Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT
(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(APPELLANTS)

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC, and
THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

APPLICATION FOR LEAVE TO INTERVENE

(AMNESTY INTERNATIONAL AND
CANADIAN FRIENDS SERVICE COMMITTEE, APPLICANTS)
(PURSUANT TO RULES 55-57 OF THE *RULES OF THE SUPREME COURT OF CANADA*)

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TAB 1

Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT
(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
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THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC, and
THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

NOTICE OF MOTION FOR INTERVENTION
(AMNESTY INTERNATIONAL AND
CANADIAN FRIENDS SERVICE COMMITTEE, APPLICANTS)
(PURSUANT TO RULES 55-57 OF THE *RULES OF THE SUPREME COURT OF CANADA*)

TAKE NOTICE that Amnesty International ("AI") and Canadian Friends Service Committee ("CFSC") (together, the "Coalition") hereby apply to a judge pursuant to Rules 55-57 of the *Rules of the Supreme Court of Canada* for an order for leave to intervene or any further or other order that the judge may deem appropriate;

AND FURTHER TAKE NOTICE that the Coalition seeks leave to file a memorandum of argument on the appeal of no more than 10 pages and leave to make oral argument for not longer than 10 minutes;

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. AI is a worldwide voluntary human rights movement founded in 1961 with close to 3 million members around the world, including 60,000 members and supporters across Canada. AI is impartial and independent of any government, political persuasion or religious creed, and is financed by subscriptions and donations from its worldwide membership;

2. CFSC was established in 1931, and is the peace and service agency of Quakers in Canada, with approximately 2,000 members. CFSC is impartial and independent of any government or political persuasion, and is financed by subscriptions and donations from its membership and supporters, and currently receives no government funding;

3. The Coalition has significant experience and expertise in the areas of human rights, including Indigenous peoples' human rights (including land rights) and, in particular, on the prevailing norms and standards under in these areas under international law;

4. The Coalition brings a unique perspective because of their status as non-governmental, non-Indigenous, non-corporate, human rights organizations that represent a broad segment of Canadian society who are deeply concerned about Indigenous rights and the need for true reconciliation;

5. The Coalition has a strong and legitimate interest in the issues raised in the appeal, both by virtue of their work in the area of human rights, including Indigenous rights, and by virtue of their membership base;

6. The Coalition will make useful and distinct submissions grounded in its extensive knowledge of international law, its experience dealing with issues of Indigenous rights (including land rights) before various international institutions, and the unique perspective of its members on the issue of true reconciliation;

7. The Coalition will submit that the approach to aboriginal title must be consistent with international norms and standards governing human rights in general and Indigenous rights in particular, and that such an approach must be recognized and adopted before reconciliation can occur;

8. No party will be prejudiced by the intervention; and

9. If granted leave to intervene, the Coalition will not duplicate the submissions of the parties or any other interveners.

Dated at Toronto this 5th of July 2013.

Signed by:

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

IF THE MOTION is served and filed with the supporting documents of the application for leave to appeal, then the respondent may serve and file the response to the motion together with the response to the application for leave.

TAB 2

Court File No. 34986

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BETWEEN:

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THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

AFFIDAVIT OF ALEX NEVE, O.C.

(in support of the application for intervention of Amnesty International and Canadian Friends Service Committee)

I, **ALEX NEVE,** of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

1. I am the Secretary General of Amnesty International ("AI"), Canadian Section, English Branch ("AI Canada") and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

2. I was hired as Secretary General of AI Canada in January 2000. Prior to assuming this position I had been an active member of AI for 15 years, during which time I was employed by AI Canada and by AI's International Secretariat in London, England for 3 years. My activities with AI have included numerous research missions to monitor and report on human rights abuses, the preparation of international and national reports on issues of concern to AI, and participation in AI national and international meetings.

3. In addition to my experience with AI, I hold a Master of Laws degree in International Human Rights Law, with distinction, from the University of Essex in the United Kingdom.

4. For my human rights work in Canada and abroad, I was appointed an Officer of the Order of Canada in 2007.

5. As Secretary General for AI Canada, I am responsible for overseeing the implementation of AI's mission in Canada. This includes supervising staff and ensuring that there is a national network of volunteers to carry out AI's work in Canada. My responsibilities also include ensuring that AI's expertise is available to decision-making bodies and the general public, communicating and cooperating with others who are interested in working to advance international human rights issues, and educating the public on human rights.

6. AI Canada has a strong record as a credible, trustworthy and objective organization that possesses unique expertise on international human rights law. AI Canada has commented extensively on international human rights, including before numerous courts, various international bodies and numerous legislatures.

7. AI Canada has a strong interest in this case as it pertains directly and centrally to an area of high priority in our work – namely, the protection of the rights of Indigenous peoples as set out in Canadian law and international human rights norms and standards.

Amnesty International: The Organization

8. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of fundamental human rights.

9. AI is impartial and independent of any government, political persuasion or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding.

10. AI Canada is one of the two membership bodies for Amnesty International members and supporters in Canada. The other is Amnesty International Canada Francophone Branch. AI Canada is a Part II Corporation under the *Canada Corporations Act*.

11. The organizational structure of AI Canada includes a board of 10 directors. AI Canada has approximately 60,000 members and supporters across the country.

12. There are currently close to 3 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories the work of these groups is coordinated by national sections like AI Canada.

13. AI's policies and priorities are determined democratically by our members at the national and international levels. In June 2013, AI Canada members passed a resolution affirming the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*") as the "central framework for our human rights work on the human rights of Indigenous Peoples in Canada" and stating that "respect for the human rights of Indigenous peoples is indispensable for the reconciliation of Indigenous and non-Indigenous peoples in Canada."

Amnesty International: The Vision

14. AI's vision is of a world in which all people can freely enjoy all of the human rights enshrined in the *Universal Declaration of Human Rights ("UDHR")* and other international human rights instruments, including the *UNDRIP*.

15. 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, social, cultural and economic.

16. In 1977, AI was awarded the Nobel Peace Prize for our work in promoting international human rights.

Promoting and Advancing International Human Rights

17. AI seeks to advance and promote international human rights at both the international and national levels. As part of its work to achieve this end, AI monitors and reports on human rights abuses, participates in international committee hearings, intervenes in domestic judicial proceedings, and prepares briefs for and participates in national legislative processes and hearings. AI also prepares international and national reports for the purpose of educating the public on international human rights.

Participation in Judicial Proceedings

18. AI Canada has participated as an intervener and made submissions in numerous judicial proceedings in Canada, including proceedings relating to aboriginal rights.

19. AI Canada has intervened on the issue of the application of international human rights in many cases before the Supreme Court of Canada, including:

(a) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC (decision reserved) (proposed guiding principles to help ensure that Canadian

decision-makers' application of Article 1F(a) of the *Refugee Convention* is consistent with international law);

(b) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (regarding the forum of necessity doctrine and international standards of jurisdiction and access to justice);

(c) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (intervened with respect to what triggers a Canadian citizen's section 7 life, liberty, and security of the person interests, and the content of the principles of fundamental justice);

(d) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342 (presented submissions with respect to the interplay between extradition and refugee protection);

(e) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (argued that the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);

(f) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use);

(g) *United States v. Burns*, [2001] 1 S.C.R. 283 (regarding the international movement towards the abolition of capital punishment);

(h) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (regarding the international movement towards the abolition of capital punishment); and

(i) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (regarding the international movement towards the abolition of capital punishment).

20. In addition, AI Canada has intervened in a number of matters before the Ontario Courts. Most recently, AI Canada intervened in *Tanudjaja et al. v. Attorney General of Canada and Attorney General of Ontario*, 2013 SC (Court File No. CV-10-403688) to make submissions on the nature of Canada's international human rights obligations and the justiciability of social and economic rights, as well as in *Choc et al. v. HudBay et al.*, 2013 SC (Court File Nos. CV-10-411159, CV-11-423077, CV-11-435841) to assist the Court with issues concerning corporate accountability for human rights abuses overseas. Before the Ontario Court of Appeal, AI Canada

intervened in *Bouzari v. Islamic Republic of Iran* ([2004] O.J. No. 2800, 71 O.R. (3d) 675), which considered the right of a torture victim to sue for compensation from the offending government and the constitutional validity of the *State Immunity Act*. Finally, in *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and Immigration* ([2002] O.J. No. 431, 58 O.R. (3d) 107)), AI Canada made submissions on Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

21. AI Canada has also been involved in several matters before the Federal Court concerning fundamental human rights issues.

22. In *Canadian Human Rights Commission v. Attorney General of Canada,* 2013 FCA 75, AI Canada (styled as a respondent because of its involvement as an "interested party" in the proceedings before the Canadian Human Rights Tribunal below) successfully argued that Canada's obligations under international human rights law were inconsistent with a narrow reading of section 5(b) of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and First Nations children living off reserves.

23. In *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada,* 2008 FCA 229, the applicants (including AI Canada) asserted that the US-Canada *Safe Third Country Agreement* was invalid and unlawful because the United States fails to comply with its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*

24. In *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada,* 2008 FCA 401, the applicants (including AI Canada) asserted that Canada is in breach of its obligations under the *Convention Against Torture* by transferring Afghan detainees into the custody of Afghan officials where they are at serious risk of torture or cruel, inhuman or degrading treatment.

25. AI Canada has also acted as an intervener in a number of public inquiries. AI Canada intervened in the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("Arar Inquiry"), where it made extensive submissions on the subject of security and human rights and met on numerous occasions with the Commissioner and/or Commission counsel. Further, AI Canada was granted intervener status in the Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin ("Iacobucci Inquiry") where it made oral and written submissions on the substantive issues before the Commissioner on the source of applicable standards under international law.

26. AI Canada was also granted intervener status in the policy phase of the Ipperwash Inquiry, a provincial inquiry into the events surrounding the death of Dudley George, who was shot by an Ontario Provincial Police officer in 1995 during an Indigenous rights protest at Ipperwash Provincial Park. AI Canada advanced several arguments, including that the inquiry should interpret Canada's obligations towards Indigenous peoples in light of international rights standards.

27. Finally, in October 2012, AI Canada was accepted as a participant in the public review of the proposed New Prosperity gold and copper mine on the traditional territory of the Tsilhquot'in people in central British Columbia. AI Canada expects to make submissions before the federal review panel on the need for environmental impact assessments to uphold international human rights standards, including those set out in the *UNDRIP*.

Participation in Legislative Proceedings

28. AI Canada has also sought to advance international human rights directly through the legislative process. AI Canada has submitted written and oral arguments to government officials, legislators and House and Senate committees on numerous human rights issues. In particular, AI Canada made submissions to a subcommittee of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on the pattern of discrimination against Indigenous women and girls in Canada and their heightened vulnerability to violence. Other submissions include:

(a) *Accountability, Protection and Access to Justice: Amnesty International's Concerns with respect to Bill C-43* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada's international obligations and the *Canadian Charter of Rights and Freedoms*), October 31, 2012;

(b) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada's international obligations towards refugees and asylum-seekers), May 7, 2012;

(c) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11), May 11, 2010;

(d) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;

(e) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;

(f) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;

(g) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;

(h) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2005 (regarding security certificates);

(i) *Security through Human Rights* (submission to the Special Senate Committee on the *Anti-Terrorism Act* and House of Commons' Sub-Committee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), May 16, 2005 (regarding security certificates);

(j) Brief on Bill C-31 (*Immigration and Refugee Protection Act*), March 2001; and

(k) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court)

Engagement with International Organizations

29. AI has consultative status with the United Nations Economic and Social Council (ECOSOC), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the Council of Europe, has working relations with the Organization of American States and the Organization of African Unity, and is registered as a civil society organization with the Inter-Parliamentary Union. AI Canada recently made the following submissions to various international organizations regarding human rights and in particular the rights of Indigenous peoples:

(a) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Sixteenth session of the UPR Working Group of the Human Rights Council, April-May 2013), outlining concerns about human rights abuses against vulnerable groups, including Indigenous peoples;

(b) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012), detailing concerns over the widespread removal of First Nations children from their families, communities and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves.

(c) *Amnesty International Submission to the UN Committee against Torture* (May 2012), which highlighted, among other concerns, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry in respect to police use of force during Indigenous land rights protests.

(d) *Amnesty International Submission to the UN Committee on the Elimination of Racial Discrimination* (February 2012), outlining concerns about the rights of Indigenous peoples in Canada, as well as recommendations on the land rights of Indigenous peoples and the right to free, prior and informed consent;

(e) *Amnesty International Submission to the Inter-American Commission on Human Rights* (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;

(f) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Fourth session of the UPR Working Group of the Human Rights Council, February 2009);

(g) *Human Rights for All: No Exceptions* (AI's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada, 2009);

(h) *It Is A Matter of Rights: Improving the protection of economic, social and cultural rights in Canada* (AI's Briefing to the UN Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's fourth and fifth periodic reports concerning rights referred in the *International Covenant on Economic, Social and Cultural Rights*, submitted March 27, 2006);

(i) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (AI Canada's Submissions to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005).

30. These international bodies recognize and trust AI's experience and objectivity, and value AI's unique perspective. As Jean-Pierre Hocke, former United Nations High Commissioner for Refugees, noted "It's a worn cliché, but if Amnesty did not exist, it would have to be invented. It is simply unique."

Expertise on Indigenous Rights

31. AI Canada has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Indigenous people as recognized in both Canadian law and international human rights standards, and the dire consequences that this has had for the health, safety, well-being and cultural integrity of Indigenous societies in Canada. Through our collaboration with Indigenous peoples' representatives and organizations, we have

documented and helped draw attention to violation of land rights, unjust treatment of Indigenous activists engaged in protest in defense of their land rights, and unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities.

32. AI Canada's work in the area of Indigenous rights has included: intervening in judicial proceedings (before both courts and tribunals) that engage Indigenous rights or human rights issues with a particular impact on Indigenous peoples; investigating individual complaints of mistreatment by police and the justice system; working with specific communities involved in land rights disputes; collaborating with the Native Women's Association of Canada in a long-term campaign on violence against Indigenous women; engaging in public education activities to promote existing and emerging standards in domestic and international law; and engaging with United Nations human rights bodies and mechanisms, including special rapporteurs, working groups and treaty bodies in their ongoing monitoring of human rights concerns relating to Indigenous peoples in Canada.

33. AI Canada's expertise in the area of Indigenous rights can be seen in three of its most recent initiatives in this area, as well as its history of prior involvement in issues relating to Indigenous rights.

34. Most recently, AI Canada has been closely involved in the ongoing proceedings relating to a human rights complaint lodged by three groups, including the First Nations Child and Family Caring Society, alleging discrimination in the provision of child welfare services to First Nations children.

35. In 2009, AI Canada was granted interested party status before the Canadian Human Rights Tribunal, to make submissions on the impact of international human rights law on the adjudication of the complaint. After the Attorney General of Canada successfully brought a motion to dismiss the complaint on the basis that the *Canadian Human Rights Act* did not allow for a "comparison" between First Nations children living on reserves and those living off reserves, AI Canada was a party to the complainants' application for judicial review in Federal Court (heard in February 2012, which was granted) and the subsequent appeal to the Federal Court of Appeal by the Attorney General of Canada (heard in March 2013, which was

dismissed). In both the Federal Court and the Federal Court of Appeal, AI Canada made submissions on Canada's obligations under international human rights law – both to children in general, and to Indigenous children in particular, under the *UNDRIP* and other international instruments. The matter has now been returned to the Tribunal. AI Canada made opening submissions in February 2013 and expects to make closing submissions at the end of the proceedings.

36. Another recent example of AI Canada's involvement occurred in February 2012, when AI presented a submission to the United Nations Committee on the Elimination of Racial Discrimination during that treaty body's review of Canada's compliance with its obligations under the *UN Convention on the Elimination of Racial Discrimination.* AI's submission focused on three major areas of concern, one of which was the rights of Indigenous peoples. In particular, AI highlighted the persistent failure of governments in Canada to reach fair and timely resolution of numerous outstanding disputes over Indigenous peoples' rights in lands and resources; the harmful consequences of government negotiation policies based on minimizing recognition and protection of Indigenous peoples' rights, and the lack of adequate interim protection in the context of widespread resource development in the midst of such unresolved claims. AI Canada's Indigenous rights campaigner, Craig Benjamin, was in Geneva when the Canadian delegation appeared before the Committee for review.

37. A final recent example is AI's involvement as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada,* ongoing before the Inter-American Human Rights Commission. AI made submissions on specific state obligations under international human rights standards as they relate to (i) remedying the breach of Indigenous peoples' rights to lands, territories and resources; (ii) providing effective interim protection pending full realization of this remedy; and (iii) resolving competing claims based on principles that are consistent with international human rights law. AI Canada took the lead in AI's involvement in this case.

38. AI Canada's involvement in issues relating to Indigenous rights is longstanding. For example, AI Canada worked closely with the family of Dudley George, who was shot by police at Ipperwash Provincial Park in 1995. AI Canada campaigned for a provincial inquiry into the circumstances surrounding the shooting; acted as an intervener in the policy phase of the

Ipperwash Inquiry and has continued to work for the implementation of the Inquiry recommendations. In 2011, AI Canada published a case study, "I was never so frightened in my entire life: Excessive and dangerous police response during Mohawk land rights demonstrations on the Culbertson Track", examining police institutionalization of the Ipperwash Inquiry recommendations.

39. AI Canada has also been a longstanding advocate for the just resolution of land disputes with Indigenous nations. AI published three reports on the situation of the Lubicon Cree in northern Alberta entitled "Time is wasting: Respect for the land rights of the Lubicon Cree long overdue" (2003), "Land and Life Under Threat: The Lubicon Cree" (2008) and "From Homeland to Oil Sands: The Impact of Oil and Gas Development on the Lubicon Cree of Canada" (2010). The Lubicon Cree have suffered the devastating impacts of more than three decades of intensive oil and gas development carried out with little acknowledgement of their unresolved land claim and without adequate protection of their rights. AI Canada has also published reports on the conflict over logging at Grassy Narrows. In 2007, AI Canada published "The law of the land: Amnesty International Canada's position on the conflict over logging at Grassy Narrows" and in 2009, "A Place to Regain Who We Are: Grassy Narrows First Nation, Ontario." AI Canada is currently completing a major report on the need for greater involvement by Indigenous peoples in the various processes, such as environmental impact assessments, by which the potential merits and risks of proposed resource development projects are evaluated.

40. AI Canada has actively campaigned for the end to violence against Indigenous women. In October 2004, AI published a report on discrimination and violence against Indigenous women in Canada called "Stolen Sisters: Discrimination and Violence Against Indigenous Women in Canada." The report examines the social and economic context of the high rates of violence experienced by Indigenous women in Canada, who are five times more likely than all other women to die as a result of violence. Many factors contribute to this violence, including a long history of discrimination and impoverishment. In 2009, we issued a follow-up report titled "No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada."

41. AI and AI Canada played an active role in the negotiation and adoption of the *UN Declaration on the Rights of Indigenous Peoples* (the "*UNDRIP*"). AI Canada represented AI at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI Canada co-hosted a symposium on national implementation of international norms for Indigenous rights that was attended by the UN Special Rapporteur. Domestically, AI Canada has engaged with the federal government to support the Declaration; co-organized a briefing for Parliamentarians on the implementation of the *UNDRIP* in 2008; and, prior to November 2010, issued numerous public statements on the government of Canada's failure to endorse the Declaration. Now that the *UNDRIP* has been endorsed by Canada, AI Canada's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous people. This work has included presentations to federal and provincial human rights commissions, Parliamentarians and government staff.

42. Work on Indigenous rights in Canada is part of a larger body by AI on Indigenous rights globally, in which AI Canada plays an active role. Recent reports and briefs include:

(a) "Pushed to the Edge: Indigenous rights denied in Bangladesh's Chittagong Hill Tracts" (2013);

(b) "Americas: Governments must stop imposing development projects on Indigenous peoples' territories" (2012);

(c) "India: Vedanta's perspective uncovered: Policies cannot mask practices in Orissa" (2012); and

(d) Amicus curiae brief in the *Case of the Kichwa People of Sarayaku vs. Ecuador*, Submitted Before the Inter-American Court of Human Rights (2011).

43. Furthermore, as a result of our longstanding and ongoing work on the issue of remedies for human rights violations, AI and AI Canada have developed an expertise on the protection and promotion of Indigenous rights, and the relevance of international human rights standards to pressing concerns in Canada.

AI's Interest in this Appeal

44. AI Canada has an active and long-standing interest in protecting the rights of Indigenous peoples in Canada, including rights related to title and land use. AI Canada has raised issues related to Indigenous rights to title and land use in:

(a) "From Homeland to Oil Sands: The Impact of Oil and Gas Development on the Lubicon Cree of Canada" (2010);

(b) "Pushed to the Edge: The land rights of Indigenous Peoples in Canada" (2009);

(c) "Land and Life Under Threat: The Lubicon Cree" (2008); and

(d) "Time is wasting": Respect for the land rights of the Lubicon Cree long overdue" (2003)

The interconnection between Indigenous land rights and title and other internationally protected human rights, including rights to effective participation in decision-making; rights to livelihood, health and culture; and the right to live free from violence and discrimination, is the subject of a forthcoming AI Canada report, "Not to be Sidelined: Why resource development decisions must rigorously uphold the human rights of Indigenous peoples," to be published later this year.

45. As part of AI Canada's larger interest in ensuring Indigenous rights are protected in accordance with Canadian law and international human rights norms and standards, AI Canada has been following the efforts of the Tsilhquot'in people in central British Columbia in respect of land and resource issues for many years. AI Canada's involvement has included writing to the federal Minister of the Environment in support of the recommendations of the Federal Environmental Impact Assessment of the proposed Prosperity Mine, obtaining standing as a party to the forthcoming federal Panel Review of the New Prosperity Project, and raising land rights issues arising in this case before the UN Committee on the Elimination of Racial Discrimination during the 2012 review of Canada.

46. However, the issues raised in this case go beyond the interests of the Tsilhquot'in people. AI Canada has repeatedly witnessed and documented conditions of impoverishment, ill-health,

cultural erosion among Indigenous communities in Canada arising from the failure to protect the land and resource rights on which their cultures and economies fundamentally rely. These conditions are of deep concern to our organization, both because of the individual and collective hardship, suffering and injustice they represent, but also because of the lost opportunity to set positive examples for respect for Indigenous rights that are desperately needed in the international community. We are concerned as well because these injustices continue to occur despite the Constitutional affirmation of Indigenous peoples' rights, and the Supreme Court of Canada's elaboration of principles such as reconciliation and honour of the Crown. Accordingly, we see the case before the Court as an important opportunity to ensure that the promise of aboriginal rights protection set out in the Constitution can be more effectively realized by Indigenous peoples. It is our view that international human rights law and standards provide a crucial tool in achieving this aim.

Overview of the AI's Proposed Submissions

47. AI Canada and the Canadian Friends Service Committee ("CFSC") (together, the "Coalition") are jointly seeking leave to intervene in this appeal. If granted leave to intervene, the Coalition proposes to make submissions on the principles of international law that should be incorporated in further developing and applying the framework for aboriginal rights (and aboriginal title in particular) under Canada's constitution, including section 35 of the *Constitution Act, 1982* (the "*Constitution Act*"). The Coalition's submissions may be summarized as follows.

i. International human rights law is relevant to the issues raised in this appeal

48. This Court has, on multiple occasions, recognized the relevance, persuasiveness and importance of international human rights law when interpreting statutes and the *Charter*. The federal government has also acknowledged the relevance of international human rights standards to the interpretation of domestic laws, including the Constitution. However, it appears that this

Court has yet to apply international human rights law in its analysis of s. 35 of the *Constitution Act*, and in particular on issues relating to aboriginal rights.[1]

49. This appeal presents this Court with an appropriate and timely opportunity to do so, as recent years have seen significant developments in the prevailing international legal norms and standards in the area of aboriginal rights generally, and land and resource rights in particular. The duty to respect Indigenous peoples' lands rights has been recognized as a norm of customary international law. In addition, in September 2007, the U.N. General Assembly adopted the *UNDRIP*, which consolidates and codifies the minimum content of Indigenous peoples' human rights at a global level. Consistent with the purpose and content of the *UNDRIP,* the comments, reports and jurisprudence of various U.N. treaty bodies and the Special Rapporteur on the rights of indigenous peoples have made other U.N. instruments increasingly relevant to the question of aboriginal rights, including the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights,* the *International Covenant on Civil and Political Rights,* and the *Convention on the Rights of the Child.*

50. A number of regional instruments and institutions further reinforce the modern approach to aboriginal rights under international law, such as the *American Declaration of the Rights and Duties of Man,* the *American Convention on Human Rights,* and the jurisprudence of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

51. In light of this Court's regard to international law when interpreting domestic statutes and the *Charter*, its "living tree" approach to constitutional interpretation, its recognition that Indigenous peoples have a special legal and constitutional status, and its recognition that the aboriginal rights enshrined in s. 35 may evolve over time, international human rights law has an important role to play in defining the nature and scope of the aboriginal rights that are affirmed and protected in s. 35 of the *Constitution Act.*

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[1] In these submissions aboriginal rights includes the right to aboriginal title

ii. Framework for recognizing aboriginal title under s. 35 of the *Constitution Act* must be consistent with international human rights law

52. Canada's legal framework for recognizing aboriginal title under s. 35 of the *Constitution Act* must respect and reflect the principles set out in international human rights law. A framework that fails to do so risks leaving Canada behind the international community on the question of recognizing and giving effect to aboriginal title, and undermines the prospects for true reconciliation (discussed further in the following section).

53. A key principle of international human rights law engaged on the facts of this appeal is that the state must not discriminate against Indigenous peoples' customary forms of land ownership and use. The prohibition against racial discrimination is a peremptory norm in international law, and is also included in binding treaties to which Canada is a party. Respect for the principle of non-discrimination requires that traditional systems of land use be taken into account in determining title. To use the distinctiveness of aboriginal culture to limit rights is inconsistent with the principle of non-discrimination. The Inter-American Commission on Human Rights has characterized the failure to protect Indigenous peoples' customary forms of possession and use of the land "one of the greatest manifestations" of racial discrimination.

54. In justifying some of the more problematic approaches to the question of aboriginal rights, courts often invoke the doctrine of "discovery" (or the concept of *terra nullius*). This doctrine is fundamentally incompatible with the principle of non-discrimination under international human rights law, and the concomitant principle that doctrines of superiority are invalid. The time has come to firmly repudiate and jettison the doctrine of discovery. Certainly, the doctrine can no longer be used to justify an impoverished approach to the issue of determining aboriginal title.

55. Indeed, the state has a clear responsibility under international human rights law to provide effective legal protection for Indigenous peoples' customary rights to land. While the standard for proving aboriginal title might be *different* than proving common law title, it must not be so onerous as to deny effective protection of land rights. Indigenous land rights as set out in international law do not depend on conditions such as continuous, uninterrupted occupation, evidence of intensive land use, an intent to use the land only in accordance with the practices of

the past, or other restrictive criteria. Rather, the standard is based simply on evidence of traditional ownership, or other traditional occupation or use of the land.

56. Finally, it must be recognized that the right to aboriginal title plays a crucial role in the safeguarding and development of *other* rights of Indigenous peoples protected by international law, including the right to culture, the right to health and the right to self-determination. This interrelationship further highlights the importance of an approach to aboriginal title that is consistent with the principles of international human rights law, so that these other, related rights are protected instead of undermined.

iii. Understanding of "reconciliation" must be consistent with international human rights principles

57. This Court has stated that reconciliation between Indigenous peoples and the Crown is the "basic promise of s. 35 of the Constitution Act" and that the "fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

58. However, the understanding of "reconciliation" must be built on a foundation of justice, and must be consistent with the principles of international human rights law outlined above. Reconciliation requires a framework for the determination of aboriginal rights that respects the principle of non-discrimination, and accounts for differences in custom and tradition, rather than using them as barriers to title. Reconciliation requires recognizing the history of Indigenous peoples in this country, while also affirming their right to have dynamic cultures that do not simply stay frozen in time. Reconciliation requires a firm commitment to according full legal effect to aboriginal rights, including the affirmation of aboriginal title, in aboriginal cases. Indeed, international human rights law is clear that where a violation of aboriginal rights has been established, restitution is required. Finally, reconciliation and good governance must be based on awareness that respect for the human rights of all – without discrimination – is in the best interest of all Canadians.

59. While consultation and negotiation may be the preferable routes to reconciliation, courts cannot simply rely on federal and provincial governments to voluntarily pursue genuine

reconciliation. True reconciliation – which stands to benefit both Indigenous and non-Indigenous peoples alike – can only occur once a principled framework is established to ensure the full recognition and protection of the rights of Aboriginal peoples, in a manner that respects the principles of international human rights law, the purposes of s. 35 of the Constitution Act, and underlying principles in Canada's Constitution.

AI's Important and Unique Perspective

60. I believe that AI brings an important perspective and approach to the issues raised in this appeal, including the issue of the principles to be applied in determining aboriginal rights (including land rights) under the *Constitution Act*. AI's experience and expertise gives it a unique and important perspective on the issue of how international human rights standards and norms should be taken into account when determining the nature and scope of Indigenous rights, and related state obligations, in Canada's constitutional framework.

61. To my knowledge, none of the other parties or the other proposed interveners will address the issues raised in this appeal from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation.

62. In this way, the Coalition will bring an important and unique perspective to this appeal – namely, that of a broad segment of Canadian civil society that supports human rights (and Indigenous rights), and believes that society as a whole benefits from the fulfilment and protection of the rights of all sectors of society. This is a perspective that this Court has rarely had the opportunity to hear from in cases involving Indigenous rights.

63. AI Canada is uniquely positioned as an international, non-governmental organization to bring a truly international perspective to this case, given our experience, expertise and history in dealing with issues concerning human rights, Indigenous rights and international law.

64. AI has extensive knowledge of the international norms that are relevant in this case, including the *UNDRIP*, the *UDHR*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of Racial Discrimination*. AI also has

extensive knowledge of the decisions, comments and reports issued by the treaty bodies responsible for monitoring the implementation of these instruments, UN Special Rapporteurs, and other international institutions dealing with Indigenous rights, including the Inter-American Commission on Human Rights, Inter-American Court of Human Rights and African Commission on Human and Peoples' Rights.

65. If granted leave to intervene, AI Canada will be mindful of submissions made by the parties and other interveners and will not duplicate argument and materials before the Court.

66. I make this affidavit in support of the Coalition's application to intervene in this appeal and for no other or improper purpose.

SWORN BEFORE ME at the City of Ottawa in the Province of Ontario this 4th day of July, 2013

A Commissioner for Taking Affidavits

MICHAEL BOSSIN
Barrister & Solicitor

ALEX NEVE, O.C.

TAB 3

Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT
(RESPONDENTS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(APPELLANTS)

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC,
THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

AFFIDAVIT OF JENNIFER PRESTON

(in support of the application for intervention of Amnesty International and Canadian Friends Service Committee)

I, **JENNIFER PRESTON,** of the City of Guelph in the Province of Ontario, do solemnly affirm and state as follows:

1. I am the Program Coordinator for the Quaker Aboriginal Affairs Committee of the Canadian Friends Service Committee ("CFSC") and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe to be true.

2. I was hired by CFSC as the Program Coordinator for the Quaker Aboriginal Affairs Committee in 1997. Prior to assuming this position I had been an active member of the Quakers for 40 years, and have been employed by CFSC since 1996.

3. In my current role as Program Coordinator for the Quaker Aboriginal Affairs Committee, I participate in the planning, implementing, monitoring, evaluating and developing of CFSC initiatives and plans put forward by the Committee at the local, national and international levels. My work emphasizes monitoring international standard setting in the context of Indigenous peoples' human rights and the implementation of the *UN Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

4. In addition to my role at CFSC, I have contributed to and co-edited a book on Indigenous rights (*Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, Purich Publishing Ltd., 2010), and I was a lecturer in Canadian Studies at the University of Waterloo.

5. Since 2008, I have been contracted each year to write the review chapter on Canada for the International Year Book on the World's Indigenous Peoples; *The Indigenous World,* International Work Group for Indigenous Affairs (IWGIA), Copenhagen.

6. Following my keynote presentation on the UN Declaration at Trent University, I co-authored "The UN Declaration on the Rights of Indigenous Peoples—Partnerships to Advance Human Rights" in Lynne Davis, Ed., *Alliances: Re/Envisioning Indigenous-non-Indigenous Relationships*. University of Toronto Press, 2010.

7. In 2007, I was the lead writer on *The UN Special Rapporteur: Indigenous Peoples Rights – Experiences and Challenges* (International Centre for Human Rights and Democratic Development, International Work Group for Indigenous Affairs (IWGIA), Tebtebba Foundation and Canadian Friends Service Committee).

8. During the past decade I have presented numerous times both nationally and internationally at academic and other forums on a diverse range of topics related to Indigenous peoples' rights, including the *UN Declaration on the Rights of Indigenous Peoples*.

9. I hold degrees from McMaster University (BA, Hons.) and the University of Guelph (MA).

CFSC: The Organization

10. The Religious Society of Friends ("Quakers") arose in England 365 years ago.

11. CFSC was established in 1931, and is the peace and service agency of Quakers in Canada. CFSC has 21 members on its board of directors, 5 staff members, and a membership of approximately 2,000. CFSC has three program committees that develop and direct the group's work in Canada, including the Quaker Aboriginal Affairs Committee.

12. There are currently close to 400,000 members of Quakers in over 75 countries.

13. CFSC is impartial and independent of any government or political persuasion. CFSC is financed by subscriptions and donations from its membership and supporters, and currently receives no government funding.

CFSC: The Vision

14. CFSC is guided by a vision of a world in which: peace and justice prevail, the causes of war and oppression are removed, the whole of Creation is treated with respect, and individuals and communities are freed to reach their fullest potential.

15. CFSC works with a wide range of partners at the international, national and community levels to bring about their vision of long-term sustainable changes in our world.

16. For over 80 years, in pursuit of this vision, the CFSC has engaged in a wide variety of work including service projects, engaging with governmental and other decision-makers, research and education, and policy dialogue.

17. In 1947, Quakers, represented by two sister Quaker service organizations of CFSC, Friends Service Council in Britain and American Friends Service Committee in the USA, were awarded the Nobel Peace Prize for their humanitarian service work particularly during times of war.

CFSC's Interest, Experience and Expertise in Protecting Indigenous Rights

18. CFSC's work in relation to Indigenous issues focuses on human rights and non-discrimination, land rights and self-determination, Indigenous peoples' human rights as elaborated in the *UN Declaration on the Rights of Indigenous Peoples*, and Indigenous rights protected under the Canadian Constitution.

19. CFSC has had a long-standing concern for the rights of Indigenous peoples.

20. The formal beginnings of work on Indigenous issues within CFSC began in 1974. CFSC's concerns were expressed in a minute recorded by the Canadian Yearly Meeting, which stated: "a confrontation between the Ojibway people of the [Kenora] area and various levels of government...has occupied our hearts and minds. We are concerned that active violence not erupt; and equally concerned that long standing grievances be understood, and all measures of settlement of those grievances be encouraged..." Members of CFSC went to Kenora to be a presence and to hear firsthand the long standing grievances concerning land rights, housing, medical care, education, Indigenous spirituality, child welfare, and mercury poisoning. A physician member of CFSC went there to treat Indigenous people suffering from mercury poisoning and to document the problem.

21. CFSC's Quaker Committee on Native Concerns (now Quaker Aboriginal Affairs Committee) was born out of this work and work amongst CFSC members in western Canada. Since then the Committee has supported Indigenous community building initiatives, and urged governments to live up to their legal commitments to Indigenous communities including Grassy Narrows in Ontario, Attawapiskat in northern Ontario, Esgenoopetitj (Burnt Church) in New Brunswick, Pimicikamac Cree Nation in northern Manitoba, Passamaquoddy in New Brunswick, and the Lubicon Cree in northern Alberta.

22. In the 1990s and 2000s, CFSC worked with Indigenous partners and others, such as Amnesty International Canada, during the negotiations of the *UN Declaration on the Rights of Indigenous Peoples*. In particular, CFSC closely monitored progress towards achieving the Declaration, and made numerous public statements concerning that progress, as well as Canada's position on the Declaration.

23. In 2006, CFSC co-hosted a symposium on national implementation of international norms for Indigenous rights that was attended by the UN Special Rapporteur on the Rights of Indigenous Peoples. CFSC also co-hosted an international expert seminar on the implementation of recommendations of the Special Rapporteur, at his request.

24. The UN adopted the Declaration in 2007, and CFSC now focuses on its implementation. It has made a number of statements concerning the impact of the Declaration on various aspects of Indigenous rights, and the implications of the Declaration for various actors, including state governments and international institutions (such as the UN). Members of CFSC, including myself, have written extensively on the Declaration.

25. CFSC has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Indigenous peoples as recognized in both Canadian law and international human rights standards, and the dire consequences that this has had for the health, safety, well-being and cultural integrity of Indigenous societies in Canada. Through our collaboration with Indigenous peoples' representatives and organizations, we have documented and helped draw attention to violation of land rights, unjust treatment of Indigenous activists engaged in protest in

defense of their land rights, and unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities.

26. Recent examples of CFSC's interest and experience in the area of Indigenous peoples' rights include:

(a) Endorsing a letter released by Indigenous and human rights organizations, and signed by 50 lawyers and academics, to end the "campaign to erode the constitutional and legal status of Aboriginal and Treaty rights in Canada" (January 2013);

(b) Writing an open letter to the Government of Canada on the anniversary of Canada's endorsement of the *UN Declaration on the Rights of Indigenous Peoples*, emphasizing the need for an honourable approach (November 2011);

(c) Writing to provincial governments and making public statements in support of the Lubicon Cree of Northern Alberta and their ongoing land disputes with the Government of Canada and the Government of Alberta concerning decades of unwanted oil and gas development on their lands (May 2006 – present);

(d) Publicly urging the Government of Ontario, the forestry company Weyerhaeuser and other corporations to respect international human rights standards in their dealings with the Grassy Narrows and White Dog communities in Ontario, and in particular the requirement of free, prior and informed consent of Indigenous peoples for decisions that affect their land and resource rights (October 2010);

(e) Writing a joint letter to the Prime Minister and Minister of Public Safety with regard to the concern of arming border guards in the Mohawk Akwesasne community (June 10, 2009);

(f) Writing a joint letter to the Minister of Canadian Heritage and Official Languages concerning the consultation process for Canada's Universal Periodic Review at the United Nations, and specifically Canada's failure to consult with Indigenous organizations or civil society throughout the process (May 2009);

(g) Making an oral presentation to the Senate Standing Committee on Foreign Affairs with regard to Canada's first appearance before the Human Rights Council Universal Periodic Review (2009); and

(h) Writing joint submissions (together with Amnesty International Canada) on the provincial government's review of the *Ontario Provincial Mining Act*, in response to the Kitchenuhmaykoosib Inninuwug KI and Ardoch First Nations objection to mining on their territories (October 15, 2008).

27. In addition, CFSC has issued a number of joint statements on Indigenous rights issues, including on:

(a) Canada's appearance at the Universal Periodic Review ("World community urges comprehensive response to human rights violations facing Indigenous peoples in Canada") in April 2013;

(b) the Idle No More movement, along with more than 40 Indigenous and human rights organizations ("Joint Statement Supporting Chief Spence and Idle No More" in January 2013;

(c) the 5th anniversary of the adoption of the UN Declaration ("Fifth anniversary of United Nations Declaration on the Rights of Indigenous Peoples: protection of Indigenous peoples' rights to lands, territories and resources more urgent than ever") in September 2012;

(d) the Committee on the Elimination of Racial Discrimination's review of Canada ("UN Committee calls for "comprehensive strategy" to uphold the human rights of Indigenous peoples in Canada") in March 2012;

(e) the Attawapiskat housing crisis in Northern Ontario, and the larger human rights issues concerning Indigenous peoples that it represents (December 2011);

(f) the case of the Hul'qumi'num Treaty Group at the Organization of American States ("Human rights groups and Indigenous peoples' organizations will closely monitor landmark international hearing into Canadian land rights case") in October 2011;

(g) the rights of Indigenous children in Canada ("Children's rights denied by indifference and legal technicalities: Indigenous peoples and human rights organizations call for an immediate end to discrimination against First Nations families") in April 2011; and

(h) supporting the *UN Declaration on the Rights of Indigenous Peoples* ("Supportive Statements Worldwide") in September 2009.

28. CFSC also has significant experience with Indigenous rights issues at the international level, and advances its interest in protecting Indigenous peoples' human rights by participating in various international forums. In this context, CFSC has had and hosted substantive meetings with Ambassadors and other state representatives, UN agencies, and Indigenous representatives from around the world.

29. In October 2012, CFSC partnered with other groups to issue a Joint Submission to the United Nations Human Rights Council in regard to the Universal Periodic Review Concerning Canada (Second Cycle). This Joint Submission focused on Indigenous peoples' human rights and concerns about the Canadian government's treatment of those rights as compared to the standards set by international instruments, including the *UN Declaration on the Rights of Indigenous Peoples*.

30. In February 2012, CFSC partnered with other groups to issue a Joint Submission to the Committee on the Elimination of Racial Discrimination (CERD), the UN Treaty Body that oversees the state compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination.* This submission examined Canada's human rights obligations as a party to the Convention and in relation to the *UN Declaration on the Rights of Indigenous Peoples*. CFSC made an oral presentation to CERD at its formal NGO hearings in advance of Canada's review.

31. In addition, CFSC has attended the UN Permanent Forum on Indigenous Issues in New York since its inception in 2002. CFSC works with partners to raise issues of concern relating to the human rights of Indigenous peoples, including the implementation of the *UN Declaration on the Rights of Indigenous Peoples*. At the most recent Permanent Forum (May 2013), CFSC joined other groups in making statements on the Doctrine of Discovery; the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*; violence against Indigenous women; and the importance of Indigenous languages and cultures.

32. CFSC also annually attends the meetings in Geneva of the UN Expert Mechanism on the Rights of Indigenous Peoples (a panel of five independent experts designed to provide the UN Human Rights Council with thematic expertise on the rights of Indigenous peoples in the manner and form requested by the Council) (the "EMRIP"), working alongside Indigenous partners and others, to advance Indigenous peoples' human rights. In the most recent session (July 2012), CFSC joined with other groups in issuing: submissions on the implementation of the *UN Declaration on the Rights of Indigenous Peoples*; a response to the EMRIP report on Indigenous peoples and the right to participate in decision making,

with a focus on extractives; a response to the EMRIP study on the role of languages and culture in the promotion and protection of the rights and identity of Indigenous peoples; and a statement on the upcoming World Conference on Indigenous Peoples.

33. CFSC has monitored and attended the negotiations of the Organization of American States Working Group to develop a draft *American Declaration on the Rights of Indigenous Peoples*. This is a regional human rights instrument to complement the *UN Declaration on the Rights of Indigenous Peoples*.

34. CFSC has also monitored other international mechanisms whose work affects Indigenous peoples' human rights and participated in joint submissions to these bodies. This includes the Convention on Biological Diversity, the World Intellectual Property Organization, UNESCO, and the Food and Agriculture Organization.

35. More generally, since 1948, Quakers – through the Quaker United Nations Office (QUNO) in Geneva and New York – have been promoting CFSC's concerns at the United Nations, and are currently one of only 130 non-governmental organizations to have acquired "general consultative status" by the Economic and Social Council (ECOSOC).

CFSC's Interest in this Appeal

36. CFSC has an active and long-standing interest in protecting the rights of Indigenous peoples in Canada, including rights related to title and land use. CFSC has raised issues related to Indigenous rights to title and land use in many different joint statements and submissions, including most recently our joint submission to the UN Permanent Forum on Indigenous Issues 2013 on the doctrine of discovery and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, as well as our joint submission to EMRIP 2012 on the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, specifically detailing issues around title and the doctrine of discovery (both discussed above).

37. As part of its more general interest in protecting the rights of Indigenous peoples in Canada, CFSC has been closely following the struggle of the Tsilhquot'in people in central British Columbia for several years. I have reported on it in my annual review of Canada published in *The Indigenous World* (IWGIA), and CFSC has discussed the case in its submissions to EMRIP in 2012 and its submissions to the UN Permanent Forum on Indigenous Issues in 2013.

38. CFSC also has a strong interest in the process of reconciliation. Quakers have been involved in organizing local Truth and Reconciliation Commission events and volunteering at national events. CFSC has developed resources to help educate Quakers and encourage them to engage with the critical work of reconciliation.

39. CFSC has repeatedly witnessed and documented conditions of impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada arising from the failure to protect the land and resource rights on which their cultures and economies fundamentally rely. These conditions are of deep concern to our organization, both because of the individual and collective hardship, suffering and injustice they represent, but also because of the lost opportunity to set positive examples for respect for Indigenous rights that are desperately needed in the international community. We are concerned as well because these injustices continue to occur despite the Constitutional affirmation of Indigenous peoples' rights, and the Supreme Court of Canada's elaboration of principles such as reconciliation and honour of the Crown. Accordingly, we see the case before the Court as an important opportunity to ensure that the promise of aboriginal rights protection set out in the Constitution can be more effectively realized by Indigenous peoples. It is our view that international human rights law and standards provide a crucial tool in achieving this aim.

Overview of Amnesty International and CFSC's Proposed Submissions

40. Amnesty International and the CFSC (together, the "Coalition") are jointly seeking leave to intervene in this appeal. If granted leave to intervene, the Coalition proposes to make submissions on the principles of international law that should be incorporated in further developing and applying the framework for aboriginal rights (and aboriginal title in

particular) under Canada's constitution, including section 35 of the *Constitution Act, 1982* (the "*Constitution Act*"). The Coalition's submissions may be summarized as follows.

i. International human rights law is relevant to the issues raised in this appeal

41. This Court has, on multiple occasions, recognized the relevance, persuasiveness and importance of international human rights law when interpreting statutes and considering provisions of the *Charter*. The federal government has also acknowledged the relevance of international human rights standards to the interpretation of domestic laws, including the Constitution. However, it appears that this Court has yet to apply international human rights law in its analysis of s. 35 of the *Constitution Act*, and in particular on issues relating to aboriginal rights.

42. This appeal presents this Court with an ideal opportunity to do so, as recent years have seen significant developments in the prevailing international legal norms and standards in the area of aboriginal rights generally, and land and resource rights in particular. The duty to respect Indigenous peoples' lands rights has been recognized as a norm of customary international law. In addition, in September 2007, the UN General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (*"UNDRIP"*), which consolidates and codifies the minimum content of Indigenous peoples' human rights at a global level. Consistent with the purpose and content of the *UNDRIP,* the comments, reports and other jurisprudence of various UN treaty bodies and the Special Rapporteur on the rights of indigenous peoples have made other UN instruments increasingly relevant to the question of aboriginal rights, including the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights,* the *International Covenant on Civil and Political Rights,* the *Convention on the Rights of the Child.*

43. A number of regional instruments and institutions further reinforce the modern approach to aboriginal rights under international law, such as the *American Declaration of the Rights and Duties of Man,* the *American Convention on Human Rights,* and the jurisprudence of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights.

44. In light of this Court's regard to international law when interpreting domestic statutes and the *Charter*, its "living tree" approach to constitutional interpretation, its recognition that Indigenous peoples have a special legal and constitutional status, and its recognition that the aboriginal rights enshrined in s. 35 may evolve over time, international human rights law has an important role to play in defining the nature and scope of the aboriginal rights that are affirmed and protected in s. 35 of the *Constitution Act.*

ii. Framework for recognizing aboriginal title under s. 35 of the *Constitution Act* must be consistent with international human rights law

45. Canada's legal framework for recognizing aboriginal title under s. 35 of the *Constitution Act* must respect and reflect the principles set out in international human rights law. A framework that fails to do so risks leaving Canada behind the international community on the question of recognizing and giving effect to aboriginal title, and undermines the prospects for true reconciliation (discussed further in the following section).

46. A key principle of international human rights law engaged on the facts of this appeal is that the state must not discriminate against Indigenous peoples' customary forms of land ownership and use. The prohibition against racial discrimination is a peremptory norm in international law, and is also included in binding treaties to which Canada is a party. Respect for the principle of non-discrimination requires that traditional systems of land use be taken into account in determining title. To use the distinctiveness of aboriginal culture to limit rights is inconsistent with the principle of non-discrimination. The Inter-American Commission on Human Rights has characterized the failure to protect Indigenous peoples' customary forms of possession and use of the land "one of the greatest manifestations" of racial discrimination.

47. In justifying some of the more problematic approaches to the question of aboriginal rights, courts often invoke the doctrine of "discovery" (or the concept of *terra nullius*). This doctrine is fundamentally incompatible with the principle of non-discrimination under international human rights law, and the concomitant principle that doctrines of superiority are invalid. The time has come to firmly repudiate and jettison the doctrine of

discovery. Certainly, the doctrine can no longer be used to justify an impoverished approach to the issue of determining aboriginal title.

48. Indeed, the state has a clear responsibility under international human rights law to provide effective legal protection for Indigenous peoples' customary rights to land. While the standard for proving aboriginal title might be *different* than proving common law title, it must not be so onerous as to deny effective protection of land rights. Indigenous land rights as set out in international law do not depend on conditions such continuous, uninterrupted occupation, evidence of intensive land use, an intent to use the land only in accordance with the practices of the past, or other imposed criteria. Rather, the standard is based simply on evidence of traditional ownership, or other traditional occupation or use of the land.

49. Finally, it must be recognized that the right to aboriginal title plays a crucial role in the safeguarding and development of *other* rights of Indigenous peoples protected by international law, including the right to culture, the right to health and the right to self-determination. This interrelationship further highlights the importance of an approach to aboriginal title that is consistent with the principles of international human rights law, so that these other, related rights are protected instead of undermined.

iii. Understanding of "reconciliation" must be consistent with international human rights principles

50. This Court has stated that reconciliation between Indigenous peoples and the Crown is the "basic promise of s. 35 of the Constitution Act" and that the "fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

51. However, the understanding of "reconciliation" must be built on a foundation of justice, and must be consistent with the principles of international human rights law outlined above. Reconciliation requires a framework for the determination of aboriginal rights that respects the principle of non-discrimination, and accounts for differences in custom and tradition, rather than using them as barriers to title. Reconciliation requires

recognizing the history of Indigenous peoples in this country, while also affirming their right to have dynamic cultures that do not simply stay frozen in time. Reconciliation requires a firm commitment to according full legal effect to aboriginal rights, including the affirmation of aboriginal title, in aboriginal cases. Indeed, international human rights law is clear that where a violation of aboriginal rights has been established, restitution is required. Finally, reconciliation and good governance must be based on awareness that respect for the human rights of all – without discrimination – is in the best interest of all Canadians.

52. While consultation and negotiation may be the preferable routes to reconciliation, courts cannot simply rely on federal and provincial governments to voluntarily pursue genuine reconciliation. True reconciliation – which stands to benefit both Indigenous and non-Indigenous peoples alike – can only occur once a principled framework is established to ensure the full recognition and protection of the rights of Aboriginal peoples, in a manner that respects the principles of international human rights law, the purposes of s. 35 of the Constitution Act, and underlying principles in Canada's Constitution.

CFSC's Important and Unique Perspective

53. I believe that CFSC brings an important perspective and approach to the issues raised in this appeal, including the issue of the principles to be applied in determining aboriginal rights (including land rights) under the *Constitution Act*. CFSC's experience and expertise gives it a particularly unique and important perspective on the issue of how international human rights standards and norms should be taken into account when determining the nature and scope of Indigenous rights, and related state obligations, in Canada's constitutional framework.

54. To my knowledge, none of the other parties or the other proposed interveners will address the issues raised in this appeal from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation.

55. In this way, the Coalition will bring an important and unique perspective to this appeal – namely, that of a broad segment of Canadian civil society who support respect for human rights (including Indigenous rights), and believes that society as a whole benefits from the fulfilment and protection of the rights of all sectors of society. This is a perspective that this Court has rarely had the opportunity to hear from in cases involving Indigenous rights.

56. CFSC is also uniquely positioned as an international, faith-based, non-governmental organization to bring a truly international perspective to this case, given its experience, expertise and history in dealing with issues concerning human rights, Indigenous rights and international law.

57. CFSC has extensive knowledge of international norms that are relevant in this case, including the *UN Declaration on the Rights of Indigenous Peoples,* the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights,* the International Labour Organization's *Indigenous and Tribal Peoples Convention, 1989* (Number 169) and the *International Convention on the Elimination of All Forms of Racial Discrimination.* CFSC also has extensive knowledge of the decisions, comments and reports issued by the treaty bodies responsible for monitoring the implementation of these instruments, as well as regional institutions dealing with Indigenous rights, including the Inter-American Commission on Human Rights, Inter-American Court of Human Rights and African Commission on Human and Peoples' Rights.

58. If granted leave to intervene, the Coalition will be mindful of submissions made by the parties and other interveners and will not duplicate argument or materials before the Court.

59. I make this affidavit in support of the Coalition's application to intervene in this appeal and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Toronto in the Province of Ontario this 3 day of July, 2013

A Commissioner for Taking Affidavits

JENNIFER PRESTON

TAB 4

Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT
(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(APPELLANTS)

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC, and
THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

MEMORANDUM OF ARGUMENT

(IN SUPPORT OF THE APPLICATION FOR INTERVENTION OF AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE)

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PART I—FACTS

A. Overview

1. Amnesty International ("AI") and Canadian Friends Service Committee ("CFSC") (together, the "Coalition") seek leave to intervene in this appeal to make submissions on how Canada's obligations under international law impact the framework governing the recognition of aboriginal title under section 35 of the *Constitution Act, 1982*. AI and CFSC bring a unique and important perspective to these issues, both by virtue of their extensive expertise in international human rights issues, and because of their status as non-governmental, non-Indigenous, non-corporate, human rights organizations that represent a broad segment of Canadian society who are deeply concerned about Indigenous rights and the need for true reconciliation.

B. The Coalition's background

2. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of fundamental human rights. It is impartial and independent of any government, political persuasion or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding. Currently, there are close to 3 million members of AI in over 162 countries around the world, including 60,000 members and supporters across Canada. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.[1]

3. AI's policies and priorities are determined democratically by its members at the national and international levels. In June 2013, AI members in Canada passed a resolution affirming the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*") as the "central framework for our human rights work on the human rights of Indigenous Peoples in Canada" and stating that "respect for the human rights of Indigenous peoples is indispensable for the reconciliation of Indigenous and non-Indigenous peoples in Canada." Ultimately, AI's vision is of a world in which people can freely enjoy the human rights enshrined in the *Universal Declaration of Human Rights* and other human rights instruments, including the *UNDRIP*.[2]

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[1] **Affidavit of Alex Neve, O.C., sworn July 4, 2013** ("Neve Affidavit"), Application for Leave to Intervene of Amnesty International and Canadian Friends Service Committee ("Application"), Tab 2 at paras. 8-12, 16

[2] **Neve Affidavit**, Application, Tab 2 at paras. 13-14

4. AI has acted as an intervener in dozens of matters before this Court, provincial appellate and trial courts, the federal courts and various tribunals.[3] AI has also participated in legislative proceedings, and made submissions before a number of international organizations on issues of human rights and, in particular, the human rights of Indigenous peoples.[4]

5. CFSC was established in 1931, and is the peace and service agency of Quakers in Canada. There are currently close to 400,000 members of Quakers in over 75 countries, and approximately 2,000 members of CSFC. CFSC is impartial and independent of any government or political persuasion. It is financed by subscriptions and donations from its membership and supporters, and currently receives no government funding. In 1947, Quakers, represented by two sister Quaker service organizations of CFSC, were awarded the Nobel Peace Prize for their humanitarian service work during the war.[5]

6. CFSC is guided by a vision of a world in which peace and justice prevail and individuals and communities are freed to reach their fullest potential. CFSC has three program committees that develop and direct the group's work in Canada towards achieving this vision, including the Quaker Aboriginal Affairs Committee.[6]

C. The Coalition's experience and expertise in Indigenous rights issues

7. AI's work in the area of Indigenous rights is extensive and longstanding.[7] In particular, AI has significant experience on matters relating to the application of international legal principles and standards to questions of Indigenous rights, including land rights. Most recently, AI has been involved in making submissions on international law as an interested party in ongoing proceedings before the Canadian Human Rights Tribunal relating to a human rights complaint alleging discrimination in the provision of child welfare services to First Nations children.[8] At the international level, AI presented a submission to the UN Committee on the Elimination of Racial Discrimination ("CERD") during that treaty body's review of Canada's compliance with its obligations under the *International Convention on the Elimination of All*

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[3] **Neve Affidavit**, Application, Tab 2 at paras. 18-27

[4] **Neve Affidavit**, Application, Tab 2 at paras. 29-30

[5] **Affidavit of Jennifer Preston affirmed July 3, 2013** ("Preston Affidavit"), Application, Tab 3 at para. 11-13, 17

[6] **Preston Affidavit**, Application, Tab 3 at paras. 11, 14

[7] **Neve Affidavit**, Application, Tab 2 at paras. 32, 38-42

[8] See, for example, *Attorney General of Canada v Canadian Human Rights Commission et al.*, 2013 FCA 75

Forms of Racial Discrimination ("*ICERD*"), with AI's submission focusing on the rights of Indigenous peoples (including land and resource rights). And, in AI's role as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada* before the Inter-American Court on Human Rights, AI made submissions on specific state obligations under international human rights standards related to the breach of Indigenous peoples' rights to land.[9]

8. AI has also been a longstanding advocate for the just resolution of land disputes with Indigenous nations, publishing a number of reports on the issue, both in Canada and abroad.[10]

9. CFSC's expertise and experience in the area of Indigenous rights is also extensive. CFSC has actively participated in matters before a range of international institutions. In October 2012, CFSC partnered with other groups to issue a Joint Submission to the UN Human Rights Council, which focused on Indigenous peoples' human rights and concerns about the Canadian government's treatment of those rights in light of the standards set by international instruments, including the *UNDRIP*. In February 2012, CFSC partnered with other groups to issue a Joint Submission to the CERD, on the issue of Canada's human rights obligations as a party to the *ICERD* and in relation to the *UNDRIP*.[11]

10. CSFC has also attended the UN Permanent Forum on Indigenous Issues in New York since its inception in 2002. At the most recent Permanent Forum in May 2013, CFSC joined other groups in making statements on the doctrine of discovery and the implementation of the *UNDRIP*. CFSC also participated in the most recent session of the UN Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") in July 2012, where CFSC joined with other groups in issuing submissions on the implementation of the *UNDRIP*.[12]

11. Finally, CFSC has monitored and attended the negotiations of the Organization of American States Working Group to develop a draft *American Declaration on the Rights of Indigenous Peoples*, and has also monitored and participated before other international mechanisms whose work affects Indigenous peoples' human rights.[13]

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[9] **Neve Affidavit**, Application, Tab 2 at paras. 34-37

[10] **Neve Affidavit**, Application, Tab 2 at paras. 39, 42, 44

[11] **Preston Affidavit**, Application, Tab 3 at paras. 29-30

[12] **Preston Affidavit**, Application, Tab 3 at paras. 31-32

[13] **Preston Affidavit**, Application, Tab 3 at paras. 33-34

12. Both members of the Coalition have extensive knowledge about the impact of *UNDRIP* and other relevant international law instruments on questions of Indigenous rights. Up until 2007 the Coalition played an active role in the negotiation and adoption of the *UNDRIP*. Now that the *UNDRIP* has been adopted the Coalition's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous people.[14]

D. The Coalition's interest in this appeal

13. The Coalition has an active and long-standing interest in protecting the rights of Indigenous peoples in Canada, including rights related to title and land use. The Coalition has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Indigenous peoples as recognized in both Canadian domestic law and international human rights standards, and the dire consequences that this has had for the health, safety, well-being and cultural integrity of Indigenous societies in Canada.[15]

14. As part of the Coalition's larger interest in ensuring Indigenous rights are protected in accordance with Canadian law and international human rights norms and standards, the Coalition has been following the efforts of the Tsilhquot'in people in central British Columbia in respect of land and resource issues for many years.[16]

15. However, the issues raised in this appeal go beyond the interests of the Tsilhquot'in people. The Coalition has repeatedly witnessed and documented conditions of impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada arising from the failure to protect the land rights on which their cultures and economies fundamentally rely. These conditions are of deep concern to the Coalition, not only because of the individual and collective hardship, suffering and injustice they represent, but also because these injustices continue to occur despite the constitutional affirmation of Indigenous peoples' rights. Accordingly, the Coalition considers case before the Court as an important opportunity to ensure that the promise of aboriginal rights protection set out in the Constitution is more effectively realized by Indigenous peoples, in a manner consistent with international human rights law and standards.[17]

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[14] **Neve Affidavit**, Application, Tab 2 at para. 41; **Preston Affidavit**, Application, Tab 3 at paras. 22-28

[15] **Neve Affidavit**, Application, Tab 2 at paras. 31, 44; **Preston Affidavit**, Application, Tab 3 at paras. 25, 36

[16] **Neve Affidavit**, Application, Tab 2 at para. 45; **Preston Affidavit**, Application, Tab 3 at para. 37

[17] **Neve Affidavit**, Application, Tab 2 at para. 46; **Preston Affidavit**, Application, Tab 3 at paras. 25, 36

E. The Coalition's unique perspective on the issues raised in this appeal

16. The Coalition is uniquely positioned to bring a truly international perspective to this case, given its breadth of experience and history in issues concerning human rights, including Indigenous rights, and international law. In particular, the Coalition has extensive knowledge of the relevant international instruments; the decisions, comments and reports issued by the treaty bodies responsible for monitoring the implementation of those instruments; and the jurisprudence of international institutions dealing with Indigenous rights, including the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.[18]

17. Moreover, none of the other parties (or the other proposed interveners) will address the issues raised in this appeal from the perspective of an international, non-governmental, non-Indigenous, human rights organization, without any corporate affiliation.[19] In this way, the Coalition will bring an important and unique perspective to this appeal: that of a broad segment of Canadian civil society that supports human rights, including Indigenous rights; believes that society as a whole benefits from the fulfillment and protection of the rights of all sectors of society; and believes that the proper recognition of Indigenous rights must occur in order to truly achieve reconciliation, which will stand to benefit all Canadians. This is a perspective that this Court has rarely had the opportunity to hear from in cases involving Indigenous rights.[20]

PART II—QUESTIONS IN ISSUE

18. The question on this motion is whether the Coalition should be granted leave to intervene in this appeal.

PART III—ARGUMENT

19. Leave to intervene may be granted where a party has an interest in the subject matter before the Court and will be able to make submissions that are useful to the Court and different from those of the other parties.[21]

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[18] **Neve Affidavit**, Application, Tab 2 at paras. 63, 64; **Preston Affidavit**, Application, Tab 3 at paras. 56, 57

[19] **Neve Affidavit**, Application, Tab 2 at para. 61; **Preston Affidavit**, Application, Tab 3 at para. 54

[20] **Neve Affidavit**, Application, Tab 2 at paras. 58-59, 62; **Preston Affidavit**, Application, Tab 3 at para. 55

[21] *Rules of the Supreme Court of Canada*, Rules 55 to 57; *Reference re Workers' Compensation Act*, [1989] 2 SCR 335 at 339, 340 [*Workers' Compensation*]; *R v Finta*, [1993] 1 SCR 1138 at 1142 [*Finta*]

A. The Coalition has a strong and legitimate interest in this appeal

20. Any interest in an appeal is sufficient to support an application for intervener status, subject always to the discretion of the Judge hearing the motion.[22]

21. As demonstrated above, the Coalition has a long-standing and deep commitment to the protection of Indigenous peoples' human rights, including land rights. The issue of how Indigenous rights are to be properly determined and realized in a manner that respects the relevant standards and norms under international law, and advances genuine reconciliation, has been a centre-piece of the Coalition's work for many years. The Coalition has demonstrated its interest in these issues by its advocacy in various fora, including government committees, courts, tribunals and international institutions, as well as through public education and community outreach work.

B. The Coalition will make unique and useful submissions

22. The Coalition will bring a unique perspective and approach to the issues raised in this appeal in at least two ways.[23] First, the Coalition has a depth of expertise and experience in the prevailing standards and norms governing Indigenous rights under international human rights law. Second, the Coalition represents the collective view of a broad segment of Canadian society that is concerned about Indigenous rights, and the need to have those rights properly respected and recognized before true reconciliation with Indigenous peoples can occur. The following is a summary of the Coalition's proposed submissions.[24]

i. International human rights law is relevant to the issues raised in this appeal

23. This Court has, on multiple occasions, recognized the relevance, persuasiveness and importance of international human rights law when interpreting statutes and the *Charter*. The federal government has also acknowledged the relevance of international human rights standards to the interpretation of domestic laws, including the Canadian Constitution.[25] However, it appears that this Court has yet to apply international human rights law in its analysis of s. 35 of

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[22] *Workers' Compensation*, at 339; *Finta*, at 1143-44

[23] The issues raised by the Coalition are not new, and have been raised by the parties: see Appellant's factum at paras. 105, 191

[24] **Neve Affidavit**, Application, Tab 2 at paras. 47-59; **Preston Affidavit**, Application, Tab 3 at paras. 40-52

[25] Committee on the Elimination of Racial Discrimination, 18th session, Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada (March 2012) at para. 39

the *Constitution Act, 1982* (the "*Constitution Act*")[26] and in particular on issues relating to aboriginal rights (including the right to aboriginal title).

24. This appeal presents this Court with an appropriate and timely opportunity to do so. Recent years have seen significant developments in the prevailing international legal norms relating to aboriginal rights generally, and land and resource rights in particular. The duty to respect Indigenous peoples' lands rights has now been recognized as a norm of customary international law.[27] In addition, in September 2007, the UN General Assembly adopted the *UNDRIP*, which consolidates and codifies the minimum content of Indigenous peoples' human rights at a global level.[28] Comments, reports and other jurisprudence of various treaty bodies, as well as the Special Rapporteur on the rights of indigenous peoples, set out a body of norms and standards consistent with the purpose and content of the *UNDRIP*. A number of regional instruments and institutions further reinforce the modern approach to aboriginal rights under international law, such as the *American Declaration of the Rights and Duties of Man,* the *American Convention on Human Rights,* and the jurisprudence of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights.[29]

25. In light of this Court's regard to international law when interpreting domestic statutes and the *Charter*, its "living tree" approach to constitutional interpretation, its recognition that Indigenous peoples have a special legal and constitutional status, and its recognition that the aboriginal rights enshrined in s. 35 may evolve over time, international human rights law has an important role to play in defining the nature and scope of the aboriginal rights that are affirmed and protected in s. 35 of the *Constitution Act.*[30]

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[26] 1982, c. 11 (U.K.), Schedule B

[27] Inter-American Court of Human Rights ("IACtHR"). *Case of the Mayagna (Sumo) Awas Tingni community v Nicaragua, Merits, Reparations and Costs*. Judgment of August 31, 2001, Series C No. 79 at para. 140(d).

[28] UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* S. James Anaya, 11 August 2008, UN Doc. A/HRC/9/9 at paras. 85, 86

[29] As a member of the Organization of American States, the *American Declaration* defines the human rights obligations that Canada has undertaken as a party to the *OAS Charter*: OAS General Assembly Resolution No. 371/78, AG/RES (VIII-O/78). The *American Convention* (and decisions interpreting it) reflect principles of international human rights law that are relevant to interpreting the *American Declaration*: see *Mary and Carrie Dann v United States*, I/A Comm. H.R., Case N° 11.140, Report No. 75/02, 27 December 2002 at para. 131

[30] *R. v Van der Peet*, [1996] 2 SCR 507 at paras. 3, 24, 25, 30

ii. Framework for recognizing aboriginal title under s. 35 of the *Constitution Act* must be consistent with international human rights law

26. Canada's legal framework for recognizing aboriginal title under the *Constitution Act* must respect the principles set out in international human rights law. A framework that fails to do so risks leaving Canada behind the international community on this important issue, and undermines the prospects for true reconciliation (as discussed further below).

27. A key principle of international human rights law engaged on the facts of this appeal is that the state must not discriminate against Indigenous peoples' customary forms of land ownership and use. The prohibition against racial discrimination is a peremptory norm in international law, and is also included in binding treaties to which Canada is a party.[31] Respect for the principle of non-discrimination requires that traditional systems of land use be taken into account in determining title.[32] To use the distinctiveness of aboriginal culture to limit rights is inconsistent with the principle of non-discrimination. The Inter-American Commission on Human Rights has characterized the failure to protect Indigenous peoples' customary forms of possession and use of the land "one of the greatest manifestations" of racial discrimination.[33]

28. Courts often invoke the doctrine of "discovery" (or the concept of *terra nullius*) in justifying some of the more problematic approaches to the question of aboriginal rights. This doctrine is fundamentally incompatible with the principle of non-discrimination under international human rights law, and the concomitant principle that doctrines of superiority are invalid.[34] The time has come to firmly repudiate and jettison the doctrine of discovery. Certainly, the doctrine can no longer be used to justify an impoverished approach to the issue of determining aboriginal title.[35]

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[31] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998), at 515; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, (1966) 5 ILM 352

[32] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002 at para. 130. See also African Commission on Human and Peoples' Rights, Decision 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ("Endorois"), 4 February 2010 at para. 209

[33] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004 at para. 166

[34] See, for example, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 5

[35] The British Columbia Court of Appeal did rely on the doctrine of discovery: see *William v British Columbia*, 2012 BCCA 285 at paras. 166-173

29. Indeed, the state has a clear responsibility under international human rights law to provide effective legal protection for Indigenous peoples' customary rights to land.[36] While the standard for proving aboriginal title might be *different* than proving common law title, it must not be so onerous as to deny effective protection of land rights. Indigenous land rights as set out in international law do not depend on conditions such as continuous, uninterrupted occupation, evidence of intensive land use, an intent to use the land only in accordance with the practices of the past, or other imposed criteria. Rather, the standard is based simply on evidence of traditional ownership, or other traditional occupation or use of the land.[37]

30. Finally, it must be recognized that the right to aboriginal title plays a crucial role in the safeguarding and development of *other* rights of Indigenous peoples protected by international law, including the right to culture, the right to health and the right to self-determination. This interrelationship further highlights the importance of an approach to aboriginal title that is consistent with the principles of international human rights law, so that these other related rights are protected instead of undermined.

iii. Understanding of "reconciliation" must be consistent with international human rights principles

31. This Court has stated that reconciliation between Indigenous peoples and the Crown is the "basic purpose of s. 35 of the Constitution Act" and that the "fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[38]

32. However, the understanding of "reconciliation" must be built on a foundation of justice, and must be consistent with the principles of international human rights law outlined above. Reconciliation requires a framework for the determination of aboriginal rights that respects the principle of non-discrimination, and accounts for differences in custom and tradition, rather than using them as barriers to title. Reconciliation requires recognizing the history of Indigenous

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[36] African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Endorois*, Twenty-Seventh Activity Report, 2009, Annex 5 at para. 209

[37] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, UN Doc. A/HRC/15/37/Add.4 (1 June 2010) at para. 29

[38] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. 186; *Misikew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para. 1

peoples in this country, while also affirming their right to have dynamic cultures that do not simply stay frozen in time. Reconciliation requires a firm commitment to according full legal effect to aboriginal rights, including the affirmation of aboriginal title. Indeed, international law is clear that where a violation of aboriginal rights has been established, restitution is required.[39] Finally, reconciliation and good governance must be based on awareness that respect for the human rights of all – without discrimination – is in the best interest of all Canadians.

33. While consultation and negotiation may be the preferable routes to reconciliation, courts cannot simply rely on federal and provincial governments to voluntarily pursue genuine reconciliation. True reconciliation – which stands to benefit both Indigenous and non-Indigenous peoples alike – can only occur once a principled framework is established to ensure the full recognition and protection of the rights of Aboriginal peoples, in a manner that respects the principles of international human rights law, the purposes of s. 35 of the *Constitution Act*, and the underlying principles of Canada's Constitution.

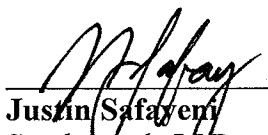
PART IV—SUBMISSIONS ON COSTS

34. The Coalition does not seek costs of this leave motion, or of intervening in the appeal if granted leave. The Coalition requests that no order as to costs be made against it.

PART V—ORDER SOUGHT

35. The Coalition requests an order granting it leave to intervene in this appeal and to file a factum of 10 pages. If leave to intervene is granted, the Coalition seeks leave to present oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July, 2013



Justin Safayeni
Stockwoods LLP
Lawyers for Amnesty International and
Canadian Friends Service Committee

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[39] International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 51-52; IACtHR, *Case of Sawhoyamaxa v Paraguay*, Ser. C. No. 146 (Judgment) 29 March 2006

PART VI—TABLE OF AUTHORITIES

	AUTHORITY	Referring Paragraph
	CANADIAN CASES	
1.	*Attorney General of Canada v. Canadian Human Rights Commission* et al., 2013 FCA 75	7
2.	*R. v Finta*, [1993] 1 S.C.R. 1138	19, 20
3.	*R. v Van der Peet*, [1996] 2 S.C.R. 507	25
4.	*Delgamuukw v British Columbia*, [1997] 3 SCR 1010	31
5.	*Misikew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388	31
	INTERNATIONAL CASES	
6.	*Mary and Carrie Dann v. United States*, I/A Comm. H.R., Case N° 11.140, Report No. 75/02, 27 December 2002 at para. 131	24
7.	Inter-American Court of Human Rights. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs*. Judgment of August 31, 2001, Series C No. 79 at para. 140(d)	24
8.	Inter-American Court of Human Rights, *Case of Sawhoyamaxa v. Paraguay*, Ser. C. No. 146 (Judgment) 29 March 2006	32
	INTERNATIONAL INSTRUMENTS AND REPORTS	
9.	*OAS Charter*: OAS General Assembly Resolution No. 371/78, AG/RES (VIII-O/78)	24
10.	*International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, (1966) 5 ILM 352	27

PART VII—STATUTORY PROVISIONS

Section 35 of the *Constitution Act, 1982*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Rules of the Supreme Court of Canada

PARTICULAR MOTIONS

MOTION FOR INTERVENTION

55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

56. A motion for intervention shall be made in the case of

(*a*) an application for leave to appeal, within 30 days after the filing of the application for leave to appeal;

(*b*) an appeal, within four weeks after the filing of the factum of the appellant; and

(*c*) a reference, within four weeks after the filing of the Governor in Council's factum.

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(*a*) identify the position the person interested in the proceeding intends to take in the proceeding; and

(*b*) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.