

FEDERAL COURT OF APPEAL

**HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND JERRY NATANINE**

Applicants

-and-

**TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-SERVICES
INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE ATTORNEY GENERAL OF
CANADA**

Respondents

**MOTION RECORD OF THE PROPOSED INTERVENER AMNESTY
INTERNATIONAL**

Motion for Leave to Intervene brought by Amnesty International

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NOTICE OF MOTION

Motion for Leave to Intervene brought by Amnesty International

TAKE NOTICE THAT Amnesty International (AI) will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Court Rules*.

THE MOTION IS FOR an Order that:

1. AI is granted leave to intervene in this application for judicial review pursuant to Rule 109 of the *Federal Court Rules*;
2. AI is entitled to receive all materials filed in this application;
3. AI may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Court Rules*;
4. AI's memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this application;
5. AI shall accept the record in its current state, and not seek to file any additional evidence;

6. AI shall be allowed to present oral argument at the hearing of the application, with the time for oral argument by counsel to AI shall be determined by the panel hearing the application;
7. AI shall seek no costs in respect of the application, and shall have no costs ordered against it; and
8. The style of cause shall be changed to add Amnesty International as an intervener, and hereafter all documents shall be filed under the amended style of cause.

THE GROUNDS FOR THE MOTION ARE:

A. AI's background and expertise in matters of human rights

9. 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.
10. AI Canada is one of the two membership bodies for AI members and supporters in Canada. The other is AI Canada's Francophone Branch.
11. AI Canada has approximately 60,000 members and supporters across the country. There are currently close to three 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.
12. As part of its work to advance and promote international human rights at both the international and national levels, 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.
13. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.

14. AI has intervened, or otherwise been involved as a party, in dozens of legal proceedings before the Supreme Court of Canada, this Honourable Court, the Federal Court, the Ontario Court of Appeal, the Ontario Superior Court of Justice (among others). In these proceedings, AI has assisted the court by making submissions on the content and application of international human rights law to the issues in dispute. AI has also participated as an intervener in a number of public inquiries and administrative hearings.
15. In the legislative process, AI has sought to advance international human rights by submitting written and oral arguments to government officials, legislators, and House and Senate Committees on numerous human rights issues.

B. AI's domestic and international experience and expertise in protecting the human rights of Indigenous peoples

16. AI has a varied and long-standing history of working to protect and advance the land, resource, and cultural rights of Canada's Indigenous peoples. Most recently, AI intervened before the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, providing submissions on international human rights standards surrounding Indigenous land and resource rights. In July 2013, AI also intervened to provide an international human rights perspective to the federal Panel considering whether to approve the opening of the New Prosperity Gold and Copper Mine in British Columbia.
17. AI has also worked to promote other Indigenous human rights, for instance by providing submissions to this Honourable Court in *Canadian Human Rights Commission v. Attorney General*, 2013 FCA 75, regarding Canada's international human rights obligations to provide an appropriate level of child welfare services to Indigenous children living on reserves commensurate with the benefits received by other children not living on reserves.
18. More generally, through AI's collaboration with Indigenous peoples' representatives and organizations, AI has documented and helped draw attention to various rights violations in Canada, including lack of meaningful consultation regarding large extractive projects that seriously threaten Indigenous lands, resources, and traditional and contemporary cultures and livelihoods; unequal access to basic government services needed to ensure an adequate

standard of living in Indigenous communities; and pervasive violence against Indigenous women.

19. In addition, AI's work in this regard has included engaging with United Nations (UN) 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.
20. AI also played an active role in the UN processes leading to the finalization and adoption of the *UN Declaration on the Rights of Indigenous Peoples (UN Declaration)*. Now that the *UN Declaration* has been endorsed by Canada, AI's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous peoples.
21. AI engages with a broad range of international and inter-governmental organizations. AI has consultative status with the UN Economic and Social Council, the UN Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the African Union; and is registered as a civil society organization with the Inter-Parliamentary Union.

C. AI's specific and genuine interest in protecting the human rights of Indigenous peoples in Canada

22. AI has a specific, active, long-standing, and demonstrated interest in protecting the rights of Indigenous peoples in Canada. AI has repeatedly researched and documented conditions of marginalization, impoverishment, ill-health, and cultural erosion among Inuit, First Nations and Métis communities in Canada, which arise from the failure to properly respect the human rights of Indigenous peoples, as recognized and protected by international law. These conditions are of deep concern to AI because of the individual and collective hardship, suffering, and injustice they represent, as well as the lost opportunity to set positive examples that are sorely needed in the international community.
23. AI has also been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, their specific legal obligations toward Indigenous peoples, including, in particular, the duty to meaningfully consult with and accommodate Indigenous peoples in relation to resource extraction projects which have the potential to

affect their rights and interests. This is despite the fact the rights of Indigenous peoples are recognized in both Canadian law and in international human rights standards, and that Canada's failure to uphold these rights has led to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous peoples in Canada. AI is concerned that these injustices continue to occur despite domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments.

24. AI considers this judicial review an important opportunity to ensure that the human rights of Indigenous peoples are affirmed and respected in accordance with international human rights law.
25. In addition, this Court's decision in this case will provide further guidance on the application of general principles of consultation previously outlined by the Supreme Court of Canada. The interpretation of domestic legal principles benefits a great deal from the standards set out in international law. If granted leave to intervene, AI would present submissions on international law as it relates to the standard of protection required for the rights of Indigenous peoples, including the duty to consult and accommodate Indigenous peoples, a perspective that would be of assistance to the Court in resolving the issues presented by this case.

D. AI will make a unique, important, and useful contribution to this case

26. None of the other parties will address the issues raised in this application from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation. The international human rights perspective AI seeks to bring will assist this Court in determining the important matters of public interest before it.
27. None of the parties share AI's experience, expertise, and knowledge in matters related to international human rights law, both generally and in the particular context of Indigenous peoples. AI's experience and knowledge in these matters will provide the Court with a relevant and helpful perspective on whether the process of the NEB in this case meets the requirements of procedural fairness, and whether the decision of the NEB in this case is substantively reasonable.

28. If AI is not granted leave to intervene, the Court will not fully hear the important international human rights perspective on the issues raised in this application. In particular, it will not hear full argument on matters involving the interpretation of constitutional human rights provisions, where international law has long been recognized as a relevant and persuasive source that can and should be taken into consideration.
29. This Court has the inherent authority to allow intervention where it is just, on such terms and conditions as are appropriate.
30. If granted leave to intervene, AI present international human rights principles that will help to clarify and bolster the domestic legal framework concerning the Crown's duty to consult and accommodate Indigenous peoples in decisions affecting their rights and interests. In particular, AI will submit that:
 - I. Canada's international legal obligations should be taken into account in determining required content of the duty of procedural fairness, and the substantive (un)reasonableness an administrative decision;
 - II. In particular, an administrative decision is only reasonable if it accords with Canada's international obligations to respect Indigenous rights concerning lands, territories, and resources. Relevant principles in this case include:
 - i. The vital importance of the natural environment to Indigenous peoples' identities, cultures and ways of life requires a very high standard of precaution in all decisions potentially affecting Indigenous people's exercise of their rights in respect to lands, territories and resources;
 - ii. Efforts to balance the rights of Indigenous peoples against other social imperatives must take into account the distinct contemporary situation of Indigenous peoples, including the unresolved legacy of past violations and heightened risk of further marginalization and discrimination;
 - III. An administrative decision is only reasonable if it accords with Canada's international obligations to ensure effective participation of Indigenous peoples in decisions affecting those rights. Relevant principles in this case include:

- i. Indigenous peoples have the right to participate, according to their own customs and traditions, in all decisions potentially affecting their rights;
 - ii. Consultation must be comprehensive and make a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples; and
 - iii. Where the potential for harm is significant, projects should proceed only with the free, prior, and informed consent (FPIC) of the affected Indigenous peoples
31. In making these arguments, AI will rely on a number of international instruments, including the *Universal Declaration of Human Rights*, the *UN Declaration on the Rights of Indigenous Peoples*, the *UN Charter*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on the Elimination of all Forms of Racial Discrimination*.
32. To aid in interpreting the nature and scope of Canada's obligations under these instruments, AI will also rely on the comments and reports of various UN treaty bodies, UN Special Rapporteurs, and relevant jurisprudence of foreign and international courts.
33. Finally, AI will rely on some of Canada's own policies on the applicability of international law and statements and submissions before UN bodies as to the measures it says are being taken to comply with its international obligations.

E. AI's participation in this case is in the interests of justice

34. This case raises important issues of public interest regarding the human rights of Indigenous peoples – in particular, the standard of protection necessary when extractive projects have the potential to seriously impact access to resources necessary for Indigenous peoples to exercise their traditional culture and livelihoods.
35. Given the important rights and interests at stake, international human rights norms are particularly relevant in clarifying the domestic legal standards applicable to resource development decision-making.

36. AI submits that the public interest aspects of this case militate in favour of allowing interveners to participate, so that this Court can have the full benefit of all relevant perspectives before rendering its decision.

F. AI will not delay the application or duplicate materials

37. If granted leave to intervene, AI will be mindful of submissions made by the parties and other interveners in this application, and will seek to avoid duplication of arguments and materials before the Court.
38. AI will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will AI seek to supplement the factual record.
39. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.
40. If granted leave to intervene, AI will abide by any schedule set out by this Court for the delivery of materials and for oral argument.
41. If granted leave to intervene, AI will seek no costs and would ask that no costs be awarded against it.
42. The Applicants have consented to AI's motion for leave to intervene.

AND TAKE FURTHER NOTICE that in support of this motion, AI will rely upon:

43. The Affidavit of Alex Neve, sworn 28 November 2014; and

44. Such further and other material as counsel may advise and this Honourable Court may allow.

1 December 2014


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Court File No. A-354-14

FEDERAL COURT OF APPEAL

B E T W E E N :

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Court File No. A-354-14

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AFFIDAVIT OF ALEX NEVE**(in support of the motion to intervene of Amnesty International)**

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, 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 three 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 of AI Canada, I am responsible for overseeing the implementation of AI's mission in Canada. This includes supervising staff and ensuring 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 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 before numerous courts, various international bodies, and numerous legislatures.
7. AI has a strong interest in this case as it pertains directly and centrally to an area of high priority in the organization's work – namely the protection of the human rights of Indigenous peoples in accordance with international human rights norms and standards, and in particular, the duty to meaningfully consult with and accommodate Indigenous peoples in relation to government decisions which have the potential to seriously harm Indigenous rights.

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 AI members and supporters in Canada. The other is AI Canada's Francophone Branch. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act*, SC 2009, c. 23.
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 more than three million members AI members 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. AI's policies and priorities are determined democratically by its members at the national and international levels.

Amnesty International: The Vision

13. AI's vision is of a world in which all people can freely enjoy all the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights instruments.
14. 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.
15. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.

Promoting and Advancing International Human Rights

16. 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.

Monitoring and Reporting on Human Rights Abuses

17. AI's investigative work is carried out by human rights researchers who receive, cross-check, and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups, Indigenous communities, and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, websites, and other media outlets. AI also sends approximately 130 fact-finding missions to some 70 countries each year to assess what is happening on the ground.
18. AI uses its research to prepare reports, briefing papers, newsletters, and campaigning materials. Among its publications is the annual Amnesty International Report on human rights in countries around the world. AI Canada has participated in preparing these reports and has assisted in distributing them in Canada. AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.
19. Canadian courts, including the Supreme Court, have recognized AI's research as credible. The following judgments have emphasized the important evidentiary role of AI reports: *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, 35 Imm LR (3d) 241; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, 250 FTR 299; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118, 250 FTR 299; and *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, 2002 SCC 1, [2002] 1 SCR 3.

Participation in Judicial and Administrative Proceedings

20. AI Canada has appeared before Canadian courts, inquiries, and administrative bodies to provide submissions on the international human rights of Indigenous peoples in the following cases:

- a. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2: submitted that the test for aboriginal title must be developed in a manner that is consistent with international human rights law, and not arbitrarily or narrowly construed;
 - b. *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, 444 NR 120: 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 children living off reserves;
 - c. *First Nations Child and Family Caring Society of Canada et. al. v. Canada* (Canadian Human Rights Tribunal File No. T1340/7008, judgment reserved): submitted that Canada's international obligations must be respected in the interpretation of the *Canadian Human Rights Act* in determining whether Canada has discriminated against First Nations children living on reserves;
 - d. *Federal Review Panel for the New Prosperity Gold-Copper Mine Project*: (independent Review Panel convened by the Minister of the Environment to undergo a federal environmental assessment, 2013): provided submissions on international law standards regarding the protection of Indigenous land and cultural rights; and
 - e. *Ipperwash Inquiry* (2006): argued that the federal division of powers must not be a barrier to the protection of human rights of Indigenous peoples, and urged the Commissioner to develop recommendations that are consistent with international human rights and recognize the wider international context of grave human rights violations against Indigenous peoples.
21. AI Canada has intervened before the Supreme Court of Canada regarding other international human rights issues in the following cases:

- a. *Febles v. Canada*, 2014 SCC 68: presented submissions with respect to the interpretation of the Article 1F(b) exclusion provision of the *Convention Related to the Status of Refugees*;
- b. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62: presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture;
- c. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1: argued the *Immigration and Refugee Protection Act (IRPA)*'s Special Advocate regime violates international norms and constitutional principles of procedural fairness;
- d. *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2013] 2 SCR 678: proposed guiding principles to help ensure that Canadian decision-makers' application of Article 1F(a) of the *Refugee Convention* is consistent with international law;
- e. *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572: presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice;
- f. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44: intervened with respect to what triggers a Canadian citizen's constitutional rights to life, liberty, and security of the person, and the content of the principles of fundamental justice;
- g. *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342: presented submissions with respect to the interplay between extradition and refugee protection;
- h. *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui 2*]: intervened with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings

violates international norms and the constitutional principles of procedural fairness;

- i. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui I*]: presented submissions on the constitutionality of the procedural protections in the *IRPA*'s security certificate regime and on the arbitrary detention of foreign nationals under that regime).
 - j. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3: submitted that the absolute prohibition on torture is a peremptory norm of customary international law;
 - k. *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269: argued 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;
 - l. *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283: presented submissions regarding the international movement towards the abolition of capital punishment;
 - m. *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858, 84 DLR (4th) 498: presented submissions regarding the international movement towards the abolition of capital punishment; and
 - n. *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438: presented submissions regarding the international movement towards the abolition of capital punishment.
22. In addition to advocacy before the Supreme Court of Canada, AI Canada has appeared before other Canadian courts as an intervener or applicant in the following cases:
- a. *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174: submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition;

- b. *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13 (leave to intervene before the Federal Court of Appeal granted, but government discontinued the appeal): (prepared submissions on Canada's international human rights obligations to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve);
- c. *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, Court File No. C57714 (Ontario Court of Appeal, judgment reserved); *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220: argued that the right to adequate housing is justiciable under the *Charter* and Canada's international human rights obligations;
- d. *Choc et al v. HudBay et al*, 2013 ONSC 1414, 116 OR (3d) 674: made arguments regarding corporate accountability for human rights abuses overseas;
- e. *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136: intervened with respect to the validity of the US-Canada *Safe Third Country Agreement*, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;
- f. *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, [2009] 4 FCR 149: submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment;
- g. *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, [2004] OJ No 2800: intervened regarding the right of a torture victim to sue for compensation from the offending government; and

- h. *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, [2002] OJ No 431: presented submissions regarding 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.
- 23. Further, AI Canada was granted intervener status in the following inquiries:
 - a. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry): submissions on the subject of security and human rights; and
 - b. The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry): submissions on several issues, including the prohibition against torture, prohibition against the use of information obtained through torture, and the presumption of innocence of Canadians detained abroad.
- 24. In other national and international judicial fora, AI and its national branches have presented submissions on a variety of important matters, including:
 - a. *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (European Court of Human Rights): presented submissions regarding Italy's violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya;
 - b. *Boumediene v. Bush*; *Al Odah v. United States*, 128 S Ct 2229 (2008) (United States Supreme Court): intervened regarding the *Military Commission Act* of 2006 as an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;
 - c. *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (United Kingdom House of Lords): made submissions regarding the applicability of the *European Convention on Human Rights* and the UK's *Human Rights Act 1998* to the actions of British armed forces in Iraq;

- d. *A and others v. Secretary of State for the Home Department* (No. 2), [2005] UKHL 71 (United Kingdom House of Lords): presented arguments regarding the inadmissibility of evidence obtained through torture;
- e. *A and others v. Secretary of State for the Home Department*, [2005] 2 AC 68 (United Kingdom House of Lords): made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act* 2001;
- f. *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 AC 147 (United Kingdom House of Lords): intervened with respect to exceptions for state immunity for international crimes; and
- g. *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (European Court of Human Rights): presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture.

Participation in Legislative Proceedings

25. AI Canada has also sought to advance international human rights directly through the Canadian legislative process. On many occasions, the organization has provided written and oral submissions to government officials, legislators and House and Senate committees. Submissions include:

- a. *Brief in Support of Bill C-279* (brief to the Standing Senate Committee on Legal and Constitutional Affairs, supporting the inclusion of “gender identity” as a prohibited ground of discrimination under the *Canadian Human Rights Act*), October 2014.
- b. *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;
- c. *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;

- d. *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;
- e. 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;
- f. 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;
- g. Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;
- h. Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;
- i. Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2005 (regarding security certificates);
- j. *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;
- k. Brief on Bill C-31 (*Immigration and Refugee Protection Act*) (March 2001): expressed concern that the proposed legislation provided insufficient protection to persons seeking asylum in Canada interdicted by immigration control officers while *en route* to the country; and; and

1. 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).

Participation with International Organizations

26. AI has consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, 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.
27. AI has made submissions to various international organizations and UN monitoring bodies regarding Canada's compliance with its international human rights obligations, including:
 - a. *Canada: Submission to the United Nations Human Rights Committee*, (July 2014): AI's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it adopted in November 2014 as a first step in the review of Canada's compliance under the *International Covenant on Civil and Political Rights*;
 - b. *Canada: Human rights abuses prevalent among vulnerable groups*, (April-May 2013): Amnesty International Submission to the Universal Periodic Review;
 - c. *Canada: Submission to the UN Universal Periodic Review*, (October 2012): Amnesty International's submission to the second review of Canada's human rights record by the UN Human Rights Council;
 - d. *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;

- e. *Canada: Briefing to the UN Committee Against Torture*, (May 2012): Amnesty International's submission to the Committee's review of Canada, which highlighted, among other things, 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;
- f. *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination*, (February 2012): Amnesty International's submission to the Committee's review of Canada, outlining concerns about the rights of Indigenous peoples in Canada, as well as making recommendations on the land rights of Indigenous peoples and the right to free, prior, and informed consent;
- g. *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;
- h. *Canada: Submission to the UN Universal Periodic Review*, (February 2009): Amnesty International's submission to the first review of Canada's human rights record by the UN Human Rights Council;
- i. *Human Rights for All: No Exceptions*, (February 2007): Amnesty International's submission 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;
- j. *It Is A Matter of Rights: Improving the protection of economic, social and cultural rights in Canada* (27 March 2006): 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 to in the *International Covenant on Economic, Social and Cultural Rights*;

- k. *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations*, (2005): AI Canada's submission to the United Nations Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada;
 - l. *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, (October 8, 2004); and
 - m. *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, (November 2000).
28. These international bodies recognize and trust AI's experience, objectivity, and distinctive 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 human rights in the Indigenous context

29. AI has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Inuit, First Nations, and Métis peoples – including, in particular, the duty to meaningfully consult with and accommodate Indigenous peoples in relation to resource extraction projects that have the potential to affect Indigenous rights. This is despite the fact that the rights of Indigenous peoples are recognized in both Canadian law and by international human rights standards, and that Canada's failure to uphold them has led to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous societies in Canada. Through its collaboration with Indigenous peoples' representatives and organizations, AI has documented and helped draw attention to various rights violations which have led to Indigenous peoples being deprived of the ability to exercise their traditional culture and livelihoods and perpetuated a legacy of marginalization and discrimination.
30. AI's work in this area has included: intervening in judicial proceedings that engage human rights issues with a particular impact on Indigenous peoples (as outlined in paragraph 20); investigating complaints of systemic patterns of mistreatment; working with specific

communities involved in land rights disputes; collaborating with the Native Women's Association of Canada and other organizations in a long-term campaign on violence against Indigenous women; engaging in public education activities to promote existing and emerging standards in domestic and international law; and engaging with UN 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.

31. AI's involvement in issues relating to human rights of Indigenous peoples is longstanding. For example, AI worked closely with the family of Dudley George, who was shot by police at Ipperwash Provincial Park in 1995. AI 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 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 Culberston Track," examining concerns about failure of police and government to implement the Ipperwash Inquiry recommendations.
32. As part of its efforts to ensure the human rights of vulnerable members of Indigenous communities are respected, AI has actively campaigned for putting an end to violence against Indigenous women. In October 2004, AI published a report on discrimination and violence against Indigenous women and girls 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 much more likely than other women to be targeted for acts of violence. The report highlights some of the factors contributing to this violence, including inequalities in services and the overall standard of living in Indigenous communities, as well as a long history of discrimination and impoverishment. In 2009, AI 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."

33. AI played an active role in the UN processes leading to the finalization and adoption of the *UN Declaration on the Rights of Indigenous Peoples (UN Declaration)*. AI was present at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI co-hosted a symposium on national implementation of international norms for Indigenous rights that was attended by the UN Special Rapporteur. Domestically, AI has engaged with the federal government to support the Declaration; co-organized a briefing for Parliamentarians on the implementation of the *UN Declaration* 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 *UN Declaration* has been endorsed by Canada, AI's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous peoples. This work has included presentations to federal and provincial human rights commissions, Parliamentarians, and government staff.
34. Work on human rights in the Indigenous context in Canada is part of a larger body by AI on the human rights of Indigenous peoples globally, in which AI 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);
 - 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);
 - e. "Australia: 'The land holds us:' Aboriginal Peoples' right to traditional homelands in the Northern Territory" (2011);
 - f. "We're only asking for what is ours: Indigenous peoples in Paraguay" (2009); and

- g. "United States of America: Maze of injustice: The failure to protect Indigenous women from sexual violence" (2007).

35. Further, as a result of AI's longstanding and ongoing work on the issue of remedies for human rights violations, the organization has developed an expertise on the protection, promotion, and realization of the human rights of Indigenous peoples, and the relevance of international human rights standards to issues of pressing concern in Canada.

AI's interest in this application

36. As discussed above, AI has a specific, active, and long-standing interest in protecting the rights of Indigenous peoples in Canada, and a particular interest in protecting rights to lands, territories and resources that are so inextricably tied to the exercise of Indigenous peoples cultures and livelihoods.

37. AI has repeatedly witnessed and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada arising from the failure to properly respect the human rights of Indigenous peoples, as recognized and protected by international law. These conditions are of deep concern to AI, both because of the individual and collective hardship, suffering, and injustices they represent, but also because of the lost opportunity to set positive examples that are desperately needed in the international community.

38. AI is also concerned because these injustices continue despite domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments. Accordingly, AI sees the case before this Court as an important opportunity to ensure that the human rights of Indigenous peoples – and, in particular, the right to meaningfully participate in all decisions potentially affecting their cultures and livelihoods as well as other rights – are affirmed and respected. It is AI's view that international human rights law and standards provide a relevant, persuasive, and important tool in achieving this aim.

Overview of AI's Proposed Submissions

39. If granted leave to intervene, AI will present international human rights principles that will help to clarify and bolster the domestic legal framework concerning Canada's duty to consult and accommodate Indigenous peoples in decisions affecting their rights and interests. In particular, AI will submit that:

- a. Canada's international legal obligations should be taken into account in determining the required content of the duty of procedural fairness, and the substantive (un)reasonableness of an administrative decision;
- b. In particular, an administrative decision is only reasonable if it accords with Canada's international obligations to respect Indigenous rights concerning lands, territories, and resources. Relevant principles in this case include:
 - i. The vital importance of the natural environment to Indigenous peoples' identities, cultures and ways of life requires a very high standard of precaution in all decisions potentially affecting Indigenous people's exercise of their rights in respect to lands, territories and resources;
 - ii. Efforts to balance the rights of Indigenous peoples against other social imperatives must take into account the distinct contemporary situation of Indigenous peoples, including the unresolved legacy of past violations and heightened risk of further marginalization and discrimination;
- c. An administrative decision is only reasonable if it accords with Canada's international obligations to ensure effective participation of Indigenous peoples in decisions affecting those rights. Relevant principles in this case include:
 - i. Indigenous peoples have the right to participate, according to their own customs and traditions, in all decisions potentially affecting their rights;
 - ii. Consultation must be comprehensive and make a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples; and

- iii. Where the potential for harm is significant, projects should proceed only with the free, prior, and informed consent (FPIC) of the affected Indigenous peoples

40. In making these arguments, AI will rely on a number of international instruments, including the *Universal Declaration of Human Rights*, the *UN Declaration on the Rights of Indigenous Peoples*, the *UN Charter*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *UN Convention on the Elimination of All Forms of Racial Discrimination*. To aid in interpreting the nature and scope of the obligations under these instruments, AI will also rely on the comments and reports of various UN treaty bodies, UN Special Rapporteurs, and relevant jurisprudence of foreign and international courts.

AI's Perspective is Important, Useful, and Unique


41. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. None of the other parties or other proposed interveners will address the issues raised in this judicial review from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation. In this way, AI will bring an important and unique perspective to this case.

42. AI will make a useful contribution to the issues raised in this case by highlighting the international human rights considerations that it engages. AI has extensive knowledge of the international norms, standards, and instruments that are relevant in this case, as well as the decisions, comments, and reports issued by the treaty bodies responsible for monitoring the implementation of these instruments, by UN special rapporteurs, and by other international institutions dealing with the human rights of Indigenous peoples. Indeed, AI has actively participated in the processes leading up to the adoption of many of these instruments, and has made submissions and/or participated in proceedings before many of the treaty bodies. AI's experience and knowledge in these matters will provide the Court with a relevant and ultimately helpful perspective in adjudicating the important issues raised by this judicial review.

43. If granted leave to intervene, AI will be mindful of submissions made by the parties and other interveners and will not duplicate argument and materials before the Court.
44. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding if granted leave to intervene.
45. AI will abide by any schedule set out by this Court for the delivery of written materials and for oral submissions at the hearing.
46. I make this affidavit in support of AI's motion for leave to intervene in this judicial review and for no other or improper purpose.

SWORN BEFORE ME at the City of
Ottawa in the Province of Ontario this
27 day of November, 2014


A Commissioner for Taking Affidavits


ALEX NEVE, O.C.

FEDERAL COURT OF APPEAL

**HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND JERRY NATANINE**

Applicants

-and-

**TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-SERVICES
INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE ATTORNEY GENERAL OF
CANADA**

Respondents

**WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER AMNESTY
INTERNATIONAL**

Motion for Leave to Intervene brought by Amnesty International

OVERVIEW

1. The proposed intervener, Amnesty International (AI), is an international human rights organization with decades of experience and a longstanding interest in ensuring that the rights of Indigenous peoples are protected in accordance with Canada's international legal obligations. AI has worked towards this goal through a variety of means, including interventions in judicial proceedings before this Court and others.
2. This case raises important issues of public interest concerning the appropriate standard of protection that must be taken into account by administrative tribunals when dealing with extractive projects that may impact Indigenous peoples' access to the resources necessary to sustain their traditional culture and livelihoods.
3. AI seeks leave to intervene in this judicial review to provide this Honourable Court with an international human rights law perspective on these issues. This perspective will assist this

Court to determine whether the decision of the National Energy Board (NEB) in this case was reasonable and whether the duty of procedural fairness was satisfied through the NEB process.

4. If granted leave to intervene, AI will assist this Court by making submissions on how international law informs, among other things: (i) the need for administrative tribunals to properly recognize and respect the importance of Indigenous peoples' rights relating to their land and culture; and (ii) the scope of consultation with and accommodation of Indigenous peoples necessary in the context of resource development operations that threaten to impact those rights. Such questions necessarily require a purposeful balancing of Indigenous rights against other societal interests, while taking into account the unresolved legacy of past violations and heightened risk of further marginalization and impoverishment of Indigenous communities. AI will submit that according to international law, where such projects seriously threaten the lands, resources, culture, and livelihoods of Indigenous peoples, operations should only proceed with the free, prior, and informed consent of the affected Indigenous peoples.
5. In making these arguments, AI will rely on a number of international instruments, as well as the comments and reports of United Nations (UN) treaty bodies and UN special rapporteurs, and the jurisprudence of other courts and international institutions.
6. This Court recently granted AI intervener status in *Canada (Attorney General) v Pictou Landing First Nation (Pictou Landing)*, a case with many similarities to the one at bar, finding that AI had a genuine interest and valuable contribution to make in assessing the reasonableness of an administrative decision that raised matters of public importance regarding Indigenous rights.¹
7. AI submits that, just as in the case of *Pictou Landing*, AI's perspective in this case is unique. None of the other parties address the international law arguments AI proposes to make, nor do they share AI's extensive expertise in this area. These arguments will assist this Court in determining the important issues before it on this judicial review; indeed, courts have long recognized that international law can be a relevant and persuasive source

¹ 2014 FCA 21 at para 11 [*"Pictou Landing"*].

for interpretation, particularly when matters of human rights and/or constitutional rights are engaged. If AI is not granted leave to intervene, these submissions on international human rights law will simply not be heard.

8. Consequently, AI requests that its motion for leave to intervene be granted.

PART I – FACTS

A. AI's background and purpose

9. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of fundamental rights. It is impartial and independent of any government, political persuasion, or religious creed. It is financed by subscriptions and donations from its worldwide membership, and receives no government funding.²
10. AI Canada is one of the two membership bodies for AI members and supporters in Canada. The other is AI Canada Francophone Branch. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act* S.C. 2009, c. 23.³
11. AI Canada has approximately 60,000 members and supporters across the country, and a board of 10 directors. There are currently over three 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. AI's policies and priorities are determined democratically by its members at the national and international levels.⁴
12. As part of its work to advance and promote international human rights at both the international and national levels, AI monitors and reports on human rights abuses, participates in international committee hearings, intervenes in domestic judicial proceedings, and prepares briefs for an participates in national legislative processes and hearings. AI also

²Affidavit of Alex Neve sworn 28 November 2014 at paras 8-9 ["Neve Affidavit"].

³Neve Affidavit at para 10.

⁴Neve Affidavit at paras 11-12

prepares international and national reports for the purpose of educating the public on international human rights.⁵

13. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.⁶

B. AI's experience and prior involvement in judicial and legislative proceedings

14. AI has intervened in, or otherwise been involved as a part in, dozens of different legal proceedings before the Supreme Court of Canada, this Court, the Federal Court, the Ontario Court of Appeal, and the Ontario Superior Court of Justice (among others). In these proceedings, AI has assisted the court by making submissions on the content and application of international human rights law to the issues in dispute. AI has also participated as an intervener in a number of public inquiries and administrative hearings.⁷

15. In the legislative process, AI has sought to advance international human rights by submitting written and oral arguments to government officials, legislators and House and Senate committees on numerous human rights issues.⁸

C. AI's experience in protecting the human rights of Indigenous people domestically

16. AI has a varied and long-standing history of working to advance and protect the human rights of Indigenous peoples in Canada, including in particular children and other vulnerable members of Indigenous communities.
17. AI participated 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), and made submissions on how Canada's obligations towards Indigenous peoples should be interpreted in light of international human rights standards. Since then, AI has continued to

⁵ Neve Affidavit at para 16.

⁶ Neve Affidavit at para 15.

⁷ Neve Affidavit at paras 20-23.

⁸ Neve Affidavit at para 25.

work for the implementation of the Inquiry recommendations, and has published a case study examining police institutionalization of these recommendations.⁹

18. AI has also 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. This formed part of AI's larger campaign to end discrimination and violence against Indigenous women, which also included reports highlighting some of the factors contributing to this violence, including inequalities in services and overall standard of living in Indigenous communities, as well as a long history of discrimination and impoverishment.¹⁰
19. In October 2012, AI was granted standing in the public review of the proposed New Prosperity Gold and Copper Mine on the traditional territory of the Tsilhqot'in people in central British Columbia, and made submissions on the need for environmental impact assessments to uphold international human rights standards, including those set out in the *UN Declaration on the Rights of Indigenous Peoples (UN Declaration)*. Its submissions were cited by the panel as an important consideration.¹¹
20. Before the courts, AI recently intervened in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 to provide submissions on international human rights standards surrounding Indigenous land and resource rights. In that landmark case, the Supreme Court recognized the right of the Tsilhqot'in people to own, control, and enjoy the benefits of their traditional territory in central British Columbia. AI also participated in proceedings before this Honourable Court in *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75 (*Caring Society*), making submissions on Canada's obligations under international human rights law – both to children in general, and to Indigenous children in particular – pursuant to the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Convention on the*

⁹ Neve Affidavit at para 31.

¹⁰ Neve Affidavit at paras 27, 32.

¹¹ Neve Affidavit at para 20.

Elimination of all Forms of Racial Discrimination (ICERD), the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *UN Declaration*.¹²

21. In the *Caring Society* case, this Court held that the *Canadian Human Rights Act* permitted a “comparison” between First Nations children living on reserves and those living off reserves. AI provided opening and closing submissions as to Canada’s international human rights obligations during the subsequent hearing on the merits before the Tribunal. The Tribunal has not yet released its judgment.¹³
22. More generally, through AI’s collaboration with Indigenous peoples’ representatives and organizations, it has documented and helped draw attention to various rights violations including unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities. In addition to intervening in judicial proceedings that engage human rights issues with a particular impact on Indigenous peoples, AI’s work in this regard has included investigating complaints of systemic patterns of mistreatment; working with specific communities involved in land rights disputes; collaborating with the Native Women’s Association of Canada and other organizations in a long-term campaign against violence against Indigenous women; engaging in public education activities to promote existing and emerging standards in domestic and international law; and engaging with UN 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.¹⁴

D. AI’s experience in Indigenous human rights issues at the international level

23. AI regularly makes submissions to various international bodies and organizations, in which it raises concerns about the proper respect for human rights in the context of Indigenous peoples, including the widespread removal of First Nations children from their families due to systemic underfunding of welfare services on reserves, Canada’s failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls, and Canada’s failure to respect Indigenous land and resource rights. Many

¹² Neve Affidavit at para 20.

¹³ Neve Affidavit at para 20.

¹⁴ Neve Affidavit at para 30.

of these submissions were made before the UN treaty bodies responsible for monitoring compliance with, and offering interpretive views concerning, treaties that are relevant to the issues raised in this judicial review.¹⁵

24. AI also played an active role in the UN processes leading to the finalization and adoption of the *UN Declaration*. AI was present at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI co-hosted a symposium in Ottawa on the national implementation of international norms for Indigenous rights that was attended by the UN special rapporteur on the rights of Indigenous peoples. Domestically, AI has engaged with the federal government to support the Declaration; co-organized a briefing for Parliamentarians on the implementation of the *UN Declaration* 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 *UN Declaration* has been endorsed by Canada, AI's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous people. This work has included presentations to federal and provincial human rights commissions, Parliamentarians and government staff.¹⁶
25. Finally, AI engages with a broad range of international and inter-governmental organizations. AI has consultative status with the UN Economic and Social Council, the UN Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the African Union; and is registered as a civil society organization with the Inter-Parliamentary Union.¹⁷
26. These international bodies recognize and trust AI's experience and objectivity, and value AI's unique perspective. As Jean-Pierre Hocke, former UN 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."¹⁸

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

¹⁵ Neve Affidavit at para 27.

¹⁶ Neve Affidavit at para 33.

¹⁷ Neve Affidavit at para 26.

¹⁸ Neve Affidavit at para 28.

27. While AI has a broad interest in protecting and promoting the human rights of all, it also has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples. In particular, AI has long advocated for the appropriate implementation of international standards with respect to the human rights of Indigenous peoples to maintain their culture, to own and use their traditional lands and territories, to preserve their knowledge systems, and to participate meaningfully in decision-making which may result in potential impacts on those rights. These rights are all affirmed in the Canadian Constitution.
28. AI has repeatedly researched and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada, which arise from the failure to properly respect the human rights of Indigenous peoples, as recognized and protected by international law. These conditions are of deep concern to AI because of the individual and collective hardship, suffering, and injustice they represent, as well as the lost opportunity to set positive examples that are desperately needed in the international community.¹⁹
29. AI has also been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Indigenous individuals – including, in particular, the duty to meaningfully consult with Indigenous peoples in relation to resource extraction projects which may affect Indigenous rights. This is despite the fact these rights are recognized in both Canadian law and by international human rights standards, and that Canada's failure to uphold them has led to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous societies in Canada. AI is concerned that these injustices continue to occur despite domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments.²⁰
30. AI considers this application an important opportunity to ensure that the human rights of Indigenous peoples – and, in particular the right to be meaningfully consulted and accommodated with regards to government actions that threaten traditional and contemporary cultures and livelihoods – are affirmed and respected in accordance with international human rights law.

¹⁹ Neve Affidavit at para 37.

²⁰ Neve Affidavit at para 38.

PART II – ISSUES

31. The only issues raised on this motion are whether AI should be granted leave to intervene in this application and, if leave should be granted, the terms governing AI's intervention.

PART III – SUBMISSIONS

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

32. Rule 109 of the *Federal Court Rules* provides that a proposed intervenor must (a) describe how the proposed intervenor wishes to participate in the proceeding, and (b) how that participation will assist the determination of a factual or legal issue related to the proceeding.²¹ Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervenor should leave be granted.
33. The factors traditionally considered on a motion for leave to intervene have been described by this Court as follows:
- I. Is the proposed intervenor directly affected by the outcome?
 - II. Does there exist a judiciable issue and a veritable public interest?
 - III. Is there an apparent lack of other reasonable or efficient means to submit the question to the Court?
 - IV. Is the position of the proposed intervenor adequately defended by one of the parties to the case?
 - V. Are the interests of justice better served by the intervention of the proposed third party?
 - VI. Can the Court hear and decide the cause on its merits without the proposed intervenor?²²

²¹ SOR/98-106.

²² *Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426 at para 19, 357 NR 384 [*"Boutique Jacob"*].

34. This Court has indicated that it is not necessary to meet all of these factors, particularly where the proposed intervenor is able to assist the Court by bringing a distinct perspective and expertise to bear on the issues in dispute.²³ Indeed, the “overriding consideration requires, in every case, that the proposed intervenor demonstrate that its intervention will assist the determination of an issue” by “add[ing] to the debate an element which is absent from what the parties before the Court will bring.”²⁴ Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.²⁵
35. Recently, Justice Stratas of this Court proposed a modified list of factors to better reflect the real issues at stake on motions to intervene.²⁶ Specifically, Stratas J.A. outlined the following considerations as guiding whether intervenor status should be granted:
- I. Has the proposed intervenor complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervenor status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervenor status should be granted
 - II. Does the proposed intervenor have a genuine interest in the matter before the Court, such that the Court can be assured that the proposed intervenor has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
 - III. In participating in this appeal in the way it proposes, will the proposed intervenor advance different and valuable insights and perspectives that will actually further the Court’s determination of the matter?

²³ *Globalive Wireless Management Corp v Public Mobile Inc et al*, 2011 FCA 119 at para 5(c), 200 ACWS (3d) 675 [“Globalive”].

²⁴ *Canada (Attorney General) v Sasvari*, 2004 FC 1650 at para 11, 135 ACWS (3d) 691.

²⁵ *Boutique Jacob*, *supra* note 22 at para 21.

²⁶ *Pictou Landing*, *supra*, note 1 at para. 11.

- IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
- V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing “the just, most expeditious and least expensive determination of every proceeding on its merits”? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?
36. Applying the above-noted factors in *Pictou Landing*, Stratas J.A. found that AI met the test for intervention. The present case has many similarities to *Pictou Landing*, both being applications for judicial review of administrative decisions with significant public interest dimensions, where Indigenous rights were relevant to the issues at stake. Specifically, in *Pictou Landing*, Stratas J.A. found that:
- AI had a genuine interest in ensuring respect for Indigenous rights in the administrative decision-making process;
 - Further exploration of international human rights law would assist the court in determining both the standard of review and the application of that standard;
 - The issues to be considered (namely, whether to uphold the exercise of discretion by an administrative decision-maker, which had a significant impact on the welfare of certain Indigenous people) raised matters of sufficient public interest that AI’s intervention should be permitted; and
 - The terms of the proposed intervention were not inconsistent with Rule 3, since the proposed interveners did not intend to duplicate matters already raised by the parties and the interventions would not unduly delay the proceeding.
37. Similarly, AI has a genuine interest and valuable contribution to make in assessing the reasonableness of the decisions at issue in this case, which raise matters of public

importance regarding Indigenous rights. For the reasons set out below, AI believes it meets the relevant test and should be granted intervenor status in this case.

B. AI has a genuine interest in this case

38. AI has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples, and a particular interest in protecting the land and resource rights of Indigenous peoples so inextricably tied to the exercise of their traditional and contemporary cultures and livelihoods. This interest is clear from AI's long track record of working to ensure that the human rights of Indigenous peoples are protected in accordance with international human rights law – both before domestic courts, legislatures, tribunals, and public inquiries, as well as before international bodies. It is also clear from AI's other advocacy, education, and reporting efforts on this issue.²⁷
39. Human rights groups with a demonstrated and genuine interest in a specific human rights cause have an interest in an appeal that engages that cause, and may be permitted to intervene if they have something unique and useful to add.²⁸ As outlined above, this Court has previously found that AI has a genuine interest in ensuring respect for the rights of Indigenous peoples, as well as the necessary knowledge, skills, and resources to assist the Court in determining whether a particular decision accords with international norms and obligations in that regard.²⁹
40. If granted leave to intervene, AI would present submissions on international law such that this Court may approach the issues before them with the benefit of the international human rights law perspective.

C. AI can make a unique, important, and useful contribution to this case

41. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. None of the other parties or other proposed interveners will address the issues raised in this judicial review from the perspective of an international, non-governmental, non-Indigenous human rights organization, without any corporate affiliation.

²⁷ See paras 15-29 of these Written Representations.

²⁸ See, e.g., *Globalive*, *supra* note 23 at para 5(c).

²⁹ *Pictou Landing*, *supra*, note 1.

42. Nor do any of the parties share AI's experience, expertise, and knowledge in matters related to international human rights law, both generally and in the particular context of Indigenous peoples. The international human rights perspective AI seeks to bring will assist this Court in determining the required content of the duty of procedural fairness, as well as whether the decision of the NEB in this case is reasonable.
43. As Stratas J.A. recognized in *Pictou Landing*, "Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters" may inform the interpretation of domestic legal principles. Further, "contextual matters may inform the Court's determination of whether the standard of review is correctness or reasonableness", and assist the Court in assessing whether the decision at issue was correct or reasonable.³⁰
44. If AI is not granted leave to intervene, the Court will not fully hear the important international human rights perspective on the issues raised in this case. In particular, it will not fully hear how the NEB's determination engages Canada's international obligations with respect to Indigenous rights, or how international law impacts the interpretation of constitutional human rights provisions – an area where international law has long been recognized as a relevant and persuasive source that can and should be taken into consideration.
45. AI submits that the international human rights perspective it seeks to bring will assist this Court in determining whether the NEB's decision in this case was reasonable in light of Canada's obligations to Indigenous peoples reflected in international and domestic law.
46. If granted leave to intervene, AI will present international human rights principles that will clarify and bolster the domestic legal framework concerning Canada's duty to consult and accommodate Indigenous peoples in decisions affecting their rights and interests. In particular, AI will submit that:
- I. Canada's international legal obligations should be taken into account in determining the required content of the duty of procedural fairness, and the substantive (un)reasonableness of a tribunal's decision;

³⁰ *Pictou Landing*, *supra*, note 1 at paras. 23-25.

II. In particular, an administrative decision is only reasonable if it accords with Canada's international obligations to respect Indigenous rights concerning lands, territories, and resources. Relevant principles in this case include:

- i. The vital importance of the natural environment to Indigenous peoples' identities, cultures and ways of life requires a very high standard of precaution in all decisions potentially affecting Indigenous people's exercise of their rights in respect to lands, territories and resources;
- ii. Efforts to balance the rights of Indigenous peoples against other social imperatives must take into account the distinct contemporary situation of Indigenous peoples, including the unresolved legacy of past violations and heightened risk of further marginalization and discrimination;

III. An administrative decision is only reasonable if it accords with Canada's international obligations to ensure the effective participation of Indigenous peoples in decisions affecting those rights. Relevant principles in this case include:

- i. Indigenous peoples have the right to participate, according to their own customs and traditions, in all decisions potentially affecting their rights;
- ii. Consultation must be comprehensive and make a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples; and
- iii. Where the potential for harm is significant, projects should proceed only with the free, prior, and informed consent (FPIC) of the affected Indigenous peoples

I. International law affects the issues before this Court.

47. International law is relevant to a number of different issues facing this Court on this application for judicial review, since the underlying decision and its consequences directly engage Canada's international legal obligations with respect to the human rights of Indigenous peoples.

48. International law is relevant to examining whether a duty of procedural fairness has been satisfied, by shedding additional light on the nature and importance of the interests at stake, and how Canada is obligated to respect and protect those interests, both substantively and procedurally.
49. International law is also relevant in assessing the range of acceptable and defensible options available to the NEB,³¹ and whether the ultimate decision reached in this case was reasonable. Decisions that are contrary to Canada's international legal obligations, or that fail to reflect the values and principles of international law, are not reasonable, particularly in the absence of a clear statutory provision authorizing a breach of Canada's international legal obligations. Finally, international law is relevant in that it informs the interpretation and application of domestic laws and legal principles, as well as the mandates of and legislation governing federal environmental regulatory agencies.³²
50. AI intends to outline Canada's international obligations with respect to Indigenous rights that are engaged on the facts of this case. Those obligations are set out in binding treaties, including the *UN Charter*, the *ICCPR*, the *ICESCR*, and the *ICERD*. They are also found in the principles of customary international law, which form part of the Canadian common law, and other sources of law like the *Universal Declaration of Human Rights* and the *UN Declaration on the Rights of Indigenous Peoples*, which establish minimum standards for protection of human rights and codify principles of customary international law.³³ Also persuasive are the views of the UN treaty bodies and agencies charged with promoting and reviewing the implementation of treaties, UN Special Rapporteurs, and the decisions of foreign and international Courts interpreting international human rights instruments.³⁴
51. Canadian courts have long recognized that the values and principles set out in international law are "relevant and persuasive" sources of the interpretation of the human rights enshrined in Canada's *Constitution Act, 1982*.³⁵ Further, the Supreme Court of Canada

³¹ See *Pictou Landing*, *supra*, note 1 at para. 26.

³² *Ibid.*

³³ See, e.g. International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples* (Interim Report, 2010) online: < <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> > ["Hague Conference"].

³⁴ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348, 38 DLR (4th) 161, Dickson CJ, dissenting on other grounds [*Reference re Public Service*]; *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445 at para 155, 215 ACWS (3d) 439.

³⁵ *Reference re Public Service*, *supra* note 34 at 348; *R v Hape*, 2007 SCC 26 at para 55, [2007] 2 SCR 292 [*Hape*].

has determined that the specific mandates of administrative agencies must be interpreted and applied consistently with the Canadian Constitution, including the constitutional obligation to uphold the honour of the Crown and fulfill the duty to consult and accommodate.³⁶ International law is thus a useful source for administrative bodies to interpret and implement their own mandates in accordance with the Canadian Constitution.³⁷ Absent express, unequivocal, contrary legislative intent, courts have applied a presumption of conformity, requiring that domestic law be interpreted so as to avoid violations of Canada's international law obligations.³⁸

52. The substance of Canada's international human rights obligations that are relevant in this case fall into two broad and related categories: those dealing with Indigenous rights respecting land and culture, and those dealing with Indigenous rights respecting consultation and accommodation.

II. An administrative decision is only reasonable if it accords with Canada's international obligations to respect Indigenous rights concerning lands, territories, and resources

(i) The vital importance of traditional lands to the realization of Indigenous rights requires a very high standard of precaution in all decisions potentially affecting those lands

53. International human rights bodies and courts have consistently recognized that, for Indigenous peoples, secure access to resources on their traditional territories is an essential precondition for the enjoyment of other protected human rights and their very survival.³⁹ These rights include the right to culture, life, health, subsistence, livelihood, a healthy environment, property, and water.⁴⁰

54. The duty to respect Indigenous people's land rights has been recognized by the Inter-American Commission on Human Rights as a norm of customary international law.⁴¹ Further, international case law has established that the fact that the extent and nature of the Indigenous rights in question are disputed by the State, or that the State has not fully

³⁶ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 45, [2010] 3 SCR 103.

³⁷ *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75.

³⁸ *R v Hape*, *supra* note 35 at para 53.

³⁹ *Hague Conference*, *supra* note 33 at 47; See also United Nations Human Rights Committee, *Communication No 1457/2006: Angela Poma Poma v. Peru*, 95th Sess, UN Doc CCPR/C/95/D/14572006 at para 7.2.

⁴⁰ United Nations Committee on Social, Economic and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 at para 27.

⁴¹ *Hague Conference*, *supra* note 33 at 47.

recognized pre-existing Indigenous rights in its own laws and procedures, does not negate the existence of these rights or justify their violation.⁴²

55. The fact that land and resource rights are so inextricably tied to the exercise of other Indigenous human rights and the ability for Indigenous communities to exercise their traditional and contemporary cultures and livelihoods gives added urgency to the responsibility to uphold these rights. For this reason, the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has stated that a “precautionary approach [...] should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples.”⁴³

(ii) Efforts to balance between the rights of Indigenous peoples and other social imperatives must take into account the Canada's legacy of past violations and the risk of continued marginalization and discrimination

56. The *UN Declaration* sets out to achieve a balancing of rights among Indigenous peoples and between Indigenous and non-Indigenous peoples. In all instances, that balance that is struck must be principled and consistent with strict criteria for the protection of human rights. The *UN Declaration* states:

The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.⁴⁴

57. Balancing Indigenous rights against other societal interests requires a case-by-case, purposeful approach that considers the cumulative impacts of a project in the context of the unresolved legacy of past violations and current inequalities faced by Indigenous peoples. This means the history of dispossession and continued discrimination experienced by Indigenous peoples and historic patterns of decision-making that have excluded Indigenous

⁴² *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (2001) Judgment, Inter-Am Ct HR (Ser C) No 79 at para 140(d).

⁴³ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, 21st Sess, UN Doc A/HRC/21/47 (6 July 2012) at para 52 [*Anaya, 2012*].

⁴⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007), art 46 [*UN Declaration*].

legal traditions creates special obligations on the State.⁴⁵ In such a context, assertions of national economic interests cannot be assumed to trump the rights of Indigenous peoples.

III. An administrative decision is only reasonable if it accords with Canada's international obligations to ensure the effective participation of Indigenous peoples in decisions affecting those rights.

(i) *Indigenous peoples must meaningfully participate according to their own customs and traditions*

58. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights and interests.⁴⁶ This right derives in part from the right of "all peoples" or nations to self-determination set out in a number of international instruments, including the *ICCPR*,⁴⁷ the *ICESCR*,⁴⁸ and the *UN Declaration*.⁴⁹ The right of self-determination encompasses the right of Indigenous peoples to freely determine their political status, to govern themselves according to their own procedures and within their own institutions, and to determine their own priorities and strategies for their economic, social, and cultural development.⁵⁰ As a corollary, the right to self-determination imposes an obligation on states and other bodies to work with Indigenous peoples' own governance institutions and respect Indigenous peoples' exercise of their own independent jurisdiction when contemplating extractive activities.⁵¹ The *ICCPR*, *ICESCR*, and the *UN Declaration* all recognize that the right of self-determination is inseparable from the right of all peoples both to control their own natural resources and to be secure in their means of subsistence.⁵²

59. The duty to involve Indigenous peoples in the decision making process is also a corollary of the high standard of precaution referred to above. Only through Indigenous peoples' involvement can the full range of potential harms be identified and the seriousness of these harms appropriately gauged. As noted by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, when

⁴⁵ *Ibid* art 21(2).

⁴⁶ *UN Declaration*, *supra* note 44, art 18.

⁴⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 1 [*ICCPR*].

⁴⁸ *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 1 [*ICESCR*].

⁴⁹ *UN Declaration*, *supra* note 44, preamble, art 3.

⁵⁰ *Ibid* arts 3, 23

⁵¹ *Ibid*, art 18

⁵² *Ibid*, art 20; *ICCPR*, *supra* note 47 art 1; *ICESCR*, *supra* note 48 art 1.

large-scale economic activities are carried out on the lands of Indigenous peoples, “it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.”⁵³

(ii) *Consultation must make a good faith effort reach a mutual agreement and seek to protect the human rights of Indigenous peoples*

60. It is a general principle of international law that States have the obligation to consult Indigenous peoples on matters which may affect their rights and interests,⁵⁴ meaning that this principle applies to all states regardless of whether they have ratified specific instruments. Under international law, the adequacy of the consultation with Indigenous peoples, and the outcomes of those consultations, are crucial tests of whether resource extraction should be allowed to proceed on the lands of Indigenous peoples. According to the UN Human Rights Committee:

the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of a minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.⁵⁵

61. Processes or mechanisms to enable Indigenous peoples’ participation in decision making should be developed in collaboration with Indigenous peoples and respect their own traditions, customs, and procedures for decision-making. Special Rapporteur Anaya has noted that “[i]n order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus” as consultation procedures are often not affected “because the affected indigenous peoples

⁵³ United Nations Economic and Social Council, *Human Rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, 59th Sess, UN Doc E/CN.4/2003/90 (21 January 2003) at para 7.

⁵⁴ *Hague Conference*, *supra* note 33 at 13.

⁵⁵ United Nations Human Rights Committee, *Apirana Muhiika et. al. v. New Zealand*, Communication No. 547/1993, 55th Sess, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).

were not adequately included in the discussions leading to the design and implementation of the consultation procedures.”⁵⁶

62. While the degree of consultation required may vary depending on the nature of the proposed project, the scope of its impact, and the nature of the rights at stake,⁵⁷ the duty to consult requires something more substantial than merely the collection and consideration of the views of Indigenous peoples. The consultation must be robust and comprehensive, and consider the project in the context of the overall approach to land and resource development of which it is part, including the potential future developments to which it would logically lead. The duty has been described as a “true instrument” of participation that allows Indigenous people to truly “influence the decision making process,” and one that requires “genuine dialogue [...] aimed at reaching an agreement.”⁵⁸ The consultation should not be treated as an end in itself; at minimum, the duty requires making a genuine, good faith effort and reach a mutual agreement, and be open to the possibility that a project should be rejected.

(ii) Where the potential for harm is significant projects should proceed only with the free, prior, and informed consent (FPIC) of the affected Indigenous peoples.

63. There are actions which, by their very nature, and considering the historical circumstances of Indigenous peoples, make the FPIC of affected Indigenous communities mandatory.⁵⁹ According to the Inter-American Commission, such interventions include ones that have the potential to deprive Indigenous peoples of “the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.”⁶⁰ More generally, the UN Special Rapporteur has stated that FPIC will be a presumptive requirement:

For all those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural

⁵⁶ United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, James Anaya, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009) at para 51.

⁵⁷ *Ibid* at para 65.

⁵⁸ *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245 at paras 167, 186, 200 [“Kichwa”].

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

resources that are traditionally used by indigenous peoples in ways that are important to their survival.⁶¹

64. As indicated in paragraph 54, the *UN Declaration* provides that FPIC, like almost all other international human rights standards, is necessarily subject to a purposive, case by case assessment of the circumstances of the affected peoples and the potential for harm to their rights. Thus, FPIC is not an absolute right. Rather, the final determination of whether FPIC is required must be based on the circumstances of the affected peoples and the potential for serious harm to their rights. Such a determination must always be in proportion to the rights at stake and the potential for harm. The FPIC standard is appropriate even when the exact scope of the Indigenous rights in question is still the subject of unresolved court cases or negotiations with the State. As a standard of law, FPIC is subject to judicial review by courts and similar bodies.

D. AI's participation in this case is in the interests of justice

65. This case raises important questions of public interest regarding the human rights of Indigenous peoples – in particular, the scope of consultation and accommodation necessary when extractive projects have the potential to impact access to resources necessary for Indigenous peoples to exercise their cultures and livelihoods.
66. Given the important rights and interests at stake, and the constitutional dimensions of the legal principles engaged, Canada's obligations under international law are particularly relevant in this case. They will assist this Court in clarifying the domestic legal standards applicable to resource development decision-making. Further, respect for human rights is not only in the interest of Indigenous peoples, but is itself recognized as a broader societal imperative. The preamble to the *UN Declaration* states "the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."⁶²

⁶¹ *Anaya, 2012, supra* note Error! Bookmark not defined. at para 65.

⁶² *UN Declaration, supra* note 44, preamble.

67. Therefore, AI submits that the public interest aspects of this case militate in favour of allowing interveners to participate, so that this Court can have the full benefit of all relevant perspectives before rendering its decision.

E. AI will not delay this judicial review or duplicate materials

68. AI's intervention would be consistent with securing a just, expeditious, and least expensive determination of this proceeding on its merits, and is therefore not inconsistent with the imperatives in Rule 3 of the *Federal Courts Rules*.⁶³
69. If granted leave to intervene, AI will be mindful of submissions made by the parties and any other interveners, and will not duplicate argument and materials before the Court. AI will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will AI seek to supplement the factual record.⁶⁴
70. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding. If granted leave to intervene, AI will abide by any schedule set by this Court for the delivery of materials and for oral argument.⁶⁵
71. If granted leave to intervene, AI will seek no costs and would ask that no costs be awarded against it.⁶⁶
72. The Applicants have consented to AI's motion for leave to intervene.⁶⁷

PART IV – ORDER SOUGHT

73. AI respectfully requests an order granting it leave to intervene in this application, pursuant to Rule 109 of the *Federal Court Rules*.
74. If this Honourable Court determines that leave should be granted, AI respectfully requests permission to file a written factum and the right to present oral argument at the hearing of this application.

⁶³ *Supra*, note 21.

⁶⁴ Neve Affidavit at para 43.

⁶⁵ Neve Affidavit at paras 43-44.

⁶⁶ Neve Affidavit at para 41.

⁶⁷ Neve Affidavit at para 42.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 1, 2014



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SCHEDULE "A" – AUTHORITIES

TAB	CANADIAN CASE LAW
1.	<i>Beckman v Little Salmon/Carmacks First Nation</i> , 2010 SCC 53
2.	<i>Canada (Attorney General) v Canadian Human Rights Commission</i> , 2013 FCA 75
3.	<i>Canada (Attorney General) v Pictou Landing First Nation</i> , 2014 FCA 21
4.	<i>Canada (Attorney General) v Sasvari</i> , 2004 FC 1650
5.	<i>Canadian Pacific Railway Company v Boutique Jacob Inc.</i> , 2006 FCA 426
6.	<i>First Nations Child and Family Caring Society of Canada v Canada (Attorney General)</i> , 2012 FC 445
7.	<i>Globalive Wireless Management Corp v Public Mobile Inc et al</i> , 2011 FCA 119
8.	<i>R v Hape</i> , 2007 SCC 26
9.	<i>Reference re Public Service Employee Relations Act (Alberta)</i> , [1987] 1 SCR 313
	INTERNATIONAL CASE LAW
10.	<i>Case of the Kichwa Indigenous People of Sarayaku v Ecuador</i> , (2012) Judgment, Inter-Am Ct HR (Ser C) No 245
11.	<i>Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua</i> , (2001) Judgment, Inter-Am Ct HR (Ser C) No 79.
12.	United Nations Human Rights Committee, <i>Communication No 1457/2006: Ángela Poma Poma v. Peru</i> , 95th Sess, UN Doc CCPR/C/95/D/14572006.
13.	United Nations Human Rights Committee, <i>Apirana Muhiika et. al. v. New Zealand</i> , <i>Communication No. 547/1993</i> , 55th Sess, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).

	INTERNATIONAL INSTRUMENTS AND REPORTS
14.	International Law Association, <i>The Hague Conference (2010): Rights of Indigenous Peoples</i> (Interim Report, 2010) online: < http://www.ila-hq.org/en/committees/index.cfm/cid/1024 >.
15.	United Nations Committee on Social, Economic and Cultural Rights, <i>General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)</i> , 22nd Sess, UN Doc E/C.12/2000/4
16.	<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).
17.	United Nations Economic and Social Council, <i>Human Rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen</i> , 59th Sess, UN Doc E/CN.4/2003/90 (21 January 2003).
18.	United Nations Human Rights Council, <i>Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya</i> , 21st Sess, UN Doc A/HRC/21/47 (6 July 2012)
19.	United Nations Human Rights Council, <i>Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya</i> , 12th Sess, UN Doc A/HRC/12/34 (15 July 2009).

SCHEDULE "B" – STATUTES, DECLARATIONS, AND CONVENTIONS

STATUTES

Federal Court Rules, SOR/98-106

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervenor and of any solicitor acting for the proposed intervenor; and

(b) describe how the proposed intervenor wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervenor, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervenor.

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

(3) A moving party may serve and file

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir:

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) La Cour assortit l'autorisation d'intervenir de directives concernant:

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

(2) L'intimé signifie et dépose son dossier et sa réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

(3) Le requérant peut signifier et déposer des

written representations in reply within four days after being served with a respondent's record under subsection (2).

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

CONVENTIONS

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article premier

1. Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.

2. Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et de leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale, fondée sur le principe de l'intérêt mutuel, et du droit international. En aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance.

3. Les Etats parties au présent Pacte, y compris ceux qui ont la responsabilité d'administrer des territoires non autonomes et des territoires sous tutelle, sont tenus de faciliter la réalisation du droit des peuples à disposer d'eux-mêmes, et de respecter ce droit, conformément aux dispositions de la Charte des Nations Unies.

International Covenant on Social, Economic and Cultural Rights, 16 December 1966, 993 UNTS 3.

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FEDERAL COURT OF APPEAL

B E T W E E N :

**HAMLET OF CLYDE RIVER,
NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND
JERRY NATANINE**

Applicants

- and -

**TGS-NOPEC GEOPHYSICAL COMPANY
ASA (TGS), PETROLEUM GEO-SERVICES
INC. (PGS), MULTI KLIENT INVEST AS
(MKI), and THE ATTORNEY GENERAL OF
CANADA**

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE PROPOSED INTERVENER
AMNESTY INTERNATIONAL
Motion for Leave to Intervene brought by
Amnesty International**

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Lawyers for the Proposed Intervener,
Amnesty International

FEDERAL COURT OF APPEAL

Court File No. A-354-14

DATED: _____

AT: _____

PRESENT: _____

BETWEEN:

**HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND JERRY NATANINE**

Applicants**-and-**

**TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-SERVICES
INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE ATTORNEY GENERAL OF
CANADA**

Respondents

ORDER

Motion for Leave to Intervene brought by Amnesty International

HAVING CONSIDERED the material submitted by Amnesty International (“AI”) in support of its Motion for leave to Intervene in the within application (the “Motion”); and

HAVING reviewed the submissions already filed on record by the applicant and respondents;

IT IS ORDERED AS FOLLOWS:

1. AI is granted leave to intervene in this application pursuant to Rule 109 of the *Federal Court Rules*, subject to the following directions;
2. AI is entitled to receive all materials filed in this appeal;

3. AI may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Court Rules*;
4. AI's memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this appeal;
5. AI shall accept the file in its current state, and not seek to file any additional evidence;
6. The time for oral argument by counsel to AI shall be determined by the panel hearing the appeal;
7. AI shall seek no costs in respect of the appeal, and shall have no costs ordered against it;
8. The style of cause shall be changed to add Amnesty International as an intervener, and hereafter all documents shall be filed under the amended style of cause.

Court File No. A-354-14

FEDERAL COURT OF APPEAL

**HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND JERRY NATANINE**

Applicants

-and-

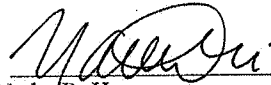
**TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS), PETROLEUM GEO-
SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI), and THE
ATTORNEY GENERAL OF CANADA**

Respondents

CONSENT

Motion for leave to intervene brought by Amnesty International

The applicants, Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization – Clyde River, and Jerry Natanine, consent to the issuance of an order granting the proposed intervener, Amnesty International, leave to intervene in this appeal.


per Nader R. Hasan
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Fax: (416) 964-8305
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FEDERAL COURT OF APPEAL

B E T W E E N :

**HAMLET OF CLYDE RIVER,
NAMMAUTAQ HUNTERS & TRAPPERS
ORGANIZATION – CLYDE RIVER, AND
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- and -

**TGS-NOPEC GEOPHYSICAL COMPANY
ASA (TGS), PETROLEUM GEO-SERVICES
INC. (PGS), MULTI KLIENT INVEST AS
(MKI), and THE ATTORNEY GENERAL OF
CANADA**

Respondents

**MOTION RECORD OF THE PROPOSED
INTERVENER
AMNESTY INTERNATIONAL
Motion for Leave to Intervene brought by
Amnesty International**

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