SCC Court File No. 40061

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)
IN THE MATTER OF a Reference to the Court of Appeal of Québec in relation to the *Act respecting First Nations, Inuit and Métis children, youth and families* (Order in Council No.: 1288-2019)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

– and –

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

RESPONDENTS

– and –

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INTERVENERS

[Style of cause continued on next page]

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

(Rule 42 of the Rules of the Supreme Court of Canada)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Attorney General of the Northwest Territories ("AGNT") affirms the inherent right of self-government of Indigenous peoples, and their inherent jurisdiction in relation to child and family services pursuant to s. 35 of the *Constitution Act, 1982*.[1]

2. The AGNT supports the right of Indigenous peoples to administer and enforce laws made pursuant to their inherent jurisdiction and supports conflict of law provisions within negotiated self-government agreements whereby Indigenous laws prevail in respect of conflicts or inconsistencies with laws of the Northwest Territories pertaining to child and family services.

3. The Northwest Territories is a distinct legislative entity. Unlike the Provinces which have their legislative authority set forth in s. 92 of *The Constitution Act, 1867*[2], the Government of the Northwest Territories derives its legislative authority principally through the *Northwest Territories Act* ("*NWT Act*")[3].

4. While the Northwest Territories' legislative authority pursuant to the *NWT Act* is not afforded the same constitutional protections as the provinces are afforded via ss. 92, 92A and 93 of *The Constitution Act, 1867*, the Northwest Territories nevertheless enjoys plenary and sovereign jurisdiction. Section 18 of the *NWT Act* confers on the Northwest Territories powers similar in nature and scope to the powers of provincial legislatures set out in ss. 92 and 93 of *The Constitution Act, 1867,* and in particular, identical power in relation to civil rights jurisdiction:

> 18(1) The Legislature may make laws in relation to the following subjects in respect of the Northwest Territories: (j) property and civil rights[4]

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[1] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c11.
[2] 30 & 31 Victoria, c. 3 (U.K.).
[3] S.C. 2014, c. 2, s. 2.
[4] Ibid., s. 18(1)(j).

5. On January 1st, 2020, *An Act respecting First Nations, Inuit and Métis children, youth and families*[5] ("*Federal Act*") came into force. The *Federal Act* affirms the inherent right of self-government and provides Indigenous groups the option of legislating in relation to child and family services. Pursuant to ss. 21 and 22(3), the *Federal Act* gives Indigenous child and family services laws the force of law as federal law, and federal paramountcy over Provincial and Territorial child and family services laws in cases of conflict or inconsistency. These attributes endure regardless of whether or not an Indigenous group and the Provincial or Territorial governments are successful in negotiating a coordination agreement pursuant to s. 20 of the *Federal Act*.

6. On February 10, 2022, the Quebec Court of Appeal rendered its decision in Reference to the Court of Appeal of Quebec in relation to *An Act respecting First Nations, Inuit and Métis children, youth and families*[6]. The court held that the *Federal Act* is constitutional with the exception of ss. 21 and 22(3) which are *ultra vires* the Federal Parliament and therefore unconstitutional.

B. Statement of Facts

7. The AGNT takes no position on the facts underlying the appeal.

PART II – RESPONSE TO QUESTIONS IN ISSUE

8. The following constitutional question was submitted by Canada:

> Are Sections 21 and 22(3) of *An Act respecting First Nations, Inuit and Métis children, youth and families ultra vires* of the Parliament of Canada due to the Constitution of Canada?

9. The AGNT states that Canada's constitutional question should be answered in the affirmative. The *Federal Act*, and in particular ss. 21 and 22(3), changes the jurisdiction delegated to the Northwest Territories by the *NWT Act* and has the effect of undermining the legislative authority of the Northwest Territories. By having the force of federal law

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[5] S.C. 2019, c. 24.

[6] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185.

pursuant to s. 21, Indigenous laws become Federal enactments within the Northwest Territories and gain a power to change Northwest Territories laws that they would not otherwise have. This creates the potential to significantly alter the legislative authority of the Northwest Territories in relation to child and family services and the administration of its child and family service laws. This could result in requiring the Government of the Northwest Territories to administer the Indigenous law. The issue arises directly from the *Federal Act* recognizing and affirming the inherent right of an Indigenous group to legislate in relation to child and family services without providing guidance as to either the scope or content of that legislation, and by creating ambiguity with respect to linking legislative authority with the responsibility and authority of the Indigenous group to administer and enforce its own legislation.

PART III – ARGUMENT

A. Constitutional Nature of the *NWT Act*

10. The *NWT Act* is the constitution for the Northwest Territories; it provides for a legislature and specifically sets forth areas of jurisdiction in which the Government of the Northwest Territories may pass laws. The Government of the Northwest Territories is independent from the Federal Government in its exercise of its legislative authority and has a sovereign-like character. This was affirmed by Justice Vertes in *Morin v. Crawford*[7]:

> [53] It has long been recognized that the territorial assemblies, whether of the Northwest Territories or the Yukon, are not acting as agents or delegates of the federal Parliament when legislating within their sphere of powers. In this sense they have sovereign-like legislative character. This was noted by the Yukon Court of Appeal in *R.* v. *Chamberlist* (1970), 72 W.W.R. 746, when discussing the powers of the Yukon Commissioner in Council . . .

11. In *Re Canada Assistance Plan*[8] this Court stated that the *NWT Act* is of a constitutional nature:

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[7] 1999 CanLII 6802 at para. 53 (NWT SC).
[8] [1991] 2 S.C.R. 525 at 563.

> Both the *Canadian Bill of Rights* and s. 110 of *The North-West Territories Act* [note: R.S.C. 1886] have a constitutional nature. It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form.

12. The *NWT Act* governs legislation generally in that ss. 18 functions in a similar way to s. 92 of *The Constitution Act, 1867* by setting out the heads of power under which the Northwest Territories has authority to legislate. It also imposes a "manner and form" limitation on the Federal Government by virtue of s. 61, which requires the Federal Government to consult with the Executive Council of the Northwest Territories "before a bill that amends or repeals [the *NWT Act*] is introduced in the House of Commons by a federal Minister . . ."[9] This requirement to consult the Executive Council protects the independent jurisdiction of the Northwest Territories by preventing the Federal Government from acting unilaterally in ways that might affect its legislative authority.

B. Interplay between the *Federal Act* and the *NWT Act*

13. Section 18 of the *Federal Act* affirms that s. 35 inherent rights include "jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority". The Government of the Northwest Territories supports the affirmation of inherent rights, however the authority expressed in s. 18 is ambiguous with respect to the scope and content. The authority to legislate is not clearly linked with the authority to administer and enforce laws, arguably forming an avenue for Indigenous groups to create legislation without also taking over the responsibility of administering and enforcing child and family services laws. This oversight is compounded by s. 21 which elevates Indigenous laws as having the force of law as federal law.

14. Indigenous laws originating in s. 35 rights have an independent source of jurisdiction; the Government of the Northwest Territories recognizes and affirms these jurisdictions. Section 21 of the *Federal Act* "force of law as federal law", gives to Indigenous laws an additional power they would not have if they were passed pursuant only to their

[9] Section 61, *Northwest Territories Act*, S.C. 2014, c. 2, s.2

inherent s. 35 jurisdiction. The phrase, "as federal law" does more than affirm the Federal paramountcy power of Indigenous laws as set forth in s. 22(3); it makes them Federal enactments. This is of particular significance as it pertains to the Northwest Territories with respect to its legislative authority pursuant to the *NWT Act*, which contains a provision giving Federal paramountcy to Federal enactments. Specifically, s. 31 of the *NWT Act* states:

> (31) In the event of a conflict between a law of the Legislature and a federal enactment, the federal enactment prevails to the extent of the conflict.

15. When ss. 18 and 21 of the *Federal Act* are read in conjunction with s. 31 of the *NWT Act*, the result is a conferral, by Federal Parliament to Indigenous groups, of the power to enact legislation that may direct the Government of the Northwest Territories as it relates to the delivery of child and family services to Indigenous families. The effect is to alter both the legislative authority of the NWT in relation to child and family services, and the application of the NWT child and family service laws.

16. This two-pronged effect on the Northwest Territories via the interplay between ss. 18 and 21 of the *Federal Act*, and s. 31 of the *NWT Act* is demonstrated in the *Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat* ("Inuvialuit Law") and its regulations, which have been recently enacted pursuant to the *Federal Act* and purport to place positive obligations on the Government of the Northwest Territories with respect child and family service laws that are being administered by the Government of the Northwest Territories. The following are concrete examples:

> <u>*Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat*</u>:
>
> Meaning of "all information"
>
> 20. For greater certainty, "all information" in s. 19 (Right to all information) includes:
>
> a. Personal information, including . . .
> b. Information about a child or youth's placements or proposed placements;
> c. Information about past child and family services files . . .
> d. Criminal record check information . . .
> e. Aggregate information . . .
> f. Documents and other records recording such information. . . .

> 21. Further to s. 19 (Right to all Information), an external protection authority must provide the Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat with all information available to the external protection authority: . . .
>
> 63. Every external protection authority, every federal or provincial or territorial government or entity such government created, and every service provider other than the Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat, who contravenes any provision of, or fails to perform a duty imposed by or under:
>
> a. this law,
> b. its regulations,
> c. or a previously issued notice of violation under this section,
>
> commits a violation and is liable to a warning, a requirement to attend mediation, or the imposition of an administrative monetary penalty.[10]
>
> Family Support Regulation:
>
> 2. A service available to the benefit of an Inuvialuk child or youth in protective care must be made available to the benefit of an Inuvialuit child or youth not in protective care, if:
>
> (a) the service would be in the child or youth's best interest; and
> (b) providing the service could reduce the level of protective intervention that may presently or later be required in relation to the child or youth.
>
> 3. A service under s. 2 includes financial services and supports, including financial supports or supports to a person caring for the child or youth, including a parent.
>
> 6. Everyone providing a service is responsible for the cost of implementing s. 2 with respect to their own services, except to the extent that the Inuvialuit Qitunrariit Innuuiarnikkun Maligaksat may enter into an agreement to absorb a cost.[11]

17. As it pertains to the above examples, the Northwest Territories is the "external protection authority", and these provisions of the Inuvialuit Law purport to place positive obligations on the Government of the Northwest Territories to administer child and family services to Indigenous families according to the Indigenous law, as opposed

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[10] *Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat*, Inuvialuit Law 2021. 20, 21, 63.
[11] Family Support Regulation, Reg. 2021-2, ss. 2, 3, 6, pursuant to the *Inuvialuit Qitunrariit Innuuiarnikkun Maligaksat*, Inuvialuit Law 2021.

to the Indigenous group administering and enforcing its own child and family services laws.

18. In affirming s. 35 rights in s. 18 of the *Federal Act*, Federal Parliament did not include a right to bind another government through legislation because there is no recognized Indigenous inherent right to bind another government through its laws. Even if the Indigenous laws are drafted with the intention to direct the Government of the Northwest Territories, they cannot bind another government. However, the "force of law as federal law" does bind the Government of the Northwest Territories by way of s. 31—this means that what has been conferred on Indigenous groups is more than the affirmation of their inherent rights or paramountcy where there is a conflict, it is also the power to bind the Government of the Northwest Territories by requiring it to administer and enforce the laws of the Indigenous group.

19. The above issue also holds true from an interpretive perspective. Section 18(1) of the *Federal Act* states that the inherent right of self-government as recognized and affirmed by s. 35 of the *Constitution Act, 1982* ". . . includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority."[12] Apart from the broad definition of "child and family services" in s. 1, there are no provisions in the *Federal Act* that delineate either the scope or the content of those laws. Provided the law passed by the Indigenous group is "in relation to" child and family services, or "in relation to those services," it has the force of federal law and is paramount to Northwest Territories laws respecting child and family services to the extent of a conflict or inconsistency. As addressed above, this oversight presents a significant challenge as it pertains to the legislative authority of the Northwest Territories and the administration of its laws.

[12] *Federal Act*, s. 18(1).

20. The phrase "in relation to" affords the Indigenous group an expansive interpretation as to the scope of its laws. The words of this Court in *Nowegijick* v. *R.*[13] *("Nowegijick"),* a decision involving the interpretation of s. 87 of the *Indian Act*[14]*,* speak to this point:

> The words 'in respect of' are, in my opinion, words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters.

21. The liberal interpretive approach articulated in *Nowegijick* was subsequently applied and followed in both *Simon* v. *The Queen*[15] and *Mitchell* v*. Peguis Indian Band*[16]. In the latter the Chief Justice said:

> In *Nowegijick*, the Court had the following to say:
>
> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption…
>
> "…The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. . . . . It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation." [emphasis added in both paragraphs]

22. The liberal interpretation afforded to laws made by Indigenous groups by virtue of the phrase "in relation to" and a liberal construction of the *Federal Act* means the scope of

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[13] [1983] 1 SCR 29 at 39.
[14] R.S.C. 1970, c. I-6, s. 87.
[15] [1985] 2 S.C.R. 387 at paras. 17, 50.
[16] [1990] 2 S.C.R. 85 at pp. 98-99.

permissible Indigenous child and family service laws is broad and without apparent limitation.

C. Indigenous Laws as Federal Enactments

23. Both the Federal *Statutory Instruments Act*[17] and the Federal *Interpretation Act*[18] define "regulation." The Federal *Interpretation Act* is applicable to the *NWT Act,* and it sets out very broad definitions of the meaning of "enactment" and "regulation":

> "enactment" means an Act or regulation or any portion of an Act or regulation;
>
> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (a) in the execution of a power conferred by or under the authority of an Act, or
> (b) by or under the authority of the Governor in Council;[19]

24. Indigenous laws are instruments passed within the framework of the *Federal Act* and so fall within the Federal *Interpretation Act* definition of "regulation. Applying the definition of "enactment" in the *Interpretation Act*, Indigenous laws are enactments, and by virtue of s. 21 the *Federal Act* are "federal enactments."

25. Furthermore, Canada has been explicit that the *Federal Act* incorporates Indigenous laws by reference, thereby making those laws federal enactments. The Quebec Court of Appeal acknowledged this view in the case under appeal here:

> [5] The Act affirms that the inherent right of Aboriginal self-government, a right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, includes jurisdiction in relation to child and family services. It also offers Aboriginal peoples a framework for exercising that jurisdiction, by providing for the possibility of negotiations with the federal and provincial governments and for the incorporation of Aboriginal laws into federal legislation.[20]

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[17] R.S.C. 1985, c. S-22, s. 2(1).
[18] R.S.C. 1985, c. I-21, s. 2(1).
[19] Ibid.
[20] 2022 QCCA 185 at para. 5.

26. It is important to note that the purported incorporation of Indigenous laws by reference in s. 21 is an exercise of federal power to another legislating body in respect of laws that don't yet exist. Regardless of the mechanism[21], from the perspective of the Government of the Northwest Territories, Indigenous laws passed pursuant to the *Federal Act* become enactments with the force of federal law which will prevail over conflicting Northwest Territories laws in relation to child and family services independent of s. 22(3) of the *Federal Act*. In other words, because of s. 31 of the *NWT Act*, Indigenous laws will have paramountcy over Northwest Territories laws in relation to child and family services even if this Court finds s. 22(3) of the *Federal Act ultra vires*. The impact of s. 21 of the *Federal Act* on the Government of the Northwest Territories cannot be understated and is highly problematic because it has the effect of the Federal Government altering both the legislative authority of the Government of the Northwest Territories and the administration of child and family services.[22] Importantly, the Federal Government has done so in contravention of its self-imposed manner and form limitation as set out in s. 61 of the *NWT Act*.

D. Section 61 of the *NWT Act*: Consultation—a manner and form requirement

27. Section 18 of the *NWT Act* gives the Northwest Territories plenary and sovereign powers to make laws in its own Legislature in respect of child and family services. The independence of the Legislature of the Northwest Territories is reinforced by s. 61 which

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[21] We have not located an example in legislation or case law where a government has incorporated by reference a document or law that doesn't yet exist. The conferral of power in s. 21 seems more akin to a delegation or divestment of jurisdiction than an incorporation by reference, especially in the present case where the law will be based on inherent jurisdiction (per s. 18), is insulated from other federal laws, and is not subject to amendment by Parliament.

[22] "Democracy is a fundamental value in the Constitution that gives people the right to choose who governs them." *Quebec (Attorney General) v Canada (Attorney General)*, [2015] SCC 14 at para 61.

requires the Federal Government to consult the Northwest Territories prior to any amendment to the *NWT Act*. Specifically, it states:

> 61 (1) Before a bill that amends or repeals this Act is introduced in the House of Commons by a federal minister, the Minister must consult the Executive Council with respect to the proposed amendment or repeal.
>
> (2) The Legislative Assembly may make any recommendations to the Minister that it considers appropriate with respect to the amendment or the repeal of this Act.

28. Section 2 of the *NWT Act* defines the nature of the required consultation:

> (3) Wherever in this Act a reference is made, in relation to any matter, to a duty to consult, that duty must be exercised
>
> (a) by providing the person to be consulted with the following:
>
> (i) notice of the matter in sufficient form and detail to allow the person to prepare their views on the matter,
>
> (ii) a reasonable period for the person to prepare those views, and
>
> (iii) an opportunity to present those views to the person having that duty; and
>
> (b) by considering, fully and impartially, any views so presented.

29. By giving Indigenous laws in relation to child and family services the "force of law as federal law" and thus making them Federal enactments, Federal Parliament has altered the legislative authority of the Northwest Territories in s. 18(1)(j) of the *NWT Act,* and it has done so without properly consulting the Government of the Northwest Territories, as required by s. 61 of the *NWT Act*. For the consultation to be complete and meaningful there should have been consultation concerning the impact upon the *NWT Act* where the impugned provisions amount to an indirect amendment to the *NWT Act*. The AGNT submits that any amendments to the *NWT Act* must be direct and explicit.

30. Section 52(1) of the *Constitution Act, 1982* provides for its supremacy and the corresponding requirement of Federal Parliament and Legislatures to follow its procedural requirements:

> The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

31. That section enshrines an older principle, as explained by the Supreme Court of Canada in *Re Manitoba Language Rights Reference*:[23]

> Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity.

32. In his review of *Re Manitoba Language Rights Reference* and related cases, Peter Hogg also concludes that Federal Parliament can bind itself by manner and form requirements:

> Would the Parliament or a Legislature be bound by *self-imposed* rules as to the "manner and form" in which statutes were to be enacted? The answer, in my view, is yes. . . . These "manner and form" laws, which purport to redefine the legislative body, either generally or for particular purposes, are binding for the future.[24]

33. The Federal Government has bound itself by a manner and form requirement to consult the Northwest Territories before amending the Northwest Territories constitution (i.e., the *NWT Act*). It has not met this requirement, thus rendering s. 21 of the *Federal Act* inoperable and without effect.

E. Negotiating Self-Government Agreements

34. In the last twenty (20) years the Federal Government, the Northwest Territories, and two Indigenous nations have negotiated, ratified, and implemented via legislation, two constitutionally protected treaties with self-government provisions: (1) the 2003 "Land-Claims and Self-Government Agreement Among the Tłı̨chǫ and Government of the

[23] [1991] 2 S.C.R. 525 at p.723 at para (i).
[24] P. Hogg, *Constitutional Law of Canada*, 5th ed., para. 12:10 at pp. 12-14 to 12-15.

Northwest Territories and the Government of Canada[25], and (2) the 2015 Délı̨nę Final Self Government Agreement.[26]

35. The outcome of successful self-government negotiations in the Northwest Territories has been constitutionally protected treaties that address areas of exclusive law-making authority in matters internal to the Indigenous group, such as governance structure and constitution, and areas of shared law-making authority, such as housing, education, adoption, and child welfare. Importantly, the agreements contain provisions which guarantee the continued application of Northwest Territories laws in areas of shared law-making authority.[27] Termed a "concurrency of laws" model, this approach resembles the overlapping legislative powers of the Federal and Provincial Governments within ss. 91 and 92 of *The Constitution Act, 1867*; Indigenous laws do not displace NWT laws in areas of shared law-making authority, rather, conflict of law provisions are negotiated and included in the agreements to resolve inconsistencies.

---

[25] The Tłı̨chǫ Agreement was implemented by the federal *Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1, assented to 2005-02-15, and the territorial *Tłı̨chǫ Land Claims and Self-government Agreement Act*, S.N.W.T. 2003, c. 28, assented to 2003-10-10.

[26] The Délı̨nę Agreement was implemented by the federal *Délı̨nę Final Self-Government Agreement Act*, S.C. 2015, c. 24, assented to 2015-06-18, and the Territorial *Délı̨nę Final Self-Government Agreement Act*, S.N.W.T. 2015, c. 3, assented to 2015-03-12.

[27] See Section 2.9.2 of the Délı̨nę Final Self Government Agreement, which states: "Unless otherwise provided in the [final self-government agreement], Federal Law, NWT Law and [Délı̨nę Go tine Government] Law shall apply in the Délı̨nę District." See also Section 7.7.1 of the Tłı̨chǫ Agreement, which states, "Unless otherwise provided in the Agreement, the powers of the Tłı̨chǫ Government to enact laws are concurrent with those of government ("government" is defined in Section 1.1.1 as "(a) the Government of Canada; (b) the Government of the Northwest Territories or its successor or successors; or, (c) both.").

36. The *Federal Act*, and in particular ss. 21 and 22(3), has the effect of disrupting the balance of legislative authority as between an Indigenous Government [28] and the Government of the Northwest Territories within the context of negotiated self-government agreements.

37. The AGNT submits there is a potential for legal harm should the Court hold s. 21 of the *Federal Act* to be constitutional and *intra vires*. The model as promulgated by the *Federal Act* is contrary to the principle of federalism set out in *Reference re Securities Act*,[29]

> It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres . . .

38. While of a different constitutional nature than the provinces, the principle of federalism and its application to cases dealing with division of power between the Federal and Provincial Governments is directly relevant to the relationship between an Indigenous Government and the Government of the Northwest Territories. *R*. v. *Comeau*[30] described the relationship between the powers of Federal and Provincial Governments as "symbiotic":

> [78] Federalism refers to how states come together to achieve shared outcomes, while simultaneously pursuing their unique interests. The principle of federalism recognizes the 'autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": "*Reference re Secession of Quebec*, at para. 58; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R 511, at para. 5. The tension between the centre and the regions is regulated by the concept of jurisdictional balance: *Reference re Secession of Quebec*, at paras. 56-59. The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial

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[28] The term "Indigenous Government" is used to describe the entity created by the Indigenous group, ratified by the relevant Indigenous collective, and recognized as the government in the self-government agreement.

[29] [2011] 3 S.C.R. 837 at para. 7

[30] [2018] 1 S.C.R. 342 at paras. 78-79.

> interests. The same concern has led to, for example, the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine.
>
> [79] An expansive interpretation of federal powers is typically met with calls for recognition of broader provincial powers, and vice versa; the two are in a symbiotic relationship. Many of the doctrinal tools used by the courts in division of power cases reflect the tension between federal and provincial capacity: see, e.g., H.L. Kong, "Republicanism and the division of powers in Canada" (2014), 64 U.T.L.J. 359, at pp.393-97 . . .

39. The relationship between the rights of Indigenous Governments and the powers of the Government of the Northwest Territories is also symbiotic: both are of a distinct nature, able to function independently but living together with a mutual goal of reconciliation as captured by s. 35 of *The Constitution Act*, *1867*. The principle of federalism directs us to view each as autonomous in our respective spheres of legislative authority, with self-government agreements being the path to achieving coordination and balance between those authorities. Indeed, this Court has repeatedly stated the importance of negotiation between Indigenous peoples and governments in reconciling both their interests and their relationship.

40. Recently, in *Mikisew Cree First Nation* v. *Canada (Governor General in Council)*[31], in discussing the honour of the Crown and Section 35 rights Abella J. stated:

> The fact that these rights are political in implication does not detract from their enforceability in law, but highlights their essential role in reconciling Aboriginal and Crown sovereignty. Our Constitution places a responsibility on the executive and legislative branches, along with Indigenous leaders, to collaborate and reconcile competing claims and historical grievances (Dickson, at p. 146). This has been described as a generative constitutional order, which 'mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society' (Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R (2d) 433, at p. 436; *Carrier Sekani*, at para 38). This process is supported by the judiciary's role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met. . . .

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[31] [2018] 2 S.C.R. 765 at para [87].

41. The effect of ss. 21 and 22(3) undermines the legislative autonomy of the Northwest Territories and the principle of federalism. It also compromises the jurisdictional balance between Indigenous Governments and the Government of the Northwest Territories achieved via the negotiation of comprehensive self-government agreements. If the Federal Government replicates its approach in the *Federal Act*, the ripple effect will be a patchwork of laws, a disagreement as to the scope of those laws, and an inability to effectively implement those laws in a harmonious manner.

> . . . the path of negotiation is the path of social peace as well as the path which will not divert resources to the courts over abstract and complex legal battles.[32]

PART IV – COSTS

42. The AGNT does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2022.

Trisha Paradis
Sandra Jungles
John C.T. Inglis

Counsel for the Intervener, Attorney General of the Northwest Territories

[32] Hogg, Peter W., and Turpel, Mary Ellen. "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues." *Canadian Bar Review* 74.2 (1995): 187-224 at footnote 20.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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