Court File No. 36664

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

BETWEEN:

KTUNAXA NATION COUNCIL and KATHRYN TENEESE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CITIZENS OF THE KTUNAXA NATION

Appellants

- and -

MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS and GLACIER RESORTS LTD.

Respondents

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN MUSLIM LAWYERS ASSOCIATION, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, KOOTENAY PRESBYTERY (UNITED CHURCH OF CANADA), EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN LEGAL FELLOWSHIP, ALBERTA MUSLIM PUBLIC AFFAIRS COUNCIL, AMNESTY INTERNATIONAL CANADA, TE'MEXW TREATY ASSOCIATION, CENTRAL COAST INDIGENOUS RESOURCE ALLIANCE, SHIBOGAMA FIRST NATIONS COUNCIL, CANADIAN CHAMBER OF COMMERCE, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, COUNCIL OF THE PASSAMAQUODDY NATION AT SCHOODIC, KATZIE FIRST NATION, AND WEST MOBERLY FIRST NATIONS AND PROPHET RIVER FIRST NATION

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PART I – FACTS AND OVERVIEW

1. International law accords special protections for Indigenous peoples to ensure substantively equal protection under general international human rights instruments. States must provide a high standard of protection for all rights of Indigenous peoples and Indigenous persons, consistent with the recognition that a history of discrimination, marginalization and dispossession has left Indigenous peoples in a situation of extreme disadvantage and greatly heightened risk of further harm. In particular, international law has established rigorous standards to protect Indigenous peoples' relationships to their traditional lands, and especially to spiritually important places, in order to protect and fulfill Indigenous peoples' rights to culture, identity, livelihood, health and a wide range of associated rights. Rigorous standards are necessary because land use decisions affecting traditional lands of Indigenous peoples can have significant human rights implications that may not be apparent to the decision-makers.[1]

2. In this appeal, the Court must decide whether approval by the Minister of Forest, Lands and Natural Resources (the "Minister") of a Master Development Agreement ("MDA") with Glacier Resorts Ltd. ("Glacier") violated the rights of the Ktunaxa people ("Ktunaxa") under s. 2(a) of the *Canadian Charter of Rights and Freedoms*[2] (the "*Charter*") and s. 35 of the *Constitution Act*.[3] Amnesty International Canada ("AI Canada") submits that this Court should conduct its analysis of these issues consistently with international human rights law norms.

3. AI Canada takes no position on the facts alleged by the parties but is supportive of the Ktunaxa's interpretations of freedom of religion and duty of consultation, accommodation and consent in Canadian law, as those are consistent with international human rights law.

PART II – ISSUES

4. AI Canada adopts the Ktunaxa's statement of the questions in issue (Appellants' factum paragraphs 40-43) and focuses its submissions on the scope of protections under s. 2(a) of the

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[1] United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, UNCHROR, 59th Sess, Agenda item 15, UN Doc E/CN.4/2003/90 (21 January 2003) at para 7 [*Stavenhagen Report*] [Amnesty's BOA at TAB 42]: "When such developments occur in areas occupied by indigenous peoples, it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them."

[2] Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Charter and s. 35 of the *Constitution Act*. AI Canada does not take a position on the ultimate disposition of the issues in this case, and focuses its submissions on international law and norms that should guide this Court's interpretation and consideration of the matters at issue in this case.

PART III – SUBMISSIONS

5. AI Canada submits that the Court's interpretation and determination of the issues should be guided by the following:

A) The Court should interpret s. 2(a) of the *Charter* consistently with relevant and applicable international human rights norms, including Article 18 of the *International Covenant for Civil and Political Rights*[4] (the "*ICCPR*") and Articles 12(1), 25, and 46(2) of the *United Nations Declaration on the Rights of Indigenous Peoples*[5] (the "*UNDRIP*").

B) To this end, the Court must ascertain whether:

i) the Minister's decision to approve the MDA interferes with the Appellants' religious freedoms, having due regard to the specific way that the religious traditions of the Ktunaxa people are practiced and the need for substantively equal rights protections; and whether

ii) any interference to the Appellant's religious freedoms is (a) strictly necessary for an objective and compelling purpose such as protection of the fundamental rights and freedoms of others; and (b) proportionate to the specified objective.

C) The Court should interpret s. 35 in manner that ensures meaningful consultation and accommodation consistent with international law norms stemming from Canada's obligations to respect, protect, and fulfill Indigenous peoples' rights to, *inter alia*, religion and culture.

A. Section 2(a) should be interpreted consistently with international human rights norms

6. This Court has, on multiple occasions, recognized the relevance, persuasiveness and importance of international human rights law when interpreting the scope of rights domestically.[6]

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[4] GA Res 2200A (XXI), UNGAOR, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*] [Amnesty's BOA at TAB 29].
[5] GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008) [Amnesty's BOA at TAB 36].
[6] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 at paras 65, 96-98 [Amnesty's BOA at TAB 5]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 70 [Amnesty's BOA at TAB 1].

This Court has also affirmed that interpretations of domestic law that are inconsistent with Canada's obligations under international law should be rejected, save with the limited exception of a clear, unequivocal legislative intent to default on those obligations.[7]

7. Canada is a party to international and regional human rights instruments that recognize the rights of all persons to freedom of religion and culture, and provide strict criteria for any limitation to these rights.[8] Authoritative interpretations of these instruments, as well as of the *American Convention on Human Rights*,[9] provide important guidance to this Court on Canada's obligations under international law.[10]

8. The UNDRIP, which consolidates and codifies the minimum content of Indigenous peoples' human rights at a global level, addresses freedom of religion.[11] The UNDRIP does not create new human rights, but, consistent with a large body of existing regional and universal jurisprudence, provides a contextualized elaboration of general human rights principles and rights as they relate to the specific circumstances of Indigenous peoples, including the protection of Indigenous spiritual practices and how such rights can be reconciled with the rights of others.[12]

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[7] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at paras 53-56, citing *Daniels v White*, [1968] SCR 517, 2 DLR (3d) 1 at 541 [Amnesty's BOA at TAB 7].

[8] *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, at arts 2, 18 [Amnesty's BOA at TAB 44]; *ICCPR*, *supra* note 4, art 18(3) [Amnesty's BOA at TAB 39]; *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 993 UNTS 3 (entered into force 3 January 1976) at art 15(1)(a) [*ICESCR*] [Amnesty's BOA at TAB 30]; *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UNGAOR, 660 UNTS 195 (entered into force 4 January 1969) at art 5(d)(vii) [Amnesty's BOA at TAB 31]; *American Declaration of the Rights and Duties of Man*, OR OEA/Ser.L/V/II.23/Doc. 21, rev. 6 (1948), at art III [*American Declaration*] [Amnesty's BOA at TAB 28].

[9] 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) [*American Convention*] [Amnesty's BOA at TAB 27].

[10] The *American Declaration*, *supra* note 8 [Amnesty's BOA at TAB 28], defines the human rights obligations that Canada has undertaken as a party to the *Charter of the Organization of American States*, OAS GA Res No 371/78, AG/RES (VIII-O/78) (entered into force 13 December 1951). The *American Convention* [Amnesty's BOA at TAB 27] (and decisions interpreting it) reflect principles of international human rights law relevant to interpreting the *American Declaration*, see *Mary and Carrie Dann v United States* (2002), Inter-Am Comm HR, No 11.140, Report No 75/02 at para 131 [Amnesty's BOA at TAB 15].

[11] United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, 11 August 2008, UN Doc A/HRC/9/9 at paras 18-33, 40, 43, 85-86 [*Anaya Report 2008*] [Amnesty's BOA at TAB 43]. The Federal Government has committed to implementing the *UNDRIP*. See Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Indigenous and Northern Affairs Canada <http://news.gc.ca/web/article-en.do?nid=1063339> [Amnesty's BOA at TAB 24].

[12] *Anaya Report 2008*, *supra* note 11 at paras 40, 85-86 [Amnesty's BOA at TAB 43].

B. Freedom of religion under international law

9. Compliance with Article 18 of the ICCPR and Articles 12(1), 25, and 46(2) of the UNDRIP requires determining whether the Appellants' freedom of religion has been infringed and whether such infringement can be justified.

i. The assessment of whether an infringement has occurred must account for Indigenous religious and spiritual practices

10. Determining whether an infringement of freedom of religion has occurred requires consideration of the unique impacts that land-use decisions can have on Indigenous peoples' cultures, religions, and identities from the Indigenous peoples' perspectives. This approach aligns with jurisprudence from this Court confirming the need to be fully attentive to the context in which Indigenous peoples exercise their rights.[13] It is also consistent with international and Canadian jurisprudence acknowledging that facially neutral application of rights can lead to discriminatory effects,[14] as well as recognizing that historical and contemporary oppression and systemic discrimination necessitates certain special protections for Indigenous rights.[15]

11. International jurisprudence increasingly recognizes the intersection between environmental integrity and the protection of human rights, including the particular importance of the natural environment for the fulfillment of a wide range of human rights of Indigenous

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[13] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 60 [Amnesty's BOA at TAB 8]: "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools…".

[14] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32 at para 8 [Amnesty's BOA at TAB 34]: "To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same."; *Law v Canada*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 25, per Iacobucci J. [Amnesty's BOA at TAB 4]: "True equality does not necessarily result from identical treatment. Formal distinctions…will be necessary…to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense."

[15] *Case of the Saramaka People v Suriname* (2007), Preliminary Objections, Merits, Reparations, and Costs Judgement, Inter-Am Ct HR (Ser C) No 172 at para 85 [*Saramaka People v Suriname*] [Amnesty's BOA at TAB 12] (on the need under international human rights law for special measures to protect and guarantee the full exercise of the rights of indigenous peoples); See also United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, UNCERD, 51st Sess, UN Doc A/52/18 (1997) [*UNCERD General Recommendation No. 23*] [Amnesty's BOA at TAB 33] (wherein the UN Committee on the Elimination of Racial Discrimination called upon the parties to the *International Convention on the Elimination of All Forms of Racial Discrimination*, of which Canada is one, to undertake a special measures to secure the rights of Indigenous peoples); See also *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), Merits, Reparations and Costs Judgment, Inter-Am Ct HR (Ser C) No 125 at paras 51, 63 [Amnesty's BOA at TAB 13].

peoples.[16] For many Indigenous peoples, essential places for the practice of their religions are often natural sites unmarked by temples, shrines or other human constructions.[17] Particular ceremonies may be site-specific – that is, they may only be carried out at the very place where they have been traditionally practiced or may require the inherent spirituality or holiness of that site to be maintained, including by leaving the site in its natural state.[18] Thus, international law recognizes that decisions that deprive Indigenous peoples of access to, or alter the character of, the land that defines their sacredness may deny Indigenous peoples the ability to meaningfully express and exercise their religious beliefs.

12. The Inter-American Commission and the Inter-American Court of Human Rights have developed a distinct body of jurisprudence that interprets the *American Declaration on Human Rights* and the *American Convention on Human Rights* in a way that accounts for the specific circumstances of Indigenous peoples[19] and recognizes the special spiritual significance to Indigenous peoples of land and sacred places in the natural environment.[20]

13. Consistent with jurisprudence interpreting international and regional human rights instruments in the context of Indigenous peoples, the UNDRIP requires states to protect access to specific ceremonial and sacred sites, and to ensure preservation of the fundamental characteristics of those sites, so that Indigenous peoples can exercise their religious and spiritual traditions.[21] It also requires the state to avoid actions that have the effect of depriving Indigenous peoples of their

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[16] United Nations Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox*, UN GA HRC/25/53 (30 December 2013) at paras 17-25 [Amnesty's BOA at TAB 38]; United Nations Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UNGAOR, 61st Sess, Supp No 18, UN Doc A/61/18 (18 August 2006) at para 19 [Amnesty's BOA at TAB 35].

[17] Natasha Bakht & Lynda Collins, "The Earth is our Mother: Freedom of Religion and the Preservation of Aboriginal Sacred Sites in Canada", (2017) 62:3 McGill LJ (forthcoming) at 2 [Bakht & Collins] [Amnesty's BOA at TAB 26]; See also *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*, African Commission on Human and Peoples' Rights, No 276/2003 at para 166 [Amnesty's BOA at TAB 14] (where the African Commission on Human and Peoples' Rights recognized that "religion is often linked to land") [*Centre for Minority Rights Development*].

[18] John Borrows, "Living Law on a Living Earth: Aboriginal Religion Law and the Constitution" in Law and Religious Pluralism in Canada, Richard Moon ed. (Vancouver: UBC Press, 2008) at 166-67 [Amnesty's BOA at TAB 25].

[19] *Anaya Report 2008*, *supra* note 11 at para 28 [Amnesty's BOA at TAB 43].

[20] See e.g. *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Merits, Reparations and Costs Judgment, Inter-Am Ct HR (Ser C) No 79 at para 149 [Amnesty's BOA at TAB 11] (ordering Nicaragua to adopt measures to delineate ensure access and protect indigenous communal lands); *Saramaka People v Suriname*, *supra* note 15 at paras 200-01 [Amnesty's BOA at TAB 12] (ordering Suriname to pay 600,000 USD to a development fund as redress for immaterial damages following environmental damage to lands of spiritual significance to the Saramaka people).

[21] UNDRIP, *supra* note 5 at arts 12(1), 25 [Amnesty's BOA at TAB 36].

cultural values.[22] The Special Rapporteur on the rights of Indigenous peoples recognizes that development or resource extraction can affect the metaphysical relationship between Indigenous peoples and sacred natural spaces to the extent that the very presence of development activities in sacred places can represent a desecration.[23]

14. The domestic jurisprudence of other national jurisdictions confirms the importance of adopting a contextually sensitive approach to evaluating whether Indigenous persons' freedom of religion has been infringed. In interpreting the legally protected rights of the Maori people, New Zealand Courts recognize both their spiritual connection to the lands and waters of their traditional territories,[24] as well the harmful effect that physical development, resource extraction and pollution can have on the metaphysical aspects of that connection.[25] The Supreme Court of India has also recognized that Indigenous peoples' connections to sacred sites can be adversely affected by land development, requiring specific legal protections or forms of redress.[26]

ii. Justifying limitations of freedom of religion under international law

15. International human rights law also provides for clear guidance as to when limitations on freedom of religion can be justified. In addition to being prescribed by law, limitations must be (a) strictly necessary for a just and compelling public purpose;[27] and (b) proportionate to the specified objective.[28]

a) Limitations on freedom of religion must be necessary for a just and compelling public purpose

16. Under Article 18(3) of the ICCPR, limitations on freedom of religion, must be for one of an exhaustive set of legitimate, specified purposes. Limitations must be "necessary to protect

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[22] UNDRIP, *supra* note 5 at art 8 [Amnesty's BOA at TAB 36]
[23] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya, Addendum, The situation of Indigenous peoples in the United States of America*, 30 August 2012, UN Doc A/HRC/21/47/Add.1 at paras 43-44 [Amnesty's BOA at TAB 39].
[24] *Ngati Rangi Trust v Manawatu-Wanganui Reg'l Council* A67/2004 NZEnvC 172, 18 May 2004 at paras 93-97, 318-321, 331 [Amnesty's BOA at TAB 16].
[25] *Te Runanga o Taumarere v Northland Reg'l Council* [1996] NZRMA 77 at 22, 59 [Amnesty's BOA at TAB 18]; See also Catherine J Iorns Magallanes, "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2015) 21:2 Widener Law Review 273 at 296-306 (summarizing New Zealand jurisprudence) [Magallanes] [Amnesty's BOA at TAB 23].
[26] *Orissa Mining Corp Ltd v The Union of India*, (2013) 6 SCC 476 (India) at paras 55-60 [Amnesty's BOA at TAB 17].
[27] ICCPR, *supra*, note 4 at art 18(3) [Amnesty's BOA at TAB 29].
[28] *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Annex at para 10 [*Siracusa Principles*] [Amnesty's BOA at TAB 32].

public safety, order, health, or morals or the fundamental rights and freedoms of others"[29] - criteria that have been adopted by this Court in the context of s. 2(a).[30] Moreover, Article 46(2) of the UNDRIP requires that limitations be "non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[31] The Special Rapporteur on the rights of indigenous peoples cautions that "mere commercial interests" where benefits are "primarily for private gain" will not constitute a valid public purpose.[32]

b) Limitations on freedom of religion must be proportionate to the public purpose

17. If freedom of religion is limited for a purpose allowable under international law, the limitation must be proportionate to that purpose.[33] In assessing proportionality, AI Canada submits that this Court should be guided by international and comparative jurisprudence.

18. The African Commission on Human and Peoples' Rights holds that state actions limiting freedom of religion must not be applied in a manner "that would completely vitiate the right."[34]

19. New Zealand law requires consideration of the effect of a proposed land use on Maori beliefs about the metaphysical entities inhabiting their lands, as part of the decision-making process.[35] Protection provided by the Courts depends on the impact the proposed development will have on the Maori belief, and thus has ranged from the need to consult with affected Maori to the rejection of developments that interfere with Maori spiritual relationship with the proposed site.[36]

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[29] ICCPR, *supra* note 4 at art 18(3) [Amnesty's BOA at TAB 29]; See also United Nations Human Rights Council, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, UN Doc CCPR/C/21/Rev.1/Add.4 at para 8 [Amnesty's BOA at TAB 37].
[30] *R v Big M Drug Mart Ltd*., [1985] 1 SCR 295, 18 DLR (4th) 321 at 337 [Amnesty's BOA at TAB 6]: "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."
[31] UNDRIP, *supra* note 5 at art 46(2) [Amnesty's BOA at TAB 36].
[32] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples*, 1 July 2013, UN Doc A/HRC/24/41 at para 35 [Amnesty's BOA at TAB 40].
[33] *Siracusa Principles, supra* note 28, Annex at para 10 [Amnesty's BOA at TAB 32].
[34] See e.g. *Centre for Minority Rights Development*, *supra* note 17 at para 172 [Amnesty's BOA at TAB 14].
[35] Magallanes, *supra* note 25 at 296, 298-300 [Amnesty's BOA at TAB 23]; See e.g. *The Outstanding Landscape Prot. Soc'y Inc. v Hastings Dist. Council* [2007] NZRMA 8 (EC) at paras 68-70 [Amnesty's BOA at TAB 19].
[36] Magallanes, *supra*, note 25 at 299-300 [Amnesty's BOA at TAB 23]; See for example *Ngati Rangi Trust v Manawatu-Wanganui Reg'l Council* (unreported) (EC), Auckland A067/2004, 18 May 2004 at paras 109, 318, 320 (NZ) [Amnesty's BOA at TAB 16].

iii. Analysis under section 2(a) of the *Charter* in light of Canada's international commitments and obligations

20. In this case, the assessment of a potential infringement of freedom or religion must be conducted from the Ktunaxa's perspective to consider how the proposed development will affect their metaphysical relationship to the land.[37]

21. Regarding whether an infringement is justified or proportional, AI Canada makes two observations. First, the interests of a third-party such as Glacier only came into existence because of the Ministerial decision to sign the MDA, as this is a development on Crown Land. Had the assessment of the potential infringement of the Ktunaxa's right to freedom of religion been done prior to signing the MDA, the weighting of factors would be necessarily different. Second, if this Court finds a violation of freedom of religion and must evaluate whether the approving the development is justified, it should consider its previous guidance that third-party commercial rights should not be considered *ipso facto* a compelling and substantial objective.[38]

C. Consultation with Indigenous peoples must be consistent with International law

22. This Court's interpretation of s. 35(1) of the *Constitution Act* should be consistent with the rights of Indigenous peoples under international human rights law to meaningfully participate in decisions affecting their rights. This right arises as corollary to a number of rights including the right to self-determination,[39] the right to freedom of religion,[40] and the right to culture,[41] guaranteed under binding international human rights covenants to which Canada is party.

23. Respect for Indigenous rights has been found to reflect "an important underlying constitutional value".[42] The obligation to respect and uphold Indigenous rights and engage in fair dealing is also rooted in the honour of the Crown, which is intended to reconcile pre-existing Indigenous sovereignty with the asserted sovereignty of the Crown.[43] This goal of reconciliation

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[37] Bakht & Collins, *supra* note 17 at 21-22 [Amnesty's BOA at TAB 26].
[38] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 127 [Amnesty's BOA at TAB 10].
[39] ICCPR, *supra* note 4 at art 1 [Amnesty's BOA at TAB 29]; ICESCR, *supra* note 8 at art 1 [Amnesty's BOA at TAB 30].
[40] ICCPR, *supra* note 4 at art 18 [Amnesty's BOA at TAB 29].
[41] ICESCR, *supra* note 8 at art 15 [Amnesty's BOA at TAB 30].
[42] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 82 [Amnesty's BOA at TAB 9].
[43] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras 25-26, 32 [Amnesty's BOA at TAB 3].

also underpins international law norms on the rights of Indigenous peoples.[44]A corpus of international law has developed to further reconciliation that parallels Canadian jurisprudence.[45]

24. Under international human rights law, the duty to consult Indigenous peoples on decisions that may affect their rights requires, *inter alia*, the following considerations:

i. The elevated risk of harm to Indigenous peoples, and the need for a precautionary approach to avoid such harm, requires the effective participation of Indigenous peoples in all decision-making processes where their rights may be at risk.[46]

ii. The right of Indigenous peoples to participate in decision-making processes means that consultation must be collaborative and inclusive,[47] and according to Indigenous peoples' customs and traditions through culturally appropriate procedures. [48]

iii. Meaningful participation requires good faith efforts by the state to reach mutual agreement with Indigenous peoples, while protecting their human rights.[49]

iv. Where consultation reveals potential for harm, the state has a positive obligation to ensure that the accommodation that is offered is sufficient to protect against the harm and must include the option of abandoning plans.[50]

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[44] UNDRIP, *supra* note 5, Preamble at paras 6, 7, 19 [Amnesty's BOA at TAB 36].
[45] Beverley McLachlin, "Aboriginal Peoples and Reconciliation" (2003) 9 Canterbury Law Review 240 at 2-3 [Amnesty's BOA at TAB 22].
[46] UNDRIP, *supra* note 5 at art 18 [Amnesty's BOA at TAB 36]; *Stavenhagen Report*, *supra* note 1 at paras 11, 19 [Amnesty's BOA at TAB 42]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 547/1993*, UNHRCOR, 70th Sess, Annex, UN Doc CCPR/C/70/D/547/1993 (16 November 2000), at para 9.5 [Amnesty's BOA at TAB 20]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 1457/2006*, UNHRCOR, 95th Sess, Annex, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) at paras 7.2, 7.6 [Amnesty's BOA at TAB 21].
[47] Where the UNDRIP refers to consultation, it calls either for "consultation and collaboration" (art 15.2) or "consultation and cooperation" (arts 17.2, 19, 36.2, 38) [Amnesty's BOA at TAB 36].
[48] UNDRIP, *supra* note 5 at art 18 [Amnesty's BOA at TAB 36].
[49] United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/12/34 (15 July 2009) at para 49 [*Anaya Report 2009*] [Amnesty's BOA at TAB 41].
[50] *Anaya Report 2009*, *supra* note 49 at para 50 [Amnesty's BOA at TAB 41]; UNDRIP, *supra* note 5 at art 19 [Amnesty's BOA at TAB 36]; *Saramaka People v Suriname*, *supra* note 15 at para 134 [Amnesty's BOA at TAB 12].

v. Importantly, land development projects with the potential for significant harm, including to the exercise of Indigenous peoples' customs and religious beliefs, should proceed only with the free, prior informed consent of the affected Indigenous peoples.[51]

25. This Court has similarly recognized that consultation must be meaningful and at times deep, and that consent of the affected First Nation may be required in the face of certain land use decisions.[52] AI Canada submits that, consistent with international human rights law, the destruction of a sacred site falls towards the deep end of the consultation spectrum discussed by this Court, requiring the consent of the affected First Nation.

26. While AI Canada does not take a position on the ultimate disposition of this case, it submits that *if* the Court finds that the consultation did not meet the above requirements, the Court's remedy should, at a minimum, require consultation that meets Canada's international law obligations.

PART IV – POSITION ON COSTS

27. AI Canada seeks an Order from this Honourable Court that there be no costs awarded to or against it in relation to this appeal.

PART V – ORDER SOUGHT

28. AI Canada also requests that it be granted leave to provide oral submissions of 10 minutes to the Court on the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
Dated at Ottawa, Ontario, this 26th day of October, 2016.

Margot Venton
FOR Counsel for the Intervener
Amnesty International Canada

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[51] UNDRIP, *supra,* note 5 at art 19 [Amnesty's BOA at TAB 36]; *Saramaka People v Suriname, supra* note 15 at para 134 [Amnesty's BOA at TAB 12]; *UNCERD General Recommendation No. 23, supra* note 15 at para 5 [Amnesty's BOA at TAB 33].

[52] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 168 [Amnesty's BOA at TAB 2]; *Haida Nation v British Columbia, supra* note 43 at paras 40-48 [Amnesty's BOA at TAB 3].

PART VI – LIST OF AUTHORITIES

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PART VII – STATUTES, LEGISLATION

LEGISLATION	Pinpoint
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	Art. 2(a)
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	Art. 35