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)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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**PART I – OVERVIEW AND STATEMENT OF FACTS**

1. The Lands Advisory Board supports the opinion of the Quebec Court of Appeal that "Aboriginal peoples have a right of self-government within Canada, based on the historical relationship between them and the Crown, such right forming part of the Aboriginal rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*" [1] and asks that it be confirmed.

2. In its consideration of the laws enacted by "Indigenous governing bodies" pursuant to the *Act respecting First Nations, Inuit and Métis children, youth and families,* [2] the Court of Appeal further said, "The legislative texts in question here, however, are not enactments of the federal government, but rather enactments of Aboriginal governing bodies exercising the s. 35 Aboriginal right of self-government of their peoples." [3] That statement too should be confirmed.

3. The Lands Advisory Board provides advocacy, training and resources for the First Nation parties to the Framework Agreement on First Nation Land Management, a government-to-government agreement between the signatory First Nations and Canada which, when ratified by a First Nation brings its Land Code into effect with respect to its reserve lands and resources. At the same time, specified land provisions of the *Indian Act* [4] are no longer applicable to that First Nation. To date, 104 First Nations have ratified the Framework Agreement.

4. Land Codes and subsequent Land Laws are First Nation enactments not subject to vetting or approval by Canada and not subject to federal veto or disallowance. They answer the description of the legislative texts set out in paragraph 2 and are rightly seen as exercising the s. 35 Aboriginal right of self-government in relation to reserve lands subject to Aboriginal title.[5]

5. There are other examples. Section 7 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, [6] provides that First Nations can enact their own rules to apply on reserve

[1] *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 (CanLII), at para 364.
[2] S.C. 2019, c. 24.
[3] *Supra* note 2, at para 64.
[4] R.S.C. 1985, c. I-5.
[5] See, e.g., *Guerin v. The Queen*, 1984 CanLII 25 (SCC), at pp. 354 (Wilson, J.) and 382 (Dickson, J.); also *Osoyoos Indian Band v. Town of Oliver*, 2001 SCC 85 (CanLII), at paras 41-42.
[6] S.C. 2013, c. 20.

in the event of marital breakdown or divorce. Where they have done so, subsection 12(1) states that the Provisional Rules set out in the Act will not apply to them.[7]

6. Aboriginal laws may be enacted pursuant to treaties or modern land claim settlements but are more often referenced in governance agreements ratified by statutes or contemplated by statutes for specific purposes. Where the hallmarks of independent enactment are present, they are s. 35 laws whether or not the relevant agreements or statutes say so. The statutes are best understood as instruments of recognition, affirmation or reconciliation that neither enable the exercise of s. 35 powers nor delegate powers to the enacting communities. In the case at bar, it would be a tautology to referentially incorporate laws already imprinted with a federal fiat.

7. A more relevant question is whether such instruments of recognition can limit or attach conditions to s. 35 laws. Absent the agreement or consent of the enacting community, the presumption should be that they cannot.

8. The impugned legislation is an imperfect attempt to provide federal recognition of Aboriginal child and family services laws and incorporate them as federal laws without concomitant federal protection of those laws, enforcement of those laws or adequate provisions for implementing those laws. That does not render the referential incorporation unconstitutional but it does raise the question of whether the designation as federal laws actually adds anything to their efficacy.

9. The other major issue before the Court is whether potential conflicts between s. 35 Aboriginal laws and provincial or territorial laws are to be resolved by the doctrine of paramountcy, which

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[7] It may be noted here that subsection 12(2) applies the same exemption for First Nations that have enacted their own rules regarding matrimonial property on reserve pursuant to the Framework Agreement. Unfortunately, the actual reference is to the *First Nations Land Management Act*, an awkward statute intended to ratify the Agreement that went on to repeat some, but not all, of its provisions. This created decades of confusion whether the operative instrument was the Agreement or the statute. On November 4, 2022, replacement legislation, the *Framework Agreement on First Nation Land Management Act*, was given first reading in the House of Commons as Division 3 of Part 4 of Bill C-32. Subsection 5(1) of the proposed act says simply, “The Framework Agreement continues to have effect and has the force of law.”

the impugned statute appears to do, or by an appropriate justificatory test for. The Lands Advisory Board regards the former as a blunt instrument ill suited to the task and any justificatory tests discussed so far as requiring refinement.

## PART II – POSITION WITH RESPECT TO APPELLANTS' QUESTIONS

10. The Attorney General of Quebec sets out the following constitutional questions at paragraph 7 of his Factum:

    1. Are ss. 1-17 of the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, invalid, given that s. 91(24) of the *Constitution Act, 1867* and the internal architecture of the Constitution do not authorize the federal government to legislate on how the provinces are to provide services to children and families?

       LAB: The Act and Indigenous laws contemplated by the Act do not dictate how provinces are to provide services to children and families. In the exercise of their s. 35 rights, Indigenous communities can provide for such services in respect of their member families and the effect may be to cause provincial authorities to resile from files. On its face, the Act does not compel anything on the part of provincial service agencies and it is consistent with Parliament's authority under s. 91(24).

    2. Are ss. 8 and 18-26 of the *Act respecting First Nations, Inuit and Métis children, youth and families* invalid, given that constitutional law, including Part V of the *Constitution Act, 1982*, and the internal architecture of the Constitution do not allow the federal government to unilaterally define the scope of s. 35(1) of the *Constitution Act, 1982*?

       LAB: Agreed that the Act cannot define the scope of s. 35 but it is not clear that the Act does that. It affirms and describes a class of subjects well within the s. 35 sphere of Aboriginal jurisdiction and makes no error in doing so.

    3. Was the Court of Appeal justified in holding that s. 35(1) of the *Constitution Act, 1982* refers to Aboriginal self-government rights that are generic in nature?

LAB: Yes. The s. 35 sphere of Aboriginal jurisdiction, like ss. 91 and 92, includes classes of subjects like community child and family services, cultural preservation and community governance of reserve lands.

11. The Attorney General of Canada sets out these questions at paragraphs 46 and 47 of his Factum:

46. [T]he issues raised by the AGQ's appeal should be stated as follows:

a. Are sections 1 to 17 of the Act invalid under the division of powers and the architecture of the Constitution?

LAB: No. Section 35 is part of the architecture of the Constitution and must be afforded constitutional room for the rights and titles it affirms. To the extent that Indigenous governments accept the national standards set out in those sections in order to proceed under the Act, they consent to any consequent limitation or conditions on the exercise of their s. 35 rights of self-government.

b. Are sections 8 and 18 to 26 of the Act invalid under Part V of the *Constitution Act, 1982*, and the architecture of the Constitution?

LAB: No. These sections provide for notice to Attorneys General and for the eminently necessary Coordination Agreements to facilitate implementation of s. 35 laws. To that extent, they hardly affect, much less alter, the architecture of the Constitution.

47. The AGC's appeal raises only one issue:

c. Did the Court of Appeal err in finding that section 21 and subsection 22(3) of the Act are invalid?

LAB: Section 21 referentially incorporates Aboriginal laws as federal laws. It is not unconstitutional though one doesn't want to look under the hood. Subsection 22(3) is heavy handed and may frustrate Indigenous communities' access to specialized

services, policing, enforcement and the provincial courts[8] but it is not necessarily unconstitutional.

**PART III - ARGUMENT**

12. Aboriginal laws enacted under the s. 35 right of self-government are constitutionally valid *ex proprio vigore*, operative and binding within the overall framework or architecture of the Constitution of Canada.

13. Subject to any challenges to the authority of the enacting body or to the manner and form of enactment, the only limitation on such laws is that they must be within the s. 35 sphere of Aboriginal jurisdiction, a sphere roughly but not adequately or generously defined by decisions such as *Van der Peet* [9] and *Pamajewon.*[10] Those decisions dealt with matters other than community cohesion, cultural preservation and community services directed at the "core of Aboriginality".

14. The challenge before the Court in these appeals is to delineate the constitutional interactions of s. 35 enactments with other provincial or territorial statutes and laws in a purposive manner.

15. While the Court may uphold the referential incorporation of Indigenous laws by subsection 21(2) of the Act, their designation as federal laws adds little, if any, value to their efficacy. Subsections (2) and (3) effectively isolate them from almost all other federal laws, giving rise

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[8] Needs which run contrary to the submission of the AG Quebec that Indigenous communities have no motivation to negotiate such agreements.

[9] *R. v. Van der Peet*, 1996 CanLII 216 (SCC). Note that at para 56 the Court said "The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive)"; yet s. 35 rights to harvest for "food, social and ceremonial purposes" are and were well established. See, e.g., *R. v. Sparrow*, *infra* note 12.

[10] *R. v. Pamajewon*, 1996 CanLII 161 (SCC). In that case the Court said, at para. 28, that the *Van der Peet* test required not only evidence of the central significance of a regulated activity but noted there was no evidence it had been historically regulated by the Ojibway themselves.

to concerns that no federal resources will be available to defend those laws if challenged or to enforce them in any way as federal laws.

16. Enforcement is a particular concern given that there is no organized scheme federally or in any province at present for the enforcement of Band by-laws pursuant to the *Indian Act* or of Land Codes and Land Laws pursuant to the Framework Agreement. It is a national embarrassment that will only become worse as Aboriginal communities start exercising their s. 35 rights to make laws. Collaborative agreements are needed and the burden of concluding them should fall equally on all levels of government.

17. Similar problems arise if the blunt tool of paramountcy is seen as necessary for the implementation of s. 35 laws. It gets in the way of collaborative solutions.[11] One can analogize the problem to the situation the Court faced in *Sparrow*.[12] Having recognized an existing Aboriginal right to fish, the Court worked to avoid making a declaration pursuant to s. 52 of the *Constitution Act, 1982* which would have rendered the inconsistent laws void. Instead, the Court devised a three-part test by which inconsistent laws could nonetheless apply if justified.

18. Should the Court favour a justificatory approach to resolving conflicts between Aboriginal laws and provincial regimes of child and family services, a test better than one devised for the

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[11] A less contentious approach would make provision for some application of provincial laws rather than excluding them altogether. See, for example, the *Contraventions Act*, S.C. 1992, s. 65.1(1) which, if adapted to the present context, would require the consent of Indigenous communities affected or intended to be affected, or parallel enactments by Canada and the communities to be valid.

[12] "In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1). " *R. v. Sparrow*, 1990 CanLII 104 (SCC).

regulation of harvesting should be developed, with gradations of increasing protection as the substance of Indigenous enactments may be closer to the core of the s. 35 sphere.

19. Given the need for collaborative agreements which cannot, apparently, be forced, an approach based on justification for infringements may be all that is available. Which is a sad commentary.

20. The Lands Advisory Board looks to the Court for affirmation of the s. 35 rights of Indigenous communities to be self-governing and of Indigenous governing bodies to enact laws.

**PARTS IV & V – COSTS AND ORDER REQUESTED**

21. The Lands Advisory Board seeks no costs and accepts liability for disbursements as ordered by Justice Côté on October 7, 2022.

All of which is respectfully submitted this 14th day of November, 2022.

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**PART VI – TABLE OF AUTHORITIES**

| | **CITED AT PARAGRAPH NO.** |
|---|---|
| **CASES** | |
| *Guerin v. The Queen*, 1984 CanLII 25 (SCC) | 4 |
| *Osoyoos Indian Band v. Town of Oliver*, 2001 SCC 85 (CanLII) | 4 |
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