Court File No. 40061

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

IN THE MATTER OF REFERENCE TO THE COURT OF APPEAL FOR QUEBEC RELATING TO THE ACT CONCERNING CHILDREN, YOUNG PEOPLE AND FIRST NATIONS, INUIT AND MÉTIS FAMILIES (Decree No. 1288-2019)

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, SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA

Respondents

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

ATTORNEY GENERAL OF QUÉBEC

Respondent

-and-

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF NORTHWEST TERRITORIES, SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA, ASENIWUCHE WINEWAK NATION OF CANADA, ASSEMBLY OF FIRST NATIONS, MAKIVIK CORPORATION, ASSEMBLY OF FIRST NATIONS QUÉBEC-LABRADOR, FIRST NATIONS OF QUÉBEC AND LABRADOR HEALTH AND SOCIAL SERIVCES COMMISSION

Interveners

Style of cause continued on next page

FACTUM OF THE INTERVENER,
COUNCIL OF YUKON FIRST NATIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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

Interveners

Boughton Law Corporation
700 – 595 Burrard Street
Vancouver, BC V7X 1S8

Tammy Shoranick
Daryn Leas | James M. Coady, K.C.
Tel: 604.647.4130
Fax: 604.683.5317
Email: tshoranick@boughtonlaw.com
dleas@boughtonlaw.com
jcoady@boughtonlaw.com

Counsel for the Intervener,
Council of Yukon First Nations

Borden Ladner Gervais LLP
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Agent for the Intervener,
Council of Yukon First Nations

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

COPY TO:

Bernard, Roy and Associés
1, rue Notre-Dame, Est, bureau 8.00
Montrél, QC H2J 1B6

Samuel Chayer | Francis Demers
Gabrielle Robert | Roy Bernard
Tel: 514.393.2336 ext 51456
Fax: 514.873.7074
Email: samuel.chayer@justice.gouv.qc.ca
francis.demers@justice.gouv.qc.ca
gabrielle.robert@justice.gouv.qc.ca

~ AND ~

Direction du droit constitutionnel et autochtone
Ministère de la Justice du Québec
1200, route de l'Eglise, 4 étage
Québec. QC G1V 4M1

Tania Clercq | Hubert Noreau-Simpson
Marie-Catherine Bolduc
Tel: 418.643.1477
Fax: 418.644.7030
Email: tania.clercq@justice.gouv.qc.ca
hubert.noreau-simpson@justice.gouv.qc.ca
marie-catherine.bolduc@justice.gouv.qc.ca

Counsel for the Appellant/Respondent,
Attorney General of Québec

Noël et Associés
225, montée Paiement, 2 étage
Gatineau, QC J8P 6M7

Pierre Landry

Tel: 819.503.2178
Fax: 819.771.5397
Email: p.landry@noelassocies.com

Agent for the Appellant/Respondent,
Attorney General of Québec

Department of Justice Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Bernard Letarte | François Joyal | Andréane Joanette-Laflamme | Lindy Rouillard-Labbé | Amélia Couture
Tel: 613.946.2776
Fax: 613.952.6006
Email: bernard.letarte@justice.gc.ca

Counsel for the Respondent/Appellant,
Attorney General of Canada

Franklin Gertler Étude Légale
507, Place d'Armes, Bureau 1701
Montrél, QC H2Y 2W8

Franklin S. Gertler | Gabrielle Champigny | Hadrien Gabriel Burlone
Tel: 514.798.1988
Fax: 514.798.1986
Email: franklin@gertlerlex.ca
gchampigny@gertlerlex.ca
h.burlone@hotmail.ca

~ AND ~

Assembly of First Nations Quebec-Labrador
250 rue Chef-Michel-Laveau. Bureau 201
Wendake, QC G0A 4V0

Mira Levasseur Moreau
Tel: 418.842.5020
Fax: 418.842.2660
Email: mlmoreau@apnql.com

Counsel for the Respondent /Intervener,
Assembly of First Nations Quebec-Labrador

Counsel for the Respondent,
First Nations of Quebec and Labrador Health and Social Services Commission

Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 613.670.6290
Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

Agent for the Respondent/Appellant,
Attorney General of Canada

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855 Ext 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent/Intervener,
Assembly of First Nations Quebec-Labrador

Agent for the Respondent,
First Nations of Quebec and Labrador Health and Social Services Commission

Pape Salter Teillet LLP
546 Euclid Aveenue
Toronto, ON M6G 2T2

Kathryn Tucker |Nuri Frame |
Robin Campbell, c.j.c
Tel: 416.916.2989
Fax: 416.916.3726
Email: ktucker@pstlaw.ca
nframe@pstlaw.ca
rcampbell@makivik.org

Counsel for the Respondent/Intervener,
Makivik Corporation

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855 Ext 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent/Intervener,
Makivik Corporation

Assembly of First Nations
1600 – 55 Metcalfe Street
Ottawa, ON K1P 6L5

Stuart Wuttke | Julie McGregor
Adam Williamson
Tel: 613.241.6789 Ext 228
Fax: 613.241.5808
Email: swittke@afn.ca
jmcgregor@afn.ca
awilliamson@afn.ca

Counsel for the Respondent/Intervener,
Assembly of First Nations

Supreme Law Group
1800 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

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

Agent for the Respondent/Intervener,
Assembly of First Nations

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

Claire Truesdale
Tel: 604.687.0549 Ext 201
Fax: 604.687.2696
Email: ctruesdale@jfklaw.ca

Counsel for the Respondent/Intervener,
Aseniwuche Winewak Nation of Canada

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent/Intervener,
Aseniwuche Winewak Nation of Canada

Conway Baxter Wilson LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Tel: 613.691.0368
Fax: 613.688.0271
Email: dtaylor@conwaylitigation.ca

~ AND ~

Burchells Lawyers LLP
1800 – 1801 Hollis Street
Halifax, NS B3J 3N4

Naiomi W. Metallic
Tel: 902.403.2229
Fax: 902.420.9326
Email: nmetallic@burchells.ca

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

Attorney General of Manitoba
Constitutional Law
1230 – 405 Broadway
Winnipeg, MB R3C 3L6

Heather Leonoff, K.C. | 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
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Manitoba

Attorney General of British Columbia
PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7

Leah Greathead
Tel: 250.356.8892
Fax: 250.356.9154
Email: leah.greathead@gov.bc.ca

Counsel for the Intervener,
Attorney General of British Columbia

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 1J8

Tel: 613.282.1712
Fax: 613.288.2896
Email: msobkin@sympatico.ca

Agent for the Intervener,
Attorney General of British Columbia

Alberta Justice and Solicitor General
10025 – 102 A Avenue, 10th Floor,
Edmonton, AB T5J 2Z2

Angela Croteau | Nicholas Parker
Tel: 780.422.6868
Fax: 780.643.0852
Email: angela.croteau@gov.ab.ca
nicholas.parker@gob.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

Attorney General of the Northwest Territories
Legal Division, Department of Justice
4903 - 49th Street, P.O. Box 1320
Yellowknife, NT X1A 2L9

Trisha Paradis | Sandra Jungles
Tel. 867.767.9257
Fax: 867.873.0234
Email: trisha_paradis@gov.nt.ca

Counsel for the Intervener,
Attorney General of Northwest Territories

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Northwest Territories

JFK Law Corporation
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Robert Janes, K.C. | Naomi Moses
Tel: 604.687.0549
Fax: 604.687.2696
Email: rjanes@jfklaw.ca
nmoses@jfklaw.ca

Counsel for the Intervener,
Grand Council of Treaty #3

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Grand Council of Treaty #3

O'Reilly, André-Grégoire & Associés s.e.n.c.
1007 – 1155 Robert-Bourassa Blvd.
Montréal, QC H3B 3A7

James A. O'Reilly, O.C., C.Q., Ad. E. | Marie-Claude André-Grégoire | Michelle Corbu | Vincent Carney
Tel: 514.871.8117
Fax: 514.871.9177
Email: james.oreilly@orassocies.ca
marie-claude.andre-gregoire@orassocies.ca
michelle.corbu@orassocies.ca
vincent.carney@orassocies.ca

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

Sunchild Law
Box 1408
Battleford, SK S0M 0E0

Michael Seed
Tel: 306.441.1473
Fax: 306.937.6110
Email: michael@sunchildlaw.com

~ AND ~

Dionne Schulze, s.e.n.c.
507 Place d'Armes, #502
Montréal, QC H2Y 2W8

Nicholas Dodd
Rose Victoria Adams
Tel: 514.842.0748
Fax: 514.842.9983
Email: ndodd@dionneschulze.ca

Counsel for the Intervener
Federation of Sovereign Indigenous Nations

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Agent for Intervener,
Federation of Sovereign Indigenous Nations

Hafeez Khan Law Corporation
1430 – 363 Broadway Ave.
Winnipeg, MB R3C 3N9

Hafeez Khan
Tel: 431.800.5650
Fax: 431.800.2702
Email: hkhan@hklawcorp.ca

~ AND ~

Peguis Child and Family Services
Unit 1-1349 Border Street
Winnipeg, MB R3H 0N1

Earl C. Stevenson
Tel: 204.632.5404
Fax: 204.632.7226
Email: earl.stevenson@peguiscfs.org

Counsel for the Intervener,
Peguis Child and Family Services

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Peguis Child and Family Services

Native Women's Association of Canada
120 Promenade du Portage
Gatineau QC J8X 2K1

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

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

First Peoples Law LLP
230 – 55 Murray Street
Ottawa, ON K1N 5M3

Virginia Lomax
Tel: 613.722.9091
Fax: 613.722.9097
Email: vlomax@firstpeopleslaw.com

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

Gowling WLG (Canada) LLP
2300 – Bentall 5
550 Burrard Street
Vancouver, BC V6C 2B5

Paul Seaman
Keith Brown
Tel: 604.891.2731 | 416.862.3614
Fax: 604.443.6780
Email: paul.seaman@gowlingwlg.com
keith.brown@gowlingwlg.com

Counsel for the Intervener,
Indigenous Bar Association

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Cam Cameron

Tel: 613.786.8650
Fax: 613.563.9869
Email: cam.cameron@gowlingwlg.com

Agent for the Intervener,
Indigenous Bar Association

Olthuis Kleer Townshend LLP
250 University Ave, 8th Floor
Toronto, ON M5H 2E5

Maggie Wente | Krista Nerland
Tel: 416.981.9330
Fax: 416.981.9350
Email: mwente@oktlaw.com
knerland@oktlaw.com

Counsel for the Intervener,
Chiefs of Ontario

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Chiefs of Ontario

Fogler, Rubinoff LLP
3000 – 77 King Street West
TD Centre North Tower, P.O. Box 95
Toronto, ON M5K 1G8

Katherine Hensel | Kristie Tsang
Tel: 416.864.9700
Fax: 416.941.8852
Email: khensel@foglers.com
ktsang@foglers.com

Counsel for the Intervener,
Inuvialuit Regional Corporation

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Inuvialuit Regional Corporation

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

**Brian A. Crane, K.C. | Graham Ragan |
Alyssa Flaherty-Spence | Kate Darling**
Tel: 613.786.0107
Fax: 613.563.9869
Email: brian.crane@gowlingwlg.com
graham.ragan@gowlingwlg.com
alyssa.flaherty-spence@gowlingwlg.com
kate.darling@livingtreelaw.ca

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

Burchells Lawyers LLP
1800 – 1801 Hollis Street
Halifax NS B3J 3N4

**Jason T. Cooke |
Ashley Hamp-Gonsalves**
Tel: 902.428-8344
Fax: 902.420-9326
Email: jcook@burchells.ca
ahampgonsalves@burchells.ca

Counsel for the Intervener,
NunanuKavut Community Council

Juristes Power Law
701 – 99 Bank Street
Ottawa, ON K1P 6B9

Jonathan Laxer

Tel: 613.907.5652
Fax: n/a
Email: jlaxer@powerlaw.ca

Agent for the Intervener,
NunanuKavut Community Council

William B. Henderson
3014 – 88 Bloor Street East
Toronto, ON M4W 3G9

William B. Henderson
Tel: 416-413-9878
Fax: n/a
Email: lawyer@bloorstreet.com

Counsel for the Intervener,
Lands Advisory Board

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855 Ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Lands Advisory Board

Pape Salter Teillet LLP
546 Euclid Avenue
Toronto, ON M6G 2T2

Jason T. Madden | Alexander DeParde
Emilie N. Lahaie
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, ON K1P 1C3

Matthew Estabrooks
Tel: 613.786.0211
Fax: 613.788.3573
Email: matthew.estabrooks@gowlingwlg.com

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, ON M6G 2T2

Zachary Davis | 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, ON K1P 1C3

Matthew Estabrooks
Tel: 613.786.0211
Fax: 613.788.3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for the Intervener,
Listuguj Mi'Gmaq Government

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Andrew K. Lokan
Tel: 416.646.4324
Fax: 416.646.4301
Email: andrew.lokan@paliareroland.com

Counsel for the Intervener,
Congress of Aboriginal Peoples

Dentons Canada LLP
1420 – 99 Bank Street
Ottawa, ON K1P 1H4

David R. Elliott
Tel: 613.783.9699
Fax: 613.783.9690
Email: david.elliott@dentons.com

Agent for the Intervener,
Congress of Aboriginal Peoples

Public Interest Law Centre
100 – 287 Broadway Street
Winnipeg, MB R3C 0R9

Joëlle Pastora Sala | Allison Fenske
Maxximilian Griffin-Rill 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
701 – 99 Bank Street
Ottawa, ON K1P 6B9

Darius Bossé

Tel: 613.702.5566
Fax: n/a
Email: dbosse@juristespower.ca

Agent for the Intervener,
First Nations Family Advocate Office

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

David Outerbridge | Craig Gilchrist |
Rebecca Amoah
Tel: 416.865.7825
Fax: 416.865.7380
Email: douterbridge@torys.com

Counsel for the Intervener,
Assembly of Manitoba Chiefs

Ratcliff LLP
500 – 221 East Esplanade
North Vancouver, BC V7M 3J3

Maegen M. Giltrow, K.C.
Natalia Sudeyko
Tel: 604.988.5201
Fax: 604.988.1452
Email: mgiltrow@ratcliff.com

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

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Tel: 613.237.4740
Fax: 613.232.2680
Email: broy@champlaw.ca

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

Gowling WLG (Canada) LLP
2300 – 550 Burrard Street
Bentall 5
Vancouver, BC V6C 2B5

Aaron Christoff | Brent Murphy
Tel: 604.443.7685
Fax: 604.683.3558
Email: aaron.chritoff@gowlingwlg.com

Counsel for the Intervener,
Tribal Chiefs Ventures Inc.

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Marie-Christine Gagnon
Tel: 613.786.0086
Fax: 613.563.9869
Email: marie-christine.gagnon@gowling.com

Agent for the Intervener,
Tribal Chiefs Ventures Inc.

Olthuis Van Ert
66 Lisgar Street
Ottawa, ON K2P 0C1

Gib Van Ert | Fraser Harland |
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
1100 – 20 Dundas Street West
Toronto, ON M5G 2G8

Jessica Orkin | 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 Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613.482.2463
Fax: 613.235.5327
Email: cbauman@goldblattpartners.com

Agent for the Intervener,
David Asper Centre for Constitutional Rights

Cain Lamarre
814 Saint Joseph Boulevard
Roberval, QC G8H 2L5

François G. Tremblay | Benoît Amyot
Tel: 418.545.4580
Fax: 418.549.9590
Email: notification.cain.saguenay@clcw.ca

Counsel for the Intervener,
Regroupement Petapan

Conway Baxter Wilson LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3CX9

Marion Sandilands
Tel: 613.780.2021
Fax: 613.688.0271
Email: msandilands@conwaylitigation.ca

Agent for the Intervener,
Regroupement Petapan

McCarthy Tétrault LLP
5300 TD Bank Tower
Toronto, ON M5K 1E6

Jesse Hartery | Simon Bouthillier
Tel: 416.362.1812
Fax: 416.868.0673
Email: jhartery@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

Gowling WLG (Canada) LLP
2300 – 550 Burrand Street
Bentall 5
Vancouver, BC V6C 2B5

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
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey Beedell
Tel: 613.786.0171
Fax: 613.563.9869
Email: jeff.beedell@gowlingwlg.com

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

Simon Bouvin Lemieux
106 – 1150 Saint-Félicien Boulevard
Saint-Félicien, QC G8K 2W5

Keven Ajmo
Tel: 418.679.8888
Fax: 514.679.8902
Email: k.ajmo@sblavocats.com

Counsel for the Inervener,
Conseil des Atikamekw d'Opitciwan

Gowling WLG (Canada) LLP
2300 – 550 Burrand Street
Bentall 5
Vancouver, BC V6C 2B5

Maxime Faille
Tel: 604.891.2733
Fax: 604.443.6786
Email: maxime.faille@gowlingwlg.com

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

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey Beedell
Tel: 613.786.0171
Fax: 613.563.9869
Email: jeff.beedell@gowlingwlg.com

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

Falconers LLP
204 – 10 Alcorn Avenue
Toronto, ON M4V 3A9

Julian 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, ON K1P 5H9

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

Agent for the Intervener,
Nishnawbe Aski Nation

Table of Contents

Page

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal will not only determine the constitutional validity of the *Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (the "***Act***"), but will establish the extent of—and the extent to which Indigenous peoples can have confidence in—the promise of a nation-to-nation relationship between Indigenous governments and the Crown.

2. The Council of Yukon First Nations ("**CYFN**") strongly supports a finding by this Court that s. 35 of the *Constitution Act, 1982*[1] includes a generic inherent right to self-government that affords Indigenous peoples the right to, among other things, regulate child and family services. But, CYFN submits this Court should also affirm the federal government's jurisdiction, pursuant to s. 91(24) of the *Constitution Act, 1867*[2], to put into practice decades of reconciliation rhetoric by legislating to afford Indigenous laws made further to s. 35 self-government rights and s. 91(24) legislation with the power of federal law, as it has done in the *Act*. For too long, s. 91(24) has been wielded by Parliament as a weapon to legislate against Indigenous peoples' interests and rights; in the *Act*, Parliament has recognized that its s. 91(24) powers must now be harnessed to guarantee the priority of Indigenous laws over provincial laws in the fabric of Canadian constitutional law.

3. CYFN submits this Court should find s. 21 and s. 22(3) of the *Act* are constitutional and that the federal government has jurisdiction under s. 91(24) to give Indigenous laws the status of federal law, and thus the protection of paramountcy. This conclusion is both legally correct and the only outcome that will propel our nation forward on the path to achieve reconciliation and the promise of a nation-to-nation relationship between Indigenous peoples and the Crown. CYFN further submits this Court should recognize that the novel circumstances raised in this appeal—where an Indigenous law made further to s. 35 rights that also has the status of federal law pursuant to s. 91(24) legislation—dictates that jurisprudence applying the framework in *R v Sparrow*, [1990] 1 SCR 1075 ("***Sparrow***") to conflicts between provincial laws and s. 35 rights is inappropriate; rather, the rules of paramountcy apply to shield such Indigenous laws to the extent of a conflict.

---

[1] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c 11
[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

B. Statement of Facts

4. CYFN takes no position on the underlying facts in this appeal, but provides this Court context as to the specific interests of self-governing Yukon First Nations. CYFN is an umbrella organization representing ten self-governing Yukon First Nations; CYFN and its members have a long and important history and experience with respect to Indigenous self-government. On May 29, 1993, the Council for Yukon Indians (predecessor to CYFN) and the Government of Canada and Government of Yukon (collectively, the "**Crown**"), signed an Umbrella Final Agreement (the "**UFA**"),[3] which established a model for First Nations self-government. The UFA provided the framework within which each of Yukon First Nation has or will conclude land claims agreements with the Crown (the "**Final Agreements**"). The Final Agreements incorporate all the text of the UFA, with the addition of specific provisions that apply to individual First Nations. Eleven Yukon First Nations have entered into Final Agreements, which are treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*.

5. Each Yukon First Nation with a Final Agreement has also negotiated a Self-Government Agreement (the "**Self-Government Agreements**") negotiated pursuant to "Ch. 24—Yukon Self-Government" of the UFA. All Yukon First Nation Self-Government Agreements are substantially similar; each recognizes a First Nation's power to enact laws relating to its administration and management of its citizens and lands.[4] The Final Agreements and Self-Government Agreements affirm the inherent right to self-government, establish a nation-to-nation relationship and were enacted without prejudice to the s. 35 rights of Yukon First Nations.[5] It is open to Yukon First Nations who have Self-Government Agreements to act further to s. 35 rights to self-government. The Self-Government Agreements address paramountcy: s. 13.5.2 provides self-governing Yukon First Nations and the federal government will negotiate the paramountcy of laws of Yukon First Nations over conflicting federal laws, and s. 13.5.3 provides a territorial laws is inoperative to the extent it provides for any matter in a law enacted by a self-governing First Nation.[6]

---

[3] *Umbrella Final Agreement* between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993 [**UFA**]

[4] *See for example* Vuntut Gwitchin First Nation Self-Government Agreement [**VGFN SGA**] made between the Vuntut Gwitchin First Nation, the Government of Canada and the Government of Yukon on May 29, 1993 at s. 13.1.1, pdf p. 23

[5] UFA, *supra* note 3 at ss. 24.12.2 and 24.12.4, pdf p. 279-280.

[6] *See for example* VGFN SGA, *supra* note 4 at ss. 13.5.2 and 13.5.3, pdf p. 28-29

PART II – STATEMENT OF ISSUES

6. CYFN's submissions speak to two issues raised in this appeal: i) the constitutionality of s. 21 and s. 22(3) of the *Act*; and ii) the applicability of the *Sparrow* framework.

PART III – STATEMENT OF ARGUMENT

7. CYFN submits that:

a) S. 21 and s. 22(3) of the *Act* are constitutional for at least two reasons in addition to those raised by the Attorney General of Canada in this appeal:

i. Indigenous laws may be enacted concurrently further to s. 35 inherent rights to self-government and pursuant to federal legislation made under s. 91(24), and in that regard the paramountcy protections afforded to Indigenous laws in the *Act* are pursuant to s. 91(24) legislation, not s. 35; and,

ii. jurisprudence under s. 88 of the *Indian Act*, RSC 1985, c I-5 (the "***Indian Act***") affirms the jurisdiction of the federal government to use s. 91(24) to afford Indigenous laws the status of federal law, and thus paramountcy over conflicting provincial laws.

b) the *Sparrow* test should not apply to Indigenous laws enacted pursuant to s. 35 inherent rights of self-government where such laws have also been granted the status of federal law pursuant to s. 91(24) legislation.

A. S. 21 and s. 22(3) of the *Act* are constitutional

i. <u>The paramountcy protections in the *Act* are further to s. 91(24), not s. 35</u>

8. CYFN maintains that s. 35 inherent rights to self-government provide Indigenous governments legislative jurisdiction over their children and families. At the same time, CYFN submits it is constitutionally valid for the federal government to use its s. 91(24) authority to affirm the existence of that s. 35 right to self-government and, through s. 91(24) legislation, to provide additional tools to facilitate the exercise of that right, as it has done in the *Act*. S. 21 and s. 22(3) of the *Act* are such tools; they afford Indigenous laws made further to both the s. 35 right to self-government <u>and,</u> in accordance with the *Act* with the force of law as federal law, and federal paramountcy over provincial laws in cases of conflict or inconsistency.

9. CYFN submits the Court of Appeal erred in finding that Indigenous child welfare laws would be enacted only pursuant to the s. 35 right to self-government and not concurrently pursuant to the *Act*.[7] The Court of Appeal determined Indigenous laws are enacted "in reliance on the right to self-government are not federal laws enacted under s. 91 and subject to the doctrine of federal paramountcy, but rather Aboriginal laws that serve Aboriginal imperatives."[8] The Court of Appeal thus found the *Act* improperly grants constitutional priority to legislation of an Indigenous government acting pursuant only to the s. 35 right of self-government.[9] That is not accurate; the *Act* grants constitutional priority to Indigenous laws made pursuant to both s. 35 and validly enacted s. 91(24) legislation; in doing so, the *Act* does not expand the scope of s. 35 but instead engages both s. 35 and s. 91(24) and the corresponding constitutional protections of each.

10. The *Act* rightly affirms the right of Indigenous governments to make laws regarding child welfare as an expression of s. 35 rights to self-government and provides tools to Indigenous governments to exercise its jurisdiction with respect to those rights in a manner that ensures their constitutional certainty. While affirmation of this s. 35 right in the *Act* was correct and furthers reconciliation, the *Act* itself relies on the federal government's s. 91(24) jurisdiction and provides a mechanism for Indigenous laws to also be made further to the *Act*. S. 21 and 22(3) of the *Act* confer Indigenous laws enacted pursuant to s. 35 rights and in accordance with the framework established in the *Act* with the force of federal law and paramountcy over conflicting provincial laws. This is triggered when the self-government right is exercised in accordance with the *Act*.

11. An Indigenous government could make laws using its s. 35 rights without accepting benefits it may be entitled to in the *Act*. Such laws may not automatically be paramount to conflicting laws, though may be paramount pursuant to s. 35. However, if an Indigenous government seeks to increase certainty as to the status of its laws vis-à-vis provincial laws—and to access benefits of the *Act*—it may enact legislation pursuant to the right to self-government and in accordance with the *Act*; such laws would be made pursuant to both s. 35 and s. 91(24) and would be entitled to the corresponding constitutional protections of each.

---

[7] Unofficial English translation of the opinion of the Court, *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***] at paras. 536-542, 544 and 548
[8] *Id.* at para. 540
[9] *Id.* at paras. 536-548

> Incorporation by reference of another jurisdiction's valid laws does not preclude them from continuing to apply, if otherwise applicable, of their own force (*R v Francis*, [1988] 2 SCR 1025, at 1031). They are, therefore, available for enforcement either as federal law or as Indigenous law, in each case with the relevant constitutional consequences.
>
> […]
>
> [T]he Constitution gives Parliament all the power it needs to give the force of federal law to the provisions in Indigenous child welfare laws validly enacted pursuant to inherent rights of self-government and, having done so, to determine their priority as against other, coordinate federal legislation. The manner in which Parliament chooses to achieve that result should, therefore, be of little, if any, constitutional consequence, as long as the statutory language makes the federal intention sufficiently clear. Parliament may, of course, at any time change its mind and discontinue doing so. Should that happen, those laws would remain in force as valid Indigenous laws, still with the full protection of section 35 of the *Constitution Act, 1982* but without the added heft of federal law.[10]

12. Similarly, Yukon Self-Government Agreements provide for paramountcy of Yukon First Nations' laws over conflicting Yukon territorial laws—and, subject to negotiation, federal—laws.[11] The *Yukon First Nations Self-Government Act*, SC 1994, c 35 is federal legislation with the stated purpose in its preamble of bringing the Self-Government Agreements into effect under federal law; it provides as follows with respect to the paramountcy of Yukon First Nations' laws:

> 19(1) To the extent that a Yukon enactment and a law enacted by a first nation make provision for the same matter, the Yukon enactment does not apply to the first nation, to its citizens or in respect of its settlement land.[12]

This federal declaration of the paramountcy of First Nations' laws over territorial laws in s. 91(24) legislation does not negate the fact that such Indigenous laws could have been enacted pursuant to inherent rights of self-government, but it *does* provide legal certainty as to the status of Indigenous laws vis-à-vis territorial laws without the need to resort to courts to determine the issue. This is a valid exercise of federal s. 91(24) jurisdiction and is a positive endeavor that furthers reconciliation and guarantees the priority of Indigenous laws in the Canadian constitutional order. [13]

---

[10] Kerry Wilkins, *With a Little Help from the Feds: Incorporation by Reference and Bill C-92* online: ABlawg at pp. 2-3
[11] *See for example* VGFN SGA, *supra* note 4 at ss. 13.5.2 and 13.5.3, pdf p. 28-29
[12] *Yukon First Nations Self-Government Act*, SC 1994, c 35 at s. 19(1)
[13] Respondent Attorney General of Canada's Factum filed August 15, 2022 at paras. 104-105

13. Any limitation on the ability of the federal government to use its s. 91(24) jurisdiction to declare Indigenous laws paramount over provincial or territorial laws would not only be legally incorrect, but it could have far-reaching adverse impacts and could jeopardize the existing Yukon First Nation Self-Government Agreements and modern treaty framework. The federal declaration of paramountcy of Indigenous laws over conflicting territorial and provincial laws is constitutional and affords the certainty necessary for Indigenous governments to trust the promise of a nation-to-nation relationship. The federal government, through s. 21 and s. 22(3) of the *Act*, provides that certainty and, in doing so, facilitates essential progress towards reconciliation.

ii. Jurisprudence confirms Indigenous laws can be made paramount to Provincial laws

14. CYFN submits the Court of Appeal erred in finding that the federal government used its s. 91(24) authority to unconstitutionally broaden the scope of s. 35 through s. 21 and 22(3).[14] CYFN submits the federal government has, and can, pass s. 91(24) legislation that gives Indigenous laws the status of federal law and thus paramountcy over conflicting provincial legislation. Courts have consistently acknowledged this federal jurisdiction in the context of s. 88 of the *Indian Act*, which, like the *Act*, is a product of the federal government's s. 91(24) powers.

15. While the *Indian Act* incorporates colonial mechanisms and has few redeeming qualities and limited application to the Yukon Territory, s. 88 jurisprudence on the incorporation of Indigenous laws as federal laws, and the paramountcy of such laws over conflicting provincial laws, provides support for a finding that s. 21 and s. 22(3) of the *Act* are constitutionally valid. In the context of s. 88, this Court and lower courts have recognized that Indigenous laws made in accordance with s. 81 of the *Indian Act* have the status of a federal law and will override conflicting provincial laws of general application. These cases provide helpful guidance and precedent on the issue of the constitutional validity of s. 21 and s. 22(3) of the *Act*.

16. S. 88 of the *Indian Act* incorporates by reference provincial laws which would otherwise be inapplicable to Indians, subject to certain exceptions, including "to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts…."[15]

---

[14] *QCCA, supra* note 7 at paras. 536-542, 544 and 548
[15] *Indian Act*, RSC 1985, c I-5 at s. 88 [emphasis added]

17. S. 81 of the *Indian Act* provides Indian band councils can make bylaws for enumerated purposes including, for example, health, wildlife management and observance of law and order.[16] S. 88 of the *Indian Act* affords Indigenous laws made pursuant to s. 81 paramountcy over conflicting provincial laws. S. 88 *Indian Act* jurisprudence is instructive; this Court and lower courts have consistently recognized that Indigenous laws made in accordance with the *Indian Act* have the force of federal law[17] and override conflicting provincial laws of general application.[18] Similarly, compliance with s. 20 of the *Act* triggers s. 21 and s. 22(3) and cloaks Indigenous laws with the force of federal law and paramountcy over provincial laws.

18. To CYFN's knowledge, none of the s. 88 cases considered it *ultra vires* federal jurisdiction for Parliament, via the *Indian Act*, to use s. 91(24) to grant federal law status to Indigenous laws, and paramountcy over conflicting provincial laws. S. 88 jurisprudence provides clear precedent to support a finding s. 21 and s. 22(3) of the *Act* are not *ultra vires* federal jurisdiction, and that Parliament can use its s. 91(24) jurisdiction to incorporate by reference, and extend the doctrine of paramountcy, to Indigenous laws on child and family services. The Court of Appeal's failure to recognize this jurisdiction goes against reconciliation and the nation-to-nation relationship; in doing so the Court of Appeal "denies any form of sovereignty to Indigenous communities. It asserts, in effect, that Parliament can only give primacy to a norm adopted by an officially recognized sovereign entity (a provincial legislature, for example), but not to one adopted pursuant to the exercise of a limited right of self-government."[19] Such an outcome cannot stand.

---

[16] CYFN maintains that Indigenous laws made pursuant to s. 81 of the *Indian Act* are also made further to the inherent right of self-government, and that Indigenous governing bodies are not reliant on any grant of authority made in the *Indian Act* to exercise their self-government rights.

[17] *R v. Blackbird*, [2005] 74 OR (3d) 241, [2005] 2 CNLR 309 (ONCA) at para. 8; *R v Jimmy*, [1987] BCJ No 1516, [1987] 3 CNLR 77 (BCCA) at para. 12; *S (EG) v Spallumcheen Band Council*, [1998] BCJ No 3268, [1999] 2 CNLR 306 (BCPC) **[*Spallumcheen BCPC*]** at para. 46;

[18] *R v. Van der Peet*, [1996] 2 SCR 507 at para. 118; *Kruger et al v The Queen*, [1978] 1 SCR 104 at p. 116; *R v Kruger et al,* [1975] 5 WWR 167, 60 DLR (3d) 144 (BCCA) at p. 147; *Spallumcheen BCPC*, *supra* note 17 at paras. 46-47; *S (EG) v Spallumcheen Band Council*, [1998] BCJ No 2778, [1999] 2 CNLR 318 (BCSC) at para. 2

[19] Jean Leclair, *Zeus, Metis and Athena. The Path towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders* (June 28, 2022) **[*Leclair*]** at p. 24

B. The *Sparrow* test should not apply

19. CYFN submits the framework in *Sparrow*[20] does not apply to conflicts between provincial laws and Indigenous laws enacted further to a s. 35 right, where such Indigenous laws have concurrently been made further to s. 91(24) legislation and are granted the status of federal law in that legislation, as is done in s. 21 of the *Act*. In such cases, Indigenous laws hold the dual status of both a s. 35 right and a s. 91(24) federal law; this dual status renders Indigenous laws paramount to provincial laws in a conflict and the rules of paramountcy, not the test in *Sparrow*, should apply.

20. The scenario in this appeal can be distinguished from that in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44[21] and other cases that apply the *Sparrow* framework to conflicts between provincial laws and s. 35 rights[22] in that none of those cases examined a conflict between a provincial law and a conflicting law or right made pursuant to both s. 35 and s. 91(24) legislation. In *Tsilhqot'in*, this Court held that where a federal or provincial law conflicts with a s. 35 right the *Sparrow* test applies and the question of paramountcy is not engaged as there is no conflicting provincial and federal laws.[23] But the conflict in *Tsilhqot'in* was between only a s. 35 right and a provincial law; that is not so here, where a s. 35 right and a federal law (the Indigenous law, having been granted the effect of federal law in the *Act*) could both conflict with a provincial law.

21. The *Tsilhqot'in* Court acknowledged that s. 35 limits on federal and provincial powers have nothing to do with whether something lies at the core of the federal government's powers; the Court affirmed that where the basis of a conflict is between federal and provincial levels of government, paramountcy continues to apply.[24] Here, the *Act* gives Indigenous laws the effect federal law and as such the conflict in question is between provincial and federal laws; the *Sparrow* framework, and *Tsilhqot'in* and its progeny applying that framework, do not govern this scenario.

---

[20] *R v Sparrow*, [1990] 1 SCR 1075 at pp. 1112-1119
[21] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 25 [***Tsilhqot'in***] at paras. 118-125, 150-152
[22] *See for example Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras. 160-161; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447 at para. 53; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at paras. 150-154; *R v Badger*, [1996] 1 SCR 771 at paras. 96-98
[23] *Tsilhqot'in*, *supra* note 21 at paras. 151-152
[24] *Id.* at paras. 142 and 152; *McCaleb v Rose*, 2017 BCCA 318, 2 BCLR (6th) 344 at paras. 8-12

22. In *R v Côté*, [1996] 3 SCR 139, this Court contemplated that both a s. 35 right and a federal law could conflict with a provincial law, resulting in the need to conduct analyses under both *Sparrow* and paramountcy rules. This Court noted that even if the provincial law was not found to unjustifiably infringe Aboriginal rights under *Sparrow*, "it may still be open to the appellants to challenge the provincial regulation under the federal statutory protection extended to aboriginal treaties under s. 88 of the *Indian Act*."[25] This Court ultimately determined the provincial law did not infringe the appellants' rights, and no analysis under *Sparrow* or paramountcy was required.[26]

23. However, in *obiter* the *Côté* court (*per* Lamer C.J.) considered overlapping statutory and constitutional protection from inconsistent provincial legislation afforded to treaty rights under both s. 35 and s. 88 of the *Indian Act*; the Court found s. 88 confers special statutory protection to s. 35 treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy.[27] Indeed, the Court noted that the statutory protection for treaty rights under s. 88 against conflicting provincial laws appeared broader than that afforded under s. 35—the Court opined that once it has been demonstrated that a provincial law infringed the terms of treaty, the treaty would arguably prevail under s. 88 without applying the *Sparrow* test or any other justification test.

> While the appellants have failed to demonstrate that the *Regulation* unjustifiably infringes their constitutional rights under s. 35(1) of the *Constitution Act, 1982*, I must still consider whether the provincial regulation has encroached on their treaty rights in contravention of the federal statutory protection accorded to treaty rights under s. 88 of the *Indian Act*.
>
> […]
>
> S. 88 accords a special statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy…I note that, on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes "the terms of [a] treaty", the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the precise boundaries of the protection of s. 88 remains

---

[25] *R v Côté*, [1996] 3 SCR 139 [***Côté***] at para. 33; Leclair, *supra* note 19 at pp. 26-27
[26] *Côté, supra* note 25 at paras. 83 and 88
[27] *Id*. at paras. 84-88

> a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88. In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s. 35(1).[28]

24. While *Côté* was decided prior to developing s. 35 jurisprudence, neither *Côté* nor that subsequent jurisprudence directly address a scenario where both a s. 35 right and a s. 91(24) law (as opposed to general 91(24) jurisdiction) are simultaneously engaged, as they are in this appeal. *Tsilhqot'in* does not even reference *Côté*. CYFN submits this Court should adopt the *Côté obiter* reasoning to distinguish s. 35 cases invoking *Sparrow* and should find that Indigenous laws made pursuant to a s. 35 right and having the status of federal law further to s. 91(24) legislation have both the constitutional shield of s. 35 and the additional statutory shield of federal legislation. Such laws, which have the status of both s. 35 rights and federal law, carry stronger protection than afforded by s. 35 alone; as such, paramountcy rules and not *Sparrow* should apply.

25. In *Côté*, this Court validated federal s. 91(24) jurisdiction to afford s. 35 rights special statutory protection and paramountcy against conflicting provincial legislation; it flows the federal government has jurisdiction to legislate that the *Act* cloaks Indigenous laws having the status of federal law with such statutory protection. The *Sparrow* test should not apply to justify an infringement of a s. 35 right where the federal government has afforded that right an additional shield of statutory protection pursuant to s. 91(24) legislation; in such cases, the rules of paramountcy, not *Sparrow*, apply. This Court can and should find s. 21 and s. 22(3) of the *Act* provide Indigenous laws enacted pursuant to both s. 35 and the *Act* with the status of federal law and thus a shield of statutory protection that invokes paramountcy rules and removes the opportunity for a conflicting provincial law to be justified under the *Sparrow* framework.

PART IV – SUBMISSIONS ON COSTS

26. CYFN seeks no costs and asks that no costs be awarded against it.

PART V – ORDER

27. CYFN takes no position on the outcome of this appeal.

---

[28] *Côté, supra* note 25 at paras. 84, 86-87 [citations omitted]

PART VI – SUBMISSIONS ON PUBLICATION

N/A

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

Tammy Shoranick
Daryn Leas
James M. Coady, K.C.
Counsel for the Intervener,
Council of Yukon First Nations

PART VII – AUTHORITIES

A. Caselaw

No.	Authority	Paragraph Reference
1.	*Delgamuukw v British Columbia*, [1997] 3 SCR 1010	20
2.	*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447	20
3.	*McCaleb v Rose*, 2017 BCCA 318, 2 BCLR (6th) 344	20
4.	*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765	20
5.	*R v Badger*, [1996] 1 SCR 771	20
6.	*R v. Blackbird*, [2005] 74 OR (3d) 241, [2005] 2 CNLR 309 (ONCA)	17
7.	*R v. Côté*, [1996] 3 SCR 139	22, 23, 24, 25
8.	*R v Jimmy*, [1987] BCJ No 1516, [1987] 3 CNLR 77 (BCCA)	17
9.	*R v Francis*, [1988] 2 SCR 1025	11
10.	*R v Kruger et al,* [1975] 5 WWR 167, 60 DLR (3d) 144 (BCCA)	17
11.	*Kruger et al v The Queen*, [1978] 1 SCR 104	17
12.	*R v Sparrow*, [1990] 1 SCR 1075	*passim*
13.	*R v. Van der Peet*, [1996] 2 SCR 507	17
14.	*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et lesfamilles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185	*passim*
15.	*S (EG) v Spallumcheen Band Council*, [1998] BCJ No 3268, [1999] 2 CNLR 306 (BCPC)	17
16.	*S (EG) v Spallumcheen Band Council*, [1998] BCJ No 2778, [1999] 2 CNLR 318 (BCSC)	17
17.	*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 25	20, 21, 24

B. Secondary Sources

No.	Secondary Source	Section, Rule, Etc.
1.	Umbrella Final Agreement made between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993	24, 24.12.2, 24.12.4
2.	Vuntut Gwitchin First Nation Self-Government Agreement made between the Vuntut Gwitchin First Nation, the Government of Canada and the Government of Yukon on May 29, 1993	13.1.1, 13.5.2, 13.5.3
3.	Jean Leclair, *Zeus, Metis and Athena. The Path towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders* (June 28, 2022), online: SSRN	pp. 24, 26, 27
4.	Kerry Wilkins, *With a Little Help from the Feds: Incorporation by Reference and Bill C-92* online: ABlawg	pp. 2, 3

C. Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24	ss. 20, 21, 22(3)
	Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, LC 2019, ch 24	ss. 20, 21, 22(3)
2.	*Constitution Act, 1867* (U.K.), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5	s. 91(24)
	Lois Constitutionnelles De 1867, 30 & 31 Vict., ch 3 (R.-U)	s. 91(24)
3.	*Constitution Act, 1982,* being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c 11	s. 35
	Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11	s. 35
4.	*Indian Act*, RSC 1985, c I-5	ss. 81, 88
	Loi sur les Indiens, LRC (1985), ch I-5	ss. 81, 88

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
5.	*Rules of the Supreme Court of Canada*, SOR/2002-156	Rule 37 Rule 42
	Règles de la Cour suprême du Canada, DORS/2002-156	Régle 37 Régle 42
6.	*Yukon First Nations Self-Government Act*, SC 1994, c 35	s. 19(1)
	Loi sur l'autonomie gouvernementale des premières nations du Yukon, LC 1994, ch 35	s. 19(1)

PART VII – STATUTES, REGULATIONS, ETC.

A. Statutes

i. An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24

An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24	
Force of law **21 (1)** A law, as amended from time to time, of an Indigenous group, community or people referred to in subsection 20(3) also has, during the period that the law is in force, the force of law as federal law.	**Force de loi** 21 (1) A également force de loi, à titre de loi fédérale, le texte législatif, avec ses modifications successives, du groupe, de la collectivité ou du peuple autochtones visé au paragraphe 20(3), pendant la période au cours de laquelle ce texte est en vigueur.
Interpretation **(2)** No federal law, other than this Act, affects the interpretation of a law referred to in subsection (1) by reason only that subsection (1) gives the law the force of law as federal law.	**Interprétation** **(2)** Les lois fédérales, autre que la présente loi, n'ont aucun effet sur l'interprétation du texte visé au paragraphe (1) du seul fait que ce paragraphe lui donne force de loi à titre de loi fédérale.
Application of federal laws **(3)** No federal law, other than this Act and the Canadian Human Rights Act, applies in relation to a law referred to in subsection (1) by reason only that subsection (1) gives the law the force of law as federal law.	**Application des lois fédérales** **(3)** Les lois fédérales, autre que la présente loi et la Loi canadienne sur les droits de la personne, ne s'appliquent pas relativement au texte visé au paragraphe (1) du seul fait que ce paragraphe lui donne force de loi à titre de loi fédérale.
Conflict — provincial laws **22(3)** For greater certainty, if there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services that is in a provincial Act or regulation, the provision that is in the law of the Indigenous group, community or people prevails to the extent of the conflict or inconsistency.	**Conflit — loi provinciale** **22(3)** Il est entendu que les dispositions relatives aux services à l'enfance et à la famille de tout texte législatif d'un groupe, d'une collectivité ou d'un peuple autochtones l'emportent sur les dispositions incompatibles relatives aux services à l'enfance et à la famille de toute loi provinciale ou de tout règlement pris en vertu d'une telle loi.

ii. Yukon First Nations Self-Government Act, SC 1994, c 35

Yukon First Nations Self-Government Act, SC 1994, c 35	
Yukon enactments	**Lois territoriales**
19 (1) To the extent that a Yukon enactment and a law enacted by a first nation make provision for the same matter, the Yukon enactment does not apply to the first nation, to its citizens or in respect of its settlement land.	19 (1) Les lois territoriales s'appliquent à la première nation, à ses citoyens et à ses terres désignées dans la mesure où elles ne traitent pas d'une matière à l'égard de laquelle cette première nation a édicté un texte législatif.

B. Secondary Sources

i. Umbrella Final Agreement between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993

Umbrella Final Agreement between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993

CHAPTER 24 - YUKON INDIAN SELF-GOVERNMENT

24.1.0 General

24.1.1 Government shall enter into negotiations with each Yukon First Nation which so requests with a view to concluding self-government agreements appropriate to the circumstances of the affected Yukon First Nation.

24.1.2 Subject to negotiation of an agreement pursuant to 24.1.1 and in conformity with the Constitution of Canada, the powers of a Yukon First Nation may include the powers to:

24.1.2.1 enact laws and regulations of a local nature for the good government of its Settlement Land and the inhabitants of such land, and for the general welfare and development of the Yukon First Nation;

24.1.2.2 develop and administer programs in areas of Yukon First Nation responsibility;

24.1.2.3 appoint representatives to boards, councils, commissions and committees as provided for in the Settlement Agreements;

24.1.2.4 allocate, administer and manage Settlement Land;

24.1.2.5 contract with Persons or governments;

24.1.2.6 form corporations and other legal entities;

24.1.2.7 borrow money; and

24.1.2.8 levy and collect fees for the use or occupation of Settlement Land including property taxes.

24.1.3 Self-government agreements shall not affect:

24.1.3.1 the rights of Yukon Indian People as Canadian citizens; and

24.1.3.2 unless otherwise provided pursuant to a self-government agreement or legislation enacted thereunder, their entitlement to all of the services, benefits and protections of other citizens applicable from time to time.

24.2.0 Subjects for Negotiation

24.2.1 Negotiations respecting a self-government agreement for a Yukon First Nation may include the following subjects:

24.2.1.1 the Yukon First Nation constitution;

24.2.1.2 the Yukon First Nation's community infrastructure, public works, government services and Local Government Services;

24.2.1.3 community development and social programs;

24.2.1.4 education and training;

24.2.1.5 communications;

24.2.1.6 culture and aboriginal languages;

24.2.1.7 spiritual beliefs and practices;

24.2.1.8 health services;

24.2.1.9 personnel administration;

24.2.1.10 civil and family matters;

24.2.1.11 subject to federal tax Law, the raising of revenue for local purposes including direct taxation;

24.2.1.12 economic development;

24.2.1.13 the administration of justice and the maintenance of law and order;

24.2.1.14 relations with Canada, the Yukon and local governments;

24.2.1.15 financial transfer arrangements;

24.2.1.16 an implementation plan; and

24.2.1.17 all matters ancillary to the foregoing, or as may be otherwise agreed.

Umbrella Final Agreement between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993

24.3.0 Devolution

24.3.1 Government and a Yukon First Nation may negotiate the devolution of programs and services associated with the responsibilities of the Yukon First Nation as agreed in negotiations over matters enumerated in 24.2.1.

24.3.2 For greater certainty, pursuant to 24.2.1, Government and the Yukon First Nation may negotiate the devolution of programs and services dealing with the following:

24.3.2.1 Yukon First Nation authority for the design, delivery and management of Indian language and cultural curriculum;

24.3.2.2 Yukon First Nation authority for the design, delivery and administration of tribal justice; and

24.3.2.3 the division and sharing of Yukon First Nation and Government responsibility for the design, delivery and administration of programs relating to,

Education

(a) Indian student counselling,

(b) cross cultural teacher/administrator orientation,

(c) composition of teaching staff,

(d) early childhood, special, and adult education curriculum,

(e) kindergarten through grade 12 curriculum,

(f) the evaluation of teachers, administrators and other employees,

Health and Social Services

(g) family and child welfare, including custom adoption,

(h) substance abuse programs,

(i) juvenile offender programs,

(j) child development programs,

(k) programs for the mentally, physically, emotionally or socially disabled,

(l) other health and social services that the parties may agree to from time to time,

Justice

(m) policing and enforcement of law,

(n) corrections,

(o) probation services,

(p) community conflict resolution,

Employment Opportunities

(q) increased employment opportunities for Yukon Indian People; and

24.3.2.4 such other programs and services as the parties may agree.

24.4.0 Participation

24.4.1 The parties to the Umbrella Final Agreement may negotiate guaranteed representation for Yukon First Nations on government commissions, councils, boards and committees in the Yukon established to deal with the following matters:

24.4.1.1 education;

24.4.1.2 health and social services;

24.4.1.3 justice and law enforcement; and

24.4.1.4 other matters as may be agreed.

24.5.0 Yukon First Nation Constitutions

24.5.1 Negotiations regarding a Yukon First Nation constitution may include the following:

24.5.1.1 composition, structure and powers of the Yukon First Nation government institutions;

24.5.1.2 membership;

24.5.1.3 election procedures;

24.5.1.4 meeting procedures;

24.5.1.5 financial management procedures;

24.5.1.6 composition and powers of all committees;

24.5.1.7 the rights of individual members of a Yukon First Nation with respect to the powers of the Yukon First Nation government institutions;

24.5.1.8 amending procedures;

24.5.1.9 internal management of the Yukon First Nation, including regional or district management structures; and

24.5.1.10 use, occupation and disposition of the Yukon First Nation's Settlement Land and resources.

24.6.0 Financial Transfer Arrangements

24.6.1 The intent of any financial transfer arrangement negotiated in accordance with 24.2.1.15 shall be to:

24.6.1.1 specify a method for determining levels of Government financial transfers to the Yukon First Nation in question;

24.6.1.2 specify obligations of all parties, including minimum program delivery standards for programs to be delivered by the Yukon First Nation; and

24.6.1.3 specify accountability requirements with respect to transferred funds.

24.6.2 Such financial transfer arrangements shall address requirements for contributions from the Government towards the funding of Yukon First Nation institutions and programs.

24.6.3 Financial transfer arrangements may provide for the transfer of funds through a block-funding mechanism.

24.6.4 Financial transfer arrangements may be re-negotiable every five years.

24.7.0 Regional or District Structures

24.7.1 A Yukon First Nation, Canada, the Yukon and Yukon municipalities, may develop common administrative or planning structures within a community, region or district of the Yukon and these structures shall:

24.7.1.1 remain under the control of all Yukon residents within that district; and

24.7.1.2 include direct representation by the affected Yukon First Nations within that district.

24.8.0 Status of Yukon First Nations under the Income Tax Act

24.8.1 Agreements negotiated pursuant to 24.1.1 shall include provisions respecting the status of a Yukon First Nation as a municipality or public body performing the functions of government or a municipal corporation under the Income Tax Act, S.C. 1970-71-72, c. 63.

24.8.2 Unless the parties otherwise agree, an entity described in 24.8.1 shall be restricted by its enabling authority to the provision of government or other public services and, in particular, it shall not engage in commercial activities nor control any entity that carries on a commercial activity or is engaged in making investments.

24.9.0 Legislation

24.9.1 The parties to the Umbrella Final Agreement shall negotiate guidelines for drafting Legislation to bring into effect agreements negotiated pursuant to 24.1.1.

24.9.2 Subject to 24.9.1, the Yukon shall recommend to its Legislative Assembly, Legislation separate from the Settlement Legislation to bring into effect those agreements negotiated pursuant to 24.1.1 for which the Yukon has legislative authority.

Umbrella Final Agreement between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993

24.9.3 Subject to 24.9.1, Canada shall recommend to Parliament Legislation separate from the Settlement Legislation to bring into effect those agreements negotiated pursuant to 24.1.1 for which Canada has legislative authority.

24.10.0 Amendment

24.10.1 Government shall consult with affected Yukon First Nations before recommending to Parliament or the Yukon Legislative Assembly, as the case may be, Legislation to amend or repeal Legislation enacted to give effect to those agreements negotiated pursuant to 24.1.1.

24.10.2 The manner of consultation in 24.10.1 shall be set out in each self-government agreement.

24.10.3 Yukon First Nations constitutions may be amended only by internal amending formulae or by amendment to the self-government Legislation.

24.11.0 Process

24.11.1 Prior to commencing substantive negotiations on self-government agreements, the parties to such negotiations shall agree on:

24.11.1.1 the order in which the matters to be negotiated are to be addressed;

24.11.1.2 the time frame within which negotiations will take place, which shall be concurrent with time frames established for the negotiation of Yukon First Nation Final Agreements; and

24.11.1.3 such other matters as may be necessary or desirable to ensure that negotiations proceed in a logical and efficient manner.

24.11.2 Funding for negotiations shall be according to federal policy for self-government negotiations.

24.12.0 Protection

24.12.1 Agreements entered into pursuant to this chapter and any Legislation enacted to implement such agreements shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982.

24.12.2 Nothing in this chapter or in the Settlement Agreements shall preclude Yukon First Nations, if agreed to by the Yukon First Nations and Canada, from acquiring constitutional protection for self-government as provided in future constitutional amendments.

24.12.3 Any amendments to this chapter related to the constitutional protection for self-government in whole or in part shall be by agreement of Canada and the Yukon First Nations.

Umbrella Final Agreement between the Government of Canada, the Government of Yukon and the Council for Yukon Indians, May 29, 1993
24.12.4 Nothing in 24.12.1, 24.12.2 or 24.12.3 shall be construed to affect the interpretation of aboriginal rights within the meaning of sections 25 or 35 of the Constitution Act, 1982.

ii. Vuntut Gwitchin First Nation Self-Government Agreement made between the Vuntut Gwitchin First Nation, the Government of Canada and the Government of Yukon on May 29, 1993

Vuntut Gwitchin First Nation Self-Government Agreement made between the Vuntut Gwitchin First Nation, the Government of Canada and the Government of Yukon on May 29, 1993
13.1 The Vuntut Gwitchin First Nation shall have the exclusive power to enact laws in relation to the following matters: 13.1.1 administration of Vuntut Gwitchin First Nation affairs and operation and internal management of the Vuntut Gwitchin First Nation;
13.5.2 Canada and the Vuntut Gwitchin First Nation shall enter into negotiations with a view to concluding, as soon as practicable, a separate agreement or an amendment of this Agreement which will identify the areas in which laws of the Vuntut Gwitchin First Nation shall prevail over federal Laws of General Application to the extent of any inconsistency or conflict.
13.5.3 Except as provided in 14.0, a Yukon Law of General Application shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the Vuntut Gwitchin First Nation.