

**COURT OF APPEAL FOR ONTARIO**

**IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018 c. 12.**

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**FACTUM OF THE INTERVENER  
THE UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING**

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## **PART I – OVERVIEW**

1. This case presents another milestone in the process of reconciling the Crown assertion of sovereignty with the rights of Indigenous peoples. The outcome is so significant that it could preclude current and future generations of Indigenous peoples from exercising their constitutionally protected rights as self-determining peoples.

2. The United Chiefs and Councils of Mnidoo Mnising (UCCMM) intervenes on behalf of their members to ensure that their constitutionally affirmed rights are not rendered meaningless by a jurisdictional dispute between the Crown's orders of government.

3. The UCCMM Nations have exerted their jurisdiction over their lands and waters, and have exercised their customs, practices and traditions in their territory, since time immemorial. These inherent rights were also given constitutional protection in s. 35 of the *Constitution Act, 1982*.

***Constitution Act, 1982, s. 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.***

4. Serving as stewards of the largest freshwater island in the world, the UCCMM Nations have interacted sustainably with the environment which they have occupied for thousands of years. However, unsustainable emissions of anthropocentric greenhouse gases (GHG), often by industrial actors extracting natural resources from Indigenous lands, has already altered their environment and begun to interfere with their constitutionally protected s. 35 rights and jurisdiction. The impact on these rights will only be exacerbated as climate change progresses.

***Affidavit of Tribal Chair Patsy Corbiere, at paras 9, 12 & 16 (Record of the Intervener UCCMM) [Tribal Chair Corbiere Affidavit].***

5. The UCCMM Nations submit that the division of powers amongst the Crown's orders of government must be interpreted in a way that allows the Crown to safeguard the constitutionally protected rights of Indigenous communities and to uphold its obligations toward Indigenous peoples. Put another way, the division of powers between the Crown's orders of government must be reconciled with the role of Indigenous governments and the Crown's duties in relation to their s. 35 rights. This is consistent with the constitutional principle of the Honour of the Crown and the unwritten constitutional principle of the protection of minorities.

6. As climate change risks substantially infringing and even *de facto* extinguishing many of the s. 35 rights held by the UCCMM Nations, the *Greenhouse Gas Pollution Pricing Act* (hereafter the "GGPPA" or the "Act") must be found to be *intra vires* Parliament's legislative

authority. The Act is vital to controlling the serious impacts of climate change on the s. 35 rights of the UCCMM Nations. Constitutionally protected s. 35 rights must not be rendered meaningless by the jurisdictional vacuum that would result from finding the Act *ultra vires*. This would impede Canada's legitimate attempts to reduce the country's GHG emissions in order to necessarily prevent dangerous levels of climate change.

7. The pith and substance of the *GGPPA* is to reduce cumulative GHG emissions in line with what is required for Canada to avoid dangerous levels of climate change, quantified as 1.5 degrees of warming. This is *intra vires* of Parliament's Peace, Order and Good Governance (POGG) authority under both the National Concern branch and the National Emergency Branch.

## **PART II - FACTS**

8. Since time immemorial, the Anishinabek have successfully coexisted sustainably with other elements of the environment. This close link to lands and waters means that First Nations are the first to experience environmental dangers. Threats to the environment, including anthropogenic climate change, pose direct threats to the Anishinabek and their way of life.

***Tribal Chair Corbiere Affidavit, supra at paras 9-16.***

9. UCCMM is a key voice and leader in the broader Anishinabek Nation. The traditional territories of the UCCMM Nations are primarily situated on the island of Mnidoo Mnising (Manitoulin Island, Ontario), the islands surrounding it, and the North shore of Georgian Bay, part of the Great Lakes Basin.

***Tribal Chair Corbiere Affidavit, supra at paras 5-6.***

10. The UCCMM Nations are Treaty partners with the Crown. The UCCMM Nations and the Crown entered into a nation-to-nation relationship in 1836 via the Manitoulin Treaty and once again in 1850 as signatories of the Robinson-Huron Treaty. These treaties between two separate nations form part of our constitutional genealogy and represent solemn promises. At the core of this solemn nation-to-nation Treaty partnership between the Crown and the UCCMM Nations is a shared vision that the Anishinaabek and the Crown can co-exist in a mutually respectful and beneficial relationship.

***Tribal Chair Corbiere Affidavit, supra at para 8.***

11. The UCCMM Nations are stewards of one of the world's most unique environments. Mnidoo Mnising is the largest freshwater island in the world, nestled within Lake Huron, the fourth largest lake in the world. It is also a sacred territory, its name translating to “spirit island” in Anishinaabemowin. It is “the sacred place where the Spirits retreat and where [their] elders are buried.”

***Tribal Chair Corbiere Affidavit, supra at para 13.***

12. The UCCMM Nations interact respectfully with this distinct ecosystem based on thousands of years of traditional knowledge. They also continue to exercise their customs, practices, traditions, and governance rights throughout their lands and waters in accordance with this knowledge. A core tenet of this interaction is that “humans are a part of the ecosphere and connected to [their] environment rather than something separate from it.” This relationship has been, and continues to be, a sustainable one.

***Tribal Chair Corbiere Affidavit, supra at para 13.***

13. UCCMM respects and accepts the abundance of scientific evidence contained in the whole of Canada’s Record which clearly establishes the state of climate change science, GHG emissions in Canada, and the effectiveness and necessity of Canada-wide carbon pricing to achieve the deep GHG emissions reductions required to avoid catastrophic climate change.

14. The close relationship to lands and waters has enabled the UCCMM Nations to witness firsthand the impacts of climate change. For example, over recent decades, the UCCMM Nations have noticed: (i) a decrease in native species in favour of invasive species; (ii) more instances of drought in the summer months due to higher temperatures and less precipitation; (iii) increased instances of forest fires; (iv) shorter and thinner ice cover in the winter months; (v) increased frequency and intensity of microburst storms; and (vi) diminishing water quality due to increased green algae blooms resulting from higher water temperatures.

***Tribal Chair Corbiere Affidavit, supra at paras 16-28.***

15. The impact of climate change on traditional food sources, medicinal plants, sacred sites, and the territory that is at the core of their ethos and central to their wellness, is increasingly becoming one of the most critical threats to mental and physical health. The effects of climate change are impairing the core of their subsistence, are a growing obstacle to the intergenerational

transfer of their culture, and pose a threat to the ability of future generations to exercise their rights as a self-determining people.

***Tribal Chair Corbiere Affidavit, supra at paras 16-28.***

16. For instance, moose populations are moving north, levels of native fish species are declining in favour of invasive species and declining ice-cover is impacting ice fishing. This makes it increasingly difficult for “members to feed themselves and their families in accordance with [their] traditional customs and practices.” Instead, members “are being forced to rely on a colonial food system completely inconsistent with [their] traditional diet. This has led to ill health and the emotional stress associated with not being able to feed [their] families.”

***Tribal Chair Corbiere Affidavit, supra at paras 17-19.***

17. Natural medicines are also now harder to come by in the area as the geographic ranges of important plants move north. As a result, “the methods by which [they] have ensured [their] health and well-being since time immemorial are now at risk.”

***Tribal Chair Corbiere Affidavit, supra at para 20.***

18. To summarize, the effects of climate change are impairing the UCCMM Nations’ ability to continue serving as stewards to their sacred island home – something they have done sustainably for thousands of years. It prejudices their ability to govern their lands and waters as self-determining Nations. As the effects of climate change continue to erode their home, so too does it erode the core of who they are as distinctive First Nations.

**PART III – ISSUES**

19. The UCCMM Nations will address the following issues:

- A. Whether Section 35 rights are integral to the interpretation of sections 91 and 92 of the *Constitution Act, 1867*.
  - i. The division of powers must be interpreted in a way that upholds the Honour of the Crown and aligns with s. 35 rights.
  - ii. The unwritten constitutional principle of the protection of minorities requires the division of powers to be organized in a way that safeguards s. 35 rights.
- B. The GGPPA is clearly intra vires both branches of Parliament’s POGG authority when the rights of Indigenous communities are considered.
  - i. The GGPPA is within Parliament’s authority under POGG. The reduction of GHG emissions to limit the impact of climate change on Indigenous rights is a matter of National Concern as per the test established in *Crown Zellerbach*.

- ii. Climate Change mitigation is a National Emergency under POGG within the meaning established in the jurisprudence, particularly given its potential to render s. 35 rights meaningless.

#### **PART IV – ARGUMENT**

20. The grand purpose of s. 35 is reconciliation wherein Indigenous rights are reconciled with the reality of the Crown's asserted sovereignty. UCCMM submits that as First Nation governments, our member Nations must be respected as equal Treaty partners. The Crown's division of powers must be reconciled and understood according to the constitutionally protected rights of Indigenous peoples in s. 35.

*Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 129.

21. UCCMM submits that the *GGPPA* plays a critical role in fulfilling the Crown's obligation to uphold s. 35 rights and is therefore *intra vires*. This is because:

- (1) in this case, a finding that the federal order of government has the constitutional authority to address cumulative GHG emissions allows the Crown to protect and uphold s. 35 rights. This is the only interpretation of the Constitution that is consistent with the constitutional principle of the Honour of the Crown and the unwritten constitutional principle of protection for minorities. This is because where even one province fails to act to mitigate climate change, the efforts of the others and of Canada are undercut; and,
- (2) such a finding is also consistent with an analysis of the POGG power under both its National Concern and National Emergency branches in the context of an evolving constitutional framework that affirms s. 35 rights.

To hold otherwise would place Indigenous rights in a jurisdictional void and would fail to give meaning to the reconciliatory spirit of s. 35. We cannot have any gaps in the effective mitigation of climate change.

**(A) Section 35 rights are integral to the interpretation of sections 91 and 92**

22. As established above, s. 35 recognizes and affirms the UCCMM Nations' rights, including: (1) Aboriginal and Treaty rights to exercise customs, practices, and traditions like hunting, fishing, trapping or gathering; (2) land and water rights recognized under Treaty and asserted as part of Aboriginal Title; and (3) jurisdictional rights including governance and self-

determination over areas such as health and the environment. These rights have been an integral part of the UCCMM Nations distinctive culture since time immemorial.

23. However, climate change threatens the very core of these rights. The UCCMM Nations' distinctive way of life are inherently linked to the health of their home, Mnidoo Mnising, which they have occupied for millennia. Without immediate and significant action, we fear that "climate change will continue to have a major negative impact on [their] customs, practices, and traditions as well as cause an intergenerational transfer of such harm. We strongly believe [their] very way of life is at risk." Climate change therefore risks rendering the UCCMM Nations' s. 35 rights hollow and *de facto* extinguished. These are island peoples whose identity and subsistence depends on their lands and surrounding waters.

***Tribal Chair Corbiere Affidavit, supra at paras 16-28.***

24. If GHG emissions are not reduced drastically and in a timely manner, UCCMM's rights to exercise certain customs, practices and traditions, interact with their traditional lands and waters, and exercise their inherent constitutional jurisdiction will be impacted to the point of rendering these rights meaningless. For the Crown's powers to be divided between its orders of government in a way that allows such important and constitutionally protected rights to be diminished by the effects of the GHG emissions generated by its citizens, is contrary to the law as set out by the SCC. It is not in keeping with the constitutional principles of the Honour of the Crown and the protection of minorities.

***i. The division of powers must be interpreted in a way that upholds the Honour of the Crown and aligns with s. 35 rights***

25. The Honour of the Crown is a fundamental constitutional principle that governs the Crown's relationship with Indigenous peoples. It arises from the "Crown's assertion of sovereignty over an Aboriginal people and de facto control [over their] land and resources." It obliges the Crown to act honorably in its historical and future relationship with Indigenous peoples.

***Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 32 [Haida].***

26. The Honour of the Crown has been used as an interpretive constitutional principal for centuries and has served in modern times as "an interpretive guide post to the public law duties"

where s. 35 rights are at stake. It is a fundamental pillar of our constitution which the SCC has stated “must be understood generously.”

***Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 86 [MMF]; *Haida, supra* at para 17.**

27. This constitutional principle is key to understanding the interplay of the division of legislative authority in s. 91 and 92 with the rights recognized and affirmed at s. 35. Specifically, we submit that this solemn obligation of the Crown itself must be at the heart of any interpretation of the division of powers. The allocation of authority between the Crown’s orders of government must be interpreted to give meaning to s. 35 constitutional rights. To do otherwise would result in a jurisdictional void and a potentially unjustifiable infringement or *de facto* extinguishment of s. 35 rights.

28. The Honour of the Crown “binds the Crown qua sovereign” and it therefore should be expected that the Crown has divided its powers between its orders of government to uphold the promises and obligations it undertook when it asserted sovereignty over Indigenous peoples and took *de facto* control over their lands and resources. As Dickson C.J. made clear in *Peguis*, “any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.”

***Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 44; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 109 [*Peguis*].**

29. The SCC has made clear the importance of using the rights affirmed in s. 35 to interpret the division of powers. In *Sparrow*, it explicitly held that the powers in s. 91 must “now be read together with s.35(1)” as “federal power must be reconciled with federal duty [our emphasis].”

***R v Sparrow*, [1990] 1 SCR 1075 at 1109 [*Sparrow*].**

30. In *Daniels*, the SCC did just that. It was necessary to read s. 91(24) and s. 35 together to avoid placing Métis and non-status Indians in a jurisdictional void. It has also been confirmed in *Caring Society* that division of powers disputes between the Crown’s orders of government should not place Indigenous peoples in jurisdictional gaps.

***Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 34-35 [*Daniels*]; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 2 at para 381 [*Caring Society*].**

31. Given the significant threat climate change poses to the s. 35 rights of the UCCMM Nations as well as the rights of Indigenous communities in Ontario and throughout Canada, the division of powers must be interpreted in a way that upholds the Honour of the Crown and therefore safeguards the very core of s. 35 rights. Here, this means: (1) avoiding the creation of a legislative vacuum on reducing the country's cumulative GHG emissions; and (2) adapting the POGG tests to include s. 35 rights.

32. The UCCMM Nations must not be collateral damage in this intra-Crown dispute nor should they bear the brunt of the consequences for a decision that would render the federal order of government jurisdictionally unable to address cumulative, nation-wide, GHG emissions. As the SCC has made clear, "jurisdictional tug-of-war[s]" must not leave Indigenous peoples in a "jurisdictional wasteland."

*Daniels, supra* at paras 14-15.

33. The Court must interpret s. 91 and 92 consistently with the constitutional principle of the Honour of the Crown to avoid creating a legal vacuum on climate change mitigation. The consequences of a legal vacuum on climate change are not abstract. They lead to the destruction and deterioration of lands and waters and render worthless the s. 35 rights to which these lands and waters are tied.

34. As set out below in the context of the POGG national concern test, a failure by one or more provinces to meet the national minimum benchmark price on carbon would jeopardize Canada's ability to meet its national GHG emissions target. This in turn jeopardizes international efforts required to mitigate the effects of climate change. If the Court were to find that the *GGPPA* is *ultra vires*, the Crown would be unable to meet its constitutional obligations to the UCCMM Nations and the Honour of the Crown would not be upheld.

35. The Honour of the Crown is only upheld in this case if the division of powers is interpreted to ensure that the federal order of government has the jurisdiction to address the cumulative dimensions of GHG emissions which pose significant threat to s. 35 rights. Given the urgency of rapidly mitigating the country's aggregate levels of GHG emissions, the federal order of government is required, and best placed, to uphold the Crown's constitutional obligations toward Indigenous peoples.



***ii. The unwritten constitutional principle of the respect for and protection of minorities also requires the division of powers to be interpreted in a way that safeguards 35 rights***

36. The SCC has confirmed that respect for and protection of minorities is an unwritten constitutional principle which “inform[s] and sustain[s] the constitutional text” and is a “major [element] of the architecture of the Constitution itself and [is] as such its lifeblood.” It forms part of the “vital unstated assumptions upon which the text [of our Constitution] is based” and “continues to exercise influence in the operation and interpretation of our Constitution.”

***Reference re Secession of Quebec, [1998] 2 SCR 217 at paras 49-54 [Secession Reference].***

37. The unwritten constitutional principle of the protection of minorities has not only an interpretative function but also serves a broader, normative role as an “organizing principle” of the Constitution. As this Court held in *Lalonde*, “the principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text.”

***Secession Reference, supra at paras 50-54; Lalonde v Ontario (Commission de restructuration des services de santé), 56 OR (3d) 505 at para 114.***

38. This unwritten principle has been used a number of times to provide courts with a purposeful understanding of constitutional provisions within the broader architecture of the Constitution. This includes, for instance, the interpretation of the *Supreme Court of Canada Act* within the larger Constitutional framework in *Reference re Supreme Court Act*.

***Reference re Supreme Court Act, ss 5 & 6, 2014 SCC 433 at para 48.***

39. The UCCMM Nations submit that the unwritten organizing constitutional principle of the protection of minorities operates to support the harmonious interpretation of the division of powers with the protections of s. 35 rights. This is also consistent with the SCC’s jurisprudence, which has explicitly highlighted the inherent link between the unwritten constitutional principle of protection of minorities and s. 35 rights, noting that the protection of s. 35 rights “whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.”

***Secession Reference, supra at para 82.***

40. In this case, an organization of the Constitution consistent with the unwritten constitutional principle of the protection of minorities requires this Court to ensure that the division of powers does not create a jurisdictional gap resulting in the infringement of s. 35

rights. This favors an interpretation of the division of powers that allows the Crown to make the critical cuts to Canada's cumulative GHG emissions required to avoid dangerous levels of climate change and the *de facto* extinguishment of s. 35 rights.

41. Parliament's legislative authority to take the steps needed to reduce the cumulative dimension of Canada's GHG emissions must be upheld in order to ensure that the division of powers between the Crown's orders of government is aligned with this fundamental element of the architecture of the Constitution. An interpretation that considers the infringement of constitutionally affirmed rights of historically marginalized Indigenous peoples simply as collateral damage to an intra-Crown dispute is inconsistent with the overall architecture of Canada's constitution and with the equal partnership required to achieve reconciliation.

**(B) The GGPPA is clearly *intra vires* both branches of Parliament's POGG authority when the rights of Indigenous communities are considered**

42. The UCCMM Nations submit that the pith and substance of the GGPPA is to reduce the aggregate national levels of anthropogenic GHG emissions in line with what is required for Canada to avoid the dangerous levels of climate change represented by 1.5 degrees of warming. The Act is vital to address the very serious and irreversible impacts of climate change on the First Nation rights. UCCMM submits the GGPPA is *intra vires* Parliament's legislative authority, and could be justified under a number of different federal powers, such as the criminal law power (as argued by some intervenors) and both branches of POGG. We submit that integrating s. 35 rights into the analysis of POGG's National Concern and Emergency branches further supports the conclusion that the GGPPA is *intra vires* these powers.

***i. The reduction of GHG emissions to limit the impact of climate change on Indigenous rights is a matter of National Concern as per the test established in Crown Zellerbach.***

43. The constitutional rights of Indigenous peoples in Canada must be factored into what constitutes a national concern. The infringement of s. 35 rights by the effects of climate change makes this a serious matter of concern to the country as a whole. Preventing anthropogenic GHG emissions from crossing the threshold required to avoid dangerous levels of climate change is not only a new matter, but now undisputedly a matter that goes beyond purely local or private matters. It is a matter of national (and international) concern.

***R v Crown Zellerbach, [1988] 1 SCR 401 at 431-432 [Crown Zellerbach].***

44. **Scale of impact on Indigenous rights, governance, and self-determination:** The *Crown Zellerbach* test for determining whether a matter is of national concern requires the Court to consider the scale of impact such a finding would have on provincial jurisdiction. We submit that the Court must equally consider the scale of impact the allocation *or denial* of Parliament’s jurisdiction over cumulative GHG emissions will have on Indigenous territories, jurisdiction, and rights.

*Crown Zellerbach, supra at 431-432.*

45. Indigenous governments are this country’s first orders of government and the scale of impact on their territories and constitutional rights must be considered in this analysis. An understanding of these rights must go beyond the narrow confines of hunting, fishing, trapping, and gathering to instead also consider the scale of impact of the core of their constitutionally protected jurisdictional rights as self-determining Nations. The recognition of inherent rights of government under s. 35 has been explicitly recognized by Canada and assumed by the SCC in *Pamajewon*. It was also recognized by the BCSC in *Campbell* where the Court noted that “aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten ‘underlying values’ of the Constitution.”

*R v Pamajewon, [1996] 2 SCR 821 at para 24 [Pamajewon]; Campbell et al v AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123 at para 81 [Campbell].*

46. This understanding of First Nations as rights holding governments requiring their inherent jurisdiction to be respected by the Crown is also in keeping with the rights of self-determination recognized in *UNDRIP*. This has domestic import and it should inform the interpretation of the POGG power. The SCC has made clear that international law has domestic import and “interpretations that reflect [international law] values and principles are preferred.”

*United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295, UNGAOR, 61<sup>st</sup> Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (endorsed by Canada 12 November 2010), art 33 [UNDRIP]; Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 70; 114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 at paras 30-32.*

47. Therefore, as First Nations with constitutionally protected governance and jurisdictional authority, we submit that the division of powers must ensure that legislative authority is allocated to the Crown’s orders of government in a way that will have the least impact on the core of Indigenous governance and their exercise of jurisdiction.

48. This means ensuring the constitutional rights and jurisdiction of Indigenous communities are not rendered hollow by the effects of climate change as a result of a constitutional vacuum created by provinces wishing to avoid meeting the national minimum standard for pricing carbon. The division of powers should not be interpreted to allow provinces to avoid participating in a pan-Canadian effort to price carbon on the pretext of protecting their constitutional jurisdiction. This places Indigenous governance rights, and the survival of Indigenous cultures and subsistence, at stake. It is not supported by an interpretation of the division of powers that upholds the Honour of the Crown and gives effect to the protection of minorities.

49. Federal legislation to effectively reduce GHG emissions to avoid crossing the threshold of 1.5 degrees of warming is a matter of national concern as it substantially reduces the scale of impact of climate change on Indigenous rights. The failure of even one province to enact sufficient carbon pricing is unacceptable to UCCMM.

50. **The provincial inability test must explicitly consider the effects of a province's failure to act on Indigenous rights and interests:** It is well established that when determining if a matter is of national concern, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter." The UCCMM Nations submit that "extra-provincial" interests must include Indigenous interests. Courts must consider what impact the failure of even one province to effectively reduce GHG emissions would have on s. 35 rights.

*Crown Zellerbach, supra at 431-432.*

51. Carbon pricing is a vital tool in the fight against climate change. It has been internationally recognized as essential to cost-effectively achieve the deep GHG emissions reductions required to limit the effects of climate change to what experts consider just short of catastrophic. The experience of the last twenty-five years offers a natural experiment for what happens in the absence of a national carbon price i.e., GHG emissions go up and Canada repeatedly fails to meet its national GHG emissions reduction targets. This historical failure to nationally reduce GHG emissions has contributed to the growing and very serious risk that unabated GHG emissions create for Indigenous peoples in Canada and their constitutionally protected s. 35 rights.

*Affidavit of John Moffet, at paras 25, 34 & 49 (Canada’s Record Vol. 1, Tab 1 [Moffet Affidavit].*

52. Given the current state of climate change and GHG levels, the Court must consider the impact on s. 35 rights of even one province’s failure to substantially reduce GHG emissions. More specifically, we submit it must consider the conduct of Ontario, which is Canada’s second largest GHG emitter and has recently abolished its carbon pricing system. This failure warrants strong and decisive federal legislation to abate emissions.

*ii. Climate Change mitigation is a National Emergency under POGG particularly given its potential to render s. 35 rights meaningless*

53. Climate change is an emergency at a planetary and national scale, as it threatens the life-sustaining systems that provide all living things with material and spiritual subsistence.

54. The UCCMM Nations have a distinctive connection to the environment in which they have always lived sustainably. This intimate connection with their lands and waters puts them on the front lines of climate change. Though the sustainable way of life of the UCCMM Nations accounts for very few GHG emissions, they bear a much greater brunt of the harm caused by climate change, and experience it far sooner than the average Canadian. We therefore submit that Canada’s cumulative levels of GHG emissions is a national emergency requiring, at a minimum, an immediate national carbon price.

55. Under the Emergency Branch of POGG, Parliament has jurisdiction to implement legislation required to address a national emergency “of such proportions as to transcend the authority vested in the Legislatures of the provinces.” Because a national emergency justifies incursion into matters otherwise of provincial jurisdiction, the SCC has determined that it must be confined to legislation that is temporary in nature.

*Re: Anti inflation, [1976] 2 SCR 373 at 436-437 [Re: Anti inflation].*

56. The urgent need to drastically reduce Canada’s GHG emissions to avoid 1.5 degrees of warming and irreparable harm to the constitutional rights of the UCCMM Nations and those of other Indigenous communities in Canada is a national emergency.

57. The SCC has held that establishing the evidentiary requirement for this authority is simply a finding that there is a rational basis for characterizing a situation as an emergency. The legislation need not include the word “emergency”, and the court may even take judicial notice of “exceptional circumstances...so notorious” that extrinsic material is not required.

*Re: Anti inflation, supra at 375 & 423.*

58. In this case, the *GGPPA*'s Preamble speaks to the purpose of responding to an emergency. For example, it states that “recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an *unprecedented risk* to the environment” and that the “impacts of climate change [...] are already being felt throughout Canada and are impacting Canadians, *in particular the Indigenous peoples* [in] *Canada* [...] [our emphasis]”.

*Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No 1, SC 2018 c 12 at Preamble.*

59. The science clearly establishes how and why the current situation qualifies as an emergency: (1) the time required to make the unprecedented reductions in GHG emissions needed to avoid dangerous climate change is running out; (2) the GHG reductions needed require a fundamental restructuring of Canada's economy as a whole (its decarbonisation); (3) Canada has repeatedly failed as a country to reduce its GHG emissions in line with its own targets; and (4) the harms caused by insufficient GHG emissions reductions are largely irreversible.

*Moffet Affidavit, supra at paras 13-15 & Exhibit D (Canada's Record Vol. 1, Tab 1).*

60. The impact of climate change on the constitutional rights of the UCCMM Nations and the rights of other Indigenous peoples in Canada make it even clearer that this is a national emergency. Their close connection to their lands and waters as well as centuries of continued historical marginalization and systemic discrimination amplifies the harm resulting from the effects of climate change. Ultimately this is a national emergency of the utmost importance as it threatens not only their rights, but their very existence as culturally distinctive First Nations.

*Tribal Chair Corbiere Affidavit, supra at paras 16-28, 34, 50 & 82.*

61. We submit that the appropriate timeframe for justifying the *GGPPA* as an emergency measure is 11 years; from now until 2030. The recent report by the Intergovernmental Panel on Climate Change (IPCC) on the state of climate science concluded that “rapid, far-reaching” and “unprecedented” changes in all sector” of society are required to keep temperature gain to between 1.5 and 2 degrees Celsius. The actions taken up to 2030 will be decisive in whether we avoid crossing the 1.5 degree threshold. This timeframe aligns with the 2030 deadline Canada has set for achieving its current national GHG emissions reduction target.

*Moffet Affidavit, supra at Exhibit D at 213 (Canada's Record Vol. 1, Tab 1).*

62. The analysis of the “temporary” nature of measures aimed at mitigating climate change must take into account the fact that climate change operates at a planetary scale, and responds on a geological timeframe to GHG emissions that can have effects lasting some 100 years. It must also recognize the fact that the UCCMM Nations and other Indigenous communities have interacted with their lands and waters sustainably for millennia and that climate change risks permanently infringing this relationship in a matter of a few years. As such, these two contextual factors demonstrate that the timeframe for legislation to address this emergency (eleven years) is but the blink of an eye.

***Moffet Affidavit, supra* at Exhibit G at 290 (Canada’s Record Vol. 1, Tab 1).**

63. Accordingly, the UCCMM Nations submit that the Court should uphold Parliament’s jurisdiction to legislate in order to reduce Canada’s aggregate levels of GHG emissions under the emergency branch of POGG until 2030, which is in line with the timeframe established by the IPCC. This is the only interpretation of the Constitution which upholds the Honour of the Crown and is consistent with the unwritten constitutional principle of protection of minorities.

64. While the UCCMM does not wish to undermine the importance of the internal need for a balancing of powers between the Crown’s orders of government, this internal question must be secondary to empowering Parliament to deal with an issue that imperils the future of all Canadians and particularly Indigenous communities who have contributed very little to creating the problem yet are at the frontlines of the harm.

65. In short, the interpretation of s. 91 and 92 must align with minority protection and Indigenous rights in our Constitution and under *UNDRIP*. Climate Change is a National Concern and a National Emergency according to the findings of the SCC.

**PART V – ORDERS SOUGHT**

66. That the Constitutional question be answered: The whole *GGPPA* is *intra vires*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** on February 25, 2019.

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Original Signed

Cynthia Westaway

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Original Signed

Nathalie Chalifour

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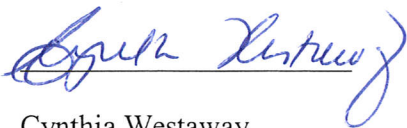
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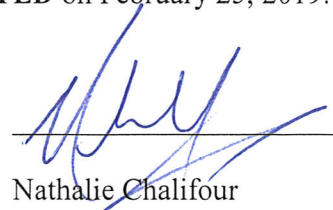
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## SCHEDULE A – LIST OF AUTHORITIES

### CASES

1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40
2. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817
3. *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC
4. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12
5. *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 2
6. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73
7. *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505
8. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14
9. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40
10. *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911
11. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 109
12. *R v Crown Zellerbach*, [1988] 1 SCR 401
13. *R v Pamajewon*, [1996] 2 SCR 821
14. *R v Sparrow*, [1990] 1 SCR 1075
15. *Re: Anti inflation*, [1976] 2 SCR 373
16. *Reference re Secession of Quebec*, [1998] 2 SCR 217
17. *Reference re Supreme Court Act, ss. 5 & 6*, 2014 SCC 433

## **SCHEDULE B – LEGISLATION CITED**

- i. *Constitution Act, 1867* (UK). 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
- ii. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- iii. *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No 1*, SC 2018 c 12.
- iv. *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49.

# Constitution Acts, 1867 to 1982

## PART II

### RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Marginal note: Recognition of existing aboriginal and treaty rights

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

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

Marginal note: Land claims agreements

(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.

Marginal note: Aboriginal and treaty rights are guaranteed equally to both sexes

(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. [\(96\)](#)

Marginal note: Commitment to participation in constitutional conference

**35.1** The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “Constitution Act, 1867”, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. [\(97\)](#)

# United Nations Declaration on the Rights of Indigenous Peoples





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## Joint Statement on Implementation - March 2011

*“Implementation of the Declaration should be regarded as a political, moral and legal imperative without qualification.”*

Professor James Anaya, United Nations Special Rapporteur on the rights of indigenous peoples, August 2010 report to the UN General Assembly

Indigenous peoples globally continue to face dispossession of their lands and resources, discrimination, forced assimilation and other grave human rights abuses. The *United Nations Declaration on the Rights of Indigenous Peoples*<sup>1</sup> is the most comprehensive international human rights instrument to specifically address their economic, social, cultural, political, civil, spiritual and environmental rights. In its own words, the *Declaration* sets out minimum standards necessary for the “dignity, survival and well-being” of Indigenous peoples.

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<sup>1</sup> General Assembly Resolution 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15



The UN General Assembly overwhelmingly adopted the *Declaration* on 13 September 2007. This historic adoption followed more than twenty years of deliberation and debate in which Indigenous peoples worked directly with states to elaborate upon and advance their human rights. This marked the first time within the UN that rights holders had such a central role in the creation of a new human rights instrument.

The *Declaration* affirms Indigenous peoples' right of self-determination and underlines the prohibition of discrimination and genocide in international law. The *Declaration* calls on states to honour and respect the Treaties and other agreements they have entered into with Indigenous peoples, to protect Indigenous languages and cultures, and to uphold Indigenous peoples' rights to lands, territories and resources.

The *Declaration* affirms the inherent or pre-existing collective human rights of Indigenous peoples, as well as the human rights of Indigenous individuals. It provides a framework for justice and reconciliation, applying existing human rights





standards to the specific historical, cultural and social circumstances of Indigenous peoples.

The *Declaration* reflects a range of human rights standards that have emerged over the last three decades through the work of international and regional human rights bodies as they have dealt with violations against Indigenous peoples. Many of these standards, such as the provisions of international human rights conventions or customary international law, establish clear legal obligations for states.

As we actively engage with the full and effective implementation of the *UN Declaration on the Rights of Indigenous Peoples*, we urge that:

**Governments**, in conjunction with Indigenous peoples, use the *Declaration* as the basis for reviewing and reforming laws and policies to ensure that Indigenous peoples' rights are upheld without discrimination.

**Courts and human rights tribunals** use the *Declaration* as a relevant and persuasive source in interpreting Indigenous human rights and related state obligations.



**Indigenous peoples and their institutions** use the *Declaration* as a principled framework for advancing their rights, in their own policy- and decision-making and in their negotiations with governments and other third parties.

**Civil society organizations** work cooperatively with Indigenous peoples, in promoting and implementing their human rights and maintaining the *Declaration* as a living instrument.

**Educational institutions** include the *Declaration* in their curriculum, including teacher training.

**Corporations and investors** ensure their human rights policies and business practices incorporate the standards in the *Declaration*.

The global consensus that now exists in support of the *Declaration* reinforces its weight as a universal human rights instrument. The ongoing and widespread human rights violations against Indigenous peoples worldwide underline the urgency of moving ahead with the full and effective implementation of the *Declaration*.



## **United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,



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*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,



*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,



*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as

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<sup>2</sup> See resolution 2200 A (XXI), annex.



the Vienna Declaration and Programme of Action,<sup>3</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human

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<sup>3</sup> A/CONF.157/24 (Part I), chap. III.



rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be





taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

### **Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

### **Article 2**

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.

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<sup>4</sup> Resolution 217 A (III).



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### **Article 3**

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.

### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.



## **Article 6**

Every indigenous individual has the right to a nationality.

## **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

## **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:



- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

## **Article 9**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No



discrimination of any kind may arise from the exercise of such a right.

### **Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution,



developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

## **Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.



### **Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

### **Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children,



have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

### **Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.





## **Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

## **Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the



child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

### **Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

### **Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent



before adopting and implementing legislative or administrative measures that may affect them.

### **Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.



2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

## **Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.



### **Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

### **Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to



achieving progressively the full realization of this right.

### **Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

### **Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they



have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

### **Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.



## **Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

## **Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for





indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

### **Article 30**

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned,



through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

### **Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.



## **Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.



### **Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

### **Article 34**

Indigenous peoples have the 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, in accordance with international human rights standards.



### **Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

### **Article 36**

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

### **Article 37**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their



successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

### **Article 38**

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

### **Article 39**

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.



### **Article 40**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

### **Article 41**

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.



### **Article 42**

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

### **Article 43**

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

### **Article 44**

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

### **Article 45**

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.





## **Article 46**

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.



3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



## Supportive Statements

The tragic and brutal story of what happened to us, especially at the hands of the governments, is well known. ... But today, with the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly, we see the opportunity for a new beginning, for another kind of relationship with States in North America and indeed throughout the world.

Statement of Indigenous Representatives from the North American Region, September 13, 2007

Adoption of the Declaration sends a clear message to the international community that the rights of Indigenous Peoples are not separate from or less than the rights of others, but are an integral and indispensable part of a human rights system dedicated to the rights of all.

Joint Statement by Amnesty International, Friends World Committee for Consultation (Quakers), International Federation of Human Rights Leagues, International Service for Human Rights, and Rights & Democracy, September 14, 2007



The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. ... [I]t provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.

UN Secretary-General Ban Ki-moon, International Day of World's Indigenous People, 9 August 2008

The UN Declaration on the Rights of Indigenous Peoples serves as OHCHR's framework for action to further the advancement and protection of indigenous peoples' rights. The main priority of the Office is to contribute to the promotion and implementation of this key instrument, along with relevant recommendations, comments and observations of UN human rights treaty bodies, and Special Procedures.

UN Office of the High Commissioner for Human Rights (OHCHR), April 2011



The Declaration constitutes one of the most significant achievements in this field of human rights, and we are confident that it will advance the rights and ensure the continued development of indigenous peoples around the world. The EU was encouraged by the wide support to the Declaration from Indigenous peoples' representatives, as well as the large number of States. ... The challenge before us now, is to make sure that the indigenous peoples will in fact enjoy the rights recognised in the Declaration.

Portugal (on behalf of the European Union),  
Human Rights Council, September 26, 2007

The Declaration contextualizes all existing human rights for Indigenous Peoples and provides therefore the natural frame of reference for work and debate relating to the promotion of indigenous peoples' rights.

Norway, UN Expert Mechanism on the Rights of  
Indigenous Peoples, 2009





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**Quebec Native  
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[www.faq-qnw.org](http://www.faq-qnw.org)



**Union of BC  
Indian Chiefs**  
[www.ubcic.bc.ca](http://www.ubcic.bc.ca)



**IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018 c. 12.**

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE INTERVENER  
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