NO. 144690
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Environmental Assessment Act*, SBC 2002, c. 3 and the *Judicial Review Procedure Act*, RSBC 1996, c. 241

BETWEEN:

PROPHET RIVER FIRST NATION, WEST MOBERLY FIRST NATIONS and MCLEOD LAKE INDIAN BAND

Petitioners

AND

MINISTER OF THE ENVIRONMENT and MINISTER OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS

Respondents

AND

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondent

AND

AMNESTY INTERNATIONAL

Proposed Intervenor

NOTICE OF APPLICATION

Name of Applicant: Amnesty International

To: **Prophet River First Nation, West Moberly First Nations & McLeod Lake Indian Band**
c/o Devlin Gailus Westaway
Attn: John Gailus
Suite C-100 Nootka Court
633 Courtney Street
Vancouver, B.C. V8W 1B9

And to: **Minister of the Environment & Minister of Forests, Lands and Natural Resource Operations**
c/o Ministry of Justice
Legal Services Branch – Aboriginal Law and Litigation Group
Attn: Erin K. Christie
3rd Floor, 1405 Douglas Street
PO Box 9270 Stn Prov Govt
Victoria, B.C. V8W 9J5

And to: **British Columbia Hydro and Power Authority**
c/o Fasken Martineau DuMoulin LLP
Attn: Charles Willms
2900-550 Burrard Street
Vancouver, B.C. V6C 0A3

TAKE NOTICE that an application will be made by the Applicant Amnesty International, to the presiding judge or master at the courthouse at Vancouver Law Courts, 800 Smithe Street, Vancouver, B.C. V6Z 2E1 on 31/03/2015 at 9:45 am for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order that Amnesty International be granted leave to intervene in this proceeding, on the terms set out in the draft order attached hereto as Schedule "A"; and

2. Such further and other relief as this Court deems just.

Part 2: FACTUAL BASIS

1. This is an application for leave to intervene in the present proceedings brought by Amnesty International ("AI").

A. The legal issues raised by the parties in this matter

2. In the underlying petition for judicial review, the Petitioners, who are signatories or adherents to Treaty No. 8, seek to quash the decision of the Minister of Environment and the Minister of Forests, Lands and Natural Resource Operations (the "Ministers") to issue Environmental Assessment Certificate #E14-02 (the "Certificate") to BC Hydro and Power Authority ("BC Hydro") for the Site C hydroelectric project (the "Project").[1] The Ministers' decision to issue the Certificate was made pursuant to s. 17(3) of the *Environmental Assessment Act*, SBC 2002, c. 43 (the "*BCEAA*").

3. The Petitioners contend that the Project will constitute an unjustifiable infringement of their Treaty rights, according to the standard of Treaty infringement articulated in *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 at para. 48, namely that no meaningful right to exercise

[1] Petition to the Court, paras. 1-4, orders sought, 32.

Treaty rights within the First Nations' traditional territories would remain. The Petitioners argue that in deciding to issue the Certificate, the Ministers erred in law by failing to consider whether the Project would constitute an unjustifiable infringement of their Treaty rights. In the alternative, the Petitioners assert that if the Ministers did consider whether the Project would give rise to an infringement, the Ministers failed to consider relevant factors, including the cumulative effects of the Project, in reaching their decision.[2]

4. In the further alternative, if the Project does not constitute an infringement of their Treaty rights, the Petitioners argue that the Crown failed to meet its constitutional duty to consult and accommodate the Petitioners. The Petitioners contend, *inter alia*, that the Crown's approach to consultation proceeded on the basis of an incorrect understanding of the nature of the established Treaty rights at issue, and was based on inadequate consideration of the serious adverse effects that would be caused by the Project or of the available alternatives.[3]

5. In their Responses to the Petition, the Ministers and BC Hydro both contend that in exercising their powers under s. 17(3) of the *BCEAA*, the Ministers were not by law required to consider whether the Project would be an unjustifiable infringement of the Petitioners' Treaty rights. The Minister and BC Hydro assert that the Ministers' legal obligations in relation to the Petitioners' Treaty rights was limited to ensuring that the Crown satisfied its duty to consult and accommodate.[4] The Ministers and BC Hydro concede that the Project will have serious, non-mitigable adverse impacts on the Petitioners' Treaty rights and thus triggered the Crown's duty to consult and accommodate, but assert that the consultation process satisfied this duty.[5]

6. The parties' arguments will require this Court to consider the content of the decision-making powers and obligations of the Ministers under s. 17(3) of the *BCEAA*, in cases in which the significant adverse environmental consequences of a project will have serious negative effects on and/or are asserted to infringe Treaty rights. This case raises the legal issue of whether Crown actors such as the Ministers, when exercising a statutory discretion to authorize a resource development project that will cause serious adverse effects to Treaty rights, are obliged to consider the requirements of common law justification under s. 35(1) of the *Constitution Act, 1982*, or whether the legal obligations of the Crown in such circumstances are instead confined to the duty to consult and accommodate. The parties' arguments in this case also raise issues regarding the content of the Crown's duty to consult and accommodate in circumstances in which an Aboriginal party asserts, and seeks to establish within an administrative process, that a resource development project will give rise to an infringement of its Treaty rights.

7. These are important and novel issues of constitutional and administrative law. To AI's knowledge, these issues have not been the subject of any significant judicial consideration, by the courts in British Columbia or in other Canadian jurisdictions, particularly since the Supreme Court of Canada's decision in *Haida Nation v. British Columbia*, 2004 SCC 73 clarified the law regarding the duty to consult and accommodate, and since *Mikisew* established the respective roles of consultation and infringement analyses when the Crown purports to take up land under

[2] Petition to the Court, paras. 45-51.
[3] Petition to the Court, paras. 52-70.
[4] Response to Petition of Ministers, paras. 46-49; Response to Petition of BC Hydro, Part 5, paras. 6-8.
[5] Response to Petition of Ministers, paras. 4, 70-75; Response to Petition of BC Hydro, Part 5, paras. 14, 20.

the terms of a Treaty.

8. 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. AI submits that its intervention will provide this Court with a valuable and different perspective that will assist this Court in deciding the important public law issues raised in the instant case.

B. AI's expertise and interest concerning the human rights of Indigenous peoples in Canada

9. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of internationally recognized rights. It is impartial and independent of any government, political persuasion, or religious creed. AI Canada is the 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.[6]

10. AI has extensive expertise and experience, recognized in Canada and around the world, in the area of international human rights law, and in particular in protecting the human rights of Indigenous peoples domestically and internationally.[7]

11. In Canada, as part of its long-standing and varied work to advance and protect the human rights of Inuit, First Nations, and Métis peoples, AI has made submissions to inquiries, legislative bodies, environmental review panels and to all levels of courts. For instance, AI made submissions on the imperative that environmental impact assessment processes uphold international human rights standards, including those set out in the *UN Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*"), at the public review of the proposed New Prosperity Gold and Copper Mine in central British Columbia.[8]

12. AI has also documented and helped draw attention to various violations of the rights of Indigenous peoples in Canada; investigated complaints of systemic patterns of mistreatment; worked with specific communities involved in land rights disputes; collaborated with the Native Women's Association of Canada and other organizations in a long-term campaign against violence against Indigenous women; and engaged in public education activities to promote existing and emerging standards in domestic and international law.[9]

13. At the international level, AI has worked to protect Indigenous rights by making submissions to various bodies, including Special Rapporteurs, UN working groups, treaty bodies, and the Inter-American Commission on Human Rights, by playing an active role in the UN processes leading to the finalization and adoption of the *UN Declaration*, and by engaging with a

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[6] Affidavit #1 of Alex Neve, sworn March 15, 2015 at paras. 8-15 ["Neve Affidavit"].
[7] Neve Affidavit at paras. 17-35.
[8] Neve Affidavit at para. 20f).
[9] Neve Affidavit at paras. 20, 29-35.

broad range of international and inter-governmental organizations on such issues.[10]

14. AI has a specific, active, long-standing, and demonstrated interest in protecting the human rights of Indigenous peoples. AI has researched and documented conditions of discrimination, impoverishment, ill-health, and cultural erosion among Indigenous peoples 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.[11] AI is concerned that these injustices continue despite domestic constitutional protections, and Canada's ratification and endorsement of international human rights instruments, including the *UN Declaration*.[12]

Part 3: LEGAL BASIS

15. The granting of intervenor status in a proceeding of this kind derives from the inherent jurisdiction of this Court, and is not directly addressed by the *Supreme Court Civil Rules.*[13] The question of whether a party should be allowed to intervene in a proceeding is a matter of discretion, and depends on the particular facts of the case.[14]

16. In deciding whether leave to intervene should be granted, the Court must adopt a "liberal approach"[15] to determine "whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties." Where an application for intervention concerns a public law issue, as here, the application "may be allowed even though the applicant does not have a direct interest in the appeal".[16]

17. Ultimately, in determining an application to intervene, the Court must decide whether the proposed intervenor "will contribute something significant that otherwise would be absent from the litigation such that they will be of assistance to the Court."[17]

A. AI's interest in ensuring respect for Indigenous rights in state decision-making regarding resource development projects

18. The Petitioners' 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 the *BCEAA*.

19. AI has a particular interest in ensuring respect for Indigenous rights in state decision-making regarding resource development projects, such as those which arise in this case, as reflected in the organization's domestic and international activities, outlined above.

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[10] Neve Affidavit at paras. 27-35.
[11] Neve Affidavit at paras. 36-40.
[12] Neve Affidavit at para. 40.
[13] *Can. Labour Congress v. Bhindi* (1985), 17 DLR (4th) 193 (BCCA) at para. 2.
[14] *Regional District of Comox-Strathcona v. Hansen*, 2003 BCSC 974 at para. 21.
[15] *College Institute Educators' Assoc. v. British Columbia*, 2002 BCSC 1480 at para. 16.
[16] *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para. 7.
[17] *Schooff v. Medical Services Commission*, 2009 BCSC 1596 at para. 203.

20. More particularly, both before and after the provincial approval of the Site C project, AI made 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*.[18]

B. AI will make a valuable contribution to this case and will bring a different perspective that will be of assistance to this Court

21. 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; the limitation of Indigenous peoples' rights and the scope 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 continue to exercise their cultures and livelihoods.

22. Given the important rights and interests at stake in this case, and the constitutional dimensions of the legal principles engaged, Canada's obligations under international law are particularly relevant here. AI is well and uniquely positioned to assist the Court in considering such questions. In particular, AI's proposed submissions will assist this Court in clarifying the domestic legal standards applicable to the state decision-making at issue here.

23. AI brings a valuable and different perspective and approach to the issues raised in this judicial review. None of the parties will address these issues 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.

24. If granted leave to intervene, AI intends to present submissions regarding the international human rights principles that ought to inform the Court's interpretation of the important questions of domestic public law that arise in this case. An outline of AI's proposed submissions follows.

Point #1: The issues before this Court must be determined consistently with Canada's international human rights obligations and commitments

25. 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*,[19] and for the interpretation of domestic legislation.[20] Canadian laws, both provincial and federal, are presumed to conform with

[18] Neve Affidavit at para. 39, Exhibit B.
[19] *Reference re Public Service Employee Relations Act (Alberta)*,[1987] 1 S.C.R. 313 at 348; *R v. Hape*, 2007 SCC 26 at para. 55.
[20] *Hape*, *supra* note 19 at para. 53-54; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

international law, and interpretations of domestic laws that would put Canada in breach of its international human rights obligations ought to be rejected.[21]

26. AI will argue that international human rights norms and standards relating to Indigenous peoples' rights must inform the interpretation of the Ministers' decision-making powers and obligations under s. 17(3) of the *BCEAA*, as well as the assessment of the Ministers' approach to and treatment of the Petitioners' constitutionally-protected Treaty rights in the course of the exercise of their statutory discretion.

Point #2: International law requires a high standard of protection for Indigenous peoples' rights

27. 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. The correlative obligation on states to respect and protect Indigenous peoples' land and resource rights has been recognized as a norm of customary international law[22] and has been codified in the *UN Declaration*,[23] which Canada has endorsed.

28. International law requires strict justification for any conduct that will limit or negatively impact human rights. It would be discriminatory to apply a more lenient standard of protection for Indigenous rights than for the rights of other individuals and groups. The applicable standard of justification must therefore be at least as strict as that applicable to other rights; indeed, this standard must arguably be higher, given the rigorous protection required for Indigenous rights.[24]

29. AI's submissions will further develop these points concerning the protections afforded to Indigenous peoples under international law, and will rely upon a number of international instruments and treaties, as well as the comments and reports of United Nations (UN) treaty bodies and UN Special Rapporteurs, and the jurisprudence of domestic and international courts and institutions.[25]

Point #3: The domestic legal standard applicable to determine whether an infringement of Treaty rights can be justified, or whether the Crown has fulfilled its duty to consult and accommodate, must be informed by and conform to Canada's international obligations

30. AI will argue that the Ministers' discretion under the *BCEAA* must be exercised in a manner consistent with international law protections and obligations relating to Indigenous rights. International human rights principles must also inform the domestic legal standard

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[21] *Hape*, *supra* note 19 at para. 53.

[22] 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. 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).

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

[24] *UN Declaration*, *supra* note 23, art. 46(2).

[25] Neve Affidavit at paras. 41-42.

applicable to determine whether a project that will have significant non-mitigable adverse impacts on Indigenous rights may proceed. In the present case, the Joint Review Panel Report found, and the Respondents concede, that the Project will have such impacts. International human rights law is also particularly relevant to determine the applicable domestic legal standard for assessing the sufficiency of Crown consultation and accommodation for this Project.

31. AI will argue that the interpretation urged by the Ministers and BC Hydro – that the Ministers' legal obligation to consider the impact of the Project on the Petitioners' Treaty rights is confined to consideration of the duty to consult and accommodate[26] – is inconsistent with international human rights principles. *Inter alia*, such an interpretation fails to accord appropriate substantive protection to Indigenous peoples' rights, and fails to ensure that limitations on Indigenous peoples' rights conform to the stringent standard set by international law.

Point #4: 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 Treaty rights can be justified

32. AI will argue that international human rights standards and Canada's international obligations and commitments ought also to inform this Court's determination of the standard of review applicable to the Ministers' decision, as well as the application of this standard of review to the particular circumstances of this case. The international law principles that are relevant in this context include the positive obligations of every state to respect and ensure the human rights of all persons in its territory, the right to an effective remedy, and the right of access to an independent and impartial tribunal for determination of one's rights.[27]

33. AI will argue that these international law principles militate in favour of a searching review on the part of this Court of the Ministers' decision to grant the Certificate authorizing the Project, in order to ensure that the Petitioners' right to an effective remedy in the case of a violation of their rights is not rendered illusory.

C. AI's intervention will not prejudice the rights of the parties to this proceeding

34. If granted leave to intervene, AI will be mindful of submissions made by the parties and any other intervenors, 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.[28]

35. AI has moved expeditiously to serve and file these application materials and will not delay the progress of the proceeding. If granted leave to intervene, AI will abide by any schedule

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[26] Response to Petition of Ministers at paras. 46-49; Response to Petition of BC Hydro, Part 5 at paras. 6-8.

[27] *Universal Declaration of Human Rights*, GA Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, arts. 2, 10; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA Res 2200 (XXI), 21 UN GAOR Supp. (No. 16), art. 2(1); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47, arts. 2(1), 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, arts. 1, 2, 8(1).

[28] Neve Affidavit at para. 44.

set by this Court for the delivery of materials and for oral argument.[29]

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

37. The Petitioners have consented to AI's motion for leave to intervene. [30]

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Alex Neve, sworn on March 11, 2015.

The applicant estimates that the application will take 2 hours.

[ ] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: March 13, 2015

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Signature of Jessica R. Orkin
Lawyer for Applicant, Amnesty International

[29] Neve Affidavit at para. 45.
[30] Neve Affidavit at para. 46.

Applicant's address for service: Jessica R. Orkin
Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto Ontario M5G 2G8
Fax: 416 979 4430
Email: jorkin@sgmlaw.com

To be completed by the court only:

Order made
[ ] in the terms requested in paragraphs ..... of
Part 1 of this notice of application
[ ] with the following variations and additional terms:

.....

.....

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Date….....

.....
Signature of [ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts

SCHEDULE "A"

NO. 144690
VANCOUVER REGISTRY

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AND

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Respondent

AND

AMNESTY INTERNATIONAL

Proposed Intervenor

ORDER MADE AFTER APPLICATION

BEFORE A JUDGE OF THE COURT _____

ON THE APPLICATION of Amnesty International, coming on for hearing at Vancouver on _____, 2015, and on hearing Jessica Orkin, lawyer for Amnesty International; John Gailus, lawyer for the Petitioners; Erin Christie, lawyer for the Respondent Ministers; and Charles Willms, lawyer for the Respondent BC Hydro;

THIS COURT ORDERS that:

1. Amnesty International (AI) be granted leave to intervene in this proceeding, on the following terms:

    a. AI shall be permitted to provide written representations on the application of international human rights law and principles to the issues raised by the parties in this proceeding;

    b. AI shall be entitled to receive all materials filed in this application;

    c. AI shall be permitted to present oral argument at the hearing of the application, with the time for oral argument by AI's counsel to be determined by the judge hearing the petition;

    d. AI shall not seek to adduce evidence or cross-examine witnesses;

    e. AI shall not seek costs in respect of the petition or have costs ordered against it;

    f. The style of proceeding shall be amended to add Amnesty International as an intervenor, and hereafter all documents shall be filed under the amended style of proceeding.

By the Court.

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Registrar