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FEDERAL COURT OF APPEAL

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Applicants and appellants

-and-

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Respondents

MOTION RECORD OF THE PROPOSED INTERVENER AMNESTY INTERNATIONAL

Motion for Leave to Intervene brought by Amnesty International

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Applicants and Appellants

-and-

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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 application for judicial review pursuant to Rule 109 of the *Federal Court Rules*;

2. AI is entitled to receive all materials filed in this application;

3. AI may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Court Rules*;

4. AI's memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this application;

5. AI shall accept the record in its current state, and not seek to file any additional evidence;

6. AI shall be allowed to present oral argument at the hearing of the application, with the time for oral argument by counsel to AI shall be determined by the panel hearing the application;

7. AI shall seek no costs in respect of the application, and shall have no costs ordered against it; and

8. The style of cause shall be changed to add Amnesty International as an intervener, and hereafter all documents shall be filed under the amended style of cause.

THE GROUNDS FOR THE MOTION ARE:

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

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

11. AI's specific and genuine interest in protecting the human rights of Indigenous peoples in Canada, and in this case in particular;

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

13. AI's participation in this case is in the interests of justice; and

14. AI will not delay the application or duplicate materials.

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

16. The Applicants have consented to AI's motion for leave to intervene.

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

17. The Affidavit of Alex Neve, sworn 12 February 2015; and

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

17 February 2015

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AFFIDAVIT OF ALEX NEVE

(in support of the motion to intervene of Amnesty International)

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

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

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

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

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

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

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

7. AI has a strong interest in this case as it pertains directly and centrally to an area of high priority in the organization's work – namely the protection of the human rights of Indigenous peoples in accordance with international human rights norms and standards, and in particular, the duty to meaningfully consult with and accommodate Indigenous peoples in

relation to government decisions which have the potential to seriously harm Indigenous rights.

Amnesty International: The Organization

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

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

10. AI Canada is one of the two membership bodies for AI members and supporters in Canada. The other is AI Canada's Francophone Branch. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act*, SC 2009, c. 23.

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

12. There are currently more than three million members AI members in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups, and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like AI Canada. AI's policies and priorities are determined democratically by its members at the national and international levels.

Amnesty International: The Vision

13. AI's vision is of a world in which all people can freely enjoy all the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights instruments.

14. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural, and economic.

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

Promoting and Advancing International Human Rights

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

Monitoring and Reporting on Human Rights Abuses

17. AI's investigative work is carried out by human rights researchers who receive, cross-check, and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups, Indigenous communities, and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, websites, and other media outlets. AI also sends approximately 130 fact-finding missions to some 70 countries each year to assess what is happening on the ground.

18. AI uses its research to prepare reports, briefing papers, newsletters, and campaigning materials. Among its publications is the annual Amnesty International Report on human rights in countries around the world. AI's research is recognized around the world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.

19. Canadian courts, including the Supreme Court, have recognized AI's research as credible. The following judgments have emphasized the important evidentiary role of AI reports: *Thavachchelvam v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 601, 242 ACWS (3d) 166; *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, 35 Imm LR (3d) 241; *Shabbir v.*

Canada (Minister of Citizenship and Immigration), 2004 FC 480, 250 FTR 299; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118, 250 FTR 299; and *Suresh v. Canada (Minister of Citizenship and Immigration, et al)*, 2002 SCC 1, [2002] 1 SCR 3.

Participation in Judicial and Administrative Proceedings

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

    a. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2: submitted that the test for aboriginal title must be developed in a manner that is consistent with international human rights law, and not arbitrarily or narrowly construed;

    b. *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, 444 NR 120: argued that Canada's obligations under international human rights law were inconsistent with a narrow reading of section 5(b)of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and children living off reserves;

    c. *First Nations Child and Family Caring Society of Canada et. al. v. Canada* (Canadian Human Rights Tribunal File No. T1340/7008, judgment reserved): submitted that Canada's international obligations must be respected in the interpretation of the *Canadian Human Rights Act* in determining whether Canada has discriminated against First Nations children living on reserves;

    d. *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13 (leave to intervene before the Federal Court of Appeal granted, but the government discontinued the appeal): (prepared submissions on Canada's international human rights obligations to ensure that the

level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve);

e. *Joint Review Panel for the Enbridge Northern Gateway Project* (1 February 2013): presented submissions on international law standards regarding the protection of Indigenous land, resource, and cultural rights, including the scope of the duty to consult and accommodate Indigenous groups when deciding whether to approve a resource development project;

f. *Federal Review Panel for the New Prosperity Gold-Copper Mine Project*: (independent Review Panel convened by the Minister of the Environment to undergo a federal environmental assessment, 2013): provided submissions on international law standards regarding the protection of Indigenous land and cultural rights, to which the Panel Report referred; and

g. Ipperwash Inquiry (2006): argued that the federal division of powers must not be a barrier to the protection of human rights of Indigenous peoples, and urged the Commissioner to develop recommendations that are consistent with international human rights and recognize the wider international context of grave human rights violations against Indigenous peoples.

21. AI Canada has intervened before the Supreme Court of Canada regarding other international human rights issues in the following cases:

a. *Jesus Rodriguez Hernandes, B306, J.P. et al and Appulonappa et al v. Canada (Minister of Public Safety and Emergency Preparedness and the Queen)* (SCC Court File Nos. 35677, 35685, 35688, 35388, and 35958, to be heard February 2015, leave to intervene granted): arguing that the definition of "people smuggling" and "human smuggling" in the *Immigration and Refugee Protection Act* must be construed in accordance with Canada's international human rights obligations.

b. *Febles v. Canada*, 2014 SCC 68: presented submissions with respect to the interpretation of the Article 1F(b) exclusion provision of the *Convention Relating to the Status of Refugees* (*Refugee Convention*);

c. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62: presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture;

d. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1: argued the *Immigration and Refugee Protection Act* (*IRPA*)'s Special Advocate regime violates international norms and constitutional principles of procedural fairness;

e. *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2013] 2 SCR 678: proposed guiding principles to help ensure that Canadian decision-makers' application of Article 1F(a) of the *Refugee Convention* is consistent with international law;

f. *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572: presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice;

g. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44: intervened with respect to what triggers a Canadian citizen's constitutional rights to life, liberty, and security of the person, and the content of the principles of fundamental justice;

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

i. *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui 2*]: intervened with respect to whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international norms and the constitutional principles of procedural fairness;

j. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui 1*]: presented submissions on the constitutionality of the

procedural protections in the *IRPA*'s security certificate regime and on the arbitrary detention of foreign nationals under that regime).

k. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3: submitted that the absolute prohibition on torture is a peremptory norm of customary international law;

l. *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269: argued the right to the protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity;

m. *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283: presented submissions regarding the international movement towards the abolition of capital punishment;

n. *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858, 84 DLR (4th) 498: presented submissions regarding the international movement towards the abolition of capital punishment; and

o. *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438: presented submissions regarding the international movement towards the abolition of capital punishment.

22. In addition to advocacy before the Supreme Court of Canada, AI Canada has appeared before other Canadian courts as an intervener or applicant in the following cases:

a. *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174: submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition;

b. *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, Court File No. C57714 (Ontario Court of Appeal, judgment reserved); *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220: argued that the right to adequate housing is justiciable under the *Charter* and Canada's international human rights obligations;

c. *Choc et al v. HudBay et al*, 2013 ONSC 1414, 116 OR (3d) 674: made arguments regarding corporate accountability for human rights abuses overseas;

d. *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136: intervened with respect to the validity of the US-Canada *Safe Third Country Agreement*, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;

e. *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, [2009] 4 FCR 149: submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment;

f. *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, [2004] OJ No 2800: intervened regarding the right of a torture victim to sue for compensation from the offending government; and

g. *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, [2002] OJ No 431: presented submissions regarding Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

23. Further, AI Canada was granted intervener status in the following inquiries:

a. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry): submissions on the subject of security and human rights; and

b. The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin (Iacobucci

Inquiry): submissions on several issues, including the prohibition against torture, prohibition against the use of information obtained through torture, and the presumption of innocence of Canadians detained abroad.

24. In other national and international judicial fora, AI and its national branches have presented submissions on a variety of important matters, including:

a. *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (European Court of Human Rights): presented submissions regarding Italy's violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya;

b. *Boumediene v. Bush; Al Odah v. United States*, 128 S Ct 2229 (2008) (United States Supreme Court): intervened regarding the *Military Commission Act* of 2006 as an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;

c. *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (United Kingdom House of Lords): made submissions regarding the applicability of the *European Convention on Human Rights* and the UK's *Human Rights Act 1998* to the actions of British armed forces in Iraq;

d. *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71 (United Kingdom House of Lords): presented arguments regarding the inadmissibility of evidence obtained through torture;

e. *A and others v. Secretary of State for the Home Department*, [2005] 2 AC 68 (United Kingdom House of Lords): made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act* 2001;

f. *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (United Kingdom House of Lords): intervened with respect to exceptions for state immunity for international crimes; and

g. *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (European Court of Human Rights): presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture.

Participation in Legislative Proceedings

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

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

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

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

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

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

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

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

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

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

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

k. Brief on Bill C-31 (*Immigration and Refugee Protection Act*) (March 2001): expressed concern that the proposed legislation provided insufficient protection to persons seeking asylum in Canada interdicted by immigration control officers while *en route* to the country; and; and

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

Participation with International Organizations

26. AI has consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the Organization of African Unity; and is registered as a civil society organization with the Inter-Parliamentary Union.

27. AI has made submissions to various international organizations and UN monitoring bodies regarding Canada's compliance with its international human rights obligations, including:

a. *Canada: Submission to the United Nations Human Rights Committee*, (July 2014): AI's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it adopted in November 2014 as a first step in the review of Canada's compliance under the *International Covenant on Civil and Political Rights*;

b. *Canada: Human rights abuses prevalent among vulnerable groups*, (April-May 2013): Amnesty International Submission to the Universal Periodic Review;

c. *Canada: Submission to the UN Universal Periodic Review*, (October 2012): Amnesty International's submission to the second review of Canada's human rights record by the UN Human Rights Council;

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

e. *Canada: Briefing to the UN Committee Against Torture*, (May 2012): Amnesty International's submission to the Committee's review of Canada, which highlighted, among other things, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry in respect to police use of force during Indigenous land rights protests;

f. *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination*, (February 2012): Amnesty International's submission to the Committee's review of Canada, outlining concerns about the rights of Indigenous peoples in Canada, as well as making recommendations on the land rights of Indigenous peoples and the right to free, prior, and informed consent;

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

h. *Canada: Submission to the UN Universal Periodic Review*, (February 2009): Amnesty International's submission to the first review of Canada's human rights record by the UN Human Rights Council;

i. *Human Rights for All: No Exceptions*, (February 2007): Amnesty International's submission to the United Nations Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada;

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

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

l. *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada*, (October 8, 2004); and

m. *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, (November 2000).

28. These international bodies recognize and trust AI's experience, objectivity, and distinctive perspective. As Jean-Pierre Hocke (former United Nations High Commissioner

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

Expertise on human rights in the Indigenous context

29. AI has long been concerned by the frequent failure of governments in Canada to uphold, fully and without discrimination, the human rights of Inuit, First Nations, and Métis peoples – including, in particular, the duty to meaningfully consult with and accommodate Indigenous peoples in relation to resource extraction projects that have the potential to affect Indigenous rights. This is despite the fact that the rights of Indigenous peoples are recognized in both Canadian law and by international human rights standards, and that Canada's failure to uphold them has led to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous societies in Canada. Through its collaboration with Indigenous peoples' representatives and organizations, AI has documented and helped draw attention to various rights violations which have led to Indigenous peoples being deprived of the ability to exercise their traditional culture and livelihoods and perpetuated a legacy of marginalization and discrimination.

30. AI's work in this area has included: intervening in judicial and administrative proceedings that engage human rights issues with a particular impact on Indigenous peoples (as outlined in paragraph 20); investigating complaints of systemic patterns of mistreatment; working with specific communities involved in land rights disputes; collaborating with the Native Women's Association of Canada and other organizations in a long-term campaign on violence against Indigenous women; engaging in public education activities to promote existing and emerging standards in domestic and international law; and engaging with UN human rights bodies and mechanisms, including Special Rapporteurs, working groups, and treaty bodies in their ongoing monitoring of human rights concerns relating to Indigenous peoples in Canada.

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

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

32. As part of its efforts to ensure the human rights of vulnerable members of Indigenous communities are respected, AI has actively campaigned for putting an end to violence against Indigenous women. In October 2004, AI published a report on discrimination and violence against Indigenous women and girls in Canada called "Stolen Sisters: Discrimination and Violence Against Indigenous Women in Canada." The report examines the social and economic context of the high rates of violence experienced by Indigenous women in Canada, who are much more likely than other women to be targeted for acts of violence. The report highlights some of the factors contributing to this violence, including inequalities in services and the overall standard of living in Indigenous communities, as well as a long history of discrimination and impoverishment. In 2009, AI issued a follow-up report titled "No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada."

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

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

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

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

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

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

e. "Australia: 'The land holds us:' Aboriginal Peoples' right to traditional homelands in the Northern Territory" (2011);

f. "We're only asking for what is ours: Indigenous peoples in Paraguay" (2009); and

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

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

AI's interest in this application

36. AI has a specific, active, and long-standing interest in protecting the rights of Indigenous peoples in Canada, and a particular interest in this judicial review, as it engages Canada's obligation to protect rights to lands, territories and resources that are so inextricably tied to the exercise of Indigenous peoples cultures and livelihoods.

37. AI considers this judicial review an important opportunity to ensure that the human rights of Indigenous peoples are affirmed and respected in accordance with international human rights law. In June 2010, AI Canada released its first public statement urging the government to not approve the Northern Gateway Project over the objections of potentially affected First Nations. On 1 February 2013, AI made oral submissions to the Joint Review Panel (JRP), wherein it presented arguments about the need for the Panel to take Canada's international human rights obligations with respect to Indigenous peoples into account when making its conclusions in its report. The final JRP report which provided the basis of the Governor-in-Council's approval of the project did not contain any considerations of the international human rights concerns put before it. On 19 June 2014, AI Canada issued a joint response with a Coalition of other First Nations, humanitarian, and environmental organizations criticizing the overall process that led to the issuance of certificate of public convenience and necessity, including the JRP proceedings, the Panel's final report, and the Governor-in-Council's approval, stating it failed to respect and protect the human rights of Indigenous peoples whose lands and waters would be affected by the project, and violated Canada's domestic and international legal obligations. AI also drew attention to the JRP process in its 2013 Annual Report, "The state of the world's human rights."

38. More generally, AI has repeatedly witnessed and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada. These conditions arise from Canada's failure to properly respect the human rights of Indigenous peoples, as recognized and protected by international law. These conditions are of deep concern to AI, both because of the individual and collective hardship, suffering, and injustices they represent, but also because of the lost opportunity to set positive examples that are desperately needed in the international community. AI is also concerned because these injustices continue despite domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments. Accordingly, AI sees the case before this Court as an important opportunity to ensure that the human rights of Indigenous peoples – and, in particular, the right to meaningfully participate in all decisions potentially affecting their cultures and livelihoods as well as other rights – are affirmed and respected. It is AI's view that international human rights law and standards provide a relevant, persuasive, and important tool in achieving this aim.

Overview of AI's Proposed Submissions

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

    a. International human rights norms and standards must be considered when interpreting the Aboriginal rights, enshrined in section 35 of the *Constitution Act, 1982*, that are engaged by this judicial review. Specifically,

        i. Administrative bodies bear the duty of implementing their mandates in a manner consistent with the rule of law, including upholding constitutionally protected rights;

        ii. International law is a relevant and persuasive source of interpretation of domestic law, including the Canadian Constitution, the *Canadian Environmental Assessment Act* (*CEAA*), and the mandates of regulatory agencies;

        iii. The framework of Aboriginal rights in Canadian common law and the protection of Indigenous rights in international law are interlinked and mutually reinforcing;

    b. International law requires a high standard of protection for Indigenous peoples' rights, including those rights that are disputed by the state;

    c. Decisions under review must respect the high standard of protection, and properly account for the public interest, meaning that:

        i. The factors set out in the *CEAA* must be interpreted and applied in accordance with Canada's international obligations;

        ii. The precautionary principle governing the JRP's mandate must be interpreted and applied in accordance with Canada's international obligations; and

iii. A broader and proper understanding of the public interest should take into account the goal of achieving reconciliation, and the role of adhering to international law in moving towards that goal;

d. Canada's duty to consult must be informed by and accord with its international obligations to ensure the effective and meaningful participation of Indigenous peoples in decisions affecting their rights

i. International law requires the protection and accommodation of Indigenous institutions and traditional systems of decision-making;

ii. Meaningful participation in decision-making at international law requires a process that enhances and is consistent with Indigenous peoples' customs and traditions;

iii. Meaningful participation requires a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples; and

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

1. In making these arguments, AI will rely on a number of international instruments, including the *Universal Declaration of Human Rights*, the *UN Declaration on the Rights of Indigenous Peoples*, the *UN Charter*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *UN Convention on the Elimination of All Forms of Racial Discrimination*. To aid in interpreting the nature and scope of the obligations under these instruments, AI will also rely on the comments and reports of various UN treaty bodies, UN Special Rapporteurs, and relevant jurisprudence of foreign and international courts. Finally, AI will rely on some of Canada's own policies on the applicability of international law and statements before UN bodies as to the measures it says are being taken to comply with its international obligations.

AI's Perspective is Important, Useful, and Unique

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

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

42. 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.

43. AI has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding if granted leave to intervene.

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

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

SWORN BEFORE ME at the City of Ottawa in the Province of Ontario this 11 day of February, 2015

A Commissioner for Taking Affidavits

S. ANANDA SANGARÉ

ALEX NEVE, O.C.

Tab 3

Court File Nos. A-56-14, A- 59-14, A-63-14, A-64-14, A-67-14, A-437-14, A-439-14, A-440-14, A-442-14, A-443-14, A-445-14, A-446-14, A-447-14, A-448-14, A-514-14, A-517-14, A-520-14, A-522-14

FEDERAL COURT OF APPEAL

BETWEEN:

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all the citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

Applicants and Appellants

-and-

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, NORTHERN GATEWAY PIPELINES INC., NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP and NATIONAL ENERGY BOARD

Respondents

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER AMNESTY INTERNATIONAL

Motion for Leave to Intervene brought by Amnesty International

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OVERVIEW

1. The proposed intervener, Amnesty International (AI), is an international human rights organization with decades of experience and a longstanding interest in ensuring that the rights of Indigenous peoples are protected in accordance with Canada's international legal

obligations and commitments. AI has worked towards this goal through a variety of means, including interventions in judicial proceedings before this Court and others.

2. This case raises important issues of public interest concerning the appropriate standard of protection that must be accorded by administrative bodies and the Crown when dealing with resource development projects that may impact Indigenous peoples' access to the resources necessary to sustain their traditional culture and livelihoods.

3. AI seeks leave to intervene to provide this Honourable Court with an international human rights law perspective on the issues in this judicial review. AI made oral submissions regarding Canada's international human rights obligations and commitments towards Indigenous peoples with respect to the Northern Gateway Pipeline project to the Joint Review Panel (JRP). However, international law was overlooked in the JRP's conclusions. An international human rights law perspective will assist this Court to determine whether the JRP process and the decision of the Governor in Council to approve the Northern Gateway Project based on the JRP's report was reasonable or correct.

4. If granted leave to intervene, AI will assist this Court by making submissions on how international law informs, among other things: (i) the need for regulatory bodies and the Crown to recognize and respect Indigenous peoples' rights relating to their land and culture; and (ii) the scope of consultation with and accommodation of Indigenous peoples necessary in the context of resource development operations that threaten to impact those rights. Such questions necessarily require a purposeful balancing of Indigenous rights against other societal interests, while taking into account the unresolved legacy of past violations and heightened risk of further marginalization and impoverishment of Indigenous communities. AI will submit that according to international law, where such projects seriously threaten the lands, resources, culture, and livelihoods of Indigenous peoples, operations should only proceed with the free, prior, and informed consent of the affected Indigenous peoples.

5. In making these arguments, AI will rely on a number of international instruments, as well as the comments and reports of United Nations (UN) treaty bodies and UN special rapporteurs, and the jurisprudence of other courts and international institutions.

6. This Court recently granted AI intervener status in *Canada (Attorney General) v. Pictou Landing First Nation* (*Pictou Landing*), finding that AI had a genuine interest and valuable contribution to make in assessing the reasonableness or correctness of an administrative decision that raised matters of public importance regarding Indigenous rights.[1]

7. Just as in the case of *Pictou Landing*, AI's perspective in this case is unique. None of the other parties address the international law arguments AI proposes to make, nor do they share AI's extensive expertise in this area. These arguments will assist this Court in effectively determining the issues before it; 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.

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

PART I – FACTS

A. AI's background and purpose

9. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of internationally recognized rights. It is impartial and independent of any government, political persuasion, or religious creed. AI Canada is the organization's English Section. AI currently has over 3 million members in over 162 countries, including 60,000 supporters across Canada. AI envisions a world in which every person enjoys all the human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, economic, social, and cultural. In 1977, AI was awarded the Nobel Peace Prize for its work.[2]

B. AI's expertise and experience

10. AI's research is recognized in Canada and globally as accurate, credible, and unbiased, and its reports are widely consulted by governments, intergovernmental organizations,

[1] 2014 FCA 21 at para 11, 237 ACWS (3d) 570 ["*Pictou Landing*"].
[2] Affidavit of Alex Neve sworn 11 February 2015 at paras 8-15 ["Neve Affivdait].

journalists, and scholars. The organization has made submissions regarding human rights to courts, legislatures, and international bodies in Canada and around the world. AI's documentation has been relied upon by Canadian courts and Tribunals. Further, AI Canada has been granted intervener status at numerous inquiries and administrative and judicial proceedings at different levels of court, including this Court. AI Canada has also sought to advance international human rights law directly through the legislative process.[3]

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

11. AI has a varied and long-standing history of working to advance and protect the human rights of Inuit, First Nations, and Métis peoples in Canada. AI's work has focused on its concern that Canada has failed to uphold both Canadian law and international human rights standards with respect to Indigenous peoples, leading to dire consequences for the health, safety, well-being, and cultural integrity of Indigenous peoples in Canada.[4]

12. AI has done so by providing submissions to Inquiries like the Ipperwash Inquiry in 1995, to the Parliamentary Committees such as House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on the epidemic of violence against Indigenous women and girls in Canada, and to Canadian courts and Tribunals in several proceedings that engage human rights issues with a particular impact on Indigenous peoples.[5]

13. AI has also made submissions on the need for environmental impact assessments to uphold international human rights standards, including those set out in the *UN Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) at the public review of the proposed New Prosperity Gold and Copper Mine in central British Columbia and to the JRP during the approval process at issue in this judicial review.[6] In the New Prosperity Mine review, the panel cited AI's submissions as an important consideration.[7]

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[3] Neve Affidavit at paras 18-25.
[4] Neve Affidavit at para 29.
[5] Neve Affidavit at para 20.
[6] Neve Affidavit at para 20
[7] *Report of the Review Panel: New Prosperity Gold-Copper Mine Project* (British Columbia, 31 October 2013) at 210-211, 213 online: <http://www.ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>.

14. Before the courts, AI recently intervened in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 to provide submissions on international human rights standards surrounding Indigenous land and resource rights. The Supreme Court recognized the right of the Tsilhqot'in people to own, control, and enjoy the benefits of their traditional territory in central British Columbia.[8]

15. AI also participated in proceedings before this Honourable Court in *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75 (*Caring Society*), making submissions on Canada's obligations under international human rights law pursuant to the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights* (*ICCPR*), the *International Convention on the Elimination of all Forms of Racial Discrimination* (*ICERD*), the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) and the *UN Declaration*.[9]

16. In the *Caring Society* case, this Court held that the *Canadian Human Rights Act* permitted a "comparison" between First Nations children living on reserves and those living off reserves.[10] AI provided opening and closing submissions as to Canada's international human rights obligations during the subsequent hearing on the merits before the Tribunal.[11]

17. More generally, through AI's collaboration with Indigenous peoples' representatives and organizations, it has documented and helped draw attention to various rights violations including unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities. AI's work has also included investigating complaints of systemic patterns of mistreatment; working with specific communities involved in land rights disputes; collaborating with the Native Women's Association of Canada and other organizations in a long-term campaign against violence against Indigenous women; and engaging in public education activities to promote existing and emerging standards in domestic and international law.[12]

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[8] Neve Affidavit at para 20.
[9] Neve Affidavit at para 20.
[10] *Canadian Human Rights Commission v Attorney General of Canada*, 2013 FCA 75, 444 NR 120.
[11] Neve Affidavit at para 20.
[12] Neve Affidavit at paras 29-33, 38.

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

18. AI regularly makes submissions to various international bodies, including Special Rapporteurs, UN working groups, treaty bodies, and the Inter-American Commission on Human Rights, in which it raises concerns about Canada's failure to respect and fulfil rights in the context of Indigenous peoples, including the widespread removal of First Nations children from their families due to systemic underfunding of welfare services on reserves, Canada's failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls, and Canada's failure to respect Indigenous land and resource rights.[13]

19. AI also played an active role in the UN processes leading to the finalization and adoption of the *UN Declaration.* AI was present at the UN Working Group on the Draft Declaration from 2004-2006. In 2006, AI co-hosted a symposium in Ottawa on the national implementation of international norms for Indigenous rights that was attended by the UN special rapporteur on the rights of Indigenous peoples. Prior to November 2010, AI engaged with the federal government to urge it to adopt the *UN Declaration* through co-organizing a briefing to Parliamentarians, and issuing a number of public statements. Now that the *UN Declaration* has been endorsed by Canada, AI's efforts have shifted to ensuring it is respected and implemented in the course of Canada's dealings with Indigenous people. This work has included presentations to federal and provincial human rights commissions, Parliamentarians and government staff.[14]

20. Finally, AI engages with a broad range of international and inter-governmental organizations. AI has consultative status with the UN Economic and Social Council, the UN Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the African Union; and is registered as a civil society organization with the Inter-Parliamentary Union. These international bodies recognize and trust AI's experience and objectivity, and value AI's unique perspective.[15]

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[13] Neve Affidavit at para 27.
[14] Neve Affidavit at para 33.
[15] Neve Affidavit at para 26.

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

21. AI has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples. AI has repeatedly researched and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous communities in Canada. These conditions arise from Canada's failure to properly and effectively respect the human rights of Indigenous peoples, as recognized and protected by international law, including the right to be meaningfully consulted in relation to resource development projects which may affect Indigenous land, resource, and cultural rights. These issues are of deep concern to AI because of the individual and collective hardship, suffering, and injustice they represent, as well as the lost opportunity to set positive examples that are desperately needed in the international community.[16] 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.[17]

PART II – ISSUES

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

PART III – SUBMISSIONS

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

23. 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.[18] 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.

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[16] Neve Affidavit at paras 36-37.
[17] Neve Affidavit at para 38.
[18] SOR/98-106.

24. This Court has indicated that it is not necessary to meet all of these factors, particularly where the proposed intervener is able to assist the Court by bringing a distinct perspective and expertise to bear on the issues in dispute.[19] Indeed, the "overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue" by "add[ing] to the debate an element which is absent from what the parties before the Court will bring."[20] Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.[21]

25. Recently, Justice Stratas of this Court proposed a modified list of factors to better reflect the real issues at stake on motions to intervene.[22] Specifically, Stratas J.A. outlined the following considerations as guiding whether intervener status should be granted:

a. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted

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

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

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[19] *Globalive Wireless Management Corp v Public Mobile Inc et al*, 2011 FCA 119 at para 5(c), 200 ACWS (3d) 675 ["*Globalive*"].
[20] *Canada (Attorney General) v Sasvari*, 2004 FC 1650 at para 11, 135 ACWS (3d) 691.
[21] *Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426 at para 21, 357 NR 384.
[22] *Pictou Landing, supra*, note 1 at para. 11.

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

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

26. Applying the above-noted factors in *Pictou Landing*, Stratas J.A. found that AI met the test for intervention. The present case has many similarities to *Pictou Landing*, both being applications for judicial review of administrative decisions with significant public interest dimensions, where Indigenous rights were relevant to the issues at stake. Specifically, in *Pictou Landing*, Stratas J.A. found that:

- AI had a genuine interest in ensuring respect for Indigenous rights in the administrative decision-making process;
- Further exploration of international human rights law would assist the court in determining both the standard of review and the application of that standard;
- The issues to be considered (namely, whether to uphold the exercise of discretion by an administrative decision-maker, which had a significant impact on the welfare of certain Indigenous people) raised matters of sufficient public interest that AI's intervention should be permitted; and
- The terms of the proposed intervention were not inconsistent with Rule 3, since the proposed interveners did not intend to duplicate matters already raised by the parties and the interventions would not unduly delay the proceeding.

27. Similarly, AI has a genuine interest and valuable contribution to make in assessing the reasonableness or correctness of the decisions at issue in this case, which raise matters of

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

B. AI has a genuine interest in this case

28. AI has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples, and a particular interest in protecting the land and resource rights of Indigenous peoples so inextricably tied to the exercise of their traditional and contemporary cultures and livelihoods. This interest is clear from AI's long track record of working to ensure that the human rights of Indigenous peoples are protected in accordance with international human rights law – both before domestic courts, legislatures, tribunals, and public inquiries, as well as before international bodies. It is also clear from AI's other advocacy, education, and reporting efforts on this issue.[23]

29. On 1 February 2013, AI presented oral submissions to the JRP for the Northern Gateway project on international law standards regarding the protection of Indigenous land, resource, and cultural rights, including the scope of the duty to consult and accommodate Indigenous groups when deciding whether to approve a resource development project. The final JRP report which provided the basis of the Governor-in-Council's approval of the project did not contain any consideration of the international human rights concerns put before it. AI has also issued a number of public statements urging the government to refrain from approving the project over the objections of First Nations, and criticizing the overall process that led to the issuance of certificates of public convenience and necessity for being inconsistent with Canada's domestic and international legal obligations towards Indigenous peoples. AI also drew attention to the JRP process in its 2013 Annual Report, "The state of the world's human rights."[24]

30. 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.[25] As outlined above, this Court has previously found that AI has a genuine interest in ensuring respect for the rights of

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[23] See paras 11-21 of these Written Representations.
[24] Neve Affidavit at para 37.
[25] See, e.g., *Globalive*, *supra* note 19 at para 5(c).

Indigenous peoples, as well as the necessary knowledge, skills, and resources to assist the Court in determining whether a particular decision accords with international norms and obligations in that regard.[26]

31. If granted leave to intervene, AI would present submissions on international law, arguments that were also put before the JRP but were not considered in the Panel's final report. AI's submissions will assist this Court in approaching the issues before it with the benefit of the international human rights law perspective that was overlooked by the JRP, and as a result, also the Governor in Council when making the decision to issue the certificate of public convenience and necessity.

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

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

33. Nor do any of the parties share AI's experience, expertise, and knowledge in matters related to international human rights law, both generally and in the particular context of Indigenous peoples. The international human rights perspective AI seeks to bring will assist this Court in determining the required content of the duty of procedural fairness, as well as whether the JRP process, its final report, and the decision of the Governor in Council were reasonable or correct.

34. As Stratas J.A. recognized in *Pictou Landing*, "Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters" may inform the interpretation of domestic legal principles. Further, "contextual matters may inform the Court's determination of whether the standard of review is correctness or reasonableness", and assist the Court in assessing whether the decision at issue was correct or reasonable.[27]

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[26] *Pictou Landing*, *supra*, note 1.
[27] *Pictou Landing*, *supra*, note 1 at paras. 23-25.

35. If granted leave to intervene, AI will present this Court with the important international human rights law perspective on the issues raised in this case and which were also presented to the JRP. In particular, AI will outline how the JRP process and the Governor in Council's determination engages Canada's international obligations with respect to Indigenous rights, and how international law impacts the interpretation of constitutional human rights provisions – an area where international law has long been recognized as a relevant and persuasive source that can and should be taken into consideration.

36. AI submits that the international human rights law perspective it seeks to bring will assist this Court in determining whether the JRP process and the Governor in Council's decision to issue a certificate of public convenience and necessity in this case was reasonable or correct in light of Canada's obligations to Indigenous peoples reflected in international and domestic law.

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

    a. International human rights norms and standards must be considered when interpreting the Aboriginal rights, enshrined in section 35 of the *Constitution Act, 1982*, that are engaged by this judicial review. Specifically,

        i. Administrative bodies bear the duty of implementing their mandates in a manner consistent with the rule of law, including upholding constitutionally protected rights;

        ii. International law is a relevant and persuasive source of interpretation of domestic law, including the Canadian Constitution, the *Canadian Environmental Assessment Act, 2012* (*CEAA*), and the mandates of regulatory agencies;

iii. The framework of Aboriginal rights in Canadian common law and the protection of Indigenous rights in international law are interlinked and mutually reinforcing;

b. International law requires a high standard of protection for Indigenous peoples' rights, including those rights that are disputed by the state;

c. Decisions under review must respect the high standard of protection, and properly account for the public interest, meaning that:

i. The factors set out in the *CEAA* must be interpreted and applied in accordance with Canada's international obligations;

ii. The precautionary principle governing the JRP's mandate must be interpreted and applied in accordance with Canada's international obligations; and

iii. A broader and proper understanding of the public interest should take into account the goal of achieving reconciliation, and the role of adhering to international law in moving towards that goal;

d. Canada's duty to consult must be informed by and accord with its international obligations to ensure the effective and meaningful participation of Indigenous peoples in decisions affecting their rights

i. International law requires the protection and accommodation of Indigenous institutions and traditional systems of decision-making;

ii. Meaningful participation in decision-making at international law requires a process that enhances and is consistent with Indigenous peoples' customs and traditions;

iii. Meaningful participation requires a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples; and

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

I. The issues before this Court must be determined consistently with Canada's international human rights obligations and commitments

(i) Administrative bodies must implement their mandates in a manner consistent with the rule of law, including upholding constitutionally protected rights

38. The Supreme Court of Canada has determined that the specific mandates of administrative agencies must be interpreted and applied consistently with the Canadian Constitution, including the constitutional obligation to uphold the honour of the Crown, respect potential and recognized Aboriginal rights, and fulfill the duty to consult and accommodate.[28]

(ii) International law is a relevant and persuasive source of interpretation of domestic law and the mandates of regulatory agencies

39. Canadian courts have long recognized that the values and principles set out in international law are "relevant and persuasive" sources of the interpretation of the human rights enshrined in Canada's *Constitution Act, 1982*,[29] as well as the mandates of and legislation governing federal environmental regulatory agencies like the *Canadian Environmental Assessment Act, 2012*.[30] International law is, as a result, relevant in assessing the range of acceptable and defensible options available to the JRP and the Governor in Council,[31] and whether the ultimate decision reached in this case was reasonable or correct. Further, because Canadian laws are presumed to comply with international law, [32] any interpretation of domestic laws and regulatory mandates that have the effect of violating Canada's international human rights obligations should be rejected.

40. Finally, international law can assist in determining whether a duty of procedural fairness has been satisfied by shedding additional light on the nature and importance of the interests at stake, and how Canada is obligated to respect and protect those interests under

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[28] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 45, [2010] 3 SCR 103.
[29] *Reference re Public Service Employee Relations Act (Alberta)*,[1987] 1 SCR 313 at 348, 38 DLR (4th) 161; *R v Hape*, 2007 SCC 26 at para 55, [2007] 2 SCR 292 [*Hape*].
[30] *Ibid.*
[31] See *Pictou Landing*, *supra*, note 1 at para. 26.
[32] *R v Hape*, *supra* note 29 at para 53

international law. Procedural fairness concerns have been squarely raised by a number of parties to this proceeding, and will need to be addressed by this Court.[33]

(iii) The framework of Aboriginal rights in Canadian common law and the protection of Indigenous rights in international law are interlinked and mutually reinforcing

41. AI intends to outline Canada's international obligations with respect to Indigenous rights that are engaged on the facts of this case. Those obligations, such as the duty to ensure the full and effective participation of Indigenous peoples in all decisions potentially affecting their rights, find congruency in the Canadian common law framework for Aboriginal rights protection. As noted by the UN General Assembly, "human rights, the rule of law and democracy are interlinked and mutually reinforcing."[34] As stated by Chief Justice McLachlin,

> Aboriginal rights from the beginning have been shaped by international concepts [...] More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms [...] Whether we like it or not, aboriginal rights are an international matter.[35]

II. International law requires a high standard of protection for Indigenous peoples' rights

42. Several parties in this proceeding argue that the decisions under review fail to adequately consider and protect various Indigenous rights relating to land ownership and title, resource use (including hunting and fishing rights), the maintenance of Indigenous governance institutions and traditions, and the exercise and protection of cultural heritage and practices.[36] All of these rights require a high standard of protection under international law.

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[33] See especially Notice of Application, *Haisla Nation v. Canada*, File A-63-14 at para 254 and Notice of Motion, *Martin Louie, on behalf of all Nadleh Whut'en v Canada*, File 14-A-48 at para 53.

[34] United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 67th Sess, UN Doc A/RES/67/1 (24 September 2012) at para 5.

[35] Right Honourable Beverley McLachlin, Chief Justice of Canada, "Aboriginal Rights: International Perspectives" (Speech delivered at the Order of Canada Luncheon, Canadian Club of Vancouver, Vancouver, British Columbia, 8 February 2002).

[36] See Notice of Application, *Gitxaala Nation v. Canada*, File A-64-14 at paras 31, 36; Notice of Motion, *Haisla Nation v. Canada*, File 14-A-51 at para 20; Notice of Application, *Kitasoo Xai'Xais v. Canada*, at paras. 63-66; and Notice of Motion, *Martin Louie, on behalf of all Nadleh Whut'en v. Canada*, File 14-A-48 at paras 38, 43; See Notice of Application, *Gitxaala Nation v. Canada*, File A-64-14 at para. 38; Notice of Motion, *Haisla Nation v. Canada*, File 14-A-51 at para 20; and Notice of Motion, *Martin Louie, on behalf of all Nadleh Whut'en v. Canada*, File 14-A-48 at paras 40-42; See Notice of Application, *Gitxaala Nation v. Canada*, File A-64-14 at paras. 20, 33-35.

43. The duty to respect and protect Indigenous peoples' land and resource rights is codified in the *UN Declaration*[37] (which Canada has endorsed) and recognized by the Inter-American Commission on Human Rights as a norm of customary international law.[38] For Indigenous peoples, secure access to and control over their traditional territories and the resources of those territories is an essential precondition for the enjoyment of other protected human rights and the very survival of Indigenous peoples.[39] These rights include the rights to life, health, subsistence, livelihood, a healthy environment and drinkable water.[40]

44. Indigenous peoples' cultural rights – including rights to practice and pass on to future generations their unique languages, customs, and traditions, as well as to maintain the institutions and structures of their society – are also protected under international law, including in the *UN Declaration.*[41] These rights are of "central significance" not only because of their importance in defining the identities of Indigenous communities, but also because they "almost by definition embody the corollary rights to non-discrimination and, especially, to self-determination."[42]

45. The fact that the extent and nature of the Indigenous rights in question are disputed by the State, or that the State has not fully recognized pre-existing Indigenous rights in its own laws and procedures, does not negate the existence of these rights or justify their violation.[43]

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

[38] International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples* (Interim Report, 2010) online: <http://www.ila-hq.org/en/committees/index.cfm/cid/1024 > at 47 [*Hague Conference*]; Further, international case law has established that the fact that the extent and nature of the Indigenous rights in question are disputed by the State, or that the State has not fully recognized pre-existing Indigenous rights in its own laws and procedures, does not negate the existence of these rights or justify their violation: *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (2001) Judgment, Inter-Am Ct HR (Ser C) No 79 at para 140(d) [*Mayagna (Sumo) Awas Tingni*].

[39] *Hague Conference*, *supra* note 38 at 47; See also United Nations Human Rights Committee, *Communication No 1457/2006: Angela Poma Poma v. Peru*, 95th Sess, UN Doc CCPR/C/95/D/14572006 at para 7.2.

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

[41] See *UN Declaration*, *supra* note 37, arts. 8, 11, 15, 31 and *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, 993 UNTS 3 arts 1, 15 [*ICESCR*].

[42] See United Nations, General Assembly, *Rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework, Note of the Secretary General*, 69th Sess, UN Doc A/69/267 (6 Aug 2014).

[43] *Mary and Carrie Dann v United States*, (2002), Inter-Am Comm HR, Case 11.140, Report No 75/02, doc 5 rev 1 at para 130 [*Mary and Carrie Dann*].

Indeed, failure to adequately protect asserted rights pending formal recognition risks compounding past injustices or perpetuating a double standard in access to justice that would be considered a form of racial discrimination.[44]

46. International law requires strict justification for any conduct that will negatively impact human rights. Article 46(2) of the *UN Declaration* states:

> [t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are ... in accordance with international human rights obligations ... and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.[45]

47. Similarly, the Inter-American Court on Human Rights has held that any infringement of human rights must be based in law, be strictly necessary, serve "a legitimate goal in a democratic society," and be proportionate to that goal."[46] Further, the Committee on the Elimination of Racial Discrimination has stated that "development objectives are no justification for encroachments on human rights[.]"[47]

48. International law also recognizes that an especially rigorous standard of protection is required for Indigenous rights, particularly given the unresolved legacy of past violations and current inequalities faced by Indigenous peoples in Canada. International law has repeatedly recognized that the history of dispossession and continued discrimination experienced by Indigenous peoples, and historic patterns of decision-making that have excluded Indigenous legal traditions, must be taken into account when dealing with issues affecting Indigenous rights.[48]

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[44] *Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am Comm HR, No 40/04, Case 12.053 at para 167.
[45] *Supra* note 37, art 46(2).
[46] *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Judgment, Inter-Am Ct HR (Ser C) No 125 at paras 144, 146.
[47] United Nations General Assembly, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, 64th Sess, UN Doc CERD/C/64/CO/9/Rev.2 (12 March 2004) at para 15.
[48] *UN Declaration, supra* note 37, art 21(2); *Mary and Carrie Dann, supra* note 43 at para 125.

III. Decisions under review must respect the high standard of protection, and properly account for the public interest

(i) Assessing potential adverse effects

49. The decisions under review must be consistent with the high standard of protection for Indigenous rights outlined above. An interpretation of the relevant legislation or an exercise of statutory discretion that is inconsistent with Canada's obligations under international law cannot be reasonable or correct.

50. The high standard of protection must be taken into account in reviewing the interpretation and application of the factors set out in the *CEAA*. In particular, it is relevant to assessing:

a. the significance of the project's "environmental effects" (s. 19(1)(b)), which are defined to include effects on aboriginal peoples' health and socio-economic conditions, their physical and cultural heritage, their use of lands and resources for traditional purposes, and on any of their structures, sites or things that are of historical, archaeological, paleontological or architectural significance (s. 5(1)(c));

b. the "cumulative environmental effects" that are likely to result from the project (s. 19(1)(a));

c. the adequacy of "mitigation measures" to address such environmental effects (s. 19(1)(d)); and

d. whether, and to what extent, "Aboriginal traditional knowledge" ought to be taken into account (s. 19(3)).

51. The high standard of protection is also relevant to determining how the "precautionary principle", which the JRP is required to apply as part of its overall mandate (s. 4(2)), ought to be interpreted in the circumstances of this case.[49] Indeed, given the vital importance of Indigenous rights, and the high risk of their violation, international law requires that a strict precautionary approach "guide decision-making about any measures that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples."[50]

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[49] Several parties challenge the JRP's interpretation and application of this principle: see Notice of Application, *Gitxaala Nation v. Canada*, File A-64-14 at para. 57, 77-79; Notice of Motion, *Haisla Nation v. Canada*, File 14-A-51 at para 21; and Notice of Application, *Gitga'at First Nation v. Canada*, File A-67-14 at paras. 6, 41.

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

52. To be consistent with the high standard of protection, the specific factors set out in the *CEAA,* and the general precautionary principle that informs the JRP's mandate, must be interpreted and applied in a way that reflects an acute awareness that Indigenous peoples have substantive rights that must be protected and the inherent seriousness of any damage to these rights, particularly given previous harm inflicted on Indigenous peoples and the heightened vulnerability to harm that has resulted.[51] Arguments, assurances, and evidence offered in favour of a project must be rigorously scrutinized. Any uncertainty about the rights in question should, if anything, be the basis of even greater caution in assessing the seriousness of potential risks. Adopting a more relaxed approach fails to afford Indigenous rights the required standard of protection, and is inconsistent with Canada's international obligations.

(ii) Assessing the public interest

53. Part of the mandate of the decisions under review was to assess whether the project was in the public interest.

54. The public interest is not limited to economic matters or financial benefits. Even where the financial benefit of a project can be objectively shown, such a project is not automatically in the public interest. In this case, the decisions under review will inevitably impact the larger, overarching public interest in reconciliation with Indigenous peoples and respect for human rights. Critically, public interest should not be understood in a way that excludes Indigenous peoples or which assumes an adversarial relationship between Indigenous and non-Indigenous interests. Advancing the goal of genuine reconciliation between Indigenous and non-Indigenous peoples is a crucial aspect of the public interest, and serves to benefit all Canadians. Compliance with Canada's international human rights obligations is also in the public interest and similarly benefits all Canadians.

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[51] The Inter-American Court, for example, has said that the social and environmental impact assessment of resource development projects on the lands of Indigenous peoples, "must conform to the relevant international standards and best practices." *Case of the Saramaka People v Suriname* (2007), Judgment, Inter-Am Ct HR (Ser C) No 172 at para 41 [*Saramaka People*].

III. Canada's duty to consult must be informed by and accord with its international obligations to ensure the effective and meaningful participation of Indigenous peoples in decisions affecting their rights.

(a) International law requires the protection and accommodation of Indigenous institutions and traditional systems of decision-making

55. As set out in a number of international instruments, including the *ICCPR*,[52] the *ICESCR*,[53] and the *UN Declaration*,[54] "all peoples" or nations have a right to self-determination. Flowing from this right to self-determination, Indigenous peoples have the right to freely determine their political status, to govern themselves according to their own procedures and within their own institutions, and to determine their own priorities and strategies for their economic, social, and cultural development.[55] The exercise of this right includes maintaining and strengthening their own distinct political, legal and cultural institutions, including those through which decisions about land use and protection are traditionally made.[56]

56. As a corollary, international law imposes an obligation on states and other bodies to work with and accommodate Indigenous peoples' own governance institutions and respect Indigenous peoples' exercise of their own independent jurisdiction and traditional decision-making systems when contemplating extractive activities.[57] Regulatory processes must not contribute to the erosion of these traditions or unjustifiably impair the continued exercise of Indigenous peoples' own decision-making processes.[58]

(b) Meaningful participation in decision-making at international law requires a process that enhances and is consistent with Indigenous peoples' customs and traditions

57. Indigenous peoples right under international law to meaningful participation in all decision-making processes that potentially affect their rights and interests flows from the right of self-determination outlined above. As well, this obligation to ensure the meaningful

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[52] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 1 [*ICCPR*].
[53] *ICESCR, supra* note 41 art 1.
[54] *UN Declaration, supra* note 37, preamble, art 3.
[55] *Ibid* arts 3, 18, 23.
[56] Ibid arts 5, 20.
[57] *Ibid,* art 18. See also *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245 at para 177 ["*Kichwa*"].
[58] The *ICCPR*, *ICESCR*, and the *UN Declaration* all recognize that the right of self-determination is inseparable from the right of all peoples both to control their own natural resources and to be secure in their means of subsistence. See *Ibid,* art 20; *ICCPR, supra* note 52, art 1; *ICESCR, supra* note 41, art 1.

participation of Indigenous peoples in the decision making process is necessary to fulfill the high standard of precaution required in all decisions potentially affecting Indigenous peoples' rights. Only through Indigenous peoples' involvement can the full range of potential harms be identified and the seriousness of these harms appropriately gauged.

58. The right of Indigenous peoples to meaningful participation in the decision-making process requires the state to collaborate with Indigenous peoples, including by actively consulting "according to their customs and traditions" and "through culturally appropriate procedures."[59] Participation by Indigenous peoples in decision-making is to be conducted through representative institutions in a form appropriate to the circumstances.[60] "Representativeness" in turn requires the involvement of Indigenous peoples from the outset in the design and implementation of the decision-making process in order to ensure that Indigenous peoples determine the manner by which their representation is chosen and that the process chosen is compatible with their customs and traditions.

59. In most instances, a process designed to solicit comments from the general public will not on its own be sufficient to meet the requirement at international law that the decision-making process must respect Indigenous peoples' traditional means of decision-making. Given the diversity of indigenous peoples, the model of decision-making is expected to vary according to varied customs and traditions.

(i) Meaningful consultation requires a good faith effort to reach a mutual agreement, in keeping with the intended purpose of protecting the human rights of Indigenous peoples

60. While the degree of consultation required may vary depending on the nature of the proposed project, the scope of its impact, and the nature of the rights at stake,[61] the duty to consult requires something more substantial than merely the collection and consideration of the views of Indigenous peoples. The duty has been described as a "true instrument" of participation that allows Indigenous people to truly "influence the decision making process," and one that requires "genuine dialogue [...] aimed at reaching an agreement."[62] At a minimum, the duty to consult under international law requires making a genuine, good faith

[59] *Saramaka People*, *supra* note 51 at para 133.
[60] *UN Declaration*, *supra* note 37, art 32.
[61] *Ibid* at para 65.
[62] *Kichwa*, *supra* note 57 at paras 167, 186, 200.

effort to reach a mutual agreement, and being open to the possibility that a project should be rejected.

61. The obligation to consult Indigenous peoples on matters that may affect their rights and interests is established as a general principle of international law. The adequacy of the consultation with Indigenous peoples, and the outcomes of those consultations, are crucial tests of whether resource extraction should be allowed to proceed on the lands of Indigenous peoples.[63]

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

62. As well, in situations where resource operations take place on the recognized or customary land of Indigenous peoples, or impact areas of cultural significance or resources traditionally used by indigenous peoples, and these interventions have the potential to deprive Indigenous peoples of "the capacity to use and enjoy their lands and other natural resources necessary for their subsistence,"[64] the free prior and informed consent (FPIC) of the Indigenous communities is a presumptive requirement.[65]

63. FPIC, although not an absolute right, is subject to a purposive, case by case assessment of the circumstances of the affected peoples and the potential for serious harm to their rights. Such a determination must always be in proportion to the rights at stake and the potential for harm. Consistent with the principle of effective interim protection, [66] the FPIC standard is appropriate even when the exact scope of the Indigenous rights in question is still the subject of unresolved court cases or negotiations with the State.

64. In the present case, given Indigenous peoples' contention that the Northern Gateway project may have serious impacts on their capacity to use and enjoy their lands, Canada's obligations with respect to free, prior and informed consent require careful consideration.

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[63] United Nations Human Rights Committee, *Apirana Muhuika et. al. v. New Zealand, Communication No. 547/1993*, 55th Sess, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).
[64] *Ibid.*
[65] Anaya, *supra* note 50at para 65.
[66] United Nations Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 19.

Likewise, the Federal Government's reliance on the environmental assessment review panel as the primary means of Crown consultation must be viewed in light of Canada's international obligation to provide for the meaningful participation of Indigenous people in decision-making processes that affect their rights and interests. As discussed above, meaningful participation must be consistent with Indigenous peoples' own customs and traditions and allow input into the choice of consultation mechanism, including its design and implementation, in light of traditional decision-making methods.

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

65. This case raises important questions of public interest regarding the human rights of Indigenous peoples – in particular, the scope of consultation and accommodation necessary when resource development projects have the potential to impact access to resources necessary for Indigenous peoples to exercise their cultures and livelihoods. These international human rights concerns were presented to the JRP but were not addressed in its final report on which the decision to issue a certificate of public convenience and necessity by the Governor in Council was based.

66. Given the important rights and interests at stake, and the constitutional dimensions of the legal principles engaged, Canada's obligations under international law are particularly relevant in this case. They will assist this Court in clarifying the domestic legal standards applicable to resource development decision-making. Further, respect for human rights is not only in the interest of Indigenous peoples, but is itself recognized as a broader societal imperative. The preamble to the *UN Declaration* states "the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."[67]

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

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[67] *UN Declaration, supra* note37, preamble.

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

68. AI's intervention would be consistent with securing a just, expeditious, and least expensive determination of this proceeding on its merits, and is therefore not inconsistent with the imperatives in Rule 3 of the *Federal Courts Rules*.[68]

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

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

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

72. The Applicants have consented to AI's motion for leave to intervene.

PART IV – ORDER SOUGHT

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

74. If this Honourable Court determines that leave should be granted, AI respectfully requests permission to file a written factum and the right to present oral argument at the hearing of this application.

75. AI does not seek costs and asks that no costs be ordered against it.

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[68] *Supra*, note 18.
[69] Neve Affidavit at para 42.
[70] Neve Affidavit at paras 43-44.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

17 February 2015

Justin Safayeni
Colleen Bauman
Naomi Greckol-Herlich

Lawyers for the proposed
intervener,
Amnesty International

PART V – AUTHORITIES

	CANADIAN CASE LAW
1.	*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.
2.	*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75
3.	*Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21, 237 ACWS (3d) 570.
4.	*Canada (Attorney General) v Sasvari*, 2004 FC 1650, 135 ACWS (3d) 691.
5.	*Canadian Human Rights Commission v Attorney General of Canada*, 2013 FCA 75, 444 NR 120.
6.	*Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426, 357 NR 384.
7.	*First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445
8.	*Globalive Wireless Management Corp v Public Mobile Inc et al*, 2011 FCA 119, 200 ACWS (3d) 675.
9.	*R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.
10.	*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.
	INTERNATIONAL CASE LAW
11.	*Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245
12.	*Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (2001) Judgment, Inter-Am Ct HR (Ser C) No 79.

13.	*Case of the Saramaka People v Suriname* (2007), Judgment, Inter-Am Ct HR (Ser C) No 172.
14.	*Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Judgment, Inter-Am Ct HR (Ser C) No 125.
15.	*Mary and Carrie Dann v United States*, (2002), Inter-Am Comm HR Case 11.140, Report No 75/02, doc 5 rev 1.
16.	*Maya Indigenous Communities of the Toledo District (Belize)* (2004), Inter-Am Comm HR, No 40/04, Case 12.053.
17.	United Nations Human Rights Committee, *Communication No 1457/2006: Ángela Poma Poma v. Peru*, 95th Sess, UN Doc CCPR/C/95/D/14572006.
18.	United Nations Human Rights Committee, *Apirana Muhuika et. al. v. New Zealand, Communication No. 547/1993*, 55th Sess, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).
	INTERNATIONAL INSTRUMENTS AND REPORTS
19.	International Law Association, *The Hague Conference (2010): Rights of Indigenous Peoples* (Interim Report, 2010) online: < http://www.ila-hq.org/en/committees/index.cfm/cid/1024 >.
20.	United Nations Committee on Social, Economic and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4.
21.	United Nations General Assembly, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, 64th Sess, UN Doc CERD/C/64/CO/9/Rev.2 (12 March 2004).
22.	United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 67th Sess, UN Doc A/RES/67/1 (24 September 2012).

23.	United Nations General Assembly, *Rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework, Note of the Secretary General*, 69th Sess, UN Doc A/69/267 (6 August 2014).
24.	United Nations Economic and Social Council, *Human Rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, 59th Sess, UN Doc E/CN.4/2003/90 (21 January 2003).
25.	United Nations Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).
26.	United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, 21st Sess, UN Doc A/HRC/21/47 (6 July 2012).
27.	United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and* fundamental freedoms of indigenous peoples, James Anaya, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009).
	OTHER
28.	*Report of the Review Panel: New Prosperity Gold-Copper Mine Project* (British Columbia, 31 October 2013) at 210-211, 213 online: <http://www.ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>.
29.	Right Honourable Beverley McLachlin, Chief Justice of Canada, "Aboriginal Rights: International Perspectives" (Speech delivered at the Order of Canada Luncheon, Canadian Club of Vancouver, Vancouver, British Columbia, 8 February 2002).

APPENDIX "A" – STATUTES, DECLARATIONS, AND CONVENTIONS

STATUTES

***Federal Court Rules*, SOR/98-106**

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

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

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

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

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

(a) the service of documents; and

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

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

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

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

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

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

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

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

a) la signification de documents;

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

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

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

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

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

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

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

DECLARATIONS

United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 61st Sess, Supp 49, UN Doc A/RES/61/295 (2 October 2007)

Preamble

...

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

...

Article 3

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

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer

Préambule

...

Convaincue que la reconnaissance des droits des peuples autochtones dans la présente Déclaration encouragera des relations harmonieuses et de coopération entre les États et les peuples autochtones, fondées sur les principes de justice, de démocratie, de respect des droits de l'homme, de non-discrimination et de bonne foi,

...

Article 3

Les peuples autochtones ont le droit à l'autodétermination. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.

Article 8

1. Les autochtones, peuples et individus, ont le droit de ne pas subir d'assimilation forcée ou de destruction de leur culture.

2. Les États mettent en place des mécanismes de prévention et de réparation efficaces visant :

a) Tout acte ayant pour but ou pour effet de priver les autochtones de leur intégrité en tant que peuples distincts, ou de leurs valeurs culturelles ou leur identité ethnique;

b) Tout acte ayant pour but ou pour effet de les déposséder de leurs terres, territoires ou ressources;

c) Toute forme de transfert forcé de population

which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to

ayant pour but ou pour effet de violer ou d'éroder l'un quelconque de leurs droits;

d) Toute forme d'assimilation ou d'intégration forcée;

e) Toute forme de propagande dirigée contre eux dans le but d'encourager la discrimination raciale ou ethnique ou d'y inciter.

Article 11

1. Les peuples autochtones ont le droit d'observer et de revivifier leurs traditions culturelles et leurs coutumes. Ils ont notamment le droit de conserver, de protéger et de développer les manifestations passées, présentes et futures de leur culture, telles que les sites archéologiques et historiques, l'artisanat, les dessins et modèles, les rites, les techniques, les arts visuels et du spectacle et la littérature.

2. Les États doivent accorder réparation par le biais de mécanismes efficaces – qui peuvent comprendre la restitution – mis au point en concertation avec les peuples autochtones, en ce qui concerne les biens culturels, intellectuels, religieux et spirituels qui leur ont été pris sans leur consentement préalable, donné librement et en connaissance de cause, ou en violation de leurs lois, traditions et coutumes.

Article 15

1. Les peuples autochtones ont droit à ce que l'enseignement et les moyens d'information reflètent fidèlement la dignité et la diversité de leurs cultures, de leurs traditions, de leur histoire et de leurs aspirations.

2. Les États prennent des mesures efficaces, en consultation et en coopération avec les peuples autochtones concernés, pour combattre les préjugés et éliminer la discrimination et pour

promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories

promouvoir la tolérance, la compréhension et de bonnes relations entre les peuples autochtones et toutes les autres composantes de la société.

Article 21

1. Les peuples autochtones ont droit, sans discrimination d'aucune sorte, à l'amélioration de leur situation économique et sociale, notamment dans les domaines de l'éducation, de l'emploi, de la formation et de la reconversion professionnelles, du logement, de l'assainissement, de la santé et de la sécurité sociale.

2. Les États prennent des mesures efficaces et, selon qu'il conviendra, des mesures spéciales pour assurer une amélioration continue de la situation économique et sociale des peuples autochtones. Une attention particulière est accordée aux droits et aux besoins particuliers des anciens, des femmes, des jeunes, des enfants et des personnes handicapées autochtones.

Article 25

Les peuples autochtones ont le droit de conserver et de renforcer leurs liens spirituels particuliers avec les terres, territoires, eaux et zones maritimes côtières et autres ressources qu'ils possèdent ou occupent et utilisent traditionnellement, et d'assumer leurs responsabilités en la matière à l'égard des générations futures.

Article 26

1. Les peuples autochtones ont le droit aux terres, territoires et ressources qu'ils possèdent et occupent traditionnellement ou qu'ils ont utilisés ou acquis.

2. Les peuples autochtones ont le droit de posséder, d'utiliser, de mettre en valeur et de

and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary

contrôler les terres, territoires et ressources qu'ils possèdent parce qu'ils leur appartiennent ou qu'ils les occupent ou les utilisent traditionnellement, ainsi que ceux qu'ils ont acquis.

3. Les États accordent reconnaissance et protection juridiques à ces terres, territoires et ressources. Cette reconnaissance se fait en respectant dûment les coutumes, traditions et régimes fonciers des peuples autochtones concernés.

Article 27

Les États mettront en place et appliqueront, en concertation avec les peuples autochtones concernés, un processus équitable, indépendant, impartial, ouvert et transparent prenant dûment en compte les lois, traditions, coutumes et régimes fonciers des peuples autochtones, afin de reconnaître les droits des peuples autochtones en ce qui concerne leurs terres, territoires et ressources, y compris ceux qu'ils possèdent, occupent ou utilisent traditionnellement, et de statuer sur ces droits. Les peuples autochtones auront le droit de participer à ce processus.

Article 28

1. Les peuples autochtones ont droit à réparation, par le biais, notamment, de la restitution ou, lorsque cela n'est pas possible, d'une indemnisation juste, correcte et équitable pour les terres, territoires et ressources qu'ils possédaient traditionnellement ou occupaient ou utilisaient et qui ont été confisqués, pris, occupés, exploités ou dégradés sans leur consentement préalable, donné librement et en connaissance de cause.

2. Sauf si les peuples concernés en décident librement d'une autre façon, l'indemnisation se fait sous forme de terres, de territoires et de ressources équivalents par leur qualité, leur

compensation or other appropriate redress.

étendue et leur régime juridique, ou d'une indemnité pécuniaire ou de toute autre réparation appropriée.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 31

1. Les peuples autochtones ont le droit de préserver, de contrôler, de protéger et de développer leur patrimoine culturel, leur savoir traditionnel et leurs expressions culturelles traditionnelles ainsi que les manifestations de leurs sciences, techniques et culture, y compris leurs ressources humaines et génétiques, leurs semences, leur pharmacopée, leur connaissance des propriétés de la faune et de la flore, leurs traditions orales, leur littérature, leur esthétique, leurs sports et leurs jeux traditionnels et leurs arts visuels et du spectacle. Ils ont également le droit de préserver, de contrôler, de protéger et de développer leur propriété intellectuelle collective de ce patrimoine culturel, de ce savoir traditionnel et de ces expressions culturelles traditionnelles.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

2. En concertation avec les peuples autochtones, les États prennent des mesures efficaces pour reconnaître ces droits et en protéger l'exercice.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Article 32

1. Les peuples autochtones ont le droit de définir et d'établir des priorités et des stratégies pour la mise en valeur et l'utilisation de leurs terres ou territoires et autres ressources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of

2. Les États consultent les peuples autochtones concernés et coopèrent avec eux de bonne foi par l'intermédiaire de leurs propres institutions représentatives, envue d'obtenir leur consentement, donné librement et en connaissance de cause, avant l'approbation de tout projet ayant des incidences sur leurs terres ou territoires et autres ressources, notamment

mineral, water or other resources.

en ce qui concerne la mise en valeur, l'utilisation ou l'exploitation des ressources minérales, hydriques ou autres.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

3. Les États mettent en place des mécanismes efficaces visant à assurer une réparation juste et équitable pour toute activité de cette nature, et des mesures adéquates sont prises pour en atténuer les effets néfastes sur les plans environnemental, économique, social, culturel ou spirituel.

CONVENTIONS

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

Article 1	**Article premier**
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.	1. Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.	2. Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et de leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale, fondée sur le principe de l'intérêt mutuel, et du droit international. En aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.	3. Les Etats parties au présent Pacte, y compris ceux qui ont la responsabilité d'administrer des territoires non autonomes et des territoires sous tutelle, sont tenus de faciliter la réalisation du droit des peuples à disposer d'eux-mêmes, et de respecter ce droit, conformément aux dispositions de la Charte des Nations Unies.

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

Article 1	*Article premier*
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.	1. Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and	2. Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et de leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale, fondée sur le

international law. In no case may a people be deprived of its own means of subsistence.

principe de l'intérêt mutuel, et du droit international. En aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance.

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

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

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Article 15

1. Les Etats parties au présent Pacte reconnaissent à chacun le droit:

a) De participer à la vie culturelle;

b) De bénéficier du progrès scientifique et de ses applications;

c) De bénéficier de la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur.

2. Les mesures que les Etats parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre celles qui sont nécessaires pour assurer le maintien, le développement et la diffusion de la science et de la culture.

3. Les Etats parties au présent Pacte s'engagent à respecter la liberté indispensable à la recherche scientifique et aux activités créatrices.

4. Les Etats parties au présent Pacte reconnaissent les bienfaits qui doivent résulter de l'encouragement et du développement de la coopération et des contacts internationaux dans le domaine de la science et de la culture.

Tab 4

Court File Nos. A-56-14, A- 59-14, A-63-14, A-64-14,
A-67-14, A-437-14, A-439-14, A-440-14,
A-442-14, A-443-14, A-445-14, A-446-14,
A-447-14, A-448-14, A-514-14, A-517-14,
A-520-14, A-522-14

FEDERAL COURT OF APPEAL

DATED: _____

AT: _____

PRESENT: _____

BETWEEN:

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all the citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE

Applicants and appellants

-and-

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, NORTHERN GATEWAY PIPELINES INC., NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP and NATIONAL ENERGY BOARD

Respondents

ORDER

Motion for Leave to Intervene brought by Amnesty International

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

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

IT IS ORDERED AS FOLLOWS:

1. AI is granted leave to intervene in this application pursuant to Rule 109 of the *Federal Court Rules*, subject to the following directions;
2. AI is entitled to receive all materials filed in this appeal;
3. AI may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Court Rules*;
4. AI's memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this appeal;
5. AI shall accept the file in its current state, and not seek to file any additional evidence;
6. The time for oral argument by counsel to AI shall be determined by the panel hearing the appeal;
7. AI shall seek no costs in respect of the appeal, and shall have no costs ordered against it;
8. The style of cause shall be changed to add Amnesty International as an intervener, and hereafter all documents shall be filed under the amended style of cause.