Court File No: 40061

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

ATTORNEY GENERAL OF CANADA
ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR
FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES
MAKIVIK CORPORATION
ASSEMBLY OF FIRST NATIONS
ASENIWUCHE WINEWAK NATION OF CANADA,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Respondents

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

ATTORNEY GENERAL OF QUEBEC

Respondent

(*Style of cause continued on following page*)

INTERVENER'S FACTUM ON APPEAL
NATIVE WOMEN'S ASSOCIATION OF CANADA

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

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(*Style of cause continued from previous page*)

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FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES, GRAND COUNCIL OF TREATY #3,
INNU TAKUAIKAN UASHAT MAK MANI-UTENAM (ITUM), ACTING AS A TRADITIONAL BAND AND ON BEHALF OF
THE INNU OF UASHAT MAK MANI-UTENAM,
FEDERATION OF SOVEREIGN INDIGENOUS NATIONS,
PEGUIS CHILD AND FAMILY SERVICES,
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INUVIALUIT REGIONAL CORPORATION, INUIT TAPIRIIT KANATAMI,
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NUNATUKAVUT COMMUNITY COUNCIL, LANDS ADVISORY BOARD,
MÉTIS NATIONAL COUNCIL, MÉTIS NATION-SASKATCHEWAN,
MÉTIS NATION OF ALBERTA, MÉTIS NATION BRITISH COLUMBIA,
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PART I. OVERVIEW

1. *Apiitendaagoziwag anishinaabekwe*. Indigenous women are so important, and so valued.

2. Indigenous women must be seen and heard in constitutional Indigenous rights discussions. The Native Women's Association of Canada[1] ("NWAC") asks this Court to explicitly advance Indigenous women's equality guarantee under s. 35(4) of the *Constitution Act, 1982* ("*Constitution*")[2], in its ruling in these appeals.

3. In *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*[3] (the "*Reference*") the Québec Court of Appeal ("QCCA") affirmed a generic Indigenous self-governance right to child and family services and advanced the need for "a new approach" to resolving federal-provincial-Indigenous jurisdiction issues that include Indigenous Peoples as "political actors and creators of law."[4]

4. The QCCA ruled *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "Act")[5] establishes a national Indigenous self-governance framework, outside the *Indian Act*,[6] for peoples contemplated by s. 35 of the *Constitution*.[7] The QCCA held that regulating child and family services ("CFS") is a "generic right that extends to all Aboriginal peoples"[8] because self-determination in child welfare is key to achieving s. 35's reconciliation purposes.[9]

5. NWAC submits that the new approach called for by the QCCA must:

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[1] NWAC represents Indigenous women who are political actors and creators of law within their communities and families. When NWAC refers to Indigenous women in this factum, this includes Indigenous Girls, Two-Spirit, Transgender, and Gender-Diverse People.
[2] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), c 11, s 35 [*Constitution*].
[3] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 [*Reference*].
[4] *Ibid* at para 562.
[5] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [*Act*].
[6] *Indian Act*, RSC 1985, c I-5.
[7] *Reference*, *supra* note 3 at para 194.
[8] *Reference*, *supra* note 3 at para 494.
[9] *Reference*, *supra* note 3 at paras 468 – 494.

(i) comply and engage with s. 35(4) of the *Constitution*;

(ii) redress Indigenous women's historic, systemic disempowerment to treat them substantively equal;

(iii) advance reconciliation between Indigenous women and the Crown; and,

(iv) rise to meet Canada's international human rights commitments.

PART II. ISSUES

6. The central issue before this Court is whether the Act is invalid under the division of powers and the *Constitution's* architecture. The Court must decide whether the Act, which accounts for Indigenous governing bodies' jurisdiction over CFS, unjustifiably infringes on provincial jurisdiction over these services. The Act's underlying premise recognizes Indigenous People's inherent right to self-government, as affirmed by the *Constitution* s. 35.

7. In addressing these issues, this Court must interpret s. 35 constitutional rights in light of s. 35(4) guarantees to substantive equality for Indigenous women, and can set a test that affirms and complies with those rights.

PART III. ARGUMENT

A. An adapted Indigenous self-governance rights test must engage equality rights

8. This Court has been asked to adapt and evolve the legal test for aboriginal rights to reflect Indigenous Peoples' generic self-governance rights.[10] The Act legislates Indigenous self-governance over CFS while advancing Indigenous women's substantive equality.[11] NWAC submits the gender equality guarantees found within s. 35(4)[12] and the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP")[13] Art. 44 must inform this test.

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[10] *Reference*, *supra* note 3 at para 487.
[11] *Act*, *supra* note 4, preamble ("Whereas Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage").
[12] *Constitution*, *supra* note 2.
[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007) art 44 ["UNDRIP"].

9. When read together, s. 35 and the UNDRIP confirm Indigenous self-governance rights and advance Indigenous gender-based equality. The *Constitution* enshrines Indigenous women's equal access to their Indigenous rights through s. 35(4).[14] Of course, it is well established law in Canada that the law must develop in a manner that is consistent with *Charter* values,[15] and the *Charter* protects substantive equality as an overarching value.[16] Further, by enacting the *United Nations Declaration on the Rights of Indigenous Peoples Act*[17] ("UNDRIPA"), Canada signalled its intention to harmonise its laws with UNDRIP to foster reconciliation.[18] The Act contains principles that are consistent with both UNDRIP and the *Constitution* s. 35(4). Any Indigenous rights framework this Court adjudicates, or Parliament legislates, must align with UNDRIP's principles.[19]

10. NWAC submits an adapted Indigenous self-governance rights test must specifically call in Indigenous women. By specifically invoking the promise of gender-based equality within s. 35(4), this Court will meet its obligation to interpret the Constitution consistently with critical domestic and international animating legal norms and principles.

B. Equality rights must advance substantive, not formal, equality principles

11. Section 35(4) is a constitutional directive to pause and consider gender equality within these appeals' s. 35 rights analyses. Section 35(4) carries this legal promise into s. 35 rights, guaranteeing their equal application to male and female persons.[20] When viewed through a

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[14] *Constitution*, *supra* note 2 s 35.
[15] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 (SCC) at paras 91-97 (describing proper approach when common law is inconsistent with Charter values). This approach was recently confirmed in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 61 ("[i]t has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the Charter").
[16] *Fraser v Canada*, 2020 SCC 28 at para 42 ["*Fraser*"].
[17] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIPA*].
[18] *Reference*, *supra* note 3 at para 512.
[19] *UNDRIPA*, *supra* note 17 at s 5.
[20] *Constitution*, *supra* note 2 s 35(4).

constitutional equality lens, s. 35(4) requires that the law must advance substantive equality to avoid perpetuating Indigenous women's historic disadvantages.[21]

12. Section 35(4) is a relevant mechanism through which to meaningfully engage constitutional gender-based equality guarantees[22] within today's male-dominated Indigenous governance systems.[23] Advocates for s. 35(4)'s inclusion reasoned the *Indian Act*'s built-in gender inequities, which restricted band membership in ways that privileged men, warranted an explicit gender equality provision under s. 35.[24] Critics argued the *Canadian Charter of Rights and Freedoms*[25] already protected gender equality, but s. 35 is not in the *Charter*, so the 1983 Constitutional Conference prompted Parliament to enact s. 35(4) into law.[26]

13. Section 35 cannot be interpreted without attention to gender-based substantive equality under s. 35(4). This Court's constitutional analysis must align with substantive equality principles or risk a formal equality default position. Substantive equality recognizes that facially neutral treatment may produce serious inequality when it fails to account for the ways systemic disadvantages limit a group's opportunities.[27] As recently affirmed in *Fraser*, substantive equality is the "animating norm" of the constitutional equality guarantee.[28] In *Beckman*, this

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[21] See for e.g. *Fraser*, *supra* note 16 at para 42.
[22] See *Act*, *supra* note 5 at s 19; this Court held that s. 15 of the *Charter* applies to *Indian Act* Bands: *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, 173 DLR (4th).
[23] Statistics Canada Government of Canada, "Gender Results Framework: Data table on the representation of men and women in First Nations band councils and Chiefs in First Nations communities in Canada, 2019" *The Daily* (13 April 2021), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/210413/dq210413f-eng.htm>.
[24] See *McIvor v Canada*, 2009 BCCA 153; also see *Sandra Lovelace v Canada*, Communication No R6/24 (29 December 1977), UN Doc Supp No 40 (A/36/40).
[25] *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[26] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, 32-1, No 69 (27 June 1983); *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 211 [NIMMIWG Final Report].
[27] *Fraser*, *supra* note 16 at paras 42 and 47, citing *Andrews* v *Law Society of British Columbia*, [1989] 1 SCR 143 at 164, 56 DLR (4th) 1.
[28] *Fraser*, *supra* note 16 at para 42.

Court confirmed s 35(4) must operate in harmony with other constitutional organizing principles.[29]

(i) Colonization historically disadvantaged Indigenous women

14. Constitutionally enshrined substantive equality principles apply in these appeals because the Court's ruling can recognize and help reverse the Crown's role in disempowering Indigenous women within Indigenous governance structures.

15. Before colonization, Indigenous women held power and place as leaders in their communities.[30] Colonization sought to destroy women's relationships to land and property, as understood in First Nations communities, replacing Indigenous governance structures with ones placing men firmly in charge.[31] Through assimilationist laws and policies, including the Indian Residential School program and *Indian Act*, Canada attempted to silence Indigenous women,[32] then threatened their survival.

16. Indigenous women are doubly disadvantaged by racism and sexism. As this court recognized in *R v Kapp* and affirmed in subsequent decisions, Indigenous people are systemically disadvantaged on the basis of race, largely due to the Crown's harmful actions.[33] Indigenous women's intersectional oppression results in the harms articulated throughout the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* ("MMIWG report").

17. The MMIWG Report classifies Indigenous women's gender and race-based discrimination harms as a genocide.[34] Indigenous women are sexually assaulted, killed, and jailed at rates far exceeding non-Indigenous women.[35] These violence and overincarceration rates are not mere by-products of trauma-infused interpersonal relationships-- they are informed by broad

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[29] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 98.
[30] NIMMIWG Final Report, *supra* note 26 at 163.
[31] *Ibid* at 165.
[32] *Ibid* at 167.
[33] *R v Kapp*, 2008 SCC 41 at para 59.
[34] NIMMIWG Final Report, *supra* note 26 at 10.
[35] Statistics Canada, Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada by Loanna Heidinger, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 April 2022) at 11, 13-14.

social structures perpetuating Indigenous women's inequality.[36] Colonial harms manifest today as the ongoing MMIWG tragedy, of which courts have taken judicial notice.[37] As the SCC noted in *R v Barton*[38]:

> Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people — and in particular Indigenous women, girls, and sex workers — have endured serious injustices, including high rates of sexual violence against women. The ongoing work of the National Inquiry into Missing and Murdered Indigenous Women and Girls is just one reminder of that painful reality.[39]

18. Indigenous women face significant barriers claiming their governance rights today, given their historic marginalization and the ongoing genocide of Indigenous Peoples *vis a vis* the MMIWG crisis. The Indigenous governance rights analyses at the centre of these appeals must dismantle Indigenous women's barriers to advance their substantive equality. Indigenous feminist scholars insist that decolonization must apply a gender equality lens or Indigenous governance rights frameworks risk perpetuating systemic male privilege and oppressing Indigenous women.[40]

(ii) Advancing Indigenous women's equality today redresses disadvantage

19. Parliament expressly recognized the Act's implementation helps redress Indigenous women's disempowerment.[41] This is the intent of Parliament. NWAC respectfully suggests this Court's constitutional analysis must align with gender-based equality rights guaranteed to Indigenous women. Only when courts work to dismantle historic disadvantage can Indigenous women freely claim their s. 35(4) equality rights.

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[36] John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50 Osgoode Hall LJ 699 at 700 [Borrows].
[37] See *R v Barton*, 2019 SCC 33 at para 198 [*Barton*]; *R v Wood*, 2022 MBCA 46 at paras 31-32; *R v Bunn*, 2022 MBCA 34 at para 104; *R v LP*, 2020 QCCA 1239 at paras 83-90, 179; *R v Sharma*, 2020 ONCA 478 at para 96.
[38] *Barton*, *supra* note 37.
[39] *Ibid* at para 198.
[40] Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48 UBC L Rev 593 at 616.
[41] *Act*, *supra* note 5, preamble.

20. Indigenous women's substantive equality directly connects to each Indigenous governance structure's success.[42] The equality rights advanced by NWAC are not *ultra vires* the issues on appeal because they advance reconciliation and strengthen Indigenous self-governance, two principles at the heart of s. 35 cases.

C. A constitutional Indigenous rights analysis must engage reconciliation principles

21. Reconciliation principles are the "fundamental objective of the modern law of aboriginal and treaty rights."[43] The SCC confirms "…the ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty…" and "…the purpose of s. 35 of the *Constitution Act, 1982*, is to facilitate this reconciliation."[44]

22. Indigenous self-governance rights are essential to realizing s. 35's reconciliation principles.[45] In *Haida Nation*[46] this Court further clarified the "…process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal people…" recognizing "…Indigenous women experience these legacies in gendered racialized ways, including the loss of status and culture, children and family ties, gendered health implications, cultural transmission practices, language, and access to land…"[47]

23. Cooperative federalism recognizing Indigenous governing bodies' inherent rights advances reconciliation. In contrast, when cooperative federalism excludes Indigenous Peoples' jurisdiction, including Indigenous women's equality rights, it irreconcilably fractures this relationship.

24. This Court must advance reconciliation with Indigenous women, given their gender-based systemic disadvantages since colonization. For Indigenous women, substantively equal access to s. 35 governance rights reduces their vulnerability to violence and ultimately strengthens

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[42] Borrows, *supra* note 36 at 713.
[43] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para 1.
[44] *Mikisew Cree First Nation v Canada (Governor General in Council)* 2018 SCC 40 at para 58.
[45] *Reference*, *supra* note 3 at para 474.
[46] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[47] *Ibid* at paras 11, 32.

communities.[48] These appeals will only successfully advance reconciliation principles to the degree they correspondingly redress Indigenous women's historic disempowerment.

D. A constitutional Indigenous rights analysis must conform to international human rights instruments

25. Canada can honour its reconciliation promises through its legal imperative to adhere to international human rights treatises, which demand Indigenous women's access to equality rights.

26. This Court affirms Canada's international human rights commitments hold persuasive value in constitutional rights analyses.[49] The conformity principle presumes the Act at issue in these appeals, and this Court's analysis thereof, conforms to international law.[50]

27. The *Convention on the Elimination of All Forms of Discrimination against Women*[51] ("CEDAW") requires Canada take appropriate steps to eliminate discrimination against women in political and public life, and ensure women enjoy these rights on equal terms with men.[52] The *United Nations Convention on the Rights of the Child*[53] ("UNCRC") requires Canada take all appropriate measures to protect children from discrimination on the basis of, *inter alia*, their race and gender.[54]

28. NWAC submits this Court must act on its obligations to interpret these appeals' constitutional issues in conformity with international human rights treatises. CEDAW and the UNCRC recognize Indigenous women and girls' equal right to participate in and engage their governance rights.

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[48] Borrows, *supra* note 36 at 708.
[49] See e.g. *Nevsun Resources Ltd v Araya*, 2020 SCC 5; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 174 DLR (4th) 193; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193.
[50] *R v Hape*, 2007 SCC 26 at para 53.
[51] *Convention to Eliminate All Forms of Discrimination Against Women*, UNGA OR Res 34/180, (18 December 1979) (Ratified by Canada on 10 December 1981), art 7.
[52] *Ibid*.
[53] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (Ratified by Canada on 31 December 1991).
[54] *Ibid*.

(i) UNDRIP affirms equitable Indigenous self-governance rights

29. In 2021, Canada enacted UNDRIPA to bring its laws into alignment with UNDRIP's terms.[55] Parliament intends Canada's laws align with UNDRIP. UNDRIPA guides Parliament's implementation of an action plan to achieve UNDRIP's objectives as Canada's "minimum standards."[56]

30. UNDRIPA provides a persuasive and significant interpretive lens through which to view these appeals' constitutional issues related to Indigenous Peoples self-governance rights.[57] UNDRIPA Art. 4(a) affirms UNDRIP as a universal international human rights instrument with application in Canadian law, implicating the doctrine of conformity and raising UNDRIP to the status of a binding international human rights instrument relevant to constitutional interpretation. Further, UNDRIPA Art. 5 states, "the Government of Canada must, in consultation and cooperation with Indigenous Peoples, take all measures necessary to ensure that the laws of Canada are consistent with" UNDRIP.[58] The language is not permissive: UNDRIPA compels courts to interpret statutes in alignment with UNDRIP.[59] The Attorney General for Canada supports applying UNDRIP to recognize and affirm Indigenous Peoples' inherent right to self-government under s. 35 and the Act.[60]

31. UNDRIP Article 34 recognizes Indigenous Peoples' right to "promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs." The word 'develop' clarifies Indigenous rights must not remain frozen in their precolonial state but remain free to evolve amidst their rights' shifting nature.

32. All human rights are universal, indivisible, interdependent, and interrelated.[61] UNDRIP requires Canada ensure Indigenous women's perspectives and gender equality are central to all

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[55] UNDRIPA, *supra* note 17, preamble, s 4. Also see: *Reference*, *supra* note 3 at paras 55, 186-189, 193, 198.
[56] UNDRIPA, *supra* note 17, preamble, s 4.
[57] UNDRIPA, *supra* note 17.
[58] UNDRIPA, *supra* note 17, s 5 [emphasis added].
[59] UNDRIPA, *supra* note 17 at preamble.
[60] Factum of the Appellant Attorney General of Canada at para 133.
[61] *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, (1993) at art 5.

activities, including governance activities.[62] UNDRIP Art. 44 requires Canada guarantee Indigenous rights equally to male and female individuals. Art. 22 requires Canada take necessary steps to protect Indigenous women and children against all violence and discrimination.[63]

33. NWAC submits the key to meet Canada's UNDRIP obligations is for this Court to provide gender-specific directives within its s. 35 analyses.[64] Parliament's UNDRIPA enactment provides UNDRIP with uniquely persuasive value alongside other international human rights treaties in Canadian Indigenous rights analyses.

E. Conclusion

34. Indigenous women await this Court's ruling in these appeals because they hope for affirmation of their s. 35(4) rights matter. For this Court's decision to align with the constitution's guarantee to substantive equality, promote reconciliation and conform to international human rights law, it must produce a rights framework that specifically advances Indigenous women's equal access to these rights. Only in engaging s. 35(4)'s gender-based equality guarantees and UNDRIP Art 44 will this Court's ruling be justifiable in the contexts of cooperative federalism and advancing reconciliation.

PART IV: COSTS

35. NWAC does not seek costs and asks that it not be subject to any costs orders.

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[62] Brenda Gunn, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011) at 26-27 [Gunn], citing M Celeste McKay and Craig Benjamin, "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, Jackie Hartley, Paul Joffe, and Jennifer Preston, eds (Saskatoon, Purich Publishing Ltd: 2010) 156 at 157, emphasis added.
[63] UNDRIP, *supra* note 13 at arts 22, 44.
[64] Gunn, *supra* note 62 at 27.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11TH day of November, 2022.

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