

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

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

Motion for Leave to Intervene brought by Amnesty International

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TAB 1

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

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 appeal 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 not to exceed 20 pages, 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, but counsel shall be prepared to limit oral submissions to not more than 15 minutes;
7. AI shall seek no costs in respect of the appeal, 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. It is financed by subscriptions and donations from its worldwide membership, and receives no government funding.
10. AI Canada is one of the two membership bodies for Amnesty International members and supporters in Canada. The other is Amnesty International Canada Francophone Branch. AI Canada is a Part II Corporation under the *Canada Corporations Act*.
11. AI Canada has approximately 60,000 members and supporters across the country, and a board of 10 directors. There are currently close to 3 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups, and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like AI Canada. AI's policies and priorities are determined democratically by our members at the national and international levels.
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 different legal proceedings before the Supreme Court of Canada, this Honourable 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.
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 First Nations and Indigenous peoples

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 First Nations communities.
17. For example, AI was involved as a party in *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75 (the “*Caring Society* case”), a case stemming from a complaint to the Canadian Human Rights Tribunal (the “Tribunal”), and which raises certain issues that are similar to those in the present appeal. The Attorney General of Canada successfully brought a motion before the Tribunal to dismiss the complaint of the First Nations Child and Family Caring Society (the “Caring Society”) and the Assembly of First Nations, on the basis that the *Canadian Human Rights Act* did not allow for a “comparison” between First Nations children living on reserves and those living off reserves. The complainants’ application for judicial review in Federal Court was granted, and the Attorney General’s appeal to this Court was dismissed.
18. In the *Caring Society* case hearings at the Federal Court and the Federal Court of Appeal, AI made submissions on Canada’s obligations under international human rights law – both to children in general, and to First Nations children in particular – pursuant to the *Convention on*

the Rights of the Child, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous Peoples. The *Caring Society* case has now been returned to the Tribunal for a full hearing on the merits, which is in progress. AI remains closely involved in those proceedings as an interested party, has made opening submissions and will be exercising its right to make final submissions.

19. Most recently, AI was granted leave to intervene before the Supreme Court of Canada in *William v. British Columbia* and, in November 2013, made oral and written submissions on the international human rights law standards that should be applied in delineating the scope of Aboriginal rights and Aboriginal title under s. 35 of the *Constitution Act, 1982*.
20. More generally, through AI's collaboration with First Nations representatives and organizations, it has documented and helped draw attention to various rights violations in Canada, including unequal access to basic government services needed to ensure an adequate standard of living in First Nations communities. In addition to intervening in judicial proceedings that engage human rights issues with a particular impact on First Nations peoples, AI's work in this regard has included:
 - a. investigating complaints of systemic patterns of mistreatment;
 - b. working with specific communities involved in land rights disputes;
 - c. collaborating with the Native Women's Association of Canada in a long-term campaign on violence against Indigenous women;
 - d. engaging in public education activities to promote existing and emerging standards in domestic and international law; and
 - e. 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.

21. At the international level, 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. Many 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 appeal.
22. 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*. Now that the *UN Declaration on the Rights of Indigenous Peoples* 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.
23. 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 Organization of African Unity; and is registered as a civil society organization with the Inter-Parliamentary Union.

C. AI's specific interest in protecting the human rights of First Nations peoples

24. AI has a specific, active, long-standing, and demonstrated interest in protecting the rights of Indigenous peoples, and in particular First Nations children and other vulnerable members of First Nations communities.
25. AI has repeatedly witnessed and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among First Nations 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.
26. AI has also been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of First Nations individuals – including, in particular, First Nations children and other vulnerable members of First Nations communities. This is despite the fact that these rights are recognized in both Canadian law and in international

human rights standards, and that Canada's failure to uphold them has lead to dire consequences for the health, safety, well-being, and cultural integrity of First Nations 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.

27. AI considers this appeal an important opportunity to ensure that the human rights of First Nations – and, in particular, the right to non-discrimination – are affirmed and respected in accordance with international human rights law.
28. In addition, this Court's decision in this appeal on the scope and interpretation of Jordan's Principle and/or the right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") will likely have a significant impact on the resolution of the *Caring Society* case. If granted leave, AI would be given an opportunity to present this Court with submissions on international law, just as it has (and will) before the Tribunal in the *Caring Society* case, such that both decision-making bodies will approach the issues before them with the benefit of the international human rights law perspective.

D. This appeal raises matters of public interest

29. This appeal raises important matters of public interest, including questions about:
 - a. the proper interpretation of Jordan's Principle, as it might affect a broad range of government decision-making regarding the availability and quality of healthcare, child and family services, and other services delivered to First Nations children living on reserves; and
 - b. the scope and applicability of the equality rights protections set out in s. 15 of the *Charter* to the delivery of healthcare services to First Nations children living on reserves.
30. At this core, this case is about whether First Nations families can access healthcare and social services to the same degree and of the same quality as other Canadians – an issue that will have an impact beyond this appeal.

31. All else being equal, 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's proposed submissions

32. If granted leave to intervene, AI will address two of the main issues raised on this appeal: the proper interpretation and applicability of Jordan's Principle, and the applicability of s. 15 of the *Charter* to the circumstances of this case – that is, where there is an adverse, substantive difference in health care treatment between First Nations children living on reserves and children living off reserves.
33. AI will make submissions on these issues from the perspective of international human rights law, which neither of the parties has addressed in their materials.
34. AI will submit that, properly interpreted, Jordan's Principle is not simply limited to the question of "who pays" as between the provincial and federal government, but rather aims to preclude any substantive, adverse differences in the accessibility or quality of health or welfare services received by First Nations children living on reserves as compared to children living off reserves. This broader interpretation of Jordan's Principle reflects and properly takes into account Canada's international human rights obligations. By contrast, a narrower interpretation of Jordan's Principle would be inconsistent with these obligations and should be avoided.
35. AI will also submit that these same international obligations influence the content and interpretation of the right to equality in s. 15 of the *Charter*, and lead to the conclusion that a substantive adverse difference in the quality or availability of health or welfare services received by First Nations children living on reserves as compared to children living off reserves amounts to discrimination that is contrary to the *Charter*, whether pursuant to the logic of Jordan's Principle or otherwise.
36. In making these arguments, AI will rely on a number of international instruments, including the *UN Declaration on the Rights of Indigenous Peoples*, the *International Covenant on Civil and Political Rights*, the *International Convention on Economic, Social and Cultural Rights*, the

International Convention on the Elimination of all Forms of Racial Discrimination and the *Convention on the Rights of the Child*.

37. 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, the reports of UN Special Rapporteurs, and relevant jurisprudence of other courts and international judicial institutions.
38. AI will submit that Canada's obligations under these international instruments includes, but is not limited to, the obligation to provide children with access to health and social services without any discrimination based on Indigenous identity or whether that child is living on or off reserve. In addition, AI Canada will submit that this obligation has been brought into even sharper focus by the comments and reports of the relevant UN treaty bodies and UN Special Rapporteurs, and the jurisprudence of other international institutions, which have expressly addressed the need for special and effective measures to safeguard the rights of First Nations children and other vulnerable members of First Nations communities, given the ongoing effects of the long history of discrimination that they have faced.
39. Finally, AI will rely on some of Canada's own statements and submissions before UN bodies as to the measures it says are being taken to comply with its international obligations under international treaty law.

F. AI will make a unique, important and useful contribution to this appeal

40. None of the other parties (or the proposed intervener) will address the issues raised in this appeal from the perspective of an international, non-governmental, non-First Nations 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 in this appeal.
41. 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 ultimately helpful perspective in adjudicating the important issues raised by this appeal.

42. If granted leave to intervene, there is no risk of AI duplicating the position of other parties to the appeal. Based on the materials filed to date, none of the parties will be making substantive arguments concerning international human rights law.
43. The only other proposed intervener of which AI is aware is the Caring Society. The Caring Society plans to address a number of issues of domestic law, as well as Canada's obligations under the *Convention on the Rights of the Child*. However, the Caring Society's proposed submissions on international law are limited to that instrument, and do not address any other international instruments, reports or jurisprudence.
44. If AI is not granted leave, the international human rights law perspective that it proposes to bring to the issues raised in this appeal will simply not be heard by this Court. This perspective is important, particularly in matters involving the interpretation of human rights provisions or *Charter* rights, where international law has long been recognized as a relevant and persuasive source that can and should be taken into consideration.
45. This Court has the inherent authority to allow intervention where it is just, on such terms and conditions as are appropriate.
46. AI has satisfied the overriding consideration for leave to intervene by demonstrating that it can assist the Court by making unique and useful submissions. The other relevant factors recognized by this Court for determining leave also support the conclusion that leave should be granted.

G. AI will not delay the appeal or duplicate materials

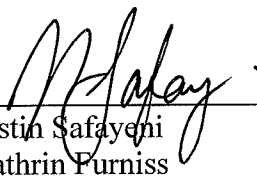
47. If granted leave to intervene, AI will be mindful of submissions made by the parties and any other interveners, and will not duplicate argument and materials before the Court.
48. To the extent that the Caring Society's proposed submissions on the *Convention on the Rights of the Child* may risk overlapping some of with AI's submissions on that specific instrument, AI is committed to working with the Caring Society (and any other interveners that may be granted leave) to ensure that there is no duplication in the materials presented to this Court. AI will instead direct its submissions at addressing other relevant international instruments, reports and jurisprudence, as outlined above.

49. 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.
50. AI has brought this motion now and not earlier so as to review the written submissions made by the parties before this Court.
51. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.
52. If granted leave to intervene, AI will abide by any schedule set by this Court for the delivery of materials and for oral argument.
53. If granted leave, AI will seek no costs and would ask that no costs be awarded against it.
54. The Respondents have consented to AI's motion for leave to intervene. The Appellant has advised that it will not be providing its consent.
55. Rules 109 and 369 of the *Federal Court Rules*.
56. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

1. The Affidavit of Alex Neve, sworn December 17, 2013; and
2. Such further and other material as counsel may advise and this Honourable Court may allow.

December 20, 2013


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FEDERAL COURT OF APPEAL

B E T W E E N :

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- and -

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**NOTICE OF MOTION OF AMNESTY
INTERNATIONAL**

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Solicitors for the Respondent,
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TAB 2

Court File No. A-158-13

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

AFFIDAVIT OF ALEX NEVE, O.C.**(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 3 years. My activities with AI have included numerous research missions to monitor and report on human rights

abuses, the preparation of international and national reports on issues of concern to AI, and participation in AI national and international meetings.

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

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

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

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

7. AI 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 First Nations peoples, and in particular First Nations children and other vulnerable members of First Nations societies, in accordance with international human rights norms and standards.

Amnesty International: The Organization

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

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

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

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

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

Participation in Judicial Proceedings

17. AI has participated as an intervener and made submissions in numerous judicial proceedings in Canada, including proceedings relating to the human rights of First Nations children and how these rights should be protected in accordance with international norms and standards.

18. In *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75 (the “*Caring Society* case”), AI – styled as a respondent because of its involvement as an “interested party” in the proceedings before the Canadian Human Rights Tribunal below – successfully argued that Canada’s obligations under international human rights law were inconsistent with a narrow reading of section 5(b) of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and First Nations children living off reserves. The Federal Court of Appeal upheld the Federal Court’s order that the human rights complaint concerning different levels of funding for First Nation children living on and off reserves should proceed to a hearing on the merits before the Tribunal. AI remains involved in the Tribunal proceedings as an interested party. The *Caring Society* case is discussed further below at paras. 33-35.

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

- (a) *William v. British Columbia*, 2013 SCC (decision reserved) (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) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40 (proposed guiding principles to help ensure that Canadian decision-makers’ application of Article 1F(a) of the *Refugee Convention* is consistent with international law);
- (c) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (regarding the forum of necessity doctrine and international standards of jurisdiction and access to justice);
- (d) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (intervened with respect to what triggers a Canadian citizen’s section 7 life, liberty, and

security of the person interests, and the content of the principles of fundamental justice);

- (e) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 S.C.R. 342 (presented submissions with respect to the interplay between extradition and refugee protection);
- (f) *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269 (argued that the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity);
- (g) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use);
- (h) *United States v. Burns*, [2001] 1 S.C.R. 283 (regarding the international movement towards the abolition of capital punishment);
- (i) *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 (regarding the international movement towards the abolition of capital punishment); and
- (j) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (regarding the international movement towards the abolition of capital punishment).

20. In addition, AI has intervened in a number of matters before the Ontario Courts. Most recently, AI intervened in *Attorney General of Canada v. Diab*, 2013 ONCA (under reserve) to make submissions on when the risk of having torture-derived evidence used against the person sought in extradition proceedings should preclude extradition; in *Tanudjaja et al. v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 5410 to make submissions on the nature of Canada's international human rights obligations and the justiciability of social and economic rights; as well as in *Choc et al. v. HudBay et al.*, 2013 ONSC 1414 to assist the Court with issues concerning corporate accountability for human rights abuses overseas. AI also intervened in *Bouzari v. Islamic Republic of Iran* ([2004] O.J. No. 2800, 71 O.R. (3d) 675), which considered the right of a torture victim to sue for compensation from the offending government and the constitutional validity of the *State Immunity Act*. Finally, in *Ahani v. Her Majesty the Queen, The Attorney General of Canada and the Minister of Citizenship and*

Immigration ([2002] O.J. No. 431, 58 O.R. (3d) 107)), AI made submissions on Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

21. Besides the *Caring Society* case, AI has also been involved in several other matters before the Federal Court concerning fundamental human rights issues.

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

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

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

25. AI was also granted intervener status in the policy phase of the Ipperwash Inquiry, a provincial inquiry into the events surrounding the death of Dudley George, who was shot by an Ontario Provincial Police officer in 1995 during an Indigenous rights protest at Ipperwash

Provincial Park. AI advanced several arguments, including that the inquiry should interpret Canada's obligations towards Indigenous peoples in light of international rights standards.

26. Finally, 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. AI's 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* (the "UN Declaration"), was cited by the panel as an important consideration in its findings.

Participation in Legislative Proceedings

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

- (a) *Accountability, Protection and Access to Justice: Amnesty International's Concerns with respect to Bill C-43* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada's international obligations and the *Canadian Charter of Rights and Freedoms*), October 31, 2012;
- (b) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada's international obligations towards refugees and asylum-seekers), May 7, 2012;
- (c) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11), May 11, 2010;

- (d) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;
- (e) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;
- (f) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;
- (g) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;
- (h) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2005 (regarding security certificates);
- (i) *Security through Human Rights* (submission to the Special Senate Committee on the *Anti-Terrorism Act* and House of Commons' Sub-Committee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), May 16, 2005 (regarding security certificates);
- (j) Brief on Bill C-31 (*Immigration and Refugee Protection Act*), March 2001; and
- (k) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court)

Engagement with International Organizations

28. 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. AI recently made the following submissions to various international bodies regarding human rights and, in particular, concerns about proper respect for human rights in the context of First Nations peoples (and Indigenous peoples more generally):

- (a) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Sixteenth session of the UPR Working Group of the Human Rights Council, April-May 2013), outlining concerns about human rights abuses against vulnerable groups, including Indigenous peoples;
- (b) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012), detailing concerns over the widespread removal of First Nations children from their families, communities and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves;
- (c) *Amnesty International Submission to the UN Committee against Torture* (May 2012), which highlighted, among other concerns, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry in respect to police use of force during Indigenous land rights protests;
- (d) *Amnesty International Submission to the UN Committee on the Elimination of Racial Discrimination* (February 2012), outlining concerns about the rights of Indigenous peoples in Canada, as well as recommendations on the land rights of Indigenous peoples and the right to free, prior and informed consent;
- (e) *Amnesty International Submission to the Inter-American Commission on Human Rights* (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;
- (f) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Fourth session of the UPR Working Group of the Human Rights Council, February 2009);
- (g) *Human Rights for All: No Exceptions* (AI's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada, 2009);
- (h) *It Is A Matter of Rights: Improving the protection of economic, social and cultural rights in Canada* (AI's Briefing to the UN Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's fourth and fifth periodic reports concerning rights referred in the *International Covenant on Economic, Social and Cultural Rights*, submitted March 27, 2006); and

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

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

Expertise on human rights in the First Nations context

30. AI has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of First Nations people – including, in particular, First Nations children and other vulnerable members of First Nations communities – as recognized in both Canadian law and in international human rights standards, and the dire consequences that this has had for the health, safety, well-being and cultural integrity of First Nations societies in Canada. Through its collaboration with First Nations representatives and organizations, AI 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 First Nations communities.

31. AI's work in this area has included: intervening in judicial proceedings (before both courts and tribunals) that engage human rights issues with a particular impact on First Nations peoples; 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 in a long-term campaign on violence against Indigenous women; engaging in public education activities to promote existing and emerging standards in domestic and international law; and engaging with United Nations human rights bodies and mechanisms, including special rapporteurs, working groups and treaty bodies in their ongoing monitoring of human rights concerns relating to First Nations peoples in Canada.

32. AI's expertise in applying international human rights law in the First Nations context can be seen in three of its most recent initiatives in this area, as well as its history of prior involvement in related issues.

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

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

35. In both the Federal Court and the Federal Court of Appeal, AI made submissions on Canada's obligations under international human rights law – both to children in general, and to First Nations children in particular – pursuant to the *Convention on the Rights of the Child* (the "CRC"), the *International Covenant on Civil and Political Rights* (the "ICCPR"), the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "ICERD"), the *International Covenant on Economic, Social and Cultural Rights* (the "ICESCR") and the *UN Declaration*. The matter has now been returned to the Tribunal for a full hearing on the merits, which is in progress. AI remains involved in those proceedings as an interested party, and will be exercising its right to make final submissions.

36. Another recent example of AI's involvement occurred in February 2012, when AI presented a submission to the United Nations Committee on the Elimination of Racial Discrimination during that treaty body's review of Canada's compliance with its obligations

under the *ICERD*. AI's submissions raised concerns about the delivery of services in First Nations communities, including child protections services, resulting in part from inequities in funding. AI Canada's Indigenous rights campaigner, Craig Benjamin, was in Geneva when the Canadian delegation appeared before the Committee for review.

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

38. AI's involvement in issues relating to human rights in the First Nations context 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 Culbertson Track," examining police institutionalization of the Ipperwash Inquiry recommendations.

39. As part of its efforts to ensure the human rights of vulnerable members of First Nations communities are respected, AI has actively campaigned for the end to violence against Indigenous women. In October 2004, AI published a report on discrimination and violence against Indigenous women 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 five times more likely than other women to die as a result of violence. The report highlights some of the factors contributing to this violence, including inequalities in services and the overall standard of living in First Nations 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.”

40. AI played an active role in the United Nations 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 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.

41. Work on human rights in the First Nations 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).

42. Furthermore, as a result of Amnesty International’s longstanding and ongoing work on the issue of remedies for human rights violations, the organization has developed an expertise on the protection and promotion of the human rights of First Nations peoples, and the relevance of international human rights standards to issues of pressing concern in Canada.

AI’s Interest in this Appeal

43. As discussed above, AI has a specific, active and long-standing interest in protecting the rights of First Nations peoples in Canada, and a particular interest in protecting the rights of First Nations children and other vulnerable members of First Nations societies.

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

45. AI is concerned as well because these injustices continue to occur despite domestic and constitutional protections, and Canada’s ratification and endorsement of international human rights instruments. Accordingly, Amnesty International sees the case before this Court as an important opportunity to ensure that the human rights of First Nations peoples – and, in particular, the right to non-discrimination – 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 the AI's Proposed Submissions

46. If granted leave to intervene, AI proposes to highlight some of the principles of international human rights law that are relevant in considering the interpretation and application of Jordan's Principle. In particular, AI will submit that a broader interpretation of Jordan's Principle – one that is not simply limited to the question of "who pays" as between the provincial and federal government, but that aims to preclude any substantive, adverse differences in the accessibility or quality of health or welfare services received by First Nations children living on reserves as compared to children living off reserves – reflects and properly takes into account Canada's international human rights obligations. By contrast, a narrower interpretation is inconsistent with these obligations and should be avoided.

47. AI will also submit that these same international obligations influence the content and interpretation of the right to equality enshrined in section 15 of Canada's *Charter of Rights and Freedoms*, and lead to the conclusion that a substantive adverse difference in health or welfare services received by between children living on and off reserves amounts to discrimination that is contrary to the *Charter*, whether pursuant to the logic of Jordan's Principle or otherwise.

48. In making these arguments, AI will rely on a number of international instruments, including the *UN Declaration*, the *ICCPR*, the *ICESCR*, the *ICERD* and the *CRC*. 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, the reports of UN Special Rapporteurs, and relevant jurisprudence of other courts and international judicial institutions.

AI's Important, Useful and Unique Perspective

49. I believe that AI brings an important, useful and unique perspective and approach to the issues raised in this appeal, including the issue of how to interpret Jordan's Principle, as well as the scope and applicability of the right to equality in s. 15 of the *Charter*.

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

bring an important and unique perspective to this appeal – namely, that of a broad segment of Canadian civil society that supports human rights and believes that society as a whole benefits from the fulfilment and protection of the human rights of all sectors of society.

51. AI will make a useful contribution to the issues raised in this case by highlighting the international human rights considerations that it engages. Given the organization's experience, expertise and history in dealing with issues concerning human rights, particularly in the First Nations context, and international law, it is uniquely positioned to play this role. As set out above, 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, UN Special Rapporteurs, and other international institutions dealing with the human rights of First Nations 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 appeal.



52. 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.

53. AI has brought this motion now and not earlier so as to review the written submissions made by the Appellant and the Respondents before this Court. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.

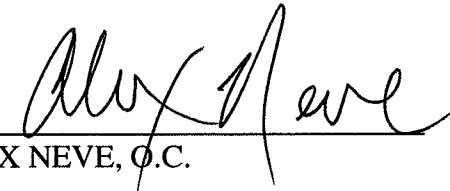
54. AI will abide by any schedule set by this Court for the delivery of written materials and for oral submissions at the hearing.

55. I make this affidavit in support of AI's motion for leave to intervene in this appeal and for no other or improper purpose.

SWORN BEFORE ME at the City of
Ottawa in the Province of
Ontario this 17 day of
December, 2013

A Commissioner for Taking Affidavits


ALEX NEVE, O.C.

LSUC #: 63487F

TAB 3

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

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 First Nations individuals – and, in particular, the rights of children and other vulnerable members of First Nations communities – are protected in accordance with Canada's international legal obligations. AI has worked towards this goal through a variety of means, including interventions.
2. This appeal raises important matters of public interest concerning the application and interpretation of Jordan's Principle, as well as the analysis of equality rights under s. 15 of the

Canadian Charter of Rights and Freedoms (the “*Charter*”). This Court’s decision on these matters will have far-reaching implications beyond this case.

3. AI seeks leave to intervene in this appeal to provide this Honourable Court with an international human rights law perspective on these two issues. More specifically, if granted leave, AI will submit that a broader interpretation of Jordan’s Principle – one that is not simply limited to the question of “who pays” as between the provincial and federal government, but that aims to preclude any substantive, adverse differences in the accessibility or quality of health or family services received by First Nations children living on reserves as compared to children living off reserves – reflects and properly takes into account Canada’s international human rights obligations, while a narrower interpretation does not. AI will also submit that these same international obligations influence the content and interpretation of the right to equality enshrined in s. 15 of the *Charter*, and lead to the conclusion that a substantive adverse difference in health or welfare services received by children based on First Nations identity or their residence on or off reserves amounts to discrimination that is contrary to the *Charter*.

4. 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.

5. AI’s perspective is unique. None of the other parties address the international law arguments that 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 appeal; indeed, courts have long recognized that international law can be a relevant and persuasive source 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.

PART I - FACTS

A. AI's background and purpose

6. 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. It is financed by subscriptions and donations from its worldwide membership, and receives no government funding.¹

7. AI Canada is one of the two membership bodies for Amnesty International members and supporters in Canada. The other is Amnesty International Canada Francophone Branch. AI Canada is a Part II Corporation under the *Canada Corporations Act*.²

8. AI Canada has approximately 60,000 members and supporters across the country, and a board of 10 directors. There are currently close to 3 million members of AI in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories the work of these groups is coordinated by national sections like AI Canada. AI's policies and priorities are determined democratically by our members at the national and international levels.³

9. 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

¹ Affidavit of Alex Neve sworn December 17, 2013 ("Neve Affidavit"), Amnesty International Motion Record ("AI MR"), Tab 2 at paras. 2-3

² Neve Affidavit, AI MR, Tab 2 at para. 10

³ Neve Affidavit, AI MR, Tab 2 at para. 11-12

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.⁴

10. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.⁵

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

11. AI has intervened in, or otherwise been involved as a party in, dozens of different legal proceedings before the Supreme Court of Canada, this Honourable Court, the Federal Court, the Ontario Court of Appeal and the Ontario Superior Court of Justice (among others).⁶ 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.⁷ AI has also participated as an intervener in a number of public inquiries and administrative hearings.⁸

12. 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.⁹

C. AI's experience in protecting the human rights of First Nations peoples domestically

13. 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 First Nations communities.

⁴ Neve Affidavit, AI MR, Tab 2 at para. 16

⁵ Neve Affidavit, AI MR, Tab 2 at para. 15

⁶ Neve Affidavit, AI MR, Tab 2 at paras. 19-23

⁷ Neve Affidavit, AI MR, Tab 2 at para. 17

⁸ Neve Affidavit, AI MR, Tab 2 at paras. 24-26

⁹ Neve Affidavit, AI MR, Tab 2 at para. 27

14. 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.¹⁰ Since then, AI has continued to work for the implementation of the Inquiry recommendations, and has published a case study examining police institutionalization of these recommendations.¹¹

15. 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.¹² This formed part of AI's larger campaign for the end to 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 First Nations communities, as well as a long history of discrimination and impoverishment.¹³

16. 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*

¹⁰ Neve Affidavit, AI MR, Tab 2 at para. 26

¹¹ Neve Affidavit, AI MR, Tab 2 at para. 38

¹² Neve Affidavit, AI MR, Tab 2 at para. 27

¹³ Neve Affidavit, AI MR, Tab 2 at para. 39

Rights of Indigenous Peoples. Its submissions were cited by the panel as an important consideration.¹⁴

17. Before the courts, AI was involved as a party in *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75 (the “*Caring Society* case”), a case stemming from a complaint to the Canadian Human Rights Tribunal (the “Tribunal”), and which raises certain issues that are similar to those in the present appeal. The Attorney General of Canada successfully brought a motion before the Tribunal to dismiss the complaint of the First Nations Child and Family Caring Society (the “Caring Society”) and the Assembly of First Nations, on the basis that the *Canadian Human Rights Act* did not allow for a “comparison” between First Nations children living on reserves and those living off reserves. The complainants’ application for judicial review in Federal Court was granted, and the Attorney General’s appeal to this Court was dismissed.¹⁵

18. In the *Caring Society* case hearings at the Tribunal, Federal Court and the Federal Court of Appeal, AI made submissions on Canada’s obligations under international human rights law – both to children in general, and to First Nations children in particular – pursuant to the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights* and the *UN Declaration on the Rights of Indigenous Peoples*. The *Caring Society* case has now been returned to the Tribunal for a full hearing on the merits, which is in progress. AI remains closely involved in those proceedings as an interested party, has made opening submissions and will be exercising its right to make final submissions.¹⁶

¹⁴ Neve Affidavit, AI MR, Tab 2 at para. 26

¹⁵ Neve Affidavit, AI MR, Tab 2 at para. 34. See *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, Amnesty International Book of Authorities (“AI BOA”), Tab 1

¹⁶ Neve Affidavit, AI MR, Tab 2 at para. 35

19. Most recently, AI was granted leave to intervene before the Supreme Court of Canada in *William v. British Columbia* and, in November 2013, made submissions on the international human rights law standards that should be applied in delineating the scope of Aboriginal rights and Aboriginal title under s. 35 of the *Constitution Act, 1982*.¹⁷

20. More generally, through AI's collaboration with First Nations 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 First Nations communities. In addition to intervening in judicial proceedings that engage human rights issues with a particular impact on First Nations 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 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.¹⁸

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

21. 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. Many 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 appeal. Some recent examples include:

¹⁷ Neve Affidavit, AI MR, Tab 2 at para. 19(a)

¹⁸ Neve Affidavit, AI MR, Tab 2 at para. 30

- (a) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Sixteenth session of the UPR Working Group of the Human Rights Council, April-May 2013), outlining concerns about human rights abuses against vulnerable groups, including Indigenous peoples;
- (b) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012), detailing concerns over the widespread removal of First Nations children from their families, communities and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves.
- (c) *Amnesty International Submission to the UN Committee against Torture* (May 2012), which highlighted, among other concerns, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry in respect to police use of force during Indigenous land rights protests.
- (d) *Amnesty International Submission to the UN Committee on the Elimination of Racial Discrimination* (February 2012), outlining concerns about the rights of Indigenous peoples in Canada, as well as recommendations on the land rights of Indigenous peoples and the right to free, prior and informed consent;
- (e) *Amnesty International Submission to the Inter-American Commission on Human Rights* (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;
- (f) *Amnesty International Submission to the UN Human Rights Council* (Universal Periodic Review of Canada, Fourth session of the UPR Working Group of the Human Rights Council, February 2009);
- (g) *Human Rights for All: No Exceptions* (AI's Submissions to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada, 2009);
- (h) *It Is A Matter of Rights: Improving the protection of economic, social and cultural rights in Canada* (AI's Briefing to the UN Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's fourth and fifth periodic reports concerning rights referred in the *International Covenant on Economic, Social and Cultural Rights*, submitted March 27, 2006); and
- (i) *Protection Gap: Strengthening Canada's Compliance with its International Human Rights Obligations* (AI's Submissions to the United Nations Human Rights

Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005).¹⁹

22. 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*. AI was present at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI co-hosted a symposium 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 on the Rights of Indigenous Peoples* 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 on the Rights of Indigenous Peoples* 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.²⁰

23. Finally, AI engages with a broad range of international and inter-governmental organizations. 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.²¹

24. These international bodies recognize and trust AI's experience and objectivity, and value AI's unique perspective. As Jean-Pierre Hocke, former United Nations High Commissioner for

¹⁹ Neve Affidavit, AI MR, Tab 2 at para. 28

²⁰ Neve Affidavit, AI MR, Tab 2 at para. 40

²¹ Neve Affidavit, AI MR, Tab 2 at para. 28

Refugees, noted: "It's a worn cliché, but if Amnesty did not exist, it would have to be invented. It is simply unique."²²

D. AI's specific interest in protecting the human rights of First Nations peoples

25. 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 rights of Indigenous peoples, and in particular First Nations children and other vulnerable members of First Nations communities.²³ This can be seen in AI's extensive involvement in these issues both domestically and internationally, as discussed above.

26. AI has repeatedly witnessed and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among First Nations 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, both because of the individual and collective hardship, suffering and injustice they represent, but also because of the lost opportunity to set positive examples that are desperately needed in the international community.²⁴

27. AI has also been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of First Nations individuals – including, in particular, First Nations children and other vulnerable members of First Nations communities – as recognized in both Canadian law and in international human rights standards, and the dire consequences that this has had for the health, safety, well-being and cultural integrity of First Nations societies in Canada. AI is concerned that these injustices continue to occur despite

²² Neve Affidavit, AI MR, Tab 2 at para. 29

²³ Neve Affidavit, AI MR, Tab 2 at paras. 17, 43

²⁴ Neve Affidavit, AI MR, Tab 2 at paras. 44

domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments.²⁵

28. AI considers this appeal as an important opportunity to ensure that the human rights of First Nations – and, in particular, the right to non-discrimination – are affirmed and respected in accordance with international human rights law.²⁶

E. AI's perspective

29. None of the other parties or other proposed interveners will address the issues raised in this appeal from the perspective of an international, non-governmental, non-First Nations human rights organization, without any corporate affiliation. In this way, AI will bring an important and unique perspective to this appeal.

30. 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 appeal.²⁷

²⁵ Neve Affidavit, AI MR, Tab X at paras. 30, 45

²⁶ Neve Affidavit, AI MR, Tab X at para. 45

²⁷ Neve Affidavit, AI MR, Tab X at paras. 51

PART II - ISSUES

31. The only issues raised on this motion are whether AI should be granted leave to intervene in this appeal 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 intervener must (a) describe how the proposed intervener 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. Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervener should leave be granted.

33. The factors to be considered on a motion for leave to intervene are well established, and have been described by this Court as follows:

- a) Is the proposed intervener directly affected by the outcome?
- b) Does there exist a judicable issue and a veritable public interest?
- c) Is there an apparent lack of other reasonable or efficient means to submit the question to the Court?
- d) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- e) Are the interests of justice better served by the intervention of the proposed third party?
- f) Can the Court hear and decide the cause on its merits without the proposed intervener?²⁸

²⁸ *Canadian Pacific Railway Company v. Boutique Jacob Inc.*, 2006 FCA 426, AI BOA, Tab 2 at para. 19

34. 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.²⁹ 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.”³⁰

35. In the end, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.³¹

B. AI’s interest in this appeal

36. As set out above, 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 human rights of First Nations children and other vulnerable members of First Nations communities. 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.

37. 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.³²

²⁹ *Globalive Wireless Management Corp. v. Public Mobile Inc. et al.*, 2011 FCA 119, AI BOA, Tab 3 at para. 5(c)

³⁰ *Canada (Attorney General) v. Sasvari*, 2004 FC 1650, AI BOA, Tab 4 at para. 11

³¹ *Boutique Jacob*, AI BOA, Tab 2 at para. 21

³² See, for example, *Globalive*, AI BOA, Tab 3 at para. 5(c); *Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267, AI BOA, Tab 5 at para. 7 (Canadian Council for Refugees has an “interest in the outcome of the appeal”); *Canadian Human Rights Commission*, AI BOA, Tab 1 (CCLA granted intervenor status)

38. With respect to this appeal, AI's interest is heightened because of its ongoing involvement as an Interested Party in the *Caring Society* case, which remains ongoing before the Canadian Human Rights Tribunal. This Court's decision on the scope and interpretation of Jordan's Principle and/or the right to equality under s. 15 of the *Charter* will likely have a significant impact on the resolution of the *Caring Society* case. If granted leave, AI would be given an opportunity to present this Court with submissions on international law, just as it has before the Tribunal, such that both decision-making bodies will approach the issues before them with the benefit of the international human rights law perspective.

C. This appeal raises public interest issues

39. This appeal raises important matters of public interest. At its core, it is about whether First Nations families can access healthcare and social services to the same degree as other Canadians. This appeal raises questions about the proper interpretation of Jordan's Principle, which may influence a broad range of government decision-making regarding the availability and quality of health, child and family services, and other services delivered to First Nations children living on reserves. The appeal also raises questions about the scope and applicability of the equality rights protections set out in s. 15 of the *Charter* to the delivery of healthcare and other services to First Nations children living on reserves.

40. Simply put, the issues in this case will have an impact beyond the parties to the appeal.

41. All else being equal, 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.

D. AI's proposed submissions

42. If granted leave to intervene, AI will address two of the main issues raised on this appeal: the proper interpretation of Jordan's Principle, and the applicability of s. 15 of the *Charter* to the circumstances of this case (e.g. where there is an adverse, substantive difference in health care treatment between First Nations children living on reserves and children living off reserves).

43. AI will make submissions on these issues from the perspective of international human rights law, which neither of the parties has addressed in their materials.

44. With respect to Jordan's Principle, AI will highlight some of the standards of international human rights law that are relevant to the exercise of considering the Principle's interpretation and application. In particular, AI will submit that a broader interpretation of Jordan's Principle – one that is not simply limited to the question of “who pays” as between the provincial and federal government, but that aims to preclude any substantive, adverse differences in the accessibility or quality of health or welfare services received by First Nations children living on reserves as compared to children living off reserves – reflects and properly takes into account Canada's international human rights obligations. By contrast, a narrower interpretation of Jordan's Principle would be inconsistent with these obligations and should be avoided.³³

45. AI will also submit that these same international obligations influence the content and interpretation of the right to equality enshrined in s. 15 of the *Charter*, and lead to the conclusion that a substantive adverse difference in the quality or availability of health or welfare services received by First Nations children living on reserves as compared to children living off reserves

³³ Neve Affidavit, AI MR, Tab 2 at para. 46

amounts to discrimination that is contrary to the *Charter*, whether pursuant to the logic of Jordan's Principle or otherwise.³⁴

46. In making these arguments, AI will rely on a number of international instruments, including the *UN Declaration on the Rights of Indigenous Peoples*, the *International Covenant on Civil and Political Rights*, the *International Convention on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination* and the *Convention on the Rights of the Child*. 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, the reports of UN Special Rapporteurs, and relevant jurisprudence of other courts and international judicial institutions.³⁵

47. AI will submit that Canada's obligations under these international instruments includes, but is not limited to, the obligation to provide children with access to health and social services without any discrimination based on Indigenous identity or whether that child is living on reserve or off reserve. In addition, AI Canada will submit that this obligation has been brought into even sharper focus by the comments and reports of the relevant UN treaty bodies and UN Special Rapporteurs, and the jurisprudence of other international institutions, which have expressly addressed the need for special and effective measures to safeguard the rights of First Nations children and other vulnerable members of First Nations communities, given the ongoing effects of the long history of discrimination that they have faced. Finally, AI will rely on some of Canada's own statements and submissions before UN bodies as to the measures being taken to comply with its international obligations under international treaty law.

³⁴ Neve Affidavit, AI MR, Tab 2 at para. 47

³⁵ Neve Affidavit, AI MR, Tab 2 at para. 48

E. AI can make a unique, important and useful contribution to this appeal

48. If granted leave to intervene, there is no risk of AI duplicating the position of the parties to the appeal. Based on the materials filed to date, none of the parties will be making substantive arguments concerning international human rights law. Moreover, 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.

49. With respect to other proposed interveners, the only other one of which AI is aware is the Caring Society, which plans to address a number of issues of domestic law, as well as Canada's obligations under the *Convention on the Rights of the Child*. However, the Caring Society's proposed submissions on international law are limited to that instrument, and do not address any other international instruments, reports or jurisprudence. To the extent that the Caring Society's proposed submissions on the *Convention on the Rights of the Child* may risk overlapping some of with AI's submissions on that specific instrument, AI is committed to working with the Caring Society (and any other interveners that may be granted leave) to ensure that there is no duplication in the materials presented to this Court.³⁶ AI will instead direct its submissions at addressing other relevant international instruments, reports and jurisprudence, as outlined above.

50. If AI is not granted leave, the international human rights law perspective that it proposes to bring to the issues raised in this appeal will simply not be heard by this Court. This perspective is important, particularly in matters involving the interpretation of human rights provisions or *Charter* rights, where international law has long been recognized as a relevant and persuasive source that can and should be taken into consideration.³⁷

³⁶ Neve Affidavit, AI MR, Tab 2 at para. 51

³⁷ See, for example, *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, AI BOA, Tab 6 at paras. 21-27

51. In the final analysis, then, AI submits that the international human rights perspective it seeks to bring will assist this Court in determining the important matters of public interest before it in this appeal. Accordingly, AI submits that it has satisfied the overriding consideration for leave to intervene, and that the other factors recognized by this Court also support the conclusion that leave should be granted.

F. AI will not delay this appeal or duplicate materials

52. 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.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.

53. AI has brought this motion now and not earlier so as to review the written submissions made by the parties before this Court. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.³⁹ If granted leave to intervene, AI will abide by any schedule set by this Court for the delivery of materials and for oral argument.⁴⁰

54. If granted leave, AI will seek no costs and would ask that no costs be awarded against it.

55. The Respondents have consented to AI's motion for leave to intervene. The Appellant has advised that it will not be providing its consent.

PART IV – ORDER SOUGHT

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

³⁸ Neve Affidavit, AI MR, Tab 2 at para. 52

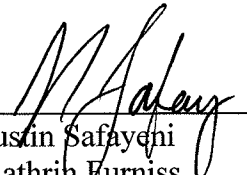
³⁹ Neve Affidavit, AI MR, Tab 2 at para. 53

⁴⁰ Neve Affidavit, AI MR, Tab 2 at para. 54

57. If this Honourable Court determines that leave should be granted, AI respectfully requests permission to file a factum not exceeding 20 pages and the right to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 20, 2013


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000049

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Lawyers for the Proposed Intervener,
First Nations Child and Family Caring Society

SCHEDULE "A" - AUTHORITIES

| TAB | CASE LAW |
|------------|--|
| 1. | <i>Canadian Human Rights Commission v. Attorney General of Canada</i> , 2013 FCA 75 |
| 2. | <i>Canadian Pacific Railway Company v. Boutique Jacob Inc.</i> , 2006 FCA 426 |
| 3. | <i>Globalive Wireless Management Corp. v. Public Mobile Inc. et al.</i> , 2011 FCA 119 |
| 4. | <i>Canada (Attorney General) v. Sasvari</i> , 2004 FC 1650 |
| 5. | <i>Li v. Canada (Minister of Citizenship and Immigration)</i> , 2004 FCA 267 |
| 6. | <i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 47 |

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SCHEDULE "B" – STATUES

Canadian Charter of Rights and Freedoms, s. 15

Constitution Act, 1982, s. 35

Federal Court Rules , SOR/98-106, Rule 19

000052

Court File No. A-158-13

FEDERAL COURT OF APPEAL

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and
MAURINA BEADLE

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE PROPOSED INTERVENER,
AMNESTY INTERNATIONAL**

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Solicitors for the Respondent,
Amnesty International

TAB 4

FEDERAL COURT OF APPEAL

Court File No. A-158-13

DATED: _____

AT: _____

PRESENT: _____

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

ORDER**(Motion for Leave to Intervene by Amnesty International)**

HAVING considered the material submitted by Amnesty International ("AI") in support of its Motion for Leave to Intervene in the within appeal (the "Motion"), and the material filed by the appellant in response;

HAVING noted that the respondents consent to the Motion while the appellant opposes the Motion; and

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

IT IS ORDERED AS FOLLOWS:

1. AI is granted leave to intervene in this appeal 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 not to exceed 20 pages, 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, but counsel shall be prepared to limit oral submissions to not more than 15 minutes;
 7. AI shall seek no costs in respect of the appeal, 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.
-

TAB 5

000055

Court File No. A-158-13

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

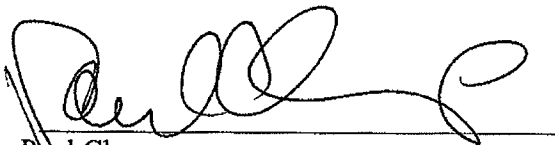
PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

CONSENT

Motion for leave to intervene brought by Amnesty International

The respondents, Pictou Landing Band Council and Maurina Beadle, consent to the issuance of an order granting the proposed intervener, Amnesty International, leave to intervene in this appeal.



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Counsel for the Respondents

FEDERAL COURT OF APPEAL

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and
MAURINA BEADLE

Respondents

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

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Amnesty International