CANADA'S SUBMISSION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE MERITS OF THE PETITION OF THE SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION

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SUBMISSION OF CANADA
TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE MERITS OF THE PETITION OF THE SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION

I. EXECUTIVE SUMMARY

1. These observations by Canada on the merits are provided in complement to the submissions by Canada and British Columbia on the admissibility of the petition, which were filed with the Inter-American Commission on Human Rights (Commission) on May 13, 2022. They pertain to a number of hard-rock mining projects located in the upper reaches of certain watersheds in British Columbia, Canada, near the international border with Alaska, United States.

2. Canada wishes to clarify with these submissions that Canada's domestic legal framework protects not only the rights asserted by the petitioners, but also allows individuals located outside of Canada and non-Canadians to seek remedies before Canadian courts. Canada understands that some member tribes represented by the petitioners claim to be "aboriginal peoples of Canada", that they hold constitutionally-protected s. 35 Aboriginal rights within British Columbia, and that they are owed a duty to consult and accommodate with respect to certain mining projects. Their claim is currently being considered by the relevant authorities of the Government of British Columbia.

3. Canada continues to submit and to emphasize that the petitioners could have pursued domestic remedies in relation to the approved mining projects and that there remain various legal avenues available to the petitioners to challenge decisions made under both federal and provincial legislation governing the approvals of the proposed mines. Allowing this petition to proceed would undermine the integrity of the Commission's petition process and also set a precedent that claimants can bring their claims directly to the Commission while domestic processes are and remain available to them.

4. As part of their merits submissions, the petitioners assert a new violation by Canada of their right to a healthy environment. Canada submits that the petitioners' allegations that the right to a healthy environment was violated are inadmissible *ratione materiae*. The petitioners have not only failed to specify which Articles of the *American Declaration on the Rights and Duties of Man* (*American Declaration*) Canada has allegedly violated, but they have also not substantiated their allegations in that regard.

5. Canada submits that the petitioners' new allegations regarding the Eskay Creek Revitalization project and the New Polaris Gold Mine project, as well as their allegations regarding "active mine exploration projects in the transboundary watersheds", are manifestly out of order pursuant to Article 34 (b) of the *Rules of Procedure of the Inter-American Commission on Human Rights*. They are inadmissible, first, as highly speculative and as failing to state facts that tend to establish a violation of rights and, second, on the basis that

the petitioners have not exhausted any domestic remedies with respect to these projects that have yet to receive authorization to proceed, if such authorization is ever granted.

6. Canada continues to submit that the petitioners are unable to establish that the approval of the mining projects violates their human rights under the *American Declaration*. Canada wishes to clarify that it does not disagree with or wish to challenge the petitioners' position that Indigenous peoples have the right to enjoy the benefits of their own culture; the right to their own means of subsistence; the right to the preservation of health; and the right to use and enjoy the lands they have traditionally used and occupied. Canada fully agrees that Indigenous peoples have these rights. What Canada disagrees with are the allegations that it has violated these rights, as submitted by the petitioners.

7. Canada continues to submit that the potential risk raised by each of the five mining projects cited in the petition was assessed through environmental assessments that were carried out for the projects. For each of the projects, it was determined, by the relevant authorities, that the project was not likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures. Since the petitioners have not established that the cited mining projects are likely to cause environmental harm, Canada cannot be found to have violated the petitioners' rights with the approval of the projects.

8. Canada recalls that both the federal and the British Columbia environmental assessment frameworks establish robust processes for assessing the potential impacts that proposed projects may have on the environment, including potential transboundary effects, and for assisting decision-makers to make informed decisions with respect to those projects. Canada wholly rejects the petitioners' assertions that the federal and British Columbia regulatory frameworks are insufficient to protect their rights, and that the federal government and British Columbia cannot be counted on to prevent any potential significant harm from British Columbia mines. Not only are the petitioners attempting to discredit Canada's assessment processes by relying on their own experts, and by raising unrelated past incidents, but they also appear to challenge environmental assessment as an adequate means to assess any potential adverse impact raised by a project. The petitioners' assertion contradicts the recognition in international law that environmental assessments constitute a sound assessment tool in relation to activities that may cause significant environmental damage.

9. Canada rejects the petitioners' allegations that it has not adequately consulted with the petitioners regarding the cited mining projects. Extensive consultations with Indigenous groups were carried out for all the cited mining projects. The petitioners had several opportunities to participate in the environmental assessment processes for those projects; yet, to Canada's knowledge, the petitioners did not avail themselves of those opportunities to raise any of their concerns. The petitioners have provided no explanation as to why they did not participate in the environmental assessment processes for the cited mining projects and have not established why those processes were not adequate to secure their participation.

10. Canada wishes to emphasize that this petition raises highly complex factual and legal questions that are undoubtedly best first left to Canadian authorities—and to domestic courts if called upon to adjudicate—to consider and resolve in the light of Canada's unique

historical context, constitutional framework, and the special status of Indigenous peoples in Canada's constitutional and legal order. There is a significant body of Aboriginal law in Canada, which domestic courts are well placed to apply to the situations before them.

11. Canada therefore respectfully requests that the Commission dismiss this petition. The petitioners have not established that Canada has violated their human rights as protected under the *American Declaration* by approving the cited mining projects. That conclusion is established on the basis that the cited mining projects do not pose a threat to the environment and that Canada has met any obligations to consult with respect to the mining projects.

II. INTRODUCTION

12. On March 15, 2024, the Inter-American Commission on Human Rights (Commission) provided Canada with a copy of the observations on the merits submitted by the Southeast Alaska Indigenous Transboundary Commission (petitioners) regarding hard-rock mining projects located in the upper reaches of certain watersheds in British Columbia, Canada, near the international border with Alaska, United States.

13. These observations by Canada on the merits are provided in complement to the submissions by Canada and British Columbia on the admissibility of the petition, which were filed with the Commission on May 13, 2022. Canada relies on the facts and observations in those submissions and provides, in these present observations, additional information regarding the assessment of the alleged risk to the environment raised by the petitioners, including potential transboundary impacts, and on the scope of the consultations carried out by environmental authorities in Canada regarding those mining projects.

14. Canada submits that the petitioners have not provided any new information to establish that, by approving the cited mining projects, Canada has violated their human rights as protected under Articles I (life and personal security), XI (preservation of health and well-being), XIII (benefits of culture), and XXIII (property) of the *American Declaration on the Rights and Duties of Man* (*American Declaration*). Canada submits that the petitioners have not established that the impugned mining projects pose a threat to the environment, such that their human rights are impacted, or that Canada failed to meet any consultation obligations with respect to those mining projects.

15. Canada wholly maintains its position that the petitioners should have exhausted domestic remedies with respect to the cited mining projects. Canada notes in this regard that the Commission granted the petitioners an exemption to the requirement to exhaust domestic remedies on the basis that Canada's legal framework does not extend to the protection of the rights of the petitioners, particularly given that they are based outside of Canada. Canada seeks to clarify, with these submissions, that its legal framework protects not only the rights asserted by the petitioners, but also allows individuals located outside of Canada and non-Canadians to seek remedies before Canadian courts. Canada continues to submit that the petitioners could have pursued domestic remedies in relation to the approved mining projects and that there remain various legal avenues available to the petitioners to challenge decisions made under both federal and provincial legislation governing the approvals of the proposed mines.

16. While the petitioners' original petition cited six mining projects (the Red Chris, Brucejack, KSM, Galore Creek, Schaft Creek, and Tulsequah Chief projects), their observations on the merits include two new proposed mining projects, the Eskay Creek Revitalization and New Polaris Gold Mine mining projects. As will be explained, Canada respectfully requests that the Commission decline to consider, as inadmissible, allegations regarding these new proposed mining projects, which are still in early stages of development and for which environmental authorities have yet to take any decision whether these projects should be allowed to proceed.

17. Canada wishes to recall that of the six mining projects referred to in the original petition, environmental assessments were conducted for the five following projects: Red Chris, Brucejack, KSM, Galore Creek, and Tulsequah Chief. These projects are hereinto referred to as "the cited mining projects". The sixth mining project—the Schaft Creek project—would be subject to federal environmental impact assessment legislation if the project were to proceed,[1] as explained in Canada's admissibility submissions. It should be noted that the Schaft Creek project is not, at this stage, considered a "proposed mining project" given that the environmental assessment process has not been initiated. Canada accordingly maintains that the Schaft Creek project should not be considered as part of this petition.

III. ARGUMENT

A. Preliminary Matters

i) Admissibility report – failure to exhaust domestic remedies

18. In its Admissibility Report, the Commission states that Canada has not provided information on the domestic remedies that were not exhausted and on the extent to which those remedies were adequate to repair the alleged violation.[2] The Commission further states that based on the information on the record, Canada's legal framework does not extend to the protection of the rights of the petitioners, particularly given that the petitioners are based outside of Canada.[3]

19. These statements appear to be in response to allegations by the petitioners that the Constitution of Canada does not provide protection for specific rights, including the right to property, the right to health and the right to use and enjoy traditionally occupied lands; that there was no reasonable chance of challenging the approval of the cited mining projects

[1] S.C. 2019, c. 28, online: https://laws.justice.gc.ca/eng/acts/I-2.75/FullText.html [IAA]. The *Impact Assessment Act* would apply if the project is captured in the *Physical Activities Regulations*, SOR/2019-285, online: https://laws.justice.gc.ca/PDF/SOR-2019-285.pdf. It is once the project proponent submits an Initial Project Description that the Impact Assessment Agency of Canada would decide whether a federal impact assessment is required or not, in accordance with the legislation.
[2] Inter-American Commission on Human Rights, Report on Admissibility No. 179/23, Petition 3004-18, Southeast Alaska Indigenous Transboundary Commission (Canada), OEA/Ser.L/V/II, Doc. 193 (August 25, 2023) ("Admissibility Report"), at paras. 58-59.
[3] Admissibility Report, at para. 59.

under the laws of Canada; and that the protection of the laws of Canada do not extend to non-Canadian nationals, such as the petitioners.[4]

20. Canada submits that the petitioners' statements in these respects are erroneous.[5] Canada's legal framework protects the rights asserted by the petitioners and allows individuals and Indigenous collectives located outside of Canada and non-Canadians to assert standing and seek remedies before Canadian courts. Without commenting on the merits of any such proceeding, Canada continues to submit that the petitioners could have pursued domestic remedies in relation to the approved mining projects. Additionally, there are various legal avenues the petitioners could still pursue to challenge decisions made under both federal and provincial legislation governing the approvals of the proposed mines.

21. The petitioners' position that they would have no reasonable chance of success in challenging the approval of the cited mining projects is without merit. It is grounded in a misunderstanding and in a mischaracterization of Canada's legal framework and of how Canada implements its international human rights obligations domestically. The petitioners' position implies that, to be enforceable in domestic courts, human rights must necessarily be enshrined in a state's Constitution and that claimants must be Canadians and/or located in Canada. This is inaccurate.

22. Canada implements its international human rights treaty obligations through a wide range of measures. These include the constitutional protections in the *Canadian Charter of Rights and Freedoms*[6] (*Canadian Charter*), which is part of Canada's Constitution, and which protects basic rights and freedoms essential to a free and democratic country. The rights and freedoms guaranteed by the *Canadian Charter* include fundamental freedoms, democratic rights, mobility rights, the right to life, liberty and security of the person, and equality rights for all.

23. In addition, Canada implements its international human rights obligations through a wide range of laws—including human rights legislation in each one of Canada's federal, provincial and territorial jurisdictions—policies, and programs adopted by federal, provincial, and territorial governments within their respective jurisdictions. This means that human rights in Canada are protected not only in Canada's Constitution and legislation at

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[4] Petitioners' Admissibility Submission, at paras. 291-298.

[5] For example, the Petitioners assert at para. 291 of their Admissibility Submission that: "the protections under the Charter are limited to *Canadians*. For example, the Charter 'protects every *Canadian's* right to be treated equally under the law.'" The petitioners footnote this statement with a reference to the *Canadian Human Rights Act*. The *Canadian Human Rights Act* is a federal law that prohibits discrimination in employment and in the provision of services and is neither part of the *Canadian Charter of Rights and Freedoms*, nor part of Canada's Constitution more generally. Section 15 of the *Canadian Charter* protects equality rights and provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (emphasis added) The Supreme Court of Canada has found violations of equality rights where claimants were not Canadians (see, for e.g. *Lavoie v. Canada*, [2002] 1 S.C.R. 769, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1961/index.do; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/fr/407/1/document.do).

[6] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

the federal, provincial, and territorial levels, but also through a wide range of policies and programs across the federation.

24. As pertains to the petitioners' allegations that s. 35 of the *Constitution Act, 1982*[7] is ineffective and only protects the rights of Indigenous peoples in Canada, Canada submits that those allegations are also false. Canada submits that the rights protected under s. 35 of the *Constitution Act, 1982*, which constitutionalizes Aboriginal rights, are not only enforceable in Canadian courts, but they may also extend to Indigenous peoples outside of Canada, as will be further explained below.

Section 35 of the Constitution Act, 1982

25. In 1982, Canada amended its Constitution to elevate Aboriginal and treaty rights to constitutionally protected rights through the inclusion of s. 35 in Part II of the *Constitution Act, 1982*.

26. Section 35 of the *Constitution Act, 1982* states:

> 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.

27. Affording constitutional protection to Aboriginal and treaty rights was a significant step, since it placed Aboriginal and treaty rights beyond the authority of governments and required the Crown[8] to justify any infringement on Aboriginal and treaty rights. The Supreme Court of Canada, the highest court in Canada, has clearly enunciated the rationale for this constitutional protection:

> "…the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[9] *[emphasis in original]*

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[7] *Constitution Act, 1982*, s. 35, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
[8] In Canada, some government acts are referred to as those of "the Crown".
[9] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1407/index.do, at para. 30.

28. The Supreme Court of Canada decided several key cases involving the application and interpretation of s. 35. The Court has stated that the purpose of s. 35 is to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown.[10] The specific rights of each Aboriginal collectivity are not set out in the Constitution. Rather, the Constitution provides general protection for Aboriginal and treaty rights, and the Court has enunciated legal tests for proving the specific content of Aboriginal rights. These rights enjoy constitutional protection under s. 35(1), which means that the government is required to justify any measure that infringes upon or denies these rights.

29. The Supreme Court of Canada has described Aboriginal rights as falling along a spectrum with respect to their degree of connection to the land. At one end of the spectrum is a right to the land itself known as Aboriginal title.[11] In recognition of the fact that Aboriginal rights can vary with respect to their degree of connection with the land, the Supreme Court of Canada has also recognized as Aboriginal rights practices, customs, and traditions that are integral to the distinctive Indigenous culture of the group claiming the right even in the absence of a claim of title to the land. Although an Indigenous group may not have Aboriginal title to the land, it may nevertheless have a site-specific right to engage in a particular activity.

30. In order for an activity to be protected as an Aboriginal right under s. 35, the Supreme Court of Canada has stated that it must be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[12] The nature of the right is not frozen in time. It can evolve in light of present-day circumstances.[13] The Indigenous perspective is also key to assessing whether activities constitute Aboriginal rights under s. 35.[14]

31. As noted in Canada's admissibility submissions and contrary to the assertions of the petitioners, the Supreme Court of Canada has recognized that Indigenous groups located outside of Canada can be recognized as "aboriginal peoples of Canada" under s. 35 of the *Constitution Act, 1982*, if they are the modern successors of Aboriginal societies that occupied Canadian territory at the time of European contact.[15] The Supreme Court has stated that, as is the case for Indigenous peoples in Canada claiming Aboriginal rights, Indigenous peoples located outside of Canada who are "aboriginal peoples of Canada" will need to satisfy the same legal test in order to demonstrate that they hold s. 35 Aboriginal rights in Canada and thus can exercise section 35 Aboriginal rights in Canada.[16]

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[10] *Ibid.*, at para. 31.
[11] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1569/index.do, at para. 138.
[12] *R. v. Van der Peet, supra*, note 9, at para. 46. In *R v. Powley*, [2003] 2 SCR 207, the Supreme Court of Canada modified the *Van der Peet* test with respect to Métis people to reflect their distinctive history, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2076/index.do.
[13] *R. v. Sappier*; *R. v. Gray*, [2006] 2 SCR 686, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2329/index.do, at para. 48.
[14] *R. v. Van der Peet, supra*, note 9, at paras. 49-50.
[15] *R. v. Desautel*, [2021] 1 SCR 533, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18836/index.do. In this prosecution case, Mr. Desautel was charged with hunting without a license contrary to provincial legislation. In defense, he asserted a s. 35 Aboriginal right to hunt elk.
[16] *Ibid.*, at paras. 18-34.

32. Canada understands that some member tribes represented by the petitioners claim to be "aboriginal peoples of Canada", that they hold s. 35 Aboriginal rights within British Columbia, and that they are owed a duty to consult and accommodate with respect to the mining projects, and specifically the Eskay Creek Revitalization project.[17] Their claim is currently being considered by the relevant authorities of the Government of British Columbia and, in the case of seven of those member tribes (the Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman), the Government of British Columbia is consulting with them regarding the potential adverse impacts of the Eskay Creek Revitalization project on their asserted Aboriginal rights in British Columbia and how potential adverse impacts to those asserted rights can be addressed and mitigated through the environmental assessment process, where appropriate.[18]

33. The petitioners' claim that they "would have no reasonable chance of success on a s. 35 claim seeking protection of their rights"[19] is unfounded. Without commenting on the merits of any such claim, the petitioners have the option to resort to Canadian courts in order to establish that they are "aboriginal peoples of Canada" and to obtain judicial recognition of the existence and scope of their rights under s. 35 of the *Constitution Act, 1982*.

34. The petitioners' claim that s. 35 "only creates a procedural obligation on the government"[20] also misconstrues the Supreme Court of Canada's caselaw on s. 35. Once proven, Aboriginal and treaty rights are afforded substantive protection by virtue of their recognition under section 35 of the *Constitution Act, 1982*. Accordingly, governments are prevented from actions or decisions that would unjustifiably infringe those established rights. Governments are also subject to procedural obligations, such as the duty to consult, before taking actions or decisions that might adversely impact Aboriginal and treaty rights that have yet to be formally recognized.

35. The duty to consult and, where appropriate, accommodate was developed, amongst other reasons, to preserve Aboriginal interests pending resolution of final claims.[21] The duty to consult, which is grounded in the honour of the Crown, arises where the Crown contemplates conduct that might adversely impact asserted or established Aboriginal and treaty rights. The

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[17] See letter from Eshter Ashton, Chair of the Southeast Indigenous Transboundary Commission to Elenore Arend, Chief Executive Assessment Officer, Environmental Assessment Office, Government of British Columbia, January 30, 2024, attached as Annex 1; letter from Guy Archibald, Executive Director of the Southeast Alaska Indigenous Transboundary Commission to British Columbia Environmental Assessment Office, Government of British Columbia, 'RE: Early Engagement Comments on the New Polaris Project', June 8, 2023, attached as Annex 2.
[18] See letter from Elenore Arend, Chief Executive Assessment Officer and Associate Deputy Minister, Environmental Assessment Office, Government of British Columbia, to Southeast Alaska Indigenous Transboundary Commission, Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman, July 3, 2024, attached as Annex 3.
[19] Petitioners' Admissibility Submission, at para. 294.
[20] *Ibid.*
[21] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2189/index.do, at para. 38.

Supreme Court of Canada in *Desautel* recognized that Indigenous collectives outside of Canada may be owed a duty to consult.[22]

36. It is in the specific context of Aboriginal claims yet to be proven that the Supreme Court of Canada has held that s. 35 "guarantees a process, not a particular result."[23] However, the consultation process may reveal a duty to accommodate, where there is a strong *prima facie* claim, and the consequences of the government's proposed decision may adversely affect it in a significant way. The duty to accommodate requires that the Crown take steps to avoid irreparable harm or to minimize adverse impacts on the Indigenous interests pending final resolution of the underlying claim.[24]

37. Canada therefore submits that the petitioners' submissions err in their interpretation of s. 35 of the *Constitution Act, 1982*, which is contradicted by the jurisprudence from the Supreme Court of Canada.

38. Further, there is a range of remedies available to courts when it is determined that the Crown has granted authorizations in breach of the duty to consult. These include quashing the impugned authorizations or ordering further consultations, even in cases where the rights have not yet been established. Once a s. 35 right has been established, the Crown is required to justify any measure that infringes upon or denies the right.[25]

39. Canada further submits that the petitioners also err in alleging that Canada's 2019 federal *Impact Assessment Act*[26] only applies to "Indigenous peoples of Canada". Again, this is inaccurate. The definition of "Indigenous peoples of Canada" in s. 2 of the Act expressly adopts the definition of "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982* which, as explained above, may include Indigenous peoples outside of Canada:

> Indigenous peoples of Canada has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.

40. Canada therefore submits that the petitioners have no basis for claiming that Canada's legal framework does not afford substantive protection to their asserted s. 35 rights or that it does not allow for the judicial recognition of such rights, and that Canadian law does not provide adequate or effective remedies to the petitioners.

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[22] *R. v. Desautel*, *supra*, note 15, at paras 75-76.
[23] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 SCR 386, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/16816/index.do, at para. 79.
[24] *Haida Nation v. British Columbia (Minister of Forests)*, supra, note 21, at para. 47.
[25] The general principles governing justification were established by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 SCR 1075, online: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/609/index.do. The Supreme Court of Canada set out a two-step process of analysis starting with whether the measure had a valid legislative objective. In the affirmative, the inquiry proceeds to the second stage of inquiry, which is guided by the Crown's fiduciary relationship with Indigenous peoples and the goals of reconciliation. At this stage of inquiry, the test must be adapted to the legal and factual context in which the infringement arose. While the considerations will vary with the circumstances, they might include whether there was as little infringement as possible, whether fair compensation was provided and whether the collective was consulted.
[26] IAA, *supra*, note 1.

41. Again, without commenting on the merits of any proceeding that the petitioners might initiate in Canadian courts, Canada submits that the petitioners could have pursued and could still pursue remedies before Canadian courts in a number of different ways. For example, the petitioners could initiate an action in the Supreme Court of British Columbia or the Federal Court of Canada in which they could seek on behalf of the Southeast Alaska tribes:

- a declaration of specific claimed Aboriginal rights, such as Aboriginal rights to fish, as well as Aboriginal title to a specified land area;
- a declaration that their rights have been unjustifiably infringed by specific identified actions of governments;
- a declaration that the Crown has unfulfilled legal obligations to consult with respect to claimed Aboriginal rights;
- an order to quash decisions authorizing mining projects; and/or
- damages for any harm allegedly suffered, as a result of specific identified actions of governments.

42. Alternatively, or in addition to the above, the petitioners could have brought an application for judicial review challenging a decision of either the provincial or federal government on the basis that the Crown has failed to meet its duty to consult and, if necessary, to accommodate asserted Aboriginal rights. Such applications could have been filed in the Supreme Court of British Columbia, in respect of decisions of the provincial government, or in the Federal Court or the Federal Court of Appeal (depending on the body that made the decision), in respect of decisions of the federal government. Canada continues to rely on its submissions on admissibility as well as on British Columbia's supplemental submissions to explain the judicial review processes at the federal level and in British Columbia. As explained in Canada's admissibility submissions, judicial review remains available to the petitioners to varying degrees under federal and provincial legislation.[27]

43. Canada notes that in several international communications in the United Nations system in which Canada was involved, judicial review was accepted to be an effective remedy by international treaty bodies.[28]

44. As recognized by this Commission, domestic courts are generally better placed to determine the facts and domestic law applicable to a particular case, and to formulate and enforce an appropriate remedy where necessary.[29] This is particularly so with respect to complex issues, such as those raised by the petitioners. The petitioners are asking the Commission to

[27] See Canada's Admissibility submission, Part III.
[28] See for e.g., *D.J.D.G. v. Canada*, HRC Communication No 1872/2009 (2010), at para. 7.4; *F.M. v. Canada*, HRC Communication No 1580/2007 (2008), at para. 6.3; *Dastgir v. Canada*, HRC Communication No 1578/2007 (2008), at para. 6.2; *Dupuy v. Canada*, HRC Communication No 939/2000 (2005), at para. 7.3. See also *Adu v. Canada*, HRC Communication No 654/1995 (1997), at para. 6.2; *Badu v. Canada*, HRC Communication No 603/1994 (1997), at para. 6.2; *Nartey v. Canada*, HRC Communication No 604/1994 (1997), at para. 6.2l; *H.S. v. Canada*, CAT Communication No 568/2013 (2019), at para. 4.5; *S.S. v. Canada*, CAT Communication No 715/2015 (2017), at para 6.4; *J.S. v. Canada*, CAT Communication No 695/2015 (2017), at para 7.5; *S.S. and P.S. v. Canada*, CAT Communication No 702/2015 (2017), at para 6.5; *T.A. v. Canada*, CAT Communication No 273/2005 (2006), at para 6.3; *L.Z.B. v. Canada*, CAT Communication No 304/2006 (2007), at para 6.6.
[29] See *Joseph v. Canada*, IACHR Report No. 27/93, Case No. 11.092 (1993), at para. 14.

adjudicate highly complex questions arising in the unique context of potential transboundary impacts of mining activities in Canada that are alleged to impact the petitioners' asserted Aboriginal rights under the Constitution of Canada. These questions of domestic law are best left to be first answered by domestic courts, including as it pertains to the most appropriate remedy to resolve the petitioners' unique and complex claim, and in light of the specific nature of their challenge.

45. Canada emphasizes that there is a long line of jurisprudence in Canada that has considered the protection of the s. 35 rights of Indigenous peoples and which has taken into account the specificities and historical context in which such claims arise. Canada's courts have significant knowledge and understanding of that caselaw, which they have applied in Canada's unique constitutional and legal framework. Canada's courts also routinely review decisions from government authorities taken pursuant to Canada's legislative and regulatory regimes. These include complex applications for judicial review filed by Indigenous peoples challenging government decisions made following environmental assessments.[30]

46. To illustrate the ability of Indigenous groups outside of Canada to seek domestic remedies, Canada notes that it is currently involved in a transboundary Indigenous rights claim that has been asserted by the Lummi Nation, a U.S. Tribe located in Washington State. The Lummi Nation have asserted their claim in opposition to a project to build a marine container terminal in British Columbia to increase capacity for marine containers.

47. The Lummi Nation were provided with opportunities to present their views on the potential environmental effects of the project during the assessment that was conducted under the *Canadian Environmental Assessment Act, 2012*.[31] Their views were taken into account in the report of the review panel that conducted the assessment.[32] The report informed the decision by the Minister of the Environment that the project is likely to cause significant adverse environmental effects, and the decision of the Governor in Council[33] that these effects are justified in the circumstances, such that the project can go forward. The Governor in Council considered the interests and concerns of Indigenous Nations in making that decision and was satisfied that the Crown's consultation process was consistent with the honour of the Crown and that potential impacts to such interests, including established and asserted Aboriginal and treaty rights identified in the consultation process, had been

[30] See for e.g. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, online: https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/343511/index.do in which the Federal Court of Appeal found that while the Government of Canada acted in good faith and selected an appropriate consultation framework, at the last stage of the consultation process prior to the decision of the Governor in Council (Canada's highest decision-making authority of the federal government), Canada's duty to consult was not adequately discharged. This was so, notably on the basis that Canada failed to engage, to dialogue meaningfully, and to grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The Federal Court of Appeal quashed the Governor in Council's Order in Council and remitted the matter back to the Governor in Council for action to address the flaws identified by the Court and for redetermination.

[31] S.C. 2012, c. 19, online: https://laws-lois.justice.gc.ca/eng/acts/C-15.21/20170622/P1TT3xt3.html (archived).

[32] See Review Panel (Impact Assessment Agency of Canada), "Federal Review Panel Report for the Roberts Bank Terminal 2 Project", 27 March 2020, online: https://iaac-aeic.gc.ca/050/documents/p80054/134506E.pdf, at p. 438.

[32] See *ibid.* at 438-446.

[33] In Canada's legal system, the Governor in Council is the Governor General of Canada, acting on the advice of the King's Privy Council for Canada. See *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 2(1).

appropriately accommodated.[34] The Lummi Nation have filed an application for judicial review of the Governor in Council's decision before the Federal Court of Canada.[35]

48. In their application for judicial review, the Lummi Nation is requesting that the Federal Court issues (1) an order quashing the Governor in Council's decision and remitting the matter to the Governor in Council for redetermination in accordance with the Court's reasons, (2) a declaration that Canada has a duty to consult owed to Lummi with respect to the Decision, (3) a declaration that Lummi was and remains entitled to be consulted at the deep end of the consultation spectrum with respect to the potential adverse effects of the project on Lummi's asserted Aboriginal rights, (4) a declaration that Canada failed to discharge its duty to consult and accommodate Lummi with regard to the potential adverse impacts of the Decision on Lummi's s. 35 rights, (5) an order that Canada meaningfully consult Lummi prior to any redetermination of the Decision and on any subsequent Crown authorizations, (6) an order for costs of their application, and (7) such further and other relief as the Court may deem appropriate and just.

49. Given that the matter is currently before domestic courts, Canada will not comment further, but reiterates and emphasizes that the petitioners could have sought domestic remedies, as did the Lummi Nation, to challenge the decisions of government authorities related to the mining projects in question.

50. Canada notes that in the petitioners' first petition filed in 2018, which was found inadmissible by this Commission, the petitioners had asked that the Commission exempt them from the requirement to exhaust domestic remedies "[i]n light of the financial burden Petitioners would face in having to challenge the B.C Mines in Canadian courts".[36] Canada notes that the petitioners opted not to make this argument again when they filed this petition in 2020, focusing instead on how Canada's legal framework does not protect their rights, which, as reviewed above, is an erroneous assessment of Canadian law.

51. While there is no doubt that bringing claims before domestic courts requires building a case and gathering evidence, which will necessarily imply costs, this is required in any jurisdiction that abides by the rule of law and is essential to ensure the robustness, the fairness, and the integrity of the judicial system.

52. Canada regrets that the petitioners have opted to bypass Canada's domestic avenues by seizing the Commission with complex questions of fact and law that would be better examined first before Canadian courts. International treaty bodies have consistently expressed the view that a complainant cannot refuse to avail themselves of a domestic remedy because of the costs involved and that financial considerations do not absolve a complainant from exhausting domestic remedies.[37]

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[34] *Order Deciding that the Environmental Effects of the Proposed Roberts Bank Terminal 2 Project are Justified*, P.C. 2023-0330, online: https://orders-in-council.canada.ca/attachment.php?attach=43502&lang=en.
[35] The Lummi Nation's Amended Notice of Application for Judicial Review is attached as Annex 4.
[36] Petitioners' 2018 Petition, at para. 251.
[37] See *P.S. v. Denmark*, HRC Communication No 397/1990 (1992), at para. 5.4.

53. Yet, instead of challenging the decisions made with respect to the cited mining projects, the petitioners have contracted their own experts and are asking the Commission to side with their experts' findings over those made as part of Canada's environmental assessment processes for each of the projects. Canada submits that this is wholly inappropriate, particularly when Canada has not had the opportunity to challenge this evidence before domestic courts and engage with the findings and underlying methodologies, including by cross-examining the petitioners' experts.

54. This illustrates a critical flaw with allowing the petitioners to circumvent domestic processes. It will allow the introduction before the Commission of untested scientific evidence that has not benefitted from a domestic court's impartial and rigorous scrutiny. This puts the Commission in the position of having to arbitrate between Canada's and the petitioners' scientific evidence without the benefit of cross-examination or other examination of the evidence.

55. Canada submits that aside from relying on an erroneous interpretation of Canada's legal framework, the petitioners have not demonstrated that proceeding before Canada's domestic courts would have no reasonable prospect of success.[38]

56. Canada further submits that allowing this petition to proceed would undermine the integrity of the Commission's petition process. It would also set a precedent that claimants can directly bring their claims to the Commission while domestic processes are available to them. This goes against well-established principles under international human rights law on the requirement to exhaust domestic remedies, which, as this Commission observed, "is intended to allow domestic authorities to hear the alleged violation of a protected right and, if applicable, settle the issue before it is brought before an international body."[39]

ii) Scope of the Petition – Allegations that are inadmissible ratione materiae

a. Allegations grounded in the American Convention are inadmissible *ratione materiae*

57. The petitioners submit that the *American Convention on Human Rights* (*American Convention*) bears on the interpretation of the *American Declaration*. The petitioners also refer to cases of the Inter-American Court of Human Rights that have interpreted provisions of the *American Convention*.

58. The Commission's mandate, set out in Article 1.1 of the *Statute of the Inter-American Commission on Human Rights* ("Statute"), provides that the Commission was "created to promote the observance and defense of human rights". Article 1.2 stipulates:

> For the purposes of the present Statute, human rights are understood to be:

[38] Inter-American Commission on Human Rights, Report on Admissibility No. 43/10, Petition 242-05, Mossville Environmental Action Now (United States), (17 March 2010), at para. 32.
[39] *Rosa Ángela Martino and María Cristina González v. Argentina*, IACHR Report No. 82/17, Case No. 1067-07 (2017), at para. 12.

a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;

b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

59. Canada is not a party to the *American Convention*, and Article 1.2(b) therefore applies. Further, Article 20(b) of the Statute describes the Commission's mandate for individual communications relating to Canada:

> In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:
>
> b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights;

60. The Commission's jurisdiction in examining individual communications relating to Canada is therefore limited to the rights set forth in the *American Declaration*,[40] the *American Declaration* being the "controlling instrument."[41]

61. Canada registers its fundamental objection to any attempt to broaden the scope of the provisions of the *American Declaration* based on obligations that may exist in the *American Convention*. The *American Convention* is a legally binding human rights treaty to which Canada is not a party. To interpret the *American Declaration* against the scope of the provisions in the *American Convention* would be to indirectly impose on Canada obligations it has not agreed to be bound by legally. Canada submits that the petitioners' allegations grounded in the *American Convention* are beyond the jurisdiction of the Commission and are therefore inadmissible *ratione materiae*.

b. Allegations that the petitioners' right to a healthy environment was violated are inadmissible ratione materiae

62. As part of their merits submissions, the petitioners assert a new violation by Canada of their right to a healthy environment. They generally ground their assertion in the Inter-American

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[40] As the Inter-American Court of Human Rights observed in its Advisory Opinion OC-10/89 of July 14, 1989, regarding the *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, at para. 45:

> "For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization."

[41] *Haitian Interdiction v. United States*, IACHR Report No. 51/96, Case 10.675, (1997), at para. 149.

Court's Advisory Opinion OC-23/17,[42] which they assert recognizes that the right to a healthy environment is protected in the *American Declaration*; a United Nations General Assembly Resolution that recognized the human right to a clean, healthy, and sustainable environment;[43] and the *Canadian Environmental Protection Act, 1999*, which recognizes a right to a clean, healthy, and sustainable environment.[44]

63. Canada submits that the petitioners' allegations that the right to a healthy environment was violated are inadmissible *ratione materiae*.

64. Canada first notes that the Advisory Opinion OC-23/17 interprets the scope of states' obligations under the *American Convention*, a treaty to which Canada is not a party. Canada further notes that the Advisory Opinion did not recognize specifically that the right to a healthy environment is protected under the *American Declaration* nor did the Opinion elaborate on the rights in the *American Declaration* that could be engaged by the recognition of a right to a healthy environment.

65. Rather, the Inter-American Court found the right to a healthy environment to be implicit in the economic, social and cultural rights protected by Article 26 of the *American Convention*.[45] The petitioners cannot rely on a brief mention of the *American Declaration* in the Court's Advisory Opinion to assert a new right that is neither clearly stated in the *American Declaration* nor clearly defined in international human rights law, especially as pertains to any potential extraterritorial scope this right might have.

66. Canada similarly submits that the petitioners' allegations grounded on a United Nations General Assembly resolution are inadmissible *ratione materiae*.

67. As mentioned by the petitioners, Canada fully agrees and reiterates that environmental degradation can negatively impact human rights and that states have human rights obligations related to the environment. Canada is supportive of the international momentum to highlight the connection between a healthy environment and the enjoyment of human rights and has accordingly joined many UN member states in supporting the General Assembly's Resolution on the right to a clean, healthy and sustainable environment.

68. That said, Canada recalls that the United Nations General Assembly's resolution is non-legally binding on states and falls outside the scope of the Commission's mandate. While the resolution is a positive step forward in recognizing a right to a clean, healthy and sustainable environment in international law, Canada submits that this right is still very much

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[42] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (2017), Advisory Opinion OC-23/17, Inter-Am Ct HR (Ser A) No. 23 [Advisory Opinion on the Environment and Human Rights].

[43] *The human right to a clean, healthy and sustainable environment*, Resolution adopted by the UN General Assembly on 28 July 2022, A/RES/76/300, online: https://documents.un.org/doc/undoc/gen/n22/442/77/pdf/n2244277.pdf.

[44] S.C. 1999, c. 33, online: https://lois-laws.justice.gc.ca/eng/acts/C-15.31/, see preamble, and ss. 2(1)(a.2), and 5.1 [CEPA].

[45] See Advisory Opinion on the Environment and Human Rights, at para. 57.

under development in international human rights law and there is no common understanding as to the scope and content of the right.

69. This was noted by Canada in its explanatory statement in support of its vote on the resolution. Canada stated "that there is currently no common or internationally agreed upon understanding of the content and scope of a right to a clean, healthy and sustainable environment." Canada further stated that it "looks forward to working with others and exchanging information to support due consideration of what such a right may comprise, and what it may entail within the international human rights framework."[46] Several other member states made similar statements.[47]

70. As pertains to allegations grounded in the right to a healthy environment recognized in the *Canada Environmental Protection Act, 1999,* Canada submits that they are also inadmissible *ratione materiae* and cannot be considered on the merits by this Commission. The recognition of a right to a healthy environment in the Act is limited to the administration of the Act, and dependent on the implementation framework currently in development under that Act. Any claims the petitioners might have with respect to Canada's compliance with the *Canada Environmental Protection Act, 1999* should be brought before Canadian courts.[48]

71. Canada submits that the Commission should dismiss the petitioners' allegations on the right to a healthy environment as inadmissible *ratione materiae*. The petitioners have not only failed to specify which Articles of the *American Declaration* Canada has allegedly violated, but they have also not substantiated their allegations in that regard.

iii) New information on mining projects for which domestic processes are ongoing

72. In their merits submissions, the petitioners provide information on what they term "updates" on mines proposed since filing their petition in 2020. They refer specifically to the Eskay Creek Revitalization project and the New Polaris Gold Mine project, which are currently being considered as potential mining projects that could be developed in the future.

73. The petitioners make broad and speculative assertions with respect to these projects, the assessment of which are at the early stages. For instance, with respect to the Eskay Creek Revitalization project, the petitioners argue that "it is improbable that the Canada or B.C. will adequately consider potential transboundary impacts or fully understand the potential to

[46] See Canada's Explanation of Vote in support of the Resolution on *The human right to a clean, healthy and sustainable environment*, attached as Annex 5, also reported online: https://press.un.org/en/2022/ga12437.doc.htm.
[47] See, for e.g. statements delivered by Japan, the United Kingdom, and the United States, online: https://press.un.org/en/2022/ga12437.doc.htm.
[48] The preamble of the Act provides that "the Government of Canada recognizes that every individual in Canada has a right to a healthy environment as provided under this Act", while s. 2(1)(a.2) of the Act imposes a duty on the Government of Canada to "protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits". The Act specifies in s. 5.1(1) that for the purpose of s. 2(1)(a.2), "the Ministers shall, within two years after the day on which this section comes into force, develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act."

harms to Petitioners".[49] The petitioners allege this all the while acknowledging that "the B.C. EAO plans to engage with the petitioners and the Alaska [Tribal] Transboundary Advisory Committee with respect to Eskay Creek."[50] The Alaska Tribal Transboundary Advisory Committee was established on April 14, 2023 by the British Columbia Environmental Assessment Office (B.C. EAO) to consider potential transboundary effects of the project. The Committee consists of the petitioners (SEITC) and the seven member tribes potentially impacted by the project.[51]

74. Canada submits that there has been regular engagement between the B.C. EAO and the petitioners since 2021 on the potential transboundary impacts of the Eskay Creek Revitalization project in Alaska.[52] As set out in a July 3, 2024 letter to the petitioners, the B.C. EAO is formally consulting the petitioners on the potential impacts of the Eskay Creek Revitalization project on the basis of the petitioners' asserted s. 35 Aboriginal rights in British Columbia.[53]

75. The petitioners further assert that "even if B.C. decides to assess transboundary impacts of the B.C. Mines, it is still likely that its environmental impact studies will not be able to fully predict the effects of mining on water quality".[54] They here rely on a study that does not concern any of the mining projects at issue, but that instead examines 25 mines that were assessed under the United States' legal framework for environmental assessments.

76. Canada submits that the petitioners' allegations regarding the Eskay Creek Revitalization project and the New Polaris Gold Mine project, as well as their allegations regarding "active mine exploration projects in the transboundary watersheds",[55] are manifestly out of order. They are inadmissible for two reasons. First, because they are highly speculative and fail to state facts that tend to establish a violation of rights, pursuant to Article 34(a) of the Commission's *Rules of Procedure*. Second, because the petitioners have not exhausted any domestic remedies with respect to these projects—which have yet to receive authorization to proceed, if such authorization is ever granted—contrary to Article 31(1) of the *Rules of Procedure*. As reviewed above, and in Canada's submissions at the admissibility stage, the petitioners may pursue domestic legal avenues to challenge decisions by governmental authorities in relation to these projects.

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[49] Petitioners' Merits Submission, at p. 22.
[50] *Ibid.*
[51] These are the Craig Tribal Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Klawock Association, Metlakatla Indian Community, Organized Village of Kasaan, and Organized Village of Saxman. See British Columbia Environmental Assessment Office "Alaska Tribal Transboundary Advisory Committee Terms of Reference for the Eskay Creek Revitalization Project", 14 April, 2023, online: https://projects.eao.gov.bc.ca/api/public/document/6439b9719b42b60022224429/download/Eskay%20Creek%20-%20ATTAC%20Terms%20of%20Reference%20-%2020230414.pdf.
[52] It should be noted that the B.C. EAO is carrying out the impact assessment of the Eskay Creek Revitalization Project on behalf of Canada, as a substituted process, in accordance with the Impact Assessment Cooperation Agreement Between Canada and British Columbia. As part of its assessment process, the B.C. EAO leads engagement and consultation activities in relation to the Project on behalf of itself and Canada.
[53] See July 3, 2024 letter from Elenore Arend, *supra*, note 18.
[54] Petitioners' Merits Submission, at p. 22.
[55] *Ibid*., at p. 12.

Eskay Creek Revitalization project

77. With respect to the Eskay Creek Revitalization project, as of August 21, 2024, the project is in the Application and Review phase of the environmental assessment process.[56] During that phase, the B.C. EAO will hold consultations, including with Indigenous groups in British Columbia, the public, and, as the petitioners have acknowledged, themselves and the Alaska Tribal Transboundary Advisory Committee.

78. As part of the earlier engagement during the Application Development and Review phase, the proponent was required to seek input from the Alaska Tribal Transboundary Advisory Committee, incorporate their feedback into the project design and application, summarize their key concerns, describe specific mitigation measures, and provide reasons why any concerns were not addressed. The proponent is also required to engage with the Alaska Tribal Transboundary Advisory Committee during all future phases of the environmental assessment.[57]

79. Following the Application Development and Review phase, the B.C. EAO may require the proponent to revise its application based on input from participants in the review process. The application will remain subject to the Effects Assessment, Recommendation, and Decision phases of the process, as described in British Columbia's Admissibility submissions. During all of these phases, the B.C. EAO will continue to consult with and consider input from the petitioners and from the Alaska Tribal Transboundary Advisory Committee. British Columbia's Assessment Report at the end of the assessment process will also be relied upon by Canada to inform federal decision-making on the Project under the *Impact Assessment Act*.

New Polaris Gold Mine project

80. The New Polaris Gold Mine project is at an even earlier stage in the provincial process in British Columbia.[58] On September 26, 2024, British Columbia's Chief Executive Assessment Officer found that the project was ready to proceed to the beginning of the environmental assessment process (Readiness Decision).[59] Given that the B.C. EAO anticipates that there could be transboundary effects if the project were to proceed, the project proponent will be required to assess those effects as part of its application.

81. In this regard, prior to the Readiness Decision being made, the B.C. EAO had already notified Alaska tribes that they may be affected by the proposed project, and that they will have an opportunity to provide their views and comments as part of the eventual Process

[56] The fourth of eight phases is described further at para. 17(iv) of British Columbia's Admissibility submissions.
[57] See Schedule C – Hybrid Application Information Requirements, s. 15.0 (Engagement with SEITC & U.S. Tribes through the Alaksa Tribal Transboundary Advisory Committee (ATTAC)), online: https://www.projects.eao.gov.bc.ca/api/public/document/643f21619dbd4100223264b4/download/Eskay%20Creek%20-%20Hybrid%20AIR%20-%2020230418.pdf.
[58] The eight phases are described further at para. 17(i) of British Columbia's Admissibility submissions. Until the Readiness Decision on September 26, 2024, the New Polaris Gold Mine project was at the first phase of the process.
[59] *Notice of a Decision under Section 18(1) of the Environmental Assessment Act*, S.B.C. 2018, c. 51, September 26, 2024, attached as Annex 6.

Planning and Application Development and Review phases of the project.[60] The B.C. EAO also alerted representatives from the United States and Alaska governments that the New Polaris Gold Mine project entered the Early Engagement phase under the British Columbia *Environmental Assessment Act* on March 27, 2023. The representatives in question were from the Alaska Department of Environmental Conservation, the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, the U.S. NOAA - National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the U.S. Coast Guard, and the U.S. Environmental Protection Agency.[61]

82. Member tribes were notified of the Readiness Decision on the same day it was made.[62] As described in the Readiness Decision Report for the New Polaris Gold Mine project, the Readiness Decision sought to achieve, among other goals, the objectives of ensuring that all participants in the environmental assessment process will have sufficient information to determine what requires assessment and identifying key issues to be resolved during the environmental assessment.[63] The Readiness Decision does not evaluate potential effects of the project. Potential project effects and proposed mitigations are evaluated at a later stage of environmental assessment. As further noted in the Readiness Decision Report, input from the Alaska tribes was solicited and considered in reaching the Readiness Decision. If the project is to proceed, the issues raised by the Alaska tribes during Early Engagement will be

[60] See letter from David Grace, A/Executive Project Director, British Columbia Environmental Office to Clarence Laiti, President, Douglas Indian Association, March 29, 2023, attached as Annex 7; letter from David Grace, A/Executive Project Director, British Columbia Environmental Office to Richard Peterson, President, Central Council of the Tlingit and Haida Indian Tribes of Alaska, March 29, 2023, attached as Annex 8; letter from David Grace, A/Executive Project Director, British Columbia Environmental Office to Frank Wright Jr., President Hoonah Indian Association, March 29, 2023, attached as Annex 9; letter from David Grace, A/Executive Project Director, British Columbia Environmental Office to Kevin Frank Sr., President, Angoon Community Association, 4 April 2023, attached as Annex 10; and letter from David Grace, A/Executive Project Director, British Columbia Environmental Office to Joel Jackson, President, Organized Village of Kake, April 4, 2023, attached as Annex 11.

[61] See email from Chelsea Garside, Project Assessment Officer, British Columbia Environmental Assessment Office, to Caitlin Roesler and Lisa Olson, U.S. Environmental Protection Agency, April 20 2023, attached as Annex 12; email from Chelsea Garside, Project Assessment Officer, British Columbia Environmental Assessment Office to Ben White, Alaska Department of Natural Resources, April 20, 2023, attached as Annex 13; email from Chelsea Garside, Project Assessment Officer, British Columbia Environmental Assessment Office to Molly Zaleski, U.S. NOAA - National Marine Fisheries Service, May 2, 2023, attached as Annex 14; and email from Chelsea Garside, Project Assessment Officer, British Columbia Environmental Assessment Office to Cooper Douglass and Sarah Markegard, U.S. Fish and Wildlife Service, 2 May 2023, attached as Annex 15. Alaska state officials were also notified regarding the initiation of Early Engagement for the New Polaris Gold Mine project through monthly bilateral meetings that are held with officials from the province of British Columbia.

[62] See letter from Katherine St. James, Project Assessment Director, to Clarence Laiti, President, Douglas Indian Association, September 26, 2024, attached as Annex 16; letter from Katherine St. James, Project Assessment Director, to Richard Peterson, President, Central Council of the Tlingit and Haida Indian Tribes of Alaska, September 26, 2024, attached as Annex 17; letter from Katherine St. James, Project Assessment Director, to Kevin Frank Sr., President, Angoon Community Association, September 26, 2024, attached as Annex 18; letter from Katherine St. James, Project Assessment Director, to Frank Wright Jr., President Hoonah Indian Association, September 26, 2024, attached as Annex 19; letter from Katherine St. James, Project Assessment Director, to Joel Jackson, President, Organized Village of Kake, September 26, 2024, attached as Annex 20.

[63] British Columbia Environmental Assessment Office, "Readiness Decision Report – New Polaris Gold Mine", September 26, 2024, attached as Annex 21 at p. 4.

addressed further during the environmental process and the Alaska tribes will continue to have opportunities to participate throughout the environmental assessment process.[64]

Schaft Creek project

83. In addition, Canada continues to submit that it is manifestly out of order to include the Schaft Creek mining project as part of this petition to this Commission in circumstances where decisions regarding approval of the project have not yet been made by federal and provincial authorities. Canada recalls that the project would be subject to approval under provincial and federal environmental assessment legislation prior to proceeding to construction. To date, neither British Columbia nor Canada has been given any indication by the project proponent when the process could be initiated.[65] As with the Eskay Creek Revitalization and the New Polaris Gold Mine mining projects, the inclusion of the Schaft Creek project in the petition amounts to a pre-emptive challenge by the petitioners to the possibility of the state making any future decisions regarding this project.

B. Canada has not violated the petitioners' rights under the American Declaration

84. Canada continues to submit that the petition is entirely without merit. The petitioners are unable to establish that the approval of the mining projects violates their human rights under the *American Declaration*. Canada reiterates that the petitioners' allegations that the approval of the cited mining projects violates their human rights are fundamentally premised on a claim that the mining projects involve risks of significant environmental harm. As Canada continues to argue, this claim is contradicted by the findings of environmental assessments that have been completed by federal and provincial authorities for five of the six mining projects originally cited in the petition.

85. Canada continues to be of the view that the petition does not raise questions of interpretation of the scope of Indigenous peoples' human rights under the *American Declaration*. Rather, this petition is solely aimed at having the Commission review the outcomes of the environmental assessments for mining projects that the petitioners disapprove of, and at having this Commission side with the findings of the experts commissioned by the petitioners over those made pursuant to Canada's federal and provincial environmental assessment processes. Canada continues to submit that it is wholly inappropriate to use this Commission as an appeal body regarding the conclusions of environmental assessment processes that have been carried out in Canada by authorities that are specialized in conducting environmental assessments and in determining the existence and relative significance of environmental risks.

86. In the sections that follow, Canada will review how its environmental assessments are carried out in the light of Canada's commitment to advancing Indigenous peoples' rights and how both the federal and British Columbia environmental impact assessment frameworks establish robust processes for assessing the potential impacts that proposed projects may have on the environment. Canada will argue that the threats alleged by the petitioners were

[64] *Ibid.*, at pp. 10-11.
[65] See Canada's Admissibility Submission, at para. 50.

assessed for each of the mining projects and that Canada complied with any consultation obligations.

i) Canada is committed to advancing Indigenous peoples' rights

87. Before reviewing the findings for the five mining projects for which environmental assessments were completed, Canada emphasizes that it is unwaveringly committed to advancing the rights of Indigenous peoples. Canada fully recognizes that the *United Nations Declaration on the Rights of Indigenous Peoples* (*UN Declaration*) establishes an international framework of minimum standards for the survival, dignity, and well-being of Indigenous peoples around the world and Canada is committed to implementing the *UN Declaration*. In 2021, the Parliament of Canada adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act*[66] (*UN Declaration Act*), which provides a framework for the Government of Canada to implement the *UN Declaration*, in consultation and cooperation with Indigenous peoples, and based on lasting reconciliation, healing and cooperative relations.

88. The *UN Declaration Act* affirms the *UN Declaration* as a source for the interpretation of Canadian law, and requires the Government of Canada to work with Indigenous peoples to (1) take all measures necessary to ensure the laws of Canada are consistent with the *UN Declaration*; (2) prepare and implement an action plan to achieve the objectives of the *UN Declaration*; and (3) develop annual reports on progress and submit them to Parliament.

89. On June 21, 2023, the Government of Canada released the *UN Declaration Act* Action Plan, which was developed in consultation and cooperation with Indigenous peoples across Canada.[67] This Action Plan provides a roadmap of concrete actions for Canada to implement, in partnership with Indigenous peoples, the principles and rights set out in the *UN Declaration*, and to further advance reconciliation with Indigenous peoples in a tangible way. The Action Plan includes 181 important measures that reflect priorities and proposals identified by Indigenous peoples, contributes to achieving the objectives of the UN Declaration, and aligns with specific topics covered by the *UN Declaration Act*.

90. As part of the Action Plan measures, Canada wishes to highlight a specific measure that commits to undertake exploratory discussions with Indigenous right-holders under s. 35 of the *Constitution Act, 1982* to address the impact of colonialism on Indigenous groups affected by international borders.[68]

91. The adoption of the *UN Declaration Act* and release of the Action Plan demonstrates Canada's commitment to advancing Indigenous peoples' rights. During his visit to Canada in 2023, the Special Rapporteur on the rights of Indigenous Peoples, Francisco Cali Tzay,

[66] S.C. 2021, c.14, online: https://laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html.
[67] Department of Justice, "United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan 2023-2025", 21 June 2023, online: https://www.justice.gc.ca/eng/declaration/ap-pa/index.html.
[68] *Ibid.*, Action Plan Measure Nº 53.

recognized that "Canada has taken many important steps to advance Indigenous Peoples' rights."[69]

92. Likewise, British Columbia enacted its own *Declaration on the Rights of Indigenous Peoples Act* in 2019, thereby committing to take "all measures necessary" to ensure its laws are consistent with the *UN Declaration*.[70] It has also released the Declaration on the Rights of Indigenous Peoples Act Action Plan, 2022-2027, which identifies priority actions and long terms goals for implementing the UN Declaration.[71]

93. British Columbia's *Environmental Assessment Act* also provides that one of the purposes of the B.C. EAO is to "support reconciliation with Indigenous peoples in British Columbia", including by collaborating with Indigenous nations and supporting the implementation of the UN Declaration.[72] Similarly, the federal *Impact Assessment Act* expressly states the Government of Canada's commitment to: "implementing the United Nations Declaration on the Rights of Indigenous Peoples"; "ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by s. 35 of the *Constitution Act, 1982*" and the importance of implementing an impact assessment process that "fosters reconciliation and working in partnership with the Indigenous peoples of Canada" in administering the Act.[73]

94. Canada wishes to clarify that it does not disagree with or wish to challenge the petitioners' position that Indigenous peoples have the right to enjoy the benefits of their own culture; the right to their own means of subsistence; the right to the preservation of health; and the right to use and enjoy the lands they have traditionally used and occupied. Canada fully agrees that Indigenous peoples have these rights. Canada also fully recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent. These rights, which are all recognized by the *UN Declaration*, are essential to maintain and strengthen Indigenous peoples' distinct political, legal, economic, social and cultural institutions; they constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples.

95. What Canada disagrees with are the allegations that it has violated these rights, as submitted by the petitioners. As Canada continues to submit, the potential risk raised by each of the five mining projects cited in the petition was assessed through environmental assessments carried out for each project. For each of the projects, it was determined, by the relevant

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[69] *Visit to Canada – Report of the Special Rapporteur on the rights of Indigenous* Peoples, adopted by the UN General Assembly on 24 July 2023, A/HRC/54/31/Add.2, online: https://documents.un.org/doc/undoc/gen/g23/139/12/pdf/g2313912.pdf, at para. 86.
[70] British Columbia *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044, s. 3.
[71] Government of British Columbia, "Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027", 30 March 2022, online: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf.
[72] British Columbia *Environmental Assessment Act*, SBC 2018, c. 51, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18051 [BC EAA], s. 2(2)(b)(ii).
[73] IAA, preamble.

authorities, that the project was not likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures. In the absence of establishing that the cited mining projects are likely to cause significant environmental harm, Canada cannot be found to have violated the petitioners' rights through the approval of the projects.

ii) Environmental impact assessments are effective tools to assess potential impacts on the environment

96. Canada continues to rely on its admissibility submissions and on British Columbia's supplemental submissions to describe the framework for regulating environmental assessment processes at the federal level and the provincial level in British Columbia.[74] Those submissions highlight the rigorous processes prescribed by Canada's domestic statutes, regulations, policies and guidance and for assessing potential environmental impacts of proposed mining projects by proponents.

97. Canada will not repeat the information mentioned in its admissibility submissions, but recalls that both the federal and the British Columbia environmental assessment frameworks establish robust processes for assessing the potential impacts that proposed projects may have on the environment, including potential transboundary effects, and for assisting decision-makers to make informed decisions with respect to those projects.

98. Both the federal and the British Columbia environmental assessment processes include several phases that a project is required to undergo before it may receive authorizations to proceed. These phases are aimed at fully assessing the possible impacts a potential project may have, at identifying the best ways to avoid or reduce a project's possible negative impacts, at informing decision-makers about project impacts, and ultimately at protecting people and the environment.

99. As part of these processes, project proponents are required to submit detailed information, including project plans, studies, and predictions about potential impacts. They are required to consider cumulative effects, transboundary effects, and to provide information on how potential adverse impacts can be managed though mitigation measures, as relevant.

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[74] See Canada's Admissibility Submission, at paras. 16-35. It should be noted that in June 2024, Canada's Parliament amended certain provisions of the *Impact Assessment Act.* With respect to transboundary international effects, described at para. 33 of Canada's Admissibility Submission, the amended section 2 definition of "effects within federal jurisdiction" now includes "a non-negligible adverse change … to the marine environment that is caused by pollution and that would occur outside Canada" or "a non-negligible adverse change — that is caused by pollution — *to boundary waters or international waters*, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters". [Previously, transboundary effects were captured in this definition as "a change to the environment that would occur … in a province other than the one where the project is being carried out," or "outside Canada".] This includes waters of rivers that flow across the international boundary between the United States and Canada. The amended definition of "adverse effects within federal jurisdiction" retains effects on fish and fish habitat. With respect to decision-making, described at para. 26 of Canada's Admissibility Submission, decision-makers must now determine whether a project's adverse federal effects are likely to be to some extent significant. Only likely significant adverse effects, if any, are subject to the public interest decision. See also British Columbia's submissions, at paras. 6-23.

100. A project that is approved following an environmental assessment can include legally binding conditions that the proponent must adhere to when carrying out the project. These conditions are enforceable and are monitored by responsible authorities following the approval of the project. Compliance with the project's conditions is monitored for the life of the project, and authorities are empowered to take a number of actions to ensure compliance, including issuing orders to the project proponent in case of non-compliance.

101. Further, the decisions made as a result of the environmental assessment processes only provide that the mining projects may proceed to the permitting stage. Construction and operation of a mine can only be authorized through the permitting process, which entails additional evaluations of the project proposals based on detailed project designs and establishes mitigation, monitoring and compliance requirements for any mines before they can be constructed.

102. It should be noted that both the federal and the British Columbia environmental assessment frameworks include specific provisions that require consultations with Indigenous peoples and ensure that impact assessments are conducted in a manner that respects the rights of Indigenous peoples, advances inter-jurisdictional cooperation, where applicable, and integrates Indigenous knowledge into the decision-making process.[75]

103. Canada wholly rejects the petitioners' assertions that Canada's federal and British Columbia's regulatory frameworks are insufficient to protect their rights,[76] and that Canada and British Columbia cannot be counted on to prevent any potential significant harm from British Columbia mines.[77] Not only are the petitioners attempting to discredit Canada's assessment processes by relying on their own experts, and by raising unrelated past incidents, but they also appear to challenge environmental assessment as an adequate means to assess any potential adverse impact raised by a project. In that regard, they submit that:

> "[C]onducting an environmental assessment is no safety net and unlikely to predict the effects of mining on a complex ecosystem for hundreds of years into the future."[78]

104. Yet, the petitioners' statement contradicts the recognition in international law that environmental assessments constitute a sound assessment tool in relation to activities that may cause significant environmental damage. The International Court of Justice has recognized in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case that:

> it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[79]

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[75] See for e.g., IAA, ss. 12, 22(1)(c), 22(1)(g), 22(1)(l), 22(1)(q), 28(3.1); BC EAA, ss. 2(2)(b), 7, 14, 16(1), 19(1), 21(3), 25(1), 27(5), 28(3), 29(3), 29(5), 31(5), 32(7), 32(8), 34(3), 35(2), 41(4), and 41(6).
[76] Petitioners' Merits Submission, at p. 1.
[77] *Ibid*., at p. 14.
[78] *Ibid.*, at pp. 10-11.
[79] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep, p. 14, at para. 204 [Pulp Mills on the River Uruguay Case].

105. Referring to this passage, the International Court of Justice further recognized in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* that this holding generally applies to the transboundary context:

> Although the Court's statement in the Pulp Mills case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.[80]

106. Further, the petitioners' argument that environmental assessments are unlikely to predict the effects of mining on a complex ecosystem fails to take into account that Canada's and British Columbia's environmental assessment processes enable the assessment of potential effects in complex ecosystems, but also that the obligation to prevent environmental damage is an obligation of means, not results, to be fulfilled in keeping with the standard of due diligence, as recognized by the International Court of Justice in the two above-mentioned cases.[81]

107. Canada notes that the Inter-American Court of Human Rights, in its Advisory Opinion OC-17-23, has considered in some detail the scope of states' obligations with respect to projects that may raise environmental damage, including transboundary effect. As noted in Canada's admissibility submissions, this Advisory Opinion interprets the scope of states' obligations under the *American Convention* and so is not binding on this matter before the Commission, given that Canada is not a party to the *Convention*. That being said, Canada submits that it would nonetheless be in compliance with the Inter-American Court's findings in the Opinion, including on states' obligation of prevention; the precautionary principle; the obligation of cooperation; and the procedural obligations in the context of potential environmental damage, as briefly explained in the following.

Obligation of prevention

108. On the obligation of prevention, the Court recalls that the obligation of prevention established in environmental law is an obligation of means and not result.[82] The Court explains that, as part of their general obligation to take appropriate measures to prevent human rights violations as a result of damage to the environment, states are required to (1) regulate activities that could cause significant harm to the environment; (2) supervise and monitor activities under their jurisdiction that could produce significant environmental damage; (3) require an environmental impact assessment where there is risk of significant environmental harm; (4) establish contingency plans; and (5) mitigate environmental damages when it occurs.[83]

109. Canada submits that it satisfies all these requirements. As explained in Canada's admissibility submissions, all mining in British Columbia is subject to stringent regulation,

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[80] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, [2015] ICJ Rep, p. 665, at para. 104 [Certain Activities Carried Out by Nicaragua in the Border Area Case].
[81] Pulp Mills on the River Uruguay Case, at para. 205; Certain Activities Carried Out by Nicaragua in the Border Area Case, at paras. 104, 153.
[82] Advisory Opinion on the Environment and Human Rights, at para. 143.
[83] *Ibid*, at paras. 146-174.

and is subject to robust compliance oversight. As further explained, significant legislative, regulatory, and structural changes were made in recent years to strengthen industry safety, minimize environmental risk, and strengthen oversight mechanisms. These changes have been largely in response to lessons learned from the tailings dam failure at the Mount Polley mine in 2014 and the Auditor General of British Columbia's recommendations made in 2016. These changes have established greater safety requirements, expanded investigative and enforcement capacities, and formalized ongoing audits of the system's regulatory effectiveness. Canada refers this Commission to its admissibility submissions which provide additional information on the regulatory regime for mining activities in British Columbia, and on the oversight and enforcement measures embedded in the regime.[84]

110. As pertains to the Inter-American Court's findings on environmental impact assessments, Canada submits that its environmental impact assessment processes at the federal level and in British Columbia fully meets the conditions set out by the Court. More particularly, Canada's and British Columbia's environmental processes (1) are conducted before an activity is carried out;[85] (2) are carried out by a neutral regulator with the relevant technical capacity, under the state's supervision;[86] (3) are required to examine the cumulative impact of the proposed project;[87] (4) promote the participation of interested parties, including Indigenous peoples;[88] (5) respect the traditions and cultures of Indigenous peoples;[89] and include (6) a contingency plan to respond to environmental emergencies or disasters and mitigation measures if environmental damage occurs.[90]

Precautionary principle

111. With respect to the Court's holding that states must act in keeping with the precautionary principle in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment,[91] Canada recalls that the Government of Canda has committed to implementing the precautionary principle, which is enshrined in the *Canadian Environmental Protection Act, 1999*.[92] The *Impact Assessment Act* further

[84] See British Columbia's Admissibility submissions, at paras. 24-37.
[85] IAA, s. 7; BC EAA, s. 6.
[86] IAA, ss. 25, 31, 36; BC EAA, ss. 21. 24(3), 26.
[87] IAA, s. 22(1)(a)(ii); BC EAA, s. 25(2)(a).
[88] IAA, ss. 12, 22(1)(c), 22(1)(g), 22(1)(l), 22(1)(m), 22(1)(n), 22(1)(q), 27, 28(3.1); BC EAA, ss. 13(4), 19(5), and 25(2)(a) on public participation, and ss. 2(2)(b), 7, 14, 16(1), 19(1), 21(3), 25(1), 27(5), 28(3), 29(3), 29(5), 31(5), 32(7), 32(8), 34(3), 35(2), 41(4), and 41(6) on participation by Indigenous peoples.
[89] IAA, ss. 2 (definition of 'adverse effects in federal jurisdiction'), 22(1)(g), 22(1)(l), 22(1)(q). See also Government of Canada, "Guidance: Indigenous Knowledge under the *Impact Assessment Act*", online: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html. BC EAA, ss. 2(2)(b)(i)(C) and 25(1), but also more generally provisions on Indigenous participation mentioned in the previous footnote. See also, British Columbia Environmental Assessment Office, "Guide to Indigenous Knowledge in Environmental Assessments", online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/indigenous-nation-guidance/guide_to_indigenous_knowledge_in_environmental_assessments.pdf.
[90] IAA, s. 22(1)(a)(i); see also s. 7 (prohibitions), and ss. 12-153 (compliance and enforcement); BC EAA, s. 25(2)(c); see also ss. 49-71 (compliance and enforcement).
[91] Advisory Opinion on the Environment and Human Rights, at para. 180.
[92] CEPA, ss. 2(1)(a)(ii), 3, 6(1.1), and 76.1(1).

mandates that the Government of Canada, the Minister of Environment and Climate Change, the Impact Assessment Agency of Canada, and federal authorities apply the precautionary principle when exercising their powers in the administration of the Act.[93]

Obligation of cooperation

112. The Court also explains at some length the obligation of cooperation between states with respect to projects or incidents that could cause significant transboundary environmental harm. Such obligation, the Court opines, includes (1) the duty to notify states that may potentially be affected by possible significant environmental damage as a result of activities carried out within a state's jurisdiction; and (2) the duty to consult and negotiate with potentially affected states.[94]

113. Canada continues to submit that the environmental assessments conducted for the mining projects cited in the petition revealed that none of the projects was likely to cause significant adverse environmental impacts, including in the United States, as explicitly referred to in the environmental assessment reports for the Brucejack, KSM, Galore Creek and Tulsequah Chief mining projects.[95] Accordingly, while the obligation of cooperation would not be applicable as such to the issues raised in this petition, U.S. federal and Alaska state authorities were nonetheless actively involved in the environmental assessment processes for these mining processes.

114. Moreover, Canada continues to cooperate on an ongoing basis with authorities in the United States. In 2015, British Columbia and the State of Alaska signed a Memorandum of Understanding in which they agreed to establish a bilateral working group on the protection of transboundary waters. The bilateral working group meets at least twice annually to share data on water quality and mine operations, and provide updates on environmental assessments and permitting.[96]

115. As pertains to the procedural obligations highlighted by the Inter-American Court regarding access to information, public participation, and access to justice, Canada continues to submit that the petitioners had access to information about the environmental assessments that were conducted for each of the five mining projects at issue, and had multiple opportunities to participate in the consultations that were held regarding each of these projects, as will be further explained in section iv) below. The petitioners also had the option to challenge decisions taken as part of these processes before Canadian courts. They chose instead to directly seize this Commission.

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[93] See IAA, s. 6(2). The requirement to apply the precautionary principle was also stipulated in the 1992 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, online: https://laws-lois.justice.gc.ca/eng/acts/C-15.2/20021231/P1TT3xt3.html (archived), s. 4(2).

[94] Advisory Opinion on the Environment and Human Rights, at paras. 181-210.

[95] As noted in Canada's Admissibility Submission, the majority of the environmental assessment reports are available online and links to them were provided in Annex A of Canada's Admissibility submission. The report by Fisheries and Oceans Canada and Natural Resources Canada on the Red Chris Copper-Gold Mine Project, while not available online, can be found at Annex C of Canada's Admissibility Submission.

[96] The Memorandum of Understanding and Cooperation between the State of Alaska and the Province of British Columbia can be found at Appendix A of British Columbia's Admissibility submissions.

iii) The threats alleged by the petitioners were assessed for each of the mining projects

116. The petitioners have not provided new information that would support their claims that the cited mining projects pose threats to the environment and that, as a consequence, their human rights were violated.

117. The petitioners continue to rely on the information provided in their admissibility submissions in support of their contention that the approval of the cited mining projects raise potential environmental threats of (1) pollution of waters through acid rock drainage and catastrophic failure of mine waste containment systems; and of (2) harm to fish population caused by pollution of waters. In support of their allegations, the petitioners continue to rely on opinions of experts they contracted for the purpose of this petition, past incidents involving different projects, and broad allegations regarding the inadequacy of Canada's federal and provincial regulatory frameworks governing environmental impact assessments.

118. Canada continues to rely on its admissibility submissions to emphasize that the specific risks characterized by the petitioners as environmental threats—acid rock drainage, tailings dam storage failures, and harm to fish populations caused by increased metal concentrations in downstream waters—were all considered by authorities in Canada and British Columbia as part of the environmental assessment process for the five mining projects for which environmental assessments were completed, i.e. Brucejack, Red Chris, KSM, Galore Creek, and Tulsequah Chief.

119. The environmental assessment reports, produced for each of the projects, provide detailed information on the consideration of potential environmental effects and the conclusions reached by environmental assessment authorities in British Columbia and Canada regarding these effects.[97]

120. Given the length and complexity of these reports, Canada wishes to draw this Commission's attention to the table annexed to Canada's admissibility submissions that contains extracts of the environmental assessment reports for each of the five above-mentioned mining projects, in relation to each of the potential concerns raised by the petitioners. The table includes information on the potential impacts identified during the environmental assessment process, including potential accidents or malfunctions, the mitigation measures proposed by the project proponent, and the conclusions of British Columbia and Canada environmental assessments.[98]

121. For example, the possibility of acid rock drainage and metal leaching and their possible impact on water quality was identified as a potential concern for each of the five projects.

[97] As mentioned, the majority of the environmental assessment reports are available online and links to them were provided in Annex A of Canada's Admissibility submission. The report by Fisheries and Oceans Canada and Natural Resources Canada on the Red Chris Copper-Gold Mine Project, while not available online, can be found at Annex C of Canada's Admissibility Submission.

[98] See Environmental Assessments Summary Table, attached as Annex B of Canada's Admissibility Submission.

For each of these projects, mitigation measures were proposed to address the potential impacts. These included, for example, implementing a metal leaching and acid rock drainage characterization and management program at the outset of construction and throughout the mine operating life; discharging the sulphides bearing tailings stream into a relatively deep portion of a pond where permanent submergence can be assured; collecting and diverting contact water generated at the mine site to the mine's water storage facility for treatment in the mine's water treatment plant; and installing a selenium treatment plant at the mine's site to minimize selenium loadings to the receiving environment.[99]

122. Similarly, potential impacts on fish populations were also raised for each of the projects. Mitigation measures included establishing settling ponds and diversion, setting up water treatment facilities, developing a Fisheries Habitat Compensation Plan in accordance with *Fisheries Act* requirements, and monitoring water quality. As for the potential for malfunctions and accidents, this risk was also assessed for each project. For example, for the Galore Creek mining project, it was acknowledged that a dam failure would result in major adverse environmental effects, and the project proponent therefore undertook, as mitigation measures, to construct a tailings dam in accordance with the *Canadian Dam Association Guidelines* to withstand a 1 in 10,000 year earthquake and to develop long-term maintenance and mitigation strategy for the dam and spillway events such as floods and earthquakes.[100]

123. It should be noted that as part of the environmental assessment process, the potential cumulative effects of each project were assessed[101] as were the potential transboundary effects of the Brucejack, KSM, Galore Creek and Tulsequah Chief mining projects. These are explicitly noted throughout the environmental assessment reports for each of these

[99] A summary of the proposed mitigation measures for each of the five mining projects can be found in the Environmental Assessments Summary Table at Annex B of Canada's Admissibility Submission.
[100] See Government of Canada, "Galore Creek Copper-Gold-Silver Project", at pp. 228-232.
[101] For the Brucejack mining project, see British Columbia Environmental Assessment Office, 'Brucejack Gold Mine Project - Assessment Report', 6 March 2015, in particular ss. 5.4, 6.8, 7.4, 8.6, 9.6, 10.6, 11.6, 12.6, 13.6, 14.6, 15.6, 16.6, 17.6 [Brucejack British Columbia Assessment Report]; and Canadian Environmental Assessment Agency, 'Brucejack Gold Mine Project – Environmental Assessment Report', July 2015, s. 7.3 [Brucejack CEAA Environmental Assessment Report]. For the Red Chris mining project, see British Columbia Environmental Assessment Office, 'Red Chris Porphyry Copper-Gold Project - Assessment Report', 22 July 2005, in particular s. 5.6.4 [Red Chris British Columbia Assessment Report]; and Fisheries and Oceans Canada and Natural Resources Canada, 'Red Chris Copper-Gold Mine Project – Screening Report', 19 April 2006, s. 7.12 [Red Chris Screening Report]. For the KSM mining project, see British Columbia Environmental Assessment Office, 'KSM Project – Assessment Report', June 2014, in particular ss. 4.1.2, 5.2.6, 5.3.6, 5.4.6, 5.5.6, 5.6.6, 5.7.6, 5.8.4, 5.9.6, 7.1.6, 8.1.6, 9.1.6, 10.1.6 [KSM British Columbia Assessment Report]; and Canadian Environmental Assessment Agency, 'KSM (Kerr-Sulphurets-Mitchell) Project – Comprehensive Study Report', July 2014, s. 5.6.2 6 [KSM CEAA Comprehensive Study Report]. For the Galore Creek project, see British Columbia Environmental Assessment Office, Transport Canada, Fisheries and Oceans Canada, Natural Resources Canada, Environment Canada, 'Galore Creek Copper-Gold-Silver Project – Assessment Report/Comprehensive Study Report', February 2007, in particular s. 3.4 6 [Galore Creek British Columbia Assessment Report]. For the Tulsequah Chief mining project, see Tulsequah Chief Project Committee, 'Tulsequah Chief Copper/Gold/Silver/Lead/Zinc Project – Report and Recommendations of the Tulsequah Chief Project Committee With Respect to a Decision on a Project Approval Certificate by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development and Fulfilling the Requirements of a Screening Report Pursuant to the Canadian Environmental Assessment Act', 1998, in particular s. 5.1.2 and Appendix 10 6 [Tulsequah Chief CEAA Report].

projects.[102] It should further be noted that U.S. federal and Alaska state authorities participated in the assessment process conducted for these mining projects.

124. The environmental assessments conducted for the Brucejack mining project illustrates how potential transboundary impacts were considered as part of the environmental assessment processes conducted under the *Canadian Environmental Assessment Act, 2012* and British Columbia's *Environmental Assessment Act, 2002*.

125. Both assessments explicitly acknowledged the potential transboundary effects of the project in the United States, in particular with respect to the potential surface water quality, as the Brucejack Creek watershed at the mine site drains to Sulphurets Creek and then to the Unuk River, which flows from British Columbia into Alaska.

126. The assessments acknowledged the importance of fish and fish habitat to Aboriginal groups as a source of subsistence, income, and recreation, as well as having important cultural significance. The project's potential effects on fish and fish habitat, including in Alaska, were noted along with the economic and social importance of commercial fisheries for communities.[103]

127. To address the potential transboundary effects on water quality, fish and fish habitat, the project proponent proposed a number of mitigation measures. Those measures, which become legally binding on the project proponent as a condition for obtaining an environmental assessment certificate, were considered by environmental assessment authorities along with advice from government authorities and comments received from Indigenous groups and the public.

128. On the potential impact on water quality, environmental assessment authorities noted that the project would result in metals, nutrients and suspended solids being released into Brucejack Creek, some of which would exceed water quality guidelines. However, based on the data on water flow rates and the application of mitigation measures, environmental assessment authorities found that it was unlikely that the increase in metals, nutrients and suspended solids would be measurable at the Canada-U.S. border.[104]

129. The authorities also found that it was unlikely that any project-related changes in water quality would be detectible in Sulphurets Creek, and further downstream in the Unuk River. It was noted that because there are multiple inputs in Sulphurets Creek, including from the proposed KSM Project—another mining project at issue in this petition—it will be necessary to control water quality at the outlet of Brucejack Lake in order to attribute and manage any changes in parameter concentrations resulting from the Project. Authorities noted that discharge limits for effluent unique to the Brucejack Gold Mine Project would have to be

[102] The multiple references to transboundary considerations in the environmental assessment reports for Brucejack, KSM, Galore Creek and Tulsequah Chief mining projects will not be listed here for conciseness, but a summary of the main transboundary considerations raised for each of the projects can be found at Annex B of Canada's Admissibility Submission.
[103] Brucejack British Columbia Assessment Report, at pp. 32, 52, 55, 87 and Brucejack CEAA Environmental Assessment Report, at pp. 3, 23, 62, 132-135.
[104] See Brucejack CEAA Environmental Assessment Report, in particular, at pp. 23-30.

developed by the province of British Columbia in consultation with the proponent, Aboriginal groups and local authorities to ensure that the Project does not impact downstream water quality.

130. Taking into account the implementation of the proposed mitigation measures, environmental assessment authorities concluded that the project would not result in any significant adverse environmental effects outside of Canada.[105]

131. As for the potential impact on fish and fish habitat, environmental assessment authorities noted that it is unlikely that any impacts from water quality degradation to fish and fish habitat would be observable, given the proposed water treatment approach at the mine site, the additional test that the project proponent would be required to perform to acquire provincial permits, and the follow-up program that would be established to verify that the approach to water treatment performs as intended through all phases of the project. On that basis, and considering the implementation of all the proposed mitigation measures, the environmental assessment authorities concluded that the project would not result in significant adverse effects on fish and fish habitat.[106]

132. It should further be noted that the environmental assessment process for the Brucejack mining project saw the active participation of representatives of federal and state agencies from the United States, which were invited to become members of the Brucejack Working Group. Through this formal process, downstream concerns were incorporated in the review process.[107]

133. For instance, the U.S. Environmental Protection Agency and the State of Alaska expressed concerns regarding the possibility for elevated levels of minerals in the water as well as regarding the cumulative effects on water quality and on fish and fish habitat in the United States. In response, the project proponent recalibrated its water quality model with conservative parameters to demonstrate that even if the planned mitigation measure were less effective than predicted, it would still not be possible to detect any residual impacts to water quality in the United States.

134. The proponent also showed through its cumulative effects assessment that no cumulative effects were expected on water quality or on fish or fish habitat.[108] As part of that cumulative effects assessment, the project proponent considered the potential for residual environmental effects of the project to overlap and interact with residual environmental effects of past, present and reasonably foreseeable projects and activities. Those included the Red Chris, the

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[105] Brucejack CEAA Environmental Assessment Report, at pp. 30-31. As noted in Canada's Admissibility Submission, environmental authorities in British Columbia concluded that they did not have sufficient information to make a determination regarding the potential impact of the project on surface water quality. Consistent with their recommendation, the Government of British Columbia required the project proponent to provide further specified information relevant to this issue prior to the start of project construction. See information and references provided in the Environmental Assessments Summary Table, Annex B, at p. 4.

[106] Brucejack CEAA Environmental Assessment Report, at pp. 31-35.

[107] *Ibid.*, see 'Summary of Comments on the Draft Environmental Assessment Report and Potential Conditions', Appendix G, at pp. 132-146.

[108] Brucejack CEAA Environmental Assessment Report, at pp. 29 and 62.

Galore Creek, the Schaft Creek, the KSM, and the Eskay Creek Revitalization mining projects, all of which are cited in the petition.[109]

135. The Alaska Department of Natural Resources indicated that it found no basis on which to object to the conclusion of the environmental assessment that it is unlikely that any impacts from water quality degradation to fish and fish habitat will be observable. It noted that it was satisfied that its concerns regarding potential cumulative effects were addressed by the environmental authorities and the project proponent. It further noted that, in the event that monitoring shows that the treatment process is not effective in preventing harm to Alaskan waters and fish habitat, the State of Alaska will reserve the right to take appropriate action to address the situation.[110] To date, no such action has been taken.

136. In addition to U.S. authorities, Aboriginal groups, including tribes and downstream communities in Alaska, were also consulted. The general public, including members of the American public, were also provided with opportunities to provide written comments and to attend any public meetings in Canada. All comments received were considered as part of the process and were made publicly available upon request.[111]

137. Detailed information on the potential transboundary and cumulative effects of the other mining projects for which environmental assessments were conducted, and on the involvement of U.S. federal and state authorities, can be found in the environmental assessment reports for each of those mining projects and in the summary table annexed to Canada's admissibility submission.

138. Canada reiterates and emphasizes that the specific environmental concerns raised by the petitioners were all duly considered by the relevant federal and provincial environmental authorities, as detailed in each environmental assessment report. These concerns informed the conclusions of environmental authorities regarding the potential for adverse environmental effects raised by each project, and each decision to ultimately allow each project to proceed.

139. Further, and as described in British Columbia's supplemental submissions at the admissibility stage, [112] data on water quality that was gathered as part of British Columbia and Alaska's collaboration on the Joint Water Quality Monitoring Program for Transboundary Waters does not support the petitioners' assertions. The data was gathered as part of a program that was developed in collaboration with provincial, state, Indigenous, and Tribal organizations over a period of two years from 2017 to 2019. [113] A technical team gathered water quality data in the Alsek, Taku, Stikine, and Unuk River watersheds and

[109] *Ibid.*, at pp. 59-60.
[110] *Ibid.*, at p. 124.
[111] *Ibid.*, at pp. 15-19 and see 'Summary of Comments on the Draft Environmental Assessment Report and Potential Conditions' Appendix G, at pp. 132-146.
[112] See British Columbia Supplemental Admissibility Submissions, at paras. 40-54.
[113] See Government of British Columbia "Joint Quality Monitoring Program for Transboundary Waters – Program Description and Two-Year Work Plan", 5 October 2017, online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/final_-_bc-ak_joint_water_quality_monitoring_program_description_and_two-year_work_plan_-_october_5_2017.pdf.

analyzed samples of water, sediments, and aquatic organisms. The technical team reported that water quality generally met Alaska's water quality standards. The few cases where water quality standards were not met were caused by high levels of naturally occurring minerals, not human activity, and the measured levels were not identified as a risk to local ecosystems.[114] Data on water quality from mining operations in British Columbia can be found on the BC Mine Information website.[115]

140. Canada wishes to clarify that while the environmental assessment processes for the Brucejack, Galore Creek, KSM, Tulsequah Chief and the Red Chris have concluded, federal and British Columbia environmental assessment authorities are monitoring the project proponents' compliance with the stipulated conditions for operating the mining projects. Environmental authorities are authorized to take a number of measures to ensure compliance, including conducting compliance inspections, and issuing orders to project proponents.[116]

141. Contrary to the petitioners' characterization of the amendment process as a means to allow increased pollution of transboundary watersheds, any project amendment involves an assessment of its particular effects on the environment and imposes mitigation requirements in response to those effects. For example, the amended permit authorizing effluent discharges from the Brucejack mine describes the terms and conditions that the project proponent is required to comply with to carry out activities under the permit.[117] As part of these requirements, the project proponent must also annually submit a compliance report.[118]

142. Generally, monitoring and compliance are conducted through two parallel provincial processes. The B.C. EAO is responsible for regulating compliance with a project's environmental assessment certificate, and assessments for compliance with waste discharge

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[114] Alaska Department of Environmental Conservation and BC Ministry of Environment and Climate Change Strategy, "British Columbia and Alaska Transboundary Rivers Sampling Program: 2019 Status Report", March 2020, online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/bc_ak_transboundary_rivers_2019status_report.pdf.
See also, Alaska Department of Environmental Conservation and BC Ministry of Environment and Climate Change Strategy, "British Columbia and Alaska Joint Water Quality Program for Transboundary Waters Data Report – Final Report", January 2021, online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/6_-_twg-m_ak_bc_2021_data_rpt_2021-01-08.pdf.
For information about the final program review, see Alaska Department of Environmental Conservation and BC Ministry of Environment and Climate Change Strategy, "British Columbia and Alaska Technical Working Group on Monitoring Program Review", January 2021, online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/5_-_twg-m_ak_bc_2021_prgm_review_2021-01-08.pdf. For information regarding collaborative environmental protection work between British Columbia and Alaska, see Government of British Columbia, "Protecting the environment near the B.C. and Alaska border", online: https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/further-information/bc-alaska-transboundary-waters.

[115] See British Columbia Mine Information website, online: https://mines.nrs.gov.bc.ca/.

[116] See IAA, ss. 120-129; BC EAA, ss.49-71.

[117] See copy of Permit 107835 issued by the British Columbia Ministry of Environment and Climate Change Strategy, 16 June 2022, at pp. 4-11, attached as Annex 22.

[118] See, for e.g., compliance reporting for the Brucejack mine, online: https://projects.eao.gov.bc.ca/api/public/document/642ef44642cc990022f24bb1/download/BJ%20EAC%20%23M15-01%20Proponent%20Fifth%20Year%20Operations%20Self-Compliance%20Report%2031%20Jan%202023.pdf.

permits are conducted by the Compliance and Environmental Enforcement Branch of the B.C. Ministry of Environment and Climate Change Strategy.

143. The frequency of compliance assessments is determined through onsite inspections and data review. The approach to inspections is risk-based, accounting for inherent risks, posed, for example, by discharge rates and contaminant loads, and behavioural risks, such as an operator's compliance history. The regulator's response to any non-compliance is likewise risk-based, accounting for factors such as an operator's willingness and ability to comply along with the severity of risks to the environment and human health.

144. Monitoring programs, such as the one for the Brucejack mine mentioned above, are established to evaluate potential impacts of the mines on the receiving environment. Monitoring programs include trigger response plans for each mine pursuant to which alert levels are set. If such levels are reached, it will trigger responses ranging from additional monitoring to shutting down the mine. All required reports are reviewed by provincial regulators and are publicly available online.[119] Based on the results of monitoring, regulators can adopt changes to the monitoring program or recommend amendments to the permit to further protect the environment.

145. It should be noted that as part of British Columbia's adaptive management approach, in the event that evidence suggested a need for changes to permit conditions, the Mining Authorizations Team of the B.C. Ministry of Environment and Climate Change Strategy would be seized of the matter and determine whether changes are required to enhance environmental protection. Similar measures are available under the federal *Impact Assessment Act*.[120]

146. The petitioners note that in May 2023, the operator for the Brucejack mining project received a notice of non-compliance under s. 126 of the *Impact Assessment Act* for violating a condition of its authorization to operate the Brucejack mine. The petitioners submit that this shows "how mining operations often do not conform to predictions in the environmental review stage."[121]

147. The notice of non-compliance was with respect to a sediment release near Brucejack Creek, which was observed by enforcement officers during an inspection, and was found to contravene a condition for mitigation measures the project proponent had agreed to

[119] British Columbia Mine Information, online: https://mines.nrs.gov.bc.ca/.
[120] The Impact Assessment Agency of Canada (IAAC) is responsible for verifying compliance with the conditions set out in Decision Statements issued under the CEAA 2012 or the IAA. IAAC enforcement officers undertake compliance and enforcement measures to encourage and ensure compliance. Compliance measures are actions taken by IAAC to promote awareness amongst Proponents, federal authorities, Indigenous groups, environmental groups and other members of the public as to the means of ensuring compliance with the Decision Statement. Such actions could include issuing guidance publications, providing training sessions and maintaining effective, on-going communication with the Proponent throughout the impact assessment process. Enforcement actions are actions taken by IAAC enforcement officers when there is reason to believe that the Act has been contravened. Actions include warnings (oral and written), orders, injunctions, prosecution, and penalties.
[121] Petitioners' Merits Submission, at p. 7.

implement to protect fish and fish habitat.[122] As noted in the notice of non-compliance, the issue was addressed immediately while officers were on-site and before there was any interaction between sediment-laden discharge and Brucejack Creek.[123] The nearest fish inhabited waters are 20 km from the location where the sediment release was noted.

148. Contrary to the petitioners' assertion, Canada submits that the notice of non-compliance and the steps taken by the project proponent to rectify the situation demonstrate the effectiveness of the monitoring regime in place to ensure that the approved mining project complies with the conditions stipulated for operating the mining project.

149. Canada maintains its position that the petitioners have not established that by approving the cited mining projects, Canada has violated their human rights. Such a claim critically rests on establishing that the impugned mining projects pose a threat to the environment such that the petitioners' rights can be said to be adversely impacted. The petitioners' claims are clearly contradicted by the findings and conclusions of the environmental assessments conducted for each project. While the petitioners may disagree with those findings, their disagreement cannot be taken as establishing that there will be adverse environmental impacts or that any such impacts violate their human rights.

iv) Canada complied with any consultation obligations

150. The petitioners allege that they have repeatedly attempted to engage with both the federal and British Columbia governments through and beyond environmental assessment processes for the cited mining projects.

151. To Canada's knowledge, the petitioners did not participate in any of the consultations undertaken as part of the environmental assessments that were completed for the cited mining projects. Moreover, U.S. federal and Alaska state authorities participated actively in the environmental assessment processes for the Brucejack, KSM, Galore Creek and Tulsequah Chief mining projects. To Canada's knowledge the petitioners did not raise their concerns with Canadian or American authorities.

KSM mining project

152. For example, throughout the federal environmental assessment process conducted for the KSM mining project, which was concluded in 2015, members of the public were provided with several opportunities to submit input. The then Canadian Environmental Assessment Agency provided four public comment periods over the course of the respective environmental assessment processes with respect to (1) the proposed scope of the environmental assessment, (2) the proposed project and the conduct of the assessment, (3)

[122] The condition stipulated that "The Proponent shall protect fish and fish habitat during all phases of the Designated Project, which shall include the implementation of mitigation measures to avoid causing harm to fish and fish habitat when using explosives or conducting activities in or around water frequented by fish, as well as on the Knipple Glacier."

[123] See Impact Assessment Agency of Canada, "Notice of Non-Compliance – Section 126 of the *Impact Assessment Act*", 24 May 2023, online: https://iaac-aeic.gc.ca/050/documents/p80034/152508E.pdf.

the Environmental Impact Statement which contains the project proponent's assessment of the project's effects, and (4) the draft environmental assessment report. The Canadian Environmental Assessment Agency posted notices about the public comment periods online and shared the relevant documents for public comment on the Agency's website, in addition to making these documents available for viewing at regional locations in British Columbia. For each project, the Agency accepted written comments from the public by a variety of means including mail, fax, and email. The Agency also provided funding to support public participation.

153. The Agency received over 400 comments related to transboundary concerns during the public consultations, including a submission by the Central Council of the Tlingit and Haida Indian Tribes of Alaska, one of the tribal governments comprising the SEITC.[124] Key issues that were raised included potential impacts on fish and fisheries (recreational and commercial), and human health from degraded water quality and changes in water quantity in the Unuk River.[125]

154. All comments received were shared with federal and provincial members of the Environmental Assessment Working Group, which included representatives of Indigenous groups, as well as representatives from U.S. federal and state agencies. These included the U.S. Environmental Protection Agency, the U.S. Department of the Interior, the U.S. Forest Service, the U.S. National Oceanographic and Atmospheric Administration, Fisheries Service (NOAA), the Alaska Fish and Game, and the Alaska Department of Natural Resources. The participating U.S. federal and state agencies did not identify any outstanding transboundary concerns with the environmental assessment.[126]

155. The Canadian Environmental Assessment Agency duly considered all comments received; all information, including data and studies, provided in the proponent's Environmental Impact Statement on the potential effects of the project on water quality, water quantity, fish, and human health; as well as proposed mitigation measures. On the basis of these considerations, the Agency concluded that the project was not likely to cause significant adverse environmental effects on surface water quality with the implementation of the proposed mitigation measures, water management and water treatment plans.[127]

156. British Columbia environmental authorities also held public consultation throughout the environmental assessment process as well as extensive consultations with Indigenous groups.[128]

157. Throughout the environmental assessment processes, the project proponent also engaged in consultations with various stakeholders. The proponent held public open houses in several communities in British Columbia and Alaska and conducted several activities, including

[124] See letter from Edward K Thomas, President, Central Council of the Tlingit and Haida Indian Tribes of Alaska to the Canadian Environmental Assessment Agency, 'Re: Comments on Seabridge Gold's Kerr-Sulphurets-Mitchell (KSM) Mine project', 21 October 2013, attached as Annex G of Canada's Admissibility Submission.
[125] KSM CEAA Comprehensive Study Report, at pp. III (Executive Summary), 36-37, 91-92.
[126] *Ibid.*, at p. 91.
[127] *Ibid.*, at p. 37.
[128] KSM BC Assessment Report, at pp. 28-30 and 274-475.

several public information sessions, to provide information to the general public and other interested stakeholders and to offer the opportunity to provide comments on the Project. The proponent also held meetings with specific stakeholders, including with Tlingit-Haida Central Council of Alaska and the Southeast Alaskan Tribal Council, to provide information on project design and environmental assessment studies and to identify concerns. The proponent created public notices to share information with the public and to advertise community meetings and created the KSM Project website to share project information, documentation on the environmental assessment, and contact information for the public to provide comments.[129]

Galore Creek project

158. Another example is the Galore Creek project for which a public consultation program was initiated in February 2004. As part of the environmental assessment process, a Technical Working Group was also created and included representatives of the federal and British Columbia governments, U.S. federal and Alaska state government agencies, representatives from the Tahltan Nation and local governments. The Environmental Assessment Report notes that "[e]arly in the environmental assessment review, EAO recognized that U.S. federal and Alaska state agencies should be invited to participate in the review because of potential transboundary effects (Boundary Waters Treaty, Pacific Salmon Treaty and International River Improvements Act)." The project proponent, the Tahltan Nation, the B.C. EAO, and representatives from the Canadian Environmental Assessment Agency travelled to Juneau, Alaska early in the process to discuss the project with U.S. federal, Alaska state agencies, and local government representatives. Participants in the meeting included representatives from the City of Wrangell, Alaska, the Alaska Departments of Natural Resources, Environmental Conservation, and Transportation and Public Facilities; the U.S. Department of the Interior (including the Fish and Wildlife Service and the Bureau of Indian Affairs); the U.S. Department of Agriculture – Forest Service; the U.S. Department of Commerce – National Marine Fisheries Service; and the U.S. Environmental Protection Agency. [130]

159. During the pre-application stage, the project proponent held 16 open houses in several communities, including in the community of Wrangell in Alaska. The dates of open houses were advertised in local newspapers. A public comment period on draft Terms of Reference, advertised in local newspapers, was also held by the B.C. EAO. Copies of the draft Terms of Reference were placed in public libraries. Following the close of the comment period, the draft Terms of Reference were revised to incorporate comments from the public and the additional comments submitted by members of the Technical Working Group, which included representatives of Canadian and U.S. federal agencies, British Columbia, and Alaska state government agencies along with Indigenous representatives. During the pre-application stage, smaller working groups were also established to focus on specific issues such as metal leaching and acid rock drainage, water quality and quantity, fisheries and navigable waters, wildlife, access, socio-cultural impact, and mine planning, reclamation and closure. During that stage of the environmental assessment process, 44 meetings and

[129] KSM CEAA Comprehensive Study Report, at p. 92.
[130] Galore Creek Environmental Assessment Report, at pp. 20-21.

teleconferences involving the Working Group were held. In the Application review stage, a 60-day public comment period was held to seek input on the project proponent's application. During that period, open houses were also held, including in the communities of Wrangell and Petersburg in Alaska. The Technical Working Group also met approximately twelve times.[131]

160. The public participation for the federal environmental assessment process followed the provincial process and included additional participation steps. These included advertising the availability of the Scoping Document for public review[132] and the provision of participant funding for participation in the environmental assessment process. Relevant information was also made available to the public on the Canadian Environmental Assessment Registry. A draft of the Environmental Assessment Report was also subject to a public review.[133] All comments received as part of the environmental assessment process were considered by environmental authorities.[134]

161. Canada recalls that the Galore Creek mining project was suspended by the project proponent in 2007, that the mine has not been constructed nor is it operating, and that new environmental assessments could be required should the project be reinitiated. If such were the case, there would be further opportunities for the petitioners to participate in the process. Decisions taken as part of the process could also be challenged before Canadian courts.

162. Broad public consultations were also held for the Brucejack, Tulsequah Chief, and the Red Chris mining projects as detailed in the environment assessment reports for those mines. As noted in its admissibility submissions, Canada has no record of the SEITC, as a consortium entity, having provided comments to the Canadian Environmental Assessment Agency regarding any of the mining projects during the public comment periods of the respective environmental assessments. Canada notes in this regard that the environmental assessment processes for the KSM and Brucejack mining projects were still ongoing when the SEITC was established in 2014.

The petitioners did not participate in the consultation processes and did not raise their concerns

163. The petitioners also claim that Canada failed to seek their free, prior and informed consent regarding the approval and permitting of the cited mining projects. In response, Canada continues to rely on its admissibility submissions and maintains that Canada met its obligations to consult Indigenous groups, including Indigenous groups located outside of Canada.

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[131] *Ibid.*, at pp. 20-22.
[132] Under subsection 21(1) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, online: https://laws-lois.justice.gc.ca/eng/acts/C-15.2/20021231/P1TT3xt3.html (archived) [CEAA 1992], responsible authorities are required, for a Comprehensive Study, to ensure public consultation with respect to the proposed scope of the project, the proposed factors to be considered in the environmental assessment, and the proposed scope of those factors.
[133] Galore Creek Environmental Assessment Report, at pp. 23-24.
[134] *Ibid.*, at pp. 23, 27.

164. Canada recalls that the Supreme Court of Canada in *R. v. Desautel*[135] held that Indigenous groups located outside of Canada can be included in the definition of "aboriginal peoples of Canada" and can therefore hold rights protected by s. 35 of the *Constitution Act, 1982*. In relation to the duty to consult, the Supreme Court held that the Crown does not have a freestanding duty to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. The Court recognized that the Crown is free to act in the absence of such knowledge, and further observed that "[i]t is for the groups involved to put the Crown on notice of their claims."[136] Once the Crown has been put on notice, the Court held that the Crown has to determine whether a duty to consult arises and if so, what is the scope of such duty.[137]

165. At the times when federal and provincial authorities made decisions allowing the mining projects cited in the petition to proceed, Canada had no actual or constructive knowledge of a potential adverse impact on the asserted Aboriginal rights of the petitioners. That being said, notwithstanding any Aboriginal rights that the petitioners could have asserted, and without commenting on the merits of any such claim, several opportunities under Canada's and British Columbia's environmental impact assessment processes were made available to the petitioners to raise their concerns with respect to the potential transboundary effects of the proposed mining projects. To Canada's knowledge, the petitioners did not avail themselves of those opportunities to raise any of their concerns. The petitioners have not provided any explanation as to why they did not participate in the environmental assessment processes for the cited mining projects, nor have the petitioners established how those processes were not adequate to secure their participation.

166. This situation can be contrasted with the extensive and ongoing engagement that has taken place between the petitioners and British Columbia authorities on the Eskay Creek Revitalization project, which the B.C. EAO initiated on August 3, 2021, by notifying seven Indigenous communities in Alaska that the project proponent had submitted an Initial Project Description and Engagement Plan. Throughout this engagement, authorities in British Columbia have met regularly with the petitioners, have shared draft environmental assessment documents for review and comment, and have made changes to environmental assessment documents as a result of the petitioners' input.

167. More recently, the B.C. EAO informed the petitioners that British Columbia intends to develop a consultation policy specifically dedicated to support engagement with U.S. tribes asserting s. 35 rights in British Columbia, clarifying that this approach will in no way restrict the B.C. EAO from meeting its constitutional obligations to U.S. tribes in Alaska or from engaging on transboundary effects of specific projects under environmental assessment.[138]

168. Additional information on the engagement between British Columbia authorities and the petitioners since 2021, in relation to the Eskay Creek Revitalization project, can be found at

[135] *R. v. Desautel*, *supra*, note 15.
[136] *Ibid.*, at para. 75.
[137] *Ibid.*, at para. 76.
[138] See July 3, 2024 letter from Elenore Arend, *supra*, note 18.

Annex 23.[139] While Canada reiterates its position that the petitioners' allegations with respect to the Eskay Creek Revitalization project are inadmissible, given that the project in still early stages of development, Canada wishes to draw the Commission's attention to this Annex which provides detailed information on the meaningful engagement that has occurred between British Columbia and the petitioners on key environmental concerns raised in the petition.

169. Canada thus rejects the petitioners' allegation that it has not adequately consulted with the petitioners regarding the cited mining projects. The petitioners' reliance on the case of *Indigenous Community Maya Q'eqchi Agua Calient v. Guatemala*[140] in support of their contention that Canada's compliance with its domestic law is not equivalent to fulfilling requirements under international human right law is misplaced. The petitioners assert that, in that case, while Guatemala complied with its own environmental assessment process and other laws and regulations, the Inter-American Commission found that Guatemala violated the rights of the Indigenous community on the basis that the community received insufficient, scarce and culturally inadequate information, and did not have the possibility of ensuring its right to prior consultation.

170. Canada submits that this case is not analogous to the present petition. While the state of Guatemala indicated that the mining project was approved in accordance with its internal legislation, the issue, as highlighted by this Commission, was that the state of Guatemala did not have legal mechanisms in place for consultations with Indigenous peoples. By contrast, both the federal *Impact Assessment Act* and the British Columbia *Environmental Assessment Act* impose clear consultation obligations with Indigenous peoples and require that any potential adverse impacts of designated projects on Aboriginal and treaty rights be considered at multiple stages of the environmental assessment process.[141] Extensive consultations with Indigenous groups were carried out for all the cited mining projects. The petitioners had several opportunities to participate in the environmental assessment processes for those projects; yet, to Canada's knowledge, the petitioners did not avail themselves of those opportunities to raise any of their concerns. The petitioners have provided no explanation as to why they did not participate in the environmental assessment processes for the cited mining projects, nor established how those processes were not adequate to secure their participation.

171. Canada recalls that states are to exercise due diligence in conducting environmental impact assessments, including in preventing significant transboundary environmental harm.[142] Canada submits that at all stages of the environmental assessment process, Canada exercised due diligence, including in assessing the potential environmental risks of the cited mining

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[139] See Annex 23 'Additional Information on the engagement to date with the Petitioners on the Eskay Creek Revitalization mining Project'.
[140] Report No. 11/20, Petition 1118-11 (2020).
[141] See *e.g.*, IAA, ss. 6(1)(g),16(2)(c), 22(1)(c), 63(d); see also CEAA 2012, ss. 4(d), 5(1)(c), 19; CEAA 1992, ss. 2, 4(1)(b.3), 16, 16.1; BC EAA, ss. 2(2)(b), 7, 14, 16(1), 19(1), 21(3), 25(1), 27(5), 28(3), 29(3), 29(5), 31(5), 32(7), 32(8), 34(3), 35(2), 41(4), and 41(6).
[142] Pulp Mills on the River Uruguay Case, at para. 205; Certain Activities Carried Out by Nicaragua in the Border Area Case, at paras. 104, 153.

projects, and in its consultations at various stages of the environmental assessment processes, with Indigenous communities, the general public, and U.S. federal and state authorities.

The scope of the Inter-American Court's Advisory Opinion OC-23/17

172. Before concluding, Canada wishes to address the Commission's statement in its Admissibility Report that it will examine in more detail, at the merits stage, the arguments presented by the state regarding the scope of the advisory opinions of the Inter-American Court and its questions regarding the obligations of the states with respect to Indigenous communities.[143]

173. The Commission's statement appears to be in response to Canada's submissions at the admissibility stage that the Inter-American Court's Advisory Opinion OC-23/17 does not clearly or directly address the issue of consultation of Indigenous groups in a transboundary context. Canada submitted in this regard that the notion of a state duty to avoid causing transboundary environmental harm that impacts the human rights of persons outside the state's territory (which is addressed in the Advisory Opinion) is conceptually distinct from that of a state duty to consult Indigenous groups outside the state's territory in the course of conducting environmental assessments on projects with potential transboundary effects.[144]

174. Canada wishes to reiterate and emphasize that the Inter-American Court Advisory Opinion OC-23/17 interprets the scope of states' obligations under the *American Convention*, a treaty to which Canada is not a party. Canada further wishes to add that the specific questions raised by this petition are addressed by neither this Advisory Opinion nor (to Canada's knowledge) any other caselaw from the Inter-American Commission or the Inter-American Court, or any other international human rights bodies. The reason is that the issues raised by this petition are not well suited for adjudication by an international human rights body, in circumstances where domestic courts were not first given the opportunity to consider those issues and consider the legal arguments before them against the domestic legal framework.

175. Indeed, Canada submits that a key question raised by this petition is not specifically about the scope of a state duty to consult Indigenous groups outside the state's territory in the course of conducting environmental assessments on projects with potential transboundary effects. Rather, Canada submits that a key question regarding consultation obligations, as framed by the petition, is: "What is the scope of a state's obligation to consult Indigenous groups outside of its territory in the course of conducting an environmental assessment regarding a project with potential transboundary effects, where such Indigenous groups are asserting a domestic, constitutionally-protected Aboriginal right with respect to a territory that has been divided by international borders?"

176. Canada submits that this highly complex and contextual question is undoubtedly best first left to Canadian authorities—and to domestic courts if called upon to adjudicate—to consider and resolve in the light of Canada's unique historical context, constitutional

[143] Admissibility Report, at para. 66.
[144] See Canada's Admissibility Submission, at para. 62.

framework, and the special status of Indigenous peoples in Canada's constitutional and legal order.

177. In any eventuality, Canada submits that it has met its consultation obligations regarding the cited mining projects and respectfully asks that the Commission reject the petitioners' allegations that assert otherwise. Canada also recalls that none of the cited mining projects were ultimately assessed as likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures by the project proponents. These conclusions should inform any findings by the Commission as to whether Canada met its consultation obligations.

IV. CONCLUSION

178. In light of the information in these submissions and in Canada's submissions on admissibility, Canada respectfully requests that the Commission dismiss this petition. The petitioners have not established that Canada has violated their human rights as protected under the *American Declaration on the Rights and Duties of Man* by approving the cited mining projects. That conclusion is established on the basis that the cited mining projects do not pose a threat to the environment and that Canada has met any obligations to consult with respect to the mining projects.

179. Canada also respectfully requests that the Commission dismiss the petition as it pertains to the petitioners' new allegations regarding Canada's alleged violations of their right to a healthy environment and with respect to the Eskay Creek Revitalization and New Polaris Gold Mine mining projects, which are still in early stages of the environmental assessment processes.

180. Contrary to several statements by the petitioners, Canada's legal framework affords protection to the rights asserted by the petitioners throughout their submissions. Canada maintains that the petitioners could have pursued domestic remedies in relation to the approved mining projects and that the petitioners still have legal avenues they could pursue to challenge decisions made under both federal and provincial legislation governing the approvals of the proposed mines. Canada has provided new information in these submissions to bring clarity to the domestic remedies that were not exhausted and the extent to which those remedies would be adequate to repair the alleged violations.

181. Canada is aware that the petitioners have requested that the Commission issue precautionary measures with respect to the Eskay Creek Revitalization mining project. While the information in these submissions demonstrates that there is no basis for precautionary measures, Canada respectfully requests that the Commission seek its views should it consider issuing any such measures.

182. Canada reserves the right to make further submissions on the merits of the petition in response to any additional facts or argument from the petitioners in support of their claim.