice provided by them of their concerns in this regard, the Crown's common law and constitutional obligations in this case are not limited to compliance with the duty of consultation. Rather, the GIC was required, as part of its determination under s. 52(4) of *CEAA 2012*, to also consider whether the proposed Project constituted an infringement of the Appellants' treaty rights, and if so, to satisfy itself that any such infringement satisfied the *Sparrow* justification standard.[40]

35. This argument requires this Court to consider the appropriate legal standard to be met by the Crown when deciding whether a proposed resource development project with anticipated serious adverse effects on the exercise of treaty rights is "justified in the circumstances" under s. 52(4) of *CEAA 2012*. The GIC exercises a statutory discretion under s. 52(4) of *CEAA 2012*, and, as the Appellants note,[41] it is obliged to ensure that its discretionary decisions comply with the boundaries set by s. 35(1) of the *Constitution Act, 1982*.[42] The Appellants' arguments will require the Court to determine what this obligation to ensure constitutional compliance entails in the particular circumstances of this case, and in particular whether it includes an obligation to

[38] Neve Affidavit at paras. 20-44.
[39] Appellants' Memorandum of Fact and Law, at paras. 79.
[40] Appellants' Memorandum of Fact and Law, at paras. 97-112; *R. v. Sparrow*, [1990] 1 SCR 1075 at 1009-1011 ["*Sparrow*"].
[41] Appellants' Memorandum of Fact and Law, at paras. 90-96.
[42] See, e.g., *R. v. Conway*, [2010] 1 SCR 765 at paras. 41-48.

ensure that the constitutional standard of justification of any infringements of treaty rights has been satisfied, or whether the state's constitutional obligation in this context is instead limited to the duty to consult and accommodate.

36. AI's proposed intervention will provide a unique perspective to assist this Court in interpreting this central issue. If granted leave to intervene, AI intends to present submissions regarding the international human rights principles that AI will argue ought to inform the Court's interpretation of this important question of domestic law. In particular, AI will submit that:

a) International law is a relevant and persuasive source for the interpretation of the domestic law applicable in this case;

b) International law requires strong protections for Indigenous peoples' rights; and

c) International law mandates a stringent standard of justification for the infringement of Indigenous peoples' rights.

i. International law is a relevant and persuasive source for the interpretation of the domestic law applicable in this case

37. AI submits that international human rights law furnishes important principles that ought to be considered by this Honourable Court when interpreting the meaning of the statutory discretion conferred upon the GIC under s. 52(4) of *CEAA 2012* and when assessing whether the exercise of discretion at issue in this case conforms with applicable constitutional and administrative law standards.

38. Canadian courts have long recognized that the values and principles set out in international law are "relevant and persuasive" sources for the interpretation of the human rights enshrined in Canada's *Constitution Act, 1982*,[43] and for the interpretation of domestic legislation.[44] International law is a particularly relevant source for contextual interpretation

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[43] *Reference re Public Service Employee Relations Act (Alberta)*,[1987] 1 SCR 313 at 348 (*per* Dickson CJ dissenting); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para. 46 ["*Suresh*"]; *R v. Hape*, [2007] 2 SCR 292 at para. 55 [*"Hape"*].

[44] *Hape, supra* at para. 53-54; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 70 [*"Baker"*]; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76 at para. 31; *R. v. Sharpe*, [2001] 1 SCR 45 at para. 171, 175-179 (*per* L'Heureux-Dubé J., concurring);

when, as in the present case, the statutory provision at issue defines the ambit of an open-ended discretionary power.[45]

39. As Canadian laws are presumed to conform with international law,[46] any interpretation of domestic law that would put Canada in breach of its international human rights obligations should be avoided, while an interpretation that reflects the values and principles enshrined in international law ought to be preferred.

ii. International law requires strong protections for Indigenous peoples' rights

40. The Appellants argue that, in this particular case, in which the Project will cause significant adverse environmental impacts including immitigable effects on the Appellants' ability to exercise their constitutionally-protected treaty rights, and in which the GIC was made aware of the Appellants' concerns in this regard, the GIC's consideration of the duty to consult and accommodate was insufficient to ensure compliance with the Crown's constitutional obligations. Rather, the Appellants argue that the GIC was obliged to satisfy itself that any infringement of the Appellants' treaty rights complied with the constitutional standard of justification.[47] This argument will require this Court to assess whether, in the context of the exercise of the statutory discretion set out in s. 52(4) of *CEAA 2012*, the Crown's constitutional obligation is limited to ensuring compliance with a strictly procedural conception of the duty to consult, or whether the Crown is also obliged in appropriate circumstances to ensure protection of Indigenous peoples' underlying substantive rights.

41. AI submits that international human rights principles will be of assistance to this Court in determining this question. International law requires a high standard of protection for Indigenous peoples' rights, and outlines the contours of these rights, which are codified, among other things, in international instruments that have been endorsed or ratified by Canada, including the *United*

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241 at para. 30; *Suresh*, *supra* at para. 59; *Canada (Human Rights Commission)*, *supra* at paras. 351-354.

[45] *Baker*, *supra* at paras. 67, 69-71, 73-74.

[46] *Hape*, *supra* at para. 53, aff'd in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para. 64. This presumption is also reflected in federal policy regarding regulatory activities: see Treasury Board of Canada Secretariat, *Cabinet Directive on Regulatory Management*, 2012 at para. 30. online: <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>.

[47] Appellants' Memorandum of Fact and Law, at paras. 50-79.

Nations Declaration on the Rights of Indigenous Peoples,[48] the *International Covenant on Civil and Political Rights*[49] and the *International Covenant on Economic, Social and Cultural Rights*.[50] Importantly, international law establishes that the rights of Indigenous peoples have both substantive and procedural aspects.

42. International law establishes that Indigenous peoples have substantive rights to the respect and protection of their land and resource rights, to the protection of their cultural heritage, to maintain the cultural and economic integrity of their communities through their connections to specific territories and the exercise of traditional practices such as fishing, hunting, and trapping,[51] as well as rights to effective participation in public life and to not have decisions directly relating to their rights and interests taken without their informed consent.[52] States have correlative obligations to ensure that the rights of Indigenous peoples are appropriately protected, respected and fulfilled.[53] These substantive rights are, in turn, procedurally protected and buttressed, but not *replaced or supplanted*, by the obligation that states consult Indigenous peoples on matters that may affect their rights and interests, which is now recognized as a general principle of international law.[54]

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[48] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007), preamble, arts 3, 8(2)(b), 25-28 [*"UN Declaration"*].

[49] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47, art 14(1) ["*ICCPR*"].

[50] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA Res 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, art. 15(1) ["*ICESCR*"].

[51] *UN Declaration, supra* arts 5, 8(2)(b), 11-13, 15, 20, 21, 25-28; See also, e.g. International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples* (Interim Report, 2010) online: <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> at 47-49 ["*Hague Conference"*]. Further, international case law has established that the fact that the extent and nature of the Indigenous rights in question are disputed by the State, or that the State has not fully recognized pre-existing Indigenous rights in its own laws and procedures, does not negate the existence of these rights or justify their violation: *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (2001) Judgment, Inter-Am Ct HR (Ser C) No 79 at paras. 153-154.

[52] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples* (51st Sess, 1997) UN Doc A/52/18, annex V (1997), at para. 4(d) ["*Recommendation 23*]; United Nations Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at para. 7 ["*General Comment No. 23*"].

[53] *Recommendation 23, supra.*

[54] *UN Declaration, supra*, arts 19, 32(2); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245 at paras. 164-65; *Case of the Saramaka People v. Suriname*, (2007) Judgment, Inter-Am Ct HR (Ser C) No 172 at paras. 133-137 ["*Saramaka People"*]; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, 21st Sess, UN Doc A/HRC/21/47 (6 July 2012) at paras. 49-53, 79-80 ["*Report of the Special Rapporteur, 2012*]; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya*, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009) at paras. 38-41 ["*Report of the Special Rapporteur*, 2009"].

43. In the present case, the GIC presumed that its determination of the adequacy of the consultation process was sufficient to satisfy its constitutional obligations to the Appellants, and that no consideration of the Appellants' substantive treaty rights was required. This presumption was effectively upheld by Justice Manson's decision at first instance.[55] If granted leave to intervene, AI will argue that this approach is inconsistent with Canada's international obligations to ensure protection of the substantive *and* procedural aspects of Indigenous peoples' rights.

iii. International law mandates a stringent standard of justification for the infringement of Indigenous peoples' rights

44. In the present case, the JRP concluded that the Site C Project is likely to have serious adverse and immitigable impacts on the Appellants' capacity to exercise their harvesting activities which are protected by Treaty, and would destroy burial sites and other sites of critical cultural value. The Appellants argue that these circumstances required the GIC to consider and determine whether the Site C Project constituted an unjustified infringement of their treaty rights.[56] This is particularly so, given that the cumulative effects of development mean that the lands that will be altered by the Project are essential to the continued meaningful exercise of their harvesting rights under Treaty 8.[57] Yet, in approving the Site C project, the GIC did not consider this question.[58]

45. AI submits that international human rights law principles are of assistance in interpreting the meaning of the GIC's statutory power under s. 52(4) of *CEAA 2012*, and in assessing whether the GIC's exercise of discretion in this case conforms with applicable constitutional and administrative law standards. AI submits that to maintain consistency with international law, any decision by the Crown that purports to permit an infringement of Indigenous peoples' rights – including a decision pursuant to s. 52(4) of *CEEA 2012* – must include a rigorous demonstration that the rights-limiting action satisfies the international law standard of justification.

46. More particularly, if granted leave to intervene, AI will submit that compliance with Canada's international obligations requires the following:

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[55] *Prophet River*, *supra* at paras. 61-70.
[56] Appellants' Memorandum of Fact and Law, at para. 82.
[57] Appellants' Memorandum of Fact and Law, at paras. 10-11.
[58] Appellants' Memorandum of Fact and Law, at para. 82.

a) any infringement of Indigenous peoples' rights must be in accordance with the law, serve a legitimate aim, be strictly necessary, and be proportional;[59]

b) justification decisions may not be based solely on economic interests;[60]

c) infringements that leave Indigenous peoples with no meaningful means of exercising their rights cannot be justified;[61] and

d) where the potential for harm is significant, projects should only proceed with the free, prior and informed consent of the affected Indigenous peoples.[62]

47. These international human rights law principles relating to the standard of justification for the infringement of Indigenous peoples' rights dovetail with and reinforce Canadian legal principles applicable to Indigenous peoples, and serve to enrich their interpretation.[63]

4) AI's participation in this case is in the interests of justice

48. In the circumstances of this case, it is in the interests of justice for the Court to expose itself to the international human rights perspective that AI will raise, beyond those perspectives advanced by the existing parties before the Court.

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[59] *ICCPR*, *supra* at arts. 2, 27; United Nations Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 6 [*"General Comment No. 31"*]; United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a)*, UN Doc E/C.12/GC/21 (21 December 2009) at para. 19 [*"General comment No. 21"*]; *UN Declaration*, *supra* at preamble 6, art. 46(2); United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the ICESCR)*, UN Doc E/C.12/GC/20 (2 July 2009) at paras. 6-7; *Recommendation 23*, *supra*.

[60] See, e.g., United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st Sess, UN Doc E/CN.4/1985/4, Annex (28 September 1984); United Nations, General Assembly, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, 64th Sess, UN Doc CERD/C/64/CO/9/Rev.2 (12 March 2004) at para. 15.

[61] See, e.g., *General Comment No. 31, supra* at para. 6.

[62] *UN Declaration*, *supra* at art. 10; United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 25, Rev. 1: Forced Evictions* (United Nations: New York and Geneva, 2014) at 15. *Saramaka People*, *supra* at paras. 134, 137*; General comment No. 21*, *supra* at para. 37*; Report of the Special Rapporteur, 2009*, *supra* at paras. 46-49; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, 24th Sess, UN Doc A/HRC/24/41 (1 July 2013) at paras. 36.

[63] See, e.g. *Tsilhqot'in , supra* at paras. 87, 126-127.

49. This case raises important questions of public interest regarding the human rights of Indigenous peoples, in particular the need for the Crown to recognize and respect Indigenous peoples' constitutionally-protected rights relating to their land and culture, as well as the limitation of Indigenous peoples' rights and the scope and nature of permissible justification by the state of such limitation.

50. Given the important rights and interests at stake in this case, and the constitutional dimensions of the legal principles engaged, Canada's obligations under international law are particularly relevant. AI's proposed submissions will assist this Court in clarifying the domestic legal standards applicable to decision-making in the context of resource development.[64] Further, respect for human rights is not only in the interest of Indigenous peoples, but is itself recognized as a broader societal imperative. The preamble to the *UN Declaration* states "the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."[65]

51. In *Pictou Landing*, Justice Stratas, in setting out the factors to be considered in the interests of justice inquiry, asked: "has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?"[66] This factor is manifestly applicable in this case. Indeed, as Justice Manson acknowledged in ordering that each of the parties bear their own costs in his decision on the underlying judicial review, this case engages "significant, legitimate public interest concerns".[67]

52. The intervention proposed by AI in this case emerges from and relates directly to the issues raised by the Appellants in their Notice of Appeal, namely the interpretation of the GIC's powers and obligations under an ambiguous statutory provision, and the permissible contours of the state's justification of a resource project that will have significant adverse effects on established treaty rights. The international human rights law submissions that AI proposes to

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[64] *Gitxaala Nation*, *supra* at para 21.
[65] *UN Declaration*, *supra* at preamble.
[66] *Pictou Landing*, *supra* at para. 9(IV).
[67] *Prophet River*, *supra* orders at para. 2.

present are tied to these existing legal issues, while offering a different and complementary perspective from those of the parties.

53. In *Gitxaala*, Justice Stratas determined that AI's intervention was in the interests of justice, mainly because of AI's "expertise in international law issues and the potential that international law issues may be relevant".[68] AI submits that the same reasoning applies here.

5) AI's proposed intervention will not interfere with the just, expeditious and least expensive determination of this appeal

54. AI's proposed intervention will not disrupt or delay these proceedings or otherwise contravene the overarching direction of Rule 3 of the *Federal Courts Act*.

55. If granted leave to intervene, AI will be mindful of submissions made by the parties and any other interveners, and will not duplicate argument and materials before the Court. AI will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will AI seek to supplement the factual record.[69]

56. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding. If granted leave to intervene, AI will abide by any schedule set by this Court for the delivery of materials and for oral argument.[70]

57. The Appellants have consented to AI's motion for leave to intervene. [71]

PART IV– ORDERS SOUGHT

58. AI respectfully requests an order granting it leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Courts Rules*.

59. If this Honourable Court determines that leave should be granted, AI requests permission to file a written factum of no more than 15 pages, and the right to present oral argument at the hearing of this appeal.

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[68] *Gitxaala*, *supra* at para. 25.
[69] Neve Affidavit at para. 48.
[70] Neve Affidavit at paras 49.
[71] Neve Affidavit at para 50.

60. AI does not seek costs and requests that, in the event this motion is granted, no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 9, 2016

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PART V – LIST OF AUTHORITIES

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3. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817
4. *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21
5. *Canada (Attorney General) v. Sasvari*, 2004 FC 1650
6. *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75
7. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76, 2004 SCC 4
8. *Canadian Pacific Railway Company v. Boutique Jacob Inc*, 2006 FCA 426
9. *Doig River et al. v. Attorney General of Canada et al*, 2015 FC 754
10. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.
11. *Gitxaala Nation v. Canada*, 2015 FCA 73.
12. *Globalive Wireless Management Corp v Public Mobile Inc et al*, 2011 FCA 119
13. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388
14. *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030
15. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313
16. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 1990 (FCA)
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19. *R. v. Sharpe*, [2001] 1 SCR 45
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23. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

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24. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245

25. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (2001) Judgment, Inter-Am Ct HR (Ser C) No 79

26. *Case of the Saramaka People v. Suriname*, (2007) Judgment, Inter-Am Ct HR (Ser C) No 172

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28. *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, GA Res 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3

29. International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples* (Interim Report, 2010)
online: <http://www.ila-q.org/en/committees/index.cfm/cid/1024

30. United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st Sess, UN Doc E/CN.4/1985/4, Annex (28 September 1984)

31. United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the ICESCR*), 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009)

32. United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 43rd Sess, UN Doc E/C.12/GC/21 (21 December 2009)

33. United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples* (51st Sess, 1997) UN Doc A/52/18, annex V (1997)

34. *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007)

35. United Nations, General Assembly, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, 64th Sess, UN Doc CERD/C/64/CO/9/Rev.2 (12 March 2004)

36. United Nations Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 50th Sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994)

37. United Nations Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004)

38. United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya*, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009)

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