

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS  
ORGANIZATION – CLYDE RIVER, and JERRY NATANINE**

APPELLANTS  
(Applicants)

-and-

**PETROLEUM GEO-SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI),  
TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS) and THE ATTORNEY  
GENERAL OF CANADA**

RESPONDENTS  
(Respondents)

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CHIEFS OF ONTARIO**

INTERVENERS

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**FACTUM OF THE INTERVENER,  
INUVIALUIT REGIONAL CORPORATION**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Inuvialuit Regional Corporation (IRC) is the authority representing the rights and interests of more than 4500 Inuvialuit pursuant to the *Inuvialuit Final Agreement* (IFA),<sup>1</sup> which is a modern land claims agreement protected by section 35 of the *Constitution Act, 1982*.
2. Protecting the Inuvialuit’s important relationship with their Arctic marine environment is a central focus of the IFA. The ice and waters of the Beaufort Sea and Arctic Ocean comprise over a third of the Inuvialuit Settlement Region (ISR) surface area. The IFA establishes and protects the ISR in law for present and future generations of Inuvialuit.
3. Since the 1970s, there has been significant development of renewable and non-renewable resources in the ISR. The Beaufort Sea is home to both important marine wildlife populations with respect to which Inuvialuit have harvesting rights<sup>2</sup> and to numerous Crown-issued oil and gas rights.<sup>3</sup>
4. IRC has gained extensive experience in the process, communication, trust and understanding that are necessary between modern treaty rights holders, Crown representatives, industry proponents and regulators to ensure both the integrity of express treaty rights and the maintenance of effective and mutually respectful relationships. Through negotiating cooperation and benefits agreements and participating in negotiations for the management of oil and gas resources in the Beaufort Sea,<sup>4</sup> IRC works to ensure that the rights, interests and title expressed in the IFA are not eroded over time and that the basic goals of the IFA are pursued reasonably and responsibly by proponents, Crown representatives, Inuvialuit and other actors.
5. This appeal addresses the scope of the Crown’s obligations when it undertakes decisions about development activities that may negatively impact the modern treaty rights of Aboriginal peoples, like the Inuit of Clyde River and Inuvialuit of the Western Arctic, who live on settlement lands and in marine areas of their settlement region.
6. IRC submits where deep consultation is required, the international legal principle of free, prior and informed consent (“FPIC”) as outlined in the *United Nations Declaration on the Rights*

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<sup>1</sup> *Inuvialuit Final Agreement* (25 June 1984), s. 6(1)(a), implemented by *Western Arctic (Inuvialuit Claims) Settlement Act, 1984*, c 24, IRC Book of Authorities (“IRC BOA”), Tab 17.

<sup>2</sup> *Ibid* at subsection 14(29).

<sup>3</sup> Indigenous and Northern Affairs Canada, *Oil and Gas Rights* (June 22, 2016), (accessed: October 23, 2016), IRC BOA, Tab 25.

<sup>4</sup> See ss. 3.20 and 3.21 of the *Northwest Territories Lands and Resources Devolution Agreement* (June 25, 2013), IRC BOA Tab 27.

of *Indigenous Peoples*<sup>5</sup> (“the Declaration”) offers an incremental, logical and necessary clarification of the scope and content of deep consultation in Canada in the context of a modern treaty. It provides an appropriate standard upon which to complete and assess the work required to satisfy a duty of deep consultation, to achieve the purposes of a modern treaty, and to promote reconciliation.

## **PART II – QUESTION IN ISSUE**

7. The issue in this appeal is the scope of the duty to consult and accommodate where there is a proven treaty right and deep consultation is required.

## **PART III – STATEMENT OF ARGUMENT**

### **A. Clarifying scope of deep consultation using FPIC is a logical and necessary next step**

8. In *Haida Nation v. British Columbia*, this Court explained that deep consultation is required “where a strong *prima facie* case for the claim is established, the right and the potential infringement is of high significance to the Aboriginal peoples and the risk of non-compensable damage is high”.<sup>6</sup>

9. Beyond identifying situations that would trigger a duty of deep consultation, Canada’s courts have yet to issue detailed guidance on the content of the duty of deep consultation.<sup>7</sup> IRC submits that this case provides an opportunity to explain what deep consultation means.

10. A principal draw of a land claims settlement is that, after years of negotiation, rights holders get certainty that the rights defined and the objectives identified in their land claims agreement will be diligently protected and pursued. After ratification and the ensuing celebration, though, time does pass. The rights and interests that were so intimately understood when the agreement was signed become simply a file within government bureaus and corporate headquarters.

11. Clarifying the scope of deep consultation – defining its frame in a way that reinforces Inuit-to-Crown or Nation-to-Nation relationships based on true mutual understanding – will provide an assurance in law that treaty rights will be afforded adequate process and protection when new interests are presented, engender certainty among rights holders, and encourage the continued settlement of modern treaties.

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<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA. Res. 61/295 GAOR, 61<sup>st</sup> Sess., Annex, UN Doc. A/RES/61/295 (2007) [*Declaration*] at articles 19 and 32, IRC BOA, Tab 20.

<sup>6</sup> *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511 at para 44, IRC BOA, Tab 5 [*Haida Nation*].

<sup>7</sup> *Ibid.*

12. FPIC offers a frame for deep consultation that aligns with and builds on the existing Canadian jurisprudence on the duty to consult. Article 19 of the Declaration requires States to,

[C]onsult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>8</sup>

13. Article 32(2) further explains that States will,

[C]onsult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>9</sup>

**B. This Court can avail itself of FPIC as a useful framework for deep consultation**

14. The UN General Assembly adopted the Declaration on September 13, 2007 with 143 countries voting in favour.<sup>10</sup> Canada, along with Australia, New Zealand and the United States, initially voted against the Declaration.<sup>11</sup> In 2010, Canada issued a statement of qualified support for the Declaration.<sup>12</sup> In 2016, Canada announced that it is a “full supporter of the Declaration without qualification” and that “by adopting and implementing the declaration, we are breathing life into Section 35.”<sup>13</sup> As the Declaration as a whole can help vivify Aboriginal rights in Canada, so too can FPIC help animate deep consultation.

15. The Declaration, including the provisions relating to FPIC, was developed through the dedicated work of Aboriginal and state leaders, legal practitioners and scholars, and civil society representatives over more than 20 years.<sup>14</sup> The Declaration embodies international human rights principles and laws including those found in *International Covenant on Civil and Political*

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<sup>8</sup> Declaration, *supra* note 5 at article 19.

<sup>9</sup> Declaration, *supra* note 5 at article 32.

<sup>10</sup> Office of the UN High Commissioner for Human Rights, “Declaration on the Rights of Indigenous Peoples”, online: <[www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx](http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx)>, IRC BOA, Tab 28.

<sup>11</sup> Tony Penikett, “An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction?” (2014) Seattle UL Rev 1127 at pages 1139-1140, IRC BOA, Tab 30.

<sup>12</sup> Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (November 12, 2010) *Government of Canada*, online: <[www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142)> (accessed October 13, 2016), IRC BOA, Tab 24.

<sup>13</sup> Government of Canada, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York”, (May 10, 2016) *Government of Canada*, <[news.gc.ca/web/article-en.do?nid=1064009](http://news.gc.ca/web/article-en.do?nid=1064009)> (accessed October 25, 2016), IRC BOA, Tab 22.

<sup>14</sup> Office of the UN High Commissioner for Human Rights, “Mandate of the Working Group on Indigenous Populations”, online: <[www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx](http://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx)> (accessed October 13, 2016), IRC BOA, Tab 29.



*Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – both binding documents at international law.<sup>15</sup>

16. The principle of free, prior and informed consent serves to place a balance of power – in the form of influence on process, information, time, and meaningful participation – in the hands of the people and communities who will have to endure the consequences of the proposed activity. The Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur) has explained that together, the “principles of consultation and consent function as instrumental to rights of participation and self-determination, and as safeguards for all those rights of indigenous peoples that may be affected by external actors[...].”<sup>16</sup>

17. IRC submits that it is not necessary for this Court to make a determination on the legal status of the Declaration in order to avail itself of the principle of free, prior and informed consent as a useful framework for the clarification of the duty of deep consultation in a way that aligns with domestic and international laws, values and principles.

18. This Court frequently looks to international human rights law to assist in the interpretation of Canadian constitutional law.<sup>17</sup> In *Reference Re Public Service Employee Relations Act (Alta.)*, Chief Justice Dickson explained: “The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, [...] be relevant and persuasive sources for interpretation of the *Charter*’s provisions.”<sup>18</sup> And further, “as the Canadian judiciary approaches the often general and open textured language of the *Charter*, the more detailed and textured provisions of the treaties may aid in supplying content to such imprecise concepts.”<sup>19</sup> Dickson C.J.’s approach proved to be a guide in *Saskatchewan Federation of Labour*, where this Court

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<sup>15</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) at Art. 1, ICR BOA, Tab 19 [ICESCR]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) at Art. 1, ICR BOA, Tab 18 [ICCPR]. This Court has confirmed that ICCPR is binding on Canada: *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 623 at para 25, IRC BOA, Tab 3 [*Divito*].

<sup>16</sup> *Report of the Special Rapporteur on the rights of indigenous people*, HRC, 24<sup>th</sup> Sess. UN Doc. A/HRC/24/41 (2013) at para 28, IRC BOA, Tab 32 [*Report of the Special Rapporteur* (2013)].

<sup>17</sup> *Divito supra* note 15 at 21-29; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 at paras 62-70, IRC BOA, Tab 14 [*Saskatchewan Federation*]; *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at paras 53-56, IRC BOA, Tab 10.

<sup>18</sup> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 348, IRC BOA, Tab 12.

<sup>19</sup> *Ibid* at para 58.

relied on the “emerging international consensus” around the right to strike in international law to assist in interpreting the scope of s. 2(d) of the *Charter*.<sup>20</sup>

19. IRC submits that, in line with the analysis above, the Declaration is relevant to the interpretation of the scope and content of constitutional principles relating to Aboriginal peoples, including the duty to consult as a means for upholding Aboriginal rights in Canada.

**C. FPIC aligns with Canadian law and provides certainty to negotiated settlements**

20. The principle of free, prior and informed consent provides a *process* that is designed to secure reconciliation of the substantive and procedural rights of Aboriginal peoples with the interests of governments and third parties.<sup>21</sup> FPIC is consistent with the existing body of case law on the duty to consult and accommodate and the general canon of administrative law. Additionally, it provides additional tools to help realize the goal of reconciliation articulated in the jurisprudence on s. 35.<sup>22</sup> Free, prior and informed consent is designed to build dialogue through which both States and indigenous peoples work in good faith toward consensus.<sup>23</sup>

21. IRC submits that the process required to achieve free, prior and informed consent in situations of deep consultation includes six key elements. In discharging the duty to consult, these elements combine to reinforce “the procedural safeguards of natural justice mandated by administrative law”.<sup>24</sup>

22. FPIC is consistent with this Court’s statements in *Taku River* that an exhaustive checklist for this level of consultation is impossible.<sup>25</sup> Instead, FPIC provides a framework with sufficient flexibility to adapt to different scenarios, which would prove extremely helpful to modern treaty rights holders, proponents, regulators and Crown representatives navigating the consultation process. It would save time and resources dedicated to figuring out what qualifies as deep consultation.

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<sup>20</sup> *Saskatchewan Federation*, *supra* note 17 at para 71.

<sup>21</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, HRC, 12th Sess., UN Doc. A/HRC/12/34 (2009) at paras 46-49, IRC BOA, Tab 32 [*Report of the Special Rapporteur* (2009)].

<sup>22</sup> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 56-58, IRC BOA, Tab 13; see also, *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 109 at para 39, IRC BOA, Tab 1 [*Beckman*]; *Taku River Tlingit First Nation v British Columbia*, [2004] 3 SCR 550, at para 24, IRC BOA, Tab 15 [*Taku River*].

<sup>23</sup> Iacobucci et al., “Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples,” Torys LLP, (2016), at para 22, IRC BOA, Tab 23 [Iacobucci].

<sup>24</sup> *Beckman*, *supra* note 22 at para 46; *Haida*, *supra* note 6 at para 41.

<sup>25</sup> *Taku River*, *supra* note 22 at para 32.

23. The diligent pursuit of the following six key elements will support the achievement of deep consultation, enhance the certainty of treaty promises and promote the goal of reconciliation:

- a. Freedom from force, intimidation, manipulation, coercion or pressure by a proponent [Freedom];
- b. Mutual agreement on a process for consultation [Procedural Consensus];<sup>26</sup>
- c. Robust and satisfactory engagement with the Aboriginal group prior to approval [Robust Engagement];<sup>27</sup>
- d. Sufficient and timely information exchange [Information and Understanding];<sup>28</sup>
- e. Proper resourcing, both technical and financial, to allow the Aboriginal group to meaningfully participate [Meaningful Participation];<sup>29</sup>
- f. Shared objective of obtaining the reasonable consent of the Aboriginal group [Objective of Consent].<sup>30</sup> This is an overarching objective that serves as a guide for the process as a whole.

24. The *Freedom* element reflects the fact that consent cannot be valid if it is extracted through force, threats, or intimidation. In Canada, we are fortunate to have a strong legal framework already in place that addresses this concern. Nevertheless this element is essential to a meaningful process of consent. A conceivable infringement of this element could be a threat to withhold emergency services unless consent is given to a development project within a rights holder's settlement area.

25. The *Procedural Consensus* element requires the Crown and the rights holders to come to a common understanding about what steps are required to obtain reasonable consent. This includes accommodating the needs of the participant Aboriginal group, for example by setting a schedule for consultation that provides for different harvesting seasons or days of importance. In line with *Haida*, "at all stages, good faith on both sides is required".<sup>31</sup> A requirement to work in good faith to determine a reasonable process works as a limit on the unreasonable intransigence of one or both parties. While this element may add time and effort at the front end of the consultation, procedural consensus will help manage expectations and maintain focus on the objective of reasonable consent.

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<sup>26</sup> *Report of the Special Rapporteur* (2009), *supra* note 21 at para 51.

<sup>27</sup> *Report of the Special Rapporteur* (2013), *supra* note 16 at para 67.

<sup>28</sup> *Ibid* at 65-66.

<sup>29</sup> *Report of the Special Rapporteur, HRC* (2009), *supra* note 21 at para 47.

<sup>30</sup> *Ibid* at para 48.

<sup>31</sup> *Haida Nation*, *supra* note 6 at para 42.

26. *Robust Engagement* must “take place before the government authorizes or a company undertakes or commits to undertake any activity related to the project within Indigenous territory or other lands subject to Indigenous rights.”<sup>32</sup> It requires the commitment of time, energy and resources to understand the positions and interests of the Aboriginal group. The objective of obtaining reasonable consent drives the entity seeking that consent to invest in fostering a working relationship with, teaching and learning from the Aboriginal party.

27. The *Information and Understanding* element is necessarily multidirectional. It requires an exchange of information on the nature of the project, as well as a demonstrated understanding of the Aboriginal right at stake and the specific nature of the potential impacts on the Aboriginal interests in question, including impacts on the rights of future generations.<sup>33</sup> While it is incumbent upon the Crown to furnish Aboriginal parties with information about the project, the Crown also has a responsibility to receive and understand project concerns – including those based in Traditional Knowledge – from the rights holders. This exchange will necessarily affect the Crown’s decision to accept an Aboriginal party’s non-consent or, on the other hand, the Crown’s justification of its decision to proceed without that consent under the *Sparrow* analysis discussed below.

28. Consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands and rights are at issue.<sup>34</sup> As such, the Crown has a duty to ensure that the representations of Aboriginal peoples are seriously considered.<sup>35</sup> This is the principle that the Information and Understanding element targets.

29. To satisfy the *Meaningful Participation* element, attention must be given to the “implications of power imbalances.”<sup>36</sup> The party seeking to obtain consent must ensure that the treaty rights holder has adequate financial and technical resources to responsibly study the risks and rewards of a proposed development on present and future generations, to understand their legal rights with respect to the proposal, and to present their positions for consideration. In order for an Aboriginal people to meaningfully participate, the Crown must provide them with a reasonable amount of time commensurate with the significance of the possible impacts.

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<sup>32</sup> *Report of the Special Rapporteur* (2013), *supra* note 16 at para 27.

<sup>33</sup> *Report of the Special Rapporteur* (2013) *supra* note 16 at para 65-66.

<sup>34</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, IRC BOA, Tab 2 [*Delgamuukw*].

<sup>35</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 64, IRC BOA, Tab 7 [*Mikisew Cree*].

<sup>36</sup> Iacobucci, *supra* note 23 at para 25.

30. The *Objective of Consent* requirement often attracts the most controversy, as this has been misinterpreted by some groups as a veto for rights holders. A unilateral veto, however, would provide for arbitrary decision-making, which is fundamentally inconsistent with free, prior and informed consent and with the Canadian jurisprudence. Consent in FPIC is not a binary, yes or no, concept. Rather, “consent is a complex process of building a relationship, exchanging information, conducting analysis” and fully integrating an Aboriginal community in the process of discussion, analysis and decision-making.<sup>37</sup> The objective of consent acts as overarching guide to the FPIC process.

31. In *Mikisew*, the Court reiterated that “consultation will not always lead to accommodation, and accommodation may or may not result in an agreement”.<sup>38</sup> Similarly, the Special Rapporteur has explained that FPIC should not be regarded as according a general “veto power” over decisions, but rather as establishing consent as the objective of consultations with indigenous peoples.<sup>39</sup>

32. The Honourable Frank Iacobucci recently emphasized that the standard for consultation that FPIC embodies is consultation with the objective of consent: “While a veto enables arbitrary and uninformed decisions and inhibits meaningful consultation, consultation in the aim of achieving consent emphasizes meaningful and informed dialogue and accommodation”.<sup>40</sup> The emphasis is on *bona fide* negotiations toward mutually acceptable arrangements where both parties have a real opportunity to influence the decision. The impetus of working to achieve consent drives the parties toward meaningful consultation based on respect for each party’s role and status.

33. The focus of FPIC on obtaining reasonable consent is consistent with this Court’s statements that in some cases, consent of an Aboriginal group may be required or advantageous.<sup>41</sup> This ensures that the consultation is more than merely an opportunity to “blow

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<sup>37</sup> Lorraine Land, “Who’s Afraid of the big, bad, FPIC? Evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy” (2016) 4:2 *Northern Public Affairs* 42 at 43, IRC BOA, Tab 26.

<sup>38</sup> *Mikisew Cree*, *supra* note 35 at para 66.

<sup>39</sup> *Report of the Special Rapporteur* (2009), *supra* note 21 at para 46.

<sup>40</sup> Iacobucci, *supra* note 23 at para 23.

<sup>41</sup> *Haida Nation*, *supra* note 6 at paras 40, 44; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 2, 76, IRC BOA, Tab 16 [*Tsilhqot’in Nation*]; *Delgamuukw* *supra* note 34 at para 168.

off steam.”<sup>42</sup> Consultation has to be meaningful<sup>43</sup> in order to satisfy the duty to consult and accommodate. FPIC is a means to achieve this and a standard against which to assess it.

34. As expressed in *Tsilhqot'in*, consent is the mechanism that will offer most certainty not only to those who wish to pursue a project that may have a significant impact on express Aboriginal rights,<sup>44</sup> but also to those Aboriginal peoples who have negotiated a land claims agreement. Consultation with the objective of obtaining consent provides more certainty, and is more consistent with international legal principles of self-determination for indigenous peoples.<sup>45</sup>

35. Furthermore, because the concept of reasonableness is one of the most widely used concepts in Canadian law, courts are well-equipped to assess decisions on a standard of reasonableness where an indigenous government withholds consent.<sup>46</sup> This promotes certainty of decisions for all parties, encourages balance, and sets a clear and familiar standard for the Crown, indigenous groups, and third parties.

36. In the case of deep consultation and proven rights, the FPIC framework also provides a sensible way to integrate the duty to consult and accommodate with the duty of the Crown not to infringe proven rights without justification. If the Crown proves that it has diligently pursued the requirements of FPIC and the Aboriginal party withheld its consent unreasonably, then the approval may proceed.

37. If the Aboriginal group withholds its consent, but does so reasonably, there are two options:

- a. The Crown accepts the decision and the project does not go ahead;
- b. The Crown proceeds with the decision/project without the consent of the Aboriginal group if the Crown is able to justify the infringement of the Aboriginal interest under the *Sparrow* framework.<sup>47</sup>

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<sup>42</sup> *Mikisew Cree supra* note 35 at para 54.

<sup>43</sup> *Tsilhqot'in Nation, supra* note 41 at para 96; *Taku River supra* note 22 at para 2.

<sup>44</sup> Boreal Leadership Council, “Understanding Successful Approaches to Free, Prior and Informed Consent in Canada – Part I: Recent Developments and Effective Roles for Government, Industry and Indigenous Communities” (September 2015) at 14, IRC BOA, Tab 21; *Tsilhqot'in Nation, supra* note 41 at para 2.

<sup>45</sup> ICESCR, *supra* note 15 at Art. 1; ICCPR, *supra* note 15 at Art. 1; *Declaration, supra* note 5 at Art. 3.

<sup>46</sup> *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 46, IRC BOA, Tab 4; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*, [2011] 3 SCR 708, at paras 12-13, IRC BOA, Tab 8.

<sup>47</sup> *R. v Sparrow*, [1990] 1 SCR 1075 at 1113, IRC BOA, Tab 11 (reiterated in *Tsilhqot'in Nation, supra*, at para 104).

38. IRC submits that the record produced through the application of the FPIC principles would appropriately inform the justification analysis to allow for a realistic balancing of present and future public and Aboriginal interests. This will also promote predictability and fairness.

#### **D. FPIC Supports Implementation of Treaties and Reconciliation**

39. In *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, this Court held that the honour of the Crown governs treaty implementation and requires the Crown to act in a way that accomplishes the intended purposes of the treaty. The honour of the Crown further requires that the Crown take a broad, purposive approach to the interpretation of the promise and to act diligently to fulfill it. Crown servants, therefore, “must seek to perform the obligation in a way that pursues the purpose behind the promise.”<sup>48</sup>

40. IRC submits that, where modern treaty rights are at stake and deep consultation is required, consulting with the objective of obtaining the reasonable consent of an Aboriginal people is consistent with the Crown’s obligations to diligently fulfill treaty promises.<sup>49</sup> By implementing the principle of free, prior and informed consent, parties are engaged in “the building of confidence and mutual respect.”<sup>50</sup>

41. FPIC also promotes reconciliation by encouraging Aboriginal peoples to continue to enter into modern treaties. By setting reasonable consent as the shared objective of the consultation process, FPIC supports the alignment of the goals of both parties. Not only will this help to facilitate the success of the consultation process, but it will also provide certainty that the compromise that indigenous groups have made through negotiated land claims settlements will be respected. Aboriginal communities would have an assured and specified role, as well as more precise powers and responsibilities. In this way, FPIC contributes to productive and peaceful Nation-to-Nation relationships.

#### **PART IV - COSTS**

42. The IRC does not seek costs and respectfully requests that no costs be ordered against it.

#### **PART V – ORDER REQUESTED**

43. The IRC respectfully requests that it be allowed to make an oral argument of not more than ten (10) minutes.

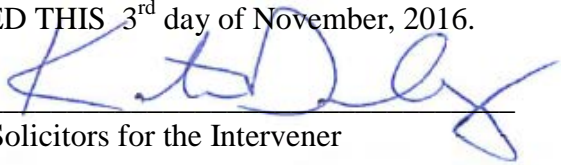
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<sup>48</sup> *Manitoba Métis Federation Inc. v. Canada*, [2013] 1 SCR 623 at paras 73-80, IRC BOA, Tab 6.

<sup>49</sup> *Ibid* at para 73; *Quebec (Attorney General) v Moses*, [2010] 1 SCR 557, at para 23, IRC BOA, Tab 9; *Mikisew Cree*, *supra* note 35 at para 51.

<sup>50</sup> *Report of the Special Rapporteur (2009) supra* note 21 at para 51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3<sup>rd</sup> day of November, 2016.

  
Solicitors for the Intervener



**PART VI – TABLE OF AUTHORITIES**

**JURISPRUDENCE**

<b>TAB</b>		<b>Paragraph</b>
1	<i>Beckman v Little Salmon Carmack First Nation</i> , 2010 SCC 53, [2010] 3 SCR 109	20, 21
2	<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010	28, 33
3	<i>Divito v Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 47, [2013] 3 SCR 623	15, 18
4	<i>Dunsmuir v New Brunswick</i> , [2008] 1 SCR 190, 2008 SCC 9	35
5	<i>Haida Nation v British Columbia (Minister of Forests)</i> , 2004 SCC 73, [2004] 3 SCR 511	8, 21, 25, 32, 33
6	<i>Manitoba Métis Federation Inc. v Canada (Attorney General)</i> , 2013 SCC 14, [2013] 1 SCR 623	39, 40
7	<i>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)</i> , 2005 SCC 69, [2005] 3 SCR 388	28, 31, 33, 40
8	<i>Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)</i> , [2011] 3 SCR 708, 2011 SCC 62	35
9	<i>Quebec (Attorney General) v Moses</i> , [2010] 1 SCR 557, 2010 SCC 17	40
10	<i>R. v Hape</i> , [2007] 2 SCR 292	18
11	<i>R. v Sparrow</i> , [1990] 1 SCR 1075	27, 37
12	<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , [1987] 1 SCR 313	18
13	<i>Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council</i> , 2010 SCC 43	20
14	<i>Saskatchewan Federation of Labour v Saskatchewan</i> , 2015 SCC 4, [2015] 1 SCR 245	18
15	<i>Taku River Tlingit First Nation v British Columbia (Project Assessment Director)</i> , [2004] 3 SCR 550, 2004 SCC 74	20, 22, 33
16	<i>Tsilhqot'in Nation v British Columbia</i> , 2014 SCC 44, [2014] 2 SCR 257	33, 34, 37

**TREATIES**

17	<i>Inuvialuit Final Agreement</i> (25 June 1984), implemented by <i>Western Arctic (Inuvialuit Claims) Settlement Act</i> , 1984, c 24	1, 2
18	<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23	15, 34

	March 1976)	
19	<i>International Covenant on Economic, Social and Cultural Rights</i> , 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)	15, 34

### INTERNATIONAL INSTRUMENTS

20	<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , GA Res. 61/295 GAOR, 61 <sup>st</sup> Sess., Annex, UN Doc. A/RES/61/295 (2007)	12, 13, 14 15, 17, 34
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### SECONDARY SOURCES

21	Boreal Leadership Council, <i>Understanding Successful Approaches to Free, Prior and Informed Consent in Canada – Part I: Recent Developments and Effective Roles for Government, Industry and Indigenous Communities</i> , September 2015	34
22	Government of Canada, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York,” (May 10, 2016) <i>Government of Canada</i> , < <a href="http://news.gc.ca/web/article-en.do?nid=1064009">news.gc.ca/web/article-en.do?nid=1064009</a> > (accessed October 25, 2016)	14
23	Frank Iacobucci et al., “Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples,” <i>Torys LLP</i> , (2016)	20, 29, 32
24	Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (November 12, 2010) <i>Government of Canada</i> , online: < <a href="http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142">www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142</a> > (accessed October 13, 2016)	14
25	Indigenous and Northern Affairs Canada, <i>Oil and Gas Rights</i> (June 22, 2016), <i>Government of Canada</i> , online: <a href="https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-NOG/STAGING/texte-text/nog_df_rts_pdf_135059136_3283_eng.pdf">https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-NOG/STAGING/texte-text/nog_df_rts_pdf_135059136_3283_eng.pdf</a> (accessed: October 23, 2016)	3
26	Lorraine Land, “Who’s Afraid of the big, bad, FPIC? Evolving integration of the <i>United Nations Declaration on the Rights of Indigenous Peoples</i> into Canadian law and policy” (2016) 4:2 <i>Northern Public Affairs</i> 42	30
27	<i>Northwest Territories Lands and Resources Devolution Agreement</i> (June 25, 2013)	4

28	Office of the UN High Commissioner for Human Rights, “Declaration on the Rights of Indigenous Peoples”, online: < <a href="http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx">www.ohchr.org/EN/Issues/IPeoples/Pages/ Declaration.aspx</a> > (accessed October 13, 2016)	14
29	Office of the UN High Commissioner for Human Rights, “Mandate of the Working Group on Indigenous Populations”, online: < <a href="http://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx">www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx</a> > (accessed October 13, 2016)	15
30	Tony Penikett, “An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction?” (2014) 37 Seattle UL Rev 1127	14
31	<i>Report of the Special Rapporteur on the rights of indigenous people</i> , HRC, 24 <sup>th</sup> Sess. UN Doc. A/HRC/24/41 (2013)	16, 23, 26, 27
32	<i>Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people</i> , HRC, 12 <sup>th</sup> Sess., UN Doc. A/HRC/12/34 (2009)	20, 23, 31, 40

**PART VII – STATUTORY PROVISIONS**

33	<i>The Constitution Act, 1982</i> , Schedule B to the Canada Act 1982 (UK), 1982, c 11s. 35
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35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.