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18 November 2015

RE: Site C Dam and the Human Rights of Indigenous Peoples in the Peace Valley

Dear Prime Minister Trudeau and Premier Clark,

Amnesty International is concerned about the violations of Indigenous peoples' human rights that would result from the construction of the Site C dam.

The planned hydroelectric project would inundate an 80 km long section of the Peace River Valley. The area that would be flooded is vital to First Nations and Métis peoples in the region who continue to rely on the Valley to provide for themselves and to practice their cultures and traditions, including by hunting, fishing, and gathering berries and plant medicines. The Peace Valley is also the location of numerous cultural and heritage sites whose history spans some 10,000 years. The landscape is inseparable from the Indigenous knowledge and stories of the peoples who live in this unique place.

The joint federal-provincial environmental assessment of the Site C dam (hereinafter 'the Joint Review') concluded that many of the impacts on Indigenous peoples' cultural heritage and contemporary land use would be of high magnitude, permanent, and irreversible. Furthermore, the Joint Review also concluded that the harm caused by the Site C dam would be compounded by the fact that extensive resource development in the region, including two previous dams on the Peace River and ongoing oil and gas development, has already severely curtailed the opportunities for Indigenous peoples to practice their cultures and traditions.

Quite simply, the area that would be flooded by the Site C dam represents one of the few remaining, largely intact landscapes that is readily accessible to Indigenous peoples. As Chief Rolland Wilson of the West Moberly First Nation has said, "It's the last chunk of valley that we have and it's vitally important."

Crucially, the harm caused by the Site C dam would deny Indigenous peoples the ability to exercise fundamental human rights protected under both Canadian and international law. These rights include the right of Indigenous peoples to maintain their cultures and identities, to practice their traditional livelihoods, to practice their religions, and to pass on to future generations the knowledge of how to live on

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the land, as well as the right of all women and men to live in safety and security. These rights are protected under an historic treaty between First Nations and the Crown (Treaty 8), the Canadian Constitution, an extensive body of Supreme Court jurisprudence, and international human rights laws and standards, including the *United Nations Declaration on the Rights of Indigenous Peoples*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Convention on the Elimination of All Forms of Racial Discrimination*, together with a much broader corpus of international human rights jurisprudence and interpretation.

First Nations and non-Indigenous land-owners have challenged the approval of the Site C dam through a series of judicial reviews in federal and provincial courts. While these challenges have not been successful at the lower courts, they may succeed on appeal. It is therefore inappropriate for the government to proceed with further construction at this point, particularly while legal challenges are ongoing.

Amnesty International, which was an intervener in the case before Federal Court, regrets that such legal challenges are even necessary. All governments have a legal, political and moral duty to uphold human rights without discrimination. Indeed, given the serious harms that have already been inflicted on Indigenous peoples in Canada through the policies and programs of the past, a particularly rigorous standard of human rights protection is required to ensure that the injustices of the past are not further compounded by the decisions of the present.

This duty has simply not been met with respect to the proposed Site C dam. Consequently, Amnesty International recommends that current construction should be halted, all related permits rescinded, and no further permits granted, unless the affected Indigenous peoples grant their free, prior and informed consent.

Provincial government officials have emphasized the efforts that were made to consult with Indigenous peoples potentially affected by the dam. Crucially, however, no amount of consultation is adequate if, at the end of the day, the concerns of Indigenous peoples are not seriously considered and their human rights remain unacknowledged or unprotected. Furthermore, consultation is only meaningful if there is genuine willingness to abandon a proposal or explore alternatives if serious human rights concerns emerge.

Unfortunately, as the public record clearly shows, instead of meeting the rigorous standard of decision-making required by Canada's obligations to respect, protect and fulfil the human rights of Indigenous peoples, the decision to allow the Site C dam to proceed was deeply flawed. Breaches of Canada's obligations include the following:

1. BC Hydro, the provincial utility responsible for developing the plans for Site C dam, explicitly stated in the Federal Court that the decision-making process, including the Joint Review, excluded any consideration of "the legal scope" of the Constitutional rights of the affected Indigenous peoples, or whether the "potential infringement" of these rights was "unjustified or justified".¹

¹ In its facts before the Federal Court, BC Hydro argued that because compliance with the legal requirements of Treaty 8 had not been examined either prior to or during the deliberations by the federal and provincial governments, the matter was also out of scope for a judicial review, stating that the environmental impact assessment of the Site C dam "was never designed - or equipped - to adjudicate the legal scope of Aboriginal or treaty rights, or their potential infringement. Determining whether a project will result in an unjustified or justified infringement of an Aboriginal group's section 35 rights is a task for judicial or quasi-judicial bodies capable of testing evidence and determining questions of law. It is not a task for Cabinet, and it is not a task for a reviewing court on judicial review, who is limited to the record that was before the statutory decision-maker." Memorandum of Fact and Law, British Columbia Hydro and Power Authority, Federal Court File No. T-2292-14, Para 81.

This statement raises serious questions about how the federal and provincial governments could approve a project of such magnitude in the absence of a clear understanding of whether or not doing so would be consistent with their legal obligations toward Indigenous peoples.

2. In its own assessment of the impacts of the Site C dam, BC Hydro suggested that many of the impacts were not significant because Indigenous peoples currently relying on the Peace Valley could readily “adapt” and use other land elsewhere in the territory. The Joint Review concluded that the project proponent’s understanding of how Treaty rights are exercised was “superficial.”² Amnesty International agrees with the panel’s conclusion that for the First Nations near the proposed dam site, many of the rights protected can only be fully exercised in the area that would be lost to flooding, because there are no other areas sufficiently close at hand that would allow comparable opportunities to fish, hunt or trap and because some of the knowledge and traditions that are at risk are specific to the Peace Valley.³ BC Hydro’s fundamental misinterpretation of one of the most critical aspects of the rights at stake is particularly concerning given that the province largely relied on BC Hydro to fulfill its Constitutional duty of consultation with Indigenous peoples.
3. The Site C dam was approved without adequately addressing the cumulative stresses already impacting the natural environment of the region or the planning tools necessary to manage or mitigate these stresses. Noting that oil and gas development, agriculture and forestry in the region has largely been regulated either on a project by project basis, or in the context of a single sector of industry, the Joint Review called for “a comprehensive land use planning vision”⁴ including a baseline study and other tools for “evaluating the effects of multiple projects in a rapidly developing region.”⁵ This has not happened. Without such a comprehensive assessment and planning process, it is doubtful that the full extent of the impacts of a project like Site C can be fully understood, much less addressed.
4. We have not seen any evidence that the province has ever given serious consideration to Indigenous peoples’ preferred use of the land. The Joint Review Panel set out one such possibility: collaboration between the province and First Nations to establish a protected area in the Valley where Indigenous land use such as hunting would have precedence. For consultation around the Site C dam to have been meaningful, this option and other proposals from Indigenous peoples should have been given proper consideration. Indeed there is clear Canadian legal precedence setting out precisely this requirement of meaningful consultation – and on a case involving one of the First Nations affected by Site C -- which appears to have been ignored in the decision-making around Site C.⁶

² Review Panel Established by the Federal Minister of the Environment and the British Columbia Minister of the Environment, *Report of the Joint Review Panel - Site C Clean Energy Project*, 1 May 2014, p. 96.

³ *Ibid.*, pp. 102, 108.

⁴ *Ibid.*, p. 122.

⁵ *Ibid.*, p. 261.

⁶ A BC court case involving one of the First Nations affected by the Site C dam dealt with exactly this point. In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* [2010 BCSC 359], the court found that consultation around a proposed mine “was not sufficiently meaningful, and the accommodation put in place was not reasonable” because “the full range of possible outcomes”, including that the project should be rejected in favour of the environmental protection sought by the West Moberly First Nations, was never considered. The decision was upheld on appeal [2011 BCCA 247] and in 2012 the Supreme Court denied the province and First Coal Corporation leave to further appeal the decision [2012 SCC 8361].

5. Given that the project would destroy a unique ecosystem and displace Indigenous peoples, non-Indigenous farmers and others who rely on this environment, there is considerable onus on the Province to demonstrate a clear and objective rationale. Commenting on forced evictions carried out in the context of development and infrastructure projects such as large dams and other energy projects, the UN Special Rapporteur on the right to housing has said that the prohibition against forced evictions in international law requires that states “must demonstrate that the eviction is unavoidable.”⁷ The Joint Review panel examining the proposed Site C dam concluded that BC Hydro “has not fully demonstrated the need for the Project on the timetable set forth.”⁸ The Panel also called for measures to more clearly establish whether or not the dam was necessary, including developing a more detailed long-term pricing and demand scenario, making this information public, and submitting it to the provincial Utilities Commission for review.⁹ This has not happened.
6. Alternatives to meet the province’s energy needs were never fully explored. The prohibition against forced evictions in international law also requires that “States should explore fully all possible alternatives”.¹⁰ This did not happen in respect to Site C. In fact, the Joint Review report is critical of BC Hydro and the province for failing to adequately explore alternatives to meet anticipated energy demands, including an alternative hydro site supported by the Treaty 8 Tribal Association¹¹, refurbishing or expansion of existing facilities¹², developing other sources of renewable energy such as geo-thermal¹³, and reducing demand.¹⁴
7. Even the claimed local benefits of the project are highly questionable, especially in respect to Indigenous women and men, and are likely to be outweighed by significant social harms. It is anticipated that the majority of jobs created in the construction of the Site C dam will be filled by temporary workers coming from other communities. This is typical of many large-scale resource development projects in the region. This model of development has already created severe strains for communities in the Peace Valley. Previous studies in the region have noted the role of resource extraction in driving up basic costs of living, especially housing, to the disadvantage of people who don’t have access to high paying jobs.¹⁵ The Site C dam is expected to follow the same path. It can be anticipated that Indigenous people in general, and Indigenous women in particular, will have the least access to any jobs created through this project and will suffer the greatest impact from any rise in accommodation prices or other cost of living increases that result. Unfortunately, the project was not subject to a rigorous human rights or social impact assessment. However, the Joint Review, despite its limited mandate in respect to social impacts, did conclude that the Site

⁷ UN Special rapporteur on adequate housing, *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, A/HRC/4/18.

⁸ *Op. cit.*, Review Panel, p. 306

⁹ *Ibid.*, pp. 287, 305-6.

¹⁰ *Op. cit.*, UN Special rapporteur on adequate housing.

¹¹ *Op. cit.*, Review Panel, p. 294.

¹² *Ibid.*, p. 304.

¹³ *Ibid.*, p. 299.

¹⁴ *Ibid.*, p. 291.

¹⁵ For example, Clarice Eckford and Jillian Wagg, *The Peace Project: Gender Based Analysis of Violence against Women and Girls in Fort St. John – revised*, The Fort St. John Women’s Resource Society, February 2014. Northern Health British Columbia, *Understanding the State of Industrial Camps in Northern BC: A Background Paper*, 17 October 2012

C dam will have “significant social costs” and the costs would not be borne by those who benefit.”¹⁶

8. Many of the social strains created by the regional resource economy, such as the shortage of affordable housing and the large wage gap between women and men, are among the established risk factors for violence against women and girls. Studies in northern BC and elsewhere have also linked the presence of a very large, mostly male transient labour force, and the lifestyle often associated with long shifts in labour camps, with increased rates of domestic violence, sexual assault and other violence against women.¹⁷ A local Indigenous women’s organization, the Fort St. John Women Warriors, is working to draw particular attention to the large numbers of missing and murdered Indigenous women from the community. States have a responsibility to take every reasonable effort to prevent such violence. This includes understanding factors putting women and girls at risk and taking effective responses to prevent such violence in every aspect of state decision-making and policy.¹⁸ In this instance, however, there is no indication that the specific impacts of the construction of the Site C dam on women’s and girls’ lives and safety was considered at any point in the decision-making process. According to a 2014 report by the Royal Canadian Mounted Police, at least 1,017 Indigenous women and girls were murdered between 1980 and 2012.¹⁹ The homicide rate for the last decade covered by the RCMP report was roughly 7 times higher for Indigenous women and girls than for all other women and girls in Canada.²⁰
9. The Site C dam does not have the consent of affected First Nations such as West Moberly and Prophet River which continue to oppose the project in court. International human rights standards require the full and effective participation of Indigenous peoples in all decisions affecting their rights.²¹ Where there is potential for serious harm to Indigenous peoples’ cultures, livelihoods and well-being, these standards further require states to act only with the free, prior and informed consent of Indigenous peoples.²² This requirement in international law further underlines the

¹⁶ *Op. cit.*, Review Panel, p.307.

¹⁷ *Op. cit.*, *The Peace Project*. See also Conseil du statut de la femme Quebec, *Opinion - Women and Plan Nord: For Equality in Northern Development*, October 2012. Pauktuutit Inuit Women of Canada and University of British Columbia School of Social Work, *The Impacts of Resource Extraction on Inuit Women and Families in Qamani'tuaq, Nunavut Territory* (Report for the Canadian Women’s Foundation), 2014. Janis Shandro et al., *Ten Steps Ahead: Community Health and Safety in the Nak’al Bun/Stuart Lake Region During the Construction Phase of the Mount Milligan Mine*, 2014.

¹⁸ In its report on violence against Indigenous women in British Columbia, the Inter-American Commission on Human Rights stated that the duty of due diligence, “encompasses the organization of the entire state structure.” Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia*, OEA/Ser.L/V/II, December 2014, para 157.

¹⁹ *Missing and Murdered Aboriginal Women: A National Operational Overview*, Royal Canadian Mounted Police (2014), p. 9. Due to the low presence of police in many remote Indigenous communities, the proportion of homicides among this population may be higher than the figures suggest.

²⁰ *Ibid* p. 10

²¹ For example, Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador Judgment of June 27, 2012 (Merits and Reparations)* Paras. 206-7 See also, Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, Para. 7 (1994).

²² UN Declaration on the Rights of Indigenous Peoples, Arts.10, 19, 32. See also UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997). The UN Special rapporteur on the right to food noted that “the right to food requires that States respect existing access to adequate food and abstain from taking measures that result in reducing such access. To fully discharge this obligation, States should refrain from adopting any policy that affects the territories and activities of small-scale, artisanal and indigenous fishers unless their free, prior and informed consent is

consent requirements established in domestic law by the Supreme Court of Canada.²³ While the requirement of free, prior and informed consent is not absolute, given the vulnerability of Indigenous peoples to further harm, exceptions must be rare and the threshold for states to proceed without consent is necessarily very high for any project that could impact on Indigenous peoples' use of the land. As international human rights experts have stated, including James Anaya, the former UN Special rapporteur on the rights of Indigenous peoples, before such an exception can even be considered, there must be a compelling and objective rationale, alternatives must be fully explored, any harmful impact must be minimized, and care must be taken to ensure that any potential harm is proportional to the benefits.²⁴ For all the reasons outlined above, the Site C dam cannot possibly meet this test.

As noted above, Amnesty International was an intervener in one of the many legal challenges to the Site C dam, the judicial review before the Federal Court. We disagree with the court's conclusion that a judicial review is not an appropriate means to address the possible violation of Treaty obligations. We also disagree that the question of Treaty infringements can only be addressed through a longer, more onerous process of a full trial. International human rights law requires that people whose rights are at risk have access to a simple, prompt and effective recourse, and to a competent court or tribunal for protection of their rights. This is especially true for groups that have been marginalized and impoverished. In our view, the court's decision that the issue of Treaty infringement could only be addressed through a full trial places an undue burden on First Nations and as such creates an unnecessary and inappropriate barrier to justice. We also feel strongly that the prospect of a lengthy legal process should not delay the federal and provincial governments acting immediately to fulfill their own responsibilities that Treaty rights and other Indigenous rights are upheld.

Having been informed of the serious harm that the dam would cause Indigenous peoples – both through communications from Indigenous peoples themselves and through the Joint Review process -- there was a clear obligation on the part of the federal and provincial governments to take effective action to ensure that the rights of Indigenous peoples were protected. This did not happen. But it is not too late.

The Government of Canada and the Government of British Columbia must act to ensure that the rights of First Nations will be respected, and that the Site C dam will not proceed against their wishes. Such an affirmation of the human rights of Indigenous peoples is indispensable for ensuring the well-being of Indigenous peoples in the Peace Valley. It also indispensable for the broader public interest in achieving reconciliation between Indigenous and non-Indigenous society in British Columbia on the basis of justice and respect for the rights of all.

Recognizing and upholding the human rights of Indigenous peoples in the Peace Valley also has a global importance. Around the world, Indigenous peoples are subjected to extreme impoverishment and widespread violation of their human rights. It is crucial that all levels of government in Canada set positive

obtained." UN Special Rapporteur on the right food, *Interim Report*, UN General Assembly 8 August 2012, UN Doc. A/67/268. Para. 61.

²³ In *Haida Nation*, the Supreme Court confirmed that "the full consent" of Indigenous peoples is part of the spectrum of accommodation that may be required both for "unresolved claims" and "intrusions on settled claims." *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511. Para. 24. The inclusion of consent in the spectrum of possible accommodations is restated at Paras. 30 and 40.

²⁴ UN Special Rapporteur on the Rights of Indigenous Peoples, *Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Report to the Human Rights Council A/HRC/24/41*, 2013, Paras. 31-36

examples that can help elevate the situation of Indigenous peoples – and not lower the bar by knowingly violating establishing international and domestic norms and standards for the protection of Indigenous rights.

I wish to thank you for your attention to this issue, and would be very grateful for a response on these matters.

Yours sincerely,

A handwritten signature in black ink, reading "Thomas Schultz-Jagow". The signature is written in a cursive style with a horizontal line above it.

Thomas Schultz-Jagow
For Salil Shetty, Secretary General