SCC File No. 40061

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

-and-

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

RESPONDENTS

(CONTINUED)

FACTUM
(GRAND COUNCIL OF TREATY #3, INTERVENER)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

JFK LAW LLP
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Robert Janes, K.C.
Naomi Moses
Tel: 604-687-0549
Fax: 604-687-2696
Email: rjanes@jfklaw.ca
nmoses@jfklaw.ca

Counsel for the Intervener,
Grand Council of Treaty #3

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa , ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855, Ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener,
Grand Council of Treaty #3

SCC File No. 40061

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

-and-

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

RESPONDENTS

-and-

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, GRAND COUNCIL OF TREATY #3, INNU TAKUAIKAN UASHAT MAK MANI-UTENAM (ITUM), FEDERATION OF SOVEREIGN INDIGENOUS NATIONS, PEGUIS CHILD AND FAMILY SERVICES, NATIVE WOMEN'S ASSOCIATION OF CANADA, COUNCIL OF YUKON FIRST NATIONS, INDIGENOUS BAR ASSOCIATION, CHIEFS OF ONTARIO, INUVIALUIT REGIONAL CORPORATION, INUIT TAPIRIIT KANATAMI, NUNATSIAVUT GOVERNMENT AND NUNAVUT TUNNGAVIK INCORPORATED, NUNATUKAVUT COMMUNITY COUNCIL, LANDS ADVISORY BOARD, MÉTIS NATIONAL COUNCIL, MÉTIS NATION-SASKATCHEWAN, MÉTIS NATION OF ALBERTA, MÉTIS NATION BRITISH COLUMBIA, MÉTIS NATION OF ONTARIO AND LES FEMMES MICHIF OTIPEMISIWAK, LISTUGUJ MI'GMAQ GOVERNMENT, CONGRESS OF ABORIGINAL PEOPLES, FIRST NATIONS FAMILY ADVOCATE OFFICE, ASSEMBLY OF MANITOBA CHIEFS, FIRST NATIONS OF THE MAA-NULTH TREATY SOCIETY, TRIBAL CHIEFS VENTURES INC., UNION OF BRITISH COLUMBIA INDIAN CHIEFS, FIRST NATIONS SUMMIT OF BRITISH COLUMBIA AND BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, REGROUPEMENT PETAPAN, CANADIAN CONSTITUTION FOUNDATION, CARRIER SEKANI FAMILY SERVICES SOCIETY, CHESLATTA CARRIER NATION, NADLEH WHUTEN, SAIK'UZ FIRST NATION AND STELLAT'EN FIRST NATION, CONSEIL DES ATIKAMEKW D'OPITCIWAN, VANCOUVER ABORIGINAL CHILD AND FAMILY

SERVICES SOCIETY, NISHNAWBE ASKI NATION, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INTERVENERS

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT

-and-

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASENIWUCHE WINEWAK NATION OF CANADA, ASSEMBLY OF FIRST NATIONS, MAKIVIK CORPORATION, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR, FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION, GRAND COUNCIL OF TREATY #3, INNU TAKUAIKAN UASHAT MAK MANI-UTENAM (ITUM), FEDERATION OF SOVEREIGN INDIGENOUS NATIONS, PEGUIS CHILD AND FAMILY SERVICES, NATIVE WOMEN'S ASSOCIATION OF CANADA, COUNCIL OF YUKON FIRST NATIONS, INDIGENOUS BAR ASSOCIATION, CHIEFS OF ONTARIO, INUVIALUIT REGIONAL CORPORATION, INUIT TAPIRIIT KANATAMI, NUNATSIAVUT GOVERNMENT AND NUNAVUT TUNNGAVIK INCORPORATED, NUNATUKAVUT COMMUNITY COUNCIL, LANDS ADVISORY BOARD, MÉTIS NATIONAL COUNCIL, MÉTIS NATION-SASKATCHEWAN, MÉTIS NATION OF ALBERTA, MÉTIS NATION BRITISH COLUMBIA, MÉTIS NATION OF ONTARIO AND LES FEMMES MICHIF OTIPEMISIWAK, LISTUGUJ MI'GMAQ GOVERNMENT, CONGRESS OF ABORIGINAL PEOPLES, FIRST NATIONS FAMILY ADVOCATE OFFICE, ASSEMBLY OF MANITOBA CHIEFS, FIRST NATIONS OF THE MAA-NULTH TREATY SOCIETY, TRIBAL CHIEFS VENTURES INC., UNION OF BRITISH COLUMBIA INDIAN CHIEFS, FIRST NATIONS SUMMIT OF BRITISH COLUMBIA AND BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, REGROUPEMENT PETAPAN, CANADIAN CONSTITUTION FOUNDATION, CARRIER SEKANI FAMILY SERVICES SOCIETY, CHESLATTA CARRIER NATION, NADLEH WHUTEN, SAIK'UZ FIRST NATION AND STELLAT'EN FIRST NATION, CONSEIL DES ATIKAMEKW D'OPITCIWAN, VANCOUVER ABORIGINAL CHILD AND FAMILY

SERVICES SOCIETY, NISHNAWBE ASKI NATION, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INTERVENERS

BERNARD, ROY & ASSOCIÉS
1, rue Notre-Dame Est, bureau 8.00
Montréal, QC H2Y 1B6

Samuel Chayer
Francis Demers
Gabrielle Robert
Tel: (514) 393-2336
Fax: (514) 873-7074
Email: samuel.chayer@justice.gouv.qc.ca
Francis.demers@justice.gouv.qc.ca
Gabrielle.robert@justice.gouv.gc.ca

MINISTÈRE DE LA JUSTICE DU QUÉBEC
1200, route de l'Église
Québec, QC G1V 4M1

Tania Clercq
Hubert Noreau-Simpson
Marie-Catherine Bolduc
Tel : (418) 643-1477
Fax : (418) 644-7030
Courriel :tania.clercq@justice.gouv.qc.ca
Hubert.noreau-simpson@justice.gouv.gc.ca
Marie-catherine.bolduc@justice.gouv.gc.ca

Counsel for the Attorney General of Québec

NOËL ET ASSOCIÉS, s.e.n.c.r.l.
225, montée Paiement, 2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Tel: (819) 503-2178
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for Counsel for the Attorney General of Québec

MINISTÈRE DE LA JUSTICE - CANADA
200, boul. René-Levesque Ouest
Montréal, QC H2Z 1X4

François Joyal
Bernard Letarte
Andréane Joanette-Laflamme
Lindy Rouillard-Labbé
Amélia Couture
Tel : (514) 283-5880
Fax : (514) 496-7876
Email : françois.joyal@justice.gc.ca
bletarte@justice.gc.ca
andreane.laflamme@justice.gc.ca
lindy.rouillard-labbe@justice.gc.ca
amelia.couture@justice.gc.ca

Counsel for the Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for Counsel for the Attorney General of Canada

PAPE SALTER TEILLET LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

Kathryn Tucker
Nuri Frame
Tel : (416) 855-7194
Fax : (416) 916-3726
Email: ktucker@pstlaw.ca
nframe@pstlaw.ca

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel**:** (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Makivik Corporation

MAKIVIK CORPORATION
1111 Dr.-Frederik-Philips Blvd.
Saint-Laurent, QC H4M 2X6

Robin Campbell
Tel : (514) 745-8880
Fax : (514) 745-0364
Email: rcampbell@makivik.org

Counsel for Makivik Corporation

FRANKLIN GERTLER ÉTUDE LÉGALE
507 Place d'Armes, bureau 1701
Montréal , QC H2Y 2W8

Franklin S. Gertler
Gabrielle Champigny
Hadrien Gabriel Burlone
Tel: (514) 798-1988
Fax: (514) 798-1986
Email: franklin@gertlerlex.ca
gchampigny@gertlerlex.ca
h.burlone@hotmail.ca

-and-

ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR (AFNQL)
Bureau 201 250, rue Chef-Michel-Laveau
Wendake, QC G0A 4V0

Mira Levasseur Moreau
Tel: (418) 842-5020
Fax: (418) 842-2660
Email: mlmoreau@apnql.com

-and-

FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION (FNQLHSSC)
250 Place Chef-Michel-Laveau, Suite 102
Wendake, QC G0A 4V0

Leila Ben Messaoud
Tel : (418) 842-1540, ext. 2813
Fax : (418) 482-7045
Email :
leila.benmessaoudouellet@cssspnql.com

Counsel for the Assembly of First Nations Quebec-Labrador (AFNQL) and First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 103
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Assembly of First Nations Quebec-Labrador (AFNQL) and First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke
Julie McGregor
Adam Williamson
Tel: (613) 241-6789 Ext: 228
Fax: (613) 241-5808
Email: swuttke@afn.ca
Jmcgregor@afn.ca
awilliamson@afn.ca

Counsel for the Assembly of First Nations

SUPREME LAW GROUP
1800 – 275, rue Slater
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for Counsel for the Assembly of First Nations

JFK LAW CORPORATION
1175 Douglas St., Suite 816
Victoria, BC V8W 2E1

Claire Truesdale
Louise Kyle
Tel: (250) 405-3467
Fax: (250) 381-8567
Email: ctruesdale@jfklaw.ca
lkyle@jfklaw.ca

Counsel for Aseniwuche Winewak Nation of Canada

SUPREME ADVOCACY LLP
340 Gilmour Suite, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Aseniwuche Winewak Nation of Canada

CONWAY BAXTER WILSON LLP
411, Roosevelt Avenue, Suite 400
Ottawa, ON K2A 3X9

David Taylor
Tel: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

-and-

BURCHELLS LAWYERS LLP
Suite 1800 1801 Hollis Street
Halifax, NS B3J 3N4

Naiomi W. Metallic
Tel: (902) 403-2229
Fax: (902) 420-9326
Email: nmetallic@burchells.ca

Counsel for First Nations Child and Family Caring Society of Canada

ATTORNEY GENERAL OF ALBERTA
10th Floor, 10025 - 102 A Avenue
Edmonton, AB T5J 2Z2

Angela Croteau
Nicholas Parker
Tel: (780) 422-6868
Fax: (780) 643-0852
Email: angela.croteau@gov.ab.ca

Counsel for the Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Attorney General of Alberta

ATTORNEY GENERAL OF MANITOBA
Constitutional Law
1230 - 405 Broadway
Winnipeg, MB R3C 3L6

Heather S. Leonoff, K.C.
Kathryn Hart
Tel: (204) 391-0717
Fax: (204) 945-0053
Email: heather.leonoff@gov.mb.ca
kathryn.hart@gov.mb.ca

Counsel for the Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Attorney General of Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7

Leah R. Greathead
Heather Cochran
Tel: (250) 356-8892
Fax: (250) 356-9154
Email: leah.greathead@gov.bc.ca
heather.cochran@gov.bc.ca

Counsel for the Attorney General of British Columbia

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Agent for Counsel for the Attorney General of British Columbia

O'REILLY & ASSOCIÉS
1155 Robert-Bourassa, Suite 1007
Montréal, QC H3B 3A7

James A. O'Reilly, Ad. E
Marie-Claude André-Grégoire
Michelle Corbu
Vincent Carney
Tel: (514) 871-8117
Fax: (514) 871-9177
Email: james.oreilly@orassocies.ca
Marie-claude.andre-gregoire@orassocies.ca
Michelle.corbu@orassocies.ca
Vincent.carney@orassocies.ca

Counsel for the Intervener, Innu Takuaikan Uashat Mak Mani-Utenam

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 103
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener, Innu Takuaikan Uashat Mak Mani-Utenam

SUNCHILD LAW
Box 1408
Battleford, SK S0M 0E0

Michael Seed
Tel : (306) 441-1473
Fax : (306) 937-6110
Email : michael@sunchildlaw.com

DIONNE SCHULZE
507 Place d'Armes, Suite 502
Montreal, QC H2Y 2W8

Nicholas Dodd
Rosa Victoria Adams
Tel : (514) 842-0748
Fax : (514) 842-9983
Email : ndodd@dionneschulze.ca

Counsel for the Federation of Sovereign Indigenous Nations

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel : (613) 787-3562
Fax : (613) 230-8842
Email : neffendi@blg.com

Agent for Counsel for the Federation of Sovereign Indigenous Nations

HAFEEZ KHAN LAW CORPORATION
1430-363 Broadway Ave.
Winnipeg, MB R3C 3N9

Hafeez Khan
Tel : (431) 800-5650
Fax : (431) 800-2702
Email: hkhan@hklawcorp.ca

PEGUIS CHILD AND FAMILY SERVICES
Unit 1-1349 Border Street
Winnipeg MB R3H 0N1

Earl C. Stevenson
Tel : (204) 632-5404
Fax : (204)632-7226
Email: earl.stevenson@peguiscfs.org

Counsel for Peguis Child and Family Services

NATIVE WOMEN'S ASSOCIATION OF CANADA
120 Promenade du Portage
Gatineau, QC J8X 2K1

Sarah Niman
Kira Poirier
Tel : (613) 720-2529
Fax : (613) 722-7687
Email: sniman@nwac.ca
kpoirier@nwac.ca

Counsel for Native Women's Association of Canada

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Peguis Child and Family Services

FIRST PEOPLES LAW LLP
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Virginia Lomax
Tel : (613) 722-9091
Fax : (613) 722-9097
Email : vlomax@firstpeopleslaw.com

Agent for Counsel for Native Women's Association of Canada

BOUGHTON LAW CORPORATION
700-595 Burrard Street
Vancouver, BC V7X 1S8

Tammy Shoranick
Daryn Leas
James M. Coady, K.C.
Tel : (604) 687-6789
Fax : (604) 683-5317
Email : tshoranick@boughtonlaw.com
dleas@boughtonlaw.com
jcoady@boughtonlaw.com

Counsel for Council of Yukon First Nations

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel : (613) 787-3562
Fax : (613) 230-8842
Email : neffendi@blg.com

Agent for Counsel for Council of Yukon First Nations

GOWLING WLG (CANADA) LLP
550 Burrard Street
Vancouver, BC V6C 2B5

Paul Seaman
Keith Brown
Tel : (604) 891-2731
Fax : (604) 443-6780
Email : paul.seaman@gowlingwlg.com
keith.brown@gowlingwlg.com

Counsel for Indigenous Bar Association

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Cam Cameron
Tel : (613) 786-8650
Fax : (613) 563-9869
Email : cam.cameron@gowlingwlg.com

Agent for Counsel for Indigenous Bar Association

OLTHUIS, KLEER, TOWNSHEND LLP
250 University Ave., 8th floor
Toronto, ON M5H 3E5

Maggie Wente
Krista Nerland
Tel : (416) 981-9330
Fax : (416) 981-9350
Email : mwente@oktlaw.com
knerland@oktlaw.com

Counsel for Chiefs of Ontario

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Chiefs of Ontario

FOGLER, RUBINOFF LLP
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Katherine Hensel
Kristie Tsang
Tel : (416) 864-7608
Fax : (416) 941-8852
Email : khensel@foglers.com
kstsang@foglers.com

Counsel for Inuvialuit Regional Corporation

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin St
Box 466 Station D
Ottawa, ON K1P 1C3

Brian A. Crane, K.C.
Graham Ragan
Alyssa Flaherty-Spence
Kate Darling
Tel : (613) 233-1781
Fax : (613) 563-9869
Email : brian.crane@gowlingwlg.com
Graham.ragan@gowlingwlg.com
Alyssa.flaherty-spence@gowlingwlg.com
Kate.darling@livingtreelaw.ca

Counsel for Inuit Tapiriit Kanatami, Nunatsiavut Government and Nunavut Tunngavik Incorporated

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Inuvialuit Regional Corporation

BURCHELLS LLP
1800-1801 Hollis St.
Halifax, NS B3J 3N4

Jason Cooke
Ashley Hamp-Gonsalves
Tel: (902) 422-5374
Fax: (902) 420-9326
Email : jcooke@burchells.ca
ahampgonsalves@burchells.ca

Counsel for NunatuKavut Community Council

POWER LAW
99 Bank Street, Suite 701
Ottawa, ON K1P 6B9

Jonathan Laxer
Tel: (613) 907-5652
Fax: (613) 907-5652
Email : jlaxer@powerlaw.ca

Agent for Counsel for NunatuKavut Community Council

WILLIAM B. HENDERSON
Barrister & Solicitor
3014 - 88 Bloor St East
Toronto, ON M4W 3G9

Tel: (416) 413-9878
Email : lawyer@bloorstreet.com

Counsel for Lands Advisory Board

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for Lands Advisory Board

PAPE SALTER TEILLET LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

Jason T. Madden
Alexander DeParde
Tel: (416) 916-3853
Fax: (416) 916-3726
Email : jmadden@pstlaw.ca
adeparde@pstlaw.ca

CASSELS BROCK & BLACKWELL LLP
885 West Georgia Street, Suite 2200
Vancouver, BC V6C 3E8

Emilie N. Lahaie
Tel: (778) 372-7651
Fax: (604) 691-6120
Email: elahaie@cassels.com

Counsel for Métis National Council, Métis Nation-Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, Métis Nation of Ontario and Les femmes Michif Otipemisiwak

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email : matthew.estabrooks@gowlingwlg.com

Agent for Counsel for Métis National Council, Métis Nation-Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, Métis Nation of Ontario and Les femmes Michif Otipemisiwak

PAPE SALTER TEILLET LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

Zachary Davis
Riley Weyman
Tel: (416) 427-0337
Fax: (416) 916-3726
Email : zdavis@pstlaw.ca
rweyman@pstlaw.ca

Counsel for Listuguj Mi'Gmaq Government

PALIARE, ROLAND, ROSENBERG, ROTHSTEIN, LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Andrew K. Lokan
Tel: (416) 646-4324
Fax: (416) 646-4301
Email : andrew.lokan@paliareroland.com

Counsel for the Congress of Aboriginal Peoples

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email : matthew.estabrooks@gowlingwlg.com

Agent for Counsel for Listuguj Mi'Gmaq Government

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Tel: (613) 783-9699
Fax: (613) 783-9690
Email : david.elliott@dentons.com

Agent for Counsel for the Congress of Aboriginal Peoples

PUBLIC INTEREST LAW CENTRE
100 - 287 Broadway
Winnipeg, MB R3C 0R9

Joëlle Pastora Sala
Allison Fenske
Tel: (204) 985-9735
Fax: (204) 985-8544
Email : jopas@pilc.mb.ca

FIRST NATIONS FAMILY ADVOCATE OFFICE
200-286 Smith Street
Winnipeg, MB R3C 1K4

Maximilian Griffin-Rill
Adrienne Cooper
Tel: (204) 957-8463
Email: mgriffin-rill@manitobachiefs.com
acooper@manitobachiefs.com

Counsel for First Nations Family Advocate Office

TORYS LLP
79 Wellington Street, 30th Floor
Box 270, TD Centre
Toronto, ON M5K 1N2

David Outerbridge
Craig Gilchrist
Rebecca Amoah
Tel: (416) 865-7825
Fax: (416) 865-7380
Email : douterbridge@torys.com
cgilchrist@torys.com
ramoah@torys.com

Counsel for Assembly of Manitoba Chiefs

JURISTES POWER
50, O'Connor Street, Suite 1313
Ottawa, ON K1P 6B9

Darius Bossé
Tel: (613) 702-5566
Fax: (613) 702-5566
Email : DBosse@juristespower.ca

Agent for Counsel for First Nations Family Advocate Office

RATCLIFF LLP
500-221 West Esplanade
North Vancouver, BC V7M 3J3

Maegen M. Giltrow, K.C.
Natalia Sudeyko
Tel: (604) 988-5201
Fax: (604) 988-1452
Email : mgiltrow@ratcliff.com

Counsel for First Nations of the Maa-Nulth Treaty Society

GOWLING WLG (CANADA) LLP
550 Burrard Street
Suite 2300, Bentall 5
Vancouver, BC V6C 2B5

Aaron Christoff
Brent Murphy
Tel: (604) 443-7685
Fax: (604) 683-3558
Email : aaron.christoff@gowlingwlg.com
brent.murphy@gowlingwlg.com

Counsel for Tribal Chiefs Ventures Inc.

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel: (613) 237-4740
Fax: (613) 232-2680
Email : broy@champlaw.ca

Agent for Counsel for First Nations of the Maa-Nulth Treaty Society

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Marie-Christine Gagnon
Tel: (613) 786-0086
Fax: (613) 563-9869
Email : Marie-Christine.Gagnon@ca.gowlingwlg.com

Agent for Counsel for Tribal Chiefs Ventures Inc.

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

Gib van Ert
Fraser Harland
Tel: (613) 501-5350
Fax: (613) 651-0304
Email : gvanert@ovcounsel.com

LAFOND & MACK LAW GROUP
7297 West Saanich Road
Saanichton, BC V8M 1R7

M^e^ Mary Ellen Turpel-Lafond
Tel: (250) 213-2904
Email : metl@lmlawgroup.ca

Counsel for Union of British Columbia Indian Chiefs, First Nations Summit of British Columbia and British Columbia Assembly of First Nations

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Jessica Orkin
Natai Shelsen
Tel: (416) 977-6070
Fax: (416) 591-7333
Email : jorkin@goldblattpartners.com
nshelsen@goldblattpartners.com

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto, Faculty of Law
78 Queen's Park
Toronto, ON M4S 2C5

Cheryl Milne
Tel: (416) 978-0092
Email: cheryl.milne@utoronto.ca

Counsel for David Asper Centre for Constitutional Rights

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-5327
Email : cbauman@goldblattpartners.com

Agent for Counsel David Asper Centre for Constitutional Rights

CAIN LAMARRE
814, boul. Saint Joseph
Roberval, QC G8H 2L5

François G. Tremblay
Benoît Amyot
Tel: (418) 545-4580
Fax: (418) 549-9590
Email : notification.cain.saguenay@clcw.ca

Counsel for Regroupement Petapan

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Marion Sandilands
Tel: (613) 288-0149
Fax: (613) 688-0271
Email : msandilands@conway.pro

Agent for Counsel for Regroupement Petapan

MCCARTHY TÉTRAULT LLP
TD Bank Tower, Suite 5300
Toronto, ON M5K 1E6

Jesse Hartery
Simon Bouthillier
Tel: (416) 362-1812
Fax: (416) 868-0673
Email : jhartery@mccarthy.ca
sbouthillier@mccarthy.ca

Counsel for Canadian Constitution Foundation

GOWLING WLG (CANADA) LLP
550 Burrard Street
Suite 2300, Bentall 5
Vancouver, BC V6C 2B5

Scott A. Smith
Tel: (604) 891-2764
Fax: (604) 443-6784
Email : scott.smith@gowlingwlg.com

Counsel for Carrier Sekani Family Services Society, Cheslatta Carrier Nation, Nadleh Whuten, Saik'uz First Nation and Stellat'en First Nation

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 563-9869
Email : jeff.beedell@gowlingwlg.com

Agent for Counsel for Carrier Sekani Family Services Society, Cheslatta Carrier Nation, Nadleh Whuten, Saik'uz First Nation and Stellat'en First Nation

SIMARD BOIVIN LEMIEUX, S.E.N.C.R.L.
1150, boul. Saint-Félicien, Bureau 106
Saint-Félicien, QC G8K 2W5

Kevin Ajmo
Tel: (418) 679-8888
Fax: (514) 679-8902
Email : k.ajmo@sblavocats.com

Counsel for Council Atikamekw d'Opitciwan

GOWLING WLG (CANADA) LLP
550 Burrard Street, Suite 2300
Vancouver, BC V6C 2B5

Maxime Faille
Tel: (604) 891-2733
Fax: (604) 443-6786
Email : maxime.faille@gowlingwlg.com

Counsel for Vancouver Aboriginal Child and Family Services Society

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 563-9869
Email : jeff.beedell@gowlingwlg.com

Agent for Counsel for Vancouver Aboriginal Child and Family Services Society

FALCONERS LLP
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9

Julian N. Falconer
Tel: (416) 964-0495 Ext : 222
Fax: (416) 929-8179
Email : julianf@falconers.ca

Counsel for Nishnawbe Aski Nation

SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email : mdillon@supremelawgroup.ca

Agent for Counsel for Nishnawbe Aski Nation

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES
Legal Division, Department of Justice
4903 - 49th Street, P.O. Box 1320
Yellowknife, NWT X1A 2L9

Trisha Paradis
Sandra Jungles
John C.T. Inglis
Tel: (867) 767-9257
Fax: (867) 873-0234
Email : Trisha_Paradis@gov.nt.ca
Sandra.jungles@gov.nt.ca
John_inglis@gov.nt.ca

Counsel for the Attorney General of the Northwest Territories

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email : lynne.watt@gowlingwlg.com

Agent for Counsel for the Attorney General of the Northwest Territories

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. Canada's reconciliation with Indigenous people will not meaningfully advance until Indigenous governance institutions are restored to their rightful place in Canada's legal landscape. This goal is best achieved through political, diplomatic, and legislative engagement, negotiation, and implementation – an approach consistent with Canada's long history of cooperative federalism. Reconciliation will be frustrated if Indigenous people are required to advance their just claims for effective and paramount self-government by resolving conflicts through extended, costly, and uncertain s. 35 litigation. This case will largely determine whether the federal government's power to legislate on Indians and lands reserved for Indians provides an effective basis for the federal government to respectfully work with Indigenous Nations to implement self-government.

2. The Grand Council of Treaty 3 ("**Grand Council**") says that Parliament has the legislative jurisdiction and power to use the same tools at its disposal to implement Indigenous self-government as it has to implement provincial and territorial self-government. Those tools include the power to delegate law-making power and to incorporate Indigenous laws as federal law. This will ensure that Indigenous laws are effective and reflect Indigenous people's autonomy, as grounded in their own values, cultures, history, geography, and political choices. Further (and contrary to the holding of the Québec Court of Appeal), federally incorporated Indigenous laws are not second-class federal laws. Rather, they enjoy the same primacy over conflicting provincial laws as other federal laws. This is consistent with and reflects Canada's federal structure.

PART II – RESPONSE TO QUESTIONS IN ISSUE

3. The Grand Council submits that since Indigenous self-government predates and is not limited to s. 35 of the *Constitution Act, 1982,* cooperative federalism principles and mechanisms, particularly referential incorporation, should be applied to resolve conflicts and inconsistencies between Indigenous laws and federal and provincial laws. This approach is more practical than s. 35 litigation and it better promotes reconciliation between Indigenous Nations and the federal and provincial governments of Canada.

PART III – ARGUMENT

Indigenous Self-Government is Not Limited to Section 35 of the Constitution Act, 1982

4. Indigenous self-government is an integral part of Indigenous autonomy. It reflects the fact that Indigenous Nations existed before the arrival of Europeans in Canada and continue to exist as autonomous political entities. For many generations, Indigenous people have maintained their own institutions, rules, customs, traditions, and practices – a body of laws and legal institutions – to make collective decisions and establish order within their Nations and with other Indigenous peoples. This pre-existing body of law was recognized in Canadian colonial law in *Connolly v. Wooolwich*,[1] a decision that recognized the legitimacy of a spousal relationship established in Cree law. Similarly, pre-existing Indigenous laws with respect to matters such as adoption have been recognized in legislation such as British Columbia's *Adoption Act*,[2] as described in the British Columbia Court of Appeal's decision in *Casimel*.[3]

5. Section 35 of the *Constitution Act, 1982* provides protection to certain forms of self-government, including those that predate s. 35. Aboriginal self-government that meets the *Pamajewon*[4] test is **protected** but not **created** by s. 35, as it is rooted in and reflects the pre-contact self-government practices of Indigenous Nations. Similarly, the more general form of self-government described in *Delgamuukw*[5] and discussed in *Campbell*[6] – the collective ability of First Nations to make binding decisions about the use of their Aboriginal title lands – reflects Indigenous Nations' territorial use and occupancy prior to the assertion of British sovereignty. In each case, s. 35 provided new constitutional protections for these rights against both colonial governments, but did not **create** the self-government rights. Both *Van der Peet*[7] (on Aboriginal Rights) and *Delgamuukw*[8] (on

---

[1] *Connolly v. Woolrich* (1867), 1 CNLC 70, [1867] QJ No. 41, Book of Authorities **[BOA]**, Tab 1.
[2] *Adoption Act*, RSBC 1996, c. 5, s. 46.
[3] *Casimel v. Insurance Corp. of British Columbia* (1993), 82 BCLR (2d) 387 (CA).
[4] *R. v. Pamajewon*, [1996] 2 SCR 821.
[5] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [***Delgamuukw***] at para 166.
[6] *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 [***Campbell***] at paras 129–136.
[7] *R. v. Van der Peet*, [1996] 2 SCR 507 at paras 28–29.
[8] *Delgamuukw* at para 134

Aboriginal Title) emphasized that s. 35 recognizes pre-existing rights known to the common law.

6. Customary councils of Indian bands remain one of the most common and important forms of Indigenous self-governments. Under the *Indian Act*, unless the Minister acts to displace customary councils, these councils govern bands based on each Nation's customs. Customary councils are not frozen in the form the Nation's governance had either before the arrival of Europeans or at the time of the assertion of British sovereignty. Instead, each band can reform or even recreate its governing institutions with free and informed consensus.[9] This exemplifies Indigenous self-government rights in two ways: first, through the customary council (and the laws it enacts). Second, through the band's power to collectively reform or recreate its system of governance using another equally important form of self-government.[10] While these forms of self-government are often connected to post-sovereignty entities (i.e. Indian bands) or arose by post-contact self-determination, and as such often do not meet the strict criteria in *Pamajewon* or *Delgamuukw*, they are still important examples of self-governance.

7. Finally, it is important that Parliament and Indigenous peoples in Canada have for years been developing forms of self-government outside of the s. 35 framework. These include the bands' delegated power to make by-laws under the *Indian Act* and the *First Nations Land Management Act*, as well as more specialized instruments, such as the *Westbank Self-Government Agreement Act* and the *Sechelt Self-Government Agreement Act*. While these forms of self-government are not on their face inherent forms of self-government, the fact that delegated powers are provided through federal legislation does not preclude these entities from exercising inherent powers. These powers are then reinforced or given binding effect through federal legislation.

Cooperative Federalism

8. The Grand Council submits that cooperative federalism principles and practices should apply to the relationships between Indigenous and colonial governments and laws in the

[9] *Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115.
[10] *Campbell* at paras 100–103.

same way as between the provinces and federal government. This is respectful of the foundational constitutional position of Indigenous people and their legal orders within Canada and is a more practical and preferable approach over difficult, costly, protracted, and uncertain s. 35 and division of powers litigation.

9. In Canada's federal structure, it may be either impossible or uncertain for a single government to achieve a certain legislative goal alone. The courts have recognized that rather than resorting to litigation to resolve such jurisdictional questions, legal mechanisms should be created that encourage governments to work together to achieve desired outcomes. This broad principle (and the tools associated with it) is called "cooperative federalism" and (along with the double aspect doctrine) it is the preferred approach to resolving jurisdictional issues between different levels of government.[11] This approach allows governments to act jointly to legislate or regulate an undertaking or activity, and courts should refrain from blocking these cooperative arrangements.[12]

10. This type of cooperation is achieved using different tools. In its simplest form, one government's legislation can be made conditional on another government's legislative or administrative act. For example, the federal government criminalized gambling, but allowed provincial governments to determine that certain gaming is lawful, either directly through legislation or through administrative acts (e.g. s. 207 of the *Criminal Code*). Thus, even though criminal law is a subject matter under federal jurisdiction, Parliament has through legislation given provincial legislatures and executives broad powers to determine what types of gambling are legal or illegal.

11. A more sophisticated tool, which will be discussed further below, is incorporation by reference, which takes a provincial law that is potentially inoperative for division of powers reasons and incorporates it into federal law, thereby curing the potential defect in the provincial legislation. For instance, in s. 88 of the *Indian Act*, Parliament incorporated provincial laws to cure some of their potential inapplicability to matters falling within

---

[11] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [***PHS***] at para 70.
[12] *PHS* at para 63.

Parliament's jurisdiction over Indians and lands reserved for the Indians.[13] The implementation legislation for modern land claim agreements in British Columbia has adapted a similar approach to ensure that otherwise inapplicable provincial laws apply in the modern treaty context.[14]

12. Another example of a form of cooperative federalism is the regime under the *Greenhouse Gas Pollution Pricing Act*. This regime allows provinces to establish and apply a carbon tax (through referential incorporation) to federally regulated matters. If a province elects not to establish a carbon tax or an alternative approach that addresses the objectives of the federal legislation, then a federal tax is imposed as a backstop.[15] This allows Parliament to create a national framework dealing with a matter of national concern under the peace, order, and good government clause of s. 91 of the *Constitution Act, 1867*, while also leaving the provinces significant latitude to address the objectives of the legislation within their local political and economic cultures.

13. These examples highlight that while our constitutional framework does not allow different law-makers to act unilaterally outside of their normal jurisdiction, governments may coordinate the exercise of their powers to ensure that complex and difficult issues spanning multiple jurisdictions are effectively and clearly addressed. This approach to resolving jurisdictional uncertainties and difficulties is consistent with our constitutional framework and is preferable to litigation and confrontation.

Incorporation by Reference

14. Legislative or regulatory incorporation by reference furthers cooperative federalism and more generally enables legislators to incorporate other legislators, regulators, or authorities' decisions into the law.[16] As noted above, for Indigenous people, Parliament

---

[13] *R. v. Dick*, [1985] 2 SCR 309 at 327.
[14] *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32, s. 15.
[15] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 30–35.
[16] The flexible and practical nature of incorporation by reference is described in John Mark Keyes, "Incorporation by Reference in Legislation" [2004] 25:3 Statute L Rev 180 [BOA, Tab 2].

has incorporated provincial laws to make them applicable to reserve land, status Indians, and s. 35 rights. Another more general example is Parliament's adoption of provincial laws of evidence into federal proceedings through s. 40 of the *Canada Evidence Act*.

15. Parliament is not limited to incorporating other Canadian legislation by reference. It can also incorporate non-legislative technical documents, for instance those prepared by expert groups, or even other countries' laws. For example, s. 4(2) of the *Aeronautics Act* incorporates the aeronautics laws of foreign states, in part by effectively criminalizing the breach of other jurisdictions' laws within Canada. Thus while Parliament ultimately determines the laws of Canada, it does not offend our constitutional structure to have other nations alter Canadian law through referential incorporation.

16. Sections 20(3) and 21(1) of the *Indigenous Child and Family Welfare Act* are examples of incorporation by reference. Together they identify certain Indigenous laws and give them effect as federal law. This is not a delegation of legislative power – the Indigenous Nation makes its laws using its inherent powers, and Canada (and if it chooses, any province) and the Indigenous Nation work together to coordinate the exercise of Indigenous law-making with other legislative powers. Only then does s. 21(1) work to incorporate the Indigenous law as federal law.

The Advantages of Incorporation by Reference

17. The use of incorporation by reference – particularly as implemented by this legislation – has a number of advantages. First, it respects all levels of government. It respects Indigenous law-making power by recognizing that in a subject matter of critical importance to Indigenous peoples – here, the protection, development, and care of Indigenous children and families – Indigenous people can and should govern themselves. This recognizes that Indigenous people continue to have self-government institutions and that part of the modern process of righting the wrongs of the past is for Parliament (and provincial legislatures) to work with Indigenous people to give Indigenous institutions an effective role in the government of Canada as a whole. It also respects the roles of the federal and

provincial governments by encouraging coordination and operating within the scope of federal legislative power (i.e. the civil rights of Indigenous people).[17]

18. Second, referential incorporation is practical, as it creates jurisdictional clarity and avoids the legislative vacuums that s. 35 litigation can cause. Section 35 jurisprudence has created great uncertainty around the lawfulness of any level of government's conduct.

19. When an Indigenous Nation exercises its powers of self-government, this immediately raises questions such as "does this power exist?" and "does this power fall within the scope of section 35?" It also raises questions such as "does some or all of a potentially conflicting provincial law infringe a s. 35 right?" and "if so, can this infringement be justified?" Further, given that the judicial application of s. 35 focuses on particular conflicts rather than on general systemic conflicts,[18] reliance on s. 35 can encourage ongoing rounds of litigation on rights conflicts involving self-government and potentially unlawful exercises of state power. This is particularly inappropriate here, as the immediate well-being of children and families may be at stake. These situations require immediate resolution, but litigation on s. 35 rights and the unlawful exercise of state power is notoriously slow and expensive. The legislative route is also reciprocal, in that it benefits both Indigenous governments and Crown governments by eliminating uncertainty about their respective jurisdictions and the lawfulness of their conduct.

20. Another practical aspect of referential incorporation is that it is by necessity built around cooperation and negotiation, which allows governments to deliberately coordinate their systems through democratic means (legislation, regulation, and policy change) to allow Indigenous self-government to operate. This also allows governments to experiment and adapt as experience grows. Judicial approaches to s. 35 rights simply do not have the same agility as processes rooted in negotiation, agreements, policies, and legislation – all of which can be much more easily and deliberately adjusted than court decisions. Section 35 decisions can clarify the existence of rights and the exercises of state power that offend

---

[17] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12; *Attorney General of Canada et al. v. Canard,* [1976] 1 SCR 170.
[18] *Mitchell v. M.N.R.*, 2001 SCC 33 at paras 15–18; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155 at paras 153–157.

those rights, but generally leave it to the parties to negotiate how to fill the gaps created by the courts' rulings.

21. Third, referential incorporation promotes reconciliation. As Binnie J observed in *Mikisew* (2005) colonial government indifference and lack of respect has been destructive to reconciliation. In *Haida*, McLachlin CJC observed that "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims" and that the recognition of s. 35 rights and sovereignty are reconciled "through the process of honourable negotiation."[19] While the court recognizes that litigation is one way of dealing with s. 35, "negotiation is a preferable way of reconciling state and Aboriginal interests."[20] Much of the modern jurisprudence concerning s. 35 rights has emphasized that parties should move away from litigation as the preferred means of defining s. 35 rights. Engagement, discussion, negotiation, and diplomacy between Indigenous Nations and the Crown are more effective than litigation, which in this context is much like warfare in terms of its length, costs, and stakes. Indeed, in its original form, s. 37 of the *Constitution Act, 1982* contemplated a process of structured negotiations leading to agreements to implement s. 35 rights, including the right of self-government. Unfortunately this process did not lead to any agreements.[21] Our modern era of conflict and litigation has largely flowed from the failure of that diplomatic process.

22. Fourth, incorporation by reference through federal legislation is appropriate for practical reasons. As demonstrated by the circumstances of the Grand Council itself – which has territories in both Ontario and Manitoba – Indigenous Nations transcend provincial boundaries. This occurs in two ways: (1) their territories cross provincial borders,[22] and (2) their members are dispersed beyond reserve lands and communities, and members may

---

[19] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [***Haida***] at para 20.
[20] *Haida* at para 14.
[21] Canadian Intergovernmental Conference Secretariat, First Ministers' Conferences 1906–2004, at 94-111, online: https://scics.ca/wp-content/uploads/2016/10/fmp_e.pdf.
[22] See *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 for an example of the judicial issues created by transboundary nations.

live in many provinces. Federal implementation is the most practical way to approach this reality so that the interests of Indigenous Nations and their cultural, political, and social integrity is respected. Another principled reason for federal incorporation by reference is that Parliament and the Executive have primary jurisdiction over Indigenous peoples as a distinct subject matter within the Canadian constitution.[23]

23. Fifth, referential incorporation respects democracy and the separation of powers. As this court has pointed out in its recent jurisprudence, each branch of government has its appropriate role, and courts must be cautious to not improperly intrude into the other's role.[24] Parliament and the legislatures – not the courts – are charged with making laws on behalf of the Crown. Referential incorporation allows democratically elected governments to articulate the purposes and values of non-Indigenous Canadians (see ss. 8, 10, 11, and 20(2) of the legislation at issue) and fulfill them within an interdependent system grounded in shared values.[25] The courts have an important but secondary role in overseeing the implementation of legislation passed by the legislative branch and ensuring it is compliant with the Constitution. Centering s. 35 litigation as the preferred means of recognizing and implementing Indigenous self-government rights ignores these principles, and instead centers the courts in the law-making process. This is both anti-democratic and contrary to the normal separation of powers.

Paramountcy and Incorporation by Reference

24. When Parliament incorporates a law or instrument by reference, it has the same force as federal law and is as much a part of the federal law of Canada as if Parliament had simply re-created the text and reproduced it in the legislation. As such, the instrument or law incorporated by reference should be subject to the rules of paramountcy.

25. Since the decisions in *Canadian Western Bank*[26] and *LaFarge*,[27] this court has moved the division of powers jurisprudence away from watertight compartments and

---

[23] *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK), s. 91(24).
[24] For example, see *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43.
[25] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 149.
[26] *Canadian Western Bank v. Alberta*, 2007 SCC 22.
[27] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23.

interjurisdictional immunity to rely instead on the doctrines of double aspect and paramountcy. This modern approach allows each level of government to operate within broadly defined heads of power, with conflicts only triggered and resolved when they are based on an exercise of otherwise valid legislative power. Rather than eliminating overlap in key areas of jurisdiction (i.e. interjurisdictional immunity) the preferred approach is to wait until there is an actual conflict between two pieces of legislation and resolve it using the doctrine of federal paramountcy (which does not engage the complex justificatory analysis of s. 35 claims).

26. Thus, federally incorporated Indigenous laws attract the doctrine of paramountcy due to basic constitutional principles rather than s. 22(3). This is suggested by the opening words of s. 22(3), "[f]or greater certainty," a phrase often used when a provision is intended to clarify something already established. While s. 22(3) may seem redundant, it has a clarifying purpose given the two branches of the modern doctrine of paramountcy. One approach narrowly construes each conflict to operational conflicts, i.e. when compliance with both laws is impossible. The second approach applies paramountcy when applying the provincial law would frustrate the purpose or object of the federal law. Section 22(3) clarifies that Parliament intends for both branches of the paramountcy doctrine to apply in this case. Thus s. 22(3) is consistent with Canada's constitutional structure and clarifies Parliament's intention to have both paramountcy branches apply.

27. This approach furthers reconciliation, as it gives federally incorporated Indigenous laws the same status and respect as any other referentially incorporated law and reinforces that the laws should prevail to give effect to their purpose. The view that paramountcy should not apply to federally incorporated Indigenous laws suggests that these laws deserve second class status. This approach is unacceptable, as it is both inconsistent with Canada's constitutional structure (which embeds the doctrine of paramountcy) and with reconciliation (which demands respect for Indigenous law-making).

PART IV and V – COSTS AND ORDER REQUESTED

28. The Intervener, Grand Council, does not seek costs and asks that no costs be awarded against it.

All of which is respectfully submitted this 11th day of November, 2022.

Robert Janes, KC
Naomi Moses

Counsel for the Intervener,
Grand Council of Treaty #3

PART VI – TABLE OF AUTHORITIES

Case Law

Description	***Para References***
Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155	19
Attorney General of Canada et al. v. Canard, [1976] 1 SCR 170	19
British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23	25
Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123	5, 6
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44	9
Canadian Western Bank v. Alberta, 2007 SCC 22	25
Casimel v. Insurance Corp. of British Columbia (1993), 82 BCLR (2d) 387 (CA)	4
Connolly v. Woolrich (1867), 1 CNLC 70, [1867] QJ No. 1	4
Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12	17
Delgamuukw v. British Columbia, [1997] 3 SCR 1010	5,6
Francis v. Mohawk Council of Kanesatake, 2003 FCT 115	6
Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73	21
Mitchell v. M.N.R., 2001 SCC 33	19
Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4	22
Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43	23
R. v. Dick, [1985] 2 SCR 309	11
R. v. Pamajewon, [1996] 2 SCR 821	5, 6
R. v. Van der Peet, [1996] 2 SCR 507	5
Reference re Secession of Quebec, [1998] 2 SCR 217	23
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	12

Legislation

Description	***Section(s)***
Adoption Act, RSBC 1996, c. 5	46
Aeronautics Act, RSC 1985, c A-2 *Loi sur l'aéronautique,* LRC 1985, c A-2	4(2) 4(2)
An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24 *Loi concernant les Enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,* LC 2019, c 24	8, 10, 11, 20(2) 20(3), 21(1), 22(3) 8, 10, 11, 20(2) 20(3), 21(1), 22(3)
Canada Evidence Act, RSC 1985, c C-5 *Loi sur la preuve au Canada,* LRC 1985, c C-5	40 40
Constitution Act, 1867, 30 &31 Victoria, c 3 (UK) *Loi constitutionnelle de 1867*, 30 & 31 Victoria, c 3	37, 91 37, 91
Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (UK) *Loi constitutionnelle de 1982*, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11	35 35
Criminal Code, RSC 1985, c C-46 *Code criminel,* LRC 1985, c C-46	207 207
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186 *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, LC 2018, c 12, art 186	
Indian Act, RSC, 1985, c. I-5 *Loi sur les Indiens*, LRC 1985, c I-5	88 88
Tsawwassen First Nation Final Agreement Act, SC 2008, c 32 *Loi sur l'accord définitif concernant la première nation deTsawwassen*, LC 2008, c 32	15 15

Secondary Sources

Description	***Para References***
Canadian Intergovernmental Conference Secretariat, First Ministers' Conferences 1906–2004, at 94-111, online: https://scics.ca/wp-content/uploads/2016/10/fmp_e.pdf.	21
John Mark Keyes, "Incorporation by Reference in Legislation" [2004] 25:3 Statute L Rev 180.	14