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

and -

AMNESTY INTERNATIONAL

Intervener

RECORD OF THE INTERVENER AMNESTY INTERNATIONAL

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MEMORANDUM OF FACT AND LAW OF THE INTERVENER AMNESTY INTERNATIONAL

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PART I – FACTS

1. Amnesty International ("AI") intervenes in these proceedings pursuant to the order of Justice Manson dated June 15, 2015,[1] to provide an international human rights law perspective on the issues before this Court. In accordance with the order granting AI leave to intervene, the present submissions address the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown.

2. The Applicants, who are beneficiaries of Treaty No. 8, challenge the decision of the Governor in Council approving the construction of the Site C Hydroelectric Project (the "Project" or "Site C Project"), a dam and hydroelectric generating station on the Peace River within Treaty No. 8 territory. The Governor in Council concluded, pursuant to subsection 52(4)(a) of the *Canadian Environmental Assessment Act, 2012* ("*CEEA 2012*"),[2] that the significant adverse environmental effects that are likely to be caused by the Project are "justified in the circumstances".[3] The Applicants argue, as they did before the Governor in Council, that the Project will infringe their treaty rights to hunt, fish and trap, as the lands within the Peace River Valley that will be altered or flooded by the Project constitute one of the last remaining areas available to them for the meaningful exercise of their treaty rights and to sustain their way of life.

3. AI accepts the facts as summarized by the Applicants in their Memorandum of Fact and Law.

PART II – ISSUES

4. In accordance with the order of Justice Manson granting AI leave to intervene, the present submissions address, from an international human rights law perspective, the appropriate standard of justification to be applied when limitations on Indigenous rights are contemplated by the Crown.

PART III – SUBMISSIONS

1) International law is a relevant and persuasive source for the interpretation of the domestic law applicable in this case

5. Canada has admitted that the Governor in Council's discretionary determination under s. 52(4) of *CEAA 2012* in this case – that the significant adverse environmental effects that are likely to be caused by the Site C Project are "justified in the circumstances" – was made without any consideration of whether

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[1] *Doig River et al. v. Attorney General of Canada et al*, 2015 FC 754 at ¶32-33.
[2] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52(4).
[3] Order in Council PC 2014-1105, dated October 14, 2014, *Applicants' Record*, Tab 2.

the Applicants' rights under Treaty No. 8 would be infringed. The Applicants argue that the Governor in Council accorded insufficient weight to the adverse impacts of the Project on their treaty rights, and did not comply with the Crown's common law and constitutional obligation to ensure that any infringement of treaty rights satisfied the *Sparrow* justification standard.[4] This argument requires this Court to consider the appropriate standard to be met by the Crown when deciding whether a project with anticipated serious adverse effects on treaty rights is "justified in the circumstances" under *CEAA 2012*.

6. AI submits that international human rights law furnishes important principles that ought to be considered by this Honourable Court when interpreting the meaning of the statutory discretion conferred upon the Governor in Council under s. 52(4) of *CEAA 2012* and when assessing whether the exercise of discretion at issue in this case conforms with applicable constitutional and administrative law standards.

7. 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*,[5] and for the interpretation of domestic legislation.[6] International law is a particularly relevant source for contextual interpretation when, as in the present case, the statutory provision at issue defines the ambit of an open-ended discretionary power.[7] As Canadian laws are presumed to conform with international law,[8] an interpretation of domestic law that would put Canada in breach of its international human rights obligations should be avoided, while an interpretation that reflects the values and principles enshrined in international law ought to be preferred.

8. Furthermore, Canada's international obligations with respect to Indigenous peoples' rights that are at issue in this case are interlinked with and mutually reinforcing of the common law framework of protection under s. 35(1) of the *Constitution Act, 1982.* As Chief Justice McLachlin has said:

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[4] Applicants' Memorandum of Fact and Law at ¶63-90; *R. v. Sparrow,* [1990] 1 SCR 1075 at 1009-1011.
[5] *Reference re Public Service Employee Relations Act (Alberta),*[1987] 1 SCR 313 at 348 (*per* Dickson CJ dissenting); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at ¶46; *R v. Hape*, [2007] 2 SCR 292 at ¶55 ["*Suresh*"].
[6] *Hape, supra* at ¶53-54; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at ¶70; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76 at ¶31; *R. v. Sharpe*, [2001] 1 SCR 45 at ¶171, 175-179 (*per* L'Heureux-Dubé J., concurring); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241 at ¶30; *Suresh, supra* at ¶59; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at ¶351-354, aff'd 2013 FCA 75.
[7] *Baker, supra* at ¶67, 69-71, 73-74.
[8] *Hape, supra* at ¶53, aff'd in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at ¶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 ¶30. online: <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>.

> 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. [9]

2) International law requires strong protections for Indigenous peoples' rights

9. 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 their connections to specific territories and the exercise of traditional practices such as fishing, hunting, and trapping.[10] States have the correlative obligations to ensure that the rights of Indigenous peoples are appropriately protected, respected and fulfilled. [11]

10. The duty to respect and protect Indigenous peoples' land and resource rights is codified in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*"), which Canada has endorsed.[12] These obligations are also enshrined in the *International Covenant on Civil and Political Rights* ("*ICCPR*") and the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*"), both of which have been ratified by Canada. By ratifying the *ICESCR,* state parties recognize at article 15(1) that "everyone" has the right to "take part in cultural life".[13] As regards Indigenous peoples, this right "includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".[14] Article 27 of the *ICCPR* requires that signatory states protect the exercise and enjoyment of cultural rights. In the case of Indigenous peoples, the right to enjoy a

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[9] 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, BC, 8 Feb 2002).

[10] 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 47-49 ["*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 ¶153-154.

[11] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples* (51st Sess, 1997) UN Doc A/52/18, annex V (1997) ["*Recommendation 23*"].

[12] *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, arts 3, 8(2)(b), 25-28 ["*UN Declaration*"].

[13] *International Covenant on Economic, Social 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, art. 15(1) ["*ICESCR*"].

[14] United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a)*, UN Doc E/C.12/GC/21 (21 December 2009) at ¶36 ["*General comment No. 21*"]; *UN Declaration*, *supra*, art 26(a). The United Nations treaty bodies issue General Comments to provide authoritative interpretation of the provisions of their respective human rights treaties. The Supreme Court of Canada has cited and relied upon General Comments when referencing international human rights law for the purpose of interpreting domestic law: see, for example, *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157 at ¶24-27; *Suresh*, *supra* at ¶66-67.

particular culture "may consist in a way of life which is closely associated with territory and use of its resources".[15] ICCPR state parties are obliged to ensure, including potentially through positive measures, that the existence and exercise of the right to culture are protected against their denial or violation.[16]

11. 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 to their very survival.[17] These rights include the rights to life, health, subsistence, livelihood, a healthy environment and drinkable water.[18] States' substantive obligation to protect these rights are, in turn, procedurally protected and buttressed by the obligation, recognized as a general principle of international law, that states consult Indigenous peoples on matters that may affect their rights and interests.[19]

3) International law mandates a stringent standard of justification for the infringement of Indigenous peoples' rights

12. In the present case, the JRP concluded that the Site C project is likely to have serious adverse and immitigable impacts on the Applicants' capacity to exercise their treaty harvesting rights, and would destroy burial sites and other sites of critical cultural value. The lands that will be altered or flooded as a result of the Project constitute the last remaining undisturbed stretch of the Peace River Valley, and include numerous specific preferred locations that are of central importance to the Applicants' ability to meaningfully exercise their harvesting rights under Treaty No. 8. The Applicants have argued – before the JRP, the Minister of the Environment and the Governor in Council – that construction of the Project will leave them with no meaningful harvesting rights within their traditional territories, and will thus give rise to an infringement of their treaty rights. In approving the Project, the Governor in Council provided no reasons to explain its conclusion that the significant adverse environmental effects that would be caused by the Project were "justified in the circumstances", as required by s. 52(4) of *CEAA 2012*.

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[15] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No. 47, art 14(1) ["*ICCPR*"]; United Nations Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at ¶3.2 ["*General Comment No. 23*"].
[16] *General Comment No. 23*, *supra* at ¶6.1, 7.
[17] *Hague Conference, supra* at 47; See also United Nations Human Rights Committee, *Communication No 1457/2006: Ángela Poma Poma v. Peru*, 95th Sess, UN Doc CCPR/C/95/D/14572006 (24 April 2009) at ¶7.2.
[18] United Nations Committee on Economic, Social 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 ¶27.
[19] *UN Declaration*, *supra*, arts 19, 32(2); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* (2012) Judgment, Inter-Am Ct HR (Ser C) No 245 at ¶164-65; *Case of the Saramaka People v. Suriname*, (2007) Judgment, Inter-Am Ct HR (Ser C) No 172 at ¶133-137 ["*Saramaka People*"]; 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 ¶49-53, 79-80 ["*Report of the Special Rapporteur, 2012*]; United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya*, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009) at ¶38-41 ["*Report of the Special Rapporteur*, 2009"].

13. AI submits that international human rights law principles are of assistance in interpreting the meaning of the Governor in Council's power to determine whether the anticipated serious adverse effects on the Applicants' treaty rights are "justified in the circumstances" under s. 52(4) of *CEAA 2012*, and in assessing whether the Governor in Council's exercise of discretion in this case conforms with applicable constitutional and administrative law standards. AI submits that to maintain consistency with international law, any decision by the Crown that purports to permit an infringement of Indigenous peoples' rights – including a decision pursuant to s. 52(4) of *CEEA 2012* – must include a rigorous demonstration that the rights-limiting action satisfies the international law standard of justification.

14. AI further submits that a decision containing insufficient reasons to permit a reviewing court to conduct an independent assessment of whether the state has met its burden of justification is itself inconsistent with Canada's obligations and commitments under international law.

i) Any infringement of Indigenous peoples' rights must be in accordance with the law, serve a legitimate aim, be strictly necessary, and be proportional

15. International law sets a stringent threshold for the justification of limitations to international human rights. This standard is well-established. Given the high standard of protection international law requires for Indigenous peoples' rights, the threshold for limiting Indigenous peoples' rights under international law must be at least as strict as it is for other human rights.

16. Under article 2(1) of the *ICCPR*, a signatory state is legally obliged to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in that Covenant. These rights include the protection of the exercise of cultural rights.[20] This obligation has both negative and positive aspects, and any limits on these rights must be justified by the state. The United Nations Human Rights Committee has stated that:

> ... under article 2, paragraph 1, ... States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.[21]

17. Likewise, limitations to the right to take part in cultural life, under article 15(1) of the *ICESCR*, must be justified according to a similarly stringent standard. The United Nations Committee on

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[20] *ICCPR*, arts 2, 27.

[21] 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 ¶6 ["*General Comment No. 31*"].

Economic, Social and Cultural Rights has held that limitations to this right:

> ... must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed.[22]

18. The Committee also notes that if a rights-limiting measure is taken deliberately, "the State party has to prove that it was taken after careful consideration of all alternatives"[23] and must also demonstrate that the measure can "be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[24]

19. Extending these justificatory standards specifically to the rights of Indigenous peoples, article 46(2) of the *UN Declaration* states that:

> [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.[25]

20. Questions concerning justification necessarily require a purposeful balancing of Indigenous rights against other societal interests. 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 within this balancing.[26] International human rights law thus recognizes that an especially rigorous standard of protection is required when justification is assessed in the context of the rights of Indigenous peoples, particularly given the unresolved legacy of past violations and current inequalities faced by Indigenous peoples in Canada.[27]

21. Thus, as a corollary to its substantive protections for Indigenous peoples' rights, 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

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[22] *General Comment No. 21*, *supra* at ¶19.
[23] *Ibid* at ¶46.
[24] *Ibid* at ¶65.
[25] *UN Declaration*, *supra* at art 46(2).
[26] *Mary and Carrie Dann v. United States*, (2002), Inter-Am Comm HR Case 11.140, Report No 75/02, doc 5 rev. 1. at ¶125; *UN Declaration*, *supra*, preamble 6; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the ICESCR)*, UN Doc E/C.12/GC/20 (2 July 2009) at ¶6-7; *Recommendation 23, supra.*
[27] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – The situation of indigenous peoples in Canada*, 27th Sess, UN Doc A/HRC/27/52/Add.2 (4 July 2014) at ¶80.

benefits of a project must be objectively demonstrated and rigorously examined with a view to determining whether the impairment of rights is in accordance with the law, serves a legitimate aim, does not exceed what is strictly necessary and that any impacts are proportionate to the harm caused.[28]

22. Of particular relevance to this case, international law also imposes high standards for the justification of involuntary evictions and displacement caused, for instance, by the construction of a large dam. These standards provide that such evictions should take place only in "exceptional circumstances",[29] where a state has "demonstrate[d] that the eviction is unavoidable and consistent with international human rights commitments," by "explor[ing] fully all possible alternatives" and carrying out "comprehensive and holistic impact assessments" that include "strategies for minimizing harm."[30]

23. Indeed, it is widely accepted under international human rights law that a "reasonable, objective, proportionate" justification is required for any decision leading to the potential limitation of human rights. Proportionality has thus emerged as a general principle of international human rights law, essential for the determination of whether a state is exercising its discretion within permissible parameters. International human rights jurisprudence has developed a three-element approach to assessing the proportionality of a rights-limiting decision: first, whether the measure that interferes with a right is suitable to achieving a legitimate aim; second, whether it is a necessary or minimally impairing measure; and third, whether it is 'strictly' proportionate, in that the benefits it brings are commensurate with the harms.[31]

24. The standards imposed by international law for a state's permissible justification of any limitations on international human rights are thus well-established. International law sets a standard which requires that any infringement (1) be made in accordance with the law (the legality test); (2) serve a legitimate aim in a democratic society (the legitimate aim test); (3) be strictly necessary; and (4) be proportionate. In some cases, states may also be required to consider alternatives before taking measures that will cause rights infringements, and they may need to compensate those whose rights will be infringed. States are required to meet this justification standard in order to maintain compliance with their obligations under international law.

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[28] *Case of the Yakye Axa Indigenous Community v. Paraguay*, (2005) Judgment, Inter-Am Ct HR (Ser C) No 125 at ¶144-146.

[29] United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, UN Doc E/1998/22 (20 May 1997) at 5.

[30] United Nations, General Assembly, *Basic Principles and Guidelines on Development-Based Evictions and Displacement - Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc A/HRC/4/18 (30 December 2013) at ¶32, 40.

[31] Yutaka Arai-Takahashi, "Proportionality" in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013) at 450-452; See also: Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 *Am J Comp L* 463 at 474.

25. Interestingly, these factors dovetail with and reinforce the justification test laid out by the Supreme Court in *Sparrow*. As the Supreme Court recently affirmed in *Tsilhqot'in*, the Crown's fiduciary duty to Indigenous peoples "infuses an obligation of proportionality into the justification process." Accordingly, the justification of infringement requires that the state establish the following:

> ...that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[32]

ii) Justification decisions may not be based solely on economic interests

26. Even where the financial benefit resulting from a rights-infringing 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. Under international law, economic interests alone are not sufficient to justify the limitation of human rights. The permissible grounds that are recognized under international law are narrow and limited, and include protection of national security, public order, public health or morals, or the rights and freedoms of others.[33] The United Nations Committee on the Elimination of Racial Discrimination has noted that "development objectives are no justification for encroachments on human rights".[34]

27. In this regard, Canadian constitutional standards again dovetail with and reinforce international human rights principles. In *Tsilhqot'in*, the Supreme Court of Canada recently affirmed the lower courts' rejection of the province's argument that the economic benefits of logging operations on the land in question constituted a sufficiently pressing and substantial objective to outweigh the harms to the rights of the Tsilhqot'in people that such development could occasion. Thus, a state's bare assertion that the economic benefits of a particular development project should trump Indigenous rights, without more, is insufficient to meet the standard required for a justification of such limitations.[35]

iii) Infringements that leave Indigenous peoples with no meaningful means of exercising their rights cannot be justified

28. Importantly, international law suggests that infringements to protected human rights that leave

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[32] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at ¶87.
[33] See, for example, United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st Sess, UN Doc E/CN.4/1985/4, Annex (28 September 1984).
[34] 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 ¶15.
[35] *Tsilhqot'in, supra* at ¶126-127.

rights-holders with no meaningful means of exercising those rights cannot be countenanced. The United Nations Human Rights Committee, explaining the meaning of article 2(1) of the *ICCPR*, has indicated that certain restrictions to rights can *never* be justified: "In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[36]

29. In other words, and by way of example, if the restrictions imposed due to the construction of a dam were to eviscerate the cultural rights of Indigenous peoples that are protected by the Covenant to a point that there was no remaining way from them to meaningfully exercise these rights, these restrictions could not be justified under international law.

30. Again, these international human rights law principles reinforce Canadian jurisprudence. As the Applicants note,[37] in *Mikisew* the Supreme Court held that the taking up of so much land, such that no "meaningful right" to hunt would remain, cannot be justified under the Treaty 8 "take up" clause, and must, therefore, be subject to an infringement analysis under *Sparrow*.[38]

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

31. International human rights standards call for a highly rigorous standard of protection of Indigenous peoples' rights, rejecting all involuntary displacement or relocation.[39] 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".[40]

32. Further, under international law, the free, prior and informed consent (FPIC) of the affected Indigenous peoples is a presumptive requirement 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 large-scale interventions are likely to deprive Indigenous peoples of the capacity to use and enjoy their lands and other natural

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[36] *General Comment No. 31, supra* at ¶6. Similarly, the African Commission on Human and Peoples' Rights has held that "a limitation may never have as a consequence that the right itself becomes illusory": see African Commission on Human and Peoples' Rights, *Communications Nos. 105/93, 128/94, 130/94 and 152/96: Media Rights Agenda and Others v. Nigeria* (1998) at ¶70.

[37] Applicants' Memorandum of Fact and Law, at ¶45.

[38] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at ¶48.

[39] *UN Declaration*, art 10.

[40] 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, *Communication No 276-2003: Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2003) at ¶290-293.

resources necessary for their subsistence.[41]

33. 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.[42]

34. Thus, under international law, projects which would have serious negative impacts on the rights of Indigenous peoples must presumptively proceed only with the free, prior and informed consent of those affected. Because FPIC is, in part, intended as a 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 over those lands and resources.[43]

PART IV– ORDERS SOUGHT

35. AI respectfully requests that this Honourable Court determine this matter in accordance with the principles of international human rights law set out above. AI asks for no costs in this proceeding, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[41] *Saramaka People, supra* at ¶134, 137; *Report of the Special Rapporteur, 2012, supra* at ¶65; *General comment No. 21, supra* at ¶37.
[42] *Report of the Special Rapporteur*, 2009, *supra* at ¶46-49.
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FEDERAL COURT

**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

-and-

AMNESTY INTERNATIONAL

Intervener

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