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-

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RESPONDENTS

-and-

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

INTERVENERS

[Style of cause continued on next page]

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PART I. – OVERVIEW OF POSITION AND FACTS

1. There is nothing more significant to Indigenous Peoples than the wellbeing and future of their children. For generations, colonial governments have actively worked to sever that relationship – to "kill the Indian in the child". In *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (the "**Act**"), Parliament is now taking steps to reverse culturally genocidal policies, by centering the laws, customs, practices, and traditions of Indigenous peoples in an exercise of its lawmaking power.

2. The constitutionality of the Act is now squarely before this Court. The issues in these appeals are of fundamental importance to federalism, and also go to the heart of Canada's commitment to reconciliation and its relationship with Indigenous Peoples. Reconciliation is not only learning the truth about our shared past, but actively taking steps to ensure the dark events of the past do not happen again. While true reconciliation is rarely found in the courtroom, this may be one of those rare cases. The Indigenous Bar Association in Canada ("**IBA**") makes three submissions on the issues raised in these appeals:

(a) Indigenous Peoples and their inherent, pre-existing self-government rights have always been a part of Canada's constitutional architecture;

(b) Self-government is a universal right held by all Indigenous Peoples; and

(c) Where Parliament incorporates by reference a law passed by an Indigenous People, it can do so without affecting the underlying Indigenous rights under s. 35.

3. In summary, the IBA submits that s. 35 ought to be interpreted as recognizing and affirming a universal right of self-government. However, in any case, the constitutionality of the Act is fundamentally a matter to be resolved with reference to Parliament's legislative choices in structuring the Act.

4. The IBA takes no position on the facts in these appeals.

PART II. POSITION ON QUESTIONS RAISED

5. The IBA takes no position on the issues raised in these appeals.

PART III. STATEMENT OF ARGUMENT

a) Indigenous Peoples and their inherent, pre-existing self-government rights have always been a part of Canada's constitutional architecture

6. Indigenous Peoples and their inherent, pre-existing rights—including self-government—have always been a part of Canada's constitutional architecture. Sitting alongside the division of powers as between the provincial and federal governments, Indigenous rights and self-government are anchored in s. 35 of the *Constitution Act, 1982* and form part of the foundation on which Canada's constitutional legitimacy rests. This fundamental fact is the necessary starting point for the development of the appropriate framework to revolve the issues in this case.

7. As this Court recently reiterated, "[t]he structure of our Constitution is identified by way of its actual provisions, recorded in its text."[1] Indigenous peoples' collective rights are deliberately situated in Part II of the *Constitution Act, 1982*. They exist <u>independent</u> of the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. Indeed, Aboriginal rights "have nothing to do with whether something lies at the core of the federal government's powers"[2] or those of another legislature. Similarly, s. 91(24) is about Parliament's "relationship with" Indigenous peoples, not its 'control' or constitutional 'authority' over them, or their s. 35 rights.[3]

8. The text of s. 35 itself reaffirms this basic fact. Section 35(1) has uniquely "recognized" and "affirmed" the "existing" rights of Indigenous Peoples. As this Court has explained, s. 35 "did not create rights; rather, it accorded constitutional status to those rights which were 'existing' in 1982."[4] These pre-existing Indigenous rights have been repeatedly recognized in the case law and doctrine for decades.[5] Self-government is a necessary corollary to the "customs," "practices", and

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[1] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 53.
[2] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 142.
[3] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 49.
[4] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 133.
[5] *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 at paras. 379-384; *Pastion v. Dene Tha' First Nation*, 2018 FC 648 at para. 8; *Waquan v. Mikisew Cree First Nation*, 2021 FC 1063 at para. 40; *Louie v. Canada (Indigenous Services)*, 2021 FC 650 at para. 37; *Bertrand v. Acho Dene Koe First Nation*, 2021 FC 287 at para. 42; *Yellowbird v. Samson Cree Nation*, 2021 FC 209 at para. 15; *Ojibway Nation of Saugeen v. Derose*, 2022 FC 531 at para. 49.

"traditions" that are – and have always been – required for Indigenous Peoples to live in "organized, distinctive societies with their own social and political structures."[6] While not always having "receive[d] the legal recognition and approval of European colonizers,"[7] Indigenous laws and self-government continue to exist to this day.

9. This continuance is also reflected in the "grand purpose" of s. 35,[8] which this Court has repeatedly confirmed includes a recognition that, before Canada came into existence, Indigenous Peoples were here, living on the land, as their forefathers had done for generations. This pre-existence is what gives rise to Indigenous rights, recognized and affirmed under s. 35, that must be reconciled with "assumed" or "asserted" Crown sovereignty, including the division of powers.[9]

10. This Court has also confirmed that s. 35 rights are "held against government" and represent a limit on the legislative powers Crown governments assert and exercise under ss. 91 and 92.[10] These rights are not powers that would otherwise be found within ss. 91 or 92. They are brought into, and reconciled within, Canada's constitution through s. 35, which has been part of Canada's constitution in form and fact for the last 40 years.

11. Accordingly, it is inaccurate to state – as the submissions by the Attorney General of Quebec do – that the recognition of Aboriginal self-government rights in the Act alters Canada's constitutional architecture, creates a novel "third order of government", or would have required a constitutional amendment to be effective. Rather, as RCAP recognized: "Aboriginal governments are one of the three distinct orders of government in Canada [and each] are sovereign within their several spheres and hold their powers by virtue of their inherent or constitutional status rather than

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[6] *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 9. See also *R. v. Desautel*, 2021 SCC 17 at para. 29.
[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 136.
[8] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 10.
[9] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31; *Mitchell v. MNR*, 2001 SCC 33 at para. 9; *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1102–1106; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 20; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 76–77; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at para. 37.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 142-143.

by delegation. They share the sovereign powers of Canada as a whole, which represent a pooling of existing sovereignties."[11] This is the "constitutional basis"[12] on which the federation rests.

b) Self-government is a universal s. 35 right held by all Indigenous Peoples

12. The court below recognized that the "right of self-government falls within s. 35 because it is a form of Aboriginal right. It is a universal right that extends to all Aboriginal peoples, because it is intimately tied to their cultural continuity and survival."[13] If this Court decides to revisit *Pamajewon* in disposing of these appeals, the IBA provides the following submissions.

13. While on its face the universality recognized by the court below may seem at odds with this Court's direction that Aboriginal rights be articulated on a specific rather than general basis,[14] this apparent conflict is overstated and not inconsistent with the balancing that this Court has struck many times before. The tension between universal, fundamental rights and a distinctive right-by-right approach has been before this Court since the beginning of its consideration of s. 35. As recognized in *Van der Peet*, "[r]ights are general and universal; they are the way in which the 'inherent dignity' of each individual in a society is respected . . . [t]his Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights."[15]

14. While this Court's direction for defining s. 35 rights in *Van der Peet* has guided the development of Aboriginal law for the last 26 years, it has become unevenly focused on prioritizing the "aboriginality" of rights, over their universality. The IBA submits that it is time for a rebalancing of these factors to recognize that self-government is a fundamental human right universally protected under s. 35, not a "defining feature of the culture"[16] for some Indigenous Peoples, but not others. This rebalancing is required for three reasons.

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[11] Canada, *Report of the Royal Commission on Aboriginal Peoples, Volume 5: Renewal: A Twenty-Year Commitment* (Canada, October 1996) at 150.
[12] *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1105.
[13] *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 at para. 59 (emphasis added).
[14] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 69.
[15] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 18-20.
[16] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 46.

15. First, all Peoples have laws. All Peoples have a means of organizing their own internal affairs, of making their collective decisions, and of passing on their traditions to the next generation. As outlined above, the very text and purpose of s. 35 already embeds the basic fact of Indigenous Peoples' self-governance prior to contact. This Court has recognized time and time again that s. 35 is aimed at reconciling Indigenous Peoples' "prior social organization" and "pre-existing systems of aboriginal law"[17] within Canadian society. If Indigenous Peoples did not have pre-contact laws or internal governance systems, the very foundations of this Court's Aboriginal law jurisprudence, both prior to and following s. 35, is called into question.[18]

16. Second, declining to acknowledge a universal right of self-government would effectively impose an approach to s. 35 rights based on "distinctness" which has long been rejected by this Court.[19] While the precise mode or manner of the <u>expression</u> of self-government rights may differ as between Indigenous Peoples in their practice, the fact that they <u>exist as rights</u> ought to be uncontroversial.[20] Just as this Court once observed that "no aboriginal group in Canada would [be able to] claim that its culture is 'distinct' or unique in fishing for food"[21] and held that was not a barrier to establishing a s. 35 right to fish, nor should a "distinctness" threshold that lacks any true meaning be required for self-government to be recognized as a universal right under s. 35.

17. Notably, acknowledging a universal right of self-government under s. 35 for all Indigenous Peoples would not circumvent the need for a specific Indigenous group to establish that a particular <u>exercise</u> of that self-government right should be protected by s. 35. Where challenged, the framework this Court has set out in *Van der Peet*, *Powley*, and *Sparrow* would still apply to the exercise of that right. This is part of the dual purpose of s. 35: the recognition and reconciliation of Aboriginal rights with assumed Crown sovereignty. Here, recognition of a universal s. 35 right of self-government would provide a much-needed baseline as the starting point for reconciliation,

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[17] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 129.
[18] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328 (*per* Martland, Judson, and Ritchie JJ.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 114.
[19] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 72.
[20] See authorities cited at footnote 5.
[21] *R v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 72.

one that aligns with this Court's direction that s. 35 "be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights."[22]

18. Third, requiring every Indigenous People to conduct a resource-intensive, case-by-case run through the *Van der Peet* gauntlet would raise deleterious access to justice concerns and run counter to this Court's longstanding direction to negotiate rather than litigate.[23] Indigenous Peoples would be forced to repeatedly turn to the courts to establish the very marrow and core of their self-government piece by piece, law by law, even following years of negotiation. This would gut Indigenous self-government and hamstring the purpose of s. 35. Recognition of a universal s. 35 right of self-government, on the other hand, would foster negotiations by providing a solid constitutional foundation for the parties to rely on.

19. The answer to these obstacles lies within s. 35 itself. The "authoritative interpretation" of s. 35 is for the courts,[24] and this Court has modified and shaped the s. 35 jurisprudence since its inception. Now is the time to do so again and revisit *Van der Peet* to recognize a universal s. 35 self-government right for all Indigenous Peoples. Not only is this reasonable, but it is necessary as part of Canada's ongoing reconciliation with Indigenous Peoples and with its own past.

20. There is precedent for adapting the *Van der Peet* test to take into account the unique circumstances of Indigenous Peoples or for different types of s. 35 rights. The Court has already done so to account for the circumstances of Métis peoples and their rights,[25] and for title to land as a type of Aboriginal right,[26] when required. To do so again would also be consistent with the Court's general guidance on when it is appropriate for it to depart from its earlier precedents as a

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[22] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras. 44-52 (*per* Wagner C.J., Abella, and Karakatsanis JJ., for the majority).

[23] *R. v. Desautel,* 2021 SCC 17 at para. 87; *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40 at para. 22 (*per* Karakatsanis J., writing for herself, Wagner C.J. and Gascon J.); *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 24; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 14; *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 186.

[24] *R. v. Desautel*, 2021 SCC 17 at para. 84.

[25] *R. v. Powley*, 2003 SCC 43 at para. 53.

[26] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 44.

matter of horizontal *stare decisis*: (i) there are "compelling reasons to do so," here as part of advancing the project of reconciliation; and (ii) "[t]his Court has made clear that constitutional decisions are not immutable, even in the absence of constitutional amendment."[27]

21. In recognizing a universal s. 35 right of self-government, this Court's decision in *Pamajewon* should not be treated as a binding authority or as foreclosing the further evolution of s. 35. *Pamajewon* represents a mechanical application of the baseline, then-nascent *Van der Peet* test from the earlies days of s. 35 jurisprudence. In addition, the case turned on the question of a s. 35 right to regulate gambling activities, which, in light of the Court's finding on that point, made it "unnecessary [...] to even consider the question of self-government."[28]

22. In particular, the dubious view in *Pamajewon* that certain Indigenous groups might not be able to establish a right of self-government "in light of the specific history and culture of the [group] claiming the right"[29] can be readily compared to the long-discredited doctrine of *terra nullius*, which this Court resoundingly rejected in *Tsilhqot'in.*[30] The assumption that Indigenous Peoples lacked social, legal, and political organization of any kind prior to contact is a false narrative that should not be resurrected or otherwise returned to and, as outlined above, has no basis in fact or law. Society—and the law—has since moved beyond this outmoded perspective.

c) Where Parliament incorporates by reference a law passed by an Indigenous People, it can do so without affecting the underlying Indigenous s. 35 rights

23. The IBA provides the following submissions to assist this Court regarding its division of powers analysis.

24. It is within Parliament's powers to incorporate by reference into a federal statute a law passed pursuant to an Indigenous Peoples' self-government rights and jurisdiction. Incorporation by reference has a long and established history in Canadian law.[31] There is no principled reason why Parliament can choose to incorporate by reference provincial legislation over lotteries,

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[27] *R. v. Henry*, 2005 SCC 76 at para. 44; see also *Canada v. Craig*, 2012 SCC 43 at para. 25.
[28] *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 41.
[29] *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 27.
[30] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 69.
[31] See Factum of the Attorney General of Canada at paras. 199-203.

limitation periods, or traffic regulations on Indian reserves,[32] but not Indigenous laws over Indigenous children and families. This is a natural extension of an existing legislative practice, and aligns with Parliament's recognition of Indigenous self-government and self-determination, including the inherent jurisdiction that comes with the exercise of those rights.[33]

25. Where Parliament chooses to incorporate Indigenous laws by reference, the division of powers analysis and the principle of federalism provides sufficient flexibility to be a full answer to the issues engaged in this appeal. While the court below correctly recognized the existence of a universal s. 35 right of self-government, it conflated the framework to resolve s. 35 rights with the framework to resolve conflicts of laws in the context of overlapping Crown jurisdiction. Indigenous laws—grounded in the inherent s. 35 right of self-government—and the framework for establishing and protecting those laws as Indigenous laws under s. 35, are distinct from the framework set out in the Act—where Parliament has incorporated Indigenous laws by reference as federal laws pursuant to Parliament's s. 91(24) powers. In the latter situation, the *Sparrow* tests for justification of an infringement of a s. 35 right is not the correct framework to resolve potential conflict with provincial laws. The passage of a law under the second part of the Act by an "Indigenous governing body" does not affect, delineate, or define the s. 35 rights of that group.

26. This Court developed the *Sparrow* framework in a very different context than this one. *Sparrow* arose in the context of provincial/federal regulation of a resource and the exercise of a s. 35 harvesting right. It is a framework for justifying the infringement of rights that includes such factors as whether: there is a valid legislative objective, there is as little infringement as possible, there is compensation available, and the Indigenous Peoples were consulted.

27. The application of the *Sparrow* framework in this context would allow the provinces to achieve indirectly what they cannot do directly: trench on the jurisdiction of the federal government's power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. This would essentially allow a province to unwind federal legislative choices under the guise of seeking to justify infringements. To allow this would be to "[permit] the Crown to do by one means that

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[32] *R. v. Furtney*, [1991] 3 S.C.R. 89; *R. v. Francis*, [1988] 1 S.C.R. 1025;
[33] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

which it cannot do by another [and] would undermine the endeavour of reconciliation, which animates Aboriginal law."[34]

28. It is perhaps because of the challenges inherent in adopting a justification approach similar to *Sparrow* that modern-day treaties and self-government agreements use a different paradigm for resolving conflicts of Indigenous law with provincial or federal laws. These agreements invariably adopt paramountcy and conflict of laws provisions, and in addition recognize (as the Act does) that in certain circumstances that are of central significance to Indigenous Peoples, their Indigenous laws will have priority over federal or provincial laws.[35]

29. However, this Court is not tasked with the reconciliation of s. 35 Indigenous laws as Indigenous laws with federal or provincial law. Indeed, there is no Indigenous law at issue before this Court that would allow for such an exercise. Rather, the issue before the Court in this reference is principally one of statutory and constitutional interpretation regarding the Act.

30. The interpretation of any statute begins with its text. In the Act, Parliament expressly chose to provide that for Indigenous Governing Bodies who choose to use the mechanisms set out in the Act,[36] those laws will have "the force of law as federal law."[37] Parliament chose to give these laws force of law as federal law. In doing so, "the relevant provisions apply as federal law not as [the source jurisdiction of the] law."[38] This was Parliament's choice, and "Parliamentary sovereignty

[34] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 44 (*per* Karakatsanis J., writing for herself, Wagner C.J. and Gascon J.).

[35] Yukon First Nation Self-Government Agreements recognize these rights as "exclusive" (e.g., Vuntut Gwitchin First Nation Self-Government Agreement, s. 13.1); Nisga'a Final Agreement, s. 33 (Nisga'a "principal authority"); Labrador Inuit Land Claims Agreement, Part 17 (Inuit Laws "prevail" over federal laws).

[36] Act, ss. 20(3), 21-22.

[37] Act, s. 21(1).

[38] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 114.

mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority."[39]

31. Determining whether the Act is *intra vires* Parliament's authority is sufficient to resolve the issues before this Court. That said, with respect to the specter of downstream jurisdictional conflicts raised by some parties, the answer is clear: in a federal-provincial division of powers dispute, ordinary division of powers rules ought to govern. In summary, the constitutionality of the Act is fundamentally a matter tied to federalism, and should be resolved with reference to Parliament's legislative choices in structuring the Act.

32. Federalism is one of the Constitution's foundational principles. It "requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests."[40] In this regard, the doctrine of paramountcy is a live issue in these appeals, and in any future division of powers litigation regarding the Act. In the IBA's submission, the ordinary thresholds for the application of the doctrine of paramountcy ought to be relaxed to ensure that Parliament's intent in providing that Indigenous laws have force "as federal laws" and would, in the circumstances set out in the Act, take precedence over provincial laws with respect to the wellbeing of First Nation, Inuit and Métis children and youth.

PART IV. –COSTS

33. The IBA seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, B.C., November 14, 2022.

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Indigenous Bar Association in Canada

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[39] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 36 (*per* Karakatsanis J., writing for herself, Wagner C.J., and Gascon J.).
[40] *R. v. Comeau*, 2018 SCC 15 at paras. 77-78.

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