SCC File No 40195

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

IN THE MATTER of An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, SC 2019, c 28 and the Physical Activities Regulations, SOR/2019-285

AND IN THE MATTER of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the Judicature Act, RSA 2000, c J-2, s 26

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and –

(Style of cause continued on next page)

FACTUM OF THE INTERVENER, FIRST NATIONS MAJOR PROJECTS COALITION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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Interveners

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PART I: OVERVIEW

1. In pith and substance, the *Impact Assessment Act* ("***IAA***")[1] and its *Physical Activities Regulations* ("***Regulations***")[2] establish a federal impact assessment regime to assess and mitigate potential adverse effects within certain matters of federal jurisdiction. The *IAA* and *Regulations* are a valid exercise of federal jurisdiction, flowing from several heads of power. Notably, the *IAA* and *Regulations* operationalize a jurisdiction-based approach to Indigenous engagement in assessing and mitigating the impacts that certain projects may have on Indigenous rights, interests, and well-being. That is a valid exercise of federal power under s 91(24) of the *Constitution Act, 1867*,[3] and an important step towards reconciliation. If, in specific circumstances, the *IAA* or *Regulations* are *applied* in a manner that arguably exceeds federal jurisdiction, that is properly a matter for judicial review, on a factual record that adequately addresses the circumstances involved.

PART II: POSITION ON ISSUES

2. The First Nations Major Projects Coalition ("**FNMPC**") submits that the *IAA* and *Regulations* are constitutionally valid as a whole, and specifically that the provisions relating to Indigenous peoples are within the legislative authority of Parliament under s 91(24). These provisions establish safeguards for Indigenous rights and interests, while recognizing Indigenous jurisdictions and ensuring the opportunity for Indigenous peoples to participate in relevant screening, assessment, and decision-making processes. The *IAA* thus provides a jurisdiction-based framework for Indigenous engagement in the federal impact assessment process for projects that are likely to impact the rights and interests of Indigenous peoples.

3. The *IAA* facilitates and encourages the coordination of federal, provincial, and Indigenous jurisdictions throughout the impact assessment process. The regulatory scheme for the federal Crown to fulfill obligations owed to Indigenous peoples—including duties to consult and accommodate—enhances Indigenous participation, "thereby strengthening the reconciliation process and reducing recourse to the courts."[4] If the *IAA* were found to be constitutionally invalid, engagement between Indigenous peoples and the Crown would be left to more *ad hoc*

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[1] SC 2019, c 28 [***IAA***].
[2] SOR/2019-285 [***Regulations***].
[3] (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 51 [***Haida***].

processes, facing the same profound challenges while stripped of the regulatory toolbox to solve them. Such a result would be contrary to this Court's broad interpretation of the scope of s 91(24) and to its repeated calls for governments to take positive steps—e.g., by establishing "regulatory schemes"[5]—to protect and help define, or operationalize, Indigenous rights.[6]

4. The Court of Appeal of Alberta ("**ABCA**") majority conflates the *scope* of s 91(24) with its *core*, undermining the analysis of the *IAA*'s constitutional validity. This error contributes in turn to the ABCA majority's misapprehension of the relationship between s 91(24) and s 35 of the *Constitution Act, 1982*[7] in the wake of this Court's decision in *Tsilhqot'in*.[8]

5. The ABCA majority also speculates that the *IAA* might be used to assert federal jurisdiction over projects on the basis of *de minimus* or tangential effects on the rights and interests of Indigenous peoples. Speculation about possible *ultra vires* applications of the *IAA* is not a sound basis for finding the statute itself to be unconstitutional, particularly in a reference opinion. If questionable applications of the *IAA*'s provisions arise and are not effectively addressed through the interjurisdictional cooperation mechanisms within the *IAA*, judicial review is available to ensure that such applications remain within constitutionally permissible bounds.

PART III: STATEMENT OF ARGUMENT

A. The *IAA* and *Regulations* provide a jurisdiction-based framework for Indigenous engagement in the federal impact assessment process for projects that are likely to impact the rights and interests of Indigenous peoples

6. The *IAA* recognizes Indigenous peoples *as peoples*, represented by Indigenous governing bodies exercising Indigenous jurisdiction.[9] The recognition of Indigenous self-government is a vital component of modern reconciliation. This Court has repeatedly affirmed that Indigenous

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[5] *Haida* at para 51.
[6] *R v Adams*, [1996] 3 SCR 101 at paras 53-54; *R v Marshall*, [1999] 3 SCR 456 at para 64; *Haida* at para 20; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55-65; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 21.
[7] Being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [***Constitution Act, 1982***].
[8] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [***Tsilhqot'in***].
[9] *IAA* Preamble, ss 2, 6(1)(e), (f), (g), 7(4), 12, 16(2)(f), 18(1)(b), 21, 22(1)(c), (q), (r), 23(c), 31, 33, 36(2), 114(1), 117, 158.

sovereignty and legal systems pre-date, and exist independently of, any state recognition.[10] The operationalizing of Indigenous legal systems through federal and provincial legislation offers predictable and defined parameters of jurisdictional responsibility enhancing coordination between Indigenous legal systems and Canadian law. In this vein, the *IAA*'s Preamble stresses "the importance of cooperating with jurisdictions that have powers, duties and functions in relation to the assessment of the effects of designated projects", while section 2 defines "jurisdiction" to include a broad range of Indigenous representative bodies who might exercise such powers, duties, and functions on behalf of Indigenous peoples of Canada.

7. This jurisdictional approach of the *IAA* is reinforced by Canada's commitment, also noted in the Preamble, to implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("***UNDRIP***"),[11] which affirms both Indigenous peoples' right to self-determination[12] and state obligations to give "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems"[13]—in brief, to their legal orders. *UNDRIP* necessarily shapes the interpretation of *IAA* provisions relating to Indigenous peoples, because Parliament requires that the federal government, "in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[14] That is, Parliament necessarily intended that the *IAA* be applied consistently with *UNDRIP*.

8. Subsection 6(1) confirms that the purposes of the *IAA* include promoting "cooperation and coordinated action between the federal government and Indigenous governing bodies that are jurisdictions" and "communication and cooperation with Indigenous peoples of Canada with respect to impact assessments", as well as ensuring respect for Aboriginal and treaty rights "in the course of impact assessments and decision-making under this Act".

9. Paragraphs 7(1)(c) and (d) prohibit the proponent of a designated project from taking any steps in the carrying out of the project that may cause impacts "with respect to the Indigenous peoples of Canada […] on (i) physical and cultural heritage, (ii) the current use of lands and

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[10] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 49 [***Uashaunnuat***]; *Haida* at para 20; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 114 [***Delgamuukw***].
[11] GA Res 61/295, 61st Sess, UN Doc A/RES/61/295 (2007) [***UNDRIP***].
[12] *UNDRIP*, arts 3, 4, 5.
[13] *UNDRIP*, art 27.
[14] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 5.

resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance" or cause any change "to the health, social or economic conditions of the Indigenous peoples of Canada".

10. These provisions delinate the scope of the *IAA*'s application to designated projects with potential impacts on the interests or well-being of Indigenous peoples. Projects within that scope must then proceed through initial screening in which the Impact Assessment Agency ("**Agency**") "must offer to consult with any jurisdiction"—including any Indigenous jurisdiction—"that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous group that may be affected" by the project.[15]

11. The factors that the Agency must consider in deciding whether to require an impact assessment include any adverse impacts on Aboriginal and treaty rights, any comments received from any jurisdiction or Indigenous group consulted under s 12, and any study or plan provided by an appropriate jurisdiction, including Indigenous jurisdictions, to the Agency.[16] If an impact assessment is required for a designated project, several provisions of the *IAA* ensure the opportunity for Indigenous peoples and representative bodies to participate throughout the assessment process, including through coordination of powers, duties, and functions between Indigenous, federal, and other jurisdictions.[17]

12. Any decision under the *IAA* to authorize the adverse effects of an assessed project as in the public interest must consider the potential impact of the project on any Indigenous group and on the s 35 rights of the Indigenous peoples of Canada.[18]

13. Significantly, s 114 empowers the Minister of Environment and Climate Change, where authorized by regulations, to enter into agreements or arrangements with Indigenous governing bodies to "to exercise powers or perform duties or functions in relation to impact assessments"[19] under the *IAA*. This creates space for Indigenous-led assessments, or parts of assessments, to be formally integrated into the federal process, providing a foundation for effective cooperation

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[15] *IAA*, s 12.
[16] *IAA*, s 16.
[17] *IAA*, ss 18(3), 21, 22(1)(c), (g), (l), (o), (q), (r), 23(c), 28(3.1), (5), (6), 29, 31, 33(1)(d), 33(2.1), 36(2)(c), (d), 37(2), (3), 39(1), 58(2), 114.
[18] *IAA*, s 63(d).
[19] *IAA*, s 114(1)(d), (e).

between Indigenous, federal, and participating provincial jurisdictions in relation to the assessment of major projects in Canada. These powers were not included in past iterations of federal environmental assessment legislation. They have the potential to further reconciliation by meaningfully incorporating Indigenous knowledge, values, and rights into project assessments.

B. The provisions of the *IAA* relating to Indigenous peoples are within federal jurisdiction pursuant to s 91(24) of the *Constitution Act, 1867*

14. The *IAA* thus establishes a jurisdiction-based framework for Indigenous engagement in the federal impact assessment process for projects that are likely to impact the rights and interests of Indigenous peoples. This is a matter within the scope of s 91(24).

15. As this Court stated in *Delgamuukw*, "the [federal] government [is] vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples."[20] *Delgamuukw*'s characterization of federal protective power under s 91(24) built on early cases such as *Re Eskimo*[21] and continues through recent cases such as *Daniels*.[22] The QCCA recently concluded, following a review of the relevant jurisprudence, that Parliament has "virtually occupied the field by legislating in just about every area of Aboriginal life without these initiatives having been defeated by the courts."[23] Falling within this broad and inclusive understanding of s 91(24), the *IAA* facilitates interjurisdictional cooperation in relation to the assessment and mitigation of project effects on Indigenous peoples.

16. Paragraphs 7(1)(c) and (d) relate specifically to Indigenous interests and well-being, thus falling within the scope of s 91(24). If the provisions are applied in circumstances that arguably exceed federal power, then mechanisms of interjurisdictional cooperation and, ultimately, judicial review are effective measures to protect provincial powers and decision-making.

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[20] *Delgamuukw* at para 176.
[21] *Reference as to whether "Indians" in s 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] SCR 104.
[22] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 37: "reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal".
[23] *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 at para 325, appeal as of right to SCC.

17. In concluding otherwise, the ABCA majority's analysis rests on three interconnected errors: (1) conflating the *scope* with the *core* of s 91(24); (2) misapprehending the relationship between s 91(24) and s 35; and (3) speculating about potential *ultra vires* applications of the *IAA* that go beyond the frame of the reference questions submitted to the ABCA and that should be left for judicial review if and when any such problematic applications might occur.

(1) The scope is not the core

18. The notion that each federal and provincial head of power may have a "basic, minimum and unassailable core" belongs to the doctrine of interjurisdictional immunity. The doctrine is now "of limited application".[24] Where it applies it renders the laws of one level of government inoperative to the extent that they intrude on core powers of the other level of government.[25] By contrast, the *scope* of a head of power covers the range of matters that, in pith and substance, fall under that head of power. The pith-and-substance analysis is used to assess the validity of a law, interjurisdictional immunity to assess its inapplicability. These analytical frameworks must be kept distinct.[26] Unfortunately, the majority reasons of the ABCA conflate them.

19. The ABCA majority notes that s 91(24) does not create "federal 'enclaves' from which provincial laws are excluded"[27] and that, as a result, "provincial laws of general application will apply to 'Indians, and Lands reserved for the Indians' providing they do not impair the core of Parliament's power under s 91(24)."[28] This is true, but irrelevant to answering the reference questions which ask about the *constitutional validity* of the *IAA* and *Regulations*. The ABCA majority's conflation of issues of interjurisdictional immunity with questions of constitutional validity cannot stand, as Justice Greckol effectively pointed out in dissent, at para 651:

> [N]o one has offered a serious articulation as to why the interests protected in ss 7(1)(c) and (d) of the *IAA* somehow fall outside the scope of "Indians, and Lands reserved for the Indians". It may be true that these interests fall outside the "core" of s 91(24) such that interjurisdictional immunity does not prevent provincial legislation of general application from authorizing projects which impact upon them and ultimately infringe Aboriginal and treaty rights under s 35 of the *Constitution Act, 1982* … However, the

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[24] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 33 [***Canadian Western Bank***].
[25] *Canadian Western Bank* at para 33; *Tsilhqot'in* at para 131.
[26] *Canadian Western Bank* at paras 42-47; *Tsilhqot'in* at paras 129 –31.
[27] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 154 [***ABCA Opinion***].
[28] *ABCA Opinion* at para 157.

applicability of provincial legislation to Indigenous peoples says nothing about the validity of federal legislation like the *IAA*.

20. The protections in ss 7(1)(c) and (d) lie within the scope of s 91(24). Applications of those provisions that arguably exceed s 91(24) are best assessed on a full factual record.

(2) The relationship between 91(24) and 35 after Tsilhqot'in

21. The ABCA majority's discussion of s 35 is also misdirected to issues of interjurisdictional immunity.[29] The majority states that there is no federal "core" power under s 91(24) that can restrict provincial authority with respect to s 35 rights, because "interjurisdictional immunity no longer applies to s 35 rights. As a consequence, provincial authority has been enlarged with respect to Aboriginal and treaty rights."[30]

22. In *Tsilhqot'in*, this Court explained that the justifiability of provincial incursions on s 35 rights is to be assessed, as in the case of federal incursions, according to the framework developed in *Sparrow*[31] and elaborated in subsequent cases, rather than by asking whether such provincial incursions impair core federal power under s 91(24). In this context, then, the *Sparrow* framework "displaces the doctrine of interjurisdictional immunity."[32] *Tsilhqot'in* thus simply clarified that s 91(24) does not by its very core pre-empt or render inoperative provincial incursions on s 35 rights. Yet that does not mean that *Tsilhqot'in* somehow restricted the scope of Parliament's s 91(24) power. Indeed, this Court in *Tsilhqot'in* specifically highlighted concurrent federal and provincial jurisdiction with respect to s 35 rights.[33]

23. Undoubtedly, the assessment of project impacts on the rights and interests of Indigenous peoples will often have both provincial and federal aspects. The *IAA* facilitates the effective application of concurrent jurisdiction by delineating which rights and interests will engage federal powers and by providing effective tools for interjurisdictional cooperation. That said, while the *IAA* provisions relating to Indigenous peoples are valid pursuant to s 91(24), it does not follow that there are no jurisdictional limits on their application.

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[29] *ABCA Opinion* at paras 158 –63.
[30] *ABCA Opinion* at para 163.
[31] *R v Sparrow*, [1990] 1 SCR 1075.
[32] *Tsilhqot'in* at para 2.
[33] *Tsilhqot'in* at para 129.

24. For instance, the thresholds set out in the *Regulations* restrict the scope of the *IAA*'s application in comparison with the predecessor legislation, the now repealed *CEAA 2012*.[34] While s 9 of the *IAA* grants ministerial discretion to designate projects falling outside of the *Regulations*, exercise of that discretion is subject to judicial review.[35] Moreover, there is a mandatory determination under s 16 of the *IAA* as to whether a designated project requires an assessment even if it is captured by *Regulations*. If an assessment is required, the *IAA* provides for interjurisdictional cooperation. Finally, judicial review is available in cases where there remain concerns about federal overreach. The ABCA majority would pre-empt the operation of these tools and diminish the opportunities for effective interjurisdictional cooperation by finding invalid an entire legislative and regulatory scheme that seeks to address the complex challenges of intersecting jurisdictions on a cooperative, functional, and practical basis.

(3) Judicial review, not a reference opinion, is the proper avenue for addressing Alberta's concerns about ultra vires *applications of the* IAA

25. The proper recourse for allegedly *ultra vires* applications of the *IAA* is through the cooperative tools set out in the *IAA* and, if necessary, through judicial review, not a reference opinion that the statute itself is invalid.[36] An appropriate factual context is necessary for

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[34] *Canadian Environmental Assessment Act*, *2012,* SC 2012 c 19 s 52, as repealed by *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c 28 s 9 [***CEAA 2012***]. Compare, for instance, ss 18-19 of the *Regulations* with ss 16-17 of the predecessor regulations, *Regulations Designating Physical Activities,* SOR/2012-147.

[35] *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102 [***Mikisew Cree 2022***]. The Federal Court upheld the federal Minister's decision *not* to designate a project. The ministerial power at issue was found in *CEAA 2012*, s 14, corresponding to *IAA*, s 9. Clearly, a ministerial decision *to* designate a project under s 9 is judicially reviewable, and *Mikisew Cree 2022* shows how the contours of federal power under provisions like *CEAA 2012*, s 14 and *IAA*, s 9 are best assessed with the benefit of a factual record, particularly given the complexity of issues relating to Indigenous peoples' rights and jurisdictional delineation.

[36] References *re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 84 –88 [***GGPPA***].

assessing relevant administrative or constitutional considerations, from the complex interplay between s 91(24) and s 35 to concerns about *de minimus* applications of the *IAA*.

26. The ABCA majority worries, e.g., that the *IAA* may be used to assert federal jurisdiction over "*any effects on any aspect of the environment, social, health or economic conditions of Indigenous peoples*".[37] As a result, "no intra-provincial activity in this country that would be free of federal oversight, regulation and veto since the Indigenous peoples of Canada populate the landscape across this country and are involved in all dimensions of Canadian society."[38]

27. The majority's limitless interpretation of the protections in paragraphs 7(1)(c) and (d) is unnecessary and contrary to the presumption in favour of a constitutionally valid reading of a statute where available. If similar logic and literal reading were applied to other federal legislation, various federal statutes could be invalidated on the grounds that they might be applied *in extremis* beyond the proper scope of federal jurisdiction.[39]

28. Paragraphs 7(1)(c) and (d) refer to effects that may impact specified categories of Indigenous interests and well-being. They are not designed to catch all effects that may impact Indigenous peoples tangentially and in the same manner as non-Indigenous citizens. If those provisions are applied in circumstances that arguably exceed the scope of s 91(24)—that is, if they were arguably applied *ultra vires*—judicial review is the appropriate recourse.

C. The *IAA* is a positive step towards building a cooperative federalism that encompasses Indigenous, federal, and provincial jurisdictions

29. This Court has repeatedly called on the Crown and Indigenous peoples to pursue reconciliation through engagement, rather than litigation, whenever possible.[40] This Court has also stressed that s 35 rights flow from the pre-existing sovereignty of Indigenous peoples, *not*

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[37] *ABCA Opinion* at para 395 [emphasis in original].
[38] *ABCA Opinion* at para 304.
[39] See e.g. *Nuclear Safety and Control Act*, SC 1997, c 9, s 44(1)(f), authorizing regulations "respecting the protection of the environment and the health and safety of persons from any risks associated" with a wide range of activities related to nuclear energy, substances, equipment, and facilities.
[40] *Tsilhqot'in* at paras 17, 18, 118; *Haida* at paras 20, 25, 47; *Delgamuukw* at para 186.

from state recognition.[41] The effective discharge of both provincial and federal obligations owed to Indigenous peoples, including duties to consult and accommodate, is best achieved within a tripartite jurisdictional context that enables engagement and coordination across Indigenous, provincial, and federal jurisdictions. Parliament is entitled to exercise its power pursuant to s 91(24) to help develop frameworks for such jurisdictional engagement and coordination, complemented by intersection with provincial jurisdiction. A broad and generous interpretation of s 91(24) offers greater opportunities for collaboration and consistency in the assessment of major projects across Canada. The division of powers is not a zero-sum game.

30. If the *IAA* were found to be constitutionally invalid, engagement between Indigenous peoples and the federal Crown would be returned to considerably more *ad hoc* processes, with the increased inefficiency and risk of litigation that entails. Nothing in this Court's jurisprudence requires such a result or the attendant uncertainty that could negatively impact investor confidence in the development of Canadian natural resources.

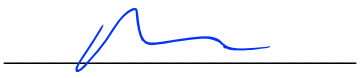
31. Indigenous-Crown reconciliation necessarily passes through the recognition of tripartite federalism in Canada, after a long period of disregard and suppression of Indigenous legal orders.[42] The *IAA* takes meaningful steps in that direction, responds to this Court's calls for engagement and negotiation, and falls within the scope of s 91(24). The interests of cooperation, efficiency, regulatory stability and confidence, and reconciliation are best advanced by upholding the *IAA* and the *Regulations*. Where necessary, the courts are fully capable of addressing the legal questions that may arise in the application of the *IAA* and *Regulations* with the benefit of a factual record.

PARTS IV & V: COSTS AND ORDER REQUESTED

32. FNMPC does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated December 21, 2022



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[41] *Uashaunnuat* at para 49; *Delgamuukw* at para 114.
[42] *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 8 –14.

PART VI: TABLE OF AUTHORITIES

JURISPRUDENCE	PARAS CITED
Canadian Western Bank v Alberta, 2007 SCC 22	18
Clyde River (Hamlet) v Petroleum Geo-Services Inc, 2017 SCC 40	3
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United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 61st Sess, UN Doc A/RES/61/295 (2007) arts 3, 4, 5, 27	7
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