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:

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APPELLANT

-and-

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RESPONDENTS

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ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, 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

A. Overview

1. Tribal Chiefs Ventures Inc. (**"TCVI"**) is a tribal council of Treaty 6 Nations, mandated to advance the treaty and inherent rights of its member Nations. In this regard, TCVI makes two submissions to the Court on the vital issues at play concerning the implementation of an inherent Indigenous right of self-government in the context of the legislation at issue, *An Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24) (the **"Act"**). This inherent right of self-government flows from the broader right of self-determination that has been inherited from the Creator.

2. First, Treaty 6 is a solemn Nation to Nation arrangement that supports the recognition of an inherent Indigenous right of self-government, including with respect to jurisdiction over child and family services. Neither the inherent right at issue, nor the Crown-Indigenous relationship under Treaty 6, have been overtaken by any later developments, including the creation of the Provinces, or the 1930 provincial Natural Resource Transfer Agreements (**"NRTAs"**). Further, since 1982, these inherent rights have been recognized and affirmed under the Canadian constitution pursuant to s. 35 of the *Constitution Act, 1982*. Recognition of an inherent Indigenous right of self-government in the context of children and families is also consistent with, and further affirmed by, the *United Nations Declaration on the Rights of Indigenous Peoples* (**"UNDRIP"**), which has now been adopted without qualification by Canada. The legal effect of Canada, the original treaty partner, deciding to recognize and implement an Indigenous right of self-government through the Act is that Indigenous laws passed under that legislation must trump provincial jurisdiction in instances where the two conflict.

3. Second, the unwritten principle of the honour of the Crown requires the federal and provincial Crowns to work together to recognize, enhance, uphold and implement that inherent right, and accordingly, to implement and operationalize the Act. Further, the pre-existing territorial boundaries associated with Treaty 6 give rise to an obligation to cooperate across the Crown's internal division of powers, and across provincial boundaries where necessary.

B. Facts

4. TCVI takes no position regarding the facts as set out in the parties' facta, but adds the following:

5. TCVI is a federally incorporated not-for-profit organization and a federally recognized Tribal Council of Treaty 6 Nations. TCVI's member Nations include Beaver Lake Cree Nation, Cold Lake First Nations, Frog Lake First Nations, Heart Lake First Nation, Kehewin Cree Nation, and Whitefish Lake First Nation No. 128, all adherents to Treaty 6.

6. Treaty 6 was entered into in 1876 between First Nations and the federal Crown, pre-dating the creation of Alberta and Saskatchewan as provinces in 1905.[1] Treaty 6 includes 48 First Nations (17 AB, 29 SK, & 2 MB). The relevant territory stretches from western Alberta into Saskatchewan and Manitoba. Among other things, Treaty 6 includes special clauses for "medicine chest", education rights, and famine and pestilence.[2]

7. The overrepresentation of Indigenous children in care is well-known, and dire.[3] This is particularly so in Alberta, where in 2014/2015 it was determined that Indigenous children account for 69% of the children in care despite comprising only 9% of the population.[4] Alberta's Office of the Child and Youth Advocate has confirmed as recently as September 2022 that Indigenous children continue to be overrepresented in care, and in deaths in the child welfare system (making up approximately 80% of those deaths from October 2021 to March 2022).[5] For this reason, jurisdiction over child and family services is a matter of critical importance; quite literally a matter of life or death for TCVI's member Nations and their children.

PART II—POSITION ON QUESTIONS RAISED

8. TCVI provides two submissions to assist the Court in resolving this appeal: (i) Treaty 6 supports the existence of an inherent Indigenous right of self-government, including with respect to child and family services. This inherent Indigenous right has not been overtaken by later developments,

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[1] *Frank v R*, [1978] 1 SCR 95 ("*Frank*") at paras 3, 5.
[2] *Treaty No 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* ("Treaty 6").
[3] *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 (**"QCCA Opinion"**) at paras 126-136.
[4] Record of the First Nations Child and Family Caring Society of Canada, vol 10, Exhibit CB-29 of Sworn Declaration of Dr. Cindy Blackstock, December 4, 2020, "Aboriginal Children in Care: Report to Canada's Premiers July 2015" at pp 2624 and 2647.
[5] *Mandatory Reviews into Child Deaths, October 1, 2021-March 31, 2022*, Office of the Child and Youth Advocate Alberta, September 2022.

but instead has been affirmed by s. 35 of the *Constitution Act, 1982* and UNDRIP; and (ii) the unwritten constitutional principle of the honour of the Crown requires both of the federal and provincial Crowns to work together to uphold Treaty, including inherent self-government rights, and to implement and operationalize validly enacted legislation for the benefit of First Nations, which includes cross-border cooperation.

9. Given the above, TCVI submits that (i) the Court below correctly recognized that an inherent Indigenous right of self-government exists with respect to jurisdiction over children and families, consistent with Treaty 6 and is protected by s. 35 of the *Constitution Act, 1982*; and (ii) ss. 18, 20(2), 20(3), 21(1), and 22(3) of the Act are valid mechanisms by which the inherent right of self-government may be operationalized. The overarching principle of the honour of the Crown requires that the different orders of government cooperate in good faith to implement the Act.

PART III—STATEMENT OF ARGUMENT

A. Treaty 6 supports an inherent Indigenous right of self-government, including with respect to child and family services, and has not been abrogated

10. Treaties form part of Canada's constitutional architecture and in this regard, inform the progressive interpretive exercise required by this case. As recognized by the Court below:

> 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*... [this right exists] within the contemporary Canadian constitutional architecture, at least with respect to child and family services, and it is constitutionally protected under s. 35 [emphasis added].[6]

11. TCVI submits that Treaty 6, and the superimposition of borders in that territory by Canada over time, does not undermine the existence of an inherent right of self-government, nor justify an analysis which would prefer provincial jurisdiction to Indigenous jurisdiction over their own children and families in any way relevant to this appeal or the Act. To the contrary, TCVI submits that Treaty 6 affirms the existence of an inherent right of self-government, including jurisdiction over children and families, for Treaty 6 nations.

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[6] QCCA Opinion at para 364.

12. Firstly, Treaty 6, as with all documents of a constitutional character, demands a progressive interpretation. Such treaties should be "liberally construed",[7] and their interpretation should be capable of evolution within their natural limits to ensure their continued relevance and legitimacy in modern times.[8] Treaties "are solemn agreements and they are intended to last indefinitely."[9]

13. In this specific regard, Treaty 6 does not expressly speak to a right of self-government *per se* (nor indeed care of children and families). However, TCVI submits that the existence of this inherent right ought to be presumed in view of the solemn relationship arrived at as between nations, enshrined by the treaty, and now further supported by the articles of UNDRIP. Treaty 6 is premised on a recognition of the collective status and political leadership of the First Nation signatories (indeed, without which it would have been impossible to conclude it). As stated by this Court in *R v. Badger*:

> ... it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.[10]

14. The treaty relationship also assumes the basic independence of the signatories, and includes an agreement for all to live together peaceably (and TCVI would add, largely independently). In this respect, the underlying principle and terms of Treaty 6 are consistent with, and are premised upon, the implicit recognition of the inherent right of self-government which must be reconciled with the assertion of Crown sovereignty and the underlying agreement to share the land.[11]

15. This relationship is founded upon the *Royal Proclamation of 1763*, which established the core elements of the relationship between First Nations and the Crown, recognizing First Nation rights in Canada, and implementing the treaty-making process. As discussed by this Court in *Manitoba Métis Federation v. Canada*, this relationship was premised on a recognition of Indigenous strength and independence, rather than a paternalistic desire to protect or subjugate Indigenous peoples.[12]

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[7] *R v Marshall*, [1999] 3 SCR 456 at para 78(2).

[8] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 23.
[9] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 at para 137.
[10] *R v Badger,* [1996] 1 SCR 771 at para 41.
[11] *Treaty 6.*
[12] *Manitoba Métis Federation v Canada (Attorney-General)*, 2013 SCC 14 ("*MMF*") at para 66.

16. Treaty 6 has been specifically described by the Federal Court as "an instrument of peace and friendship, in that it forged an alliance between the aboriginal people of that area with the Canadian government."[13] This Court has found that one central purpose of Treaty 6 was to preserve the "traditional Indian way of life."[14]

17. In its factum, the Attorney General of Alberta seeks to persuade this Court that "cede and surrender" clauses in treaties could somehow operate to extinguish the inherent right of self-government.[15] This position is untenable, and an issue that this Court ought not entertain for one instant. There is no support for the proposition that this "cede and surrender" language has any application beyond issues relating to Indigenous peoples agreeing to share their lands and resources with newcomers, and indeed the text of Treaty 6 refers only to land.[16]

18. Importantly, the creation of Alberta and Saskatchewan in 1905 also has no bearing on the care of children and families. As noted above, Treaty 6 was signed in 1876 and pre-dated their creation. Though provincial boundaries were later unilaterally superimposed, it did not alter the treaty relationship, the assumptions underpinning the relationship, nor the essential terms of the treaty as it was concluded with the federal Crown.[17] This Court recently held that the subsequent imposition of provincial and even international borders does not preclude the assertion of s. 35 rights, nor obviate the Crown's obligation to deal with Indigenous people to reconcile those rights.[18]

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[13] *Buffalo v Canada*, 2005 FC 1622 at para 514.
[14] *R v Sundown*, [1999] 1 SCR 393 at para 6.
[15] Factum of the Intervener, Attorney General of Alberta ("AB Factum") at paras 22-23.
[16] Treaty 6 provides: "The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up…all their rights, titles and privileges, whatsoever, to the lands included within the following limits..." [emphasis added].
[17] See *Frank* at para 5, where this Court determined that the creation of Alberta and Saskatchewan in 1905 did not affect "[t]he right of Indians to hunt on Treaty No. 6 lands…"
[18] See e.g. *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 49; *R v Desautel*, 2021 SCC 17 ("*Desautel*"); *R v Boyer*, 2022 SKCA 62 at para 116.

19. Likewise, it is clear that the NRTAs did not fragment treaty areas by provincial boundaries in any way relevant to this appeal.[19] The Attorney General of Alberta's invocation of the NRTAs in its factum is plainly a red herring: these agreements were arrangements internal to the Crown, and have no bearing on inherent rights relating to Indigenous people caring for their own children and families. As this Court recently reaffirmed in *R. v. Desautel*, "the NRTAs … are 'constitutional agreement[s], not the Constitution'."[20]

20. Today, the inherent rights at issue are recognized and affirmed by s. 35 of the *Constitution Act, 1982*, and further affirmed by the articles of UNDRIP, which has now been adopted without qualification by Canada via the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (**"UNDRIPA"**).

21. Alberta courts have already begun to recognize the applicability of UNDRIPA in the context of child protection, noting that "the rights guaranteed by international convention are given express application to Canadian law",[21] and that "Article 8 ... and other articles of the UNDRIPA are relevant and have application to the child protection schemes in Canada and are particularly relevant to private guardianship applications because of the risks of assimilation inherent in the adoption of Indigenous children, particularly by non-Indigenous persons."[22]

22. UNDRIP, of course, contains provisions affirming the rights of Indigenous peoples and requires that states such as Canada honour and respect treaties made with them,[23] and recognize Indigenous peoples' right to govern themselves[24] and care for and bring up their children in their culture.[25]

23. The inherent rights at issue clearly mirror a basic human right to care for one's own children and families. The Act provides a procedural method to implement this right. This is not a situation,

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[19] *Frank* at para 12; *R v Green*, 2022 SKCA 92 at paras 34, 41.
[20] *Desautel*, at para 42, citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 44.
[21] *MM v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2021 ABPC 317 at para 29.
[22] *SK v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2022 ABPC 144 at para 23.
[23] *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") at Article 37.
[24] UNDRIP at Articles 3 and 4.
[25] UNDRIP at Articles 7 and 14.

as suggested by Alberta, where it is appropriate for Indigenous people to be put to strict proof of their right to care for their own children and families. As stated by the Court below:

> This right of self-government [child and family services] falls within s. 35 because it is a form of Aboriginal right. It is a generic right that extends to all Aboriginal peoples, because it is intimately tied to their cultural continuity and survival. In the past, significant barriers, such as residential schools, impeded the exercise of that right. These situations, however, were never endorsed by Parliament, which never indicated, through clear and unambiguous legislation, its intention to extinguish the right.[26]

24. Furthermore, jurisdiction over care of one's own children and families carries with it the inevitable consequence that provincial jurisdiction must be fully ousted whenever necessary. The Attorney General of Alberta complains of various matters regarding the Louis Bull Tribe's AMO Law which, among other things, claims jurisdiction with respect to its children off-reserve and ousts the jurisdiction of provincial courts over its children.[27] However, these features are essential and indeed the very point of exercising jurisdiction over the care of children and families. In any event, it is not necessary for this Court to opine on the breadth or validity of any particular community's laws to resolve this case.[28]

25. The inappropriateness of subjecting a right of self-government regarding children and families to the *Sparrow* test is addressed in the submissions of other interveners and the parties. From a treaty perspective, though, it bears emphasizing that this Court has found that the provinces cannot extinguish s. 35 rights.[29] Thus, provinces cannot now say that provincial jurisdiction trumps treaty and inherent rights, leaving the original treaty partner, Canada, constitutionally impotent if the provinces simply choose not to cooperate. As set out below, this state of affairs also would not accord with the honour of the Crown.

26. In the present case, this means that the treaty relationship, and the underlying affirmation of the right of self-government among treaty nations, subsists and is now recognized and affirmed by s.

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[26] QCCA Opinion at para 59.

[27] AB Factum at para 20.

[28] See *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras 6-11.

[29] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 ("*Delgamuukw*") at paras 180-183.

35 of the *Constitution Act 1982*, and should not be subordinated by provincial jurisdiction, including through the application of an analysis focused on justification of infringement.

B. The honour of the Crown requires a cooperative approach for recognizing and implementing the inherent Indigenous right of self-government in regards to child and family services

27. This Court has previously held that unwritten constitutional principles may in certain circumstances give rise to substantive legal obligations capable of limiting government action. Such unwritten constitutional principles are "not merely descriptive, but are also invested with a powerful normative force, and are binding on both courts and governments."[30]

28. TCVI submits that the honour of the Crown, as an unwritten constitutional principle,[31] requires that Canada and the provinces cooperate with Indigenous communities to recognize and implement the inherent Indigenous jurisdiction over child and family services under the Act. This was recognized by the Court below when it held that "[c]ooperation between the federal and provincial governments in recognizing and implementing Aboriginal rights is necessary to ensure the harmonious exercise of these rights. This cooperation flows from the constitutional principle of the honour of the Crown..."[32]

29. In this case, the legal obligations that flow from the honour of the Crown must be understood to apply to both the federal and provincial governments. This is particularly so in the treaty context, where obligations are owed by both levels of government and where the exercise of Crown powers—both federal and provincial—are burdened by those treaty obligations.[33] As set out above, the provinces have no constitutional authority to extinguish s. 35 rights;[34] to allow the provinces to defeat the recognition and implementation of s. 35 rights by simply refusing to

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[30] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54; See also *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 ("*Toronto (City)*") at paras 54-56.
[31] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42; *Toronto (City)* at paras 54-56.
[32] QCCA Opinion at para 559.
[33] *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*, 2014 SCC 48 ("*Grassy Narrows*") at paras 35, 50.
[34] *Delgamuukw* at paras 180-183.

cooperate would be to "[permit] the Crown to do by one means that which it cannot do by another [and] would undermine the endeavour of reconciliation, which animates Aboriginal law."[35]

30. That the Act was passed by the federal government—the original Treaty 6 partner—does not detract from a provincial responsibility to honour the Act's purpose. To the contrary, as discussed above, Treaty 6 does not include any clear and plain intent to extinguish the inherent Indigenous authority over children and families. As such, both the federal and provincial governments share the burden of recognizing and implementing this existing inherent Indigenous authority, via the Act. This is in line with ultimate purpose of the honour of the Crown, which is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.[36]

31. The honour of the Crown, and the resultant Crown obligations to recognize and implement the exercise of inherent Indigenous authority over child and family services through the unique context of this Act, also accords with the principle of cooperative federalism by facilitating and indeed requiring the "enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity."[37]

32. Further, because the territorial boundaries established by treaty differ from the provincial boundaries that were established at a later date, there is both a legal and practical need for cooperation with respect to recognizing and implementing Indigenous self-government rights, both within the individual provinces and in some instances, across provincial boundaries.

33. One consequence of the unilateral imposition of borders in Treaty 6 territory is that certain Indigenous communities in Treaty 6 find themselves bisected by these provincial borders. This means that in some instances, Treaty 6 communities may have two separate provincial child and family services regimes applied to their children and families. Thus, in the context of Treaty 6, the objective of reconciliation and the concomitant obligations associated with the honour of the Crown may require that the federal government, Alberta, and Saskatchewan cooperate alongside Indigenous peoples when implementing the inherent Indigenous jurisdiction over children and

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[35] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 44.
[36] *MMF* at para 66.
[37] *Quebec (Attorney General) v Canada (Attorney General),* 2015 SCC 14 at para 148.

families. This is part and parcel of the treaty relationship, and the provinces being subject to both the benefits and burdens of the treaty relationship originally established by Canada.[38]

34. In the context of Treaty 6, a multi-jurisdictional and cooperative approach to recognizing and implementing inherent Indigenous jurisdiction over children and families also accords with the honourable requirement to act diligently in the pursuit of the Crown's solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.[39] This cooperation between and among the federal and provincial governments is essential to achieving these objectives, and only in realizing these objectives can the treaty relationship be honoured, the purposes of the Act be fulfilled, and the integrity of Indigenous children, families, and communities be safeguarded.

PART IV—COSTS

35. TCVI does not seek costs and respectfully asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia, November 14, 2022.

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Counsel for the Intervener, Tribal Chiefs Ventures Inc.

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[38] *Grassy Narrows* at para 50.
[39] See *MMF* at para 78.

PART V—TABLE OF AUTHORITIES

Legislation and Regulations	**Paragraph References**
Constitution Act, 1982	2, 8, 9, 20, 26
United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14	20, 21
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Treaty No 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions	6, 14, 17
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Buffalo v Canada, 2005 FC 1622	16
Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12	19
Delgamuukw v British Columbia, [1997] 3 SCR 1010	25, 29
Frank v R, [1978] 1 SCR 95	6, 18, 19
Grassy Narrows First Nation v Ontario (Minister of Natural Resources), 2014 SCC 48	29, 33
Keewatin v Ontario (Natural Resources), 2013 ONCA 158	12
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