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

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(INUVIALUIT REGIONAL CORPORATION, INTERVENER)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. The Inuvialuit Regional Corporation (the "**IRC**"), established pursuant to the *Inuvialuit Final Agreement* (the "***IFA***") to represent the collective interests, rights, and benefits of Inuvialuit, is mandated to continually improve the economic, social, and cultural well-being of Inuvialuit.[1] Inuvialuit are the Inuit living in the traditional territories comprising portions of what is now called the Northwest Territories (the "**NWT**"), and the Yukon.

2. A 2014 report tabled by the Office of the Auditor General of Canada concluded that the NWT was "not adequately meeting their key responsibilities for the protection and well-being of children, youth, and families."[2] A subsequent report in 2018 found that there *continues* to be "serious deficiencies in the delivery of child and family services in the [NWT]" and that "many of the services provided to children and families were worse than…in 2014."[3]

3. Indigenous children and youth are disproportionately affected by the NWT's repeated failures to provide adequate services and supports. According to the latest annual report from the NWT, 98% of child and family services in the NWT are being delivered to Indigenous children and youth, 20% of which have been identified as Inuit.[4]

4. On November 24, 2021, the IRC Board passed the *Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat*[5] (meaning "Inuvialuit Family Way of Living Law") (the "**Inuvialuit Law**"). The purpose of the Inuvialuit law is to ensure that Inuvialuit children, youth, and families are supported wherever they live, for the benefit of Inuvialuit and Inuvialuit culture, and to mitigate or prevent the harm caused by non-Inuvialuit and non-Indigenous child welfare practices.

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[1] *Inuvialuit Final Agreement*, 5 October 1984, ss. 1, 6(1)(a) [***IFA***].

[2] Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the Northwest Territories Legislative Assembly—2014: Child and Family Services—Department of Health and Social Services and Health and Social Services Authorities* (2014) at 1

[3] Office of the Auditor General of Canada, *2018 October Report of the Auditor General of Canada to the Northwest Territories Legislative Assembly: Child and Family Services—Department of Health and Social Services and Health and Social Services Authorities* (2018) at 4 [emphasis added].

[4] Northwest Territories, Health and Social Services, *Director of Child and Family Services Annual Report 2020-2021* (2021) at 18.

[5] Inuvialuit Regional Corporation, 2021 [**Inuvialuit Law**].

5. IRC has since provided notice to the NWT, Canada, and other provinces and territories, of the existence of the Inuvialuit law, and requested that they enter into coordination agreements, with a view to ensuring that the Inuvialuit Law has the force of federal law, pursuant to *An Act respecting First Nations, Inuit and Métis children, youth and families*[6] (the "**Federal Act**").

6. Because IRC is already exercising Inuvialuit jurisdiction over child and family services, IRC's submissions are focused primarily on the validity of ss. 21 and 22(3) of the Federal Act, which will have a direct impact on the implementation and operation of the Inuvialuit Law.

7. IRC submits that the federal approach to incorporation by reference in the Federal Act is, consistent with the principles of federalism reflected in s. 88 of the *Indian Act*, the incorporation of First Nations' by-laws as regulations to the *Indian Act*, the purpose of s. 35 of the *Constitution Act, 1982*, and jurisprudence from this Court. The federal approach offers the only viable way for Indigenous Governing Bodies ("**IGBs**") such as IRC to exercise jurisdiction over the well-being of their most vulnerable, and begin to repair the generations of harm inflicted through provincial and territorial authority over the protection of Indigenous children.

8. Neither the Federal Act nor the Court of Appeal of Quebec specifically addresses the application and paramountcy of Indigenous laws in the NWT and the Yukon. For the purposes of the application of the Federal Act, it is clear that Parliament intended the NWT and Yukon to be subject to the Federal Act, as provinces are. However, both NWT and Yukon: (a) have no constitutional standing as provinces for the purposes of any division of powers under s. 91(24) of the *Constitution Act, 1867* or otherwise; and (b) are subject to a different source of federal paramountcy, namely, the *Northwest Territories Act*[7] and the *Yukon Act*.[8] For these reasons, and given NWT's continuing failure to protect Indigenous children through its delegated powers, it is essential that the application of the Federal Act be clarified in relation to the NWT and Yukon if the purposes of the Federal Act are to be achieved, unimpeded, in relation to Indigenous

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[6] S.C. 2019, c. 24 [**Federal Act**].
[7] S.C. 2014, c. 2, s. 2 [***NWT Act***].
[8] S.C. 2002, c. 7. As Nunavut is referenced in s. 5 of the Federal Act, IRC is limiting its analysis to the NWT, and submits that such analysis would similarly apply to the Yukon.

children, youth, and families, in these territories, and prevent or at least mitigate further harm to them as a result of non-Indigenous child welfare practices.

PART II – ISSUES

9. The IRC submits that the following issues are before the Court in this appeal:

   (a) whether the Court of Appeal of Quebec erred in finding that ss. 21 and 22(3) of the *Federal Act* alter the purpose and scope of s. 35 and the architecture of the Constitution, and are invalid in relation to the authority of the provinces; and

   (b) if the Court of Appeal of Quebec did not err in so finding, whether ss. 21 and 22(3) of the Federal Act survive and remain valid in relation to the NWT and the Yukon.

PART III – STATEMENT OF ARGUMENT

A. The Federal Act provides space for the concurrent operation of laws

i. Inherent jurisdiction exists separate and apart from s. 35

10. Neither the Federal Act nor s. 35 grant a right to self-government—it merely recognizes and affirms this inherent right. Inherent jurisdiction is an expression and component of self-government and *sui generis*, like Aboriginal title and other s. 35-protected rights; as such, it "must be understood by reference to both common law and aboriginal perspectives."[9]

11. The source of Indigenous inherent jurisdiction, and the expression of this jurisdiction through laws passed by IGBs is not determined by the Federal Act or s. 35. The fact that such laws may also be recognized and affirmed under s. 35 is therefore not relevant to the validity and operation of ss. 21 and 22(3). This is consistent with this Court's approach of distancing itself from the framing of s. 35 rights as part of the "core" of federal power under s. 91(24) over "Indians, and Lands reserved for the Indians".[10] It is the *incorporation* of Indigenous laws by reference that goes to the core of federal authority under s. 91(24), where they are not "laws of general application". It follows that they may be incorporated without constitutional amendment.

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[9] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 112.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 140-143.

12. In *R v. Francis*,[11] a decision dealing with an apparent conflict between a provincial motor vehicle law and federal traffic regulations on reserve, La Forest J. concluded that legislation (in this case provincial) incorporated by reference as federal law, did not prevent the provincial law from "operating in its own right."[12] Similarly, Indigenous laws incorporated by reference under the Federal Act retain their own force and exist side by side with federal and provincial laws.

ii. Section 35 operates as a limit on federal and provincial legislative powers

13. Just as they do not grant any additional rights, ss. 21 and 22(3) of the Federal Act do not expand the scope of ss. 35 or 91(24)—rather, they are consistent with the purpose of both.

14. In *Tsilhqot'in Nation v. British Columbia*, McLachlin C.J., writing for this Court, stated:

> [142] The guarantee of Aboriginal rights in s. 35 of the Constitution Act, 1982, like the Canadian Charter of Rights and Freedoms, operates as a limit on federal and provincial legislative powers. The Charter forms Part I of the Constitution Act, 1982, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I Charter rights, are held against government — they operate to prohibit certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.[13]

15. By setting out a process for incorporating Indigenous laws by reference, the Federal Act codifies what is already law. Subsection 22(3) merely limits provincial and federal laws where an IGB is exercising its inherent jurisdiction in respect of child and family services.

iii. The scheme of the Federal Act is not unprecedented

16. The approach adopted in the Federal Act in incorporating Indigenous laws by reference, and the resulting limitation on provinces (and territories) from infringing on such laws, is not without precedent. Section 88 of the *Indian Act* incorporates by reference, any "order, rule, regulation or law of a band" made under the *Indian Act* or the *First Nations Fiscal Management Act*, and renders inoperative any provincial laws inconsistent with those Acts and the instruments

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[11] [1988] 1 SCR 1025.
[12] *Ibid* at 1031.
[13] *Tsilhqot'in* at para. 142 [emphasis added].

referenced. As a result, Parliament has, and continues to, through both s. 88 of the *Indian Act* and s. 22(3) of the Federal Act, expressly extend the principle of federal paramountcy to legal instruments enacted by IGBs.

iv. The Inuvialuit Final Agreement similarly establishes a hierarchy of laws

17. IRC submits that ss. 21 and 22(3) are also consistent with the approach taken by the federal government in the negotiation and conclusion of self-government agreements and treaties, where addressing conflicts between laws continues to be standard practice.

18. The *IFA*, a constitutionally-protected lands claim agreement, requires that legislation giving effect to the *IFA* provide that "where there is inconsistency or conflict between either the Settlement Legislation or this Agreement, and the provisions of any other federal, territorial, provincial or municipal law, or any by-law or regulation, the Settlement Legislation or this Agreement shall prevail to the extent of the inconsistency or conflict."[14] The subsequent *Western Arctic (Inuvialuit) Claims Settlement Act*,[15] provides for this paramountcy.

19. To the extent that the principles of the *IFA*, such as the need "to preserve Inuvialuit cultural identity and values within a changing northern society"[16] are being frustrated through the operation of territorial child and family services legislation, inconsistent with the Inuvialuit Law, IRC submits that the *IFA* conflict provisions have a similar effect to ss. 21 and 22(3).

B. Federal Paramountcy over the Northwest Territories

i. The NWT does not have constitutional status equivalent to that of provinces

20. The NWT claims in its factum to have a sovereign-like character, with the *Northwest Territories Act* (the "***NWT Act***"), as its "constitution".[17] The *NWT Act* is not a "constitution", but a statute. The NWT also incorrectly relies on case law to attribute a constitutional nature to the

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[14] *IFA*, *supra* note 1, s. 3(3).
[15] S.C. 1984, c. 24, s. 4.
[16] *IFA*, *supra* note 1, s. 1(a).
[17] Factum of the Intervener, Attorney General of the Northwest Territories at para. 10 [**NWT Factum**].

NWT Act—such case law addressing a specific provision in the *NWT Act*'s predecessor legislation dealing with language rights.[18]

21. IRC submits that the NWT's attempt to elevate statutory authority to constitutional powers conflates NWT's status as a territory with the constitutional standing of provinces, and ignores jurisprudence to date. As Décary J.A. noted in *Commissioner of the Northwest Territories v. Canada*, the *authority* of the NWT, as a creature of statute, is more like that of a municipality than that of a province:

> [21] In *Government of the Northwest Territories v. Public Service Alliance of Canada* (1999), 1999 CanLII 9202 (FC), 180 F.T.R. 20, Dubé J. seems to me to have accurately described the status of the Territories when he stated:
>
> > [32] Undoubtedly, the powers and authority of the GNWT have increased over the years, but the source of its increased powers and authority remains the Federal Crown…The Northwest Territories Act is purely a federal statute providing for a local government headed by a federal appointee. The NWT has not become a province by evolution but it is still a territory under simple delegation of power.
>
> [42] Although any comparison between territories and municipalities is unfair to the Territories since their status is closer to that of a province than it is to a municipality, it can be said that the Territories are no more the agents of their respective creators than are the municipalities when they administer the territory they have been empowered to manage.[19]

22. Despite having been delegated similar legislative powers as the provinces, NWT's jurisdiction, authority, and very existence as a government is wholly and exclusively determined by federal statute; as such, NWT does not have the constitutional standing of provinces. It follows that the NWT's legislative authority in relation to child and family services is derived from a federal statute[20] and remains subject to federal statute.

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[18] NWT Factum at para. 11.
[19] 2001 FCA 220 at paras. 21, 42, citing *Government of the Northwest Territories v. Public Service Alliance of Canada* (1999), 1999 CanLII 9202 (FC), 180 F.T.R. 20 at para 32. [emphasis added].
[20] *NWT Act*, s. 18.

ii. Federal Paramountcy in the NWT is codified in law

23. Irrespective of the validity of ss. 21 and 22(3) of the Federal Act, the paramountcy of federal law in relation to any conflicting NWT law is already codified in the *NWT Act*.[21] The legal source of the principle of paramountcy differs when it comes to the NWT, as acknowledged by the AGC,[22] and this concept of paramountcy was not considered by the Court of Appeal of Quebec in its analysis of ss. 21 and 22(3).

24. IRC submits that it is within Parliament's authority to confer precedence and otherwise create hierarchies among its own laws in relation to the NWT, including by incorporating Indigenous laws by reference into the Federal Act, and directing that such laws are paramount over NWT laws, in the case of inconsistencies between them.

iii. Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat applies to all Inuvialuit

25. The NWT asserts that "Parliament did not include a right to bind another government through legislation" (through the Federal Act) and provides examples from the Inuvialuit Law which place positive obligations on the NWT.[23] To the extent that the territorial government does not view the Inuvialuit Law as creating binding obligations, the NWT creates a significant operational conflict in the delivery of child and family services in the NWT.

26. For example, the NWT appoints a Director pursuant to the *Child and Family Services Act*,[24] ("***CFSA***"), who is mandated by and whose powers are found under the *CFSA.* Section 6 of the Inuvialuit Law, incorporated by reference as a federal law pursuant to the Federal Act, requires that *anyone* providing services to Inuvialuit children, youth, and families is subject to the Inuvialuit Law. Insofar as the NWT maintains the position that the Inuvialuit Law cannot bind them, the Director is not obligated to carry out any of the requirements of the Inuvialuit Law, including deferring to the cultural continuity requirements that Inuvialuit view as essential to the health, safety, and wellbeing of Inuvialuit.[25] This constitutes an inconsistency between the

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[21] *NWT Act*, s. 31.
[22] Reply Factum of the Attorney General of Canada at para. 28.
[23] NWT Factum at paras. 16-18.
[24] S.N.W.T. 1997, c. 13 [***CFSA***].
[25] Inuvialuit Law, *supra* note 5, ss. 10-11.

CFSA and the Inuvialuit Law (a federal enactment under the *NWT Act*) that is most predictably resolved through paramountcy, already required in s. 31 of the *NWT Act*.

27. The IRC submits that the Inuvialuit Law is and must be binding on anyone providing child and family services to Inuvialuit children, youth, and families. This is consistent with the current legislative framework under the Federal Act, where the Charter principles and best interests of the child requirements are applied across *all* child and family services delivery, and is recognized in provincial and territorial child and family services legislation, the Federal Act,[26] and the Inuvialuit Law.[27]

28. Insofar as the IRC is bound by certain provisions of the *CFSA*, where it has not chosen to exercise jurisdiction (yet), and the NWT is bound by the national standards set out in ss. 9 to 17 of the Federal Act, the IRC submits that GWNT is *also* bound by those provisions of the Inuvialuit Law that may be inconsistent with the *CFSA.* If the Inuvialuit Law is only binding on the IRC, it is merely a policy, not a law.

iv. This Court could read in the specific application of s. 22(3)

29. The purpose of Inuvialuit Law is to mitigate and prevent the continuing harms caused by the NWT's child welfare practices. If the Inuvialuit Law is subordinate to territorial legislation, and NWT is not bound by it, neither the Inuvialuit Law nor the Federal Act will achieve their purposes.

30. IRC respectfully submits that regardless of this Court's decision in relation to the validity of ss. 21 and 22(3), the Court should clarify the application of the Federal Act by reading in a reference to the application of Indigenous laws to the territories.

31. The purpose of reading in is summarized in *Schachter v. Canada*:

> In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme.

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[26] Federal Act, *supra* note 6, s. 9(1).
[27] Inuvialuit Law, *supra* note 5, s. 10.

This has the effect of extending the reach of the statute by way of reading in rather than reading down.[28]

32. Reading in will be warranted only in the "clearest of cases", where:

(a) the legislative objective is obvious and reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

(b) the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and

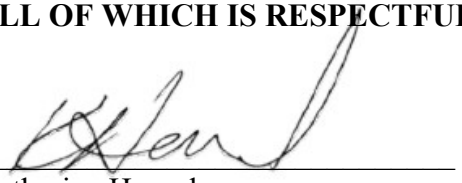
(c) reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.[29]

33. IRC submits that this remedy is the least intrusive option available to clarify the application of the Federal Act in relation to the NWT and the Yukon. It is consistent with: the purposes and overall scheme of the Federal Act; the general federal paramountcy provision set out in the *NWT Act*; s. 35 of the *Constitution Act, 1982*; as well as with the Inuvialuit Law.

PART IV – COSTS AND ORDER SOUGHT

34. The IRC does not take a position on the outcome of this appeal, beyond the issues outlined in these submissions. The IRC does not seek costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2022.



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[28] [1992] 2 SCR 679 at 698.
[29] *Ibid* at 718.

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