Court File No. T-2292-14

FEDERAL COURT

B E T W E E N:

DOIG RIVER FIRST NATION, PROPHET RIVER FIRST NATION, WEST MOBERLY FIRST NATIONS and McLEOD LAKE INDIAN BAD

Applicants

- and -

ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT and BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER AMNESTY INTERNATIONAL

- Motion for Leave to Intervene brought by Amnesty International -

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PART I – FACTS

A. Overview

1. The proposed intervener, Amnesty International (AI), is an international, non-governmental 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. The Applicants in this case challenge the determination made by the Governor in Council pursuant to s. 52(4) of the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*"),[1] that the significant adverse environmental effects that will be caused by the Site C hydroelectric project are "justified in the circumstances". This case raises important issues of public interest concerning the content of the Crown's obligations to ensure proper protection of Indigenous rights within its decision-making regarding major resource development projects that will have serious negative impacts on Indigenous peoples' access to their traditional lands and 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 which arise in this judicial review. An international human rights law perspective will assist this Court in interpreting the content of the Governor in Council's statutory powers and obligations under *CEAA 2012*, when considering a development project that will cause significant adverse effects to Indigenous peoples' rights that cannot be mitigated.

4. If granted leave to intervene, AI will assist this Court by making submissions on how international human rights law informs: (i) the need for the Crown to recognize and respect Indigenous peoples' rights relating to their land and culture in the context of decisions about resource development that will have significant adverse effects on the exercise of these rights; (ii) the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown; (iii) the interpretation of the Governor in

[1] Canadian Environmental Assessment Act, 2012, SC 2012, c. 19, s. 52, as am.

Council's statutory powers and obligations under *CEAA 2012* in cases in which serious adverse effects to Indigenous peoples' rights are anticipated; and (iv) the procedure and substance of judicial oversight of executive decisions regarding whether a proposed limitation of Indigenous rights can be justified.

5. Questions concerning justification necessarily require a purposeful balancing of Indigenous rights against other societal interests, while taking into account the unresolved legacy of past violations and the heightened risk of further disempowerment, marginalization and impoverishment of Indigenous communities. AI will submit that according to international human rights 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. AI will also submit that international law principles militate in favour of a searching review by this Court of the Governor in Council's justification decision.

6. AI's perspective in this case is unique: none of the other parties address the international human rights law arguments AI proposes to make, nor do they share AI's extensive expertise in this area. AI's proposed arguments will assist this Court in effectively determining the issues before it. Indeed, courts have long recognized that international law is a relevant and persuasive source for interpretation of domestic law, particularly when matters of human rights and constitutional rights are engaged. AI respectfully submits that its proposed participation in this case is in the interests of justice, and requests that this motion for leave to intervene be granted.

B. AI's background and purpose

7. 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 English Branch of the international organization's Canadian Section. AI currently has over three 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]

C. AI's expertise and experience

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

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

9. AI has a varied and long-standing history of working to advance and protect the human and Aboriginal 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]

10. AI has addressed these issues by providing submissions to inquiries such as the Ipperwash Inquiry in 1995, to Parliamentary Committees such as the 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 which have engaged human rights issues with a particular impact on Indigenous peoples.[5]

11. AI has also made submissions on the imperative that environmental impact assessments uphold international human rights standards, including those set out in the *UN Declaration on*

[2] Affidavit of Alex Neve sworn 26 February 2015 at paras 8-15 ["Neve Affidavit"].
[3] Neve Affidavit at paras 18-25.
[4] Neve Affidavit at paras 29-35.
[5] Neve Affidavit at para 20.

the Rights of Indigenous Peoples (*UN Declaration*) at the public review of the proposed New Prosperity Gold and Copper Mine in central British Columbia.[6] In this review, the panel cited AI's submissions as an important consideration in reaching its conclusions.[7]

12. 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]

13. AI also participated in proceedings before this Court and the Federal Court of Appeal in *Canadian Human Rights Commission v. Attorney General of Canada*, 2012 FC 445, affirmed in 2013 FCA 75 (*Caring Society*), making submissions on Canada's international human rights obligations 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]

14. More generally, AI has documented and helped draw attention to various violations of the rights of Indigenous peoples in Canada, including unequal access to basic government services needed to ensure an adequate standard of living in Indigenous communities. AI's work within Canada 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.[10]

[6] Neve Affidavit at para 20f).
[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>.
[8] Neve Affidavit at para 20a).
[9] Neve Affidavit at para 20b).
[10] Neve Affidavit at paras 29-33, 38.

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

15. 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 has raised concerns about Canada's compliance with its international human rights obligations in respect of Indigenous peoples. These submissions have addressed, amongst other subjects, the widespread removal of First Nations children from their families due to systemic underfunding of child welfare services on reserves, Canada's refusal 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.[11]

16. 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.[12]

17. 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; it has working relationships with the Organization of American States and the African Union; and it 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.[13]

[11] Neve Affidavit at para 27.
[12] Neve Affidavit at para 33.
[13] Neve Affidavit at para 26.

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

18. 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 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.[14] AI is particularly concerned that these injustices continue to occur despite domestic and constitutional protections, and Canada's ratification and endorsement of international human rights instruments, including the *UN Declaration*.[15]

PART II – ISSUES

19. The sole issue to be determined in this motion is whether AI should be granted leave to intervene in this application.

PART III – SUBMISSIONS

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

20. This Court has held that in determining whether leave to intervene should be granted pursuant to Rule 109, 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."[16] The Federal Court of Appeal has added that the most important consideration is whether the proposed intervener is able to assist the Court by bringing a distinct perspective and expertise to bear on the issues in dispute.[17] Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.[18]

[14] Neve Affidavit at paras 36-37.
[15] Neve Affidavit at para 38.
[16] *Canada (Attorney General) v Sasvari*, 2004 FC 1650 at paras 11, 135, 21 Admin LR (4th) 72.
[17] Globalive Wireless Management Corp v Public Mobile Inc et al, 2011 FCA 119 at para 5(c), 420 NR 46 ["Globalive"].
[18] Canadian Pacific Railway Company v Boutique Jacob Inc, 2006 FCA 426 at para 21, 357 NR 384.

21. Recently, in considering AI's motion to intervene in *Pictou Landing*, Justice Stratas proposed a modified list of factors to better reflect the issues at stake on such motions, particularly in public law litigation.[19] Specifically, Justice Stratas 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)?

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 proceeding 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?

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?

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?

22. For the reasons set out below, AI submits that its proposed intervention in the present case satisfies all of these criteria, and that it ought to be granted intervener status in this case.

[19] Canada (Attorney General) v. Pictou Landing First Nation, 2014 FCA 21 at para 11, 456 NR 365 ["Pictou Landing"].

B. Application of the Intervention Test to the case at bar

1) AI has a genuine interest in ensuring respect for Indigenous rights in state decision-making regarding resource development projects

23. The Applicants' arguments in this judicial review application raise important questions of public law, relating to the content of the Crown's obligations to ensure proper protection of Indigenous rights within its decision-making regarding resource development projects under the statutory regime established under *CEAA 2012*.

24. Federal Court jurisprudence establishes that in public interest litigation matters involving important questions of public law, the requirement of a "genuine interest" is satisfied if the organization seeking to intervene has a demonstrated commitment to the issues raised in the case and possesses special knowledge and expertise with respect to these issues.[20] AI submits that it satisfies the genuine interest requirement in the present case. As the Federal Court of Appeal recognized in *Pictou Landing*, AI has a genuine interest in ensuring respect for the international human rights of Indigenous peoples in Canada, as well as the necessary knowledge, skills, and resources to assist the Court in determining whether a particular state decision accords with international norms and obligations in that regard.[21]

25. AI has a genuine interest in the issues raised in this case. In particular, 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 which are so inextricably tied to the exercise of their traditional and contemporary cultures and livelihoods. AI also has a demonstrated interest in ensuring that state actors in Canada comply with their international law obligations and commitments in respect of the protection of and respect for the human rights of Indigenous peoples. These interests on the part of AI are evident from AI's long track record of working to ensure that the human rights of Indigenous peoples in Canada are protected in accordance with international human rights law – before domestic courts, legislatures, tribunals and public inquiries, as well as before international bodies. These

[20] *Globalive*, *supra* note 17 at para 5(c); *Pictou Landing*, *supra* note 19 at para 9; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 1990 at para 3, [1989] FCJ No 707 (FCA).
[21] Pictou Landing, supra note 19.

interests are also demonstrated by AI's other advocacy, education, and reporting efforts on these issues.[22]

26. More particularly, both before and after the federal approval of the Site C project, AI issued a number of public statements concerning the need to protect the Indigenous land and culture threatened by the flooding that the project would cause in the Peace River Valley. AI also drew attention to these concerns in a recent submission to the United Nations Committee on Economic, Social and Cultural Rights in advance of its planned review of Canada's compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*.[23]

2) AI can make a unique, important, and useful contribution to this case that will further the court's determination of this matter

27. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. None of the parties 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. 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.

28. In this case, the Applicants' challenge to the authorization of the Site C project is focussed upon the decision of the Governor in Council pursuant to s. 52(4) of *CEEA 2012*, that the significant adverse environmental effects that will be caused by the project are "justified in the circumstances". The Applicants' arguments on this judicial review will require this Court to interpret the content of the Governor in Council's decision-making power and obligations under s. 52(4) of *CEAA 2012* in cases in which the significant adverse environmental effects that will be caused by the project will have serious negative effects on and/or infringe treaty rights, such that the honour of the Crown is engaged. The Applicants argue that the Governor in Council's decision in this case breached s. 35(1) of the *Constitution Act, 1982*, by failing to give sufficient or any regard to the adverse impacts of the project on the Applicants' treaty rights, and by failing

[22] See paras 11-20 of these Written Representations.
[23] Amnesty International, *Canada: Submission to the Pre-Sessional Working Group of the UN Committee on Economic, Social and Cultural Rights*, (Amnesty International Publications, 2015) Index: I0R 40/2015.006 at 15 online: <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT_CESCR_ICO_CAN_19430_E.pdf>.

to apply the constitutional justification standard required by the common law when treaty rights are infringed.[24] In the alternative, the Applicants argue that even if the project does not constitute an infringement of their treaty rights, the statutory requirements of justification under *CEEA 2012* were not satisfied.[25]

29. AI's proposed submissions will offer a unique and useful contribution on two key issues raised by the Applicants' arguments in this judicial review application. First, AI's submissions will assist the Court in interpreting the applicable legal standard for decisions taken by the Governor in Council under s. 52(4) of *CEAA 2012* when the anticipated adverse environmental impacts will have serious negative effects on the exercise of treaty rights. Second, AI's submissions will assist in determining the standard of review that ought to be applied and the factors that ought to be considered in the judicial review of the constitutional and/or statutory sufficiency of the Governor in Council's determination pursuant to *CEAA 2012* that the adverse impacts on the Applicants' treaty rights were justified.

30. If granted leave to intervene, AI intends to present submissions regarding the international human rights principles that AI will argue ought to inform the Court's interpretation of these important questions of domestic law.

31. In particular, AI will submit that:

a. International human rights norms and standards must be considered when interpreting statutory powers that affect the exercise of constitutionally-protected Aboriginal and treaty rights. International law is a relevant and persuasive source of interpretation of the domestic law at issue in this judicial review application, notably the Canadian Constitution and *CEAA 2012*.

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

[24] Notice of Application, paras 21-25.
[25] Notice of Application, paras 24-27.

c. The domestic legal standard applicable to determine whether an infringement of Aboriginal or treaty rights can be justified must be informed by and conform to Canada's international obligations; and

d. International human rights standards and Canada's international obligations must also inform the procedure and substance of judicial oversight of executive decisions regarding whether a proposed infringement of Aboriginal or treaty rights can be justified, to ensure the high standard of protection of Indigenous rights required by international law.

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

(i) International law is a relevant and persuasive source of interpretation of domestic law

32. Canadian courts have long recognized that the values and principles set out in international law are "relevant and persuasive" sources for the interpretation of the human rights enshrined in Canada's *Constitution Act, 1982*,[26] and for the interpretation of domestic legislation such as the *Canadian Environmental Assessment Act, 2012*.[27] Further, because Canadian laws are presumed to conform with international law,[28] any interpretation of domestic laws and regulatory mandates that have the effect of violating Canada's international human rights obligations should be rejected. International law is, as a result, relevant in interpreting the powers and obligations of the Governor in Council when making a finding of justification "in the

[26] *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"*].
[27] Hape, supra note 26 at para 53-54; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193; Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 SCR 76 at para 31, 2004 SCC 4; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241 at para 30, 2001 SCC 40; Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans), 2009 FC 878 at para 34, 349 FTR 225.
[28] *Hape*, *supra* note 26 at para 53, aff'd in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64. This presumption is also reflected in federal policy regarding regulatory activities: see Treasury Board of Canada Secretariat, *Cabinet Directive on Regulatory Management*, 2012 at para 30. online: <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>.

circumstances" under *CEAA 2012*,[29] and in determining whether the ultimate decision reached in this case was tainted by reversible error in its treatment of the Applicants' rights.

33. If granted leave to intervene, AI will argue that international human rights principles must inform the interpretation of the Governor in Council's decision-making powers and obligations under *CEAA 2012*. As Stratas J.A. recognized in *Pictou Landing*, "Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters" may inform the interpretation of domestic legal principles. Further, "contextual matters may inform the Court's determination of whether the standard of review is correctness or reasonableness", and assist the Court in assessing whether the decision at issue was correct or reasonable.[30]

34. In the present case, an international law perspective will shed additional light on the nature and importance of the interests at stake for the Applicants in the context of the Governor in Council's justification decision, and on Canada's associated international law obligations when determining, pursuant to *CEAA 2012,* whether the significant adverse environmental effects that will be caused by the Site C project are justified in the circumstances. These issues have been squarely raised by the Applicants in these proceedings, and will need to be addressed by this Court.[31]

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

35. If granted leave to intervene, 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, and the duty to respect Indigenous peoples' rights and to ensure that any limitations on the exercise of such rights are strictly necessary, proportionate to objectively determined benefits and consistent with the principles of international law – find

[29] *Pictou Landing*, *supra* note 19 at para 26.
[30] *Ibid*, *supra* note 19 at paras 23-25.
[31] See especially Notice of Application at paras 20-28.

congruency in the Canadian common law framework for Aboriginal rights protection under s. 35(1) of the *Constitution Act, 1982*. 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.[32]

b) International law requires a high standard of protection for Indigenous peoples' rights

36. The Applicants in this proceeding argue that the decision under review failed to provide adequate protection for Indigenous rights which were found to be adversely impacted by the proposed Site C Project, and failed to comply with the applicable statutory and constitutional standards.[33] Under international law, a high standard of protection is required for Indigenous peoples' rights, including rights to the protection of cultural heritage and to maintain the cultural and economic integrity of their communities through traditional practices such as fishing, hunting, and trapping.[34] International law imposes correlative obligations on states to ensure that the rights of Indigenous peoples are appropriately protected, respected and fulfilled.

37. As set out in a number of international instruments, including the *ICCPR*,[35] the *ICESCR*,[36] and the *UN Declaration,*[37] "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.[38] The exercise of this right includes maintaining and

[32] 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).
[33] See Notice of Application at paras 21-25.
[34] *Ibid* at para 18.
[35] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47, art 1 ["*ICCPR*"].
[36] *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 1 ["ICESCR"].
[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), preamble, art 3 ["*UN Declaration"*].
[38] *Ibid,* note 37, arts 3, 18, 23.

strengthening their own distinct political, legal and cultural institutions, including those through which decisions about land use and protection are traditionally made.[39]

38. 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.[40]

39. The duty to respect and protect Indigenous peoples' land and resource rights is codified in the *UN Declaration*[41] (which Canada has endorsed) and has been recognized by the Inter-American Commission on Human Rights as a norm of customary international law.[42] For Indigenous peoples, secure access to and use of their traditional territories and the resources of those territories is an essential precondition to the enjoyment of other protected human rights and the very survival of Indigenous peoples.[43] These rights include the rights to life, health, subsistence, livelihood, a healthy environment and drinkable water.[44]

40. Indigenous peoples' cultural rights – including rights to practice and pass on to future generations their unique languages, customs, and traditions, to maintain the institutions and structures of their society, and to preserve grave sites and other significant cultural sites – are also protected under international law, including in the *UN Declaration*.[45] These rights are of "central significance" not only because of their importance in defining the identities of

[39] *UN Declaration, supra* note 37, arts 5, 20.
[40] *Ibid,* supra note 37, 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*"].
[41] *UN Declaration, supra* note 37, arts 8(2)(b), 25-28.
[42] 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).
[43] *Hague Conference*, *supra* note 42 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.
[44] 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 (11 August 2000) at para 27.
[45] See *UN Declaration*, *supra* note 37, arts. 8, 11, 15, 31 and *ICESCR*, *supra* note 36, arts 1, 15.

Indigenous communities, but also because they "almost by definition embody the corollary rights to non-discrimination and, especially, to self-determination."[46]

41. The obligation to consult Indigenous peoples on matters that may affect their rights and interests is established as a general principle of international law. At a minimum, the duty to consult under international law requires making a genuine, good faith effort to reach a mutual agreement, and being open to the possibility that a project should be rejected. 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.[47]

42. 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,[48] 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."[49] Accordingly, consultation must begin at the earliest possible stage of a project, and fully consider the intended purposes of the proposed project and alternative means to achieve those ends, as well as Indigenous peoples' own rights and interests that must be accommodated.

43. The meaningful participation of Indigenous peoples in all stages of the decision making process is also 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. International law thus recognizes that the obligation of meaningful

[46] 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).
[47] 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).
[48] *Ibid* at para 65.
[49] *Kichwa, supra* note 40 at paras 167, 186, 200.

consultation of Indigenous peoples operates as a procedural protection that buttresses states' substantive obligation to protect and respect Indigenous rights.

44. International law obliges states to ensure substantive protection of Indigenous peoples' rights. International law requires strict justification for any conduct that will infringe, limit or negatively impact human rights. Given the high standard of protection required for Indigenous rights, the applicable standard of justification must be at least as strict as that applicable to other 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.[50]

45. 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.[51] Further, the Committee on the Elimination of Racial Discrimination has stated that "development objectives are no justification for encroachments on human rights[.]"[52]

46. International human rights law also recognizes that an especially rigorous standard of protection is required for the rights of Indigenous peoples, particularly given the unresolved legacy of past violations and current inequalities faced by Indigenous peoples in Canada. International law has 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.[53]

[50] *UN Declaration*, s*upra* note 37, art 46(2).
[51] *Case of the Yakye Axa Indigenous Community v Paraguay,* (2005) Judgment, Inter-Am Ct HR (Ser C) No 125 at paras 144, 146 ["*Case of the Yakye Axa Indigenous Community v Paraguay*"].
[52] 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.
[53] *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 125.

47. International human rights standards, applicable to all groups and individuals facing involuntary evictions and displacement caused, for instance, by the construction of a large dam, provide that such evictions should take place "only in exceptional circumstances."[54] In order to "demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare," the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living calls on states to "explore fully all possible alternatives" and carry out "comprehensive and holistic impact assessments" that include "strategies for minimizing harm."[55] The UN Committee on Economic, Social and Cultural Rights has held that states "shall ensure, prior to carrying out any evictions… that all feasible alternatives are explored in consultation with the affected persons". [56] International human rights standards call for an even more rigorous standard of protection of Indigenous peoples, rejecting all involuntary displacement or relocation.[57] Indeed, as recognized by the UN High Commissioner for Human Rights, "indigenous people cannot be forcibly removed from their lands without their free, prior and informed consent".[58]

c) The domestic legal standard applicable to determine whether an infringement of Aboriginal rights can be justified must be informed by and accord with Canada's international obligations and commitments

48. The Applicants argue that the Governor in Council's determination that the significant adverse environmental effects that the Site C project is expected to cause were "justified in the circumstances" does not satisfy the applicable constitutional and/or statutory standards. In particular, they argue that the decision fails to give sufficient or any regard to the adverse impacts of the project on their rights under Treaty No. 8, and does not comply with the Crown's common law obligation to justify any infringement of Aboriginal or treaty rights. The Applicants' argument in this regard requires this Court to consider the domestic legal standard

[54] 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 6 ["*Anaya*"].
[55] *Ibid*, *supra* note 54 at paras 6, 32, 38.
[56] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art. 11.1): Forced evictions*, 16th Sess, UN Doc E/1998/22 (20 May 1997) at para 13.
[57] *UN Declaration*, *supra* note 37, art 10.
[58] United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 25, Rev. 1: Forced Evictions* (United Nations: New York and Geneva, 2014) at 15; See also African Commission on Human and Peoples' Rights. African Commission on Human and Peoples' Rights, *Communication No 276-2003*: *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*

applicable to executive decision-making regarding whether anticipated serious adverse effects on Aboriginal or treaty rights can be justified.

49. If granted leave to intervene, AI will argue that the state's determination of whether anticipated serious adverse effects on Aboriginal or treaty rights are justified must be made in a manner consistent with the international law protections for Indigenous rights described above. An interpretation of the relevant legislation or an exercise of statutory discretion that is inconsistent with Canada's obligations and commitments under international law cannot be reasonable or correct. AI will submit that the Governor in Council's bald assessment that "the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest"[59] constitutes an inadequate analysis that is inconsistent with Canada's obligations and commitments under international law.

(i) The significance given to findings of adverse effects must accord with the high standard of protection required for Indigenous rights

50. To be consistent with the high standard of protection required for Indigenous rights, the Governor in Council's authority to determine justification under *CEAA 2012* must be interpreted and applied in a way that reflects an acute awareness that Indigenous peoples have substantive rights that must be protected, as well as 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.[60] Any uncertainty about the impacts on the exercise of 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.

51. This high standard of protection must be taken into account in reviewing the interpretation and application of the factors set out in the *CEAA 2012* including effects on

[59] Order in Council PC 2014-1105, dated October 14, 2014 (*Re: BC Hydro Site C Clean energy Project*), *Motion Record*, Tab 4 ["*OIC 2014"*].

[60] 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*].

Indigenous 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)); cumulative impacts (s. 19(1)(a)); the adequacy of any mitigation measures (s. 19(1)(d)); and Indigenous peoples' own perspective on the seriousness of the impacts as reflected, for example in "Aboriginal traditional knowledge" (s. 19(3)).

52. The high standard of protection is also relevant to determining how the "precautionary principle", which the Governor in Council is required to apply under *CEAA 2012* (s. 4(2)), ought to be interpreted in the circumstances of this case. 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."[61]

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

53. Under international law, where development activities such as the proposed Site C project 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 interventions are likely to deprive Indigenous peoples of "the capacity to use and enjoy their lands and other natural resources necessary for their subsistence,"[62] the free, prior and informed consent (FPIC) of the Indigenous peoples is a presumptive requirement.[63]

54. FPIC does not constitute an absolute right, but rather should be considered as a precautionary measure requiring 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

[61] *Anaya, supra* note 54 at para 52.
[62] Ibid, supra note 54.
[63] *Ibid*, *supra* note 54 at para 65.

principle of effective interim protection,[64] 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.

55. Under international law there is a presumptive requirement that projects like the proposed Site C dam, which would have serious negative impacts on the rights of Indigenous peoples, must proceed only with the free, prior and informed consent (FPIC) of those affected. Because FPIC is, in part, intended as a protective or precautionary measure, the absence of such consent should at a minimum be understood as requiring even greater care in determining whether or not the impacts of a project are justifiable. The UN Special Rapporteur on the Rights of Indigenous Peoples has noted that the grounds to justify proceeding without consent are necessarily very narrow, given the central importance of lands and resources to Indigenous peoples and the rights which Indigenous peoples continue to exercise to those lands and resources.[65]

56. In the present case, given the JRP's conclusion that the Site C project is likely to have serious non-mitigatable impacts on Indigenous peoples' capacity to use and enjoy their lands, and would destroy burial sites and other sites of critical cultural value, Canada's international law obligations with respect to FPIC required careful consideration by the Governor in Council.

(iii) Determining whether the significant adverse environmental effects of the Site C project are justified must not be based solely on economic benefits

57. The high standard of protection required for Indigenous rights in international law dictates that where there is a finding that a proposed project will likely cause serious harm to these rights, extreme rigour must be applied to the question of whether these impacts can be justified. Asserted benefits of a project must be objectively demonstrated and rigorously examined with a view to determining whether the impairment of rights does not exceed what is strictly necessary and that any impacts are proportionate to the harm.[66] Even where the

[64] 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.
[65] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, 24th Sess, UN Doc A/HRC/24/41 (1 July 2013) at para 36.
[66] *Case of the Yakye Axa Indigenous Community v Paraguay*, supra note 51 at para 42.

financial benefit of a project can be objectively shown, this should not be the only, or even the primary, factor considered in determining whether a project is in the public interest.

58. In this case, the decisions under review will inevitably impact the larger, overarching public interest in the respect for human rights and reconciliation between Indigenous and non-Indigenous peoples. Critically, any potential justification cannot assume an inherently 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 and commitments is also in the public interest and similarly benefits all Canadians.

d) International human rights standards must also inform the procedure and substance of judicial oversight of executive decisions regarding whether a proposed infringement of Aboriginal rights can be justified

59. The decision of the Governor in Council at issue in the present case is recorded in a brief Order in Council.[67] The Governor in Council's determination that the anticipated adverse environmental impacts were justified in the circumstances was not supported by any reasons, and Cabinet privilege has been claimed over all records that might provide further explanation as to the reasons underpinning the decision. The Order in Council provides no explanation whatsoever as to how the Governor in Council considered and resolved the serious questions raised in the JRP Report regarding the asserted need for the project, the economics of the project, and the availability of energy supply alternatives. The only insight provided in the Order in Council as to the Governor in Council's reasoning appears in a single sentence, in which it is asserted that "the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest".

60. If granted leave to intervene, AI will argue that international human rights standards and Canada's international obligations and commitments ought to inform this Court's determination of the standard of review applicable to the Governor in Council's justification decision, as well as the application of this standard of review to the particular circumstances of this case.

[67] *OIC 2014, supra* note 59.

61. In the present case, the Governor in Council's decision represents the federal Crown's determination that the adverse effects on and/or infringements of the Applicants' rights as Indigenous peoples that will result from federal authorization of the Site C project have been justified according to the strict and onerous standards applicable in the circumstances. International law principles dictate that this determination on the part of the state regarding the Applicants' fundamental rights must be subject to effective judicial review, and that state conduct within the decision-making process that has the effect of undermining or frustrating such judicial review cannot be countenanced.

62. The right to have one's rights and obligations determined by an "independent and impartial tribunal" is a fundamental aspect of international law. This right, which extends to administrative proceedings,[68] is reflected in numerous international and regional instruments, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *American Convention on Human Rights*.[69] This right also forms part of the guarantees affirmed in the *UN Declaration*, which expressly frames the right in terms of the corollary state obligation:

> 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.[70]

63. This international human right to a determination by an "independent and impartial tribunal" requires that the decisions of administrative authorities be subject to judicial review by a tribunal with full jurisdiction to determine all questions of fact and law relevant to the dispute

[68] United Nations Committee on Human Rights, Communication No. 112/1981, *Y.L. v. Canada,* UN GAOR, 41st Sess, Supp. No. 40, UN Doc.A/41/40 (1986) 145 ["*Y.L. v. Canada*"].
[69] *Universal Declaration of Human Rights*, GA Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art 10; ICCPR, supra note 35, art. 14(1); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5, art. 6(1); *American Convention on Human Rights*, 22 November 1969, 9 ILM (1970) 673, 65 AJIL 679, art. 8(1).
[70] *UN Declaration*, *supra* note 37, art. 27.

before it.[71] A review that is limited to the determination of whether the discretion held by the administrative authority was used in a manner compatible with the object and purpose of the law will not satisfy the standard set by international law.[72] Similarly, the international law standard is not met by a judicial practice that treats the executive's opinion on a central issue as decisive, without subjecting that opinion to scrutiny or criticism.[73]

64. The right under international human rights law to a determination by an independent and impartial tribunal must be read together with the requirement that effective remedies be provided where rights have been violated. As this Court recognized in *Canada (Human Rights Commission) v. Canada (Attorney General)*, "international human rights law requires Canada to monitor and enforce individual human rights domestically, and to provide effective remedies where these rights are violated".[74] This correlative right to an effective remedy is recognized in various international instruments, and has been applied, in conjunction with the right to an independent and impartial tribunal, in cases in which the UN Human Rights Committee has found that Indigenous peoples' rights have been violated.[75]

65. If granted leave to intervene, AI will argue that international law principles militate in favour of a searching review on the part of this Court of the Governor in Council's justification determination, in order to ensure that the Applicants' right to an effective remedy in the case of a violation of their rights is not rendered illusory. AI will argue that where, as in the current case, the executive provides no substantive reasons for an administrative decision that purports to

[71] Known as the "composite approach", this principle was first adopted by the European Court of Human Rights in *Case of Albert and Le Compte v. Belgium (1983), Application no. 7299/75; 7496/76,* Eur Ct HR, Judgment of 10 February 1983 at para 29, and has since been adopted in a body of jurisprudence from the United Kingdom addressing judicial review proceedings under common law standards: see, e.g., *W. v. United Kingdom* (1987), 10 E.H.R.R. 29, 121 Eur. Ct. H.R. (Ser. A.) 1; *R. v. Secretary of State for the Environment, ex parte Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd*, [2001] UKHL 23 at paras 154-159; *Tsfayo v. United Kingdom* [2006] ECHR 981. In *Y.L. v. Canada, supra* note 68*,* the UN Human Rights Committee accepted this composite approach in holding, at paragraphs 9.4-9.5, that an adjudicative process before the Pension Review Board had to be viewed within the context of the availability of judicial review under the *Federal Courts Act.*

[72] *Case of Obermeier v. Austria*, Eur Ct HR, Judgement of 28 June 1990, at para 70.

[73] *Case of Chevrol v. France, Application no. 49636/99,* Eur Ct HR, Judgement of 13 February 2003, at paras 81-84.

[74] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445 at para 145, aff'd 2013 FCA 75.

[75] *ICCPR,* supra note 35, arts 2(3), 14(1); *UN Declaration*, *supra* note 37, art. 8(2); United Nations Human Rights Committee, *Communication No. 779/1997: Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, views of 24 October 2001, CCPR/C/73/D/779/1997*,* at paras 8.1-8.2.

authorize a resource development project that will have serious negative impacts on Indigenous rights protected by international law, the decision in question is inconsistent with Canada's obligations under international law.

3) AI's participation in this case is in the interest of justice

66. This case raises important questions of public interest regarding the human rights of Indigenous peoples, in particular the need for the Crown to recognize and respect Indigenous peoples' rights relating to their land and culture; the limitation of Indigenous peoples rights and the scope and nature of permissible justification by the state of such limitation; and the scope of consultation and accommodation necessary when development projects have the potential to impact access to resources necessary for Indigenous peoples to exercise their cultures and livelihoods.

67. 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. AI's proposed submissions will assist this Court in clarifying the domestic legal standards applicable to decision-making in the context of resource development. 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."[76]

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

4) AI will not delay this judicial review or duplicate materials

69. 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*.

[76] *UN Declaration*, *supra* note 37, preamble.

70. 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.[77]

71. 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.[78]

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

73. The Applicants have consented to AI's motion for leave to intervene. [79]

PART IV – ORDER SOUGHT

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

75. 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[77] Neve Affidavit at para 42.
[78] Neve Affidavit at paras 43.
[79] Neve Affidavit at para 44.

PART V – LIST OF AUTHORITIES

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1. *Canadian Environmental Assessment Act,* 2012, SC 2012, c 19, as am.
2. *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

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3. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 SCR 241, 2001 SCC 40
4. *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 174 DLR (4th) 193
5. *Canada (Attorney General) v. Pictou Landing First Nation,* 2014 FCA 21, 456 NR 365
6. *Canada (Attorney General) v. Sasvari*, 2004 FC 1650, 21 Admin LR (4th) 72
7. *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445, aff'd 2013 FCA 75
8. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 SCR 76, 2004 SCC 4
9. *Canadian Pacific Railway Company v. Boutique Jacob Inc*, 2006 FCA 426, 357 NR 384
10. *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans),* 2009 FC 878, 349 FTR 225
11. *Globalive Wireless Management Corp v. Public Mobile Inc et al*, 2011 FCA 119, 420 NR 46
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14. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 1990, [1989] FCJ No 707 (FCA)
15. *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4

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16. African Commission on Human and Peoples' Rights, *Communication No 276-2003*: *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya.*

17. *Case of Albert and Le Compte v. Belgium (1983), Application no. 7299/75; 7496/76,* Eur Ct HR, Judgment of 10 February 1983

18. *Case of Chevrol v. France, Application no. 49636/99,* Eur Ct HR, Judgement of 13 February 2003

19. *Case of Obermeier v. Austria,* Eur Ct HR, Judgement of 28 June 1990, Series A no. 179

20. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, (2012) Judgment, Inter-Am Ct HR (Ser C) No 245

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

22. *Case of the Saramaka People v. Suriname,* (2007) Judgment, Inter-Am Ct HR (Ser C) No 172

23. *Case of the Yakye Axa Indigenous Community v. Paraguay,* (2005) Judgment, Inter-Am Ct HR (Ser C) No 125

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

25. *R. v. Secretary of State for the Environment, ex parte Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd,* [2001] UKHL 23

26. *Tsfayo v. United Kingdom,* [2006] ECHR 981

27. United Nations Committee on Human Rights, *Communication No. 112/1981: Y.L. v. Canada,* UN GAOR, 41st Sess, Supp. No. 40, UN Doc.A/41/40 (1986) 145

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

29. United Nations Human Rights Committee, *Communication No. 779/1997: Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, views of 24 October 2001, CCPR/C/73/D/779/1997

30. United Nations Human Rights Committee, *Communication No 1457/2006: Ángela Poma Poma v Peru,* 95th Sess, UN Doc CCPR/C/95/D/14572006

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33. *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 UNTS 221, Eur TS 5

34. *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47

35. *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, GA Res 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3

36. United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art. 11.1): Forced evictions*, 16th Sess, UN Doc E/1998/22 (20 May 1997)

37. 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 (11 August 2000)

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

39. 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)

40. 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)

41. 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)

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online: <http://www.ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>.

49. 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)

50. Treasury Board of Canada Secretariat, Cabinet Directive on Regulatory Management, 2012
online: <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>.

CANADA
PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 2014-1105
October 14, 2014

Whereas BC Hydro has proposed the development of the Site C Clean Energy Project (the "Project"), near Fort St. John, British Columbia;

Whereas, after having considered the Report of the Joint Review Panel – Site C Clean Energy Project and taking into account the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister has decided that the Project is likely to cause significant adverse environmental effects;

Whereas, after having made this decision, the Minister has, in accordance with subsection 52(2) of the *Canadian Environmental Assessment Act, 2012* ("the Act"), referred to the Governor in Council for its consideration and decision the matter of whether those effects are justified in the circumstances;

Whereas the Government of Canada has undertaken a reasonable and responsive consultation process with Aboriginal groups potentially affected by the Project;

Whereas the consultation process has provided the opportunity for dialogue and for the exchange of information to ensure that the concerns and interests of the Aboriginal groups have been considered in the decision-making process;

Whereas the consultation process has included opportunities for the Aboriginal groups to review and comment on conditions for inclusion in a decision statement to be issued by the Minister under the Act that could mitigate environmental effects and potential impacts on the Aboriginal groups;

.../2

Whereas the Minister will consider the views and information provided by the Aboriginal groups when the Minister determines the conditions to be imposed on the proponent in the decision statement;

Whereas the consultation process undertaken is consistent with the honour of the Crown;

And whereas the concerns and interests of Aboriginal groups have been reasonably balanced with other societal interests including social, economic, policy and the broader public interest;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 52(4) of the *Canadian Environmental Assessment Act, 2012*, decides that the significant adverse environmental effects that Site C Clean Energy Project proposed by BC Hydro in British Columbia is likely to cause are justified in the circumstances.

CERTIFIED TO BE A TRUE COPY–COPIE CERTIFIÉE CONFORME

CLERK OF THE PRIVY COUNCIL–LA GREFFIÈRE DU CONSEIL PRIVÉ