S.C.C. File No. 40061

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

B E T W E E N :

ATTORNEY GENERAL OF QUÉBEC

Appellant

- and -

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

Respondents

(*Style of cause continued on next page*)

FACTUM OF THE INTERVENER
CANADIAN CONSTITUTION FOUNDATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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

M^e^ Jesse Hartery
M^e^ Simon Bouthillier
M^e^ Allison Spiegel
Tel.: (416) 362-1812
Fax: (416) 868-0673
Email: jhartery@mccarthy.ca
sbouthillier@mccarthy.ca
aspiegel@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

(*Style of cause continued*)

- and -

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES, GRAND COUNCIL OF TREATY #3, INNU TAKUAIKAN UASHAT MAK MANI-UTENAM (ITUM), AGISSANT COMME BANDE TRADITIONNELLE ET AU NOM DES INNUS DE UASHAT MAK MANI-UTENAM, FEDERATION OF SOVERREIGN 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, 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, 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, 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, STELLAT'EN FIRST NATION, COUNCIL OF ATIKAMEKW OF OPITCIWAN, VANCOUVER ABORIGINAL CHILD AND FAMILY SERVICES SOCIETY and NISHNAWBE ASKI NATION

Interveners

A N D B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

ATTORNEY GENERAL OF QUÉBEC

Respondent

(*Style of cause continued on next page*)

(*Style of cause continued*)

- and -

ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR (AFNQL), FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION (FNQLHSSC), MAKIVIK CORPORATION, ASSEMBLY OF FIRST NATIONS, ASENIWUCHE WINEWAK NATION OF CANADA, SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES, GRAND COUNCIL OF TREATY #3, INNU TAKUAIKAN UASHAT MAK MANI-UTENAM (ITUM), AGISSANT COMME BANDE TRADITIONNELLE ET AU NOM DES INNUS DE UASHAT MAK MANI-UTENAM, FEDERATION OF SOVERREIGN 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, 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, 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, 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, STELLAT'EN FIRST NATION, COUNCIL OF ATIKAMEKW OF OPITCIWAN, VANCOUVER ABORIGINAL CHILD AND FAMILY SERVICES SOCIETY and NISHNAWBE ASKI NATION

Interveners

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

BERNARD, ROY & ASSOCIÉS
1, rue Notre-Dame Est, Bureau 8.00
Montréal, Québec
H2Y 1B6

Me Samuel Chayer
Me Francis Demers
Me Gabrielle Robert
Tel: (514) 393-2336 Ext. 51456
Fax: (514) 873-7074
Email: samuel.chayer@justice.gouv.qc.ca
francis.demers@justice.gouv.qc.ca

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
2e étage 225, montée Paiement
Gatineau, Québec
J8P 6M7

Me Pierre Landry

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

MINISTÈRE DE LA JUSTICE DU QUÉBEC
Direction du droit constitutionnel et autochtone
1200, route de l'Église, 4e étage
Québec, Québec
G1V 4M1

Me Tania Clercq
Me Hubert Noreau-Simpson
Me Marie-Catherine Bolduc

Tel: (418) 643-1477
Fax: (418) 644-7030
Email: tania.clercq@justice.gouv.qc.ca

Counsel for the Appellant/Respondent, Attorney General of Québec

Ottawa Agent for the Appellant, Attorney General of Québec

MINISTÈRE DE LA JUSTICE – CANADA
284, rue Wellington
Ottawa, Ontario
K1A 0H8

Me Bernard Letarte
Me François Joyal
Me Andréane Joanette-Laflamme
Me Lindy Rouillard-Labbé
Me Amélia Couture
Tel: (613) 946-2776
Fax: (613) 952-6006
Email : bernard.letarte@justice.gc.ca
francois.joyal@justice.gc.ca

Counsel for the Respondent,
Attorney General of Canada

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

Me Christopher M. Rupar

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

Ottawa Agent for the Respondent,
Attorney General of Canada

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

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

Counsel for the Respondents,
Assemblée des Premières Nations Quebec-Labrador (APNQL) and Commission de la santé et des services sociaux des Premières Nations du Quebec et du Labrador (CSSSPNQL)

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

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

Ottawa Agent for the Respondents,
Assemblée des Premières Nations Quebec-Labrador (APNQL) and Commission de la santé et des services sociaux des Premières Nations du Quebec et du Labrador (CSSSPNQL)

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

Me Kathryn Tucker
Me Nuri Frame
Me Robin Campbell, c.j.c.
Tel: (416) 916-2989
Fax: (416) 916-3726
Email: rtucker@makivik.org
rcampbell@makivik.org

Counsel for the Respondent,
Société Makivik

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

Me Marie-France Major

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

Ottawa Agent for the Respondent,
Société Makivik

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

Me Stuart Wuttke
Me Julie McGregor
Me 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 Respondent,
Assemblée des Premieres Nations

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

Me Moira Dillon

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

Ottawa Agent for the Respondent,
Assemblée des Premières Nations

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

Me Claire Truesdale
Me Louise Kyle
Tel: (604) 687-0549
Fax: (604) 687-2696
Email: ctruesdale@jfklaw.ca

Counsel for the Respondent,
Aseniwuche Winewak Nation of Canada

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Me Marie-France Major

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

Ottawa Agent for the Respondent,
Aseniwuche Winewak Nation of Canada

CONWAY BAXTER WILSON S.R.L.
400 - 411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Me David P. Taylor
Me Naiomi W. Metallic
Me Alyssa Holland
Tel: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

Counsel for the Respondent,
Société de soutien à l'enfance et à la famille des Premières Nations du Canada

ALBERTA JUSTICE AND SOLICITOR GENERAL
10th Floor, 10025 - 102 A Avenue
Edmonton, Alberta TSJ 2Z2

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

Counsel for the Intervener,
Attorney General of Alberta

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

Me D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Alberta

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

Me Heather Leonoff, Q.C.
Me Kathryn Hart
Tel: (204) 945-3233
Fax: (204) 945-0053
Email: heather.leonoff@gov.mb.ca

Counsel for the Intervener,
Attorney General of Manitoba

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

Me D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
P.O. Box 9280, Stn. Prov. Gov't.
Victoria, British Columbia
V8W 9J7

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

Counsel for the Intervener,
Attorney General of British Columbia

Me MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, Ontario
K2P 0J8

Tel: (613) 282-1712
Fax: (613) 228-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Intervener, Attorney General of British Columbia

JFK LAW CORPORATION
340 - 1122 Mainland Street
Vancouver, BC V6B 5L1

Me Robert Janes, Q.C.
Me Naomi Moses
Tel: (604) 687-0549
Fax: (604) 687-2696
Email: rjanes@jfklaw.ca

Counsel for the Intervener,
Grand Council of Treaty #3

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

Me Marie-France Major

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

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

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

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

Counsel for the Intervener,
Innu Takuaikan Uashat Mak Mai-Utenam (ITUM), agissant comme bande traditionnelle et au nom des Innus de Uashat Mak Mani-Utenam

SUNCHILD LAW
Box 1408
Battleford, SK S0M 0E0

M^e Michael Seed
M^e Nicholas Dodd
M^e Rosa Victoria Adams
Tel: (306) 441-1473
Fax: (306) 937-6110
Email: michael@sunchildlaw.com

Counsel for the Intervener,
Federation of Sovereign Indigenous Nations

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

M^e Nadia Effendi

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

Ottawa Agent for the Intervener,
Federation of Sovereign Indigenous Nations

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

M^e Hafeez Khan
M^e Earl C. Stevenson
Tel: (431) 800-5650
Fax: (431) 800-2702
Email: hkhan@hklawcorp.ca

Counsel for the Intervener,
Peguis Child and Family Services

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

M^e Marie-France Major

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

Ottawa Agent for the Intervener,
Peguis Child and Family Services

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

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

Counsel for the Intervener,
Native Women's Association of Canada

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

M^e Virginia Lomax

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

Ottawa Agent for the Intervener,
Native Women's Association of Canada

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

M^e^ Tammy Shoranick
M^e^ Daryn Leas
M^e^ James M. Coady
Tel: (604) 687-6789
Fax: (604) 683-5317
Email: tshoranick@boughtonlaw.com

Counsel for the Intervener,
Council of Yukon First Nations

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

M^e^ Nadia Effendi

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

Ottawa Agent for the Intervener,
Council of Yukon First Nations

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

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

Counsel for the Intervener,
Indigenous Bar Association

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

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

Ottawa Agent for the Intervener,
Indigenous Bar Association

OLTHUIS, KLEER, TOWNSHEND LLP
250 University Ave., 8th floor
Toronto, Ontario
M5H 2E5

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

Counsel for the Intervener,
Chiefs of Ontario

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

M^e^ Marie-France Major

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

Ottawa Agent for the Intervener,
Chiefs of Ontario

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

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

Counsel for the Intervener,
Inuvialuit Regional Corporation

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

Me Marie-France Major

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

Ottawa Agent for the Intervener,
Inuvialuit Regional Corporation

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

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

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

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

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

Counsel for the Intervener,
NunatuKavut Community Council

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

Me Jonathan Laxer

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

Ottawa Agent for the Intervener,
NunatuKavut Community Council

M^e WILLIAM B. HENDERSON
3014 - 88 Bloor St East
Toronto, ON M4W 3G9

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

Counsel for the Intervener,
Lands Advisory Board

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

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

Ottawa Agent for the Intervener,
Lands Advisory Board

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

M^e Jason T. Madden
M^e Alexander DeParde
M^e Emillie N. Lahale
Tel: (416) 916-3853
Fax: (416) 916-3726
Email: jmadden@pstlaw.ca

Counsel for the Interveners,
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, Ontario
K1P 1C3

M^e Matthew Estabrooks

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

Ottawa Agent for the Interveners,
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, Ontario
M6G 2T2

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

Counsel for the Intervener,
Listuguj Mi'Gmaq Government

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

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

Ottawa Agent for the Intervener,
Listuguj Mi'Gmaq Government

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

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

Counsel for the Intervener,
Congress of Aboriginal Peoples

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

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

Ottawa Agent for the Intervener,
Congress of Aboriginal Peoples

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

Me Joëlle Pastora Sala
Me Allison Fenske
Me Maximillian Griffin-Rill
Me Adrienne Cooper
Tel: (204) 985-9735
Fax: (204) 985-8544
Email: jopas@pilc.mb.ca

Counsel for the Intervener,
First Nations Family Advocate Office

JURISTES POWER
99, rue Bank
Bureau 701
Ottawa, Ontario
K1P 6B9

Me Darius Bossé

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

Ottawa Agent for the Intervener,
First Nations Family Advocate Office

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

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

Counsel for the Intervener,
Assembly of Manitoba Chiefs

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

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

Counsel for the Intervener,
First Nations of the Maa-Nulth Treaty Society

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

M^e^ Bijon Roy

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

Ottawa Agent for the Intervener,
First Nations of the Maa-Nulth Treaty Society

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

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

Counsel for the Intervener,
Tribal Chiefs Ventures Inc.

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

M^e^ Marie-Christine Gagnon
Tel: (613) 786-0086
Fax: (613) 563-9869
Email: marie-christine.gagnon@ca.gowlingwlg.com

Ottawa Agent for the Intervener,
Tribal Chiefs Ventures Inc.

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

M^e^ Gib van Ert
M^e^ Fraser Harland
M^e^ Mary Ellen Turpel-Lafond
Tel: (613) 408-4297
Fax: (613) 651-0304
Email: gvanert@ovcounsel.com

Counsel for the Interveners,
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

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

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

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

Me Colleen Bauman

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

Ottawa Agent for the Intervener,
David Asper Centre for Constitutional Rights

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

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

Counsel for the Intervener,
Regroupement Petapan

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

Me Marion Sandilands

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

Ottawa Agent for the Intervener,
Regroupement Petapan

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

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

Counsel for the Interveners,
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, Ontario
K1P 1C3

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

Ottawa Agent for the Interveners,
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, Quebec
G8K 2W5

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

Counsel for the Intervener,
Conseil des Atikamekw d'Opitciwan

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

Me Maxime Faille
Tel: (604) 891-2733
Fax: (604) 443-6784
Email: maxime.faille@gowlingwlg.com

Counsel for the Intervener,
Vancouver Aboriginal Child and Family Services Society

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

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

Ottawa Agent for the Intervener,
Vancouver Aboriginal Child and Family Services Society

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

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

Counsel for the Intervener,
Nishnawbe Aski Nation

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

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

Ottawa Agent for the Intervener,
Nishnawbe Aski Nation

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

M^e^ Trisha Paradis
M^e^ Sandra Jungles
Tel: (867) 767-9257
Fax: (867) 873-0234
Email: Trisha_Paradis@gov.nt.ca

Counsel for the Intervener, Attorney General of the Northwest Territories

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

M^e^ D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of the Northwest Territories

TABLE OF CONTENTS

PAGE

PART I—OVERVIEW AND STATEMENT OF POSITION

1. The Constitution creates at least two sovereign orders of government. In a federal state like Canada, each order of government is endowed with its own legislative and executive branch. The executive can be tasked with executing the laws of its corresponding legislature and is accountable to that legislature only. It is not accountable to another legislature or another executive branch.

2. This Court has permitted a qualified and limited derogation from this structure by allowing consensual *administrative* inter-delegation between the orders of government. It has permitted the federal government to seek assistance from the provinces in the administration of federal laws, and vice-versa. However, it has never endorsed coercion. In fact, it has emphasized the opposite proposition: *administrative* inter-delegation is only constitutional if it is done *consensually*. Despite these teachings, the court below appears to have held that a provincial government and public service can be required to *implement* and *enforce* federal laws and programs.

3. The Canadian Constitution Foundation (the "**CCF**") intervenes to submit that Canada's federal structure will be altered beyond recognition if this point of law is upheld. If accepted, the federal Parliament would be capable of requiring a provincial executive and public service to implement and enforce federal laws and programs. The provincial legislatures would also be capable of requiring the federal executive and public service to implement and enforce provincial laws and programs. The Constitution, which creates coordinate orders of government, does not permit this result. Federalism jurisprudence abroad supports this conclusion.

4. In circumstances like these, the federal government has two options at its disposal: (i) implement and enforce its own laws and programs; or (ii) cooperate with the provinces through administrative inter-delegation. If the federal government chooses the latter option because the provinces have relative expertise in the implementation of these laws or programs, it cannot impose its will. This does not mean the federal law at issue is necessarily *ultra vires*, but rather that its effect cannot be to require the provincial executive and public service to implement federal laws and programs. Whether a law directly targets a provincial executive on its face or not is irrelevant. A province can *always* decline to implement and enforce federal laws or programs.

5. The CCF does not take a position on the constitutional questions that arise with ss. 18-35 of *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24. It also takes no position on whether the impugned provisions at issue are *ultra vires* or not.

PART II—STATEMENT OF ARGUMENT

A. Introduction & Scope of the Intervention

6. The Court of Appeal appears to have concluded that this case concerns the division of *legislative* power. It goes far beyond that issue. At its core, it involves the division of *executive* power. To the extent that it did acknowledge that the division of executive power was at issue, the Court of Appeal held that a provincial executive and public service could nonetheless be required to *implement* federal laws or programs if they are sufficiently "general".[1]

7. For the purposes of its intervention, the CCF assumes that the central Parliament may validly enact legislation concerning the child and family services of Indigenous peoples under s. 91(24). While this Court's binding authority suggests that this cannot be the case because child and family services fall within provincial jurisdiction,[2] the CCF does not dispute that some earlier authorities could be interpreted to the opposite effect.[3] It takes no position on this question and leaves the debate to the parties.

8. The CCF intervenes on a narrower issue to assist the Court: assuming the central Parliament can adopt norms in a given field, who must execute the law? Based on this Court's binding authority, a provincial government and public service cannot be required to *implement* and *enforce* federal laws and programs, nor, for that matter, can the federal government and public service be required to *implement* and *enforce* provincial laws and programs.

9. That said, provincial government officials can be obliged to *comply* with federal laws if they choose to engage in an activity in which private actors also engage. For instance, provincial government officials can be required to *comply* with federal laws criminalizing theft if they choose to obtain goods in the marketplace. The distinction between these concepts lies at the heart of this appeal.

---

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, ¶313-355.

2 **See:** *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, ¶37-39, 41, 44-45, per Abella J., and ¶76, per McLachlin C.J. and Fish J. concurring; *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, ¶10-11.

3 *Renvoi* (Q.C.C.A.), *supra* note 1, ¶324-326.

B. The Federal Government Cannot Require a Provincial Government and Public Service to Implement and Enforce Federal Laws and Programs

10. The Constitution establishes a division of executive and legislative authority.[4] This is Canada's basic federal structure, which creates *sovereign, coordinate* orders of government.[5] As Prime Minister Louis St. Laurent confirmed in 1949 upon Newfoundland and Labrador's admission to the union, "[a] Canadian province is not a mere administrative unit of the central government".[6] While the Attorney General of Canada and some of the other respondents are correct to note that unwritten principles cannot be used as an independent basis for invalidating legislation, they are wrong to ignore the text of the Constitution and the system of government it establishes.

11. In *Toronto (City) v. Ontario (Attorney General)*, this Court confirmed the constitutional idea that legislative supremacy is absolute, absent a constraint in the written constitution. In other words, unwritten constitutional principles cannot be used as an independent basis to deny Parliament or the provincial legislatures the right to adopt legislation that some might view as "unjust or unfair" or "*otherwise normatively deficient*". As the Court explained, holding otherwise would "trespass into legislative authority to amend the Constitution" and effectively neuter s. 33 of the *Canadian Charter of Rights and Freedoms*.[7] As a result, only the compromise adopted by the framers, as evidenced in the constitutional text, can be used to invalidate legislative enactments.

12. In this case, the Court of Appeal erroneously concluded that the principle of federalism was being used as an independent basis to invalidate legislation. It failed to account for the division of executive authority provided in the text of the Constitution in coming to its conclusion. In doing so, it ignored binding authority from this Court and its admonition that "it is indisputable that federalism has a strong textual basis", which entails that "judicially developed" doctrine may be needed to preserve the integrity of Canada's federal structure.[8] As a result, this appeal invites the Court to reaffirm a proper understanding of Parts III-VI of the *Constitution Act, 1867*.

---

4 J.-F. Gaudreault-DesBiens & J. Poirier, "From Dualism to Cooperative Federalism and Back?" in P. Oliver, P. Macklem & N. Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (OUP, 2017) at 394-398, CCF Authorities ("**BOA**") Tab 4.

5 *Reference re Securities Act*, 2011 SCC 66, ¶71.

6 "Union of Newfoundland with Canada – Ceremonies at St. John's, Newfoundland and Ottawa, Canada", House of Commons Debates (Appendix), 20-5, No 3 (April 1, 1949) at 2279 (Rt. Hon. Louis St. Laurent), BOA Tab 2.

7 *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, ¶58-60.

8 *Ibid*, ¶50.

13. Part III of the *Constitution Act, 1867* establishes the executive power of the federal order of government, while Part V establishes the executive power of the provincial orders of government. This division is confirmed in ss. 12 and 65. The first provides as follows:

> All Powers, Authorities, and Functions . . . at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors . . . shall, as far as the same continue in existence **and capable of being exercised after the Union in relation to the Government of Canada**, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless . . . to be **abolished or altered by the Parliament of Canada**.

Section 65 is to the same effect in relation to the provincial executive in Ontario and Quebec, which were newly created at the time. Such a provision was not needed in Nova Scotia and New Brunswick because their executive power continued "as it exists at the Union until altered under the Authority of this Act", but was notably "subject to the Provisions of this Act", namely those establishing the federal executive.[9] The foundational statutes of the subsequently-created provinces contain similar provisions.[10]

14. Part IV of the *Constitution Act, 1867* establishes the legislative branch of the federal order of government, while Part V establishes the legislative branch of the provincial orders of government. Finally, Part VI outlines the distribution of legislative powers.

15. Accordingly, as the Judicial Committee of the Privy Council explained in *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*:

> The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, **entrusted with the exclusive administration of affairs in which they had a common interest**, each province retaining its independence and autonomy. That object was accomplished **by distributing, between the Dominion and the provinces, all powers, executive and legislative** . . .[11]

---

9 *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 64.

10 *Manitoba Act, 1870*, ss. 2, 6-7, BOA Tab 9; *British Columbia Terms of Union*, ss. 10, 14, BOA Tab 7; *Prince Edward Island Terms of Union*, Schedule, BOA Tab 10; *Alberta Act*, ss. 3, 8, 10, BOA Tab 6; *Saskatchewan Act*, ss. 3, 8, 10, BOA Tab 11; *Newfoundland Act*, Schedule, ss. 3, 7-9, 11-13, BOA Tab 8.

11 *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.) at 441-42, *emphasis added*, BOA Tab 1.

16. This federal structure has been reaffirmed on numerous occasions. In *The Bonanza Creek Gold Mining Co. v. The King*, for instance, the Privy Council noted that "[t]he distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers."[12] In *Re: Resolution to amend the Constitution*, Martland and Ritchie JJ. (dissenting but not on this point) cited *Liquidators* and *Bonanza Creek Gold Mining* as foundational with respect to Canada's federal structure and reaffirmed that "the federal distribution *of* powers embraces not only legislative but also executive powers".[13] They explained that this division cannot be circumvented "either directly or indirectly."[14] These cases have since been unanimously reaffirmed by this Court.[15] Finally, in *Ontario (Attorney General) v. OPSEU*, Beetz J. explained that this division, which also finds expression in ss. 91(8) and 92(4) of the *Constitution Act, 1867*, is "of fundamental importance, essential to the federal principle".[16]

17. This division preserves fundamental principles of the Westminster tradition, such as responsible government and parliamentary accountability.[17] As this Court explained in the *Secession Reference*, "[t]he Constitution mandates government by democratic legislatures, and an executive accountable to them".[18] Recently, in *R. (Miller) v. Prime Minister*, the Supreme Court of the United Kingdom observed that the principle of parliamentary accountability means, above all, that the executive must "report, explain and defend its actions" before the legislature. [19]

18. These principles apply with equal vigor to all orders of government. Therefore, the division of executive and legislative authority that flows from Canada's federal structure also ensures that no order of government can circumvent the principle of parliamentary accountability. It goes without saying that provincial ministers, being representatives of a sovereign government, are not required to report, explain and defend their actions before Parliament. The same can be said about

---

12 *The Bonanza Creek Gold Mining Co. v. The King*, [1916] 26 D.L.R. 273 (P.C.) at 281.

13 *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 820, *emphasis in original*. **See also:** *The King v. Caroll*, [1948] S.C.R. 126 at 129 and 134.

14 *Resolution to amend the Constitution* (S.C.C.), *supra* note 13 at 821.

15 **See:** *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶56-57; *Toronto (City)*, *supra* note 7, ¶50, 52, per Wagner C.J. and Brown J., and ¶172, per Abella J., dissenting. **See also:** *R. v. Sullivan*, 2022 SCC 19, ¶62.

16 *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2 at 48.

17 **See:** *Secession Reference* (S.C.C.), *supra* note 15, ¶63, 65; *Toronto (City)*, *supra* note 7, ¶77.

18 *Secession Reference* (S.C.C.), *supra* note 15, ¶68.

19 *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, ¶46.

federal ministers vis-à-vis the provincial legislatures. The executive of each order of government is accountable to its corresponding legislature, not to another legislature or executive branch.

19. Consequently, delegation between the orders of government is generally prohibited. In the very limited instances where it is authorized, the order of government receiving the delegation can always *decline* to use the powers at issue.

20. The text of the Constitution authorizes two types of inter-delegation. ***First***, s. 94 of the *Constitution Act, 1867* effectively permits ***legislative*** inter-delegation with respect to matters falling within provincial jurisdiction under ss. 92(13) and (14), except with respect to Quebec. Even where legislative inter-delegation is permitted, it cannot be accomplished *without cooperation*:

> …the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights **in Ontario, Nova Scotia, and New Brunswick**, and of the Procedure of all or any of the Courts in those Three Provinces…**but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof**.

21. This Court relied on this provision in *Attorney General of Nova Scotia v. Attorney General of Canada* to hold that the existence of s. 94 "indicates that an agreement for such a delegation as is here contended for was never intended".[20] This prohibition on legislative inter-delegation has been consistently affirmed as a "necessity to preserving the integrity of the federal structure".[21] Accordingly, the federal and provincial orders of government cannot alter the federal structure, even with cooperation, unless the text of the Constitution permits it.

22. ***Second***, s. 92(14) of the *Constitution Act, 1867* effectively permits ***administrative*** inter-delegation with respect to criminal justice. Historically, it had been argued that only the provinces *could* prosecute criminal offences enacted under s. 91(27). When Parliament adopted a law in 1969 that expressly gave the Attorney General of Canada the authority to prosecute criminal offences under federal statutes, the law was challenged in the courts. In *R. v. Hauser*, Pigeon J. declined to answer the question because, in his view, the law at issue did not fall under the criminal law power.

---

[20] *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 at 38, per Kerwin J., and 57-59, per Fauteux J. **See also:** W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967), 45:3 *Can. Bar Rev*. 409 at 421.

[21] *Resolution to amend the Constitution* (S.C.C.), *supra* note 13 at 821, reaffirmed in *Toronto (City)*, *supra* note 7, ¶50, 52, per Wagner C.J. and Brown J., and ¶172, per Abella J., dissenting. **See also:** *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶78-80.

Accordingly, he reaffirmed the general rule that the division of executive power follows the division of legislative power.[22] The debate was ultimately settled in two cases, over the objection of a strong dissent by Dickson J. (as he then was), in which it was held that the federal government can be tasked with prosecuting criminal offences, consistent with the general rule. However, s. 92(14) also implicitly permits prosecutorial authority to be delegated to the provinces.[23]

23. Here again, provincial choice remains a defining feature of the delegation because the provinces have legislative authority to direct their own officers in the execution of federal laws. As Dickson J. noted in *R. v. Wetmore*, "[t]he provincial police are answerable only to the Attorney General [of the province], as are the provincial Crown Attorneys who conduct the great majority of criminal prosecutions in Canada."[24] Spence J.'s concurring reasons in *Hauser*, which were later endorsed by the Court, also illustrate that provincial choice is well understood. He defended federal authority over the enforcement of criminal laws based on this premise.[25] As a result, the provinces have sometimes *declined* to enforce federal criminal law. The province of Quebec's objection to prosecuting abortion cases prior to *R. v. Morgentaler* is one famous example.[26] The rule against coercion can thus also serve as an important structural protection of liberty.

24. Despite the lack of an anchor in the text of the Constitution permitting administrative inter-delegation more generally, this Court accepted an additional qualified and limited derogation from Canada's federal structure in this respect.[27] In this context, the Court has qualified this holding by ensuring that the corresponding executive continues to be responsible to the legislative assembly in some way, even if this is in an attenuated fashion. Accordingly, *Willis* upheld a federal law

---

22 *R. v. Hauser*, [1979] 1 S.C.R. 984.

23 *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, [1983] 2 S.C.R. 206; *R. v. Wetmore*, [1983] 2 S.C.R. 284. **See also:** Gerald V. La Forest, "Delegation of Legislative Power in Canada" (1975), 21:1 *McGill L.J.* 131 at 133.

24 *Wetmore* (S.C.C.), *supra* note 23 at 300, 303, 306.

25 *Hauser* (S.C.C.), *supra* note 22 at 1004. **See also:** *Can. Nat. Transportation* (S.C.C.), *supra* note 23 at 238 and 244.

26 **See:** D. Baker, "The Provincial Power to (Not) Prosecute Criminal Code Offences" (2017), 48:2 *Ottawa L.R.* 419 at 445; W. K. Wright, "Canada's 'Constitution outside the Courts': Provincial Non-enforcement of Constitutionally Suspect Federal Criminal Laws as Case Study" in R. Albert, P. Daly & V. MacDonnell, eds, *The Canadian Constitution in Transition* (University of Toronto Press, 2019) at 117-119, BOA Tab 5.

27 *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392. **See, e.g.,** La Forest, *supra* note 23 at 140; J. Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020), 94 *S.C.L.R.* (2d) 85 at 87-91.

permitting the "Governor in Council" to delegate the administration of federal laws and programs to the provincial executive. In the *Reference re Agricultural Products Marketing*, Laskin C.J. called this the "interposition" of the "Lieutenant Governor in Council" or the "Governor in Council".[28] This means there is always a member of the federal or provincial executive who can be held accountable before their respective legislature.

25. The Court has also limited the effect of this derogation in order to account for Canada's federal structure. It has held that administrative inter-delegation is *only* permitted "in aid of cooperative federalism".[29] In other words, each order of government may seek assistance from the other, but cannot impose its will and distort the federal structure. The Court has declined to have the provinces turned into the agents of the federal government and to have the federal government turned into the agent of the provinces. As this Court explained in the *Reference re Securities Act*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state".[30] The Court has never endorsed coercion and it should decline to do so now.

26. If this Court were to endorse coercion, this holding would also permit Parliament to require a province to use its own funds "against its wishes", and for a provincial legislature to do the same with the federal government.[31] That proposition was expressly rejected in the *Reference re Troops in Cape Breton*.[32] Overall, this is consistent with the approach adopted with respect to the legislative and administrative inter-delegation that is expressly permitted by the text of the Constitution. Cooperation is permitted and encouraged. Without it, it is up to the federal executive and public service to implement and enforce its own laws and programs, as is the case with the investigation and prosecution of criminal offences.

---

[28] *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 at 1275, per Laskin C.J., and 1290, per Pigeon J. **See also:** *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, ¶5, 57.

[29] *Pelland* (S.C.C.), *supra* note 28, ¶55. **See also:** *Gendis Inc. v. Canada (Attorney General) et al.*, 2006 MBCA 58, ¶72-73, 89, 115, 117, leave to appeal denied 2007 CanLII 2921 (SCC); *Reference re Securities Act* (S.C.C.), *supra* note 5, ¶58; *Pan-Canadian Securities* (S.C.C.), *supra* note 21, ¶130-31; J. Hartery, "Protecting Parliamentary Sovereignty and Accountability in a Dualist Federation" (2020), 58:1 *Alta L.R.* 187 at 191-92.

[30] *Reference re Securities Act* (S.C.C.), *supra* note 5, ¶62.

[31] *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 434, per Laskin C.J.

[32] *Reference re Troops in Cape Breton*, [1930] S.C.R. 554. **See also:** *Regional Municipality of Peel v. Mackenzie et al.*, [1982] 2 S.C.R. 9 at 21-22.

27. The Attorney General of Canada confuses this line of case law with the cases which stand for the proposition that Parliament's laws may bind provincial government officials when it evenhandedly regulates an activity in which both provinces and private actors engage. It is evident that provincial government officials can be obliged to *comply* with federal laws if they choose to engage in such an activity. The latter situation raises no federalism concerns, as it does not involve a statute that discriminates between a government official and a private actor or that "interfere[s] directly" with the exercise of provincial executive power.[33] Accordingly, while *AGT v. (Canada) CRTC* undoubtedly remains good law, it simply does not speak to the legal issue raised in this appeal.[34] Nor is it relevant to ask whether federal norms are sufficiently general and leave room for the provinces to adopt their own norms. As this Court has consistently explained, the provinces can never be compelled to *implement* and *enforce* federal laws or programs, irrespective of their content. Canada has its own federal executive for that purpose.

C. Federalism Jurisprudence Abroad Supports the Position Adopted by this Court

28. While a look to comparative sources can never bind this Court, it can provide persuasive authority in appropriate cases.[35] The approach adopted in the United States and Australia, for example, provides useful insight because they possess a structure that is similar to ours.[36]

29. For example, in *Printz v. United States*, the U.S. Supreme Court confirmed that the Constitution is not silent on the question of who must execute the laws of Congress:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed,"… The insistence of the Framers upon unity in the Federal Executive – to ensure both vigor and accountability – is well known… That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[37]

---

33 *R. v. Caron*, [1924] 4 DLR 105 (P.C.) at 109; *Manitoba (Attorney General) v. Forbes*, [1937] 1 DLR 289 (P.C.) at 295.

34 *AGT v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225.

35 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶19-47.

36 J. Poirier, C. Saunders & J. Kincaid, eds., *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (OUP, 2015) at 6, 445-447, 491-494, BOA Tab 3.

37 *Printz v. United States*, 521 US 898 (1997) at 922–23.

Significantly, the court held that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.... [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty".[38] This is known as the anticommandeering doctrine in American constitutional law. The High Court of Australia has articulated the same rules. It has held that a State cannot *require* the federal executive to implement and enforce State laws or programs.[39] Moreover, it has stressed that there is a difference between federal laws *conferring powers* on a State executive, which can decide whether to exercise them, and federal laws *imposing duties* on a State executive.[40]

30. Building on *Printz*, the U.S. Supreme Court explained the rationales for the anticommandeering doctrine in *Murphy v. NCAA*: (i) it is a structural protection of liberty; (ii) it promotes political accountability; and (iii) it prevents Congress from shifting the costs of regulation and implementation to the States. It also observed that the anticommandeering doctrine does not target situations in which Congress evenhandedly regulates an activity in which both States and private actors engage.[41] Moreover, each order of government may seek assistance from the other through consensual administrative inter-delegation. However, once a law attempts to impose demands on "the States' sovereign authority", it crosses a clear constitutional line.[42]

PART III—SUBMISSIONS CONCERNING COSTS

31. The CCF requests that no costs be awarded either for or against it.

PART IV—ORDER REQUESTED

32. The CCF takes no position with respect to the disposition of the appeal.

---

38 *Ibid* at 935.

39 *R. v. Hughes*, [2000] HCA 22.

40 *O'Donoghue v. Ireland*, [2008] HCA 14, ¶12, 15-25, per Gleeson C.J., ¶32, 48-51, 57, per Gummow, Hayne, Heydon, Crennan and Kiefel JJ., ¶87-90, 118-133, 164-165, per Kirby J. (dissenting, but not on the underlying distinction between powers and duties).

41 **See also:** *Re Residential Tenancies Tribunal (NSW); Ex parte DHA*, [1997] HCA 36.

42 *Murphy v. NCAA*, 584 U.S. ____ (2018) at 20.

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

Me Jesse Hartery / Me Simon Bouthillier / Me Allison Spiegel

PART V—TABLE OF AUTHORITIES

	AUTHORITIES	Paragraph(s) Referenced in Factum
CASE LAW		
1.	*A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, [1983] 2 S.C.R. 206	*22, 23*
2.	*AGT v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225	*27*
3.	*Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31	*21*
4.	*Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46	*7*
5.	*Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20	*24*
6.	*Gendis Inc. v. Canada (Attorney General) et al*., 2006 MBCA 58, leave to appeal denied 2007 CanLII 2921 (SCC)	*25*
7.	*Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.)	*15, 16*
8.	*Manitoba (Attorney General) v. Forbes*, [1937] 1 DLR 289	*27*
9.	*Murphy v. National Collegiate Athletic Association*, 584 U.S. ____ (2018)	*30*
10.	*NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45	*7*
11.	*O'Donoghue v. Ireland*, [2008] HCA 14	*29*
12.	*Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2	*16*
13.	*P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392	*24*
14.	*Printz v. U.S.*, 521 US 898 (1997)	*29, 30*
15.	*Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32	*28*
16.	*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41	*17*
17.	*R. v. Caron*, [1924] 4 DLR 105	*27*
18.	*R. v. Hauser*, [1979] 1 S.C.R. 984	*22, 23*
19.	*R. v. Hughes*, [2000] HCA 22	*29*
20.	*R. v. Sullivan*, 2022 SCC 19	*16*
21.	*R. v. Wetmore*, [1983] 2 S.C.R. 284	*22, 23*
22.	*Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*, [1997] HCA 36	*30*
23.	*Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373	*26*
24.	*Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753	*16, 21*
25.	*Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198	*24*
26.	*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48	*21*
27.	*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217	*16, 17*
28.	*Reference re Securities Act*, 2011 SCC 66	*10, 25*
29.	*Reference re Troops in Cape Breton*, [1930] S.C.R. 554	*26*
30.	*Regional Municipality of Peel v. Mackenzie et al*., [1982] 2 S.C.R. 9	*26*
31.	*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les*	*6, 7*

	AUTHORITIES	Paragraph(s) Referenced in Factum
	enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185	
32.	*The Bonanza Creek Gold Mining Co. v. The King*, [1916] 26 D.L.R. 273 (P.C.)	*16*
33.	*The King v. Caroll*, [1948] S.C.R. 126	*16*
34.	*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34	*11, 16, 17*
SECONDARY SOURCES		
35.	"Union of Newfoundland with Canada – Ceremonies at St. John's, Newfoundland and Ottawa, Canada", House of Commons Debates (Appendix), 20-5, No 3 (April 1, 1949) at 2279 (Rt. Hon. Louis St. Laurent)	*10*
36.	D. Baker, "The Provincial Power to (Not) Prosecute Criminal Code Offences" (2017), 48:2 *Ottawa L.R.* 419 at 445	*23*
37.	Gerald V. La Forest, "Delegation of Legislative Power in Canada" (1975), 21:1 *McGill L.J.* 131 at 133	*22, 24*
38.	J. Hartery, "Protecting Parliamentary Sovereignty and Accountability in a Dualist Federation" (2020), 58:1 *Alta L.R.* 187 at 191-92	*25*
39.	J. Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020), 94 *S.C.L.R.* (2d) 85 at 87-91	*24, 25*
40.	J. Poirier, C. Saunders & J. Kincaid, eds., *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (OUP, 2015) at 6, 445-447, 491-494	*28*
41.	J.-F. Gaudreault-DesBiens & J. Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism" in P. Oliver, P. Macklem & N. Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (OUP, 2017) at 394-398	*10*
42.	W. K. Wright, "Canada's 'Constitution outside the Courts': Provincial Non-enforcement of Constitutionally Suspect Federal Criminal Laws as Case Study" in R. Albert, P. Daly & V. MacDonnell, eds, *The Canadian Constitution in Transition* (University of Toronto Press, 2019) at 117-119	*23*
43.	W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967), 45:3 *Can. Bar Rev.* 409 at 421	21
STATUTES & LEGISLATION		
44.	*Alberta Act, S.C. 1905*, c. 3 [reprinted in R.S.C. 1985, App. II, No. 20], ss. 3, 8, 10	*13*
45.	*British Columbia Terms of Union*, [reprinted in R.S.C. 1985, App. II, No. 10], ss. 10, 14	*13*
46.	*British North America Act, 1949 (U.K.), 12, 13 & 14 Geo. 6*, c. 22, [reprinted in R.S.C. 1985, App. II, No. 32], Schedule, ss. 3, 7-9, 11-13	*13*

	AUTHORITIES	Paragraph(s) Referenced in Factum
47.	*Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 64	*12, 13, 14, 16, 20, 22*
48.	*Manitoba Act, 1870, S.C. 1870,* c. 3 [reprinted in R.S.C. 1985, App. II, No. 8], ss. 2, 6-7	*13*
49.	*Prince Edward Island Terms of Union,* [reprinted in R.S.C. 1985, App. II, No. 12], Schedule	*13*
50.	*Saskatchewan Act, S.C. 1905*, c. 42 [reprinted in R.S.C. 1985, App. II, No. 21], ss. 3, 8, 10	*13*