CANADA

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

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AMNESTY INTERNATIONAL

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The UN Committee on the Elimination of Racial Discrimination (the Committee) reviewed Canada's 21-23rd combined reports in August 2017.[1] In its Concluding Observations[2], the Committee requested information from Canada within one year[3] on its implementation of particular recommendations relating to Site C, Mount Polley, Immigration Detention and the Safe Third Country Agreement. The recommendations on each issue were:

1. Site C:[4]
    a. Immediately suspend all permits and approvals for the construction of the Site C dam
    b. Conduct a full review in collaboration with indigenous peoples of the violations of the right to free, prior and informed consent, of treaty obligations and of international human rights law from the building of Site C
    c. Identify alternatives to irreversible destruction of indigenous lands and subsistence which will be caused by Site C
2. Mount Polley[5]
    a. Publicly release the results of any government studies of the Mount Polley disaster and the criminal investigation into the disaster, before the statute of limitations for charges under the relevant acts expires
3. Immigration Detention[6]
    a. Undertake planned immigration detention reforms
    b. Ensure that immigration detention is only undertaken as a last resort after fully considering alternative non-custodial measures
    c. Establish a legal time limit on the detention of migrants
    d. Immediately end the practice of detention of minors
4. Safe Third Country Agreement[7]
    a. Rescind or at least suspend the Safe Third Country Agreement with the United States of America to ensure that all individuals who attempt to enter the State party through a land border are provided with equal access to asylum proceedings

On 4 March 2019, Canada submitted its interim report[8] to the Committee. In this document, Amnesty International responds to Canada's interim report to the Committee.

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[1] Committee on the Elimination of Racial Discrimination, "Consideration of reports submitted by States parties under article 9 of the Convention: Canada", CERD (8 June 2016), UN Doc CERD/C/CAN/21-23, online: http://undocs.org/CERD/C/CAN/21-23.
[2] Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada", CERD (13 September 2017), 93rd Sess, UN Doc CERD/C/CAN/CO/21-23, online: https://undocs.org/CERD/C/CAN/CO/21-23 [CERD Concluding Observations, 2017].
[3] *Ibid*, para 40.
[4] *Ibid*, para 20(e).
[5] *Ibid*, para 20(f).
[6] *Ibid*, para 34(a) and 34(b).
[7] *Ibid*, para 34(d).
[8] Government of Canada, "Interim Report in follow-up to Canada's review before the United Nations Committee on the Elimination of Racial Discrimination" (4 March 2019), UN Doc CERD/C/CAN/CO/21-23/ADD.1, online:

2. SITE C

2.1 URGENT LETTER PURSUANT TO EARLY WARNING URGENT ACTION PROCEDURE

On 14 December 2018, Mr. Noureddine Amir, the Chair of the Committee, wrote an urgent letter to Canada[9] pursuant to its Early Warning Urgent Action (EWUA) procedure indicating the Committee's concern that the construction of the Site C dam "without free, prior and informed consent, would permanently affects [*sic*] the land rights of affected [I]ndigenous peoples in the Province of British Columbia." The letter noted, further, that "it would infringe [I]ndigenous peoples' rights protected under the International Convention on the Elimination of All Forms of Racial Discrimination."

The EWUA letter requested a response from Canada before 8 April 2019. In its interim report, Canada commits to providing a "fulsome response" to the EWUA letter's request in lieu of responding to the Committee in the interim report. Canada does not, however, commit to doing so by the 8 April 2019 deadline.

Amnesty International is concerned by Canada's decision to not respond to the Committee's recommendations about Site C in the interim report. Given that Canada's interim report was delayed by nearly six months, Amnesty International urges that the State party's response to the EWUA letter be delivered by the 8 April 2019 deadline or earlier.

2.2 THE COMMITTEE'S CONCLUDING OBSERVATIONS WITH RESPECT TO SITE C

Amnesty International recalls that the Committee noted during its review of Canada, that "[v]iolations of the land rights of indigenous peoples continue in the State party; in particular, environmentally destructive decisions for resource development which affect their lives and territories continue to be undertaken without the free, prior and informed consent of the indigenous peoples, resulting in breaches of treaty obligations and international human rights law."[10]

The Committee also expressed concern over the frequency with which Indigenous peoples in Canada are forced to turn to costly legal proceedings to protect rights that have been ignored in government decision-making. The Committee called on Canada to "[i]ncorporate the free, prior and informed consent principle in the Canadian regulatory system, and amend decision-making processes around the review and approval of large-scale resource development projects" so as to "end the substitution of costly legal challenges as post facto recourse in place of obtaining meaningful free, prior and informed consent."[11]

Amnesty International submits that the continued construction of the Site C dam in Northeast British Columbia exemplifies this pattern of rights violations.

Despite the Committee's call for an immediate halt to construction,[12] neither the federal nor the provincial government has acted to withdraw approval for the project or rescind permits. To the contrary, the provincial government has allowed preparations for the dam to continue at a rapid pace. Canada's failure to respond to

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https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/CERD_C_CAN_CO_21-23_ADD-1_34177_E.docx ["Interim Report"].

[9] Mr. Noureddine Amir (Chair of the Committee on the Elimination of Racial Discrimination), *Urgent Letter to Permanent Representative of Canada to the United Nations Office in Geneva, Rosemary McCarney,* (14 December 2018), UN Doc: CERD/EWUAP/Canada-Site C dam/2018/JP/ks, online: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_ALE_CAN_8818_E.pdf ["EWUA letter"].

[10] CERD Concluding Observations, 2017, *supra* note 2, para 19(a).

[11] *Ibid,* at paras 20(c)-20(d).

[12] *Ibid,* at para 20(e).

this recommendation in its interim report is concerning given the urgency with which rights violations remain ongoing.

2.3 WEST MOBERLEY AND PROPHET RIVER FIRST NATIONS LAWSUIT

As construction moves ahead, First Nations have been forced to assume the burden of defending their rights through arduous and expensive legal proceedings. A civil suit launched by the West Moberly and Prophet River First Nations will examine whether destruction of the Peace Valley constitutes an unjustifiable breach of Canada's Treaty obligations toward First Nations, a critical legal question that the federal and provincial governments deliberately chose not to examine before granting approval for construction of the dam.[13]

Flooding the Peace Valley threatens one of the few remaining areas of traditional territory in Northeast BC left relatively untouched by development and where First Nations can engage in traditional practices—including hunting, trapping, and fishing—that are protected in their Treaty with the Crown. A joint environmental review carried out on behalf of the federal and provincial governments concluded that the dam's impact on Indigenous peoples' use of the land would be of high magnitude, permanent, and irreversible. These impacts include "severely" undermining the ability of Indigenous peoples to hunt, making fish in the river unsafe for at least a generation, and wiping out hundreds of cultural and historic sites, including grave sites.[14] A group of Canadian academics who reviewed the assessment report concluded that the "number and scope" of harms identified by the joint review panel was "unprecedented in the history of environmental assessment in Canada."[15]

The legal proceedings will not begin until later in 2019 and are expected to last at least three years. In the interim, the West Moberly First Nation sought a temporary injunction to protect their rights and interests from irreversible impacts of construction and related activity. The federal government chose not to oppose the injunction. However, the provincial government, and the provincially-owned public corporation BC Hydro both strongly opposed such interim protections.

2.4 DENIAL OF INTERIM INJUNCTION

On 24 October 2018, West Moberly's request for an interim injunction was denied by the BC Supreme Court.[16] While the First Nations claimants elaborated two potential measures to safeguard their rights—a total halt to construction, or a more limited ban meant to protect only the most important territory for ceremonies and essential species habitat—the court summarily denied both options.[17] The court did hold that the underlying issues of potential Treaty rights violations must be resolved before the inundation of the Valley, when the worst of the damage will be wrought.[18] However, the court failed to act to protect sacred sites, gravesites, and crucial plant and animal habitat that are jeopardized by activities such as planned clearcutting and road construction while the Treaty rights case proceeds.

The denial of the injunction reflects a troubling pattern in Canadian jurisprudence whereby First Nations litigants face deeply troubling obstacles to Indigenous rights recognition in court when contesting projects approved without their free, prior, and informed consent. The Site C injunction hearings highlighted two such

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[13] *Prophet River First Nation And West Moberly First Nations v Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, Minister of Transport, and British Columbia Hydro and Power Authority,* 2017 FCA 15 (Factum of the Respondent) (Attorney General of Canada). See, also, Andrew Kurjata, "Federal court dismisses First Nations' challenge of Site C dam", *CBC News* (23 January 2017), online: https://www.cbc.ca/news/canada/british-columbia/federal-court-dismisses-first-nations-challenge-of-site-c-dam-1.3948830.

[14] Canadian Environmental Assessment Agency, *Report of the Joint Review Panel: Site C Clean Energy Project: BC Hydro*, (1 May 2014), online: http://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf.

[15] Programme of Water Governance, "Statement of Concerned Scholars on the Site C Dam project, Peace River, British Columbia" (24 May 2016), online: https://sitecstatement.org/home/.

[16] *West Moberly First Nations v British Columbia*, 2018 BCSC 1835.

[17] *Ibid.* at para 346.

[18] *Ibid.* at para 363 ("I agree with West Moberly that the trial should be scheduled so that a judgment will be forthcoming in advance of reservoir inundation, when the most significant component of the alleged harm to West Moberly's treaty rights will take place. That milestone is presently scheduled to occur in the fall of 2023. Rather than order an expedited trial within 18 months as West Moberly requests, which I find to be unrealistic, I will instead direct the parties to agree upon and work toward a schedule culminating with a trial to be concluded in mid-2023.").

obstacles to Indigenous rights recognition: (1) failure to appropriately weigh harms to First Nations and access to justice concerns against asserted economic costs at the injunction hearing stage, and (2) efforts to narrowly redefine Treaty rights as isolated mechanical rights isolated from the cultural traditions that render these rights meaningful and transmissible across generations.

2.4.1 FAILURE TO PROPERLY WEIGH HARMS TO FIRST NATIONS AT THE INJUNCTION STAGE

John Borrows, a Canada Research Chair in Indigenous Law at the University of Victoria's Law School, notes "the deck is stacked" against First Nations in injunction hearings because of how "economic interests are often given greater weight than justice issues."[19] This failure to properly weigh harms to First Nations arises in the final prong of the injunction analysis, once claimants have already established that there is a valid question to be tried and a real risk of irreparable harm. Called the "balance of convenience," this final analysis is meant to weigh the costs of either granting an injunction that will halt an industrial project, or allowing the project to continue, and determine which has greater merit. It is, in effect, a judgement as to who will suffer the greater harm.[20]

Justice Milman's analysis highlights why this question is so often insurmountable for Indigenous applicants: namely that Canadian courts are more willing and able to recognize the significance of harms to industry and government, harms they are familiar with as majority non-Indigenous persons, as opposed to the unique harms to Indigenous traditions and cultural identity so often at the heart of Indigenous concerns.

Justice Milman expresses extreme skepticism when briefly considering the harms alleged by West Moberly, noting, "I do not find that West Moberly has a particularly strong claim, which limits the weight I am prepared to attach to this factor."[21] Of the limited injunction, while he notes that he is "prepared to accept that West Moberly *considers* the critical areas to be of particular importance [emphasis added]," he states nonetheless that he "agree[s] with BC Hydro that the *evidentiary support* for the configuration of the critical areas is, at best, questionable in many respects [emphasis added]."[22]

In stark opposition to this scrutiny of West Moberly's claims, Justice Milman seems to readily accept BC Hydro's allegations of harm, noting for example, that he "do[es] not find it necessary or even helpful to resolve the many conflicts in the evidence on those subjects,"[23] and that he "do[es] not need to quantify the additional costs of the proposed injunction with precision in order to recognise their significance and irreparable nature."[24] BC Hydro's harms are "apparent, without having to weigh the expert and lay opinion evidence."[25] This easily "apparent" harm, harm that Justice Milman attests himself able to "recognise" without reconciling conflicts in the evidentiary record, "weighs heavily in the balance" of his decision to deny West Moberly's injunction.[26]

Such legal interpretation increases obstacles for Indigenous claimants to secure essential land protections while disputes over their underlying rights remain unresolved, increasing the likelihood that rights violations will result before the court has time to adjudicate the case.

2.4.2 EFFORTS TO REDEFINE TREATY RIGHTS IN A NARROW, REDUCTIONIST MANNER

Throughout the injunction hearing, the lawyers representing the provincial government and the provincial government's electricity utility BC Hydro advanced a damaging interpretation of Treaty rights that insisted on narrowly defining Treaty rights as nothing more than the continued potential to hunt, fish, or trap somewhere

[19] Sarah Cox, "'Deck Stacked' against First Nations seeking Site C injunction, experts say", *The Narwhal* (19 January 2018), online: thenarwhal.ca/deck-stacked-first-nations-site-c-injunction-experts/.
[20] Balance of Convenience: "[A] determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits." *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 S.C.R. 311, citing *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd,* [1987] 1 SCR 110, 1987 CanLii 79 (SCC) at para 36.
[21] *West Moberly First Nations v British Columbia*, 2018 BCSC 1835, para 288 [*West Moberly First Nations*].
[22] *Ibid* at para 292.
[23] *Ibid* at para 309.
[24] *Ibid* at para 314.
[25] *Ibid* at para 313.
[26] *Ibid* at para 316.

within their territory, regardless of cultural and historical ties to specific areas and specific species, such as those placed at risk by Site C.

This interpretation, contrary to recognition that Indigenous peoples' right to harvest food according to their own customs and traditions is a human right inseparable from the right to culture, was contested by the Union of BC Indian Chiefs (UBCIC) in a letter to BC Premier John Horgan and BC Attorney General David Eby. The letter noted that legal arguments made by BC and supported by the province were "consistently diminishing the rights of First Nations," for example, by alleging that Treaty 8 was never intended to protect First Nations "practical, traditional, cultural, or spiritual connection to any land."[27] UBCIC has yet to receive the requested apology and retraction.

Further, this limited understanding of Treaty rights appears to have influenced the BC Supreme Court in its decision to deny the requested injunction. Justice Milman noted, "I agree with BC Hydro and British Columbia, however, that this aspect of the claim [arguing that certain treaty rights can only be exercised in connection to the Peace Valley] is also problematic because it is not clear what right West Moberly can properly assert under the Treaty that can *only* be exercised in the Peace River region [emphasis added]."[28]

The BC Supreme Court's insistence on differentiating between a "site-specific claim" and an "activity-based claim"[29] ignores the fact that Treaty rights are themselves site-specific. Traditional practices of hunting, fishing, and trapping are more than mechanical acts that can be exercised anywhere, they are part of larger cultural traditions attached to stories and inter-generational knowledge that is linked to specific locations, like the Peace River Valley. Destruction of these sites not only precludes the ability of First Nations to exercise these rights in meaningful ways, it severs essential inter-generational ties, as cultural education by elders is often site-specific. Furthermore, the proximity of the Peace Valley to communities like West Moberly, and the urban centre of Fort St. John, is critical as it allows elders and other tradition keepers much greater opportunity to pass on their knowledge.[30]

3. MOUNT POLLEY

3.1 THE COMMITTEE'S CONCLUDING OBSERVATIONS WITH RESPECT TO MOUNT POLLEY

The Committee called on Canada to "publicly release the results of any government studies of the Mount Polley disaster and the criminal investigation into the disaster, before the statute of limitations for charges under the relevant acts expires."[31] In its response, Canada does not commit to releasing any such results of studies or criminal investigations.

Canada notes the Independent Expert Engineering Investigation and Review Panel, constituted by the Ministry of Energy and Mines in August 2014, which investigated and reported on the tailings ponds breach.[32] Canada characterizes the panel's finding in the following manner: "The Panel found the regulatory staff were well qualified to perform their responsibilities and that additional MEM inspections of the [Tailings Storage Facility] would not have prevented the failure."[33]

However, Amnesty International notes in a report[34] issued in 2017 that the Panel also concluded the following: "The Panel does not accept the concept of a tolerable failure for tailings dams. To do so, no matter

[27] UBCIC, "Upholding commitments to reconciliation and Indigenous rights in court regarding the Site C injunction hearings" (7 August 2018), online: http://www.ubcic.bc.ca/upholding_commitments_to_reconciliation.
[28] *West Moberly First Nations*, *supra* note 21, para 258.
[29] *Ibid.*
[30] Amnesty International, "Out of Sight, Out of Mind: Gender, Indigenous rights, and energy development in Northeast British Columbia, Canada" (2016), Index: AMR 20/4872/2016, page 35, online: https://www.amnesty.ca/outofsight.
[31] Concluding Observations, 2017, *supra* note 2, para 20(f).
[32] Interim Report, *supra* note 8, para 4.
[33] *Ibid.*
[34] See Amnesty's report for an assessment of the Panel's findings: Amnesty International, "A Breach of Human Rights: The Human Rights Impacts of the Mount Polley Mine Disaster, British Columbia, Canada" (May 2017), page 8, online:

how small, would institutionalize failure. First Nations will not accept this, the public will not permit it, government will not allow it, and the mining industry will not survive it."

Canada notes the investigation of the Chief Inspector of Mines (CIM) which did not find a breach of the *Mines Act,* or the accompanying *Health, Safety and Reclamation Code for Mines in British Columbia* of the Mine's permits. However, Amnesty International notes in its 2017 report that the CIM not only confirmed the Expert Panel's findings, but also found significant deficiencies in the company's water management activities.[35]

Canada also notes the Auditor General's 2016 report which criticized the Government of British Columbia. The Auditor General found the Ministry of Energy and Mining to have had "sole responsibility for making sure [Mount Polley Mining Corporation] completed and maintained the dam as designed and while it could have compelled the company to comply [with regulations], it failed to do so."[36]

The Auditor General also noted that there are inadequate requirements in the permitting process for full financial sureties to cover expected or unexpected environmental liabilities, such as the Mount Polley disaster.[37] As a result, Indigenous communities and other taxpayers are forced to absorb costs of disasters, clean ups and abandoned mines.[38] The Auditor General noted that: "Overall, we concluded that compliance and enforcement activities of the two ministries are inadequate to protect the province from significant environmental risks."[39]

Despite these investigations and clear indications of the failure on the part of government officials to regulate the company's activity, there has been no independent analysis of the health impacts of the disaster on Indigenous peoples. Amnesty International has therefore called on Canada to mitigate the disproportionate impacts of the Mount Polley disaster by funding and making publicly accessible the results of an independent analysis of the health impacts of the Mount Polley disaster on Indigenous peoples, including but not limited to: cultural healing processes, access to information, access to traditional foods and medicines, and the overall health of the Fraser River, which is of vital importance to downstream Indigenous communities.

Until such studies are made publicly available, Amnesty International supports the position taken by Indigenous and settler communities that Canada suspend the company's water discharge permit which currently allows it to pipe filtered mining effluents into Quesnel Lake, and which Mount Polley Mining Corporation has been non-compliant with since 2017. Despite this, the company applied for and obtained a permit amendment in 2018 without the government requiring a public consultation. The company is permitted to discharge into Quesnel Lake until 2022 despite its water treatment process not meeting BC Water Quality Guidelines. One of its permit requirements is "make continual improvements" to its water treatment process and report on those efforts. According to locals monitoring company reporting through their involvement on the company's Public Liaison Committee, the company is not doing so. The discharge permit is currently facing an appeal process brought forward by the Concerned Citizens of Quesnel Lake, and hearings begin in May.[40]

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https://www.amnesty.ca/sites/amnesty/files/FINAL_May%2024_Mount%20Polley%20briefing.pdf ["Breach of Human Rights"]

[35] *Ibid*, page 10.

[36] *Ibid*, page 11.

[37] *Ibid*, pages 13 and 14.

[38] See subheading "Transboundary Concerns" in Breach of Human Rights, *ibid*, page 7.

[39] *Ibid*, page 11.

[40] See subsection "Appropriate and robust effluent treatment" in Breach of Human Rights, *ibid*, page 11. See also Christopher Pollon, "Year four: Tracing Mount Polley's toxic legacy", *The Narwhal* (24 October 2018), online: https://thenarwhal.ca/year-four-tracing-mount-polleys-toxic-legacy/; Christopher Pollon, "Lake Interrupted", *The Narwhal* (27 October 2018), online: https://thenarwhal.ca/lake-interrupted/; and Concerned Citizens of Quesnel Lake, "Meetings and Events", online: https://www.ccql.ca/events-and-meetings.

3.2 GOVERNMENT STUDIES INTO HEALTH IMPACTS:

As noted above, the BC government issued three reports that examined the technical[41], administrative[42], and political[43] failures that led to the tailings pond breach. A fourth study examined whether the government has failed to disclose information relevant to the public interest in relation to the disaster.[44] The reports did not analyse the impacts of the breach on the environment or human health, nor did they assign blame or recommend penalties or charges.

In 2016, the First Nations Health Authority published the only known report[45] on the health impacts of the disaster on Indigenous peoples. The scoping report noted that Indigenous peoples themselves have born the costs of remediation measures (such as providing small amounts of canned salmon to their band members) and impact studies (deferring funds earmarked for much-needed infrastructure projects). The report recommends the First Nations Health Authority call on the government to carry out a full Health Impact Assessment that takes into consideration the recommendations of the scoping report.

To Amnesty International's knowledge, neither the Federal or Provincial governments have conducted a Health Impact Study on Indigenous peoples who were affected by the Mount Polley mine disaster.

In 2017, researchers at the University of Northern British Columbia received funds from the federal government's Environmental Damages Fund to study the impacts of the Mount Polley tailings storage facility breach on Quesnel Lake.[46] Research is currently focussed on three areas: water, sediment, and the food-web around Quesnel Lake. Findings are being shared with investigators. The first set of results, published by *Nature*, show significant changes to the bacterial and mineral content of the waters of Quesnel Lake closest to the disaster and water discharge zone.[47]

Amnesty International hopes that other results will be shared with affected communities in order to support them in understanding the impacts of the disaster on their long-term health.

3.3 CRIMINAL INVESTIGATION AND JUDICIAL PROCESSES UNDERWAY

A criminal investigation was launched in 2015 by the provincial Conservation Officer Service for breaches of the BC Environmental Management Act. Investigators did not file charges under the Act before the statute of limitations expired. An investigation into violations of Federal laws is being carried out by the BC Conservation Officer Service, the Department of Fisheries and Oceans Canada and the Royal Canadian Mounted Police. The statute of limitations for charges under federal law expires on August 4, 2019. Investigators have not announced charges or made public the results of their investigation.

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[41] Independent Expert Engineering Investigation and Review Panel, *Report on the Mount Polley Tailings Storage Facility Breach*, (30 January 2015), online: https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf

[42] Al Hoffman, Chief Inspector of Mines for BC, "Mount Polley Mine Tailings Storage Facility Breach: Investigation Report of the Chief Inspector of Mines" (30 November 2015), online [pdf]: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/directives-alerts-incidents/chief-inspector-s-report-page/m-200_mount_polley_2015-11-30_ci_investigation_report.pdf.

[43] Office of the Auditor General of BC, "An Audit of Compliance and Enforcement of the Mining Sector" (May 2016), online [pdf]: http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf.

[44] Elizabeth Denham, Information and Privacy Commissioner for BC, "Investigation Report F15-02 Review of the Mount Polley Tailings Pond Failure and Public Interest Disclosures by Public Bodies" (2 July 2015), online [pdf]: https://www.oipc.bc.ca/investigation-reports/1814.

[45] Janice Shandro et al, "Health impact assessment for the 2014 Mount Polley Mine tailings dam breach: Screening and scoping phase report" (January 2016), online [pdf]: http://www.fnha.ca/Documents/FNHA-Mount-Polley-Mine-HIA-SSP-Report.pdf.

[46] University of Northern British Columbia, News Release, "Federal Funds Supporting Quesnel Lake Research" (5 October 2016), online: https://www.unbc.ca/releases/41386/federal-funds-supporting-quesnel-lake-research.

[47] Ido Hatam et al, "The bacterial community of Quesnel Lake sediments impacted by a catastrophic mine tailings spill differ in composition from those at undisturbed locations – two years post-spill", *Nature* (25 February 2019), online: https://www.nature.com/articles/s41598-019-38909-9.

Two opportunities to file charges for breaches of provincial environmental laws were stayed by provincial Crown Prosecutors in 2016 and 2018. The only remaining option for remedy is through the federal criminal investigation.

In September, the Society of Geoscientists and Engineers announced disciplinary hearings for three engineers contracted by Mount Polley for "negligence and/or unprofessional conduct in the course of their professional activities."[48] However, BC's largely discredited professional reliance model may allow Imperial Metals and its subsidiary, Mount Polley Mining Corporation, to escape responsibility.[49]

Notices of Claim for remedy and reparations stemming from the disaster were filed by bands within the Secwepemc, Tsilhqot'in, and St'at'imc Nations. The plaintiffs are awaiting the results of the criminal investigation to determine whether to pursue their civil claims.

In its interim report responding to recommendations relating to Mount Polley, Canada submits that the introduction of new legislation at the federal level will "respect Indigenous rights" and "rebuild public trust in how decisions about resource development are made."[50] Canada further submits that legislation introduced in British Columbia will "advance reconciliation" with Indigenous peoples.

While Amnesty International welcomes efforts by governments in Canada to strengthen regulations on resource development, the organization questions how reconciliation can be advanced and Indigenous rights respected without any commitment to implement the UN Declaration on the Rights of Indigenous Peoples nor any meaningful progress on holding key actors in the Mount Polley disaster accountable.

4. IMMIGRATION DETENTION

4.1 THE COMMITTEE'S CONCLUDING OBSERVATIONS IN RELATION TO IMMIGRATION DETENTION

In its Concluding Observations, the Committee expressed concerns that there are no legislated time limits on the use of immigration detention. The Committee recommended that Canada undertake planned immigration detention reforms, ensure that immigration detention is only undertaken as a last resort after fully considering alternative non-custodial measures, establish a legal time limit on the detention of migrants, and immediately end the practice of detention of minors.

4.2 DETENTION REVIEW AND INDEFINITE DETENTION

Canada notes in its Interim Report that there is a review process for immigration detention,[51] and that although there is no statutory time limit on immigration detention, the Supreme Court has held the immigration detention regime to be constitutional because of the review process.[52]

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[48] Engineers and Geoscientists British Columbia, News Release, "Mount Polley: Disciplinary Hearings Announced" (26 September 2018), online: https://www.unbc.ca/releases/41386/federal-funds-supporting-quesnel-lake-research.

[49] The Professional Reliance model is the practice of relying on industry to hire professionals to manage the risk to public health and the environment. See Stephanie Smith, "Professional Reliance: Environment compromised for corporate profit", *Vancouver Sun* (8 February 2018), online: https://vancouversun.com/opinion/op-ed/opinion-professional-reliance-environment-compromised-for-corporate-profit. See also a joint statement, regarding a critical review of the model, from Ecojustice, the Northwest Institute for Bioregional Research, the Professional Employees Association, the BC Government and Employees' Union, BC Wildlife Federation, and the Professional Reliance Working Group: Evidence for Democracy, News Release, "Professional reliance review report is a step forward for BC" (28 June 2018), online: https://evidencefordemocracy.ca/en/content/press-release-professional-reliance-review-report-step-forward-bc.

[50] Interim Report, *supra* note 8, para 10.

[51] *Ibid*, para 13.

[52] *Ibid*, para 15.

Amnesty International maintains that existing processes, including the regular review of detention by the Immigration Division does not constitute a meaningful mechanism by which the lawfulness of detention can be challenged. Each review shows deference to the previous review, resulting in circumstances where individuals are held in detention for years at a time,[53] despite the existence of regular reviews and despite not being charged with any offence.

As Amnesty International has submitted[54] to the Supreme Court of Canada, access to judicial review at the Federal Court does not function as an appeal. As such, any individual case of immigration detention in Canada remains at risk of becoming indefinite and therefore arbitrary and unlawful.

4.3 IMMIGRATION DETENTION AS A LAST RESORT

Canada notes in its Interim Report that it launched the National Immigration Detention Framework (NIDF) and the Alternatives to Detention (ATD) program under it. Canada notes that the ATD program has resulted in the establishment of new tools and programs that "enable officers to more effectively release individuals into the community, while achieving balanced enforcement outcomes."[55]

The ATD program, as well as the NIDF more generally, has been welcomed by Amnesty International and other civil society groups as a positive step towards ensuring that immigration detention is used lawfully and as a measure of last resort. At the same time, "alternatives to detention" should not be used as an alternative to release, when no measure restricting the rights of migrants is, in fact, justified. Restrictions to the rights of a migrant should not be imposed when the individual is entitled to unconditional liberty and freedom.

Recently released immigration detention guidelines for the Immigration and Refugee Board are meant to address priorities identified by the Framework and the Program, but remain non-binding on decision-makers who conduct immigration detention reviews.

4.4 DETENTION OF MINORS

Canada continues to detain children under the current immigration detention regime, including in circumstances where non-custodial measures have not been provided to allow the parents/guardians to be released. These children are then detained *de facto*, rather than as a result of an individual detention order. Canada commits to keeping minors out of immigration detention[56], but does not prohibit the use of immigration detention against minors. Canada is also unable to commit to prohibiting the separation of families, only committing to keep them together "as much as possible."[57]

Amnesty International submits that it is unlawful for children to be detained for immigration purposes. Holding children in detention, whether accompanied or unaccompanied, can never be in the child's best interests and is in violation of Canada's human rights obligations.

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[53] See cases of Ebrahim Touré and Prosper Niyonzima for example who were in immigration detention for over five and four years respectively. They are both now released, and Mr. Niyonzima has launched a civil lawsuit against the government for damages. See Lorenda Reddekopp, "Immigration detainee seeks $65M in lawsuit against Ottawa for violating rights", *CBC News* (10 November 2018), online: https://www.cbc.ca/news/canada/toronto/man-lawsuit-immigration-detention-federal-government-1.4899770. See Brendan Kennedy, "Immigration detainee Ebrahim Touré finally free after more than five years", *Toronto Star* (21 September 2018), online: https://www.thestar.com/news/investigations/2018/09/21/immigration-detainee-ebrahim-toure-finally-free-after-5-12-years.html.

[54] Factum of the Intervenor Amnesty International, filed in *Chhina v Minister of Public Safety and Emergency Preparedness*, SCC File Number 37770, heard 14 November 2018, paras 23-24. Online [pdf]: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37770/FM030_Intervener_Amnesty-International-Canada.pdf.

[55] Interim Report, *supra* note 8, para 21.

[56] *Ibid,* para 22.

[57] *Ibid*.

5. SAFE THIRD COUNTRY AGREEMENT

5.1 THE COMMITTEE'S CONCLUDING OBSERVATIONS IN RELATION TO THE SAFE THIRD COUNTRY AGREEMENT

The Committee requested in its Concluding Observations that the Safe Third Country Agreement (STCA) be rescinded or, at least, suspended. The STCA, which applies at ports of entry along the Canada-US border, bars individuals entering Canada from the US, or vice versa, from seeking refugee protection.

Canada's response notes that the STCA remains in force because it views the United States to be a "safe country" for the purposes of the agreement.[58]

Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Amnesty International opposes "safe third country" agreements whereby transfers to the third country are automatic or the individual circumstances of the asylum-seekers are otherwise not fully taken into account. Asylum-seekers have the right to appeal a decision to transfer them to any third country, with suspensive effect. The burden of proof regarding the safety of the third country for the individual lies entirely with the country of asylum. Other elements must be considered, including access to a fair and satisfactory asylum determination procedure and to effective and durable protection in the third country; and risks of *refoulement* from the third country.

Besides opposing "safe third country" agreements as a matter of principle, Amnesty International unequivocally disagrees with the Canadian government's position that the US is a "safe" country for the purposes of refugee protection. Such a position is wholly untenable, given the rapid deterioration of the rights of asylum-seekers, refugees and migrants in the United States under the Trump Administration (see 5.2). Beyond brief assertions that the US is "safe" the Canadian government has never released a legal and human rights analysis to back up the claim.

Additionally, Canada notes that the STCA supports the "orderly handling of refugee claims along the Canada-US border," even though refugee claimants entering from the US are left with no other option than to cross into Canada in a "disorderly" and often unsafe manner, often at remote locations, in order to seek protection as a direct result of the fact that they would face removal back to the US at official ports of entry under the Agreement.

5.2 US IS NOT SAFE FOR ASYLUM-SEEKERS AND REFUGEES

As noted in our submission to the Committee, Amnesty International joined with the Canadian Council for Refugees and the Canadian Council of Churches in July 2017, launching a lawsuit challenging the constitutionality of the STCA.[59] On 19 May 2017, Amnesty International and the Canadian Council for Refugees had submitted a comprehensive brief to the Canadian government which outlined the many concerns with respect to the US asylum system and its compliance with international law.[60] These concerns

[58] *Ibid*, para 27.
[59] Amnesty International Canada, "Submission to the United Nations Committee on the Elimination of Racial Discrimination" (2017), 93rd Sess, page 18, online [pdf]: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_28048_E.pdf.
[60] Amnesty International Canada and the Canadian Council for Refugees, "Contesting the Designation of the US as a Safe Third Country" (19 May 2017), online [pdf]:

include a bar on asylum claims by individuals who have been in the US for more than one year, punitive and arbitrary immigration detention in violation of international law, and failure to recognize gender-based claims resulting in possible refoulement to persecution.

Since making this submission to the Committee, there has been new research[61] from Amnesty International, which documents *refoulement* of asylum seekers at the US-Mexico border, family separations which may amount to torture, and increasing arbitrary and indefinite detention of asylum seekers. This research provides new impetus to suspend the agreement. There have been a large number of similar reports and briefs from numerous organizations, legal academics and other experts across the United States, documenting the many ways in which US law, policy and decision-making with respect to asylum-seekers, refugees and migrants violates the US Constitution and falls short of international refugee law and human rights obligations that are binding on the United States. These reports make it clear that an already bad situation is deteriorating rapidly. Amnesty International submits that this further demonstrates the imperative need to rescind or suspend the STCA.

5.3 CONCERNS REGARDING POSSIBLE CANADIAN GOVERNMENT PLANS TO EXTEND THE SAFE THIRD COUNTRY AGREEMENT

There have been two recent indications that the Canadian government may soon take steps to extend the scope of the STCA so that it effectively applies to the entire length of the Canada/US border and forecloses the existing option which allows refugees who cross the border irregularly to make claims for protection under Canada's refugee determination system. There have been media reports indicating that Canada may adopt an approach under which refugee claimants who cross irregularly would be taken to official border posts (where the STCA is in effect) and required to make their claims there.[62] That would make it possible for Canadian officials to find their claims to be ineligible because of the STCA, and thereby return them to Canada.

These concerns were amplified by an announcement as part of the 2019 federal budget, indicating that "the Government will implement a comprehensive Border Enforcement Strategy. Through this Strategy, Canadian immigration, border, and law enforcement officials—including from the Canada Border Services Agency and the Royal Canadian Mounted Police—will be better positioned to detect and intercept individuals who cross Canadian borders irregularly and who try to exploit Canada's immigration system. Failed asylum claimants who entered into Canada at irregular crossings or between official ports of entry will also be removed on a priority basis."[63]

http://www.amnesty.ca/sites/amnesty/files/Contesting%20the%20Designation%20of%20the%20US%20as%20a%20Safe%20Third%20Country.pdf.

[61] Amnesty International, "You don't have any rights here: Illegal pushbacks, arbitrary detention and ill-treatment of asylum-seekers in the United States" (October 2018), Index: AMR 51/9101/2018, online [pdf]: https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF

[62] Michelle Zilio, "Canada, US in talks to close loophole in border pact on asylum seekers", *The Globe and Mail* (18 March 2019), online: https://www.theglobeandmail.com/politics/article-canada-in-talks-with-us-to-close-loophole-in-border-pact-on-asylum/. See also Teresa Wright, "Blair mulling ways to close loophole in Safe Third Country Agreement", *National Observer* (17 March 2019), online: https://www.nationalobserver.com/2019/03/17/news/blair-mulling-ways-close-loophole-safe-third-country-agreement.

[63] Government of Canada, "Chapter 4: Delivering Real Change", *Budget 2019*, see subheading "Enhancing the Integrity of Canada's Borders and Asylum System", online: https://budget.gc.ca/2019/docs/plan/chap-04-en.html#Enhancing-Accountability-and-Oversight-of-the-Canada-Border-Services-Agency.

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CANADA

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

98TH SESSION, 23 APRIL- 10 MAY 2019, FOLLOW-UP

The UN Committee on the Elimination of Racial Discrimination reviewed Canada's 21-23rd combined reports in August 2017. In its Concluding Observations, the Committee requested information from Canada within one year on its implementation of particular recommendations relating to Site C, Mount Polley, Immigration Detention and the Safe Third Country Agreement. On 4 March 2019, Canada submitted its interim report to the Committee. In this document, Amnesty International responds to Canada's interim report to the Committee.

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