Court File No.: 40061

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

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

Respondents

(*STYLE OF CAUSE CONTINUED ON NEXT PAGE*)

FACTUM OF THE INTERVENER, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

(Pursuant to Rule 37 and 42 of the *Rules of the Supreme Court of Canada)*

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SCC File No. 40061

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(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

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-and-

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Respondents

-and-

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Interveners

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ATTORNEY GENERAL OF QUÉBEC

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Asper Centre intervenes to support the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*[1] (the "Act"), and to argue that s. 35(1) of the *Constitution Act, 1982* protects generic self-government rights. It makes two arguments:

- Consideration of the content of Canada's obligations under the *United Nations Convention on the Rights of the Child*[2] ("UNCRC"), as well the performance reviews it has received since this convention was ratified, support the contention that the pith and substance of the Act falls squarely within s. 91(24) of the *Constitution Act, 1867*.
- In the event that this Court determines that *stare decisis* governs the question at issue in this appeal, compelling reasons exist to reconsider any precedent that would preclude judicial recognition of a s. 35 generic self-government right over child and family services.

PART II – QUESTIONS IN ISSUE

2. The Asper Centre's submissions contribute to two issues that arise on this appeal: (1) the "pith and substance" of the Act falls within s. 91(24), and (2) certain generic rights of self-government, including in respect of child and family services, are recognized and protected under s. 35(1).

PART III – STATEMENT OF ARGUMENT

I. Canada's obligations and performance reviews under the UNCRC support the conclusion that the Act's pith and substance falls under s. 91(24)

3. Consideration of the content of Canada's UNCRC obligations, as well the performance reviews it has received over the decades since this convention was ratified, support the contention that the Act's pith and substance is to improve the well-being of Indigenous children, families and communities by promoting culturally appropriate child services. More specifically, this extrinsic evidence[3] confirms that one of Parliament's purposes in enacting the Act was to harness federal jurisdiction in respect of Indigenous children to respond to certain issues on which Canada has received persistent and pointed international criticism under the UNCRC, namely the crisis of

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

2 *Convention on the Rights of the Child*, 20 Nov 1989, 1577 UNTS 3 (entered into force 2 Sept 1990, ratified by Canada 13 Dec 1991 with effect 12 Jan 1992) ["*UNCRC*"].

3 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras 51, 62; *Reference re Firearms Act*, [2000] 1 SCR 783, para 16-17.

overrepresentation of Indigenous children in care and the absence of nationally-applicable culturally appropriate standards for child welfare services for Indigenous children.

4. Having been ratified by Canada,[4] the UNCRC creates binding international obligations of the highest order.[5] While Canada's international law obligations cannot on their own be used to expand the scope of federal jurisdiction,[6] they are relevant to the interpretation of legislation, on the basis that the legislature is presumed to intend to comply with its international law commitments.[7] This Court's jurisprudence confirms the relevance of the UNCRC in the interpretation of legislation.[8]

5. The preamble of the Act explains that in enacting this legislation, Parliament had expressly in mind Canada's international commitments under the UNCRC (among other international instruments). The *Hansard* debates preceding the adoption of the Act similarly confirm that in designing the bill and developing its principles, Parliament sought to ensure that Indigenous child and family services in Canada "are aligned with" its obligations under the UNCRC.[9]

6. The UNCRC includes numerous provisions that affirm the appropriateness and indeed necessity of state parties ensuring that child services provided to Indigenous children and families are culturally appropriate. The UNCRC obliges Canada to protect the right of Indigenous children to enjoy their culture, profess and practise their own religion and use their own language, and affirms a child's right to preserve their identity, including his or her family relations.[10] Article

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4 1658 UNTS 680, deposited 13 Dec 1991 ["Canada's Ratification of UNCRC"].

5 *Quebec (AG) v 9147-0732 Québec inc.*, 2020 SCC 32, paras 30-32.

6 *Attorney General (Canada) v Attorney General (Quebec) (Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act)*, [1937] 1 DLR 673 (JCPC), pp 683-684; *Thomson v Thomson*, [1994] 3 SCR 551, p 611.

7 *R v Hape*, 2007 SCC 26, para 53; *Baker v Canada*, [1999] 2 SCR 817, paras 69-71; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, paras 114, 182.

8 *Baker, ibid*, para 69; *AC v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181, para 93; *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 SCR 76, paras 31-33.

9 House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 425 (3 June 2019) at 28447 [Hon. Seamus O'Regan, Minister of Indigenous Services]; *Ibid* at 28459 [Mr. Mike Bossio].

10 *UNCRC*, *supra* note 2, ss 8(1), 30; Committee on the Rights of the Child, *General Comment No. 11 (2009): Indigenous children and their rights under the Convention*, UNCRCOR, 50th Sess, UN Doc C/GC/11 (2009), para 17 ["General Comment 11"]. See also Canada's Ratification of UNCRC, *supra* note 4.

20(3) specifically provides that, when a child is placed in alternative care, due regard must be paid to the desirability of the continuity of a child's upbringing and their cultural and linguistic background. The Committee on the Rights of the Child (the "Committee"), the UNCRC's supervisory body, has emphasized special considerations for Indigenous children, including that assessing the best interests of an Indigenous child requires the consideration of the child's cultural rights[11] and cultural continuity, which involves continuity with the child's upbringing, access to culture and language, and information about their biological family.[12] The Committee has stated that "maintaining the best interests of the child and the integrity of indigenous families and communities should be primary considerations in … social services … affecting indigenous children"[13] and has urged States parties to develop targeted measures to, among other things, prevent the loss of cultural identity of children in alternative care.[14]

7. In its periodic reviews of Canada's UNCRC performance, the Committee has been critical of Canada's compliance with its obligations, specifically in relation to the circumstances of Indigenous children and the provision of child welfare services.[15] For instance, the Committee has expressed concern regarding the fact that Indigenous children are overrepresented in Canada's child welfare system and "often lose their connections to their families, community, and culture due to lack of education on their culture and heritage".[16] The Committee has urged Canada to adopt legislative measures to ensure that Indigenous children do not lose their identity and to ensure that the principle of the "best interests of the child" is effectively implemented with specific

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11 General Comment 11, *ibid*, para 31.

12 Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UNCRCOR, 62nd Sess, UN Doc C/GC/14 (2013), para 56; General Comment 11, *ibid*, para 48.

13 General Comment 11, *ibid*, para 47.

14 *Ibid*, para 48.

15 Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Canada*, UNCRCOR, 9th Sess, UN Doc C/15/Add.37 (1995) ["1995 Concluding Observations"]; Committee on the Rights of the Child, *Concluding observations: Canada*, UNCRCOR, 34th Sess, UN Doc C/15/Add.215 (2003) ["2003 Concluding Observations"]; Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session*, UNCRCOR, 61st Sess, UN Doc C/CAN/CO/3-4 (2012) ["2012 Concluding Observations"].

16 2012 Concluding Observations, *ibid*, para 42.

regard to Indigenous children.[17] The Committee has also repeatedly pressed Canada to take steps to ensure the nation-wide implementation of the minimum standards set out in the UNCRC.[18]

8. The overarching imperative of reconciliation is a foundational principle of the Canadian constitutional order that is relevant to the interpretation of s. 91(24).[19] The scope of federal jurisdiction over "Indians" is not rigidly limited by its historical assimilative and colonial purposes,[20] but rather must be permitted to evolve to ensure its continued relevance and legitimacy.[21] In the service of reconciliation, including to overcome the profound harms caused by past colonial policy, s. 91(24) jurisdiction permits Canada to legislate specifically in relation to the protection of Indigenous peoples and the creation of special mechanisms to facilitate and ensure their cultural survival as peoples.[22] As the above extrinsic evidence relating to the UNCRC confirms, the Act's pith and substance falls squarely within this protective aspect of s. 91(24).

II. In the event that *stare decisis* applies, it is appropriate for this Court to reconsider its precedents and confirm the existence of a category of s. 35 generic self-government rights

9. The Attorney General of Québec argues that this Court's existing jurisprudence – *Van der Peet*, *Pamajewon* and *Delgamuukw*[23] – has conclusively determined that the *Van der Peet* test applies invariably to any s. 35(1) self-government claim. In particular, the AGQ asserts that these authorities dispositively hold that no "generic" self-government right of any kind can be cognizable under s. 35(1). According to the AGQ, under this Court's caselaw, judicial recognition of s. 35(1) self-government rights can occur only on a narrow case-by-case, people-by-people

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17 *Ibid*, para 43; 2003 Concluding Observations, *supra* note 15, paras 24-25.

18 1995 Concluding Observations, *supra* note 15, para 9; 2003 Concluding Observations, *ibid*, paras 8-9; 2012 Concluding Observations, *supra* note 15, paras 10-11.

19 *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 82; *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, paras 21-22 (per Wagner CJ, Abella and Karakatsanis JJ for the majority), 207, 210 (per Brown and Rowe JJ, dissenting) ["*Uashaunnuat*"]; *Manitoba Metis Federation Inc. v Canada (AG)*, 2013 SCC 14, paras 66, 140.

20 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para 5.

21 *Reference re Same-Sex Marriage*, 2004 SCC 79, paras 22-23 ["*Same-Sex Marriage*"].

22 *Canadian Western Bank v Alberta*, 2007 SCC 22, para 61; *Natural Parents v Superintendent of Child Welfare et al.*, [1976] 2 SCR 751, pp 760-761, 763 (per Laskin CJ for the majority); *Attorney General of Canada et al. v Canard*, [1976] 1 SCR 170, pp 191, 193, 206-207.

23 *R v Van der Peet*, [1996] 2 SCR 507; *R v Pamajewon*, [1996] 2 SCR 82; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

basis, grounded in evidence of specific pre-contact practices, customs and traditions.[24]

10. This argument was rejected by the court below.[25] The Asper Centre concurs with the primary position advanced by a number of parties in this appeal, that this Court's s. 35 jurisprudence, properly interpreted, does not support the restrictive approach that the AGQ purports to derive from *Van der Peet* and *Pamajewon*. To the contrary, the self-government jurisdiction at issue in this appeal falls within the category of Indigenous law that continued under the common law following the assertion of Crown sovereignty, that remained in existence upon and following the enactment of s. 35, and to which the *Van der Peet* test is inapplicable.[26] Indeed, this Court's s. 35 jurisprudence has already recognized, directly and/or by necessary implication, the existence of certain s. 35 generic collective governance and decision-making rights, without resort to the *Van der Peet* test.[27] Recognition of a generic s. 35 self-government right over child and family services – a core jurisdiction essential to Indigenous peoples' flourishing and cultural survival as peoples – represents a measured incremental development of this existing caselaw.

11. In the event, however, that this Court determines that *stare decisis* governs the question at issue, compelling reasons exist to reconsider any precedent that would preclude recognition of a generic s. 35 self-government right over child services. As this Court's jurisprudence instructs, various factors may justify departure from precedent,[28] including where a legal test is not in line with the purpose it is meant to serve,[29] where there has been an evolution in the social, international

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[24] Factum of the Attorney General of Quebec, paras 58-65, 105-108.

[25] *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, para 421.

[26] *Mitchell v Minister of National Revenue*, 2001 SCC 33, paras 9-10, 62 (*per* McLachlin CJ for the majority), 114-115 (*per* Binnie J concurring); *Van der Peet*, *supra* note 23, para 263 (*per* McLachlin J dissenting); *R v Desautel*, 2021 SCC 17, para 68. See also facta of: Assemblée des Premières Nations Québec-Labrador, paras 61-69 ["APNQL"]; Attorney General of Canada, paras 108-114; Assembly of First Nations, paras 84-85; First Nations Child & Family Caring Society of Canada, paras 67-69; Makivik Corp, paras 23-24, 32.

[27] *Delgamuukw*, *supra* note 23, para 115, 166; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, paras 16-17, 73-74; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, para 20; Brian Slattery, "Making Sense of Aboriginal Rights" (2000) 79:2 *Can Bar Rev* 196 at 202-203. See also: APNQL, *ibid*, para 79; Makivik, *ibid*, para 22.

[28] *R. v Henry*, 2005 SCC 76 , para 45-47; *Canada v Craig*, 2012 SCC 43, para 27; *Ontario (AG) v Fraser*, 2011 SCC 20, para 73 (Rothstein, J, concurring in the result); *R v B(KG)*, [1993] 1 SCR 740, p 777 (per Lamer J, for the majority); *R v Chaulk*, [1990] 3 SCR 1303, p 1353.

[29] *Henry*, *ibid*, paras 42, 45; *R v Jordan*, 2016 SCC 27, paras 30, 41, 45.

and/or legal landscapes,[30] and where there is significant and valid academic criticism.[31]

A. The highly restrictive approach to self-government rights derived from *Pamajewon* is inconsistent with the purposes of s. 35

12. *Pamajewon* was decided in 1996; at the time of its writing and issuance, this Court had rendered only three prior judgments dealing with s. 35.[32] All of this jurisprudence, including *Pamajewon*, arose from prosecutions regarding particular activities, and its content and focus was heavily shaped by that context.[33] This nascent caselaw had only begun to articulate what has subsequently become recognized as the twin overarching purposes of s. 35: "to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them".[34] While the foundations of these twin purposes may be traced in the early s. 35 caselaw,[35] the Court's attention at this stage was largely focussed upon the pre-contact practices that it identified as characterizing the prior occupation of Canada by distinctive Indigenous societies. In this Court's more recent jurisprudence, its discussion of s. 35's purposes has undergone an important shift, with its focus now upon reconciliation as an imperative with contemporary and continuing implications.[36]

13. *Pamajewon*'s holding that any self-government claims must be rooted in pre-contact practices rested expressly on reference to the purposes of s. 35 as these were then understood: Justice Lamer wrote "[a]ssuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered

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30 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, para 75 ["Sask Fed of Labour"]; *United States v Burns*, 2001 SCC 7 at para 144; *Canada (AGl) v Bedford*, 2013 SCC 72, paras 42-44; *Carter v Canada (AGl)*, 2015 SCC 5, paras 44-47; *R v Kirkpatrick*, 2022 SCC 33, paras 202-204, 219-244 (per Côté, Brown and Rowe JJ, concurring).

31 *Vavilov*, *supra* note 7, para 20; *Craig, supra* note 28, para 27, 29

32 *R v Sparrow*, [1990] 1 SCR 1075; *R v Badger*, [1996] 1 SCR 771; *R v Nikal*, [1996] 1 SCR 1013. Three further judgments were issued one day before *Pamajewon*: *R v Gladstone*, [1996] 2 SCR 723, *Van der Peet*, *supra* note 23, and *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672.

33 *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56, para 44.

34 *Desautel*, *supra* note 26, para 22.

35 *Van der Peet*, *supra* note 23, paras 31, 43, 57.

36 *Haida*, *supra* note 27, para 38; *Desautel*, *supra* note 26, para 30-31; *Uashaunnuat*, *supra* note 19, para 21, 27; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, para 10 ["*Little Salmon/Carmacks*"]; *Southwind v Canada*, 2021 SCC 28, para 55, 60.

against the test derived from consideration of those purposes".[37] In the years since *Pamajewon* was decided, however, this Court's articulation of s. 35's purposes has matured and deepened. As this Court noted in *Sappier*, s. 35 "recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the *continued existence* of these particular aboriginal societies", as the "object is to provide cultural security and continuity for the particular aboriginal society".[38]

14. There has been an important shift in the legal landscape since *Pamajewon* was decided, reflecting an understanding that the purposes of s. 35 are not exhausted by way of protection of cultural activities that characterized pre-contact Indigenous societies. Rather, reconciliation, the "grand purpose of s. 35",[39] also requires that constitutional space be preserved to recognize and enable the continued contemporary survival and flourishing of Indigenous peoples *as peoples*.[40]

15. To the extent that that *Pamajewon* denies the possibility of generic self-government rights of any kind under s. 35 or holds that self-government rights are cognizable under s. 35 only when shown to derive from specific pre-contact practices or customs, it is inconsistent with this foundational evolution of the legal landscape. If one of s. 35's purposes is to reconcile the modern-day existence of organized, autonomous Indigenous societies with the Crown's assertion of sovereignty, s. 35 must protect at least a core set of governance jurisdictions that are themselves integral to the continued flourishing and cultural survival of Indigenous peoples as distinct and autonomous peoples within the contemporary Canadian constitutional order.[41]

B. There has been a fundamental shift in the Canadian sociohistorical landscape

16. In the nearly three decades since *Pamajewon* was decided, an important shift has also occurred in terms of Canadian societal acknowledgement of the deep and lasting harms to Indigenous peoples that have been wrought by colonial practices and policies in Canada, including the

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37 *Pamajewon*, *supra* note 23, para 24.

38 *R v Sappier; R v Gray*, 2006 SCC 54, paras 26, 33. [Emphasis added.]

39 *Little Salmon/Carmacks, supra* note 36, para 10; *Daniels, supra* note 20, para 34.

40 *Little Salmon/Carmacks*, *ibid*, para 33.

41 The Asper Centre is of the view that this represents the *minimum* content of the generic self-government right protected under s. 35, rather than an exhaustive statement of the scope of the right (*i.e.*, the position advanced by the AGC at para 162 of its factum). An acknowledgement of this minimum content is sufficient to resolve this appeal.

residential school system. This nascent societal acknowledgement has included a growing appreciation of the ways in which historical assimilative policies and practices have been carried forward into current legal and administrative structures, and how the wrongs of the past continue to reverberate for present generations of Indigenous children, families and communities.[42]

17. This fundamental sociohistorical shift is particularly relevant to the jurisdiction of child services. Residential schools and culturally inappropriate child services have had profoundly destabilizing, multi-generational impacts on Indigenous peoples' societal structures. These policies and programs, directed towards Indigenous children, served – by design in some cases, by effect in others – to fundamentally undermine Indigenous peoples' capacities to maintain the institutions, practices and structures necessary for cultural survival. The urgent contemporary needs of Indigenous peoples in relation to the design and delivery of culturally-appropriate child and family services are directly tied to this history – a history that occurred entirely in the post-contact period. *Pamajewon*'s inflexible requirement that s. 35 governance rights derive from specific pre-contact practices and customs fails completely to respond to this reality. It instead serves to ensure, myopically, that any constitutional space for Indigenous self-government within s. 35 is unlikely to be responsive to contemporary needs. This smacks inappropriately of the "old rules of the game", rather than the "just settlement" that is called for by s. 35.[43]

18. A highly restrictive approach to self-government rights derived from *Pamajewon* is also inconsistent with the growing appreciation of the contribution of Indigenous peoples to the building of Canada.[44] The practical effect of the rule derived from *Pamajewon* – that the scope and content of contemporary self-government rights protected by s. 35 will be strictly constrained by historical pre-contact practices – is irreconcilable with recognition of the important and ongoing role of Indigenous peoples as "partners in confederation".[45] As an abundant body of scholarly criticism has noted,[46] *Pamajewon*'s originalism is also at odds with the dominant principle of

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42 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 68-69; See also AGC, paras 12-13; Makivik, paras 8, 78-79; AFN, paras 14-20; APNQL, paras 11, 33; Caring Society, paras 12-20.

43 *Sparrow*, *supra* note 32, p 1106.

44 *Uashaunnuat*, *supra* note 19, para 21; *Ref re Secession Quebec*, *supra* note 19, para 82.

45 *Daniels*, *supra* note 20, para 37.

46 H Russell, "Unequal Under the Law: Indigenous Originalism and the Living-Tree Approach

Canadian constitutional interpretation, where progressivism is well-established as the preferred approach.[47] While the rest of the Constitution is consciously nurtured as a "living tree which… accommodates and addresses the realities of modern life",[48] this rigid originalism precludes such recognition within s. 35. Given the foundational evolution that has occurred since *Pamajewon* was decided, it is now appropriate to acknowledge that the application of originalism as a constraint on Indigenous self-government rights acts as a barrier to s. 35 fulfilling its purpose: "a mutually respectful long-term relationship".[49]

C. A parallel shift has occurred in the international arena regarding the rights of Indigenous peoples as "peoples"

19. The shift that has occurred within the Canadian legal and sociohistorical landscape is mirrored by an "emerging international consensus"[50] regarding the rights of Indigenous peoples as "peoples" possessing the inherent right of self-determination, which necessarily entails certain inherent governance and decision-making rights.

20. The principle of self-determination has long found expression in a number of foundational international legal instruments ratified by Canada, including in common Article 1 of the International Covenants on Human Rights.[51] At the time of the issuance of *Pamajewon*, however, there remained widespread and active dispute in the international arena regarding whether this

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within Canadian Constitutional Jurisprudence" (2018) 9 Mapping Poli 112, 114-118; J Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58:13 Osgoode Hall LJ 351 at 358-362; J Borrows, "Challenging historical frameworks: Aboriginal rights, the trickster, and originalism" (2017) 98:1 Can Historical 114 at 124-127, 130-133; B W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v Pamajewon" (1997) 42:4 McGill LJ 1011 at 1030-1037; R Stacey, "The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism" (2018) 46:4 Fed L Rev 669 at 672, 679-683.

47 *Reference re Securities Act*, 2011 SCC 66 at para 56; *Canada (AG) v Hislop*, 2007 SCC 10 at paras 94-96; *Quebec (AG) v Blaikie*, [1979] 2 SCR 1016 at 1029-1030; *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145, pp 155-156; *Edwards v Canada*, [1930] AC 124, pp 106-107.

48 *Same-Sex Marriage*, *supra* note 21, paras 22-23.

49 *Little Salmon/Carmacks*, *supra* note 36, para 10.

50 *Sask Fed of Labour*, *supra* note 30, para 71.

51 *International Covenant on Civil and Political Rights*, 19 Dec 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 Mar 1976, accession by Canada 19 May 1976), art. 1; *International Covenant on Economic, Social and Cultural Rights*, 16 Dec 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 Jan 1976, accession by Canada 19 Aug 1976), art. 1. See also *Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7, art. 1 of ch. 1.

right was applicable to Indigenous peoples, and indeed whether they could claim the rights of peoplehood.[52] Prior to the adoption of UNDRIP, ILO Convention 169 was the only international law instrument referring to Indigenous peoples as "peoples" and dealing with Indigenous peoples' rights, but it included the qualification that "the use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law", and received few ratifications.[53]

21. The 2007 adoption of by the United Nations of UNDRIP[54] – the first universal instrument to affirm the right of self-determination of Indigenous peoples – represents a significant international law development that confirms the existence of a fundamental evolution in the sociohistorical and legal landscapes in the decades since *Pamajewon* was decided.[55] The evolution in Canada's position in respect of UNDRIP is similarly confirmatory.[56]

PARTS IV & V: COSTS AND ORDERS REQUESTED

22. The Asper Centre does not seek costs and asks that no costs be ordered against it. It respectfully requests that this appeal be decided in accordance with the above submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 14TH DAY OF NOVEMBER, 2022.



Jessica Orkin | Natai Shelsen | Cheryl Milne
Counsel for the Intervener, the David Asper Centre for Constitutional Rights

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[52] E-I Daes, "An overview of the history of indigenous peoples: self-determination and the United Nations" (2008) 21:1 *Cam Rev of Intl Aff* 7 at 12-13 ["Daes"]; R L Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law" (1994) 7 *Harv Hum Rts J* 33 at 35.

[53] International Labour Organization No 169, *Indigenous and Tribal Peoples Convention* (1989), art. 1(3) [not ratified by Canada]. See also International Labour Organization No 107, *Indigenous and Tribal Peoples Convention* (1957) [not ratified by Canada].

[54] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Suppo No 68, UN Doc A/RES/61/295 (2 Oct 2007), at arts 3-4.

[55] *9147-0732 Québec inc*, supra note 5, para 35.

[56] Daes, *supra* note 52, p 12; United Nations Declaration on the Rights of Indigenous Peoples, GA Res A/RES/61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/PV.107 (2007) 1 at 12-13; Government of Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", (12 Nov 2010); Permanent Forum on Indigenous Issues, ECOSOCOR, 15th Sess, Supp No 23, UN Doc E/2016/43-E/C.19/2016/11 (2016); The Honourable Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues" (10 May 2016); *United Nations Declaration of the Rights of Indigenous Peoples Act*, SC 2021, c 14.

PART VI – TABLE OF AUTHORITIES

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