

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

BETWEEN:

**ATTORNEY GENERAL OF QUÉBEC**

**APPELLANT**

**-and-**

**ATTORNEY GENERAL OF CANADA, ASSEMBLÉE DES PREMIÈRES NATIONS  
QUÉBEC-LABRADOR (APNQL), COMMISSION DE LA SANTÉ ET DES SERVICES  
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(CSSSPNQL), SOCIÉTÉ MAKIVIK, ASSEMBLÉE DES PREMIÈRES NATIONS,  
ASENIWUCHE WINEWAK NATION OF CANADA, SOCIÉTÉ DE SOUTIEN À  
L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA**

**RESPONDENTS**

AND BETWEEN:

**ATTORNEY GENERAL OF CANADA**

**APPELLANT**

**-and-**

**ATTORNEY GENERAL OF QUÉBEC**

**RESPONDENT**

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**FACTUM OF THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, THE FIRST  
NATIONS SUMMIT OF BRITISH COLUMBIA AND THE BRITISH COLUMBIA  
ASSEMBLY OF FIRST NATIONS**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW

1. In its decision below, the Quebec Court of Appeal considered the United Nations Declaration on the Rights of Indigenous Peoples (the “Declaration”)<sup>1</sup> in reaching its determination that section 35 of the *Constitution Act, 1982* includes a right to regulate child and family services.<sup>2</sup> But the interpretive weight the court gave the Declaration was unclear.
2. The same uncertainty prevails in other Canadian courts. In some decisions, reliance on the Declaration has been rejected.<sup>3</sup> Others have endorsed an interpretive presumption of conformity with the Declaration such as this Court applies to Canada’s binding international obligations.<sup>4</sup> Mostly, though, lower court invocations of the Declaration offer little in the way of methodology or reasoning to support or reject its judicial use.<sup>5</sup> Guidance from this Court is needed.
3. The Union of British Columbia Indian Chiefs (“UBCIC”), the First Nations Summit of British Columbia (“FNS”), and the British Columbia Assembly of First Nations (“BCAFN”) (collectively known as the First Nations Leadership Council (“FNLC”)) intervene to offer a “coherent and consistent methodology”<sup>6</sup> for addressing this issue and then suggest how it could be applied to the right of self-government at issue in this appeal. We advance three points.
4. First, this Court must avoid oversimplifying the Declaration’s legal status. The court below fell into this error, labelling the Declaration non-binding without attention to the significant

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<sup>1</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly, 2 October 2007, [A/RES/61/295](#) [UNDRIP].

<sup>2</sup> *Renvoi à la Cour d’appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, [2022 QCCA 185](#) at paras 506-513 [Decision below].

<sup>3</sup> See e.g. *East Prairie Metis Settlement v Canada (Attorney General)*, [2021 ABQB 762](#) at para 35; *Snuneymuxw First Nation v School District No. 68*, [2014 BCSC 1173](#) at para 59; *Hupacasath First Nation v Canada (Ministry of Foreign Affairs)*, [2013 FC 900](#) at para 51, aff’d [2015 FCA 4](#).

<sup>4</sup> See e.g. *Canada (Human Rights Commission) v Canada (Attorney General)*, [2012 FC 445](#) at paras 348-356; *Nunatukavut Community Council Inc v Canada (Attorney General)*, [2015 FC 981](#) at paras 103-106; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (Ministry of Indigenous and Northern Affairs Canada)*, [2020 CHRT 20](#) at paras 136-157.

<sup>5</sup> See e.g. *Hamilton Health Sciences Corp v H(D)*, [2015 ONCJ 229](#) at para 5; *R v Sayers*, [2017 ONCJ 77](#) at paras 49-53; *R v Francis-Simms*, [2017 ONCJ 402](#) at paras 47-48; *Scheck v Canada (Minister of Justice)*, [2019 BCCA 364](#) at para 85; *Servatius v Alberni School District No. 70*, [2020 BCSC 15](#) at para 37.

<sup>6</sup> *Quebec (Attorney General) v 9147-0732 Québec inc*, [2020 SCC 32](#) at para 3 [9147-0732 Québec].

overlap between the Declaration's provisions and Canada's binding international human rights obligations, without considering the Declaration's status in customary international law, and without fully grappling with the Declaration's domestic significance as declared by statutes or required by the honour of the Crown.

5. Second, in light of the Declaration's complex legal status, blanket depictions of it as either binding or non-binding (whether as a matter of international law, domestic law or both) are unhelpful. In each case where an article of the Declaration may be relevant, a careful judicial consideration of that provision is called for before pronouncing on the interpretive relevance or weight to be given to it. Some of the Declaration's articles reflect binding international law (whether conventional, customary, or both). According to this Court's jurisprudence, those provisions attract the interpretive presumption of conformity with international law. Even articles of the Declaration that may not be so clearly established in international law must be carefully considered, due to the authority Parliament and the BC legislature have accorded the Declaration through statute and the honour of the Crown principle.

6. Third, employing this methodology to the issues raised by this appeal reveals that the Declaration's articles affirming the Indigenous right to self-determination represent binding international law. As a result, section 35 of the *Constitution Act, 1982* should be interpreted as presumptively consistent with this right.

## **PART II – QUESTIONS IN ISSUE**

7. What is the Declaration's legal status and how should it be used by courts in statutory interpretation and the interpretation of section 35 of the *Constitution Act, 1982*?

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

### **A. The Declaration's complex legal status**

8. The Declaration is distinct among international instruments. The question of what interpretive weight courts should assign it is not straightforward.

9. At international law, a crucial distinction is drawn between binding and non-binding norms. In Canada as in many other countries, binding international norms—most notably, treaties to which the state is a party and rules of customary international law—attract the interpretive

presumption of conformity with international law.<sup>7</sup> Non-binding international norms, by contrast, may be judicially considered where they are relevant to and persuasive in respect of some legal question that falls to be determined, but domestic laws are not presumed to conform to them for interpretive purposes.<sup>8</sup>

10. At international law, the Declaration is a *formally* non-binding instrument. As a resolution of the United Nations General Assembly, it is not a definite source of international legal obligation in the same manner as international treaties or established norms of customary international law.<sup>9</sup> However, that is far from the end of the matter.

11. More important than its form is the Declaration's substance. There is no question but that parts of the Declaration overlap considerably with the provisions of international human rights treaties to which Canada has bound itself. For example, article 2 of the Declaration states that

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.<sup>10</sup>

This provision is consistent with—and, indeed, included within—equality and non-discrimination provisions of such binding instruments as the International Covenant on Civil and Political Rights 1966<sup>11</sup> (“ICCPR”) and the Convention on the Elimination of All Forms of Racial Discrimination 1969.<sup>12</sup> The same goes for several other rights affirmed by the Declaration, such as the right to life, liberty and personal security (article 7(1))<sup>13</sup> and protection from genocide (article 7(2)).<sup>14</sup>

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<sup>7</sup> *B010 v Canada (Citizenship and Immigration)*, [2015 SCC 58](#) at paras 47-48.

<sup>8</sup> [9147-0732 Québec](#) at paras 35-36.

<sup>9</sup> J. Crawford, *Brownlie's Principles of Public International Law*, 9<sup>th</sup> ed (Oxford: Oxford University Press 2009) at 182-83 [Crawford], Book of Authorities (“BOA”), Tab 1.

<sup>10</sup> [UNDRIP](#), art 2.

<sup>11</sup> [\[1976\] Can TS no 47](#), art 26 [ICCPR].

<sup>12</sup> [\[1970\] Can TS no 28](#), art 2(1).

<sup>13</sup> [ICCPR](#), art 9. See also K. Gover, “Equality and Non-Discrimination in the UNDRIP” in J. Hohmann and M. Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) 179 at 183 [Hohmann and Weller], BOA, Tab 2.

<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948, [\[1949\] Can TS no 27](#). See also J. Hohmann, “The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation” in Hohmann and Weller 150 at 164–65, BOA, Tab 3.

12. Furthermore, parts of the Declaration represent customary international law. Customary international legal norms are binding on states by virtue of their statehood alone. To the extent that any given provision of the Declaration represents international custom, the norm expressed therein is binding on Canada regardless of the Declaration's formally non-binding status. Ten years ago, an assessment of state practice in respect of the Declaration concluded that although the Declaration "as a whole cannot yet be considered as a statement of existing customary international law", it nevertheless "includes key provisions which correspond to existing State obligations under customary international law."<sup>15</sup> There have been significant developments in state practice since that time, particularly in a leading Declaration jurisdiction, namely Canada.

13. Customary international law can develop over time "based on changing practice and acceptance."<sup>16</sup> There is good reason to think that the Declaration will become increasingly recognized as declaratory of customary international law in much the same way as another formally non-binding declaration of the UN General Assembly, namely the Universal Declaration of Human Rights 1948,<sup>17</sup> has come to be recognized.<sup>18</sup>

14. The treatment of the Declaration in Canadian law adds further complexity to its legal status. Parliament has affirmed the Declaration "as a source for the interpretation of Canadian law"<sup>19</sup> and "a universal international human rights instrument with application in Canadian law."<sup>20</sup> The BC legislature has amended the *Interpretation Act* to require courts to construe every BC law and regulation as being consistent with the Declaration.<sup>21</sup>

15. Furthermore, both Parliament and the BC legislature have signalled future action to align those jurisdictions' respective laws with the Declaration by enacting statutory provisions requiring the federal and BC governments to "take all measures necessary to ensure that the laws of

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<sup>15</sup> [International Law Association, Final Report of Sofia Conference \(2012\) on the Rights of Indigenous Peoples](#). See also B. Gunn, "Overcoming Obstacles to Implementing the *UN Declaration of the Rights of Indigenous Peoples* in Canada (2013) [31 Windsor YB Access Just 147](#) at 161–62; M. Scheinin and M. Ahren "Relationship to Human Rights, and Related International Instruments" in Hohmann and Weller 63 at 64, BOA, Tab 4.

<sup>16</sup> *Nevsun Resources Ltd v Araya*, [2020 SCC 5](#) at para 74.

<sup>17</sup> [UN GA Res 217 A \(III\)](#), UN Doc A/810 (1948).

<sup>18</sup> See Crawford at 612, BOA, Tab 1.

<sup>19</sup> [United Nations Declaration on the Rights of Indigenous Peoples Act](#), SC 2021, c 14, preamble, para. 18 [UNDRIPA].

<sup>20</sup> [UNDRIPA](#), s 4(a).

<sup>21</sup> [Interpretation Act](#), RSBC 1996, c 238, s 8.1(3).

[Canada/British Columbia] are consistent with the Declaration.”<sup>22</sup> These provisions do not themselves implement the Declaration in federal and BC law. What they do, however, is create a statutory duty to implement the Declaration. They also regulate the *process* for doing so; both the federal and British Columbia laws require that measures to ensure consistency with the Declaration be undertaken “in consultation and cooperation with” Indigenous peoples.<sup>23</sup> This process has begun and is ongoing. The UBCIC, FNS, and BCAFN are deeply engaged in this work, together with the federal and BC governments.

16. For example, in British Columbia, the *Indigenous Self-Government in Child and Family Services Amendment Act* (Bill 38) received first reading in October 2022. The bill amends the *Child, Family and Community Service Act*<sup>24</sup> and the *Adoption Act*<sup>25</sup> to recognize that “Indigenous peoples have an inherent right to self-government, including self-determination, that is recognized and affirmed by section 35 of the *Constitution Act, 1982* and by the *United Nations Declaration on the Rights of Indigenous Peoples*.”<sup>26</sup> The amendments were co-developed with the FNLC and First Nations government representatives in a process that considered the alignment of provincial child and family services laws with the requirements of implementing the Declaration. As Premier Horgan noted at the introduction of the amendments, “B.C. was the first province to bring [the Declaration] into provincial law and it’s fulfilling to see how that bold action continues to create reforms that support reconciliation and make life better for Indigenous communities.”<sup>27</sup>

17. Finally, the honour of the Crown must be central to any assessment of the Declaration’s domestic legal status. In May 2016, the Government of Canada, in exercise of its Crown prerogative over foreign affairs, informed the United Nations—and the Indigenous peoples of this country and the world—that “Canada is now a full supporter, without qualification” of the Declaration, and that Canada is “commit[ted] to adopt[ing] and implement[ing] the Declaration in

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<sup>22</sup> [UNDRIPA](#), s 5; [Declaration on the Rights of Indigenous Peoples Act](#), SBC 2019, c 44, s 3 [DRIPA].

<sup>23</sup> [UNDRIPA](#), s 5; [DRIPA](#), s 3.

<sup>24</sup> [Child, Family and Community Service Act](#), RSBC 1996, c 46.

<sup>25</sup> [Adoption Act](#), RSBC 1996, c 5.

<sup>26</sup> [Bill C-38, Indigenous Self-Government in Child and Family Services Act](#), 3rd Session, 42nd Leg, BC, 2022, s 19 (First Reading 26 October 2022). See also [FNLC memorandum, dated 27 October 2022](#), summarizing the amendments for BC First Nations Chiefs and leaders.

<sup>27</sup> [Government of British Columbia News Release, “Historic changes to B.C. child-welfare laws lay path to upholding Indigenous jurisdiction”, 26 October 2022](#).

accordance with the Canadian Constitution.” The government’s statement added: “Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada’s Constitution, which provides a full box of rights for Indigenous peoples.”<sup>28</sup>

18. The full legal consequences of this monumental Crown commitment to Indigenous peoples remain to be determined. What we can say with confidence now is that this Court has repeatedly affirmed that the “honour of the Crown is always at stake in its dealings with Aboriginal peoples”, that “[i]t is always assumed that the Crown intends to fulfil its promises,”<sup>29</sup> and that the Crown must “act diligently in pursuit of its solemn obligations.”<sup>30</sup> Canada’s unqualified support of the Declaration and commitment to its adoption and implementation in our law is a promise to Indigenous peoples rivaling and perhaps exceeding those in the *Royal Proclamation, 1763*.<sup>31</sup> Judicial resort to the Declaration must be informed by this promise. The same cannot be said of any other formally non-binding international instrument.

19. In short, the legal status of the Declaration in Canadian law is unique and developing. This Court should avoid simplifications, or premature conclusions about the Declaration’s legal status and interpretive significance. It should be mindful of the ongoing efforts of governments and Indigenous peoples to implement the Declaration in Canadian law. And it should bear in mind that Canada’s support of the Declaration engages the honour of the Crown.

### **B. The Declaration, section 35, and the presumption of conformity**

20. The Declaration is an international human rights instrument. In the words of the former UN special rapporteur on the rights of Indigenous peoples, “the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.”<sup>32</sup> Parliament has

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<sup>28</sup> [Government of Canada News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples”, 10 May 2016 \[Canada News Release\]](#).

<sup>29</sup> *R v Badger*, [1996] 1 SCR 771 at para 41; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, 20.

<sup>30</sup> *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 78.

<sup>31</sup> 3 Geo. 3 [reproduced in RSC 1985, App II, No 1].

<sup>32</sup> S. James Anaya, Human Rights Council, “Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples”, [A/HRC/9/9](#) (August 11, 2008) at para 86 [Anaya].

affirmed this proposition, calling the Declaration “a universal international human rights instrument with application in Canadian law.”<sup>33</sup>

21. This Court has long held that the *Charter* is to be interpreted as presumptively protecting human rights at least as well as they are protected in international human rights treaties to which Canada is a party.<sup>34</sup> This Court has applied that interpretive approach in respect of the ICCPR,<sup>35</sup> the Convention on the Rights of the Child 1989,<sup>36</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984,<sup>37</sup> and the International Covenant on Economic, Social and Cultural Rights 1966.<sup>38</sup> The Declaration is a new international human rights instrument that should, in future cases, attract this same interpretive presumption in *Charter* cases.

22. This Court has not yet had occasion to consider the interpretive weight of international human rights instruments on section 35 of the *Constitution Act, 1982*. This case presents that opportunity, particularly in the context of Indigenous children.<sup>39</sup>

23. In proper cases, there is no principled reason not to apply the presumption of conformity with international law to section 35 of the *Constitution Act, 1982*. This Court has explained that section 35 and the *Charter* are “sister provisions, both operating to limit governmental powers, whether federal or provincial.”<sup>40</sup> In the decision below, the Quebec Court of Appeal was therefore right to conclude that “[i]l n’y a rien qui justifie de ne pas étendre cette présomption à l’art. 35 de la Loi constitutionnelle de 1982, vu qu’il se rattache principalement à la protection des droits fondamentaux des peuples autochtones.”<sup>41</sup> Those provisions of the Declaration that represent or

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<sup>33</sup> [UNDRIPA](#), s 4(a).

<sup>34</sup> [9147-0732 Québec](#) at paras 31-32. See also *Saskatchewan Federation of Labour v Saskatchewan*, [2015 SCC 4](#) at para 64; *Reference Re Public Service Employee Relations Act (Alta.)*, [\[1987\] 1 SCR 313](#) at 348-350.

<sup>35</sup> [ICCPR](#). See [9147-0732 Québec](#) at para 39; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002 SCC 1](#) at paras 45-46, 59-75 [*Suresh*].

<sup>36</sup> [\[1992\] Can TS no 3](#). See *R v DB*, [2008 SCC 25](#) at paras 59-60; *R v RC*, [2005 SCC 61](#). See also the preamble to the *Youth Criminal Justice Act*, SC 2001, c 1.

<sup>37</sup> [\[1987\] Can TS no 36](#). See [9147-0732 Québec](#) at para 39; *Suresh* at paras 45-46, 59-75.

<sup>38</sup> [\[1976\] Can TS no 46](#). See *Slaight Communications Inc v Davidson*, [\[1989\] 1 SCR 1038](#) at 1056.

<sup>39</sup> [P. Joffe, “Supporting Indigenous Peoples’ Human Rights—Especially Children,” \*ABlawg\*, 25 August 2022.](#)

<sup>40</sup> *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44](#) at para 142.

<sup>41</sup> [Decision below](#) at para 509.



declare legal norms binding on Canada ought to inform the interpretation of section 35 in the same way as Canada's human rights treaties inform *Charter* interpretation.

24. Even where articles of the Declaration may not be confidently said to reflect binding international law, they should nevertheless be considered more closely and carefully than the “relevant and persuasive” rubric, applicable to non-binding instruments in the *Charter* context, allows. This Court's jurisprudence leaves space to assign different interpretive weight to international instruments depending on “the nature of the source and its relationship to our Constitution.”<sup>42</sup> Given the distinct and developing character of the Declaration in domestic law, it merits greater judicial consideration than afforded to such non-binding international norms as treaties to which Canada is not a party, the communiqués of international organizations, or the observations of international advisory bodies—all of which this Court has considered from time to time while rightly disclaiming any judicial obligation to do so.<sup>43</sup> For courts to dismiss or sideline the Declaration as easily as they may legitimately do with non-binding international instruments would fail to take seriously the fact that Parliament has made the Declaration part of what the Quebec Court of Appeal aptly called “*l'ordre normatif fédéral*”.<sup>44</sup> It would ignore the ongoing Declaration implementation process to which both Canada and British Columbia are committed by statute. And it would risk tolerating dishonourable conduct by the Crown towards the Declaration's beneficiaries, Indigenous peoples.

25. In sum, when the Declaration is invoked in litigation, courts should undertake a careful analysis of the relevant article or articles to the issue at hand. Articles that reflect binding international law should attract the presumption of conformity, whether in the context ordinary statutes, *Charter* provisions, or section 35 of the *Constitution Act, 1982*. Articles of the Declaration that may not be legally binding in international law should nevertheless be given close consideration in light of the honour of the Crown and the ongoing federal and BC processes with Indigenous peoples to align those jurisdictions' laws with the Declaration.

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<sup>42</sup> [9147-0732 Québec](#) at para 23.

<sup>43</sup> [9147-0732 Québec](#) at para 35.

<sup>44</sup> [Decision below](#) at para 512.

### C. Application to the right to self-government

26. Applying this methodology to the present case, this Court should conclude that the right to Indigenous self-determination affirmed in the Declaration attracts the presumption of conformity with international law, and that section 35 should be interpreted accordingly.

27. To begin, this Court should reject simplistic, overbroad statements about the Declaration's legal status and recognize instead the variety of considerations that make the Declaration an instrument of special significance in domestic law.

28. Next, the Court should focus on those articles of the Declaration relevant to this appeal, leaving other articles for consideration in future cases. This appeal concerns the right to regulate child and family services specifically, and the right to Indigenous self-determination more broadly.

The most relevant articles of the Declaration with respect to this right are articles 3, 4, 5, 7, 8 and 23. Article 3 provides:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Subsequent articles particularize the right to self-determination and set out Indigenous peoples' rights to self-government over internal and local affairs (article 4); to maintain and strengthen their distinct political, legal economic, social and cultural institutions (article 5); to life, physical and mental integrity, liberty and security of person (article 7); to protection from forced assimilation or destruction of their culture (article 8); and to be actively involved in developing and determining health, housing and other economic and social programmes affecting them (article 23).

29. Turning next to the international context of these provisions, article 3 is entirely consistent with the self-determination protections in international human rights instruments binding on Canada.<sup>45</sup> Article 1(1) of both the International Covenant on Civil and Political Rights 1966<sup>46</sup> and the International Covenant on Economic, Social and Cultural Rights 1966<sup>47</sup> provide that

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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<sup>45</sup> See [Anaya](#) at para 37.

<sup>46</sup> [\[1976\] Can TS no 47](#).

<sup>47</sup> [\[1976\] Can TS no 46](#).

30. Article 3 of the Declaration reiterates the right to self-determination in the Indigenous human rights context. Article 3 is therefore not just a relevant and persuasive non-binding authority. It is an Indigenous expression of a legal principle to which Canada is committed and bound under this state’s existing international obligations. The result is that article 3 of the Declaration should attract the presumption of conformity, and section 35 of the *Constitution Act, 1982* should be interpreted as presumptively including a right to Indigenous self-determination.

31. It is here that the Quebec Court of Appeal took a misstep in its discussion of the Declaration. The court was right to conclude that there is no principled reason that the presumption of conformity should not extend to section 35.<sup>48</sup> However, it went on to say that the Declaration is “*non contraignant au plan international*” and—although not saying so explicitly—seemed to treat it as a relevant and persuasive consideration only.<sup>49</sup> If the Court of Appeal had adopted the approach proposed here, it would have instead concluded that the Declaration articles related to self-determination—particularly article 3—were not just relevant and persuasive considerations for the court, but presumptively protected by section 35 as obligations binding on Canada as a matter of international law. This would have allowed the Court to rely on the Declaration not as a mere confirmation<sup>50</sup> that its interpretation of section 35 was correct, but instead to determine that section 35 must be presumed to include the right to self-determination.

#### **PART IV – COSTS**

32. UBCIC, FNS, and BCAFN do not seek costs and ask that no costs be awarded against them.

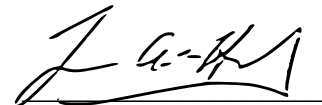
#### **PART V – ORDER SOUGHT**

33. UBCIC, FNS, and BCAFN take no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of November, 2022.



Gib van Ert



Fraser Harland

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<sup>48</sup> [Decision below](#) at para 509.

<sup>49</sup> [Decision below](#) at para 512.

<sup>50</sup> [Decision below](#) at para 513.

## PART VI – TABLE OF AUTHORITIES

### A. Jurisprudence

Case	Paragraph(s)
<i>B010 v Canada (Citizenship and Immigration)</i> , <a href="#">2015 SCC 58</a>	9
<i>Canada (Human Rights Commission) v Canada (Attorney General)</i> , <a href="#">2012 FC 445</a>	2
<i>East Prairie Metis Settlement v Canada (Attorney General)</i> , <a href="#">2021 ABQB 762</a>	2
<i>First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (Ministry of Indigenous and Northern Affairs Canada)</i> , <a href="#">2020 CHRT 20</a>	2
<i>Haida Nation v British Columbia (Minister of Forests)</i> , <a href="#">2004 SCC 73</a>	18
<i>Hamilton Health Sciences Corp v H(D)</i> , <a href="#">2015 ONCJ 229</a>	2
<i>Hupacasath First Nation v Canada (Ministry of Foreign Affairs)</i> , <a href="#">2013 FC 900</a> , aff'd <a href="#">2015 FCA 4</a>	2
<i>Manitoba Metis Federation Inc v Canada (Attorney General)</i> , <a href="#">2013 SCC 14</a>	18
<i>Nevsun Resources Ltd v Araya</i> , <a href="#">2020 SCC 5</a>	13
<i>Nunatukavut Community Council Inc v Canada (Attorney General)</i> , <a href="#">2015 FC 981</a>	2
<i>Quebec (Attorney General) v 9147-0732 Québec inc</i> , <a href="#">2020 SCC 32</a>	3, 21, 24
<i>R v Badger</i> , <a href="#">[1996] 1 SCR 771</a>	18
<i>R v DB</i> , <a href="#">2008 SCC 25</a>	21
<i>R v Francis-Simms</i> , <a href="#">2017 ONCJ 402</a>	2
<i>R v RC</i> , <a href="#">2005 SCC 61</a>	21
<i>R v Sayers</i> , <a href="#">2017 ONCJ 77</a>	2

<i>Reference Re Public Service Employee Relations Act (Alta.)</i> , <a href="#">[1987] 1 SCR 313</a>	21
<i>Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis</i> , <a href="#">2022 QCCA 185</a>	1, 23, 24, 31
<i>Saskatchewan Federation of Labour v Saskatchewan</i> , <a href="#">2015 SCC 4</a>	21
<i>Scheck v Canada (Minister of Justice)</i> , <a href="#">2019 BCCA 364</a>	2
<i>Servatius v Alberni School District No. 70</i> , <a href="#">2020 BCSC 15</a>	2
<i>Slaight Communications Inc v Davidson</i> , <a href="#">[1989] 1 SCR 1038</a>	21
<i>Snuneymuxw First Nation v School District No. 68</i> , <a href="#">2014 BCSC 1173</a>	2
<i>Suresh v Canada (Minister of Citizenship and Immigration)</i> , <a href="#">2002 SCC 1</a>	21
<i>Tsilhqot'in Nation v British Columbia</i> , <a href="#">2014 SCC 44</a>	23

## B. Domestic legislation

Legislation	Paragraph(s)
<a href="#">Adoption Act</a> , RSBC 1996, c 5	16
<a href="#">Bill C-38, Indigenous Self-Government in Child and Family Services Act</a> , 3rd Session, 42nd Leg, BC, 2022, s 19 (First Reading 26 October 2022)	16
<a href="#">Child, Family and Community Service Act</a> , RSBC 1996, c 46	16
<a href="#">Declaration on the Rights of Indigenous Peoples Act</a> , SBC 2019, c 44	15
<a href="#">Interpretation Act</a> , RSBC 1996, c 238	14
<i>Royal Proclamation, 1763</i> , 3 Geo. 3 [reproduced in RSC 1985, App II, No 1]	18
<a href="#">United Nations Declaration on the Rights of Indigenous Peoples Act</a> , SC 2021, c 14	14, 15, 20

### C. Treaties and international law sources

Treaty or International Law Source	Paragraph(s)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, <a href="#">[1987] Can TS no 36</a>	21
Convention on the Elimination of All Forms of Racial Discrimination 1969, <a href="#">[1976] Can TS no 47</a>	11
Convention on the Prevention and Punishment of the Crime of Genocide 1948, <a href="#">[1949] Can TS no 27</a>	11
Convention on the Rights of the Child 1989, <a href="#">[1992] Can TS no 3</a>	21
International Covenant on Economic, Social and Cultural Rights 1966, <a href="#">[1976] Can TS no 46</a>	21, 29
International Covenant on Civil and Political Rights 1966, <a href="#">[1970] Can TS no 28</a>	11, 21, 29
UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly, 2 October 2007, <a href="#">A/RES/61/295</a>	1, 11
Universal Declaration of Human Rights 1948, <a href="#">UN GA Res 217 A (III)</a> , UN Doc A/810 (1948)	13

### D. Secondary sources

Source	Paragraph(s)
S. James Anaya, Human Rights Council, “Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples”, <a href="#">A/HRC/9/9</a> (August 11, 2008)	20, 29
J. Crawford, <i>Brownlie’s Principles of Public International Law</i> , 9 <sup>th</sup> ed (Oxford: Oxford University Press 2009), Book of Authorities, Tab 1	10, 13
<a href="#">FNLC memorandum, dated 27 October 2022</a>	16
K. Gover, “Equality and Non-Discrimination in the UNDRIP” in J. Hohmann and M. Weller, eds, <i>The UN Declaration on the Rights of Indigenous Peoples: A Commentary</i> (Oxford: Oxford University Press, 2018) 179, Book of Authorities, Tab 2	11
<a href="#">Government of British Columbia News Release, “Historic changes to B.C. child-welfare laws lay path to upholding Indigenous jurisdiction”, 26 October 2022</a>	16

<a href="#">Government of Canada News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples”, 10 May 2016</a>	17
B. Gunn, “Overcoming Obstacles to Implementing the <i>UN Declaration of the Rights of Indigenous Peoples</i> in Canada (2013) <a href="#">31 Windsor YB Access Just 147</a> at 161–62	12
J. Hohmann, “The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation” in J. Hohmann and M. Weller, eds, <i>The UN Declaration on the Rights of Indigenous Peoples: A Commentary</i> (Oxford: Oxford University Press, 2018) 150, Book of Authorities, Tab 3	11
<a href="#">International Law Association, Final Report of Sofia Conference (2012) on the Rights of Indigenous Peoples</a>	12
<a href="#">P. Joffe, “Supporting Indigenous Peoples’ Human Rights—Especially Children,” <i>ABlawg</i>, 25 August 2022</a>	22
M. Scheinin and M. Ahren “Relationship to Human Rights, and Related International Instruments” in J. Hohmann and M. Weller, eds, <i>The UN Declaration on the Rights of Indigenous Peoples: A Commentary</i> (Oxford: Oxford University Press, 2018) 63, Book of Authorities, Tab 4	12