

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

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028751-196

In the matter of the:

Reference to the Court of Appeal of Quebec in relation with the *Act respecting First Nations, Inuit and Métis children, youth and families*
(Order in Council No. 1288-2019)

DATE: February 10, 2022

CORAM: THE HONOURABLE FRANCE THIBAUT, J.A.
YVES-MARIE MORISSETTE, J.A.
MARIE-FRANCE BICH, J.A.
JEAN BOUCHARD, J.A.
ROBERT M. MAINVILLE, J.A.

ATTORNEY GENERAL OF QUEBEC
APPLICANT

v.

ATTORNEY GENERAL OF CANADA
RESPONDENT

and

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

INTERVENERS

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OPINION OF THE COURT*

Introduction

[1] Aboriginal children are overrepresented in youth protection systems throughout Canada. In addition to the suffering they must endure as a result of this situation, it has serious detrimental effects on them, their families and their communities, particularly as regards the preservation of their identity, language and culture. This reality, which was recently highlighted by a number of commissions of inquiry, is the subject of consensus and the Government of Quebec does not dispute it.

[2] The *Act Respecting First Nations, Inuit and Métis children, youth and families*¹ (the “Act”) was assented to on June 21, 2019. Its provisions came into force on January 1, 2020.

[3] According to its preamble, the *Act* is one of the measures Parliament has taken to advance reconciliation with Aboriginal peoples.² Broadly speaking, it seeks to address

* This translation attempts to correctly translate the Opinion of the Court, but as is the case with all translations, it cannot always capture the precise nuances of the original version. For example, in French, the word “*autochtone*” is used to reflect both the words “Aboriginal” and “Indigenous”. This translation will thus use the word “aboriginal” throughout in preference to “indigenous” (save for necessary exceptions) both to better reflect the reasons as drafted in French and to highlight that this is a constitutional reference in which the terminology used in s. 35 of the *Constitution Act, 1982* is to be preferred, *i.e.* “aboriginal peoples” and “aboriginal rights”. Other terminological choices in the English translation are also guided by similar considerations. While the *Constitution Act, 1982* does not capitalize the terms “Aboriginal peoples” or “Aboriginal rights”, nor, until recently, have most other texts, including the jurisprudence, we will favour the use of capitals (save for necessary exceptions), in keeping with current practice.

¹ S.C. 2019, c. 24. The *Act* was introduced on February 28, 2019 and came into force in accordance with an order made pursuant to its s. 35 (*Order fixing January 1, 2020 as the day on which that act comes into force*, P.C. 2019-1320).

² The language of Aboriginal law is constantly evolving. The jurisprudence and commentary sometimes confuse and fail to distinguish the terms “Indian” and “Aboriginal”, as well as the terms “Aboriginal nations”, “Aboriginal communities”, “Aboriginal groups”, “First Nations” and “Aboriginal peoples”, among others. For purposes of this opinion, we have favoured the use of the term “Aboriginal” to refer to those individuals entitled to avail themselves of the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*, including “Indians” within the meaning of the *Indian Act* (R.S.C. 1985, c. I-5 [“*Indian Act*”]), the Inuit and the Métis. We have also favoured the use of the term “Aboriginal peoples” found in ss. 25 and 35 of the *Constitution Act, 1982*. Thus, unless the context otherwise requires, we will use the terms “Aboriginal” and “Aboriginal peoples”. Similarly, the words “Indigenous group, community or people” found in the *Act* will be replaced by the term “Aboriginal peoples”.

the issue of overrepresentation of Aboriginal children in child and family services systems while recognizing that Aboriginal peoples are in the best position to identify and implement solutions to this issue.

[4] The *Act* establishes national standards for the provision of child and family services in relation to Aboriginal children. These standards place the best interests of Aboriginal children at the heart of decisions made in their regard and recognize the importance for these children of maintaining ongoing relationships with their families and with the communities to which they belong, while preserving their connections to their culture. The *Act* also emphasizes a preventive approach.

[5] The *Act* affirms that the inherent right of Aboriginal self-government, a right recognized and affirmed by s. 35 of the *Constitution Act, 1982*,³ includes jurisdiction in relation to child and family services. It also offers Aboriginal peoples a framework for exercising that jurisdiction, by providing for the possibility of negotiations with the federal and provincial governments and for the incorporation of Aboriginal laws into federal legislation.

[6] On December 18, 2019, the Government of Quebec adopted Order in Council 1288-2019,⁴ which led to the filing of a Notice of Reference to the Court of Appeal on December 20, 2019. On February 25, 2020, the Court authorized the intervention of five Aboriginal groups.⁵

[7] The question submitted to the Court in this reference is the following: [TRANSLATION] Is the *Act respecting First Nations, Inuit and Métis children, youth and families ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?

[8] The Attorney General of Quebec contends that the question must be answered in the affirmative. He argues that:

- Sections 1 to 17 of the *Act* (“Part I”) are invalid because they have the effect of dictating the manner in which provinces are to provide services to Aboriginal children and families. Section 91(24) of the *Constitution Act, 1867*,⁶ however,

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [“*Constitution Act, 1982*”].

⁴ *Décret 1288-2019 concernant un 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*, (2020) 152 G.O.Q. II, 154, pp. 154-155.

⁵ *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*, Montreal C.A., No. 500-09-028751-196, February 25, 2020, Duval Hesler, C.J.Q.

⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [“*Constitution Act, 1867*”].

interpreted in accordance with the underlying constitutional principles, does not authorize Parliament to legislate on the manner in which provinces must provide services to children and families, whether Aboriginal or not;

- Sections 8 and 18 to 26 of the *Act* (“Part II”) are invalid because they constitute an attempt to unilaterally amend s. 35 of the *Constitution Act, 1982*, which exceeds the powers of Parliament, and because they seek to undermine the established constitutional order.

[9] The Attorney General of Canada and the interveners argue, conversely, that the *Act* is valid both pursuant to s. 91(24) of the *Constitution Act, 1867* and pursuant to s. 35 of the *Constitution Act, 1982* and the Aboriginal right of self-government.

[10] This opinion is divided into five chapters: (1) the context leading to the passage of the *Act*; (2) analysis of the *Act* and the legislative context leading to its passage, and discussion of some difficulties in interpreting and applying it; (3) review of the parties’ arguments; (4) consideration of the constitutionality of the *Act* under s. 91(24) of the *Constitution Act, 1867*; as well as (5) under s. 35(1) of the *Constitution Act, 1982* and pursuant to the Aboriginal right of self-government.

Summary of the Opinion

[11] This summary forms an integral part of the reasons of the panel that heard the Reference. Nevertheless, in order to fully understand all of the details and nuances the Court considered necessary in formulating its opinion, the full text of the opinion should be read. By its very nature, the summary, although accurate, cannot be exhaustive.

(a) Context leading to the passage of the Act

[12] The *Act* marks a recent milestone in a process set in motion nearly two centuries ago. A general overview of the context in which it was enacted is helpful. For decades, assimilationist policies have detrimentally affected many generations of Aboriginals. Due to overlapping constitutional jurisdictions and chronic underfunding by the federal government, to this day Aboriginal peoples continue their struggle to overcome the long-term effects of this situation.

[13] Over the past forty years, several important commissions of inquiry have highlighted the drastic consequences Aboriginal peoples and their children have suffered. There was a growing need for Aboriginal peoples to take control of their own child and family services. This led to the *Act*, which came into force on January 1, 2020.

[14] Historically, certain policies of the 19th and early 20th centuries had as their goal to assimilate Aboriginal peoples by fully integrating them in Canada’s non-Aboriginal society. To that end, a number of measures (which are now considered discriminatory)

were implemented. These initiated a process for devaluing Aboriginal cultural identity. With the arrival of Confederation, the federal government was given legislative authority over “Indians”. A number of laws were subsequently enacted to further that process. As one government member explained to Parliament, “[t]he Indians must either be treated as minors or as white men”. Despite what may have seemed, at the time, to be a *quid pro quo* to “Indian” status—no taxes could be collected on a reserve—the legislation effected a direct attack on the cultural identity of Aboriginal peoples by banning certain long-standing cultural and spiritual practices.

[15] As of 1883, the assimilationist policy gave rise to boarding schools, through which Aboriginal children were torn from their families. Testifying in 1920 before a parliamentary committee, one deputy minister stated that the objective was to see to it “that there is not a single Indian in Canada that has not been absorbed into the body politic”. As of the 1940s, the residential school system became a functional but very crude approximation of provincial youth protection services. There, Aboriginal children were provided with mediocre education under conditions of great deprivation, in which the use of Aboriginal languages was repressed. Due to the spread of illnesses such as tuberculosis, the mortality rate of the children in the system was abnormally high. Moreover, they were subjected to what would come to be described as unspeakable cruelty.

[16] In 1951, Parliament amended the *Indian Act* so that laws of general application in a province, including laws of a social nature, became applicable to Aboriginal persons residing in the province. The scope of this amendment is the subject of controversy.

[17] Over 150,000 Aboriginal children attended residential schools until the 1990s. Thousands of them suffered physical, psychological and sexual abuse. The gradual end of the residential school system, however, did not spell the end of the forced separation of Aboriginal children from their families. The residential schools were followed by a system in which Aboriginal children were placed in non-Aboriginal foster families, in what would come to be known as the “Sixties Scoop”. The mass adoption of Aboriginal children caused them to experience major identity and behavioural problems.

[18] In 2006, the *Indian Residential Schools Settlement Agreement* (“*IRS Settlement Agreement*”) provided for a comprehensive settlement of numerous individual and class actions related to the residential school system. Other framework settlements were entered into in *Brown*⁷ and *Riddle*⁸ in 2018.

[19] Between 1991 and 2019, four separate commissions of inquiry addressed, from a number of different perspectives, the legacy of the treatment of Aboriginal peoples: the *Royal Commission on Aboriginal Peoples*, the *Truth and Reconciliation Commission of Canada* (“*Truth and Reconciliation Commission*”), the *Public Inquiry Commission on*

⁷ 2018 ONSC 3429.

⁸ 2018 FC 641.

relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress (“Viens Commission”) and the *National Inquiry into Missing and Murdered Indigenous Women and Girls*. The *Royal Commission on Aboriginal Peoples*, which submitted its report in 1996, indicated that the central theme of its recommendations was the idea that Aboriginal peoples must have room to exercise their autonomy and structure their own solutions. In its 2015 report, the *Truth and Reconciliation Commission* set out a series of measures for reducing the overrepresentation of Aboriginal children within child welfare systems. The *Viens Commission* concluded, in 2019, that there is systemic discrimination against First Nations and that a youth protection system which places Aboriginal children with non-Aboriginal foster families is unsuitable. That same year, the *National Inquiry into Missing and Murdered Indigenous Women and Girls* made several recommendations also aimed at placing the design and implementation of culturally appropriate child and family services in the hands of Aboriginal peoples as part of the exercise of their right to self-determination.

[20] There is a consensus that the deplorable overrepresentation of Aboriginal children in youth protection systems is still very much present. The aforementioned three most recent commissions of inquiry denounced this reality, as did the *Special Commission on the Rights of the Child and Youth Protection* (“Laurent Commission”) in 2021. This situation has numerous interrelated causes, including chronic underfunding.

[21] Funding arrangements for Aboriginal child services vary markedly from one community to another, but the federal government is the principal source of funding, either directly through First Nations Child and Family Services (“FNCFS”) agencies or indirectly through the services provided by the provinces. The picture of the funding arrangements that emerges from the Court record in this reference is vague in a number of respects. That said, recent decisions of the Canadian Human Rights Tribunal (“CHRT”) have clearly highlighted the discriminatory and deficient nature of existing practices.

[22] In 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a complaint in that regard with the Canadian Human Rights Commission. This complaint was the basis for the 2016 ruling in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*,¹⁰ in which the CHRT found in favour of the complainants, concluding that the Department of Aboriginal Affairs and Northern Development Canada discriminates in providing services to First Nations members. The CHRT was of the view that there is a public relationship between that Department and First Nations children and families. The evidence that had been filed in the record showed

⁹ FNCFS agencies, which were created in 1991 with the implementation of the federal First Nations Child and Family Services Program, provide child welfare services to First Nations members residing on reserves.

¹⁰ 2016 CHRT 2 [“Caring Society”].

the existence of serious deficiencies in the funding and structure of the FNCFS Program, whose budget does not account for the actual needs of FNCFS agencies in light of geographical and social differences. The CHRT was of the view that the resulting adverse impacts suffered by Aboriginal children and families were due solely to their race or national or ethnic origin. The federal government accepted the decision and committed to make the necessary reforms. Several CHRT orders, particularly on the issue of compensation to victims of these discriminatory practices, have since buttressed the 2016 decision.

[23] Jurisdictional disputes between the federal and provincial governments have also complicated, and even prevented, the provision of adequate services to Aboriginal peoples. To address this situation, Jordan's Principle, which applies a child-first principle to Aboriginal children, was developed. Having been reinforced by CHRT decisions, Jordan's Principle is now unanimously accepted.¹¹

[24] Two years after the 2016 CHRT ruling, the Minister of Indigenous Services brought together provincial, territorial and Aboriginal representatives to begin an urgent reform process. Following these discussions, the federal government made a number of firm commitments. Some 2,000 organizations were consulted and a "reference group" was established to co-develop proposed legislation, leading to the tabling of Bill C-92 on February 28, 2019. The *Act* received Royal Assent on June 21, 2019 and came into force on January 1, 2020.

(b) Content of the Act

[25] The *Act* is based on two main concepts: the establishment of national standards, and recognition of the inherent right of Aboriginal self-government. The latter concept developed slowly, beginning in 1973 with the federal government's *Comprehensive Land Claims Policy*,¹² followed by the coming into force of the *Constitution Act, 1982* and the adoption, in 1995, of the *Self-Government Policy*¹³ for Aboriginal peoples. That policy recognized the existence of the right and favoured tripartite negotiations (federal and provincial governments, Aboriginal peoples). A convergence thereafter occurred between the *Comprehensive Land Claims Policy* and the *Self-Government Policy*. Between 1997 and 2017, this led to a number of agreements which, implicitly or explicitly, touched on the right to Aboriginal self-government. In addition, some federal statutes enacted during

¹¹ See below, paras. [167]-[171].

¹² Indian and Northern Affairs, *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on claims of Indian and Inuit people*, Ottawa, Indian and Northern Affairs, 1973 ["*Comprehensive Land Claims Policy*"].

¹³ Canada, *Federal Policy Guide – Aboriginal Self-Government – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Ottawa, Indian Affairs and Northern Development, 1995.

the same period occasionally referred to that right. In short, the concept of administrative and political autonomy for Aboriginal peoples has been percolating for over 45 years.

[26] In 2018, the Department of Justice published the *Principles Respecting the Government of Canada's Relationship with Indigenous peoples*.¹⁴ The inherent right of Aboriginal self-government featured prominently in these principles. The *Act* is clearly in line with these *2018 Principles*, through which we see the emergence of true Aboriginal governance.

[27] Before delving into the *Act* in detail, a general overview of its content is in order. The *Act* is comprehensive; it recognizes the right of self-government and no longer sets bipartite or tripartite agreements as a prerequisite for such purpose. Favouring a bottom-up approach, the *Act* provides Aboriginal peoples with the flexibility and functional independence to choose their own solutions. In responding to the pressing need for reconciliation, the *Act* is designed to address the excessive delays of the piecemeal agreement negotiating process. This legislative initiative was evidently guided by the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁵ (the "*UN Declaration*"). By setting out general national standards, the *Act* establishes a framework to ensure that Aboriginal children are provided with a minimum level of services, based on an evident concern for equality across Canada as well as respect for the differences between various groups.

[28] The lengthy preamble to the *Act* echoes the recommendations of the commissions of inquiry made in 1996 and 2015. The preamble is followed by substantial definitional and interpretative provisions. These set out key concepts, such as "Indigenous governing body", "family" and "Indigenous peoples". The definition of "Indigenous governing body" leaves it to Aboriginal peoples themselves to decide which entities will be responsible for applying the *Act*. In addition to preventing certain legislative conflicts, the interpretative provisions specify the principal purposes of the *Act* and establish a cardinal rule: The *Act* must be read and applied in accordance with the best interests of the child and in a manner consistent with cultural continuity and substantive equality. Parliament's intent is clearly to break with the past.

[29] Part I of the *Act* sets out the national standards alluded to above. It does so under three headings: the best interests of the Aboriginal child, the provision of child and family services, and the placement of the Aboriginal child.

[30] As regards the best interests of the Aboriginal child, which the *Act* identifies as the paramount consideration, it sets out a series of assessment factors. Among many other factors, these include the Aboriginal child's upbringing, the child's relationship with his or

¹⁴ Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Ottawa, Department of Justice, 2018 ["*2018 Principles*"].

¹⁵ G.A. Res., U.N.G.A.O.R., 61st Sess., Suppl. No. 49, U.N. Doc. A/RES/61/295 (2007).

her family members, preservation of the child's cultural identity, and the child's own preferences. To the extent possible, these factors are to be construed in a manner consistent with applicable Aboriginal laws. Respecting the Aboriginal child's culture and needs takes on particular significance when the child is placed outside his or her home community. It is important that the child's parents, care provider and home community have a strong say in any decision involving the child. The *Act* prioritizes preventive care, favours having a child continue to reside with a family member and specifies that the child's socio-economic condition alone cannot justify the child's apprehension.

[31] Thus, placement of a child should be used only as a last resort. Placement with non-Aboriginal adults can occur only after every effort has been made to place the child (in the following order of priority) with one of the child's parents, with a member of the child's family, with a member of the child's own community, or with a member of an Aboriginal group other than the one to which the child belongs. In all cases, the child's situation must be reassessed on an ongoing basis. Lastly, in providing services, the child's emotional ties to each member of his or her family must be promoted.

[32] The balance of the *Act* sets out the structure of the new scheme. Section 18 is a declaratory provision that affirms the existence of the right to Aboriginal self-government. It states, in particular, that the right includes legislative authority in relation to child and family services, which must be exercised in accordance with the *Canadian Charter of Rights and Freedoms*¹⁶ (the "*Canadian Charter*"). In ss. 20(1) and (2), the *Act* establishes a procedure pursuant to which an Aboriginal governing body can choose between two courses of action. It can inform the governments concerned that it intends to exercise its authority. Alternatively, it can request that these governments enter into a coordination agreement for this purpose. Only the second course of action gives rise to the application of ss. 21 and 22 of the *Act*. Pursuant to those sections, provided certain conditions are met, Aboriginal laws pertaining to child and family services have the same force of law as federal laws and prevail over any conflicting or inconsistent provision of a federal or provincial law respecting child and family services. The same does not extend to Aboriginal laws adopted without requesting a coordination agreement, such that ss. 21 and 22 do not apply to them. From the foregoing, it appears that Parliament wishes to encourage the course of action based on negotiation.

[33] Regardless of the course of action chosen by an Aboriginal people, any law adopted by that people that is contrary to the best interests of the child will be inapplicable. Lastly, one of the *Act's* provisions deals with resolving conflicts between two Aboriginal laws. The *Act* also contains a few additional provisions, which are less relevant for purposes of this reference.

[34] Aside from the constitutional debate arising from this reference, the *Act* itself contains ambiguities that raise a variety of questions, as a number of Aboriginal

¹⁶ Part I of the *Constitution Act*, 1982.

participants pointed out during parliamentary committee proceedings. Thus, disputes could conceivably arise as to which entities will qualify as an “Indigenous governing body”. Other potential sources of difficulty relate to the tangible capacity of Aboriginal peoples themselves to provide the services contemplated in the *Act*, or they relate to the manner in which the dispute resolution mechanisms will operate. The issue of funding for child and family services remains critical and largely unresolved, despite the reference to “fiscal arrangements” in the list of matters that may be covered by coordination agreements entered into under s. 20(2). Several public statements by Aboriginal spokespersons have been a stark reminder of this. These aspects of the *Act* could lead to litigation. That said, there is no need to say more here given the specific question raised in this reference.

(c) Respective positions of Quebec, Canada and the interveners

[35] The attorneys general presented a two-pronged argument: one based on s. 91(24) of the *Constitution Act, 1867* and the other on s. 35 of the *Constitution Act, 1982*. The Attorney General of Quebec argues that the *Act* intrudes in a provincial area of jurisdiction and unilaterally modifies the scope of s. 35. He therefore asks the Court to answer the reference question in the affirmative. The Attorney General of Canada, who contests the foregoing, is of the view that the reference calls for a negative answer, but one limited in scope.

[36] The Attorney General of Quebec relies first on the general jurisdiction that the province, as a rule, holds over child welfare. The *Act* dictates how such services are to be provided to Aboriginal persons, which, he argues, exceeds the federal powers under s. 91(24) and jeopardizes the architecture of the Constitution. In his view, the *Act* also impairs the province’s authority over its public service. Moreover, by affirming the existence of the inherent right of Aboriginal self-government, Part II of the *Act* usurps the role of the courts and unilaterally creates a third level of government in Canada. This can only be achieved through a constitutional amendment or by means of treaties protected by s. 35. It therefore follows that Part I of the *Act* is invalid under the first prong of the argument, and Part II is invalid under the second prong of the argument. These conclusions are sufficient and the Court need not opine on the scope of s. 35.

[37] After reviewing the services offered by the federal government, the Attorney General of Canada identifies the pith and substance of the *Act*, which is to protect Aboriginal children and families by reducing the number of Aboriginal children in existing child welfare systems. He is of the view that this matter undoubtedly falls within the broad powers of s. 91(24) and that the federal government’s exercise of those powers in the present case does not interfere in any manner whatsoever with provincial powers. Moreover, as for the provisions relating to the right of Aboriginal self-government, nothing in the *Act* would preclude a court challenge to the validity of Aboriginal laws. Nonetheless, the interpretation of s. 35 conveyed in the *Act* is consistent with the case law.

[38] The Assembly of First Nations is of the view that the pith and substance of the *Act* is to remedy the consequences of the federal government's colonial policies. The interpretation the *Act* offers as to the inherent right of Aboriginal self-government is consistent with legal developments, with what the honour of the Crown requires and with relevant international standards.

[39] The Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission are of the view that the *Act's* pith and substance, in addition to what the Attorney General of Canada states, is to sustain the continuity of Aboriginal culture and facilitate the exercise of the inherent right of Aboriginal self-government. Provincial laws apply to Aboriginal child and family services only by virtue of s. 88 of the *Indian Act*. The *Act* is the current expression of the federal government's responsibilities under s. 91(24). In this reference, the Court is called upon to rule on the inherent right of Aboriginal self-government.

[40] Makivik Corporation, which did not participate in the oral arguments, notes in its memorandum that, since a 1939 reference to the Supreme Court, the federal government has always had responsibility for providing services to Nunavik Inuit.

[41] The intervener Aseniwuche Winewak Nation of Canada takes a position only on Part I of the *Act* and argues that it can improve the situation of Aboriginal children who are non-status Indians or who are not members of a First Nation.

(d) First part of the analysis: the constitutionality of the national standards

[42] Sections 91 and 92 of the *Constitution Act, 1867* allocate legislative authority among the federal and provincial governments. An issue regarding the constitutionality of a statute, based on the division of powers, must be decided in a two-step process. The first step is to identify the purpose and the pith and substance of the statute. This characterization stage is followed by a classification process: to which head or heads of power listed in those sections can the statute be connected? When a statute has two or more aspects, some of which appear to be connected to s. 91 and others which appear to be connected to s. 92, the court must take into account the context in which the statute was enacted as well as its practical and legal effects. In addition to identifying the dominant aspect of a statute, the double aspect doctrine can be applied to validate similar provisions in concurrent and valid federal and provincial legislation. The doctrine of interjurisdictional immunity protects the unassailable content of a power of one level of government against impairment by a statute enacted by the other level of government.

[43] Section 91(24) encompasses all Aboriginal peoples in Canada, including the Métis and the Inuit. It is a broad power conferring legislative authority over all aspects of "Indianness". The essence of this federal head of power also includes the well-being of Aboriginal persons as well as their inter-personal relationships, such as family relationships, adoptions or testamentary matters. This plenary power implies that the

federal government will occasionally encroach on matters falling under s. 92, but that does not mean it can thereby invade areas of provincial jurisdiction: the two-step analysis is still required and, where possible, courts will favour the ordinary operation of statutes enacted by *both* levels of government.

[44] In the present case, the Attorney General of Quebec argues that, by virtue of its pith and substance, the *Act* dictates how provinces must provide child and family services in an Aboriginal context. In the Court's opinion, a full analysis of the *Act*, of the context in which it was adopted and of its effects reveals something entirely different. The pith and substance of the *Act* is to ensure the well-being of Aboriginal children, by fostering culturally appropriate services to reduce their overrepresentation in provincial child welfare systems. This is established by the extensive extrinsic evidence filed in the record.

[45] The Attorney General of Quebec's argument that the effects of the *Act* severely impair the province's authority over its public service does not withstand analysis. The national standards are stated in the *Act* in general terms and not as operational requirements imposed on provincial public servants for the provision of child and family services. These standards are compatible with Quebec's child welfare legislation. The possible effects of the *Act* on the work of provincial public servants are incidental and do not change its pith and substance.

[46] Lastly, the Court also rejects the propositions that the *Act* offends the principles of federalism and democracy which underlie the Constitution and that, based on the doctrine of interjurisdictional immunity, the *Act* is inapplicable to provincial public servants. Such principles cannot prevail over legislative provisions validly enacted under s. 91(24). As for the doctrine of interjurisdictional immunity, which is of limited application, it presupposes impairment of the core of a legislative power, which the Attorney General of Quebec has not shown in the present case.

(e) Second part of the analysis: the right of Aboriginal self-government and the regulation of child and family services

[47] The Attorney General of Quebec argues that Aboriginal governance can result only from delegations of legislative powers, agreements between governments and Aboriginal peoples, or a constitutional amendment. He is of the view that s. 35 of the *Constitution Act, 1982* does not recognize a right to Aboriginal self-government. If, however, the Court were to conclude otherwise, only the judiciary—and not Parliament—could decide the matter. By adopting the *Act*, Parliament is adding to s. 35 and, in so doing, is usurping the role of the courts.

[48] The reference, therefore, pertains to the scope of s. 35 and raises the question as to whether a right to Aboriginal self-government in relation to child and family services, if it does exist, is “generic” or, instead, specific to each of the Aboriginal peoples and can vary from one people to another.

[49] Based on the approach adopted in one line of cases, the sovereignty exercised by the Crown¹⁷ in Canada is constitutionally incompatible with such an Aboriginal right, as is the division of legislative powers between the federal and provincial governments. Under this approach, while Aboriginal governance may be politically desirable, it must result from a legislative choice. The opposing approach posits that Aboriginal peoples have always maintained a form of self-government that flows from their original sovereignty over the territory. This Aboriginal right is now enshrined in s. 35.

[50] For the reasons that follow, and subject to the important nuances set out in the full reasons, the second approach ought now to be adopted. This conclusion, which flows from the history of the relationship between the Crown and Aboriginal peoples, is also grounded in the jurisprudence interpreted in light of history.

[51] It is now common ground that the *de facto*, indeed *de jure*, autonomy of Aboriginal peoples was recognized until sometime in the 19th century. This crucial fact had already been reflected in the *Royal Proclamation* of 1763. Based in part on the latter, between 1823 and 1832, the United States Supreme Court developed two doctrines with respect to the situation of Aboriginal peoples (the doctrine of domestic dependent nation and that of residual aboriginal sovereignty) in three decisions often cited in Canadian jurisprudence. These doctrines flow from a historical right of self-governance and they postulate the benevolence of the sovereign, two concepts enshrined in the common law. The long history of independence of Aboriginal peoples and the many treaties made with them, both before and after 1763, attest to a similar reality in Canada. It was only relatively recently that a policy of displacement, settlement and assimilation of Aboriginal peoples supplanted this initial state of affairs, resulting in the devastation subsequently decried by several commissions of inquiry. Yet, entire swaths of Aboriginal customary law remained intact, such as in matters of marriage or adoption.

[52] A review of Canadian jurisprudence addressing Aboriginal self-government must begin with *Calder*¹⁸ (1973), which dealt with the origin of Aboriginal title. This decision led to the *Comprehensive Land Claims Policy* mentioned earlier and to resulting agreements which recognized certain powers of Aboriginal peoples in managing their traditional territories. These were followed by the reform brought about by the *Constitution Act, 1982* and, in its wake, attempts to define the Aboriginal rights set out in s. 35 at constitutional conferences which were ultimately unsuccessful.

[53] The ruling in *Sparrow*¹⁹ (1990) firmly rejected the argument that s. 35 was merely a preamble to future constitutional negotiations. It set out what could constitute an “existing” and “aboriginal” right, and the conditions under which a government could

¹⁷ The word “state” could be substituted for “Crown”, but since the latter is commonly used in the case law when discussing Aboriginal issues, it will be used in this opinion.

¹⁸ *Calder et al. v. Attorney General of British Columbia*, [1973] S.C.R. 313 [“*Calder*”].

¹⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [“*Sparrow*”].

legitimately regulate that right. Borrowing from three judgments rendered by the United States Supreme Court between 1823 and 1832 and referred to above, *Van der Peet*²⁰ (1996) examined the legal framework for recognizing an Aboriginal right. The framework entails reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown by applying the test and the factors set out by the Supreme Court of Canada. Further clarification was provided in *Pamajewon*²¹ (1996).

[54] *Delgamuukw*,²² a case that came before the Supreme Court of Canada in 1997, simultaneously raised the issues of Aboriginal title and of Aboriginal self-government. The British Columbia Court of Appeal, sitting as a panel of five judges, had ruled on the subject in highly instructive reasons. Three of the justices had rejected the claims relating to Aboriginal title and to Aboriginal self-government. The two others had dissented, recognizing the existence of an inherent right to Aboriginal self-government. In the Supreme Court, the debate bifurcated: on the issue of Aboriginal title, the decision significantly adapted the analysis set out in *Van der Peet*, but the Court declined to rule on the issue of the right of self-government because it deemed the trial record was insufficient to do so. There are other reference points in the jurisprudence, but the issue of self-government has not yet been judicially settled. That said, the adaptations made to the *Van der Peet* test suggests that the existence of a generic right to self-government is a viable approach.

[55] The right to Aboriginal self-government has also been the subject of significant political initiatives. For example, the 1992 Charlottetown Accord participants as a whole recognized the existence of such a right. The failure of that Accord was followed in 1995 by the federal government's *Self-Government Policy*, which, while recognizing that right, favoured a negotiating model. At the international level, the 2007 *UN Declaration* on the rights of Indigenous peoples affirms the existence of the right to self-determination of Indigenous peoples. In addition, the vast majority of doctrinal writers in Canada have expressed the opinion that s. 35 confirms the existence of a right of self-government.

[56] The Attorney General of Quebec is correct in stating that Part II of the *Act* is based on the premise that s. 35 recognizes the right to Aboriginal self-government. He is mistaken, however, in arguing that, in the instant case, Parliament has added to the content of s. 35, that without a constitutional amendment the *Act* is invalid and that, in any event, it is sufficient for the Court to ascertain the unconstitutionality of this part of the *Act* without having to rule on whether or not s. 35 does indeed confirm the existence of the right in question. Parliament can legislate based on what is set out in the Constitution, without first having to proceed by way of a court reference each time. Ultimately, however, it is for the courts to determine the constitutional validity of Parliament's legislative choice. This necessarily implies that in ruling on the validity of the *Act*, the Court must consider

²⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*"Van der Peet"*].

²¹ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*"Pamajewon"*].

²² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*"Delgamuukw"*].

the scope of s. 35 Aboriginal rights. If these do not include a right of self-government in relation to child and family services, that part of the *Act* must be declared *ultra vires*. If the right falls within s. 35, the Court must then decide whether the framework established by the *Act* for circumscribing its exercise is itself constitutionally valid.

[57] Is the *Act* incompatible with the notion of Canadian sovereignty or with the notion that the distribution of legislative powers between federal and provincial governments is exhaustive? As to the first point, we know that after 1763, Aboriginal peoples continued to live in organized and distinct societies with their own social and political structures. Admittedly, before s. 35 came into force, the Crown and Parliament could, by different means, extinguish an Aboriginal right. This, however, required clear and unambiguous action on their part, but the record contains no pre- or post-Confederation statute to that effect. As to the second point, the *Constitution Act, 1867* did not give Parliament and the provincial legislatures exclusive jurisdiction over the entirety of the law applicable in Canada: this is evidenced by the continued existence in Canada of Imperial statutes, the royal prerogative and British common law. This non-exhaustive division of powers cannot have extinguished the right of Aboriginal peoples to govern themselves insofar as that right was an Aboriginal right and remained intact.

[58] For the specific purposes of this reference, the question of whether or not there exists an Aboriginal right of self-government arises only in relation to the particular field of child and family services. The central purpose of s. 35 is to effect reconciliation and preserve a constitutional space for Aboriginal peoples so as to allow them to live as peoples—with their own identities, cultures and values—within the Canadian framework. As a normative system, Aboriginal customary law relating to children and families forms part of those values. Moreover, the evidence filed in the record by the Attorney General of Canada shows that, together, children and families are the main channel for conveying the markers of Aboriginal identity. Regulation of child and family services by Aboriginal peoples themselves cannot be dissociated from their Aboriginal identity and cultural development.

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

[60] *Sparrow* explained the conditions under which the government can regulate an Aboriginal right. These are stringent conditions. When an aspect of government regulation is inconsistent with an Aboriginal right, that right prevails, unless the government can show that it is pursuing a compelling public objective, that the legislation is in keeping with

the principles of minimal impairment and proportionality and, moreover, that it upholds the honour of the Crown.

[61] It should be noted that this interpretation of s. 35 with respect to the right of self-government seems entirely consistent with the principles set out in the *UN Declaration*.

[62] Lastly, the Court must determine whether the framework established by the *Act* for circumscribing the exercise of the Aboriginal right at issue here is itself constitutionally valid. This raises three questions pertaining to: (1) the constraints the *Act* imposes on the exercise of the Aboriginal right, (2) the potential status of Aboriginal laws as federal legislation, and (3) the legislated primacy of Aboriginal laws over provincial legislation.

[63] The constraints imposed by the *Act* stem from the priority given to the best interests of the child, the requirement to comply with the national standards set out in the *Act* itself and the further requirement to respect the fundamental rights of individuals. These appear to be compelling and substantial objectives that minimally restrict the exercise of the right of self-government, albeit challenges may arise on a case-by-case basis. The *Act* also specifies that the *Canadian Charter* applies to a governing body in the exercise of the right of self-government on behalf of an Aboriginal people. However, read in light of the jurisprudence on s. 32 of the *Canadian Charter*, and given s. 25 of said *Charter*, it is difficult to see why this constraint would be unconstitutional.

[64] When an Aboriginal governing body attempts to enter into a coordination agreement with a government and, in accordance with the *Act*, enacts legislation in relation to child and family services, s. 21 of the *Act* specifies that the legislation has “the force of law as federal law”. The aim of this provision is to render the doctrine of federal paramountcy applicable to Aboriginal legislation. In this regard, the provision alters the fundamental architecture of the Constitution and is *ultra vires*. The doctrine of federal paramountcy, which is used to resolve irreconcilable conflicts between federal and provincial laws under certain conditions, pertains only to federal laws validly enacted under s. 91 of the *Constitution Act, 1867*. The legislative texts in question here, however, are not enactments of the federal government, but rather enactments of Aboriginal governing bodies exercising the s. 35 Aboriginal right of self-government of their peoples. Only s. 35, as interpreted by the courts, could confer precedence on such legislative texts.

[65] The same is true of s. 22(3) of the *Act*, which provides that Aboriginal laws contemplated by s. 21, of which s. 22(3) is the counterpart, prevail over any conflicting or inconsistent provisions of provincial legislation. In exercising the powers conferred by s. 91(24) of the *Constitution Act, 1867*, Parliament can certainly regulate an Aboriginal right recognized under s. 35 of the *Constitution Act, 1982*, but it cannot thereby confer absolute priority on that right. Section 91(24) does not authorize Parliament to dictate every aspect of the provinces’ dealings with Aboriginal peoples, nor can Parliament completely disregard the provinces. The Canadian constitutional architecture is built on

the basis of coordinated—not subordinated—governments, with the aim of guaranteeing each government autonomy in pursuing its objectives. By giving absolute priority to the Aboriginal regulation of child and family services and setting aside the reconciliation test specific to s. 35 of the *Constitution Act, 1982*, s. 22(3) violates this principle.

[66] Recent Supreme Court of Canada jurisprudence confirms that provincial regulation of general application can apply to Aboriginal title to land. This is only possible, however, if the infringement resulting from such regulation can be justified under the existing s. 35 analytical framework. The same approach applies to the right of self-government in relation to child and family services: it is the only approach that is consistent with the constitutional paradigm based on objectives of mutual respect and reconciliation between Aboriginal peoples, the Crown and Canadian society as a whole. Consequently, although provincial child and family services schemes apply *ex proprio vigore* to Aboriginal persons on the territory of a given province, they cannot prevail over Aboriginal legislation enacted pursuant to the Aboriginal right of self-government and they cannot displace that legislation, in whole or in part, unless such provincial schemes satisfy the s. 35 impairment and reconciliation test.

[67] The answer to the reference question, therefore, is as follows: The *Act* is constitutional, except for ss. 21 and 22(3), which are not.

1- The context leading to the passage of the Act

[68] Context provides an opportunity to set out the circumstances having given rise to an event. In the instant case, the passage of the *Act*—which establishes principles and criteria for child and family services tailored to Aboriginal realities and cultures and which recognizes the right of Aboriginal peoples to enact legislative rules to implement those principles and criteria—represents a new stage in a lengthy process set in motion nearly two centuries ago. The parties filed voluminous evidence whose broad strokes it is useful to set out because it forms the basis of many of their arguments and has not been dealt with in a previous judgment, the matter having come before the Court directly under a Notice of Reference.

[69] The *Act's* passage follows a series of federal policies for the assimilation of Aboriginal persons implemented since Canada was colonized by European powers, more specifically since Confederation, as well as provincial policies for the apprehension of Aboriginal children which resulted in their removal from their communities.

[70] These policies, which have been characterized as cultural genocide,²³ left tangible and painful traces affecting several generations of Aboriginal peoples. There have been

²³ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, Vancouver, Privy Council Office, 2019 [“National Inquiry into Missing and Murdered Indigenous

legal proceedings in relation to attendance at residential schools and to the mass placement of Aboriginal children outside their communities.

[71] The situation evolved and some Aboriginal communities, through various agencies, began to provide child welfare services within the legislative framework in place in each of the provinces. Due to systemic constraints resulting from these legislative frameworks and from significant and chronic underfunding, the results were less than convincing. The federal government's funding method for services to Aboriginal children and families is completely inadequate and insufficient and does not allow Aboriginal children and families to obtain the services to which they are entitled in the same manner as the rest of the Canadian population. The jurisdictional overlap between the two levels of government has also had perverse effects on the provision of these services.

[72] Over the years, a number of commissions of inquiry (*Royal Commission on Aboriginal Peoples*, *Truth and Reconciliation Commission*, *Viens Commission* and the *National Inquiry into Missing and Murdered Indigenous Women and Girls*) have exposed the vagaries of the treatment of Aboriginal children and the devastating effects on them, their families and their communities, effects that linger to this day. Aboriginal children are overrepresented in youth protection systems and continue to be placed with people outside their families at significantly higher rates than non-Aboriginal children. The commissions made a number of recommendations. All of them point to the need to let Aboriginal peoples take control of their child and family services.

[73] It is in this context that the federal government created a working group to draft Bill C-92, which received Royal Assent on June 21, 2019 and came into force on January 1, 2020.

(a) Federal Aboriginal assimilation policies

[74] While the following does not claim to be an exhaustive survey of the laws of the 19th and early 20th centuries, a review of some of those laws as well as the statements of politicians and state actors of the time lead to the conclusion that the purpose of Canada's "Indian" policy was to assimilate Aboriginal peoples until they ceased to exist. These laws are complex and form part of the delicate relationship between Aboriginal peoples and the Crown. The intention here is not to provide a complete description nor a detailed analysis of those laws.

Women and Girls, *Final Report*, vol. 1a"], p. 408; 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*, Montreal, McGill-Queen's University Press, 2015 ["Truth and Reconciliation Commission, *Summary of the Final Report*"], p. 1.

[75] The *Act to encourage the gradual Civilization of the Indian Tribes*²⁴ in this Province, and to amend the Laws respecting Indians²⁵ was enacted in 1857. This statute represents a milestone in the evolution of Canada's Aboriginal policy. It starts from the principle that eliminating all legal distinctions between Aboriginal and non-Aboriginal persons through the process of enfranchisement will make it possible to fully integrate them in Canadian society. Enfranchisement, the process through which Aboriginal persons free themselves from the protections associated with their status, was presented as a privilege, because it allowed them to become citizens and obtain the right to own property and to vote. Subject to specific requirements, only men could ask to be enfranchised and they had to satisfy certain conditions: be more than 21 years of age, be able to speak, read and write English or French, be relatively well educated, have no debts and be of "good moral character", as determined by a committee of non-Aboriginal examiners. To encourage them to abandon their status, enfranchised Aboriginal men received a piece of land not exceeding 50 acres in the reserve as well as their individual share of the treaty annuities and other revenues of the band. The wife and children of an enfranchised Aboriginal man automatically lost their status.²⁶

[76] As just mentioned, this statute evidenced a shift in Canada's Aboriginal policy, since it could lead to the elimination of Aboriginal communities via enfranchisement. The statute stripped reserve lands of the state's protection, because in exchange for enfranchisement, those lands could gradually be given away, without the band's consent. In addition to being sexist, the statute was also a step towards government control of the Aboriginal status, because it extended the enfranchisement mechanism to other individuals, depriving them of their status and band membership. Lastly, by affirming the superiority of colonial culture and values, the statute heralded the beginning of a process of devaluing Aboriginal cultural identity.

[77] At Confederation, pursuant to s. 91(24) of the *British North America Act*,²⁷ Parliament was given the power to make laws in relation to "Indians and Lands reserved for the Indians". Aboriginal peoples were not expressly recognized as stakeholders in this

²⁴ The connotation of the word "*sauvage*" ["savages"] used in the French title of the statute (*Acte pour encourager la Civilisation graduelle des Tribus Sauvages en cette Province, et pour amender les Lois relatives aux Sauvages*) suggests that the Aboriginal peoples were inferior, reflecting the colonialist ideology of the time. The word is found in this opinion when it appears in the title of legislation or in the documents of the time. Otherwise, it has been replaced by the word Aboriginal or Indian, as the context requires.

²⁵ S. Prov. C. 1857, 20 Vict., c. 26.

²⁶ See, regarding the purposes and effects of this statute: Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 "Looking Forward, Looking Back", Ottawa, Canada Communication Group, 1996 ["Royal Commission on Aboriginal Peoples, *Report*, vol. 1"], pp. 249-251. See also: pp. 137-138; Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1 "Canada's Residential Schools: The History, Part 1 Origins to 1939", Montreal, McGill-Queen's University Press, 2015 ["Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1"], pp. 61-62.

²⁷ Now the *Constitution Act, 1867*.

new tripartite structure comprised of the United Kingdom, the federal government and the provinces.

[78] The *Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*²⁸ was enacted in 1868. The Secretary of State became the Superintendent General of Indian affairs and, in this capacity, had control and management of Aboriginal lands and property. The statute contained a definition of who was to be considered an Aboriginal person. This definition excluded non-Aboriginal men who married Aboriginal women, but included non-Aboriginal women who married Aboriginal men.²⁹

[79] Two years after Confederation, the *Act for the Gradual Enfranchisement of Indians* [in French, *Sauvages*], *the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, Chapter 42*³⁰ reiterated the previous provisions on the voluntary enfranchisement of Aboriginal men and established more drastic measures for accelerating the integration of Aboriginal persons in Canadian society. The statute went further and allowed the state to interfere in the exercise of Aboriginal self-government. To justify this measure, government officials pointed to the opposition of traditional Aboriginal governments as the key impediment to achieving their goals of civilizing and enfranchising Aboriginal peoples.³¹

[80] In 1876, the *Act to amend and consolidate the laws respecting Indians*³² [in French, *Sauvages*] was enacted. It is considered to be the first *Indian Act*. It codified and added significantly to prior laws pertaining to Aboriginal persons. Government policy was premised on the idea that Aboriginal persons were inferior to the rest of society. The annual report of the department of the interior for the year 1876 expressed as follows the prevailing philosophy that Aboriginal persons were children of the state:

Our Indian legislation [in French, *au sujet des Sauvages*] generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. [...] The true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him

²⁸ S.C. 1868, c. 42.

²⁹ On this subject, see: Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1, pp. 106-107.

³⁰ S.C. 1869, c. 6.

³¹ On this subject, see: Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1, p. 107; Royal Commission on Aboriginal Peoples, *Report*, vol. 1, pp. 252-253; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 "Restructuring the Relationship", part one, Ottawa, Canada Communication Group, 1996, pp. 200-201.

³² S.C. 1876, c. 18.

for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.³³

[81] The 1876 statute established a legislative framework whose broad strokes have remained unchanged to this day. Parliament treats Aboriginal peoples like children by taking control of their political structures, their land holding patterns, and their resource and economic development. The government's policy on Aboriginal peoples is clear. The alternative set out by the Minister of the Interior, David Laird, when the bill was introduced in Parliament, expressed the policy transparently: "The Indians [in French, *Sauvages*] must either be treated as minors or as white men".³⁴

[82] While the 1876 statute did not add anything genuinely new, it was more complex and detailed. It covered a number of important aspects of the lives of Aboriginal persons living on reserves. To facilitate the job of separating Aboriginal persons from those not entitled to the protection of the Aboriginal status attributed by the statute and band membership, it introduced new definitions such as "band" and "reserve", drawing on the policies described above. The statute defined an Aboriginal person as a male of Aboriginal blood or, in the case of mixed marriages, a non-Aboriginal woman married to such an Aboriginal male. Aboriginal women who married non-Aboriginal men lost their status. Moreover, Aboriginal women were excluded from taking part in band land surrender decisions.³⁵

[83] Most of the protective features of earlier legislation were brought forward and made clear: no one other than an Aboriginal person who was a member of the band could live on or use reserve lands without a licence from the Superintendent General; no federal or provincial taxation on real and personal property was permitted on a reserve; and no liens under provincial law could be placed on "Indian" property, nor could such property be seized for debts.³⁶

[84] In the years that followed, the Canadian government amended the *Indian Act*, thereby directly attacking the cultural identity of Aboriginal peoples by banning certain cultural and spiritual practices.³⁷

³³ Department of the Interior, *Annual Report for the year ended 30th June, 1876*, Parliament, Sessional Papers, No. 11, 1877, p. xiv, cited in: Royal Commission on Aboriginal Peoples, *Report*, vol. 1, p. 255. See also: Truth and Reconciliation Commission, *Final Report*, vol. 1, pp. 107-108.

³⁴ House of Commons, *House of Commons Debates.*, 3rd Parl., 3rd Sess., March 30, 1876, p. 952 (D. Laird), cited in: Royal Commission on Aboriginal Peoples, *Report*, vol. 1, p. 256.

³⁵ Royal Commission on Aboriginal Peoples, *Report*, vol. 1, p. 256.

³⁶ *Id.*, p. 256.

³⁷ For example, potlatch: *An Act to further amend "The Indian Act, 1880"*, S.C. 1884, c. 27. See: Truth and Reconciliation Commission, *Summary of the Final Report*, p. 55; Royal Commission on Aboriginal Peoples, *Report*, vol. 1, pp. 169 and 267-270.

[85] In extending its assimilation policies, Canada also adopted a policy to separate Aboriginal children from their parents. In 1883, Canadian Prime Minister John A. Macdonald stated in the House of Commons that this measure was required in order to break the connection of those children with their culture and identity:

When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.³⁸

[86] Pursuant to amendments made to the *Indian Act* in 1894,³⁹ the federal government adopted regulations on residential school attendance.⁴⁰ In principle, such attendance was voluntary. At that time, however, there were no formal child welfare services. Thus, if an “Indian” agent or a justice of the peace thought that an Aboriginal child was not being properly cared for or educated, he could issue an order to place the child in an industrial or boarding school. Ultimately, no child could be discharged from a school without departmental approval, even if the parents had enrolled the child voluntarily. This policy, which had no legislative basis, relied on the admission form that parents were required to sign, as of 1892, when enrolling their children in residential schools.⁴¹

[87] As early as 1883, the federal government established the first residential schools for Aboriginal children. Over the years that followed, the system grew considerably (nearly 140 residential schools). As of the 1940s, residential schools, while not designed as such,⁴² served as *de facto* provincial child welfare services and apprehended many

³⁸ House of Commons, *House of Commons Debates.*, 5th Parl., 1st Sess., vol. 2, May 9, 1883, pp. 1107-1108, cited in: Truth and Reconciliation Commission, *Summary of the Final Report*, p. 2.

³⁹ *An Act further to amend “The Indian Act”*, S.C. 1894, c. 32.

⁴⁰ *Regulation dated November 10, 1894*, (1894) 28 C. Gaz. 1012, pp. 985-986.

⁴¹ Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 60-61; Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1 “Canada’s Residential Schools: The History, Part 2 1939 to 2000”, Montreal, McGill-Queen’s University Press, 2015 [“Truth and Reconciliation Commission, *Final Report*, vol. 1, part 2”], p. 147.

⁴² Truth and Reconciliation Commission, *Final Report*, vol. 1, part 2, pp. 147-173. In its report, the Commission highlighted the following deficiencies: Indian Affairs agents and residential school staff did not have social worker skills, the system instituted did not allow children to remain connected to their families, children were sent to residential schools wrongfully and without valid reasons, and the schools were underfunded by the federal government. Overcrowded residential schools, run by individuals without the required skills to offer child welfare services, were bound to endanger the lives of Aboriginal children.

children whose living conditions were considered unsatisfactory.⁴³ The Catholic, Anglican, United, Methodist and Presbyterian churches were involved in the administration of residential schools. This partnership between the government and religious communities ended in 1969. Most of the schools closed in the 1980s, although a few remained open until the end of the 1990s.⁴⁴

[88] In 1920, the federal government amended the *Indian Act*⁴⁵ to give it the power to strip individuals of their status against their will.⁴⁶ The other major element of the amendments to the *Indian Act* was the power to compel parents to send their children to residential schools. In presenting this amendment to a parliamentary committee, Indian Affairs Deputy Minister Duncan Campbell Scott did not hide the fact that he was working towards the disappearance of Aboriginal peoples:

Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.⁴⁷

[89] Life for children in residential schools was dire. Due to a lack of resources and infrastructure to provide for their care, they were neglected and abused and “grew up unloved”.⁴⁸ Torn from their homes and families, they felt like they had been captured and locked away. They were stripped of their personal belongings and clothing. These were replaced with so-called civilized clothing, makeshift clothing that was worn out and inadequate.⁴⁹ They were separated from their siblings and lived in isolation. To identify them, they were attributed a number which could change over the years.⁵⁰ Not only was the education Aboriginal children received mediocre, but it was undermined by the amount of work they were required to perform for the school because of the self-sufficiency requirements imposed on residential schools. They were expected to grow and prepare the food they ate, make and mend much of their clothing and maintain

⁴³ See: Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children’s Action Research and Education Service, 2015, pp. 61-63; John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986*, Winnipeg, University of Manitoba Press, 1999, pp. 212-217; Department of Indian Affairs and Northern Development, *Indian Residential Schools: A Research Study of the Child Care Programs of Nine Residential Schools in Saskatchewan*, Ottawa, The Canadian Welfare Council, 1967, pp. 62-64; Special Joint Committee of the Senate and the House of Commons appointed to continue and complete the examination and consideration of the *Indian Act*, *Minutes of Proceedings and Evidence*, Ottawa, King’s Printer, 1947, fasc. 5, p. 158.

⁴⁴ Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 2-3.

⁴⁵ *An Act to amend the Indian Act*, S.C. 1919-20, c. 50.

⁴⁶ Truth and Reconciliation Commission, *Summary of the Final Report*, p. 54.

⁴⁷ Evidence of Duncan Campbell Scott before the Special Committee of the House of Commons Investigating the *Indian Act* amendments of 1920, cited in: *Ibid.*

⁴⁸ Truth and Reconciliation Commission, *Final Report*, vol. 1, part 2, p. 148.

⁴⁹ Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 39-40.

⁵⁰ *Id.*, pp. 40-41.

the schools.⁵¹ The government adopted a hostile approach to Aboriginal languages, and their use was harshly suppressed.⁵² The food served in residential schools was inadequate and the children suffered from malnutrition.⁵³ Living conditions in residential schools were also alarming.⁵⁴ The number of deaths cannot be accurately tallied because files were destroyed or are incomplete, but we know that the situation was tragic:

A January 2015 statistical analysis of the Named Register for the period from 1867 to 2000 identified 2,040 deaths. The same analysis of a combination of the Named and Unnamed registers identified 3,201 reported deaths. The greatest number of these deaths (1,328 on the Named Register and 2,434 on the Named and Unnamed registers) took place prior to 1940. [...]

[...]

The death rates for Aboriginal children in the residential schools were far higher than those experienced by members of the general Canadian population. [...]⁵⁵

[90] The buildings housing Aboriginal children constituted serious fire hazards due to their bad construction, poor maintenance and the deplorable condition of the firefighting equipment. They also had inadequate ventilation. Rampant overcrowding led to the spread of infectious diseases, including tuberculosis.⁵⁶ Dr. Peter Bryce, the chief medical officer for Indian Affairs, decried this situation in his 1907 annual report. The death toll for the 1,537 children in his survey of 15 schools was 24%, and this figure might have risen to 42% if the children who returned to their reserves had been tracked.⁵⁷

[91] In addition to these inhumane conditions under which Aboriginal children lived, there were other unspeakably cruel rules. They lived almost military lives, where no exceptions were allowed. Breaking the rules meant punishments ranging from insults to harsher forms of discipline such as slaps with a ruler or strap, or even extremely severe punishments such as being forced to kneel for hours on end, being confined to a shower, being locked in a closet or room, sometimes for days at a time, being deprived of meals, being forced to eat soap, etc.⁵⁸ This reign of terror had other tragic consequences:

⁵¹ *Id.*, pp. 77-80.

⁵² *Id.*, pp. 80-84.

⁵³ *Id.*, pp. 85-90.

⁵⁴ *Id.*, pp. 90-99.

⁵⁵ *Id.*, p. 92.

⁵⁶ *Id.*, pp. 95-96.

⁵⁷ Peter Henderson Bryce, *Report on the Indian Schools of Manitoba and the Northwest Territories*, Ottawa, Government Printing Bureau, 1907, cited in: Royal Commission on Aboriginal Peoples, *Report*, vol. 1, p. 342. See also: Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 92-93.

⁵⁸ Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec, *Final Report*, Québec, Government of Québec, 2019 ["Viens Commission, *Final Report*"], p. 60.

children attempted suicide, died after running away, etc. In addition to this violence, children in residential schools were subjected to sexual abuse that filled them with shame, plunged them into depression and created serious and lasting harm.⁵⁹

[92] The federal government gradually realized that the residential schools had disastrous effects on Aboriginal children and that it was unable to care for them⁶⁰ and, as of 1947, it began to encourage the provinces to provide Aboriginal persons with the social services they were already offering to the non-Aboriginal population, including child welfare services.⁶¹ In 1951, Parliament enacted s. 87 (now s. 88) of the *Indian Act*⁶² which, with some exceptions mentioned in that provision, prescribed that laws of general application in a province were applicable to Aboriginal persons in that province. This provision opened the door to the application of the various child welfare regimes to Aboriginal children. As we will see, the situation of Aboriginal children and families did not really improve.

(b) Provincial policies for the apprehension of Aboriginal children

[93] For nearly one century, the federal government applied a policy for the assimilation of Aboriginal peoples. In order to achieve this objective, it deliberately chose to separate Aboriginal children from their parents and natural environment and have them attend residential schools.

[94] The end of the residential school system, however, did not spell the end of the forced separation of Aboriginal children from their families. Provincial child welfare services effectively took over from the residential schools when, following the adoption of s. 88 of the *Indian Act*, provincial governments began to offer child welfare services to Aboriginal populations on reserves. For Aboriginal families and communities, the impact of this new situation was just as devastating. Some children were simply moved from residential schools to foster families within the provincial system. Furthermore, some provinces, being of the view that the federal government should bear the costs of services offered to Aboriginal families and children, did not immediately take on the duties

⁵⁹ *Id.*, pp. 60-61; Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 101-105.

⁶⁰ To this effect, see: Special Joint Committee of the Senate and the House of Commons appointed to continue and complete the examination and consideration of the *Indian Act*, *Minutes of Proceedings and Evidence*, Ottawa, King's Printer, 1947, fasc. 5, pp. 155-161.

⁶¹ Truth and Reconciliation Commission, *Final Report*, vol. 2, p. 167-168; Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5 "Canada's Residential Schools: The Legacy", Montreal, McGill-Queen's University Press, 2015 ["Truth and Reconciliation Commission, *Final Report*, vol. 5"], p. 14. See also: Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 "The Justice System and Aboriginal People", Winnipeg, Queen's Printer, 1991, pp. 516-518.

⁶² S.C. 1951, c. 29.

transferred to them, and some were only inclined to intervene when there was a danger of death.⁶³

[95] When provincial governments began to intervene on a more regular basis, pursuant to funding agreements with the federal government,⁶⁴ they effectively perpetuated the assimilative policy embodied in the residential school system. Thousands of children were removed from their natural environment and adopted out to non-Aboriginal families:

The provincial social workers assigned to reserves assessed child safety and welfare by mainstream cultural standards. They received little or no training in Aboriginal culture. They were not trained to recognize problems rooted in generations of trauma related to the residential schools. Instead, they passed judgment on what they considered bad or neglectful parenting. As a result, beginning in the 1960s, provincial child welfare workers removed thousands of children from Aboriginal communities. It has been called the “Sixties Scoop.”

Aboriginal children were placed in non-Aboriginal homes across Canada, in the United States, and even overseas, with no attempt to preserve their culture and identity. The mass adoptions continued between 1960 and 1990.

The Sixties Scoop children suffered much the same effects as children who were placed in residential schools. Aboriginal children adopted or placed with white foster parents were sometimes abused. They suffered from identity confusion, low self-esteem, addictions, lower levels of educational achievement, and unemployment. They sometimes experienced disparagement and almost always suffered from dislocation and denial of their Aboriginal identity.⁶⁵

[Emphasis added]

[96] The impact of the mass removal of Aboriginal children as of the 1960s has been described as “horrendous, destructive, devastating and tragic”⁶⁶ and was found to have

⁶³ See, overall: Truth and Reconciliation Commission, *Final Report*, vol. 1, part 2, pp. 167-168; Truth and Reconciliation Commission, *Final Report*, vol. 5, p. 14; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 “The Justice System and Aboriginal People”, Winnipeg, Queen’s Printer, 1991, pp. 518-520.

⁶⁴ Sworn declaration of Nathalie Nepton, October 14, 2020, paras. 17-18.

⁶⁵ Truth and Reconciliation Commission, *Final Report*, vol. 5, pp. 14-15. See also: Institute of Fiscal Studies and Democracy, *Enabling First Nations Children to Thrive*, Ottawa, Institute of Fiscal Studies and Democracy, 2018, pp. 26-27; Cindy Blackstock, “Residential Schools: Did They Really Close or Just Morph Into Child Welfare?”, (2007) 6:1 *Indigenous L.J.* 71, pp. 73-74; Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government*, Ottawa, Queen’s Printer for Canada, 1983, p. 31.

⁶⁶ *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, para. 1, reversed in part by *Brown v. Canada (Attorney General)*, 2013 ONCA 18, cited in *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para. 7.

been as damaging as attendance at residential schools where Aboriginal children were with their peers:

Residential schools incarcerated children for 10 months of the year, but at least the children stayed in an Aboriginal peer group; they always knew their First Nation of origin and who their parents were and they knew that eventually they would be going home. In the foster and adoptive system, Aboriginal children vanished with scarcely a trace, the vast majority of them placed until they were adults in non-Aboriginal homes where their cultural identity and legal Indian status, their knowledge of their own First Nation and even their birth names were erased, often forever.⁶⁷

[97] The devastating effect of what is referred to as the “Sixties Scoop”—which resulted in the mass adoption of Aboriginal children—is at the root of major identity and behavioural issues. In her expert report, Christiane Guay discusses studies that have shown the negative impacts of these adoptions. Some children had difficulty identifying with the culture of their foster family, while others suffered from racism and from the stereotyping of their native culture.⁶⁸ In many cases, the fact that they were trapped between two cultures caused [TRANSLATION] “these children to suffer from a negative self-image and drove many of them to seek comfort in alcohol and drugs to escape their suffering. [...] Commentators have also shown that these problems also led to suicidal thoughts or a greater propensity for crime [...]”.⁶⁹

[98] Faced with this wave of systematic “abductions”, several communities established agencies so as to provide certain child welfare services themselves.⁷⁰ These agencies, however, must comply with provincial laws and applicable criteria,⁷¹ which do not necessarily reflect Aboriginal cultures or reality. This problem is compounded by the chronic and significant underfunding of services, as we will see.

(c) Legal proceedings related to residential schools and to the apprehension of Aboriginal children

[99] Until the 1990s, over 150,000 Aboriginal children attended residential schools run by religious organizations and funded by the Government of Canada. Thousands of these

⁶⁷ Suzanne Fournier and Ernie Crey, *Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities*, Vancouver/Toronto, Douglas & McIntyre, 1997, p. 81, as cited in *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para. 7.

⁶⁸ Expert report from Christiane Guay, October 7, 2020, pp. 31-32.

⁶⁹ *Id.*, p. 32 [reference omitted].

⁷⁰ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 3 “Gathering Strength”, Ottawa, Canada Communication Group, 1996 [“Royal Commission on Aboriginal Peoples, *Report*, vol. 3”], p. 26. See also: Institute of Fiscal Studies and Democracy, *Enabling First Nations Children to Thrive*, Ottawa, Institute of Fiscal Studies and Democracy, 2018, p. 27.

⁷¹ Sworn declaration of Nathalie Nepton, October 14, 2020, paras. 19-20.

children suffered physical, psychological and sexual abuse during their stay in these schools.

[100] As documented in the report of the *Truth and Reconciliation Commission* and that of the *Viens Commission*, among others, the legacy of the tragic history of residential schools and of the Government of Canada's assimilation policies can be seen in the significant disparities noted between Aboriginal and non-Aboriginal populations in terms of education, income, health and social life. It is also reflected in the racism and the systemic discrimination Aboriginal individuals face. This is a proven fact that only those who lack awareness of the facts and the law would question.⁷² Most Aboriginal languages are in danger of disappearing because the children were denied the right to use them. The disproportionate number of incarcerated Aboriginal persons and the disproportionate number of Aboriginal children apprehended by provincial child welfare services are attributable in part to the abuse suffered in the residential schools and to the fact that the children who attended them were deprived of role models and a relationship with their families. The legacy of the abuse and of the consequences suffered by the children who attended residential schools also affects their spouses, children and grandchildren, their extended families and their communities.⁷³ According to the expert report of Christiane Guay, in most instances, attendance at residential schools is associated [TRANSLATION] "with identity issues, addiction, increased psychological distress and a greater probability of experiencing other trauma (sexual assault, physical assault, domestic violence, etc.)."⁷⁴

[101] Former residential school students instituted numerous individual and class actions. In 2006, the *IRS Settlement Agreement* was signed,⁷⁵ and, subject to the approval orders, the parties agreed to amend and merge all of the existing proposed class action statements of claim to assert a common series of class actions for the purposes of settlement.

[102] The *IRS Settlement Agreement* settles all of these class actions. It is designed to provide fair and comprehensive compensation for the effects of residential schools on those who attended them and to promote healing, education, truth, reconciliation and commemoration, particularly by financially compensating former residential school students. The *IRS Settlement Agreement* has five central elements: (1) a common experience payment; (2) a payment for personal injury, determined through an independent assessment process; (3) support, including funds for the Aboriginal Healing

⁷² Viens Commission, *Final Report*, p. 203. See also: *Caring Society*.

⁷³ Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 135-136; see also: Expert report from Christiane Guay, October 7, 2020, pp. 30-31.

⁷⁴ Expert report from Christiane Guay, October 7, 2020, p. 31 [reference omitted].

⁷⁵ The *IRS Settlement Agreement* was entered into between the Government of Canada, certain religious organizations and approximately 86,000 Aboriginal individuals in Canada who, at one time or another, attended residential schools. Implementation of the *IRS Settlement Agreement* began on September 19, 2007.

Foundation; (4) support for residential school commemoration; and (5) the establishment of the *Truth and Reconciliation Commission*.

[103] Former residential school students can therefore receive two forms of financial compensation: the common experience payment provides eligible individuals with financial compensation based on the duration of their attendance at a residential school and the personal experience payment provides compensation for abuses and wrongful acts that resulted in serious psychological and physical consequences.

[104] In June 2008, following the negotiation of the *IRS Settlement Agreement*, Prime Minister Stephen Harper apologized to the students on behalf of Canada. In his statement, he acknowledged that the goal of these schools was to separate Aboriginal children from their homes and families in order to better assimilate them:

[...] These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, “to kill the Indian in the child.” Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.⁷⁶

[105] Aboriginal individuals swept up in the Sixties Scoop instituted 23 class actions against the Government of Canada in provincial superior courts and in the Federal Court.⁷⁷

[106] In one of these proceedings, *Brown v. Canada (Attorney General)*,⁷⁸ a 2017 case— excerpted above—in which the Ontario Superior Court of Justice ruled on the certified common issue after eight years of litigation, the Government of Canada was held liable for having failed in its common law duty towards children apprehended as part of the Sixties Scoop.

[107] This judgment led to an overall settlement covering all of the class actions. This settlement was approved by the Federal Court in *Riddle v. Canada*⁷⁹ and by the Ontario Superior Court of Justice in *Brown v. Canada (Attorney General)*.⁸⁰

⁷⁶ The apologies are reproduced in: Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 370-371.

⁷⁷ See: *Riddle v. Canada*, 2018 FC 641, paras. 14-21; *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, para. 1.

⁷⁸ 2017 ONSC 251.

⁷⁹ 2018 FC 641.

⁸⁰ 2018 ONSC 3429.

(d) The various commissions of inquiry and their recommendations

[108] Countless studies, reports and surveys on various aspects of the situation of Aboriginal peoples have denounced the discrimination and the systematic and abusive apprehension experienced by Aboriginal children and have suggested avenues for reform.

[109] Of these, four merit particular attention: the *Royal Commission on Aboriginal Peoples*, the *Truth and Reconciliation Commission*, the *Viens Commission* and the *National Inquiry into Missing and Murdered Indigenous Women and Girls*.

[110] The *Royal Commission on Aboriginal Peoples*, which was established on August 26, 1991,⁸¹ was given comprehensive terms of reference. It was tasked with investigating the evolution of the relationship among Aboriginal peoples, the Canadian government, and Canadian society as a whole. It was expected to propose specific solutions, informed by domestic and international experience, to the problems which have plagued those relationships and which confront Aboriginal peoples today. The Commission was to examine all issues it deemed relevant to any or all of the Aboriginal peoples of Canada.⁸²

[111] The Commission submitted its report in October 1996. To redress the wrongs associated with the residential schools, it recommended concerted action on a number of fronts, including: (1) the creation of an Aboriginal university and the recommendation that the federal government fund the establishment and operation of a national Aboriginal archive and library to house records concerning residential schools;⁸³ (2) access to appropriate methods of healing for all individuals suffering the effects of physical, sexual or emotional abuse experienced in the residential schools;⁸⁴ and (3) the need for further inquiry and investigation into the profound cruelty inflicted on Aboriginal persons by residential school policies.⁸⁵

[112] The Commission's general recommendations were based on a renewed relationship emphasizing recognition of the fact that Aboriginal peoples are peoples and have a right of self-government:

IN THIS REPORT WE HAVE made recommendations affecting virtually every aspect of Aboriginal people's lives. We have sought to grapple with entrenched

⁸¹ *Order directing that a Commission under the Great Seal of Canada do issue appointing the following persons to conduct an inquiry and report upon the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government and Canadian society, which inquiry shall be known as the ROYAL COMMISSION ON ABORIGINAL PEOPLES*, P.C. 1991-1597.

⁸² *Royal Commission on Aboriginal Peoples, Report*, vol. 1, pp. 11-12 and 664-667 (Appendix A).

⁸³ *Id.*, pp. 687-688; *Royal Commission on Aboriginal Peoples, Report*, vol. 3, pp. 495-496 and 500-501.

⁸⁴ See, for example: *Royal Commission on Aboriginal Peoples, Report*, vol. 3, pp. 210 *et seq.*

⁸⁵ *Royal Commission on Aboriginal Peoples, Report*, vol. 1, pp. 686-687.

economic and social problems in Aboriginal communities while also seeking to transform the relationship between Aboriginal nations and Canadian governments. Each problem addressed would be difficult to resolve on its own; the problems are rendered more challenging by their interdependence. The scale and complexity of the task is daunting. Implementation will be much easier, however, if the essential themes of this report are kept in view. If one theme dominates our recommendations, it is that Aboriginal peoples must have room to exercise their autonomy and structure their own solutions. The pattern of debilitating and discriminatory paternalism that has characterized federal policy for the past 150 years must end. Aboriginal people cannot flourish if they are treated as wards, incapable of controlling their own destiny.

We advocate recognition of Aboriginal nations within Canada as political entities through which Aboriginal people can express their distinctive identity within the context of their Canadian citizenship. Aboriginal people do not have to surrender their identity to accomplish those goals. Non-Aboriginal Canadians cherish their identity as Newfoundlanders or Albertans, for instance, and still remain strongly committed to Canada.

At the heart of our recommendations is recognition that Aboriginal peoples are peoples, that they form collectivities of unique character, and that they have a right of governmental autonomy. Aboriginal peoples have preserved their identities under adverse conditions. They have safeguarded their traditions during many decades when non-Aboriginal officials attempted to regulate every aspect of their lives. They are entitled to control matters important to their nations without intrusive interference. This authority is not something bestowed by other governments. It is inherent in their identity as peoples. But to be fully effective, their authority must be recognized by other governments.⁸⁶

[Emphasis added]

[113] The *Truth and Reconciliation Commission*, which resulted from the implementation of the *IRS Settlement Agreement* discussed above and which was intended to foster reconciliation, mutual recognition and mutual respect,⁸⁷ travelled across Canada over a period of six years and heard from more than 6,000 witnesses, most of whom had attended residential schools as children.⁸⁸

⁸⁶ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 5 "Renewal: A Twenty-Year Commitment", Ottawa, Canada Communication Group, 1996, p. 1.

⁸⁷ For the mandate, see: Truth and Reconciliation Commission, *Summary of the Final Report*, pp. 339-350.

⁸⁸ *Id.*, p. v.

[114] In the report it submitted in 2015, the *Truth and Reconciliation Commission's* first five Calls to Action addressed child welfare and called upon governments to “commit to reducing the number of Aboriginal children in care”⁸⁹ by: (a) monitoring and assessing neglect investigations; (b) providing adequate resources to enable Aboriginal communities and child welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside; (c) ensuring that social workers and others who conduct child welfare investigations are properly educated and trained about the history and impacts of residential schools; (d) ensuring that those social workers and other individuals are properly informed and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to healing; and (e) requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers⁹⁰ and allocating the necessary resources to allow children to maintain their relationships with their communities and keep them in culturally appropriate environments.

[115] The Commission also called for changes to the legislative framework for Aboriginal child welfare services:

- 4) We call upon the federal government to enact Aboriginal child welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:
 - i. Affirm the right of Aboriginal governments to establish and maintain their own child welfare agencies.
 - ii. Require all child welfare agencies and courts to take the residential school legacy into account in their decision making.
 - iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.⁹¹

[116] Following numerous allegations of criminal acts committed by police officers against Aboriginal women, the Government of Quebec appointed an independent civilian observer, Mtre Fannie Lafontaine, to examine the integrity and impartiality of police investigations in this context. On November 16, 2016, she filed her initial report, in which she expressed the “need to shed light on the underlying causes of the present allegations against police officers of sexual violence and abuse of power as well as on the potential existence of a pattern of discriminatory behaviour against Indigenous people, which

⁸⁹ *Id.*, p. 319.

⁹⁰ *Ibid.* See also: pp. 137-144.

⁹¹ *Id.*, p. 320.

indicates the existence of systemic racism on the part of the police against Indigenous people”.⁹²

[117] The *Viens Commission* was established by an order in council made that same year.⁹³ It was given the following terms of reference:

[TRANSLATION]

[...] to investigate, ascertain the facts and make analyses with a view to making recommendations for concrete, effective and sustainable measures to be implemented by the Government of Quebec and Aboriginal authorities in order to prevent or eliminate, regardless of their origin or cause, any form of violence, discriminatory practices or differential treatment in the delivery of the following public services to Aboriginal persons in Quebec: police services, correctional services, justice services, health and social services, and youth protection services.⁹⁴

[118] The report of the *Viens Commission* was submitted on September 30, 2019. In a chapter setting out the inquiry’s general findings, the Honourable Jacques Viens explained that Aboriginal persons are victims of systemic discrimination:

Having completed my analysis, it seems impossible to deny that members of First Nations and Inuit are victims of systemic discrimination in their relations with the public services that are the subject of this inquiry.

While the problems may not always be systemic, the Commission hearings have revealed that our current structures and processes show a clear lack of sensitivity toward the social, geographical and cultural realities of Indigenous peoples: As a result, notwithstanding certain efforts to make changes and despite a clear desire to promote equal opportunities, many current institutional practices, standards, laws and policies remain a source of discrimination and inequality, to the point where they significantly taint the quality of services offered to First Nations and Inuit. In some cases this lack of sensitivity manifests as a complete lack of service, which leaves entire populations to their own devices with no ability to remedy their situations. In this way, thousands have been stripped not only of their rights, but of their dignity, as they are forced to live under deplorable conditions, deprived of

⁹² Fannie Lafontaine, *Independent Civilian Observer’s Report: Evaluation of the integrity and impartiality of SPVM’s investigations of allegations of criminal acts committed by SQ police officers against Indigenous women in Val-d’Or and elsewhere (Phase 1 of the Investigations)*, Quebec, Ministère de la Sécurité publique, 2016, p. 11.

⁹³ *Décret 1095-2016 concernant la constitution de la Commission d’enquête sur les relations entre les Autochtones et certains services publics au Québec : écoute, réconciliation et progrès*, (2017) 149 G.O.Q. II, 24, pp. 24-26.

⁹⁴ *Id.*, p. 25, reproduced in: Viens Commission, *Final Report*, p. 21.

their own cultural references. In a developed society such as ours this reality is simply unacceptable.⁹⁵

[Emphasis added]

[119] One part of the *Viens Commission's* inquiry focused on youth protection services. It noted that these services gave rise to the greatest number of testimonies and statements from members of First Nations and Inuit. It further noted that the current youth protection system has been imposed on Aboriginal peoples from the outside, taking into account neither their cultures nor their concepts of family. Many of those heard believed that by placing Aboriginal children with non-Aboriginal families, the system perpetuates the negative effects of the residential school system.⁹⁶

[120] The *Viens Commission* proposed a number of Calls for Action. From among the more general ones, its Call for Action 3 made the following recommendation:

Working with Indigenous authorities, draft and enact legislation guaranteeing that the provisions of the United Nations Declaration on the Rights of Indigenous Peoples will be taken into account in the body of legislation under its jurisdiction.⁹⁷

[121] Moreover, it made 30 Calls for Action (Calls for Action 108 to 137) with respect to youth protection services with a view to having services that are adapted to Aboriginal realities and are properly funded.⁹⁸

[122] In 2016, following repeated requests from various groups, the federal government launched the *National Inquiry into Missing and Murdered Indigenous Women and Girls* in order to shed light on the root causes of modern-day violence against Aboriginal women and girls. It was also a response to the *Truth and Reconciliation Commission's* Call to Action 41.

[123] Between September 2016 and December 2018, the commissioners in charge of this inquiry conducted an “in-depth study and analysis [...] on missing and murdered Indigenous women and girls, including LGBTQ and Two Spirit people, collecting information from community and institutional hearings; past and current research; and forensic analysis of police records”.⁹⁹ They also gathered evidence from over “1,400 witnesses, including survivors of violence, the families of victims, and subject-matter experts and Knowledge Keepers”.¹⁰⁰

⁹⁵ Viens Commission, *Final Report*, pp. 203-204.

⁹⁶ *Id.*, p. 407.

⁹⁷ *Id.*, p. 223.

⁹⁸ *Id.*, pp. 483-485.

⁹⁹ Women and Gender Equality Canada, “Backgrounder – National Inquiry into Missing and Murdered Indigenous Women and Girls”, November 26, 2020.

¹⁰⁰ *Ibid.*

[124] The Final Report of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* was presented on June 3, 2019 to families, survivors and Aboriginal leaders, as well as to federal, provincial and territorial governments.

[125] It contains a chapter outlining measures to stop the violence and redress the situation via Calls for Justice that target governments in particular. The section on “Calls for Social Workers and Those Implicated in Child Welfare” contains numerous recommendations, some of which it is appropriate to reproduce:

- 12.1 We call upon all federal, provincial, and territorial governments to recognize Indigenous self-determination and inherent jurisdiction over child welfare. Indigenous governments and leaders have a positive obligation to assert jurisdiction in this area. We further assert that it is the responsibility of Indigenous governments to take a role in intervening, advocating, and supporting their members impacted by the child welfare system, even when not exercising jurisdiction to provide services through Indigenous agencies.
- 12.2 We call upon on all governments, including Indigenous governments, to transform current child welfare systems fundamentally so that Indigenous communities have control over the design and delivery of services for their families and children. These services must be adequately funded and resourced to ensure better support for families and communities to keep children in their family homes.
- 12.3 We call upon all governments and Indigenous organizations to develop and apply a definition of “best interests of the child” based on distinct Indigenous perspectives, world views, needs, and priorities, including the perspective of Indigenous children and youth. The primary focus and objective of all child and family services agencies must be upholding and protecting the rights of the child through ensuring the health and well-being of children, their families, and communities, and family unification and reunification.
- 12.4 We call upon all governments to prohibit the apprehension of children on the basis of poverty and cultural bias. All governments must resolve issues of poverty, inadequate and substandard housing, and lack of financial support for families, and increase food security to ensure that Indigenous families can succeed.¹⁰¹

[Emphasis added]

¹⁰¹ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1b, Vancouver, Privy Council Office, 2019 [“National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, vol. 1b”], p. 194, paras. 12.1-12.4.

(e) The overrepresentation of Aboriginal children in youth protection systems and out-of-family placements

[126] The overrepresentation of Aboriginal children in youth protection services is part of a sad historical continuity. Despite the many warning signs given over the decades¹⁰² and the initiatives aimed at stemming the problem,¹⁰³ it is still very much present throughout Canada. This is an indisputable reality that everyone, including the parties in this case, agree on.

[127] As discussed above, the *Truth and Reconciliation Commission* devoted a significant part of its report to Canada's child welfare systems. It made a hard-hitting finding regarding overrepresentation:

The end of the residential school system did not mean that Aboriginal children were no longer forcibly separated from their families. Child welfare services carried on where the residential schools left off. More Aboriginal children are removed from their families today than attended residential schools in any one year. Following the inquiry into the death of an Aboriginal girl in Manitoba, the Honourable Ted Hughes concluded that the overrepresentation of Aboriginal children in care in Canada is “unconscionable” and “a national embarrassment”.¹⁰⁴

[128] Reiterating findings that had been known for much too long, it made a Call to Action that favours a renewed approach based on self-determination, a comprehensive response, respect for culture and language, structural interventions, and non-discrimination:

The legacy of Canada's colonial past, including the residential school system, cannot be simply willed to an end. We must ensure that Aboriginal parents,

¹⁰² To name but a few: Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government*, Ottawa, Queen's Printer for Canada, 1983, pp. 31-33; Royal Commission on Aboriginal Peoples, Report, vol. 3, pp. 21 *et seq.*; Aboriginal Children in Care Working Group, *Aboriginal Children in Care: Report to Canada's Premiers*, Ottawa, Council of the Federation Secretariat, 2015, pp. 6-8 and 43-44; First Nations of Quebec and Labrador Health and Social Services Commission, “Trajectories of First Nations youth subject to the Youth Protection Act. Component 3: Analysis of mainstream youth protection agencies administrative data”, 2016, pp. 11, 14-19 and 73-78. See also: Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program*, Ottawa, Department of Indian Affairs and Northern Development, 2007, pp. i-ii; Statistics Canada, *Living arrangements of Aboriginal children aged 14 and under*, Ottawa, Minister of Industry, 2016, pp. 1 and 6-8; Statistics Canada, *Diverse family characteristics of Aboriginal children aged 0 to 4*, Ottawa, Minister of Industry, 2017, pp. 1 and 5.

¹⁰³ For example: Expert report from Christiane Guay, October 7, 2020, pp. 22 *et seq.*; Truth and Reconciliation Commission of Canada, *Final Report*, vol. 5, pp. 56-60; Aboriginal Children in Care Working Group, *Aboriginal Children in Care: Report to Canada's Premiers*, Ottawa, Council of the Federation Secretariat, 2015, pp. 29 *et seq.*

¹⁰⁴ Truth and Reconciliation Commission, *Final Report*, vol. 5, p. 11. This entire chapter of the *Truth and Reconciliation Commission's* report supports this finding.

families, and communities have the resources they need to overcome the trauma of how they have been treated in residential schools and in broader society. The story of Canada's child welfare institutions and Aboriginal peoples suggest that the lessons of the residential schools have not yet been learned. A renewed approach to child welfare, based upon the *Touchstone of Hope* principles of self-determination, holistic response, respect for culture and language, structural interventions, and non-discrimination, can be a starting point to reversing the harmful legacy of the residential schools upon Aboriginal children and bringing about reconciliation.

Recognizing and prioritizing actions to redress the present and growing crisis of Aboriginal overrepresentation in the Canadian child welfare system will be a test of the political will and courage of the parties to the residential schools settlement agreement, and ultimately all Canadians.¹⁰⁵

[129] In 2019, in its own report, the *National Inquiry into Missing and Murdered Indigenous Women and Girls* also addressed head-on the overrepresentation of Aboriginal children in child welfare services:

[...] As many witnesses identified, the apprehension of children that occurs unfettered on this scale represents the strongest form of violence against a mother, in addition to the violence that it represents for the children. A system this broken and that places Indigenous children at greater risk for violence, now and in the future, requires nothing less than a complete paradigm shift.¹⁰⁶

[Reference omitted]

[130] Overrepresentation is a deep-seated problem in Quebec as well,¹⁰⁷ despite amendments to the *Youth Protection Act*¹⁰⁸ and despite the various agreements entered into between the government and Aboriginal communities.¹⁰⁹ The *Viens Commission* pointed out this documented fact in no uncertain terms:

¹⁰⁵ *Id.*, p. 60.

¹⁰⁶ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, vol. 1a, p. 339. See also, among others: pp. 339-355, 364-368, 379-384 and 397-402; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, vol. 1b, pp. 194-196.

¹⁰⁷ See, among others: First Nations of Quebec and Labrador Health and Social Services Commission, "Trajectories of First Nations youth subject to the Youth Protection Act. Component 3: Analysis of mainstream youth protection agencies administrative data", 2016, pp. 14-19 and 73-75.

¹⁰⁸ CQLR, c. P-34.1 ["*Youth Protection Act*"]. See ss. 2.4(5)(c), 3 para. 2, 4 para. 4, and 37.5 *et seq.* A bill was recently tabled in the National Assembly for the purpose of amending the *Youth Protection Act* in various respects, including the establishment of an Aboriginal-specific regime: Bill 15, *An Act to amend the Youth Protection Act and other legislative provisions*, 42nd Leg. (Quebec), 2nd Sess., introduced December 1, 2021, particularly s. 54 (which adds ss. 131.1 to 131.26 to the *Youth Protection Act*).

¹⁰⁹ Some of the affidavits filed in the record address the difficulties that are still very much present: Affidavit of Derek Montour, November 27, 2020, paras. 14-64; Affidavit of Nadine Vollant, November 27, 2020,

While many voices were heard, they all point to the same conclusions: the current youth protection system has been imposed on Indigenous peoples from the outside, taking into account neither their cultures nor their concepts of family. Even worse, many believe the youth protection system perpetuates the negative effects of the residential school system, in that it removes a significant number of children from their families and communities each year to place them with non-Indigenous foster families. This speaks to the sensitive nature of this issue and the major challenges involved.¹¹⁰

[131] According to the Honourable Jacques Viens, there is “no doubt that, for Indigenous peoples, the youth protection system has reached its limit”.¹¹¹ Indeed, the agreements contemplated in ss. 37.6 and 37.7 of the *Youth Protection Act* do not allow for the exercise of genuine self-determination, and only one nation has managed to enter into an agreement contemplated in s. 37.5, after nearly 20 years of negotiation.¹¹²

[132] Even more recently, the *Commission Laurent* reiterated a similar finding:

[TRANSLATION]

One of the significant consequences of applying the YPA, without adapting it to the realities of Aboriginal peoples, is the overrepresentation of Aboriginal children in the youth protection system.

[...]

A number of those who testified pointed out that the current application of the YPA results in negative, if not discriminatory, effects on Aboriginal families and, consequently, the overrepresentation of these children in the youth protection system.¹¹³

[References omitted]

paras. 17-35; Affidavit of Peggie Jérôme, November 27, 2020, paras. 23-27; Affidavit of Isabelle Ouellet, November 27, 2020, paras. 12-32; Affidavit of Amanda Larocque, November 30, 2020, paras. 21-45; Affidavit of Marjolaine Sioui, December 2, 2020, paras. 51-55 and 87 *et seq.*; Affidavit of Chief Ghislain Picard, December 7, 2020, paras. 39-56 and 70-116; Affidavit of Charlie Watt Sr., November 30, 2020, paras. 10-24; Affidavit of Nancy Etok, November 30, 2020, paras. 17-54.

¹¹⁰ Viens Commission, *Final Report*, p. 407. See also, among others: pp. 121-122, 442-446 and 456-459.

¹¹¹ *Id.*, p. 456.

¹¹² Viens Commission, *Final Report*, p. 456-459. See also: Affidavit of Marjolaine Sioui, December 2, 2020, paras. 87-118.

¹¹³ Commission spéciale sur les droits des enfants et la protection de la jeunesse, *Instaurer une société bienveillante pour nos enfants et nos jeunes : Rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse*, Quebec, Publications du Québec, 2021, pp. 281 and 292.

[133] This excessive removal of Aboriginal children in Quebec and across Canada by state agents has devastating effects on these children and their communities, as does the fact that the services offered do not take their cultures into account.¹¹⁴ There are numerous causes of this overrepresentation, although they are interconnected.

[134] From the outset, colonialist and assimilationist driven state action carried out over more than a century, particularly in matters of child and family services, caused substantial harm to Aboriginal peoples, who, to this day, are dealing with the legacy of the resulting intergenerational trauma.¹¹⁵ These policies are also a major source of the social inequalities faced by a number of Aboriginal communities. These inequalities, in turn, are a key factor for the overrepresentation of Aboriginal children in youth protection systems, because many of these children are apprehended due to “neglect”,¹¹⁶ a “catchall” category¹¹⁷ used too often to justify involvement by the system on the basis of the socio-economic conditions of Aboriginal families, without considering the historical harms they have suffered.

[135] Another cause of this overrepresentation is the mismatch between the principles underlying youth protection systems, on the one hand, and Aboriginal cultural values and

¹¹⁴ In her expert report, Christiane Guay stated the following: [TRANSLATION] “Even though the child welfare systems differ from residential schools, because their goal is not to eradicate Aboriginal cultures and languages, the practical result is often the same: Aboriginal cultures are devalued and marginalized and there are major obstacles to passing on Aboriginal languages, cultural practices and knowledge” (Expert report from Christiane Guay, October 7, 2020, p. 33).

¹¹⁵ *Id.*, pp. 16-21 and 30-33; Amy Bombay, Robyn J. McQuaid, Janelle Young *et al.*, “Familial Attendance at Indian Residential School and Subsequent Involvement in the Child Welfare System Among Indigenous Adults Born During the Sixties Scoop Era”, (2020) 15:1 *First Peoples Child and Family Review* 62, pp. 71-72; Viens Commission, *Final Report*, pp. 454-455; Truth and Reconciliation Commission, *Final Report*, vol. 5, pp. 11 *et seq.*, 31-33 and 41 *et seq.* Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children’s Action Research and Education Service, 2015, pp. 64 *et seq.*; Royal Commission on Aboriginal Peoples, *Report*, vol. 3, pp. 31-33.

¹¹⁶ Expert report of Nico Trocmé, November 26, 2020, pp. 13-16, 19-24 and Appendix 2, “Dénouer la protection urgente et le bien-être des enfants : Reconnaître le double mandat de la protection de la jeunesse au Canada”, 2020, pp. 20-26. See also: Commission spéciale sur les droits des enfants et la protection de la jeunesse, *Instaurer une société bienveillante pour nos enfants et nos jeunes : Rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse*, Quebec, Publications du Québec, 2021, p. 283; Expert report from Christiane Guay, October 7, 2020, pp. 10-14; First Nations of Quebec and Labrador Health and Social Services Commission, “Trajectories of First Nations youth subject to the Youth Protection Act. Component 3: Analysis of mainstream youth protection agencies administrative data”, 2016, pp. 15-17, 42 and 73; Truth and Reconciliation Commission, *Final Report*, vol. 5, pp. 32-36; Aboriginal Children in Care Working Group, *Aboriginal Children in Care: Report to Canada’s Premiers*, Ottawa, Council of the Federation Secretariat, 2015, pp. 10-11 and 14; Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children’s Action Research and Education Service, 2015, pp. 71-73; Cindy Blackstock, “Residential Schools: Did They Really Close or Just Morph Into Child Welfare?”, (2007) 6:1 *Indigenous L.J.* 71, pp. 75-76.

¹¹⁷ Expert report of Nico Trocmé, November 26, 2020, p. 23.

notions of family, on the other.¹¹⁸ The lack of culturally appropriate services is therefore another factor, as are the cultural biases of those who work in the youth protection system.¹¹⁹

[136] Moreover, the current situation cannot be described without mentioning the significant funding problems faced by the various agencies in charge of Aboriginal child and family services. Given the specific needs of Aboriginal children, the funding provided by the federal government for these services is quite simply insufficient.¹²⁰ This underfunding—confirmed as a finding by the CHRT in 2016, as will be discussed below—also contributes to the current overrepresentation problem.¹²¹

(f) Funding of Aboriginal child and family services

[137] According to the sworn declaration of Nathalie Nepton, Director General of the Children and Families Branch at Indigenous Services Canada, Aboriginal child and family services are provided and funded in one of the three following ways.

[138] Services to Aboriginal children and families ordinarily resident on a reserve are provided primarily by FNCFS agencies, whose operating costs are funded solely by the federal government.¹²² These agencies serve approximately 500 communities pursuant to delegations of authority made by the provinces and the Yukon.¹²³ The range of services provided by the delegated agencies varies by province or territory.¹²⁴ Federally funded services are described in the terms and conditions of the FNCFS Program.¹²⁵ The costs

¹¹⁸ In Quebec, with respect to the incongruity of the guiding principles of the *Youth Protection Act*, see: Viens Commission, *Final Report*, pp. 408 *et seq.* See also: Expert report from Christiane Guay, October 7, 2020, pp. 34 *et seq.*; Exhibit GP-7, First Nations of Quebec and Labrador Health and Social Services Commission, *Telling It Like It Is: Consultation on the Contents and Application of the Youth Protection and Young Offenders Acts in Communities of the First Nations*, 1998, pp. 41 *et seq.*

¹¹⁹ Expert report of Nico Trocmé, November 26, 2020, p. 15.

¹²⁰ See, among others: *Id.*, pp. 12-13; Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children's Action Research and Education Service, 2015, pp. 77-81 and 124-125; First Nations of Quebec and Labrador Health and Social Services Commission, *Another Step Toward Self-Determination And Upholding The Rights Of First Nations Children And Families. Consultation Process for the Reform of the First Nations Child and Family Services (FNCFS) Program*, Wendake, First Nations of Quebec and Labrador Health and Social Services Commission, 2017, pp. 42 *et seq.*

¹²¹ Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children's Action Research and Education Service, 2015, pp. 79-81; Vandna Sinha, Nico Trocmé, Barbara Fallon *et al.*, *Kiskisik Awasisak: Remember the Children. Understanding the Overrepresentation of First Nations Children in the Child Welfare System*, Ottawa, Assembly of First Nations, 2011, pp. 17-19; Cindy Blackstock, "Residential Schools: Did They Really Close or Just Morph Into Child Welfare?", (2007) 6:1 *Indigenous L.J.* 71, pp. 76-77.

¹²² Sworn declaration of Nathalie Nepton, October 14, 2020, paras. 49-56.

¹²³ *Id.*, para. 21.

¹²⁴ *Id.*, paras. 19-20 and 25.

¹²⁵ Exhibit NN-1, Terms and Conditions of the First Nations Child and Family Services Program, October 15, 2020, pp. 17-36.

funded by the federal government cover “care and maintenance”, planning and operations, administrative needs, legal services, infrastructure purchase, maintenance and renovations, as well as community well-being and jurisdiction initiatives.¹²⁶

[139] Services to the approximately 170 communities that are not served by FNCFS agencies are provided by the agencies in charge of these services for the population as a whole under applicable provincial or territorial legislation.¹²⁷ The federal government has entered into an agreement with each province and with the Yukon pursuant to which it funds the majority of the costs of delivering these services to Aboriginal children and families.¹²⁸

[140] Provincial and Yukon agencies also provide off-reserve Aboriginal child and family services.¹²⁹ In these cases, the cost of the services is funded primarily by the federal government, but through health transfer payments to the provinces.¹³⁰

[141] The Attorney General of Quebec describes the manner in which these various arrangements operate in the province. He indicates that most communities have entered into agreements with the Direction de la protection de la jeunesse pursuant to which they can provide certain services through FNCFS agencies.¹³¹ He confirms that these services are funded by the federal government,¹³² as Nathalie Nepton explained, but adds that the provincial agencies bill the band councils for the services the FNCFS agencies do not cover.¹³³ Four¹³⁴ communities, however, do not have an FNCFS agency, such that provincial agencies are responsible for providing child and family services and then claim

¹²⁶ Regarding this last category, see: Sworn declaration of Nathalie Nepton, October 14, 2020, paras. 21 and 62 and, as an example: Exhibit NN-2, Table on how First Nations child and family services are provided in each region, August 2020 (which lists the *Community Well-being and Jurisdiction Initiatives (CWJI)* funded in Quebec).

¹²⁷ Sworn declaration of Nathalie Nepton, October 14, 2020, para. 30.

¹²⁸ *Id.*, paras. 31-42. In Nunavut and in the Northwest Territories, funding for Aboriginal child welfare services is provided through federal transfer payments to the territorial governments: *Id.*, paras. 45 and 50.

¹²⁹ *Id.*, para. 13.

¹³⁰ *Ibid.* It also appears that, in certain cases, off-reserve services are provided by FNCFS agencies, but the evidence in the record does not specify the nature of these services nor their funding method.

¹³¹ Viens Commission, *Final Report*, p. 191. See: *Youth Protection Act*, ss. 32, 33, 37.6 and 37.7. See also the agreements filed in the record by the Attorney General of Quebec (Exhibits CM-13 to CM-23) and Exhibit CM-3, Entente visant à établir un régime particulier de la protection de la jeunesse pour les membres des communautés de Manawan et Wemotaci entre le Conseil de la Nation Atikamekw et le gouvernement du Québec, 2018.

¹³² Recording of the September 14, 2021 hearing, at 9:43:35, referring to: Viens Commission, *Final Report*, p. 189.

¹³³ Viens Commission, *Final Report*, p. 191.

¹³⁴ According to the *Viens Commission*, there are eight such communities, but the Attorney General of Quebec stated that, as of the hearing date, four of them had entered into an agreement with the Direction de la protection de la jeunesse in order to take on some of their services: Recording of the September 14, 2021 hearing, from 9:44:45 to 9:45:20.

the cost of those services directly from the federal government.¹³⁵ The Attorney General of Quebec also confirms that services provided to off-reserve Aboriginal persons are the same as those offered in the province to the rest of the population and that the federal government contributes to their funding through health transfer payments.¹³⁶

[142] The Attorney General of Quebec also adds that the terms and conditions for the delivery and funding of services differ for the Cree, Naskapis and Inuit, because these three peoples are parties to modern treaties. Contrary to the practice that has otherwise developed, it is the provincial government that pays for most of the services provided to them, such services being delivered by provincial agencies (in the case of the Inuit and Naskapis) or by the Cree Board of Health and Social Services of James Bay.¹³⁷

[143] The picture painted by the two attorneys general is imprecise in certain respects. It is not clear from the record what formula is used for determining the costs assumed by the federal government for the FNCFS Program. Nathalie Nepton states, without further details, that the funds are paid to the FNCFS agencies to reimburse them for the actual costs they incur for “maintenance, prevention and in other areas”;¹³⁸ the terms and conditions of the FNCFS Program¹³⁹ are not much more informative. Moreover, the sometimes vague or generic wording used in those terms and conditions to describe the services they cover do not provide a concrete idea of what those services are. As for Quebec, the evidence does not specify the terms and conditions of the agreements under which the federal government reimburses Quebec agencies for the services they provide to “Indians” living on reserves (including when an FNCFS agency provides some of these services¹⁴⁰), nor does it specify the terms and conditions for the transfer payments covering the provision of off-reserve services. Moreover, the record contains little concrete information on the manner in which child and family services to Métis and non-status Indians are delivered and funded.

[144] In order to properly define the context in which the *Act* was passed, however, it is not necessary to understand the intricacies of the terms and conditions for the funding of Aboriginal child and family services. It is sufficient to note that these services are delivered primarily by FNCFS agencies and by agencies established under provincial and territorial

¹³⁵ Viens Commission, *Final Report*, pp. 189-190. See also: Sworn declaration of Nathalie Nepton, October 14, 2020, para. 35.

¹³⁶ Viens Commission, *Final Report*, p. 196.

¹³⁷ *Id.*, pp. 194-195. See also: *James Bay and Northern Quebec Agreement (1975)*, paras. 14.0.22-14.0.24 and 15.0.19-15.0.21.

¹³⁸ Sworn declaration of Nathalie Nepton, October 14, 2020, para. 56. See also: para. 63; Affidavit of Marjolaine Sioui, December 2, 2020, para. 69.

¹³⁹ Exhibit NN-1, Terms and Conditions of the First Nations Child and Family Services Program, October 15, 2020, pp. 26-31.

¹⁴⁰ Nathalie Nepton’s sworn declaration does not address this specific matter and seems to suggest that each reserve is served either by an FNCFS agency or a provincial agency.

youth protection legislation, and that the federal government funds the majority of these services.

[145] On that point, as the CHRT found, the federal government has established a discriminatory and chronically inadequate system:¹⁴¹

[393] Overall, AANDC's¹⁴² method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements. [...]¹⁴³

(g) CHRT judgments and orders on Aboriginal child and family services

[146] In February 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint with the Canadian Human Rights Commission alleging that the Department of Aboriginal Affairs and Northern Development Canada (the "Department") discriminates in providing services to First Nations on reserve and in the Yukon.¹⁴⁴ The Canadian Human Rights Commission referred the complaint to the CHRT for an inquiry.

[147] On January 26, 2016, after many years of proceedings and 72 days of hearings, the CHRT issued its ruling in *Caring Society*. It examined the management and funding formula of the FNCFS Program, as well as that of certain child welfare services agreements.

[148] The CHRT first found that the Department is involved in the provision of child and family services to First Nations on reserves and in the Yukon, even if it does not deliver those services itself. It also found that the First Nations had established a case of unlawful discrimination on the basis of race or national or ethnic origin under ss. 3(1) and 5 of the *Canadian Human Rights Act* and that they are adversely impacted by the provision of

¹⁴¹ There are, however, some exceptions.

¹⁴² This refers to Aboriginal Affairs and Northern Development Canada, which has since been replaced by Indigenous Services Canada.

¹⁴³ *Caring Society*, para. 393.

¹⁴⁴ They alleged discrimination on the basis of race or national or ethnic origin, given the inequitable and insufficient funding for those services, contrary to s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*"Canadian Human Rights Act"*].

those services (in violation of s. 5(b)), and, in some cases, denied those services (in violation of s. 5(a)).¹⁴⁵

[149] The CHRT determined that, by funding the FNCFS Program, the Department offers the benefit or assistance of funding to “ensure”, “arrange” and “support” child and family services to the First Nations concerned or “make available” such services, in accordance with the standards of the province or territory in which the services are provided. The CHRT explained that this benefit or assistance is held out as a service and provided to First Nations in the context of a public relationship.¹⁴⁶ Just like the FNCFS agencies and the provinces and territories, the Department has a responsibility for the welfare of First Nations children.¹⁴⁷ There is therefore a “public relationship” between the Department and First Nations children and families. Through the programs, funding formulas and agreements it establishes, the Department has a direct impact on the services offered.¹⁴⁸ The CHRT was also of the view that this “public relationship” is reinforced by the government’s constitutional responsibilities and its special relationship with Aboriginal peoples,¹⁴⁹ even if it has left it to the provinces to deliver child welfare services.¹⁵⁰

[150] These constitutional obligations must be considered in light of the special fiduciary relationship between the Crown and Aboriginal peoples.¹⁵¹ The CHRT was of the opinion that, under certain conditions, a fiduciary obligation may arise from an undertaking,¹⁵² although it was not necessary to rule to that effect in the complaint before it. In the CHRT’s view, in the matter before it, it was sufficient to note that the Crown, through its public statements, the FNCFS Program and the related agreements, undertook to act in the best interests of First Nations children and families “to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon”.¹⁵³

[151] The CHRT then considered the argument that First Nations are adversely impacted by the services provided by the Department and, in some cases, are denied those services as a result of the Department’s involvement.

¹⁴⁵ *Caring Society*, para. 28. See also: paras. 456 and 459.

¹⁴⁶ *Id.*, para. 35. See paragraphs 59-60, which state that the essential nature of the FNCFS Program is to ensure that the children and families concerned receive the “assistance” or “benefit” of culturally appropriate services that are reasonably comparable to the services provided to other residents of the province of territory. See also: *Id.*, paras. 111 and 457.

¹⁴⁷ *Id.*, para. 66.

¹⁴⁸ *Id.*, para. 76.

¹⁴⁹ *Id.*, para. 77. See also: *Id.*, paras. 86 and 110-111.

¹⁵⁰ *Id.*, para. 83.

¹⁵¹ *Id.*, paras. 87 and 94-95.

¹⁵² *Id.*, paras. 99-101. The CHRT (see paras. 101-104) referred to the criteria established by the Supreme Court in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, para. 36.

¹⁵³ *Caring Society*, para. 110.

[152] After considering the evidence, including several reports on the FNCFS Program and its funding, it noted that “all have identified shortcomings in the funding and structure of the FNCFS”.¹⁵⁴ On the issue of the relevance and reliability of these reports, the CHRT found that “many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program”¹⁵⁵ over the years.

[153] The CHRT accepted the findings of various reports that had been filed in evidence, as well as the information in those reports.¹⁵⁶ It noted that the funding approach, which is based solely on assumptions as to population thresholds,¹⁵⁷ does not account for the actual needs of each community—which vary depending on its geographical and social circumstances—and is inadequate to provide essential child and family services to many First Nations:

[311] [...] Those budgets are based on the formulas that, again, do not account for the actual needs of the FNCFS Agencies. They are also static formulas. That is, as the years go by, the formulas become more and more disconnected from the actual needs of FNCFS Agencies and the children and families they serve. Specifically, the formulas do not apply an escalator for regular increases in costs, including for salaries, where the bulk of funding is spent. [...]

[315] The effects of the population thresholds in Directive 20-1, along with the other assumptions built into Directive 20-1 and the EPFA, indicate that a “one-size fits all” approach does not work for child and family services on reserve. The overwhelming evidence in this case suggests that because AANDC does not fund FNCFS Agencies based on need but, rather, based on assumptions of need and population levels, that funding is inadequate to provide essential child and family services to many First Nations. [...] ¹⁵⁸

[Emphasis added]

[154] The CHRT addressed the matter of the best interests of the child as well as Jordan’s Principle (which will be discussed below in this opinion) and analyzed the evidence comparing on-reserve and off-reserve child welfare services.¹⁵⁹ It noted that the funding formulas used “are structured in such a way that they promote negative outcomes

¹⁵⁴ *Id.*, para. 216. These reports also indicated shortcomings in the bilateral agreement entered into by Ontario and the federal government in 1965: *Id.*, paras. 217 *et seq.* For an overview of the agreements entered into with Alberta, British Columbia and the Yukon, see: *Id.*, paras. 247-253.

¹⁵⁵ *Id.*, para. 305.

¹⁵⁶ *Id.*, paras. 305 and 393.

¹⁵⁷ *Id.*, paras. 126-128, 140-141 and 307.

¹⁵⁸ *Id.*, paras. 311 and 315.

¹⁵⁹ The CHRT, however, concluded that for purposes of a discrimination analysis, there was no obligation to submit comparative evidence: *Id.*, paras. 323 *et seq.*

for First Nations children and families, namely the incentive to take children into care”,¹⁶⁰ even resulting in a denial of adequate child welfare services to some.¹⁶¹

[155] The CHRT wrote that “the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people”.¹⁶² In fact, they “perpetuate the damage done by Residential Schools rather than attempting to address past harms”.¹⁶³

[156] The CHRT was of the opinion that “[i]t is only because of their race and/or national or ethnic origin that they [First Nations people living on-reserve and in the Yukon] suffer the adverse impacts outlined above [in the decision] in the provision of child and family services”.¹⁶⁴

[157] The CHRT found the complaint before it to be substantiated, namely, that First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and family services. Among other things, the CHRT called for a reform of the FNCFS Program¹⁶⁵ and made a series of orders intended to “eliminate discrimination”,¹⁶⁶ in particular by requiring the Department to modify the FNCFS Program in accordance with the CHRT’s findings, cease applying its narrow definition of Jordan’s Principle and take measures to implement the full scope of Jordan’s Principle.¹⁶⁷ Furthermore, the CHRT retained its jurisdiction, more specifically over the remedial measures and the compensation sought, which would be determined in subsequent decisions.¹⁶⁸

[158] The federal government accepted the *Caring Society* decision. It did not challenge the decision and it undertook a process intended to lead to reforms and to a substantial increase in funding.

[159] In exercising its jurisdiction, the CHRT made other orders, more particularly with respect to requests for immediate reforms to the FNCFS Program, to the *1965 Agreement* with Ontario and to Jordan’s Principle,¹⁶⁹ with respect to other medium to long-term

¹⁶⁰ *Id.*, para. 349.

¹⁶¹ *Id.*, paras. 383 *et seq.* See also paragraph 458 for a non-exhaustive summary of the adverse impacts noted.

¹⁶² *Id.*, para. 394. See also: *Id.*, para. 404. The CHRT provided a historical overview of the residential school system and its impacts at paragraphs 406 *et seq.*

¹⁶³ *Id.*, para. 422.

¹⁶⁴ *Id.*, para. 459.

¹⁶⁵ *Id.*, para. 463.

¹⁶⁶ *Id.*, para. 468.

¹⁶⁷ *Id.*, para. 481.

¹⁶⁸ *Id.*, paras. 482-490 and 493-494.

¹⁶⁹ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10; *First Nations Child & Family Caring*

reforms¹⁷⁰ and, lastly, with respect to the compensation sought in relation to both pain and suffering (s. 53(2)(e) of the *Canadian Human Rights Act*) and wilful or reckless discrimination (s. 53(3)). The CHRT also ruled on the implementation of the orders it had made and on motions alleging Canada's failure to comply with those orders.¹⁷¹

[160] It is instructive to summarize some of these orders.

[161] In September 2019, the CHRT ruled on the issue of compensation to victims and survivors of Canada's discriminatory practices.¹⁷² It determined that the maximum amounts sought should be awarded, for a total of \$40,000 per individual,¹⁷³ because "this

Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 16; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 7; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 35; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36. Some of these decisions were the subject of motions for judicial review before the Federal Court: *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, notice of appeal, October 29, 2021, No. A-290-21 (appeal proceedings suspended). See also: Exhibit NN-1, Terms and Conditions of the First Nations Child and Family Services Program, October 15, 2020, pp. 6-8.

¹⁷⁰ No decision was rendered specifically on this point, but the CHRT has retained jurisdiction to this day. In a recent decision, it touched on possible long-term remedies: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12, para. 3, specifying that there were still steps to be taken in that regard.

¹⁷¹ For example, *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 24, where it was alleged that Canada had failed to comply with orders regarding the funding for band representative and mental health services in Ontario. See also: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12, which dealt with a consent order "for a determination that First Nations children and families living on-reserve and in the Yukon who are served by a provincial or territorial agency or service provider are within the scope of the Tribunal's current remedial orders" (para. 1).

¹⁷² *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39.

¹⁷³ This amount consists of \$20,000 in compensation for pain and suffering (s. 53(2)(e)) and \$20,000 for wilful or reckless discrimination (s. 53(3)). In coming to this determination, the CHRT rejected the Attorney General of Canada's argument that only systemic, not individual, remedies could be ordered. On the contrary, it found that, in addition to the orders based on systemic considerations, individual

case of racial discrimination is one of the worst possible cases [...]”.¹⁷⁴ The CHRT found that the children in question had experienced pain and suffering warranting the maximum compensation of \$20,000 under s. 53(2)(e) of the *Canadian Human Rights Act*.¹⁷⁵

[162] With respect to the compensation sought for wilful or reckless discrimination under s. 53(3), the CHRT found that Canada’s conduct had been reprehensible:

[231] The Panel finds that Canada’s conduct was devoid of caution with little to no regard to the consequences of its behaviour towards First Nations children and their families both in regard to the child welfare program and Jordan’s Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the Wen:de report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal’s orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. **In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada** who has international, constitutional and human rights obligations towards First Nations children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples [...]

[233] In light of Canada’s obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor that cannot be overlooked.¹⁷⁶

[Underlining in the original; bold added]

[163] The CHRT determined that the maximum compensation permitted under s. 53(3) should be granted,¹⁷⁷ namely \$20,000 to each First Nations child and parent or grandparent identified in the orders made under s. 53(2)(e),¹⁷⁸ for total compensation of \$40,000.

compensation could be awarded to victims, even if they were not complainants; see: *Id.*, paras. 146 and 154.

¹⁷⁴ *Id.*, para. 13.

¹⁷⁵ Depending on the situation, one or both grandparents are entitled to compensation as well.

¹⁷⁶ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, paras. 231-233.

¹⁷⁷ *Id.*, para. 242.

¹⁷⁸ *Id.*, paras. 253-257.

[164] On October 4, 2019, the Attorney General of Canada filed a motion in Federal Court for the judicial review of the foregoing CHRT decision.¹⁷⁹ The Federal Court dismissed that motion on September 29, 2021.¹⁸⁰

(h) Jurisdictional disputes regarding child and family services and impact on Aboriginal individuals and peoples

[165] The division of powers between both levels of government regarding Aboriginal matters gives rise to disputes, including with respect to the funding of child and family services. As we will see, in matters in which both levels of government can legislate, responsibility for funding such programs is a crucial issue. Each level of government is likely to try to shift responsibility for the cost of the services to the other level.

[166] Provinces have historically required financial compensation from the federal government for the child and family services they deliver to Aboriginal persons. It appears that, in situations in which such compensation is not provided for certain services or is insufficient, the services are not offered or are not necessarily comparable to those offered to children and families living off reserve.¹⁸¹ In the literature review submitted by Christiane Guay and Lisa Ellington to the *Viens Commission*, the authors provide examples of difficulties noted from the Quebec experience:

[TRANSLATION]

These jurisdictional disputes can take many forms. For example, the federal budgetary envelopes for communities not covered by an agreement do not sufficiently take into account provincial legislative amendments, despite the fact that the resulting new provincial legislation and standards apply to Aboriginal communities. Consequently, the FNCFS Program “still contains no mechanism to ensure child and family services provided [...] are reasonably comparable to those provided to children in similar circumstances off reserve” (CHRT, 2016, para. 334). In addition, the different reporting mechanisms of the provincial and federal governments and their lack of alignment require the involvement of many individuals and increase their workloads, thereby hindering the delivery of services (Awashish *et al.*, 2017). There is also an ongoing jurisdictional dispute with regard

¹⁷⁹ F.C., No. T-1621-19.

¹⁸⁰ *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, notice of appeal, October 29, 2021, No. A-290-21 (appeal proceedings suspended). These appeal proceedings were suspended following agreements-in-principle reached “on a global resolution related to compensation for those harmed by discriminatory underfunding of First Nations child and family services and to achieve long-term reform of the First Nations Child and Family Services program and Jordan’s Principle, to ensure that no child faces discrimination again” (Indigenous Services Canada, “Agreements-in-Principle reached on compensation and long-term reform of First Nations child and family services and Jordan’s Principle”, January 4, 2022).

¹⁸¹ See: *Caring Society*, para. 381.

to children placed in rehabilitation centres and foster families managed by a CISSS [integrated health and social services centre]. According to the federal government, the daily rate billed by the province for placement in a rehabilitation centre includes transportation of the child from their community to the centre and back, while the province claims the opposite. Transportation for parents to visit their child is not covered either. These issues are compounded when a child is placed dozens of kilometres from their home community, potentially leading to unfair situations due to the inability of parents to assume their parental responsibilities and take an active role in the intervention process, even when they wish to do so. This situation makes it even more difficult for children to maintain ties with their parents and community, rights that were enshrined by the First Nations Chiefs in the DRFNC [Declaration of the Rights of First Nations Children] (2015, ss. 3 and 4). Moreover, it is not uncommon for mothers to be deemed incompetent for not showing eagerness to visit their child (QNW, 2016b). In short, the legal uncertainty regarding transportation costs is detrimental to the process of parents improving their situation and preserving their relationship with their child (Awashish *et al.*, 2017).¹⁸²

[167] Jordan's Principle was developed to mitigate the harmful consequences of these jurisdictional disputes on Aboriginal children. The principle was named in memory of Jordan River Anderson of the Norway House Cree Nation in Manitoba. Jordan was born in 1999. He was hospitalized for the first two years of his life due to a serious medical condition and because there was a lack of services on his reserve. When he was two, his doctors determined he could leave the hospital and, as a transitional measure before he went home to live with his family, prescribed specialized care in a foster home close to his medical facilities. Had he not been an Aboriginal child, he would have been entitled to this medical service. The federal and Manitoba governments, however, were unable to come to an agreement, such that instead of receiving the services required by his state of health, Jordan remained in the hospital for more than two years where, tragically, he passed away, after spending his entire life there.¹⁸³

[168] Jordan's Principle is a child-first principle. It states that where a government service is available to all non-Aboriginal children and a jurisdictional dispute arises between the federal government and the government of a province or territory, or between departments in the same government, regarding services to an Aboriginal child, the government department of first contact pays for the services and can then seek reimbursement from the other entity.¹⁸⁴

¹⁸² Christiane Guay and Lisa Ellington, *Recension des écrits, secteur protection de la jeunesse*, Exhibit PD-5 submitted in connection with the *Viens Commission*, 2018, p. 45.

¹⁸³ See: Solemn declaration of Cindy Blackstock, December 4, 2020, para. 57; *Caring Society*, para. 352.

¹⁸⁴ Solemn declaration of Cindy Blackstock, December 4, 2020, para. 60; *Caring Society*, para. 351.

[169] In essence, Jordan's Principle means that when a jurisdictional dispute arises between the two levels of government regarding financial responsibility for a service to which an Aboriginal child is entitled, the service must first be provided and the jurisdictional dispute settled subsequently.¹⁸⁵

[170] On October 31, 2007, Jean Crowder, the Member of Parliament for Nanaimo-Cowichan, brought forward a motion in the House of Commons for the adoption of Jordan's Principle:

That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.¹⁸⁶

[171] This motion was unanimously passed on December 12, 2007.¹⁸⁷

[172] In its historic 2016 ruling in *Caring Society*, referred to hereinabove, the CHRT criticized the federal government's narrow application of Jordan's Principle to the delivery of services supporting the health, safety and well-being of Aboriginal children and families, and concluded as follows:

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

[...]

¹⁸⁵ *Caring Society*, para. 351.

¹⁸⁶ House of Commons, *House of Commons Debates*, 39th Parl., 2nd Sess., Vol. 142, No. 12, October 31, 2007, p. 642 (J. Crowder).

¹⁸⁷ House of Commons, *Journals*, 39th Parl., 2nd Sess., No. 36, December 12, 2007, pp. 307-309 (Division No. 27).

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps, delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.¹⁸⁸

(i) Establishment of a working group to draft proposed legislation

[173] It was in this context that, three years after the Call to Action reproduced in para. [115] of this opinion and two years after the CHRT's 2016 ruling in *Caring Society*, which found the terms and conditions of funding of the FNCFS Program to be discriminatory, the Minister of Indigenous Services convened an emergency meeting in January 2018.¹⁸⁹ The meeting brought together representatives of provinces, territories, Métis, Inuit and First Nations to discuss the issue of overrepresentation of Aboriginal children in the child welfare system, with a view to developing solutions to the problems plaguing the relationship between Aboriginal peoples and child welfare agencies.¹⁹⁰

[174] The solution that received the most support, as favoured by many in the field,¹⁹¹ advocated for recognizing the self-determination of Aboriginal peoples in relation to the

¹⁸⁸ *Caring Society*, paras. 381-382 and 391.

¹⁸⁹ See: Sworn declaration of Isa-Gros-Louis, October 15, 2020, paras. 14-16. See also: Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 7; Affidavit of Mary Ellen Turpel-Lafond, December 4, 2020, paras. 20-22.

¹⁹⁰ Indigenous Services Canada, "Speech of Minister Jane Philpott at the Emergency Meeting on First Nations, Inuit and Métis Nation Child and Family Services", April 24, 2018.

¹⁹¹ On the desirability of allowing Aboriginal peoples to develop their own rules on child welfare and social services, see, for example: Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government*, Ottawa, Queen's Printer for Canada, 1983, p. 33; Royal Commission on Aboriginal Peoples, *Report*, vol. 3, pp. 40-41, 49 (point 3.2.2.) and 622-624; First Nations of Quebec and Labrador Health and Social Services Commission, "First Nations in Quebec Health and Social Services Governance Project. Better Governance, Greater Wellbeing", 2015, pp. 11-13; First Nations of Quebec and Labrador Health and Social Services Commission, *Another Step Toward Self-Determination And Upholding The Rights Of First Nations Children And Families. Consultation Process for the Reform of the First Nations Child and Family Services (FNCFS) Program*, Wendake, First Nations of Quebec and Labrador Health and Social Services Commission, 2017, pp. 32-34; National Advisory Committee on First Nations Child and Family Services Program Reform, "Interim Report of the National Advisory Committee on First Nations Child and Family Services Program Reform", 2018, p. 15, para. 17. See also: Prime Minister of Canada, "PM speaking notes for the Assembly of First Nations", December 4, 2018.

provision of child welfare services.¹⁹² Other participants also expressed the wish that national child welfare standards be adopted.¹⁹³

[175] Following this meeting, the federal government committed to do the following:

1. Continue to fully implement the orders from the Canadian Human Rights Tribunal including Jordan's Principle, and reform First Nations child and family services including moving to a flexible funding model.
2. Work with partners to shift the focus of programming to culturally-appropriate prevention, early intervention, and family reunification.
3. Work with our partners to support communities to draw down jurisdiction in the area of child and family services, including exploring co-developed federal legislation.
4. Participate and accelerate the work at tripartite and technical tables that are in place across the country in supporting reform.
5. Support Inuit and Métis Nation leadership in their work to advance meaningful, culturally-appropriate reform of child and family services.
6. Create a data strategy with provinces/territories and Indigenous partners to increase inter-jurisdictional data collection, sharing and reporting to better understand the rates and reasons for apprehension.¹⁹⁴

[Emphasis added]

[176] This led to engagement sessions to implement these commitments. The federal government held some 65 meetings and heard nearly 2,000 community, regional and

¹⁹² Exhibit IGL-3, A report on children and families together: An Emergency Meeting on Indigenous child and family services", August 31, 2018, pp. 10-11, 15-16, 50, 58-61 and 73-77.

¹⁹³ *Id.*, pp. 21-22, 60-61 and 67-69.

¹⁹⁴ Indigenous Services Canada, "Federal Government's Commitment to Action for Indigenous Child and Family Services Reform", January 26, 2018. On the connection between these commitments and the adoption of the *Act*, see: Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 7, item 6 and p. 12; House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence*, 42nd Parl., 1st Sess., No. 149, May 9, 2019, pp. 24-25 (P. Bellegarde); House of Commons, *House of Commons Debates.*, 42nd Parl., 1st Sess., vol. 148, No. 409, May 3, 2019, pp. 27323-27324 (D. Vandal); Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 52, April 9, 10 and 11, 2019, pp. 52:10-52:11 (J.-F. Tremblay).

national organizations as well as individuals,¹⁹⁵ where, among other things, the importance of adopting standards compatible with the *UN Declaration* was emphasized.¹⁹⁶

[177] A “reference group” was established to participate in co-developing the *Act*.¹⁹⁷ Many of the reference group’s suggestions are reflected in the first part of the *Act*.¹⁹⁸

[178] On February 28, 2019, Bill C-92 was introduced.¹⁹⁹ During the course of the parliamentary proceedings, the final report of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* was submitted and recommended that the federal, provincial and territorial governments “recognize Indigenous self-determination and inherent jurisdiction over child welfare”,²⁰⁰ “develop and apply a definition of ‘best interests of the child’ based on distinct Indigenous perspectives, world views, needs, and priorities”,²⁰¹ “prohibit the apprehension of children on the basis of poverty and cultural bias”²⁰² and prioritize the placement of children with members of their family and community.²⁰³

[179] After four days of consideration in committee in the House of Commons and six days in the Senate, Bill C-92 was given Royal Assent on June 21, 2019.²⁰⁴ The *Act* came into force on January 1, 2020.²⁰⁵ To date, 56 Indigenous governing bodies have expressed their intention to exercise their right to self-government under s. 20(1) or s. 20(2).²⁰⁶

¹⁹⁵ House of Commons, *House of Commons Debates.*, 42nd Parl., 1st Sess., vol. 148, No. 409, May 3, 2019, p. 27324 (D. Vandal). See also: Indigenous Services Canada, “Progress on six points of action”, June 7, 2020; Sworn declaration of Isa-Gros-Louis, October 15, 2020, paras. 27-34.

¹⁹⁶ Sworn declaration of Isa-Gros-Louis, October 15, 2020, para. 30; Affidavit of Mary Ellen Turpel-Lafond, December 4, 2020, para. 28.

¹⁹⁷ Affidavit of Mary Ellen Turpel-Lafond, December 4, 2020, Exhibit D, Email from Joanne Wilkinson to the members of the reference group, October 9, 2018.

¹⁹⁸ See: Affidavit of Mary Ellen Turpel-Lafond, December 4, 2020, para. 19, Exhibit C, Preferred Option Paper on First Nations, Inuit and Metis Child, Youth and Family Wellness Legislation, 2018, item 3.

¹⁹⁹ House of Commons, *House of Commons Debates.*, 42nd Parl., 1st Sess., vol. 148, No. 389, February 28, 2019, p. 25887 (S. O’Regan).

²⁰⁰ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Final Report*, vol. 1b, p. 194, item 12.1. See also: item 12.2.

²⁰¹ *Id.*, p. 194, item 12.3.

²⁰² *Id.*, p. 194, item 12.4.

²⁰³ *Id.*, pp. 194-195, item 12.6.

²⁰⁴ Senate, *Senate Debates*, 42nd Parl., 1st Sess., vol. 150, No. 308, June 21, 2019, p. 8845.

²⁰⁵ *Order fixing January 1, 2020 as the day on which that act comes into force*, P.C. 2019-1320.

²⁰⁶ See: Indigenous Services Canada, “Notices and requests related to *An Act respecting First Nations, Inuit and Métis children, youth and families*”, January 18 and 21, 2022. See also: Exhibit DM-6, Email from Derek Montour to Julie Gaultier (Ministère de la Santé et des Services sociaux), February 4, 2020; Affidavit of Nadine Vollant, November 27, 2020, paras. 37-47; Affidavit of Peggïe Jérôme, November 27, 2020, paras. 45-48; Affidavit of Isabelle Ouellet, November 27, 2020, para. 58; Affidavit of Marjolaine Siouï, December 2, 2020, paras. 151-155.

2- Content of the Act

(a) Self-government and Aboriginal child and family services: some milestones

[180] As discussed above, in an effort to rectify the crisis described in the preceding chapter and the chronic overrepresentation of Aboriginal children in youth protection systems (particularly as regards out-of-family placements), Parliament adopted the *Act* that is the subject of this reference, thereby confirming its commitment to working towards not only restorative, but also forward-looking, reconciliation with Aboriginal peoples. As also mentioned above, the *Act* is based on two main concepts: (1) the establishment of national standards or principles to guide the delivery of Aboriginal child and family services, regardless of the framework within which these services are provided; and (2) recognition of the right of Aboriginal self-government and implementation of a mechanism for the effective exercise of that right in relation to child and family services.

[181] The latter point—self-government—addresses, at least in part, a historical claim of Aboriginal peoples and is of particular importance to the present matter. Parliament’s express and general recognition of such autonomy and its implementation with respect to child welfare services is a first. This is not to say, however, that the concept of self-government—within the meaning of the *Act*—has been entirely missing from Canada’s political and legislative landscape. On the contrary, although the concept was formally absent from Canadian law for a long time—or, to be more precise, disregarded by it—it is not an entirely new concept and, prior to the *Act*, it had discreetly and gradually, whether implicitly or explicitly, carved out a small place for itself within certain federal policies and through treaties or agreements with Aboriginal peoples as well as through some federal statutes. The following discussion will provide an overview—not a history—of this slow process, setting out some of its milestones (without, however, addressing the trials and tribulations of the concept²⁰⁷ before the courts, as evidenced in particular in the Supreme Court of Canada jurisprudence, which will be considered further below).

²⁰⁷ A concept whose content and boundaries are yet to be defined (although the usual starting point for a discussion of the subject is generally that there is a “presumption of overarching Crown sovereignty, but connected to it seems to be the thought that whatever forms Indigenous sovereignty might retain, they all exist *within* this larger sovereign structure” (Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis*, Toronto, University of Toronto Press, 2019, p. 125 [reference omitted]). On the manner in which the concept and the right arising therefrom are to be considered see (in addition to Christie’s book): John Borrows, *Indigenous Law and Governance: Challenging Pre-Contact and Post-Contact Distinctions in Canadian Constitutional Law?*, Conférences Chevrete-Marx, Montreal, Thémis, 2017, pp. 3-36; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Toronto, Carswell, 2013, ch. 4, pp. 351 *et seq.*; Andrée Lajoie (ed.), *Gouvernance Autochtone : aspects juridiques, économiques et sociaux*, Montreal, Thémis, 2007. See also: Kerry Wilkins, *Essentials of Canadian Aboriginal Law*, Toronto, Thomson Reuters, 2018, pp. 266 *et seq.*, paras. 470 *et seq.*

[182] For purposes of this reference and given the manner in which the parties and interveners chose to submit the matter to the Court, it may be useful to establish the starting point of this evolution in 1973, when the *Comprehensive Land Claims Policy* was adopted, further to the Supreme Court of Canada’s ruling in *Calder*, in which the existence of “Aboriginal title”²⁰⁸ was recognized as a “legal right / *droit juridique*” in Canadian common law.²⁰⁹ Originally, through this policy (which was reaffirmed in 1981 and 1986, and subsequently redrafted from time to time), the federal government expressed its intention to initiate negotiations regarding the recognition of Aboriginal title with peoples whose Aboriginal rights had not been extinguished (whether through a treaty or otherwise) as well as with a limited number of peoples in territories already governed by a treaty. The purpose was initially “to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement”.²¹⁰ Originally, however, recognition of the right of Aboriginal peoples to self-government in a broad sense was not a formal goal of the policy—and, in fact, the policy does not even mention the concept—nor was the establishment of a self-government regime, that is, political self-governance rather than merely administrative self-governance.

[183] After s. 35 of the *Constitution Act, 1982* came into force, the policy was amended and, in 1986, it recognized that Aboriginal peoples who sign an agreement retain their Aboriginal rights, unless those rights are inconsistent with the agreement. The policy underwent other changes, including in 1995 after the federal government adopted a policy on Aboriginal self-government, to which we now turn for a brief discussion.²¹¹

²⁰⁸ Like the Supreme Court of Canada in *R. v. Desautel*, 2021 SCC 17 [*Desautel*], in this opinion we have used the expression “Aboriginal title” rather than the expression “Indian title” sometimes found in the jurisprudence.

²⁰⁹ Martland, Judson and Ritchie, JJ., in reasons written by Judson, J., found, however, that this right—based on previous occupancy of the British Columbia lands by Aboriginal peoples, but dependent on the “goodwill of the Sovereign” (p. 328 *in fine*)—was extinguished before Confederation (pp. 338 *in fine*–339) when “the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation” (p. 344).

Hall, Spence and Laskin, JJ., in dissenting reasons written by Hall, J., were of the opinion that, under the common law, the Nishga were *prima facie* owners of the disputed lands by reason of their occupancy thereof from time immemorial (p. 375) and that, under the common law, they certainly had the possession and enjoyment thereof (p. 376), which right “could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation” (p. 402), which had not occurred.

Without opining on the merits, Pigeon, J., relying on a procedural argument, agreed with the findings of his colleagues Martland, Judson and Ritchie, JJ., such that Mr. Calder’s appeal was dismissed.

²¹⁰ Indian and Northern Affairs, *Comprehensive Claims Policy and Status of Claims*, Ottawa, Indian and Northern Affairs, 2000, p. 1.

²¹¹ This is apparent, for example, in the following document published in 2003, which refers specifically to both policies: Indian and Northern Affairs Canada, *Implementation of comprehensive land claim and self-government agreements. A handbook for the use of federal officials*, Ottawa, Indian Affairs and Northern Development, 2003.

[184] In 1995, following a number of constitutional failures²¹² and just over two years after the defeat of the Charlottetown Accord, the federal government committed, within the scope of its relationship with Aboriginal peoples, to *recognize* their right to self-government (and not to *grant* them that right) and to further its realization, primarily through tripartite negotiations (federal government, provincial governments, Aboriginal peoples). In concert with the *Comprehensive Land Claims Policy*, the *Self-Government Policy* describes that commitment and explains the federal government's perspective. In it, the government explicitly recognizes the right of Aboriginal self-government within the framework of Canadian sovereignty:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.

For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.

[...]

See also: Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, Gatineau, Aboriginal Affairs and Northern Development Canada, 2014, particularly pp. 7, 8, 10, 12, 13 and 16-17. Referring to its 1995 *Self-Government Policy*, the government embraced within the framework of its negotiation of Aboriginal rights the possibility of including self-government arrangements in the agreements, so that Aboriginal peoples could "govern their own affairs in a manner which provides predictability and clarity for intergovernmental relations and the application of laws" (p. 10).

²¹² Including the conferences convened under ss. 37 and 37.1 of the *Constitution Act, 1982* in order to discuss the issue of Aboriginal self-government, as well as other conferences, such as the one that led to the Charlottetown Accord, which was rejected in a referendum. See, in this regard: Argument in the Attorney General of Quebec's brief, paras. 104-124.

In light of the wide array of Aboriginal jurisdictions or authorities that may be the subject of negotiations, provincial governments are necessary parties to negotiations and agreements where subject matters being negotiated normally fall within provincial jurisdiction or may have impacts beyond the Aboriginal group or Aboriginal lands in question. Territorial governments should be party to any negotiations and related agreements on implementing self-government north of the sixtieth parallel.

The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.²¹³

[185] Implementation of the policy, which favours tripartite negotiation,²¹⁴ was carried out with varying degrees of enthusiasm and success (and was, in fact, strongly criticized). Indeed, the framework it established (unilaterally) was highly restrictive and did not address broader Aboriginal claims. Nonetheless, the federal government's recognition of Aboriginal self-government in the policy heralded changes that were brought about by some of the comprehensive land claims agreements. As previously mentioned, there was some degree of convergence between the *Comprehensive Land Claims Policy* and the *Self-Government Policy*, such that following the adoption of the latter, a number of comprehensive land claims agreements with Aboriginal peoples incorporated a self-government component.

[186] The following agreements and implementing legislation, although they do not constitute an exhaustive list,²¹⁵ are worth mentioning and are set out in chronological

²¹³ *Self-Government Policy*, pp. 3-4.

²¹⁴ A subtle call for negotiation as a (non-exclusive) tool for implementing s. 35 of the *Constitution Act, 1982* can already be found in *Sparrow*, p. 1105, a judgment that predates the publication of the *Self-Government Policy*. The Supreme Court subsequently reiterated the call for negotiation much more emphatically. See, for example: *Delgamuukw*, para. 186, citing *Sparrow*; *Haïda Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*“Haïda Nation”*], paras. 14 *in fine*, 20, 25 and 38; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para. 24; and, recently, *Desautel*, paras. 87-91.

²¹⁵ According to the Department of Crown-Indigenous Relations and Northern Affairs, as at August 25, 2020, there were “25 self-government agreements across Canada involving 43 Indigenous communities” and “2 education agreements involving 35 Indigenous communities” (Crown-Indigenous Relations and Northern Affairs, “Self-government”, August 25, 2020). These self-government agreements overlap with the comprehensive land claims agreements and seem to include all the agreements negotiated under the *Yukon First Nations Self-Government Act* (S.C. 1994, c. 35). There are also three education agreements.

order: *Agreement between Her Majesty the Queen in right of Canada and the Mi'kmaq Bands in Nova Scotia with respect to education* (1997)²¹⁶ and *Mi'kmaq Education Act*,²¹⁷ *Nisga'a Final Agreement* (1999) and *Nisga'a Final Agreement Act*,²¹⁸ *Westbank First Nation Self-Government Agreement* (2003) and *Westbank First Nation Self-Government Act*,²¹⁹ *Land Claims and Self-Government Agreement among the Tłı̨chǫ, the Government of the Northwest Territories and the Government of Canada* (2003) and *Tłı̨chǫ Land Claims and Self-Government Act*,²²⁰ *Labrador Inuit Land Claims Agreement* (2005) and *Labrador Inuit Land Claims Agreement Act*,²²¹ *First Nations Jurisdiction over Education*

Moreover, it is worth noting that various framework agreements were entered into with some First Nations to provide for the establishment of an Aboriginal government and for recognition of the right to self-government, but no final agreement has yet been entered into. See, for example:

- *Anishinabek Nation Agreement-in-Principle with Respect to Governance* (2007, a bipartite agreement between this Nation and the Government of Canada), whose preamble and s. 2.9 indicate that the Government of Canada recognizes the inherent right of self-government as an Aboriginal right protected under s. 35 of the *Constitution Act, 1982*, without, however, taking a position on the precise content of that right;
- *Miawpukek First Nation Self-Government Agreement-in-Principle* (2013, tripartite agreement between this Nation, the Government of Canada and the province of Newfoundland and Labrador), which does not use the term “self-government” in its provisions, but which intends to confer on the “Miawpukek First Nation Government” legislative authority over education, health, and child and family services, among other matters, with Aboriginal law prevailing over federal or provincial law in certain cases.

A few agreements were also entered into after 2017, and some even after the *Act* was passed (pursuant to a process begun much earlier). That is the case for the *Manitoba Métis Self-Government Recognition and Implementation Agreement* (2021, a bipartite agreement between the Manitoba Métis Federation and the Government of Canada), the *Métis Government Recognition and Self-Government Agreement* (2019, a bipartite agreement between the Métis Nation of Ontario and the Government of Canada), the *Métis Government Recognition and Self-Government Agreement* (2019, a bipartite agreement between the Métis Nation – Saskatchewan and the Government of Canada) and the *Métis Government Recognition and Self-Government Agreement* (2019, a bipartite agreement between the Métis Nation of Alberta and the Government of Canada).

Other agreements combining land claims and self-government are in the process of negotiation, with or without agreements-in-principle or framework agreements. There are currently 80 active discussion tables with individual First Nations. See: Crown-Indigenous Relations and Northern Affairs Canada, “Recognition of rights discussion tables”, December 16, 2020; Crown-Indigenous Relations and Northern Affairs Canada, “Agreements under Negotiation”, June 18, 2018.

²¹⁶ The federal government considers this agreement—which was entered into with bands otherwise governed by the *Indian Act*—and its implementing statute to be a sectoral self-government arrangement.

²¹⁷ S.C. 1998, c. 24.

²¹⁸ S.C. 2000, c. 7. The agreement to which this statute gives effect is particularly extensive.

²¹⁹ S.C. 2004, c. 17.

²²⁰ S.C. 2005, c. 1.

²²¹ S.C. 2005, c. 27. The agreement implemented by this statute (which also gives effect to a tax agreement) confers upon the Inuit government of Labrador the power to make laws in relation to social services in general, including child, youth and family services (s. 17.15), with a focus on prevention (s. 17.15.1(a)). See Appendix B, below. The agreement also confers on the Inuit government (and on an Inuit community government) the power to “incorporate by reference within an Inuit Law [or] within

in *British Columbia Act*,²²² *Tsawwassen First Nation Final Agreement* (2007) and *Tsawwassen First Nation Final Agreement Act*,²²³ *Maa-nulth First Nations Final Agreement* (2007-2009) and *Maanulth First Nations Final Agreement Act*,²²⁴ *Sioux Valley Dakota Nation Governance Agreement* (2013) and *Sioux Valley Dakota Nation Governance Act*,²²⁵ *Tla'amin Final Agreement* (2014) and *Tla'amin Final Agreement Act*,²²⁶ *Déjîñę Final Self-Government Agreement* (2015) and *Déline Final Self-Government Agreement Act*,²²⁷ *Anishinabek Nation Education Agreement* (2017) and *Anishinabek Nation Education Agreement Act*,²²⁸ *Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada* (2017) and *Cree Nation of Eeyou Istchee Governance Agreement Act*.²²⁹

[187] These agreements (many of which are tripartite and involve not only the particular Aboriginal nation and the federal government, but also the provincial or territorial government) and the federal statutes that give effect to them confer varying degrees of powers on the Aboriginal nations in question, within a geographically defined territory. In some of these agreements (generally the most recent ones), the Government of Canada expressly recognizes the right of self-government as an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*.²³⁰ This, however, is not necessarily the case for the statutes giving effect to these agreements—indeed, from among the examples in the preceding paragraph, more than half are silent on this subject,²³¹ while the others merely mention in their preamble that this constitutional provision “recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada”.²³²

a Bylaw, any Law of General Application in respect of a matter within its jurisdiction under the Agreement” (s. 17.7.1).

²²² S.C. 2006, c. 10. This statute confers on the participating Nations the power to enact laws respecting education on their lands (s. 9).

²²³ S.C. 2008, c. 32.

²²⁴ S.C. 2009, c. 18.

²²⁵ S.C. 2014, c. 1.

²²⁶ S.C. 2014, c. 11.

²²⁷ S.C. 2015, c. 24.

²²⁸ S.C. 2017, c. 32. This statute confers on the participating Nations the power to make laws respecting education on their reserves (s. 7, which is the counterpart of s. 5.1 of the agreement to which it gives effect).

²²⁹ S.C. 2018, c. 4, s. 1.

²³⁰ This is the case for the agreements mentioned in Appendix B to this opinion.

²³¹ This is the case for the following statutes: *Mi'kmaq Education Act*, *Nisga'a Final Agreement Act*, *Westbank First Nation Self-Government Act*, *Tlcho Land Claims and Self-Government Act*, *First Nations Jurisdiction over Education in British Columbia Act*, *Sioux Valley Dakota Nation Governance Act* and *Anishinabek Nation Education Agreement Act*. It is also the case for the *Cree Nation of Eeyou Istchee Governance Agreement Act*.

²³² This is the case for the following statutes: *Labrador Inuit Land Claims Agreement Act*, *Tsawwassen First Nation Final Agreement Act*, *Maanulth First Nations Final Agreement Act*, *Tla'amin Final Agreement Act* and *Déline Final Self-Government Agreement Act*. The preamble of the statutes relating to the Tsawwassen, Maanulth and Tla'amin peoples also state that “reconciliation between the prior

[188] It is important to note that a number of the agreements (or treaties) mentioned above recognize that the peoples in question have the power to regulate their child and family services themselves.²³³ Based on the evidence, however, it appears that the governing bodies have not done so.²³⁴

[189] On a completely different note, but also in keeping with the 1995 *Self-Government Policy*, the right of Aboriginal self-government is also affirmed in a few statutes not related to a particular agreement. For example, it is affirmed in the *First Nations Fiscal Management Act* (enacted in 2005 as the *First Nations Fiscal and Statistical Management Act*²³⁵). The first recital of the preamble to this statute states the following (this recital was included in the statute when it was enacted, and is not a subsequent addition): “the Government of Canada has adopted a policy recognizing the inherent right of self-government as an Aboriginal right and providing for the negotiation of self-government”.

[190] For its part, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,²³⁶ passed in 2013, refers to the self-government of “First Nations”. Its preamble states that “the Government of Canada has recognized the inherent right of self-government as an aboriginal right and is of the view that implementation of that right is best achieved through negotiations”, but that “this Act is not intended to define the nature and scope of any right of self-government or to prejudice the outcome of any self-government negotiation”,²³⁷ although it strives “to advance the exercise, in a manner consistent with the *Constitution Act, 1982*, of First Nations law-making power over family homes on reserves and matrimonial interests or rights in or to structures and lands on reserves”. The provisions of the statute, however, do not mention self-government (save for

presence of Aboriginal peoples and the assertion of sovereignty by the Crown is of significant social and economic importance to Canadians”. The preamble of the statute relating to the D ljin  First Nation specifically uses the term “self-government”, as does its title.

²³³ In this regard, from among the agreements listed above, see: *Nisga’a Final Agreement* (1999), chap. 11, under the heading “Legislative Jurisdiction and Authority”, ss. 89-93 (child and family services); *Land Claims and Self-Government Agreement among the Tl ch , the Government of the Northwest Territories and the Government of Canada* (2003), s. 7.4.4(g) (child and family services); *Labrador Inuit Land Claims Agreement* (2005), part 17.15 (social, family, youth and children’s services); *Tsawwassen First Nation Final Agreement* (2007), chap. 16 (“Governance”), ss. 69-76 (child protection services) and 99-100 (family development services); *Maa-nulth First Nations Final Agreement* (2007-2009), ss. 13.16.1 *et seq.* (child protection services); *Sioux Valley Dakota Nation Governance Agreement* (2013), s. 20.01 (care, protection and guardianship of children in need of protection); *Tla’amin Final Agreement* (2014), chap. 15 (“Governance”), ss. 73-81 (child protection services) and 99-100 (child care); *D ljin  Final Self-Government Agreement* (2015), chap. 11 (child and family services and child protection).

²³⁴ See the sworn declaration of Isa Gros-Louis, October 15, 2020, paras. 83-86, particularly para. 86: 86. I was informed that, to date, Indigenous Governments have yet to exercise their law-making authority in relation to child and family services under their self-government agreements or Treaties.

²³⁵ S.C. 2005, c. 9.

²³⁶ S.C. 2013, c. 20.

²³⁷ The *First Nations Fiscal Management Act* contains an identical proviso.

references to certain self-government agreements otherwise entered into), although they do recognize the right of First Nations to enact laws that apply to conjugal family homes on reserves, subject to giving notice to the Attorney General of the province in question.²³⁸

[191] In short, this representational and abridged overview of the period from 1973 to 2018 shows that the right to self-government (including in matters of child and family services) is not an entirely new political or legal subject. The concept, while admittedly not yet fully defined, has been “percolating”, albeit quietly, for a number of decades under various aspects (sometimes even implicitly), and has carved a modest place for itself in the federal legislative landscape,²³⁹ particularly since 1995, transitioning from

²³⁸ It is interesting to note the language of the grant—or rather, recognition—of legislative authority, which is not directed at the band councils referred to in the *Indian Act*. Indeed, it is the First Nation itself that has and exercises the legislative authority, after a public consultation by the council:

4 The purpose of this Act is to provide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.

7 (1) A First Nation has the power to enact First Nation laws that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves.

8 (1) If a First Nation intends to enact First Nation laws under section 7, the council of the First Nation must submit the proposed First Nation laws to the First Nation members for their approval.

4 La présente loi a pour objet l'adoption par les premières nations de textes législatifs — et l'établissement de règles provisoires de procédure ou autres — applicables, pendant la relation conjugale ou en cas d'échec de celle-ci ou de décès de l'un des époux ou conjoints de fait, en matière d'utilisation, d'occupation et de possession des foyers familiaux situés dans les réserves des premières nations et de partage de la valeur des droits ou intérêts que les époux ou conjoints de fait détiennent sur les constructions et terres situées dans ces réserves.

7 (1) Toute première nation peut adopter des textes législatifs applicables, pendant la relation conjugale ou en cas d'échec de celle-ci ou de décès de l'un des époux ou conjoints de fait, en matière d'utilisation, d'occupation et de possession des foyers familiaux situés dans ses réserves et de partage de la valeur des droits ou intérêts que les époux ou conjoints de fait détiennent sur les constructions et terres situées dans ses réserves.

8 (1) Lorsqu'une première nation a l'intention d'adopter des textes législatifs en vertu de l'article 7, le conseil de la première nation soumet le projet de textes législatifs à l'approbation des membres de celle-ci.

²³⁹ It should also be noted that the notion of Aboriginal self-government (particularly by First Nations) underlies, in one form or another, a number of bills tabled over the years in the House of Commons or the Senate seeking generic recognition of this autonomy. These include:

- Bill C-52, entitled *An Act relating to self-government for Indian Nations*, tabled in 1984;
- Bill S-10, entitled *An Act providing for self-government by the first nations of Canada*, tabled in 1995;
- Bill S-9, entitled *An Act providing for self-government by the first nations of Canada*, tabled in 1996;
- Bill S-12, entitled *An Act providing for self-government by the first nations of Canada*, tabled in 1996;

administrative autonomy to a somewhat political autonomy (although always within the context of Canadian sovereignty). In almost all cases, the preferred form of self-government is a nation-based model (except in Nunavut, where the public government model was chosen).²⁴⁰

[192] Things did not stop there, however.

[193] In July 2017, the federal government (under the aegis of the then Minister of Justice, the Honourable Jody Wilson-Raybould) announced a set of principles designed to govern its relationship with Aboriginal peoples from that point forward. The policy that followed in 2018 did more than merely strengthen the 1995 policy, refashioning it on the basis of s. 35 of the *Constitution Act, 1982* and the *UN Declaration*. The ten principles affirmed therein “are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with Indigenous peoples”.²⁴¹ These principles, which are set out here, together with some of their accompanying comments, are based on recognition of the right to self-determination of Aboriginal peoples, which becomes the foundation for government-Aboriginal relations:

1. The Government of Canada recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.

[...]

-
- Bill S-14, entitled *An Act providing for self-government by the first nations of Canada*, tabled in 1998;
 - Bill S-38, entitled *An Act declaring the Crown’s recognition of self-government for the First Nations of Canada*, tabled in 2002;
 - Bill C-61, entitled *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, tabled in 2002, an interesting bill whose preamble states that “neither the *Indian Act* nor this Act is intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation”;
 - Bill S-16, entitled *An Act providing for the Crown’s recognition of self-governing First Nations of Canada*, tabled in 2004;
 - Bill S-216, entitled *An Act providing for the Crown’s recognition of self-governing First Nations of Canada*, tabled in 2006;
 - Bill S-234, entitled *An Act to establish an assembly of the aboriginal peoples of Canada and an executive council*, tabled in 2008;
 - Bill S-212, entitled *An Act providing for the recognition of self-governing First Nations of Canada*, tabled in 2012;
 - Bill C-33, entitled *An Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for related funding and to make related amendments to the Indian Act and consequential amendments to other Acts*, tabled in 2014.

²⁴⁰ Given that Aboriginal peoples are a minority in Canada, the nation-based government model is favoured. With respect to Nunavut, see Appendix A, below.

²⁴¹ *2018 Principles*, p. 4.

The Government of Canada's recognition of the ongoing presence and inherent rights of Indigenous peoples as a defining feature of Canada is grounded in the promise of section 35 of the *Constitution Act, 1982*, in addition to reflecting articles 3 and 4 of the UN Declaration. The promise mandates the reconciliation of the prior existence of Indigenous peoples and the assertion of Crown sovereignty, as well as the fulfilment of historic treaty relationships.

[...]

2. The Government of Canada recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.

[...]

3. The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

[...]

4. The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

This Principle affirms the inherent right of self-government as an existing Aboriginal right within section 35. Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.

[...]

Nation-to-nation, government-to-government, and Inuit-Crown relationships, including treaty relationships, therefore include:

developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;

involving Indigenous peoples in the effective decision-making and governance of our shared home;

putting in place effective mechanisms to support the transition away from colonial systems of administration and governance, including, where it currently applies, governance and administration under the *Indian Act*; and

ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.

5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

[...]

6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

[...]

7. The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

[...]

8. The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.

[...]

9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

[...]

10. The Government of Canada recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

[...]

[Emphasis added]

[194] The *Act* is in line with these *2018 Principles*. While the *Act* is not unrelated to the previously negotiated agreements or previously enacted statutes, particularly those that followed the adoption of the 1995 *Self-Government Policy*, it is nevertheless markedly different. It is the first piece of legislation which—based on the fundamental recognition of the right to self-government as a general right—establishes a national (i.e. Canada-wide) scheme for implementing true Aboriginal self-governance, doing so outside the scope of the *Indian Act* and for all peoples contemplated in s. 35 of the *Constitution Act, 1982* (rather than on a case-by-case basis, as was the previous practice), the whole in relation to child and family services.

[195] The *Act* also differs in other respects. We begin with an overview of the *Act*, before delving into a detailed description of its provisions.

(b) Content of the Act

Overview and general principles of the Act

[196] In the *Act*, Parliament expressly affirms the right of self-government of Aboriginal peoples in Canada, thereby leaving behind particularized negotiation (bipartite or tripartite) as a prerequisite to recognition of that right. The process, therefore, no longer involves a piecemeal approach of negotiating with one group at a time, but rather recognition on a comprehensive basis, as recommended by the *Royal Commission on Aboriginal Peoples* and the *Truth and Reconciliation Commission*. The idea of negotiation subsists, but, as we shall see, the *Act* makes it more of a tool (an optional one at that) to facilitate the exercise of the right to self-government.

[197] The *Act* also abandons the notion of a rigid normative framework for Aboriginal self-governance (as is found in most of the agreements mentioned above²⁴²), favouring functional independence in the exercise of the right to self-government so as to respect the diversity of cultures, values, practices, needs, living conditions and aspirations of Aboriginal peoples. One example of this latitude is that the *Act* leaves it to Aboriginal peoples to determine the entities that will be given the legislative authority arising from the right to self-government in relation to child and family services, merely setting out a general framework for the processes or systems they will adopt. The same is true of the content of Aboriginal laws in relation to child and family services; other than providing for minimum standards, which will be discussed below, Parliament has not imposed any

²⁴² These agreements often require that the community establish a constitution, whose content is fairly narrowly defined, as well as governance standards (ethics, transparency, accountability, etc.). They also regulate, in some detail, the exercise of jurisdiction by Aboriginal governing bodies. The following are but two examples: the *Labrador Inuit Land Claims Agreement* (2005), chap. 17; and the *Nisga'a Final Agreement* (1999), chap. 11.

It is also interesting to compare the new approach set out in the *Act* to the normative framework established in the *Indian Act*, particularly ss. 74 to 86, and the *First Nations Elections Act*, S.C. 2014, c. 5.

other requirements. In the words of the federal government, the *Act* “is not about imposing solutions but is rather about opening the door for Indigenous Peoples to choose their own solutions for their children and families”,²⁴³ in keeping with the right of self-government thus recognized. As Jean-François Tremblay, Deputy Minister of Indigenous Services Canada, explained when he appeared before the Standing Senate Committee on Aboriginal Peoples on April 9, 2019:

It will be distinctions-based because, as I said, this is legislation that even if it provides some national standards and a national framework, it is based on the fact it is a more bottom-up approach. It’s the communities and nations that will understand what they want, and they will come to that table and talk with other jurisdictions on this. That’s the way we see it as distinctions-based.

[...]

When you talk about children and families, to be honest, there were a lot of pointed comments between the different groups. It’s more in the way they want to address it that it will be different. I think that’s where we’re going now. Now that we have opened that door, it’s for them to design the way they want this to happen. That’s where we’re going to see the distinction happening.²⁴⁴

[198] It would appear that, faced with the pressing requirements of reconciliation, as well as the slow and variable nature of the individual negotiation process, Parliament sought to accelerate the effective recognition of Aboriginal self-government, choosing child and family services—in which there are glaring needs—for implementing a new approach that is both broad and sectoral, non-territorialized and very different from the previous one-step-at-a-time dynamic. As we will see, to do so it also chose robust terminology which, in some respects, is mirrored in the *Indigenous Languages Act*,²⁴⁵ the *Department of Indigenous Services Act*²⁴⁶ and the *Department of Crown-Indigenous Relations and Northern Affairs Act*,²⁴⁷ which were passed concurrently with the *Act*. While little more will

²⁴³ Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 6. See also: Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 53, April 30 and May 1 and 2, 2019, p. 53:102 (S. O’Regan).

²⁴⁴ Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 52, April 9, 10 and 11, 2019, pp. 52:27 and 52:28 (J.-F. Tremblay).

²⁴⁵ S.C. 2019, c. 23 (assented to on June 21, 2019, like the *Act*).

²⁴⁶ S.C. 2019, c. 29, s. 336 (also assented to on June 21, 2019); the mission of the Department of Indigenous Services is to “provide Indigenous organizations with an opportunity to collaborate in the development, provision, assessment and improvement” of certain services (s. 7(a)) and to “take the appropriate measures to give effect to the gradual transfer to Indigenous organizations of departmental responsibilities with respect to the development and provision of those services” (s. 7(b)), the whole within the scope of the agreements entered into under s. 9 of this statute.

²⁴⁷ S.C. 2019, c. 29, s. 337 (also assented to on June 21, 2019). The mission of the Department of Crown-Indigenous Relations and Northern Affairs is to “[exercise] leadership within the Government of

be said about the *Indigenous Languages Act* (languages that are a vehicle for Aboriginal identity and whose respect, protection and development Parliament wishes to ensure), the *Department of Indigenous Services Act* will be discussed further below because it envisages the eventual transfer of certain responsibilities of the federal government to Aboriginal organizations, including in respect of child and family services (which is not a coincidence), education and health.²⁴⁸ Lastly, rounding out this legislative array is the *United Nations Declaration on the Rights of Indigenous Peoples Act*,²⁴⁹ which was adopted and came into force in June 2021 and which strengthens the basis on which Parliament has established the policy that the *Act* is intended to embody.²⁵⁰

[199] In short, based on the dual premise that Aboriginal peoples have a right to self-government and that s. 35 of the *Constitution Act, 1982* protects that Aboriginal right, Parliament has, through the *Act*, established a legislative framework to provide for and facilitate the exercise of that right in relation to Aboriginal child and family services.

[200] Admittedly, Parliament has not fully given up its claim to the regulation of these services—despite recognizing that Aboriginal peoples are self-governing in the exercise of their legislative authority, it has, as we saw earlier, established a series of general national standards that set out a framework for Aboriginal laws (in principle), as well as for provincial laws (when these are applicable) or federal laws (as the case may be), and that will serve as guidelines for the provision of these services. These national standards are clearly intended to respond to the urgent and particular situation of Aboriginal children and families, by regulating, based on certain stated core principles, the range of services that may be offered to them and the conduct of governmental or other providers of those services.

[201] This is understandable, of course, given the nature of the problem the *Act* seeks to resolve, as explained in the first chapter of this opinion. In light of the crisis being addressed and the fact that control over child welfare systems by Aboriginal peoples (as regulators and/or providers) will not occur everywhere immediately, nor at the same pace

Canada in relation to the affirmation and implementation of the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* [...]” (s. 7(a)), negotiate treaties and agreements “to advance the self-determination of Indigenous peoples” (s. 7(b)) and “[advance] reconciliation with Indigenous peoples, in collaboration with Indigenous peoples and through renewed nation-to-nation, government-to-government and Inuit-Crown relationships” (s. 7(c)).

²⁴⁸ Sections 6(2), 7, 8 and 9 of the *Department of Indigenous Services Act*, S.C. 2019, c. 29, s. 336.

²⁴⁹ S.C. 2021, c. 14.

²⁵⁰ This statute includes the obligation for the Government of Canada, “in consultation and cooperation with Indigenous peoples”, to “take all measures necessary to ensure that the laws of Canada are consistent” with the *UN Declaration* (s. 5).

It is also interesting to note the concurrent amendment to the oath or affirmation of citizenship made by the *Act to amend the Citizenship Act (Truth and Reconciliation Commission of Canada’s call to action number 94)*, S.C. 2021, c. 13, which includes the promise to respect the laws of Canada, “including the Constitution, which recognizes and affirms the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples”.

or in the same manner,²⁵¹ the framework is intended to ensure a minimum standard for the services to be delivered to all Aboriginal children, regardless of the provider, based on an evident concern for equality across Canada and respect for the differences between Aboriginal peoples. By setting out these immediately applicable core principles, Parliament has sought to guide the provision of services and reduce discordance both during and after the transitional period that began with the coming into force of the *Act*. In short, Parliament is striving to respect the right of Aboriginal self-government, but on the basis of some fundamental standards on which there appears to be a consensus.

[202] The *Act* establishes a two-track mechanism for the exercise of Aboriginal legislative authority in relation to child and family services, with varying effects depending on the track chosen. Regardless of the track chosen, however, here too the *Act* imposes a basic framework for the exercise of legislative authority and establishes an order of priority, which we will discuss below.

[203] Lastly, the *Act* distinguishes itself not only by its content, but also by the collaborative process that led to its development. As described in the preceding chapter of this opinion,²⁵² the *Act* was subject to extensive consultation among Aboriginal peoples and their representatives, both before and after Bill C-92 was tabled, reflecting a desire for reconciliation and reparation through the direct participation of the peoples concerned, the very ones who, according to the *Act*, have the right of self-government in this area. In her affidavit, Professor Mary Ellen Turpel-Lafond refers in this regard to a “co-development” process²⁵³ (although not everyone shares this opinion²⁵⁴). The collaborative approach, however, did not extend to the provinces, which, although not

²⁵¹ Currently, some, but not all, Aboriginal peoples already offer their own services, in whole or in part, including through the FNCFS agencies referred to in the previous chapter.

²⁵² See also the description of the consultation process set out in the order fixing the date on which the *Act* came into force (*Order fixing January 1, 2020 as the day on which that act comes into force*, P.C. 2019-1320), as well as in the *Technical Information Package* published in 2020 by the Department of Indigenous Services Canada (Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 7).

The description, or quality, of that process, however, was challenged by a number of participants, whose concerns were reported by the Standing Senate Committee on Aboriginal Peoples (Senate, Standing Senate Committee on Aboriginal Peoples, *Subject matter of Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families*, 42nd Parl., 1st Sess., 17th Report, May 13, 2019, p. 6).

²⁵³ Affidavit of Mary Ellen Turpel-Lafond, December 4, 2020, paras. 23 *et seq.*

²⁵⁴ During the parliamentary proceedings leading to the adoption of the *Act*, a number of participants expressed their dissatisfaction with the consultation process. See, for example: House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence*, 42nd Parl., 1st Sess., No. 149, May 9, 2019, p. 28 (A. Dumas); Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 52, April 9, 10, and 11, 2019, pp. 52:45-52:46 (C. Blackstock), 52:48, and 52:55 (F. Joe); Senate, *Senate Debates*, 42nd Parl., 1st Sess., vol. 150, No. 299, June 10, 2019, p. 8448 (D. G. Patterson, citing passages from the brief submitted by the Chiefs of Ontario).

excluded from the process, were barely given a voice despite their jurisdiction over social services and despite the fact that they are largely responsible for offering these services to Aboriginal children and families through the application, *ex proprio vigore*, of their social services legislation.²⁵⁵ We will return to this point later.

[204] We turn now to a detailed examination of the *Act*.

Detailed content of the Act

[205] The *Act* is composed of several parts. It begins with a preamble, followed by definitional and interpretative provisions that set out the general scope of the *Act* (ss. 1 to 7), as well as its purpose (s. 8) and essential principles (s. 9). The *Act* then establishes the standards for the provision of Aboriginal child and family services, the rights of Aboriginal children and families, and the conduct of providers of these services. Next, the *Act* organizes the scheme under which Aboriginal peoples will exercise their right to self-government in relation to child and family services. The *Act* ends with a series of provisions addressing a number of topics: role and powers of the Minister, five-year review of the *Act*, regulatory powers of the Governor in Council, and transitional provisions. We will now examine these provisions in more detail.

- ***Preamble***

[206] The *Act* has an imposing preamble, placed, in particular, under the aegis of the *UN Declaration* and the *Convention on the Rights of the Child*.²⁵⁶ In it, Parliament recognizes its harmful actions and the resulting historical wrongs (the legacy of residential schools, and the disruption and disadvantages experienced by Aboriginal women and girls in relation to child and family services); it declares the importance of reuniting Aboriginal children with their families and communities (which, indeed, is one the *Act's* key principles).

[207] Heeding the *Truth and Reconciliation Commission's* Calls to Action regarding the welfare of Aboriginal children, Parliament further affirms in the preamble “the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services”.²⁵⁷ It also affirms the

²⁵⁵ The Attorney General of Quebec, in the argument in his brief (para. 155), notes this lack of coordination with provincial authorities and points out that this weakness in the consultation process was raised (including by Aboriginal participants) during the legislative debates preceding the *Act's* adoption.

²⁵⁶ Can.T.S. 1992/3.

²⁵⁷ Preamble to the *Act*, seventh recital. The French version of this recital also distinguishes the right to self-determination of Aboriginal peoples from their right of self-government: “[Attendu] que le Parlement affirme le droit à l'autodétermination des peuples autochtones, y compris le droit inhérent à l'autonomie gouvernementale lequel comprend la compétence en matière de services à l'enfance et à la famille”. Given the general framework of the preamble and the wording of s. 8(c) of the *Act* (see below), it is apparent that this right to self-determination refers to the right as recognized in Articles 3, 4 and 5 of the *UN Declaration*, which right, it should be noted, is limited by the latter's own Article 46 para. 1, which

need to combine respect for the diversity of Aboriginal peoples with the needs of Aboriginal elders, parents, youth and children, regardless of gender identity or spiritual identity, as well as the need to eliminate the overrepresentation of Aboriginal children in social services systems and to ensure that there are no gaps in the services they receive, regardless of where they live.

[208] The preamble also reiterates the Government of Canada's commitment to cooperate and engage with Aboriginal peoples in order to support their dignity, well-being and development, as well as its commitment to achieve reconciliation with Aboriginal peoples "through renewed nation-to-nation, government-to-government and Inuit-Crown relationships",²⁵⁸ including a comprehensive reform of Aboriginal child and family services. Lastly, the preamble highlights the Government of Canada's acknowledgement of "the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities".²⁵⁹

- ***Definitional and interpretative provisions***

[209] The preamble is followed by ss. 1 to 5 and 7²⁶⁰ of the *Act*, under the heading "Interpretation". These provisions set out the meaning of some of the terms used in the *Act* and define the scope of the *Act*.

[210] From among the definitions set out in s. 1, we will consider the definitions of "Indigenous governing body", "family", "care provider" and "Indigenous peoples", which identify the principal parties involved in the services contemplated by the *Act*, namely services to support children and families (such services being defined as including prevention, early intervention and protection):

Note: the following definitions are presented in the order found in the French version of the *Act*.

<p><i>Indigenous governing body</i> means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people</p>	<p><i>corps dirigeant autochtone</i> Conseil, gouvernement ou autre entité autorisé à agir pour le compte d'un groupe, d'une collectivité ou d'un peuple</p>
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makes the right subject to preservation of the territorial integrity or political unity of the states in which there are Aboriginal peoples.

²⁵⁸ Preamble to the *Act*, second paragraph of the ninth recital.

²⁵⁹ *Id.*, tenth and final recital.

²⁶⁰ Section 6 of the *Act*, which provided for the designation, by order, of the minister in charge of the application of the *Act*, was repealed by the *Budget Implementation Act, 2019, No. 1* (S.C. 2019, c. 29, s. 378) at the same time as the definition of "Minister" in s. 1 of the *Act* was amended. The "Minister" in charge of the *Act* is now defined as being the Minister of Indigenous Services.

that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. (*corps dirigeant autochtone*)

family includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance with the customs, traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child. (*famille*)

care provider means a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child's parent, including in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs. (*fournisseur de soins*)

[...]

Indigenous peoples has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*. (*peuples autochtones*)

autochtones titulaires de droits reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982*. (*Indigenous governing body*)

famille vise notamment toute personne que l'enfant considère être un proche parent ou qui, conformément aux coutumes, aux traditions ou aux pratiques coutumières en matière d'adoption du groupe, de la collectivité ou du peuple autochtones dont l'enfant fait partie, est considérée par ce groupe, cette collectivité ou ce peuple être un proche parent de l'enfant. (*family*)

fournisseur de soins S'entend de toute personne qui a la responsabilité principale de fournir des soins quotidiens à un enfant autochtone, autre qu'un parent — mère ou père — de celui-ci, notamment en conformité avec les coutumes ou les traditions du groupe, de la collectivité ou du peuple autochtones dont l'enfant fait partie. (*care provider*)

peuples autochtones S'entend au sens de *peuples autochtones du Canada*, au paragraphe 35(2) de la *Loi constitutionnelle de 1982*. (*Indigenous peoples*)

[211] The definition of “Indigenous governing body” is very broad.²⁶¹ It leaves it to Aboriginal peoples themselves to decide which entities will be responsible for applying

²⁶¹ Since 2018, the expression “Indigenous governing body” has also been used in other legislation, usually with a definition that coincides with the one found in the *Act*. Thus, the definition in the *Indigenous Languages Act* (S.C. 2019, c. 23, s. 2) is identical to that in the *Act*, as is the one in s. 2 of the *Department of Indigenous Services Act* (S.C. 2019, c. 29, s. 336), in s. 2 of the *Impact Assessment Act* (S.C. 2019, c. 28, s. 1), in the *Pay Equity Act* (S.C. 2018, c. 27, s. 416 (whose s. 11 defines “Indigenous governing bodies” as in the *Act* and temporarily exempts them from the application of this statute)), in the *Corrections and Conditional Release Act* (S.C. 1992, c. 20, s. 79, as amended by S.C. 2019, c. 27,

the *Act*, which is in keeping with the direction taken in this regard by the *UN Declaration*, an international instrument which is non-binding, but which Canada has now fully recognized,²⁶² committing itself to ensuring that federal laws are consistent with it. Article 18 of the *UN Declaration* (which ties in directly with its Articles 3, 4 and 5 on the right to self-determination²⁶³ and self-government) reads as follows:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

[212] By defining Indigenous governing bodies as it has and thereby placing the selection and determination of leaders in the hands of the Aboriginal peoples concerned, Parliament, as we have seen, has departed from the approach taken in its 1995 *Self-Government Policy*, which provided a much stricter framework for the recognition of the Aboriginal authorities called upon to exercise a form of self-government and tighter regulation of their mode of governance (requirements that were often included in the various agreements mentioned above). In this respect, the *Act* makes a clean break with past practices and reorients the discussion.

[213] As for the other definitions referred to above, two of them are fundamental in that they specify the concepts underlying the entire *Act*. The “family” is not the nuclear family of the *Civil Code of Québec*, for example, nor even the immediate family, but an extended family, as it traditionally or customarily exists among Aboriginal peoples. In turn, the “care

s. 23) and in the *Fisheries Act* (R.S.C. 1985, c. F-14, s. 2(1), as amended by S.C. 2019, c. 14, s. 1(8)). The *Reduction of Recidivism Framework Act* (S.C. 2021, c. 18) uses the expression without defining it (s. 2(1)). Other statutes use the expression “Aboriginal government”, which is sometimes defined. See, for example: *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (no definition); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (whose definition refers to a governing body established under an agreement between the federal government and an Aboriginal people); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (whose definition refers to the one found in the following statute); *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8 (whose definition refers to “an Indian, an Inuit or a Métis government or the *council of the band*, as defined in subsection 2(1) of the *Indian Act*”); *Access to Information Act*, R.S.C. 1985, c. A-1 (whose s. 13(3) sets out a narrow and specific definition of “Aboriginal government” by referring to a series of specific agreements). The *Indigenous Languages Act* also uses the expression “Indigenous government” in ss. 25 to 27, but does not define it.

²⁶² Canada, which initially voted against the resolution of the United Nations General Assembly (in 2007), subsequently endorsed the *UN Declaration*, first with qualifications (in 2010), and then without any qualifications (in 2016). As mentioned above, in June 2021, Parliament adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14). Although this statute was adopted after the *Act*, the latter already has features congruent with the *UN Declaration*, as illustrated by its definition of “Indigenous governing bodies”.

²⁶³ See *supra*, note 257.

provider”, a person other than the mother or father, will sometimes (or even often) be a member of that family, who, according to Aboriginal customs or traditions, provides the child’s day-to-day care.

[214] The last definition, “Indigenous peoples”, is somewhat redundant (it is already inferred from the definition of “Indigenous”—which we have not reproduced, but which corresponds to the definition in s. 35(2) of the *Constitution Act, 1982*—and from the term “Indigenous governing body”), but it avoids any ambiguity as to the scope of the *Act*.

[215] Section 2 of the *Act* declares that it upholds the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*, without abrogating or derogating from them.²⁶⁴ Parliament, therefore, does not intend for its *Act* to limit or exhaustively define the rights protected by this provision (a limitation that would, in any event, be subject to the test set out in *Sparrow*, which will be discussed at length in the “Analysis” chapter of this opinion).

[216] Sections 3 to 5 of the *Act* seek to prevent certain normative conflicts. Thus, s. 3 provides that the *Act* yields priority to agreements entered into, prior to the effective date of s. 18(1), between an Aboriginal people, the federal government and/or a provincial government: in the event of conflict or inconsistency, the provisions of these agreements respecting child and family services prevail. Section 5 provides that the *Act* does not affect the legislative authority of the Legislature for Nunavut under s. 23 of the *Nunavut Act*.²⁶⁵ As for s. 4, it foreshadows s. 22(3), which imposes the paramountcy of Aboriginal laws over conflicting or inconsistent provincial laws, and illustrates the doctrine of federal paramountcy:

4 For greater certainty, nothing in this Act affects the application of a provision of a provincial Act or regulation to the extent that the provision does not conflict with, or is not inconsistent with, the provisions of this Act.

4 Il est entendu que la présente loi ne porte atteinte à l’application des dispositions d’aucune loi provinciale — ni d’aucun règlement pris en vertu d’une telle loi — dans la mesure où elles ne sont pas incompatibles avec les dispositions de la présente loi.

[217] Section 7 declares that the *Act* is binding on both Her Majesty in right of Canada and of the provinces.

[218] Lastly, concluding this introduction, s. 8 of the *Act* sets out its purpose and s. 9 its guiding principles for the provision of services to Aboriginal children and families.

²⁶⁴ Several of the agreements mentioned in the preceding pages contain a similar provision. The *Yukon Act* (S.C. 2002, c. 7, s. 3) also contains an equivalent provision (but for other purposes).

²⁶⁵ S.C. 1993, c. 28.

[219] Section 8 is particularly important:

8 The purpose of this Act is to

(a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;

(b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and

(c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

8 La présente loi a pour objet :

a) d'affirmer le droit inhérent à l'autonomie gouvernementale lequel comprend la compétence en matière de services à l'enfance et à la famille;

b) d'énoncer des principes applicables à la fourniture de services à l'enfance et à la famille à l'égard des enfants autochtones, et ce, à l'échelle nationale;

c) de contribuer à la mise en œuvre de la Déclaration des Nations Unies sur les droits des peuples autochtones.

[220] The way in which Parliament has formulated the first of these three purposes is noteworthy. It is clear, both from the English text and the French text of s. 8(a), that Parliament is not merely affirming the right of Aboriginal self-government in relation to child and family services. Rather, it asserts Aboriginal self-government as a general and generic right, of which self-government in relation to child and family services is a specific aspect. It is therefore a twofold recognition. Moreover, the same notion underlies s. 18 of the *Act*, to which we will return further below, but whose first paragraph, which builds on and completes s. 8(a), it is useful to set out here:

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

18 (1) Le droit inhérent à l'autonomie gouvernementale reconnu et confirmé par l'article 35 de la *Loi constitutionnelle de 1982* comprend la compétence en matière de services à l'enfance et à la famille, notamment la compétence législative en matière de tels services et l'exécution et le contrôle d'application des textes législatifs pris en vertu de cette compétence législative.

[221] Aboriginal jurisdiction over child and family services is thus reiterated as part of a broader right to self-government—which is also reaffirmed—a right protected by s. 35 of the *Constitution Act, 1982*.

[222] Admittedly, the process is unusual. Of course, when drafting laws, legislatures naturally act on the basis of their belief in what the Constitution allows them to do, but express legislative affirmation of the meaning or scope of a constitutional provision is out of the ordinary. Certainly, ss. 8(a) and 18(1) of the *Act* reflect the federal government’s view of s. 35 of the *Constitution Act, 1982*, a view already stated in the 1995 *Self-Government Policy* and the 2018 *Principles*, but they are also a constitutional declaratory affirmation (one which the Attorney General of Quebec challenges in this reference, arguing that Parliament, on its own, cannot determine the meaning or scope of a section of the Canadian Constitution, and that it cannot rely on s. 91(24) of the *Constitution Act, 1867* as the basis for any power whatsoever to so define the content of s. 35 of the *Constitution Act, 1982*).²⁶⁶

[223] Be that as it may, s. 8(a) of the *Act* (as well as s. 18) thus clearly affirms Parliament’s commitment to Aboriginal self-government, thereby contributing, as s. 8(c) states, “to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples”, particularly Articles 3, 4 and 5 of the latter.

[224] Section 8(b) provides a reminder that, in addition to affirming the right of self-government, the purpose of the *Act* also includes establishing a national framework for the provision of child and family services to Aboriginal peoples and imposing broad principles or standards, as specified in ss. 10 to 17.

[225] For its part, s. 9 establishes a cardinal rule for the interpretation and application of the *Act*: the *Act* must be read and applied in accordance with the best interests of the child (a notion elaborated in s. 10 of the *Act*) and in a manner consistent with cultural continuity and substantive equality. This provision, which underpins the entire *Act*, reads as follows:

9 (1) This Act is to be interpreted and administered in accordance with the principle of the best interests of the child.

(2) This Act is to be interpreted and administered in accordance with the principle of cultural continuity as reflected in the following concepts:

(a) cultural continuity is essential to the well-being of a child, a family and

9 (1) La présente loi doit être interprétée et administrée en conformité avec le principe de l’intérêt de l’enfant.

(2) La présente loi doit être interprétée et administrée en conformité avec le principe de la continuité culturelle, et ce, selon les concepts voulant que :

a) la continuité culturelle est essentielle au bien-être des enfants, des familles et des groupes,

²⁶⁶ The Court will return to this point later.

an Indigenous group, community or people;

(b) the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;

(c) a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;

(d) child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and

(e) the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.

(3) This Act is to be interpreted and administered in accordance with the principle of substantive equality as reflected in the following concepts:

(a) the rights and distinct needs of a child with a disability are to be considered in order to promote the child's participation, to the same extent as other children, in the activities of his or her family or the

collectivités ou peuples autochtones;

b) la transmission de la langue, de la culture, des pratiques, des coutumes, des traditions, des cérémonies et des connaissances des peuples autochtones fait partie intégrante de la continuité culturelle;

c) le fait que l'enfant réside avec des membres de sa famille et le fait de respecter la culture du groupe, de la collectivité ou du peuple autochtones dont il fait partie favorisent souvent l'intérêt de l'enfant;

d) les services à l'enfance et à la famille sont fournis à l'égard d'un enfant autochtone de manière à ne pas contribuer à l'assimilation du groupe, de la collectivité ou du peuple autochtones dont il fait partie ou à la destruction de la culture de ce groupe, de cette collectivité ou de ce peuple;

e) les caractéristiques et les défis propres à la région où se trouvent les enfants, les familles et les groupes, collectivités ou peuples autochtones doivent être pris en considération.

(3) La présente loi doit être interprétée et administrée en conformité avec le principe de l'égalité réelle, et ce, selon les concepts voulant que :

a) les droits et les besoins particuliers d'un enfant handicapé doivent être pris en considération afin de favoriser sa participation — autant que celle des autres enfants — aux activités de sa famille ou du

Indigenous group, community or people to which he or she belongs;

(b) a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(c) a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(d) the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and

(e) in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result

groupe, de la collectivité ou du peuple autochtones dont il fait partie;

b) tout enfant doit être en mesure d'exercer sans discrimination, notamment celle fondée sur le sexe et l'identité ou l'expression de genre, ses droits prévus par la présente loi, en particulier le droit de voir son point de vue et ses préférences être pris en considération dans les décisions le concernant;

c) tout membre de la famille d'un enfant doit être en mesure d'exercer sans discrimination, notamment celle fondée sur le sexe et l'identité ou l'expression de genre, ses droits prévus par la présente loi, en particulier le droit de voir son point de vue et ses préférences être pris en considération dans les décisions le concernant;

d) le corps dirigeant autochtone agissant pour le compte d'un groupe, d'une collectivité ou d'un peuple autochtones dont un enfant fait partie doit être en mesure d'exercer sans discrimination les droits de ce groupe, de cette collectivité ou de ce peuple prévus par la présente loi, en particulier le droit de voir le point de vue et les préférences de ce groupe, de cette collectivité ou de ce peuple être pris en considération dans les décisions les concernant;

e) dans le but de promouvoir l'égalité réelle entre les enfants autochtones et les autres enfants, aucun conflit de compétence ne doit

in a gap in the child and family services that are provided in relation to Indigenous children.

occasionner de lacune dans les services à l'enfance et à la famille fournis à l'égard des enfants autochtones.

[Emphasis added]

[226] In a system in which many entities, individuals and service providers (governmental and non-governmental) will be responsible for applying the *Act*, Parliament intends, through these principles, to break with the past and generate a common and consistent approach in all respects for the benefit of children, their families and their communities. In pursuing this objective, s. 9(1) (primacy of the best interests of the Aboriginal child) and s. 9(2) (principle of cultural continuity) are paramount, of course, but s. 9(3)(e), pertaining to substantive equality, is particularly important. In effect, this provision (together with others) enshrines, at least in some respects, Jordan's Principle,²⁶⁷ which is the very illustration of the concept of the best interests of the child set out in s. 9(1) of the *Act*. Paragraph 9(3)(e) seeks to ensure that a jurisdictional, funding or other dispute does not result in a child being denied appropriate services. Neither children—nor their families—should suffer as a result of these disputes, and this is what the *Act* prescribes.

[227] With the exception of s. 9(3)(c), the balance of s. 9(3)—a subsection which sets out the principle of substantive equality—offers a rather limited vision of that concept, focusing on a kind of internal equality, within the framework set by the *Act*, and not directly addressing the differences between the services offered to Aboriginal children and families as compared to those offered to non-Aboriginal children and families (a subject addressed in s. 11(d), instead, as discussed below).

- ***National standards***

[228] The three core interpretative principles of s. 9 of the *Act* are also expressed in the national standards set out in ss. 10 to 17, under three headings: the best interests of the Aboriginal child (s. 10), the provision of child and family services (ss. 11-15) and the placement of the Aboriginal child (ss. 16 and 17).

[229] Building on s. 9(1), s. 10 thus makes the best interests of the Aboriginal child “a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services” (s. 10(1)). The best interests of the Aboriginal child must be measured based on a series of factors, including: the child's heritage and

²⁶⁷ See: *Caring Society*, para. 352.

Regarding the inclusion of Jordan's Principle in the *Act*, see, for example: Vandna Sinha, Colleen Sheppard, Kathryn Chadwick *et al.*, “Substantive Equality and Jordan's Principle: Challenges and Complexities”, (2021) 35 *Journal of Law and Social Policy* 21, p. 28.

upbringing, as well as the child's needs (including the need for stability); the nature of the child's relationship with his or her parent, the care provider and any member of the child's family who plays an important role in his or her life; the importance of preserving the child's cultural identity and connections to the language and territory of the people to which the child belongs; the child's views and preferences; the plan for the child's care (which may include customary or traditional care); any family violence and any legal proceeding or measure that is relevant to the child's safety, security and well-being (s. 10(3)). In weighing these factors, "primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture" (s. 10(2)). Subsection 10(4) states that, "to the extent that it is possible to do so", subsections (1) to (3) are to be construed "in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs".²⁶⁸

[230] Section 11 reinforces s. 10 by prescribing that services must be provided in a manner that respects the needs and culture of the Aboriginal child, allowing the child to know his or her family origins (which is particularly important where the child has been placed with or adopted by persons of another Aboriginal people or by non-Aboriginal persons), the whole with a view to "substantive equality between the child and other children".

[231] Sections 12 and 13 reiterate the critical need to involve the parents, the care provider and the people to which the child belongs (in the latter case, through the Indigenous governing body). Thus, there can be no question—as was too often the case in the past—of making important decisions regarding the child without notifying the child's parent (mother or father), care provider or community, from whom the child cannot be removed without first notifying them (s. 12). Parents and care providers have party status in any civil proceeding in relation to the child, and they have the right to make representations in the proceeding, as does the Indigenous governing body²⁶⁹ (s. 13).

[232] On another note, s. 14 gives a very clear priority to preventive care: child and family services must prioritize such care (subsection 1), including during the prenatal period, "in order to prevent the apprehension of the child at the time of the child's birth" (subsection 2).

²⁶⁸ As will be seen below, if such an interpretation is not possible and one concludes that there is a conflict or inconsistency with the Aboriginal law, the *Act* provides that the standard set out in s. 10 prevails (s. 22(1), although this provision does not cover all Aboriginal laws).

²⁶⁹ Although the Indigenous governing body does not have the "party" status that parents and the care provider have.

[233] In the same vein, s. 15 sets out a rule that promotes prevention, but also combats a persistent and stigmatizing bias among many non-Aboriginal service providers and a lack of understanding, even ignorance, of the living conditions of many communities and their history, as if poverty were synonymous with neglect or vice:

15 In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.

15 Dans le cadre de la fourniture de services à l'enfance et à la famille à l'égard d'un enfant autochtone, dans la mesure où cela est compatible avec son intérêt, l'enfant ne doit pas être pris en charge seulement en raison de sa condition socio-économique, notamment la pauvreté, le manque de logement ou d'infrastructures convenables et l'état de santé de son parent — mère ou père — ou de son fournisseur de soins.

[234] Section 15.1, which concludes the “Provision of Child and Family Services” heading, prioritizes maintaining the *status quo* of a child who resides with one of his or her parents or with another adult family member, unless the child’s best interests require immediate apprehension by the appropriate authorities.

[235] Lastly, ss. 16 and 17 deal with the placement of Aboriginal children and they address a historical and contemporary issue, one often denounced by Aboriginal peoples as well as by the *Truth and Reconciliation Commission*²⁷⁰ and the *Viens Commission*,²⁷¹ to mention but these two. Indeed, the protection of Aboriginal children involves maintaining family ties and preserving their cultural identity and their relations with the community to which they belong, a subject which Parliament has prioritized here and which responds to the demands of Aboriginal peoples and their members.

[236] In accordance with s. 16, placement, even when necessary, is therefore treated as a measure of last resort, which must build on the child’s sense of belonging to his or her people and must respect the customs and traditions of that people in matters of adoption. Such placement must be done, in the following order of priority, with the child’s parent

²⁷⁰ It is worth noting one of the *Truth and Reconciliation Commission’s* Calls to Action on this subject:

4) We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

[...]

iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

(Truth and Reconciliation Commission, *Summary of the Final Report*, p. 320).

²⁷¹ Viens Commission, *Final Report*, pp. 407 *et seq.*

(mother or father), with another adult family member,²⁷² with an adult who belongs to the same people as the child, or with adult who belongs to an Aboriginal people other than the one to which the child belongs. Only as a last resort can placement with a non-Aboriginal adult be considered. In addition, whenever possible, siblings must be kept together and reunited.

[237] Section 16 also requires that the situation of an Aboriginal child who has been taken into the care of child and family services be reassessed on an ongoing basis to ensure that if the child does not reside with his or her mother or father, the child can be placed with one of them or, failing same, with another adult family member.

[238] Finally, in all cases, s. 17 requires that, when providing child and family services, the child's attachment and emotional ties to any family member with whom the child has not been placed are to be promoted.

[239] In summary, the core guiding principles and the national standards set out in ss. 9-17 are based on the following:

1. the pre-eminent principle of the best interests of the Aboriginal child in keeping with cultural continuity and substantive equality;
2. the involvement of Aboriginal families and Indigenous governing bodies in making decisions affecting Aboriginal children;
3. the prioritization of preventive care;
4. the downgrading of socio-economic conditions as a decisive factor for apprehending Aboriginal children; and
5. the prioritization of placing Aboriginal children in an Aboriginal environment.

[240] Services provided to Aboriginal children will therefore have to meet minimum requirements applicable across Canada, regardless of who provides them. The aim is to guarantee the best interests of every Aboriginal child—physically, psychologically and emotionally, and in keeping with cultural continuity and security as well as substantive equality—while ensuring that certain harmful, “ethnocentric [and] abusive”²⁷³ practices

²⁷² Family within the meaning of that term in s. 1 of the *Act*.

²⁷³ We have borrowed this expression from the *Viens Commission (Final Report, p. 417)*. The Aboriginal Justice Inquiry of Manitoba referred to an intrusion that was “paternalistic and colonial in nature, condescending and demeaning in fact, and often insensitive and brutal” (Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 “The Justice System and Aboriginal People”, Winnipeg, Queen’s Printer, 1991, p. 509).

are consigned to oblivion in all areas, in favour of an approach that respects unique Aboriginal characteristics.

- ***Framework for recognizing and implementing Aboriginal self-government in relation to child and family services***

[241] This portion of the *Act* sets out the framework for Aboriginal self-government in relation to child and family services. It begins by affirming the right of Aboriginal self-government, particularly in relation to child and family services (s. 18), and then establishes a framework for exercising that jurisdiction, which includes a series of rules for resolving conflicts of laws (ss. 19-24). Let us examine this framework.

[242] A portion of s. 18 of the *Act* was reproduced above, but we cite it now in its entirety:

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

(2) For greater certainty and for the purposes of subsection (1), the authority to administer and enforce laws includes the authority to provide for dispute resolution mechanisms.

18 (1) Le droit inhérent à l'autonomie gouvernementale reconnu et confirmé par l'article 35 de la *Loi constitutionnelle de 1982* comprend la compétence en matière de services à l'enfance et à la famille, notamment la compétence législative en matière de tels services et l'exécution et le contrôle d'application des textes législatifs pris en vertu de cette compétence législative.

(2) Pour l'application du paragraphe (1), il est entendu que l'exécution et le contrôle d'application comprend la compétence de prévoir des mécanismes de résolution des différends.

[243] This is the premise—the cornerstone—of the *Act*. The first paragraph of s. 18, whose unconventional language we noted earlier, has a declaratory purpose, one already announced in s. 8(a): the right to Aboriginal self-government, an (Aboriginal) right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, according to Parliament, includes “jurisdiction in relation to child and family services”, which in turn includes *legislative* authority in relation to such matters, as well as “authority to administer and enforce laws made under that legislative authority” (the French version speaks of “*l'exécution et le contrôle d'application des textes législatifs pris en vertu de cette compétence législative*”). Parliament is therefore making a twofold affirmation: that of the general right to Aboriginal self-government, based on s. 35 of the *Constitution Act, 1982*; and that of the resulting right to Aboriginal self-government in relation to child and family

services, pursuant to which Aboriginal peoples can make “laws / *textes législatifs*” and can administer and enforce them.

[244] The second paragraph of s. 18 further specifies that this jurisdiction includes the authority to “provide for dispute resolution mechanisms” (“*prévoir des mécanismes de résolution des différends*”). *A priori*, this expression seems sufficiently broad to cover the establishment of mechanisms for the discussion, conciliation, arbitration and resolution of disputes using traditional, customary or other approaches or modes, and, conceivably, the establishment of quasi-judicial mechanisms or forums. Would it allow for the creation of courts of law?²⁷⁴ This is an issue the parties to the reference did not address and it is not appropriate for the Court to say any more on this subject.

[245] Although the *Act* does not expressly state it, it appears that the rights set out in s. 18 are exercised by the Indigenous governing bodies, for and on behalf of the various Aboriginal peoples. When exercising the jurisdiction in relation to child and family services, these governing bodies must comply with the *Canadian Charter*, as required by s. 19 of the *Act*, a provision we will return to later.

[246] The legislative dimension of this jurisdiction is shaped by ss. 20 to 24 of the *Act*, which provide Aboriginal peoples and their governing bodies with a choice between two courses of action.

[247] Section 20 is the backbone of this structure:

<p>20 (1) If an Indigenous group, community or people intends to exercise its legislative authority in relation to child and family services, an Indigenous governing body acting on behalf of that Indigenous group, community or people may give notice of</p>	<p>20 (1) Le corps dirigeant autochtone agissant pour le compte d'un groupe, d'une collectivité ou d'un peuple autochtones qui a l'intention d'exercer sa compétence législative en matière de services à l'enfance et à la famille peut en donner avis au ministre et au</p>
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²⁷⁴ Some of the agreements mentioned above, although their context is quite different from that of the *Act*, include provisions allowing a First Nation to establish courts of justice for certain purposes, subject to various conditions. See, for example: *Nisga'a Final Agreement* (1999), chap. 12 (“Administration of Justice”), ss. 30-44 (organization and establishment of the Nisga'a Court) and 45-48 (appeal from decisions of the Nisga'a Court to the Supreme Court of British Columbia); *Labrador Inuit Land Claims Agreement* (2005), part 17.28 (“General Provisions Respecting Administration of Justice”), particularly the introductory paragraph of s. 17.28.1, as well as part 17.31 (“Inuit Court”, whose judgments are subject to appeal or review, as the case may be, before the Supreme Court of Newfoundland and Labrador, in accordance with s. 17.31.21); *Sioux Valley Dakota Nation Governance Agreement* (2013), s. 53.0 (establishment of a court, with a right of appeal to the Manitoba Court of Queen's Bench for offences under Sioux Valley Dakota Nation laws (s. 53.04(3)) and to the Manitoba Court of Queen's Bench or the Manitoba Court of Appeal, as the circumstances require (s. 53.05(6)), in all other cases). It should be noted that this agreement contains an interesting arrangement regarding cooperation with the Manitoba courts.

that intention to the Minister and the government of each province in which the Indigenous group, community or people is located.

gouvernement de chacune des provinces où est situé le groupe, la collectivité ou le peuple.

(2) The Indigenous governing body may also request that the Minister and the government of each of those provinces enter into a coordination agreement with the Indigenous governing body in relation to the exercise of the legislative authority, respecting, among other things,

(2) Ce corps dirigeant autochtone peut également demander au ministre et au gouvernement de chacune de ces provinces de conclure avec lui un accord de coordination concernant l'exercice de cette compétence portant notamment sur :

(a) the provision of emergency services to ensure the safety, security and well-being of Indigenous children;

a) la fourniture de services d'urgence nécessaires au bien-être et à la sécurité des enfants autochtones;

(b) support measures to enable Indigenous children to exercise their rights effectively;

b) des mesures de soutien permettant aux enfants autochtones d'exercer leurs droits efficacement;

(c) fiscal arrangements, relating to the provision of child and family services by the Indigenous governing body, that are sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people to exercise the legislative authority effectively; and

c) des arrangements fiscaux concernant la fourniture de services à l'enfance et à la famille par le corps dirigeant autochtone qui soient durables, fondés sur les besoins et conformes au principe de l'égalité réelle afin d'atteindre des résultats qui sont positifs à long terme pour les enfants, les familles et les collectivités autochtones et de soutenir la capacité du groupe, de la collectivité ou du peuple autochtones d'exercer efficacement la compétence législative;

(d) any other coordination measure related to the effective exercise of the legislative authority.

d) toute autre mesure de coordination liée à un exercice efficace de la compétence législative.

(3) Sections 21 and 22 apply only in respect of an Indigenous group, community or people on whose behalf an Indigenous governing body

(a) entered into a coordination agreement; or

(b) has not entered into a coordination agreement, although it made reasonable efforts to do so during the period of one year after the day on which the request is made.

(4) For the purposes of paragraph 3(b), sections 21 and 22 apply beginning on the day after the day on which the period referred to in that paragraph ends.

(5) If the Indigenous governing body, the Minister and the government of each of those provinces make reasonable efforts to enter into a coordination agreement but do not enter into a coordination agreement, a dispute resolution mechanism provided for by the regulations made under section 32 may be used to promote entering into a coordination agreement.

(6) If sections 21 and 22 do not apply in respect of an Indigenous group, community or people, nothing prevents the Indigenous governing body that has already made a request under subsection (2) on behalf of the Indigenous group, community or people from making a new request.

(3) Les articles 21 et 22 ne s'appliquent qu'à l'égard du groupe, de la collectivité ou du peuple autochtones pour le compte duquel un corps dirigeant autochtone :

a) soit a conclu l'accord de coordination;

b) soit ne l'a pas conclu, mais a fait des efforts raisonnables à cette fin dans l'année qui suit la date de présentation de la demande.

(4) Pour l'application de l'alinéa (3)b), les articles 21 et 22 s'appliquent à compter de la date qui suit celle à laquelle expire la période visée à cet alinéa.

(5) Si le corps dirigeant autochtone, le ministre et les gouvernements de chacune de ces provinces font des efforts raisonnables pour conclure l'accord de coordination mais qu'ils ne le concluent pas, le mécanisme de résolution des différends prévu par les règlements pris en vertu de l'article 32 peut être utilisé afin d'en favoriser la conclusion.

(6) Tant que les articles 21 et 22 ne s'appliquent pas à l'égard d'un groupe, d'une collectivité ou d'un peuple autochtones, rien n'empêche le corps dirigeant autochtone qui a déjà présenté une demande au titre du paragraphe (2) pour le compte de ce groupe, de cette collectivité ou de ce peuple d'en présenter une nouvelle.

(7) For greater certainty, even if sections 21 and 22 apply in respect of an Indigenous group, community or people on behalf of which an Indigenous governing body has not entered into a coordination agreement, nothing prevents the Indigenous governing body from entering into a coordination agreement after the end of the period referred to in paragraph (3)(b).

(7) Il est entendu que, même si les articles 21 et 22 s'appliquent à l'égard d'un groupe, d'une collectivité ou d'un peuple autochtones pour le compte duquel un corps dirigeant autochtone n'a pas conclu l'accord de coordination, rien n'empêche le corps dirigeant autochtone de le conclure après l'expiration de la période visée à l'alinéa (3)b).

[248] The *Act* therefore offers a choice:

- first, an Aboriginal people, acting through its governing body, can choose to exercise or not exercise its legislative authority in relation to child and family services;
- second, if it chooses to exercise that authority, it has two options:
 1. in accordance with s. 20(1), acting through its governing body it can express its intention to exercise that authority, by giving a notice to the Minister and to the government of the province or provinces concerned;²⁷⁵
 2. whether or not it gives such notice, it may, in accordance with s. 20(2), request that the Minister and the government of each of the provinces concerned enter into a coordination agreement.²⁷⁶

²⁷⁵ It should be noted that s. 20(1) does not require the Aboriginal people to give the notice provided for therein of its intention to exercise the legislative authority recognized by s. 18 of the *Act*. It simply provides that an Aboriginal people, acting through its governing body, *may* give notice (“*peut en donner avis*”). One must surely conclude from the use of this verb (which indicates the possibility, but not the obligation, to act) that an Aboriginal people could also choose to exercise its legislative authority *without* so notifying the federal or provincial governments. In such a case, the laws of this group would not benefit from the advantages of applying ss. 21 and 22 of the *Act*, but would remain subject to ss. 19, 23 and 24 of the *Act* (see below). Ultimately, it would appear that legislating in this manner, without giving notice, may be less practical.

²⁷⁶ The information package prepared by the federal government indicates that an Indigenous governing body that requests the negotiation of a coordination agreement provided for in s. 20(2) does not have to give the notice provided for in s. 20(1). See: Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 33. One might think that this interpretation is well founded, since a governing body that requests such an agreement is thereby demonstrating its intention to legislate. However, the wording of the statutory provisions in question could just as easily be interpreted as implying that these are separate and cumulative obligations: the governing body of the Aboriginal

[249] The decision to request a coordination agreement is the keystone of the system established by the *Act*: it triggers the application of ss. 21 and 22 of the *Act*. As s. 20(3) expressly states, from the moment the agreement is entered into or one year after the request has been made, the Aboriginal people who have chosen this path have the benefit of the paramountcy and conflict of laws schemes set out in ss. 21 and 22:

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.

(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.

(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.

22 (1) 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 — other than any of sections 10 to 15 of this Act and the provisions of the *Canadian Human Rights Act* — that is in a federal Act or regulation, the provision that is in the law of the

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.

(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.

(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.

22 (1) 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, autres que les articles 10 à 15 de la présente loi et les dispositions de la *Loi canadienne sur les droits de la personne*, de toute loi

people that wishes to legislate gives notice thereof to the federal Minister and to the provincial government (s. 20(1)) and may “also / également” request that a coordination agreement be entered into (s. 20(2)).

Indigenous group, community or people prevails to the extent of the conflict or inconsistency.

fédérale ou de tout règlement pris en vertu d'une telle loi.

(2) The reference to a “federal Act or regulation” in subsection (1) does not include a reference to a law that has the force of law under subsection 21(1).

(2) Les mentions de « loi fédérale » et de « règlement pris en vertu d'une telle loi », au paragraphe (1), ne visent pas le texte législatif auquel le paragraphe 21(1) donne force de loi.

(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.

(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.

[250] Parliament, therefore, has reserved the application of these provisions solely to those Aboriginal peoples whose governing bodies have requested that a coordination agreement be entered into (whether or not such an agreement is in fact entered into). Under this scheme, the laws enacted by governing bodies that have made this request are treated as federal statutes (s. 21(1)) and, except for the fact that they are subject to the *Canadian Charter* (s. 19), the *Canadian Human Rights Act* and ss. 10 to 15 of the *Act*²⁷⁷ (ss. 21(3) and 22(1)), their content and scope may be freely determined.²⁷⁸

²⁷⁷ One may wonder why *only* ss. 10 to 15 of the *Act*, to the exclusion of ss. 16 and 17, govern the Aboriginal laws contemplated in ss. 21 and 22. Yet, ss. 16 and 17, which prioritize the placement of children within their immediate or extended family or within their community, are an important tool for their protection (physical, psychological and emotional) and for the preservation of their cultural identity. The evidence in the Court record in this reference does not provide a clear understanding of the reasons for this exclusion.

²⁷⁸ It is worth noting that the scope of Aboriginal laws is not territorially limited (as would be, for example, a provincial statute, which in principle has no extraterritorial effect), but may attach to the very individuals who make up the Aboriginal peoples and follow them wherever they reside in Canada: this is a kind of *ratione personae* attachment. An Indigenous governing body, therefore, may decide that its law will apply to members of the people it represents who are located outside the usual territory of that community and even outside the province in which that territory is located. On this point, see, for example : Senate, Standing Senate Committee on Aboriginal Peoples, Proceedings, 42nd Parl., 1st Sess., Fasc. 52, April 9, 10 and 11, 2019, pp. 52:28 and 52:29 (J.-F. Tremblay); Indigenous Services Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families. Technical Information Package*, Gatineau, Indigenous Services Canada, 2020, p. 16. More generally, on the

Parliament has also provided that such laws prevail over any conflicting or inconsistent provision in federal or provincial child and family services legislation²⁷⁹ (subject to s. 23).²⁸⁰

[251] What of Aboriginal peoples who choose to exercise their legislative authority without requesting a coordination agreement under s. 20(2)? It follows from s. 20(3) that their laws will not enjoy the protection and benefits set out in ss. 21 and 22 (but will not, however, be deprived of those potentially available under s. 35 of the *Constitution Act, 1982*, assuming that this provision does indeed cover Aboriginal self-government and Aboriginal jurisdiction in relation to child and family services,²⁸¹ a matter that will be analyzed in detail further below in this opinion). Nonetheless, they will be subject to the *Canadian Charter* by virtue of s. 19 of the *Act*, which does not distinguish these laws from those adopted by Aboriginal peoples who have chosen the s. 20(2) route.

[252] Will the laws of Aboriginal peoples who do not choose the s. 20(2) route be required to comply with ss. 10-17 of the *Act* (keeping in mind that the laws of peoples who have chosen the s. 20(2) route are, by virtue of s. 22(1), required to comply with ss. 10-15 of the *Act*)? There is no reason to rule on this issue—which the parties did not raise and which could prove controversial.

[253] That said, the fact remains that by establishing this dual system, depending on whether or not the Aboriginal people wishing to exercise its legislative authority requests a coordination agreement, Parliament clearly intends to foster the negotiating approach. A coordination agreement, with its potentially wide-ranging content (see s. 20(2) of the *Act*), is clearly intended as an instrument to facilitate the exercise of Aboriginal legislative authority, to give Aboriginal peoples the means to do so and to strengthen the protection of their children. And while, as noted above, Parliament has not made negotiation

principle of the personality—or non-territoriality— of Aboriginal laws, see: Ghislain Otis, “L’autonomie gouvernementale autochtone et l’option de loi en matière de statut personnel”, (2014) 55:3 *C. de D.* 583.

²⁷⁹ In all likelihood, the effect of s. 21(2) is to exempt Aboriginal legislation from the application of the federal *Interpretation Act* (R.S.C. 1985, c. I-21), among others, and the effect of s. 21(3) is to exempt it from the jurisdiction of the federal courts (*Federal Courts Act*, R.S.C. 1985, c. F-7).

²⁸⁰ It should be noted that the notion of Aboriginal law prevailing over provincial law is not entirely new: s. 88 of the *Indian Act* (which does not cover provincial laws applicable to Aboriginal people *ex proprio vigore*) already states this with respect to the regulations or laws of a band. It is important to note, however, that this provision gives primacy to Aboriginal laws as delegated federal legislation.

²⁸¹ It is important to note that, while Aboriginal peoples who choose not to make the request provided for in s. 20(2) will be deprived of some of the benefits the *Act* gives rise to, the *Act* upholds the rights protected by s. 35 of the *Constitution Act, 1982* and does not abrogate or derogate therefrom (s. 2). If, as Parliament asserts in s. 18 of the *Act*, self-government is an existing Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, would this in itself result in some form of paramountcy for Aboriginal laws? If so, ss. 20-22 of the *Act* could not bar such paramountcy, nor could they reserve it only for those peoples who have complied with s. 20(2).

mandatory, it is nonetheless a preferred tool,²⁸² all the more so since it involves the provinces (which are indispensable partners for the delivery of child and family services) in the process of developing the framework within which these services will be regulated or provided to Aboriginal citizens.²⁸³

[254] Lastly, a few words about ss. 23 and 24, which round out this part of the *Act* and apply to every Aboriginal law (whether or not the law complies with s. 20(1) or (2) and whether or not it is covered by ss. 21 and 22).

[255] Section 23, which reads as follows, determines the scope of application of every Aboriginal law in relation to child and family services, while at the same time setting out a general exception to that application:

23 A provision respecting child and family services that is in a law of an Indigenous group, community or people applies in relation to an Indigenous child except if the application of the provision would be contrary to the best interests of the child.

23 La disposition relative aux services à l'enfance et à la famille de tout texte législatif d'un groupe, d'une collectivité ou d'un peuple autochtones s'applique à l'égard d'un enfant autochtone, sauf si son application est contraire à l'intérêt de l'enfant.

[256] This means that all laws adopted pursuant to s. 18 of the *Act* apply to the Aboriginal children concerned. This also means that even Aboriginal laws to which ss. 21 and 22 of the *Act* apply—and which, as Parliament intends, in principle prevail over any conflicting or inconsistent federal and provincial laws—are subject, like other laws, to the exception of the “best interests of the child”, which must be assessed in accordance with the principle and criteria set out in ss. 9 and 10 of the *Act*. One must therefore conclude that if the application of the Aboriginal law is contrary to the best interests of the child, general provincial laws will apply and the services thusly provided will have to comply with ss. 10-17.

[257] Section 24, which also applies to all Aboriginal laws, including those covered by ss. 21 and 22 (s. 24(2)), adds a rule for resolving conflicts between Aboriginal laws by giving precedence to the law of the people with which the child has stronger ties, taking into consideration certain criteria.

²⁸² Thus, while negotiation—which was advocated as a prelude to self-government in the 1995 *Self-Government Policy*—is no longer a prerequisite for *recognition* of the right of self-government, it nevertheless remains an important component for its *implementation*.

²⁸³ It should be noted that the *Act* does not mention Canada's territories, except for Nunavut, which is referred to in s. 5. The parliamentary proceedings related to the *Act* mention this provision and explain its *raison d'être*. See, for example: Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 53, April 30 and May 1 and 2, 2019, p. 53:113 *et seq.* (D.G. Patterson); Senate, *Senate Debates*, 42nd Parl., 1st Sess., vol. 150, No. 299, June 10, 2019, pp. 8447-8448 (D.G. Patterson).

[258] Finally, it should be noted that, as a whole, the scheme established by the *Act* to foster the exercise by Aboriginal peoples of their jurisdiction—a jurisdiction that stems directly from their right to self-government, which is recognized and affirmed by s. 18 of the *Act*—appears to be in keeping with the spirit of the *Department of Indigenous Services Act*,²⁸⁴ which was adopted concurrently. Sections 6 to 9 of the latter statute provide for the gradual transfer, by means of agreements (s. 9), of responsibilities from the Department to Aboriginal communities “with respect to the development and provision of those services” (s. 7(b)), which are those set out in s. 6(2) and include child and family services (s. 6(2)(a)). Not surprisingly, this has gone hand in hand with the recognition of Aboriginal self-government in relation to these services—so that Aboriginal peoples can regulate, administer and deliver these services themselves, while also establishing dispute resolution mechanisms, as provided for in s. 18 of the *Act*.

- ***Other provisions***

[259] The other provisions of the *Act* are of lesser interest for the purposes of this reference, except perhaps s. 32.

[260] Sections 25 and 26 require the Minister (namely the Minister of Indigenous Services²⁸⁵) to post on a website a variety of information regarding the Aboriginal peoples who avail themselves of the *Act* and to make the Aboriginal laws accessible by whatever means the Minister chooses.

[261] Sections 27 to 30 deal with the collection of information respecting Aboriginal child and family services and the obligations of those involved in this regard.

[262] Section 31 requires the Minister to conduct a five-year review of the *Act*, in collaboration with Aboriginal peoples and, at the Minister’s request, with provincial participation. This review may lead to amendments to the *Act*.

[263] Section 32(1) empowers the Governor in Council to make any regulations “relating to the application of this Act” and “respecting the provision of child and family services”, but only if Aboriginal peoples have been “afforded a meaningful opportunity to collaborate in the policy development leading to the making of the regulations (*“ont eu l’occasion de collaborer de façon significative à l’élaboration des orientations préalables à sa prise”*)”. Provincial participation in this process is optional (s. 32(2)). Section 34 allows the Governor in Council, under the same conditions, to adopt regulations regarding any transitional measures that may be necessary.

²⁸⁴ S.C. 2019, c. 29, s. 336.

²⁸⁵ Section 1 of the *Act*, definition of “Minister”.

[264] The hierarchy of these regulations, in light of the autonomy affirmed by ss. 8 and 18 of the *Act* and the paramountcy scheme established by ss. 21 and 22, is not clear.²⁸⁶ At a minimum, it can be assumed that any regulation seeking to limit, restrict or compel the exercise of the jurisdiction of Aboriginal peoples, or having that effect, would be subject to the test set out in *Sparrow*, insofar as the right to self-government recognized by ss. 8 and 18 of the *Act* were indeed protected by s. 35 of the *Constitution Act, 1982*.

[265] Finally, to conclude on this subject, the power vested in the Governor in Council by s. 32 also includes the power to provide for a dispute resolution mechanism to promote entering into a coordination agreement (see s. 20(5) of the *Act*).

[266] Section 33 of the *Act* is a transitional provision related to s. 13 of the *Act* and to the rights of Aboriginal parents, families and governing bodies to participate or make representations in legal proceedings that involve an Aboriginal child and that were pending at the time the *Act* came into force (s. 35).

(c) Some remarks regarding the application of the Act

[267] While Parliament and many observers²⁸⁷ view the *Act*²⁸⁸ as a significant—and essential—step forward in the process of reconciling with Aboriginal peoples, affirming the rights protected by s. 35 of the *Constitution Act, 1982* and redressing the historical wrongs done to Aboriginal children and families, the *Act* is not a panacea. Aside from the question of whether the content of the *Act* complies with the Canadian Constitution—which is the subject of this reference—the *Act* contains some ambiguous, imprecise or even elusive provisions, which may make its application more complex and give rise to

²⁸⁶ At least for those peoples who have made use of s. 20(2) of the *Act*, s. 22(1) provides that an Aboriginal law referred to in s. 21 prevails over any conflicting or inconsistent provision of a federal law, including, therefore, the *Act* itself (except for ss. 10-15), and any regulation made under such a law. On its face, this would cover regulations made under ss. 32 and 34.

²⁸⁷ See, for example: Carly Minsky, “Around the World: Recent Changes to Indigenous Child Welfare in Canada”, (2021) 41:1 *Children’s Legal Rights Journal* 79, p. 81 (the author refers to a “landmark law”). While authors Poirier and Hedaraly view the *Act* as only a partial response to the Calls to Action of the *Truth and Reconciliation Commission*, they nevertheless find in the *Act* a tool that “[w]hile not ignoring provinces and territories, [...] simultaneously—and implicitly—seems to have paved the way for a concrete, gradual, and pragmatic implementation of a third order of government” (Johanne Poirier and Sajeda Hedaraly, “Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who Can and Should Do What?”, (2019-2020) 24:2 *Rev. Const. Stud.* 171, pp. 197-198).

²⁸⁸ Which the courts of Quebec, not to mention others, are already applying, given that the present reference did not suspend the effects of the *Act*. See: *Protection de la jeunesse* — 216574, 2021 QCCQ 11587; *Protection de la jeunesse* — 213177, 2021 QCCQ 5824; *Protection de la jeunesse* — 212924, 2021 QCCQ 6113; *Protection de la jeunesse* — 211756, 2021 QCCQ 3166; *Protection de la jeunesse* — 211762, 2021 QCCQ 3064; *Protection de la jeunesse* — 211757, 2021 QCCQ 3063; *Protection de la jeunesse* — 209362, 2020 QCCQ 13599; *Protection de la jeunesse* — 209342, 2020 QCCQ 12974; *Protection de la jeunesse* — 209335, 2020 QCCQ 12766; *Protection de la jeunesse* — 208153, 2020 QCCQ 12383; *Protection de la jeunesse* — 206762, 2020 QCCQ 7952; *Protection de la jeunesse* — 204534, 2020 QCCQ 4334.

litigation, as several Aboriginal witnesses pointed out during the parliamentary review proceedings. We noted some of these provisions in passing in the foregoing discussion, but other questions remain.

[268] While the following is not an exhaustive list of the questions the *Act* raises and does not answer these questions, we can begin by revisiting the definition of “Indigenous governing body”. As already noted, this definition, which appears to be in keeping with Articles 3, 4, 5, 18 and 33 para. 2 of the *UN Declaration*, gives Aboriginal peoples full latitude to establish or designate entities to represent them and to implement the *Act*. This, however, could lead to internal disputes or complicate the exercise of the legislative authority recognized by s. 18 of the *Act*. Moreover, it is conceivable that the *Act* will lead to a certain fragmentation of Aboriginal governance not only among potentially competing governing bodies, but also among Aboriginal groups, communities or peoples, thereby possibly muddling the relationship between them or, perhaps, their relationship with the provinces, which may have to deal with a large number of interested parties. The question of which governing entity (i.e., “governing body”) can legitimately represent or act on behalf of an Aboriginal people in the exercise of its Aboriginal rights—which has sometimes been a source of tension in communities—has never been decided by the Supreme Court of Canada and is a critical issue here. Be that as it may, Parliament’s policy choice here is intimately tied to the generic right to Aboriginal self-government that the *Act* recognizes, concurrently recognizing the freedom of Aboriginal persons—as a group, community or people—to designate their governing bodies and regulate their own governance methods.²⁸⁹ Nonetheless, one cannot exclude the possibility that some difficulties in implementing the *Act* may arise.

[269] On a different note, for reasons that once again relate to the very idea of self-government (or so the parliamentary proceedings suggest), the *Act* does not link the legislative authority of Aboriginal peoples to their ability or willingness to provide child and family services themselves (even though, as noted above, this appears to be the ultimate objective of the reform initiated by Parliament). This could also give rise to difficulties in applying the *Act*, although these difficulties are likely to be ones that can be resolved through the agreements provided for in s. 20 of the *Act* or through other forms of negotiation.

[270] As mentioned earlier, s. 18 of the *Act* recognizes that, in the exercise of Aboriginal jurisdiction in relation to child and family services, Aboriginal peoples can establish dispute resolution mechanisms, which, *prima facie*, would appear to include the creation of quasi-judicial tribunals. Nevertheless, there remain some unanswered questions at this stage: Are these mechanisms subject to the superintending power of provincial superior courts (on the face of it, an affirmative answer seems likely, given the applicable

²⁸⁹ This is in contrast to the *Indian Act* and, as noted earlier, in contrast to various self-government agreements entered into with some Aboriginal nations, which agreements closely regulate governance methods.

constitutional ordering and the need to uphold the rule of law)? Can Aboriginal laws provide for an appeal of Aboriginal court decisions to provincial courts, whether or not there is a coordination agreement with the province?²⁹⁰ Can Aboriginal laws instead choose to give the provincial courts jurisdiction in general over the application of their provisions? One may also wonder which court will hear disputes concerning s. 23 of the *Act*, which provides that an Aboriginal law cannot apply if it is contrary to the best interests of the child—who will have jurisdiction to make this determination? Moreover which tribunal and which forum will have jurisdiction to rule on a dispute regarding s. 24 (conflict of laws between groups, communities or peoples)? These will undoubtedly be issues to be resolved (although by whom?), but it is hoped that, in the event of litigation, the parties will apply Jordan’s Principle and their discussions will not result in a disruption of the child and family services in question.

[271] Lastly, the *Act* also does not address, at least not directly, the issue of funding for Aboriginal child and family services—funding that has been shown to be dramatically deficient in the past. The *Act*’s preamble does mention it, but the federal government merely acknowledges “the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality [...]”, without otherwise committing to meeting this need.²⁹¹ While it is true that s. 6(2) of the *Department of Indigenous Services Act* requires the Minister to “ensure” (in French: “*veiller*”) that child and family services are provided to Aboriginal persons, this obligation has yet to be aligned with the *Act* and there is still a need to ensure that the services contemplated by the *Act* receive financial (and structural) support at both the individual and systemic levels, with a view to achieving substantive equality.²⁹²

[272] Paragraph 20(2)(c) of the *Act*, pertaining to coordination agreements, states that these agreements may include “fiscal arrangements” (“*arrangements fiscaux*”) relating to the provision of appropriate services by Indigenous governing bodies, so as to assist communities in exercising their legislative authority effectively, for the benefit of children and families. Presumably, these fiscal arrangements will be the cornerstone of funding for Aboriginal child and family services, but this seems very perfunctory in a context where, until quite recently, the CHRT—in the *Caring Society* decision, which the federal

²⁹⁰ As noted above, this is what has been done within the scope of certain existing self-government or land claims agreements.

²⁹¹ Adequate funding has long been recognized as a condition *sine qua non* of genuine self-government, and this is equally true of self-government in relation to child and family services. Both the 1995 *Self-Government Policy* and the 2018 *Principles* mention this. The Department of Crown-Indigenous Relations and Northern Affairs has also adopted a policy setting out a new fiscal policy model: Canada, “Canada’s collaborative self-government fiscal policy”, 2019. It is unclear, however, whether and how this policy could provide the necessary funding for the implementation of the right of self-government recognized by the *Act*.

²⁹² For an incisive critical commentary on the inadequacy of federal support and funding, even after the CHRT decision, see: Vandna Sinha, Colleen Sheppard, Kathryn Chadwick *et al.*, “Substantive Equality and Jordan’s Principle: Challenges and Complexities”, (2021) 35 *Journal of Law and Social Policy* 21.

government did not appeal—criticized the federal government for never having adequately funded Aboriginal child and family services, viewing this to be a manifestation of historical and persistent discrimination. Moreover, to the extent that these fiscal arrangements are tied to coordination agreements, how will funding be provided for child and family services in communities that have not entered into such an agreement (despite negotiations to that end) or have not requested one?

[273] During parliamentary proceedings, many witnesses noted that true Aboriginal self-government in relation to child and family services would be commensurate not only with the funding provided to Aboriginal peoples for this purpose, but also with the overall improvement in their socio-economic conditions. For example, Viviane Michel, speaking as President of Quebec Native Women Inc., made the following remarks before the Standing Committee on Indigenous and Northern Affairs (House of Commons):

If Bill C-92 is indeed to solve the problem of over-representation by indigenous children in child protection services and to help the welfare of indigenous children and families, the bill should include a holistic approach which truly takes into account all the issues affecting our nations. This should include incorporating positive obligations in the bill so that the Canadian government and provinces take all necessary measures in order to improve socioeconomic conditions for indigenous children and families. It is essential that these measures apply to all indigenous children, whether they live on a reserve or not and whether they are status Indians or not, in order to ensure substantive equality and to truly work in terms of prevention. I would remind you of section 21 of the United Nations Declaration on the Rights of Indigenous Peoples which Canada ratified and has promised to uphold.

Quebec Native Women Inc. has three recommendations concerning Bill C-92.

Firstly, we have to include a specific section in the bill on funding for child and family services for indigenous nations to guarantee predictable, stable, sustainable and needs-based funding in accordance with the principle of substantive equality.

Secondly, the bill must be amended to include Jordan's principle as legally binding on all levels of government and for all types of care and services for indigenous children.

Thirdly, the bill must include positive obligations for the Canadian government and provinces who will take all necessary measures to improve

socio-economic conditions for indigenous children and their families, including those living off-reserve and in cities.²⁹³

[274] Bobby Narcisse, Director of Social Services for the Nishnawbe Aski Nation, testified before the same Committee and echoed the foregoing theme:

With respect to funding, Bill C-92 contains no legislative guarantee of funding for our children and families. This is deeply concerning. It is not enough that the statement in the preamble acknowledges the ongoing call for funding for child and family services that is predictable, stable, needs-based and consistent with the principle of substantive equality in order to secure long-term position outcomes for indigenous children, families and communities. This call needs to be met with legislated guarantees of such funding.

The Caring Society case at the Canadian Human Rights Tribunal has shed light on human rights violations that occur when funding for our children is not legislated.

[...]

We need a paradigm shift. We need enduring change. Legislation must come hand in hand with legislative guarantees of funding. [...]²⁹⁴

[275] The remarks of Elisapee Sheutiapik, Minister for Family Services and Government House Leader for the Government of Nunavut, were to the same effect:

If the true intent of Bill C-92 is to ensure a system shift from apprehension to prevention, with a focus on preventive care and support to families, consideration must be given to the significant social inequality in the North and how this affects families and service delivery. This includes addressing poverty, food insecurity, housing challenges and the lack of infrastructure in the territory to support children and youth with high needs.

This leads to our second concern related to funding. We understand the bill is intended to affirm jurisdiction, and apply principles and standards across the provinces and territories. We also understand that the intent of the bill is to facilitate a system shift from apprehension to prevention. How can we truly shift to preventive care when Nunavut families and communities continue to be deeply

²⁹³ House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence*, 42nd Parl., 1st Sess., No. 148, May 7, 2019, p. 26 (V. Michel).

²⁹⁴ House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence*, 42nd Parl., 1st Sess., No. 149, May 9, 2019, p. 4 (B. Narcisse).

affected by poverty, which is rooted in the historical wrongdoing of the federal government: the impacts of colonialization?²⁹⁵

[276] It is difficult to argue with the foregoing remarks—and the importance of this funding cannot be overstated, whether it be to support the regulatory activity of Aboriginal peoples or the delivery of services by them.

[277] Lastly, it is likely that the issue of funding will lead to some debate with the provinces, whose role in the application of the *Act*—whether primary or subsidiary—cannot be disregarded. This has traditionally been a stumbling block.²⁹⁶

[278] In short, the *Act* is unlikely to be a cure-all for the ills that have characterized Aboriginal child and family services (especially if funding for the measures it puts into place is not equal to the task), and it could cause disagreements that impede its implementation, including increased litigation.²⁹⁷

[279] That said, the reference brought by the Government of Quebec does not ask the Court to rule on the quality of the *Act* or the seriousness of its deficiencies, nor does it ask the Court to resolve the ambiguities affecting some of its provisions. The only issue before the Court is the constitutional validity of the *Act*, and it is this issue we will consider after setting out the positions of the parties and the interveners.

²⁹⁵ Senate, Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 42nd Parl., 1st Sess., Fasc. 53, April 30 and May 1 and 2, 2019, p. 53:11 (E. Sheutiapik).

²⁹⁶ See, for example: Johanne Poirier and Sajeda Hedaraly, “Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who *Can* and *Should* do What?”, (2019-2020) 24:2 *Rev. Const. Stud.* 171, p. 192.

²⁹⁷ This was the case, in fact, as regards an American statute with certain similarities to the *Act*. The *Indian Child Welfare Act of 1978* (25 U.S.C. § 1901) generated numerous legal challenges and unintended effects, while also meeting resistance from state courts. See, in this regard: Barbara Ann Atwood, “Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance”, (2002) 51:2 *Emory L.J.* 587.

This statute was even recently challenged on the basis of the equal protection clause in the Fourteenth Amendment of the United States Constitution. The statute was first declared unconstitutional by the U.S. District Court for the Northern District of Texas, whose ruling (*Brackeen v. Zinke* (2018), 338 F. Supp. (3d) 514) was reversed by the Court of Appeals for the Fifth Circuit, which then ordered a rehearing *en banc* that resulted in the majority of the Court recognizing Congress’s authority to pass such a law as well as the validity of the “Indian child” classification; the justices of the Court, however, did not agree on the issue of “adoptive placements”. See: *Brackeen v. Bernhardt* (2019), 937 F. (3d) 406, then (2019), 942 F. (3d) 287, and, on the merits, *Brackeen v. Haaland* (2021), 994 F. (3d) 249, *certiorari* proceedings pending before the United States Supreme Court (file nos. 21-376, 21-377, 21-378 and 21-380).

While such a challenge to the *Act* is not impossible, it could run afoul of s. 15(2) of the *Canadian Charter* as well as s. 1 thereof.

3- The respective positions of Quebec, Canada and the interveners

[280] In proposing an affirmative answer to the reference question, the Attorney General of Quebec challenged the constitutionality of Part I of the *Act* on the basis that these legislative provisions interfere with the province's jurisdiction to provide child and family services as it sees fit; he also challenged Part II of the *Act* on the ground that these provisions unilaterally define the rights recognized by s. 35 of the *Constitution Act, 1982* and that this new definition requires a constitutional amendment made in accordance with the constitutional amending procedure. In general, the attorneys general presented a two-pronged argument divided into two: the validity and scope of the *Act* in light of s. 91(24) of the *Constitution Act, 1867*, and the validity and scope of the *Act* in light of s. 35 of the *Constitution Act, 1982*. As will be seen, some of the interveners structured their arguments differently, being of the view that the *Act* constitutes an indivisible whole whose provisions must be taken together and interpreted in relation to one another.

[281] Within this framework, the Attorney General of Quebec and the Attorney General of Canada thus presented submissions that are *a priori* mutually exclusive. In their oral arguments before the Court, counsel for each of them argued their respective submissions with a particular emphasis that may not have been as evident in their written arguments. This provided an opportunity to better situate the entrenched position of each attorney general. The Attorney General of Quebec asked the Court to answer the reference question in a way that would bypass a central aspect of the disputed issue. As for the Attorney General of Canada, he suggested an answer that would significantly limit the scope of the Court's opinion. The foregoing will be taken into account, with the necessary details, in the following analysis.

(a) Quebec's position

[282] The Attorney General of Quebec begins by highlighting the youth protection system in Quebec, which covers all children, including Aboriginal children and even foreign children when they are in the province. This system is the result of the application of numerous provincial laws and has various features specifically tailored to the reality of Aboriginal children. According to the Attorney General of Quebec, the provinces play a lead role with respect to [TRANSLATION] "the burdens associated with the social safety net",²⁹⁸ and any legislative initiative in that regard affecting Aboriginal peoples falls within provincial jurisdiction.

[283] A review of the intrinsic and extrinsic evidence relating to the *Act* demonstrates that the purpose of Part I of the *Act* is to establish [TRANSLATION] "national standards for child and family services when those services are provided in relation to Aboriginal persons".²⁹⁹ The effects of Part I of the *Act* are to impose on the provinces the manner in

²⁹⁸ Argument in the brief of the Attorney General of Quebec, para. 30.

²⁹⁹ *Id.*, para. 42.

which services for Aboriginal children are to be provided. Thus, one must conclude that the *Act* [TRANSLATION] “dictates how child and family services are to be delivered by the provinces in an Aboriginal context”.³⁰⁰

[284] This being so, the Attorney General of Quebec argues that such an interpretation of the jurisdiction under s. 91(24) of the *Constitution Act, 1867* oversteps its bounds. It jeopardizes our constitutional architecture—a touchstone of his argument—and violates the principles of federalism and democracy that underlie the Canadian Constitution. While it is true that in the Canadian federation both levels of government can act in a coordinated fashion, the fact remains that the federated units and the central government are sovereign in their respective fields of jurisdiction: consequently, the former are not subordinate to the latter and the latter cannot dictate to the provinces how they should exercise their powers. Our existing constitutional architecture also means that when one level of government seeks to impose obligations on public servants of the other level, it must first enter into an intergovernmental agreement for that purpose—this should have been done here, but was not.

[285] Subsidiarily, the Attorney General of Quebec submits that the *Act* should be declared inapplicable to provincial public servants, or that its provisions should be read down. Failing same, the *Act* will impair the province’s authority over its public service, which authority includes, at the very least, [TRANSLATION] “control over the duties of employees and the organization of the public services they provide”.³⁰¹

[286] Based on these arguments, it follows that Part I of the *Act*—and more specifically its ss. 9 to 17—is invalid or inapplicable.

[287] The Attorney General of Quebec then turns to s. 35 of the *Constitution Act, 1982* and submits, first, that ss. 8 and s. 18(1) of the *Act* set out one of its cornerstones. These sections purport to recognize and affirm an inherent right of Aboriginal self-government, which, pursuant to s. 35 of the *Constitution Act, 1982*, is an “existing”, “recognized” and “affirmed” right. The other provisions of Part II then give effect to this recognition. The Attorney General of Quebec argues that this implies the unilateral creation of a third level of government, one with territorially unlimited jurisdiction. In his view, the scope of s. 18 is not purely declaratory: by referring to s. 35 of the *Constitution Act, 1982*, s. 18 empowers Aboriginal peoples to make laws, which distinguishes the *Act* from other federal laws or proposed federal legislation that rely on the principle of delegated authority. He points out that the Supreme Court has refused to rule on whether s. 35 of the *Constitution Act, 1982* includes an Aboriginal right to self-government and that the jurisprudence on s. 35 precludes a legislative process such as that used in the *Act*.

³⁰⁰ *Id.*, para. 53.

³⁰¹ *Id.*, para. 80.

[288] As such, Parliament is usurping the role of the judiciary, which has the responsibility of determining the scope of s. 35 of the *Constitution Act, 1982*. Based on the same argument, he submits that s. 91(24) of the *Constitution Act, 1867* does not give Parliament the power to establish or declare the existence of Aboriginal rights or Aboriginal title, although Parliament may legislate in respect of established Aboriginal rights. However, allowing Parliament to unilaterally determine the content of s. 35 of the *Constitution Act, 1982* through the operation of s. 91(24) of the *Constitution Act, 1867* would upset the constitutional balance. The correct approach for establishing a right to Aboriginal self-government is the constitutional amendment process, with the participation of the provinces.

[289] By adopting the *Act*, Parliament is attempting to unilaterally amend the Constitution. The Attorney General of Quebec notes that the recognition of an inherent right of self-government and its implementation (including rules of paramountcy between Aboriginal laws and provincial or federal laws) have historically been addressed in the course of multilateral negotiations for the purpose of amending the Constitution. Therefore, negotiation is the preferred route. The right of Aboriginal self-government (such as in relation to child and family services) may be recognized on a case-by-case basis through treaties protected by s. 35 of the *Constitution Act, 1982*, in keeping with the responsibilities of the federal and provincial Crowns, as a whole, under this provision. Moreover, the honour of the Crown does not allow for a broader interpretation of the jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[290] Sections 8 and 18 of the *Act* purport to resolve an issue that the Supreme Court has never decided, although it has made it clear that the implementation of s. 35 of the *Constitution Act, 1982* does not lend itself to claims of excessive generality. The approach must be the same as that used for any claim to an Aboriginal right. The Attorney General takes this argument a step further, stating that, in the present matter, it is neither necessary nor appropriate for the Court to rule on whether or not there exists a right to Aboriginal self-government. It would therefore suffice for the Court to find that, given the context as set out, Part II of the *Act* is invalid.

[291] When asked at the hearing to clarify his thoughts on this last point, counsel for the Attorney General of Quebec stated emphatically that the only question before the Court was the constitutional validity of the *Act* and that, in the present matter, the Court could answer this question without making any determination as to the scope of s. 35 of the *Constitution Act, 1982*. Ultimately, according to this position, Parliament cannot pass legislation that purports to give meaning to the Constitution and that, in so doing, shifts the burden of proof by forcing the Government of Quebec to challenge the constitutionality of that legislation. This is so despite the wording of the reference question and despite the fact that the very extensive record in the reference contains a great deal of relevant evidence on the scope of the Aboriginal rights contemplated by s. 35 of the *Constitution Act, 1982*.

(b) Canada's position

[292] The Attorney General of Canada begins by providing his own description of the context, noting that the federal government's creation of an education system with institutions that could provide child welfare services dates back to the late 19th century. More recently, albeit for some 60 years now, the federal government has contributed the bulk of the funding for the child welfare services provided by the FNCFS agencies. The evidence in the record shows that, as of April 2020, there were 179 such agencies operating in Canada.

[293] The Attorney General of Canada relies on the “classic analytical framework”³⁰²—namely, the pith and substance of the *Act*—for assessing its validity; like some of the interveners, he criticizes the Attorney General of Quebec for having strayed from this framework. According to him, there is no question as to the *Act*'s pith and substance. Both the *Act* itself and the parliamentary proceedings demonstrate that the purpose of the *Act* is the [TRANSLATION] “protection and well-being of Aboriginal children, families and communities by reducing the number of children in child services systems”.³⁰³ Its purpose is intended to foster reconciliation between Aboriginal peoples and Canada.

[294] The Attorney General of Canada submits that there are three separate effects of the *Act* that must be taken into account: it will help maintain the cultural connection of Aboriginal children to their communities; it will reduce the number of children in the care of government agencies; and it will improve the effectiveness of the services provided. From this perspective, the impact of the *Act* on the work of provincial public servants, of which the Attorney General of Quebec complains, is merely an incidental effect that does not alter the pith and substance of the *Act*. There is nothing in the Court record in this reference to suggest that the principles of Part I of the *Act* will interfere with the provincial governments or deprive them of the authority to set the terms and conditions for the provision of services by their public servants.

[295] Ultimately, the Attorney General of Canada argues, the pith and substance of the *Act* is therefore “to protect and ensure the well-being of Aboriginal children, families and communities”.³⁰⁴ One of the *Act*'s main targets is the problem of overrepresentation of Aboriginal children placed in care, which results from such children being systematically apprehended. This is undoubtedly a matter that falls within the broad jurisdiction conferred by s. 91(24) of the *Constitution Act, 1867*, given that this provision allows the federal government to legislate [TRANSLATION] “in all areas of Aboriginal life”,³⁰⁵ in order to protect Aboriginal persons. In fact, Parliament has previously made laws in this regard and in a way that related to Aboriginal children and families.

³⁰² Argument in the brief of the Attorney General of Quebec, para. 39.

³⁰³ *Id.*, para. 46.

³⁰⁴ *Id.*, paras. 4, 40, 64 and 81.

³⁰⁵ *Id.*, para. 85.

[296] With respect to the Attorney General of Quebec’s argument regarding the constitutional architecture and the principles underlying the Constitution, the Attorney General of Canada replies that the federal government has the power to bind the provinces as long as it remains within its spheres of jurisdiction. In the present matter, the doctrine of interjurisdictional immunity does not have the effect the Attorney General of Quebec attributes to it. In particular, control over the duties of employees and the organization of their work does not lie at the core of the provincial jurisdiction over its public service. This argument would have the impact the Attorney General of Quebec claims it does only if it were shown that the *Act* impairs the ability of provinces to organize and manage their own public service. No such demonstration has been made.

[297] With respect to the second component of his argument, the Attorney General of Canada first reiterates that a pith and substance analysis of Part II of the *Act* shows that it is a means to achieve its purpose. As he states in his brief, the goal is to [TRANSLATION] “protect and ensure the well-being of Aboriginal children, families and communities by promoting culturally appropriate child services, with the aim of putting an end to the overrepresentation of Aboriginal children in child services systems”.³⁰⁶

[298] Section 18 allows for the timely, effective and harmonious implementation of Aboriginal legislative authority. That said, it is not argued that Parliament’s affirmation of an Aboriginal right of self-government is in any way binding on the courts, nor that Parliament can determine the content of the rights recognized by s. 35 of the *Constitution Act, 1982*. On this point, counsel for the Attorney General of Canada could not have been any clearer at the hearing. The *Act* cannot establish an Aboriginal right contemplated by s. 35 of the *Constitution Act, 1982*. Parliament cannot legislate in a way that would prevent the validity of Aboriginal laws from being challenged on the ground that s. 35 of the *Constitution Act, 1982* does not encompass an underlying Aboriginal right to self-government.

[299] Nonetheless, according to the Attorney General of Canada, Parliament may, when legislating under s. 91(24) of the *Constitution Act, 1867*, assert what it considers to be recognized and affirmed by s. 35 of the *Constitution Act, 1982*. He submits that historic Aboriginal societies necessarily had the ability to provide for the well-being of their children, since this is an integral part of their distinctive culture. Pursuant to s. 35 of the *Constitution Act, 1982*, this Aboriginal right exists independently of any court judgment. Section 91(24) of the *Constitution Act, 1867*, when read together with s. 35 of the *Constitution Act, 1982*—in keeping with a progressive interpretation of the Constitution—authorizes Parliament to shape its relationship with Aboriginal peoples. As for the paramountcy conferred on Aboriginal laws, it stems from their incorporation as federal laws, a valid and commonly used technique, and has no effect on the division of powers.

³⁰⁶ *Id.*, paras. 4 and 40.

[300] In response to the Attorney General of Quebec’s argument that an Aboriginal right of self-government can be protected only by way of constitutional amendment or treaty making, the Attorney General of Canada replies that this contention is based on an incorrect premise. Indeed, the relevant case law recognizes the possibility that s. 35 of the *Constitution Act, 1982* encompasses a right of self-government.

[301] Similarly, the Court need not specify whether the proposition set out in s. 18(1) of the *Act* applies to all Aboriginal peoples who may avail themselves of the *Act*. What is at issue here is the constitutional validity of ss. 18 to 26 of the *Act*, not the constitutional validity of any Aboriginal laws that may be enacted pursuant to the *Act* and may then be subject to a constitutional challenge. The premise of s. 18 is that Aboriginal peoples have an Aboriginal right to self-government, which includes jurisdiction over child welfare services. In the view of the Attorney General of Canada, if the Court were to reject this premise in its entirety, Part II would remain valid, [TRANSLATION] “but no Aboriginal group could validly enact child services legislation within the framework provided by the [*Act*]”.³⁰⁷ He concludes by submitting that arguments based on attempts to amend the Constitution, on the practice of treaty making, and on past federal government positions do not provide any reason for rejecting the *Act*’s premise.

[302] That said, he submits that the Court need not decide whether ss. 8 and 18 of the *Act* refer to a general right of self-government or a range of rights with a specific scope. When counsel for the Attorney General of Canada was asked at the hearing to specify her thoughts on this last point, her reply was very clearly stated. In the present matter, it is sufficient for the Court to find that Aboriginal self-government, whether or not general, necessarily involves legislative authority over child welfare services. Ultimately, the Court need not rule on the existence of a generic Aboriginal right of self-government. If there is a right to self-government in relation to child welfare services, the *Act* is valid. Any future use by Aboriginal peoples of the right of self-government may be challenged on a “case-by-case” basis. In each such case, it will be for the courts to render judgment, both as to the existence and scope of the right of self-government the group in question purports to be exercising.

(c) *The position of each intervener*

[303] With respect to Part I of the *Act*, the Assembly of First Nations submits that the pith and substance of the *Act* is evident from all of its provisions, but primarily from the preamble and ss. 2 and 8. The *Act* seeks to address the federal government’s colonial policies by mitigating the harms associated with the historically racist and discriminatory delivery of child welfare services by Canada and the provinces. Its true purpose—its pith and substance—is to ensure the well-being of Aboriginal children and peoples, not to dictate to provincial governments how child and family services should be provided. This

³⁰⁷ *Id.*, para. 157.

purpose lies entirely within the bounds of the power under s. 91(24) of the *Constitution Act, 1867*.

[304] Moreover, the relationship between the Crown and Aboriginal peoples stems from the latter's inherent right of self-government and from the treaties entered into on a nation-to-nation basis. The jurisdiction of Aboriginal peoples in relation to child and family services is rooted in their inherent right to self-determination—it cannot merely be the result of Parliament's delegation of legislative authority. In exercising its jurisdiction under s. 91(24) of the *Constitution Act, 1867*, Parliament has the authority to affirm the existence of that right. This affirmation reflects Canada's evolving relationship with Aboriginal peoples and is a necessary step in fulfilling the constitutional promise of reconciliation. This is what the honour of the Crown and the relevant international standards require.

[305] Moreover, Canadian jurisprudence does not preclude recognition of the legislative jurisdiction of Aboriginal peoples arising from their inherent right of self-government. In virtue of s. 35 of the *Constitution Act, 1982*, the Crown must recognize and protect the Aboriginal rights contemplated therein, by engaging in a process of negotiation with Aboriginal peoples—the *Act* is the result of such a process, in accordance with the Constitution.

[306] The Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission joined forces for purposes of the reference. In their opinion, the *Act* must be viewed as a whole, not as two separate schemes. The Attorney General of Quebec, therefore, is wrong to arbitrarily divide the *Act* into Parts I and II and to challenge them from two different angles and on two different grounds. According to these interveners, the *Act* has as its pith and substance [TRANSLATION] “to support the well-being of Aboriginal children, families and peoples and [...] put an end to the overrepresentation of Aboriginal children by establishing national standards focused on prevention, cultural continuity, and the preservation of identity and language, and by facilitating the exercise of the inherent right of self-government and the legislative authority in relation to Aboriginal children and families”.³⁰⁸ This pith and substance falls entirely under s. 91(24) of the *Constitution Act, 1867* when that provision is interpreted in light of the introductory paragraph of s. 91 of the *Constitution Act, 1867* and the principles underlying the Constitution, including the protection of minority rights. Provincial child and family services legislation applies within the territory of a province not *ex proprio vigore*, but by virtue of s. 88 of the *Indian Act*. Based on very recent Supreme Court of Canada jurisprudence, the *Act* could even be found valid under the national dimensions doctrine.

[307] With respect to the Aboriginal right to self-government, these two interveners argue that Aboriginal peoples never relinquished their right to self-determination. The exercise

³⁰⁸ Argument in the brief of the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission, para. 18 [reference omitted].

of this autonomy, especially in relation to child and family care and services, is an intrinsic part of their culture and their status as Aboriginal peoples.

[308] Given the current situation in which Aboriginal peoples find themselves, the promise of reconciliation conveyed by s. 35 of the *Constitution Act, 1982*, as well as the honour of the Crown, require the federal government to shift away from a passive view of its role and take decisive action. It is up to the federal government to interpret the Constitution in such a way that it fully meets its obligation, under s. 91(24) of the *Constitution Act, 1867*, to protect Aboriginal peoples. This provision empowers it to do more than is required by the minimum standards stemming from the recognition of Aboriginal rights under s. 35 of the *Constitution Act, 1982*, and this is exactly what it is trying to do here by means of the *Act*. According to the Attorney General of Quebec, other than a constitutional amendment or a court decision finding in favour of the existence of a right of Aboriginal self-government, the only way to accomplish the purpose of the *Act* is through the piecemeal negotiation and signing of treaties. In the view of these two interveners, this so-called solution is utterly impractical given the very slow pace of treaty negotiations and the extreme difficulty of amending the Constitution.

[309] Lastly, these interveners add that the Court should not venture into the realm of a hypothetical challenge to a particular Aboriginal law enacted pursuant to the *Act*. That is not the issue before it in this reference. Moreover, because the right of self-government is an inherent right, [TRANSLATION] “[i]t is not a given that Aboriginal laws, as contemplated by the [Act], can be challenged on a case-by-case basis on the ground that the inherent right of self-government in which they are rooted does not exist”.³⁰⁹

[310] The First Nations Child and Family Caring Society of Canada agrees with the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission on the pith and substance of Part I of the *Act*. In its oral argument, it began by focusing on the crisis affecting Aboriginal children, a crisis which, contrary to what the Attorney General of Quebec seems to claim, is not an inevitable consequence of Canada’s constitutional architecture. The *Act* aims to put an end to this crisis. It does so by establishing national standards for Aboriginal child welfare services and by recognizing that Indigenous governing bodies have an Aboriginal right to legislate in relation to this subject. This is a valid exercise of Parliament’s power under s. 91(24) of the *Constitution Act, 1867* and, indeed, Parliament could go much further in its initiatives in this area. The *Act* provides a means for the federal government to redress the harm caused by the colonialist and discriminatory policies instituted by it over the years in relation to child welfare services. Such services must now comply with what is referred to as Jordan’s Principle. Moreover, the *Act*’s recognition of the right to self-government is necessary if Canada is to fulfil its human rights obligations. Only

³⁰⁹ *Id.*, para. 57.

through self-determination will Aboriginal peoples be able to end the assimilation caused by the aforementioned policies.

[311] Makivik Corporation filed a brief but did not take part in the oral arguments before the Court. In its brief, it first notes that, according to a court reference decided some time ago,³¹⁰ the federal government has always been responsible for providing services to the Nunavik Inuit, and that it has purported to have taken on this responsibility. This was the case until the signing of the *James Bay and Northern Quebec Agreement*. Indeed, the Quebec government had never involved itself in the federal government's assimilation policies. These policies operated to the detriment of the Inuit for a very long time. The intervener argues that s. 35 of the *Constitution Act, 1982* protects the inherent right of self-government—not only is there no constitutional bar to recognizing this right, but s. 35 seeks to achieve reconciliation with Aboriginal peoples, which requires that they govern themselves. Recognizing this inherent right is also a way for Canada to comply with its international obligations to Aboriginal peoples.

[312] The intervener Aseniwuche Winewak Nation of Canada did not present arguments on Part II of the *Act*. With respect to Part I of the *Act*, it highlighted the fact that current child welfare systems in Canada vary from province to province and that this situation negatively impacts the safety of children that are not First Nations members and are considered non-status Indians. The various provincial laws give these Aboriginal peoples differing and generally inadequate rights. Relying specifically on *Daniels*,³¹¹ the intervener argues that the framework established by the *Act* is intended to permanently fill the gaps noted. In its view, there can be no doubt that the pursuit of such an objective is a valid exercise of the power under s. 91(24) of the *Constitution Act, 1867*.

4- First part of the analysis: the constitutionality of the national standards

(a) Analytical framework

[313] In Canada, legislative power is divided between Parliament and the provincial legislatures. The *Constitution Act, 1867* provides for this division of powers, primarily in ss. 91 and 92.

[314] Section 91 lists 29 classes of subjects over which only Parliament has the power to legislate. As for s. 92, it assigns 16 classes of subjects to the provinces over which only they have the power to legislate.

³¹⁰ *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104.

³¹¹ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 ["Daniels"].

[315] An issue regarding the constitutionality of a statute, based on the division of powers, must be decided in a two-step process. The process begins with the court characterizing the impugned statute. What is the subject matter of the statute? What is it about? What is its purpose—its pith and substance? Once the statute has been characterized, the court must refer to the heads of powers set out in ss. 91 and 92 of the *Constitution Act, 1867* in order to determine which level of government, federal or provincial, has the power to legislate in relation to the subject matter of the statute. This second step involves classification.³¹²

[316] The difficulty that arises in carrying out this analysis results from the fact that, in most cases, the statute has several aspects, some of which are federal and some provincial. In such a case, the court must determine the dominant purpose of the statute. To do so, it must necessarily examine the text of the statute, but it must also consider the context in which the statute was enacted as well as its practical and legal effects, particularly with respect to the other level of government.³¹³

[317] The effects of the statute provide an objective view of its true subject matter, whereas the purpose or subject matter expressly stated in the statute may not reflect reality. In such a case, the statute may be said to be “colourable”—it appears to deal with one subject matter, but in reality deals with another subject matter that is beyond the reach of the enacting level of government.³¹⁴

[318] While characterizing a statute involves seeking its dominant aspect, there are instances in which it is impossible to decide between the various aspects of a statute. In those situations, the subject matter of the statute, viewed from one angle, will be said to fall under provincial jurisdiction, and from another angle, under federal jurisdiction. This is referred to as the “double aspect” doctrine, in which a subject matter that has several aspects of equal importance can be characterized as coming within federal jurisdiction or within provincial jurisdiction, depending on the perspective from which it is considered.³¹⁵

[319] Under the double aspect doctrine, two similar, if not identical, provisions may validly be enacted, one in a federal statute and the other in a provincial statute, if they have been enacted for different purposes and in different legislative contexts from which they derive differing characterizations.³¹⁶

[320] Lastly, given that the modern view of federalism is increasingly accommodating of overlap between federal and provincial jurisdictions, one level of government may incidentally encroach on the jurisdiction of the other, even to a significant extent, for the

³¹² *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, paras. 26-29.

³¹³ *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [“*Canadian Western Bank*”], paras. 27-30.

³¹⁴ *R. v. Morgentaler*, [1993] 3 S.C.R. 463, pp. 482-483 and 486-487.

³¹⁵ *Canadian Western Bank*, para. 30.

³¹⁶ *Ibid.*

purpose of establishing a comprehensive regulatory framework and legislating effectively.³¹⁷ That being said, in such a case, the pith and substance of the statute must lie within the competence of the enacting order of government and must not impair the basic, minimum and unassailable content of a head of power of the other level of government, failing which it will remain valid, but will be inapplicable to that core content by virtue of the doctrine of interjurisdictional immunity.³¹⁸

(b) Section 91(24) of the Constitution Act, 1867

[321] Section 91(24) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction to make laws in relation to two subject matters: Indians and Lands reserved for the Indians. Since the *Act* establishes national standards for child and family services in relation to Aboriginal individuals wherever in Canada they may be, there is no need to address the scope of federal jurisdiction in relation to lands reserved for Indians. It is sufficient to note that the scope of federal jurisdiction over Indians encompasses all Aboriginal peoples, including non-status Indians, the Métis and the Inuit.³¹⁹

[322] Federal jurisdiction over Aboriginal peoples is very broad.

[323] First, it allows the federal government to legislate in relation to what the case law refers to as “Indianness”, that is, Aboriginal peoples *qua* Aboriginal peoples, which, as Lamer, C.J. pointed out in *Delgamuukw*, includes the Aboriginal rights contemplated by s. 35 of the *Constitution Act, 1982*:

[177] The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction—whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

[178] It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1).

³¹⁷ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, para. 36; *Canadian Western Bank*, paras. 28-29.

³¹⁸ *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, paras. 90-93; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, para. 58; *Canadian Western Bank*, paras. 33 *et seq.*

³¹⁹ *Daniels*, para. 19; *Reference as to whether “Indians” includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104.

Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.³²⁰

[Emphasis added]

[324] Moreover, as Binnie and LeBel, JJ. noted in *Canadian Western Bank*, it has been held that inter-personal relationships between Aboriginal persons, such as adoptions or family relationships, are matters that are of the essence of this federal head of power:

[61] [...] Thus, in *Natural Parents*, Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents "would be to touch 'Indianness', to strike at a relationship integral to a matter outside of provincial competence" (pp. 760-61). Similarly, in *Derrickson*, the Court held that the provisions of the British Columbia *Family Relations Act* dealing with the division of family property were not applicable to lands reserved for Indians because "[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*" (p. 296). In *Paul v. Paul*, [1986] 1 S.C.R. 306, our Court held that provincial family law could not govern disposition of the matrimonial home on a reserve. In these cases, what was at issue was relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival. [...] ³²¹

[Emphasis added]

[325] Lastly, because "the [federal] government [is] vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples",³²² it has thereby virtually occupied the field by legislating in just about every area of Aboriginal life without these initiatives having been defeated by the courts. This is evident from *Canard*,³²³ for example, a case in which the estate provisions of the *Indian Act* were challenged on the

³²⁰ *Delgamuukw*, paras. 177-178. See also: para. 181.

³²¹ *Canadian Western Bank*, para. 61.

³²² *Delgamuukw*, para. 176.

³²³ *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170.

ground that they fell within the provincial jurisdiction over property and civil rights.³²⁴ All of the Supreme Court justices agreed, without any apparent difficulty, that testamentary matters with respect to deceased Aboriginal individuals fell within the federal power over Aboriginal peoples.³²⁵

[326] In Ritchie, J.'s opinion, it was obvious that "s.91(24) of [the Constitution] clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces".³²⁶ Beetz, J. expressed the same idea, but in a different way:

The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.³²⁷

[Emphasis added]

[327] This is a plenary legislative power, with racial tones, and, as such, it allows the federal government to legislate with respect to Aboriginal peoples generally, which will necessarily result in occasional encroachment on matters that s. 92 of the *Constitution Act, 1867* reserves to the provinces.³²⁸

[328] Certainly, this does not imply that Parliament can invade areas of provincial jurisdiction on a massive scale and with impunity under the guise of s. 91(24) of the *Constitution Act, 1867*. In all cases, it will still be necessary to apply the two-step analysis set out above to ascertain that the pith and substance of the statute indeed relates to Aboriginal peoples.

[329] That being said, although the only question before the Court is the inherent validity of a federal statute, it is worth noting, before concluding the discussion on the scope of s. 91(24), that provincial legislation in relation to Aboriginal peoples is not, by that very

³²⁴ *Constitution Act, 1867*, s. 92(13).

³²⁵ *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, pp. 187, 190-191, 193, 202 and 207.

³²⁶ *Id.*, p. 191.

³²⁷ *Id.*, p. 207.

³²⁸ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 553, para. VI-2.251.

fact, *ultra vires* or inapplicable to Aboriginal peoples. The remarks of Abella, J., writing for the Supreme Court in *Daniels*, are unambiguous in this regard:

[51] But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts “should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government”: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the “Indian” power: *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] 2 S.C.R. 696, at para. 3.³²⁹

[Emphasis added]

(c) Analysis

[330] In order to determine the pith and substance of the *Act*, there is no need to repeat the detailed review of its content or of the context in which it was adopted. The Attorney General of Quebec agrees that Aboriginal children are overrepresented in youth protection systems, both in Quebec and elsewhere in Canada. He also acknowledges that this overrepresentation has serious consequences as regards the preservation of the identity, language and culture of Aboriginal children and peoples. Finally, he does not dispute that Parliament has the authority to make laws in relation to the subject matter at hand, namely Aboriginal child and family services.

[331] As previously mentioned, it is more the unilateral approach of the *Act* and its effects on provincial schemes that he challenges. He argues that by establishing national standards for child and family services, the effect of the *Act* is to impose on the provinces the manner in which they are to provide these services to Aboriginal peoples, a responsibility that belongs to the provinces by virtue of the division of legislative powers in Canada and that the courts have long recognized as such.³³⁰

[332] In short, the Attorney General of Quebec argues that the pith and substance of the *Act* is to dictate how provinces must provide child and family services in an Aboriginal context.

³²⁹ *Daniels*, para. 51.

³³⁰ *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, para. 41; *Re: B.C. Family Relations Act* [1982] 1 S.C.R. 62, p. 101; *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives’ and Children’s Maintenance Act of Ontario*, [1938] S.C.R. 398, pp. 402-403.

[333] The problem with the approach of the Attorney General of Quebec is that it departs from the classic pith and substance analysis, focusing instead solely on the effects of the *Act* despite the fact that, within our constitutional scheme, one level of government can trench on the jurisdiction of the other under certain conditions.³³¹ That said, in the Court's opinion, a full analysis of the *Act*, of its effects and of the context in which it was adopted demonstrates that its pith and substance is to protect and ensure the well-being of Aboriginal children, families and peoples by promoting culturally appropriate child services, with the aim of putting an end to the overrepresentation of Aboriginal children in child services systems.

[334] This is evident, first, from ss. 9 to 17 of the *Act* which, as we have seen, reflect a desire to allow Aboriginal children to maintain family and cultural ties when they are placed in care.

[335] Second, the extrinsic evidence discussed at length in the preceding chapters of this opinion is consistent with the provisions of the *Act*. It highlights the urgent need to address the harm done to Aboriginal children and families by child welfare systems that do not adequately take into account the importance of a child's ties to his or her community in situations in which the security or development of the child is in danger. In this regard, it is worth reiterating that the *Truth and Reconciliation Commission* formally called on the federal government to establish culturally appropriate national standards for Aboriginal children.³³²

[336] The Attorney General of Quebec makes much of s. 37.5 of the *Youth Protection Act*—which allows an Aboriginal community to enter into an agreement with the government to take charge of all youth protection services offered to the community—and suggests that the adoption of national standards therefore duplicates the mechanism established by that Quebec statute. Yet this is not the finding in the final report of the *Viens Commission*, which notes that the program established by such an agreement must be in keeping with the general principles stated in the *Youth Protection Act*.

In practical terms, s. 37.5 has enabled Indigenous organizations or communities to conclude agreements with the government for setting up their own youth protection systems since 2000. Such systems must comply with the general principles of the [*Youth Protection*] *Act* and all MSSS requirements. I believe this significantly limits the implementation of separate systems or programs that better match the values and cultural practices of Indigenous peoples.³³³

[Emphasis added; references omitted]

³³¹ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, para. 126; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, para. 35.

³³² Truth and Reconciliation Commission, *Summary of the Final Report*, p. 320.

³³³ Viens Commission, *Final Report*, p. 457.

[337] In any event, the “double aspect” doctrine can be used to cut short the argument of the Attorney General of Quebec, insofar as two provisions, even identical, may validly coexist—one in a federal statute and the other in a provincial statute—if they have been enacted for different purposes.

[338] The parliamentary proceedings also confirm that the purpose of the *Act* is to ensure the well-being of Aboriginal children and families across Canada through a culturally appropriate normative framework. Seamus O’Regan, the Minister of Indigenous Services, affirmed it during the second reading of Bill C-92, on March 19, 2019:

All that is to say that there is increasing acknowledgement in both the academic and operational worlds that current child welfare systems are failing indigenous youth.

Consider that less than 8% of this country’s population is indigenous, but indigenous children make up 52% of children in care. That statistic is horrifying. That statistic is appalling. However, that is only part of the story. Far too frequently, non-indigenous social workers come into communities that are not theirs, apply an artificial standard without any context for the communities they are in, and take children away from their mothers, grandmothers and aunties. They take them away from their cousins and their classmates and bring them to another place where they are supposedly safe. They are safe, but alone; safe, but isolated from their culture; safe, but ultimately terrified. This happens because a child protection system built on a western and urban model has no place in indigenous communities.

[...]

In this legislation, we are setting out principles applicable, on a national level, to the provision of child and family services in relation to indigenous children and families. These principles would help ensure that indigenous children and their families would be treated with dignity and that their rights would be preserved. [...]³³⁴

[Emphasis added]

[339] We turn now to the effects of the *Act*. Do they change its pith and substance?

[340] The Attorney General of Quebec claims that the practical effect of the *Act* is to dictate to provincial public servants how they must provide child welfare services to Aboriginal persons and, in so doing, to “parasite” provincial systems to the extent that it

³³⁴ House of Commons, *House of Commons Debates.*, 42nd Parl., 1st Sess., vol. 148, No. 392, March 19, 2019, pp. 26135 and 26136 (S. O’Regan).

severely impairs the core of provincial jurisdiction over the public service.³³⁵ This, he says, is the pith and substance of the *Act*.

[341] In the Court's view, the Attorney General of Quebec is overstating the scope of the *Act's* effects.

[342] To claim that, by its very nature, the *Act* regulates the organization and management of the public service is quite simply an untenable proposition, no matter the perspective from which one views it. As the Attorney General of Canada rightly pointed out at the hearing, this perspective would imply that the federal navigation rules could not apply to provincial employees on the Quebec City–Lévis ferry because they interfere with the work of those employees. This makes no sense.

[343] The national standards are stated in general terms and should therefore be seen as a guide delineating the best interests of the child with a view to cultural continuity and substantive equality (s. 9), not as operational requirements imposed on public servants for the provision of child and family services. To take another example, it is difficult to conceive that the duty not to discriminate against Aboriginal children is primarily concerned with the regulation of the provincial public service (s. 9(3)).

[344] Moreover, provincial public servants are not the only providers of care or services. FNCFS agencies also provide services to children and families on reserve and are subject to the national standards. The same will apply to the service providers to be mandated by Indigenous governing bodies in the exercise of their legislative authority.

[345] The purpose of ss. 9-17 of the *Act*, therefore, is not to regulate the work of provincial public servants, but to ensure that services for Aboriginal children and families are tailored to their specific cultures and needs—an objective which, incidentally, is in perfect harmony with the amendments that Quebec made in 2001, and again in 2017, to the *Youth Protection Act* and that authorize the government or an institution operating a child and youth protection centre to enter into an agreement with an Aboriginal people for the establishment of a special youth protection program.³³⁶ Thus, insofar as the Quebec statute already calls on public servants to take into account the particular situation of Aboriginal children, it cannot be argued that the *Act* significantly affects the work of these public servants.

[346] The situation might well be different if, for example, federal legislation were to establish thresholds for Aboriginal representation in the provincial public service. Even if the purpose of such legislation were to improve outcomes for Aboriginal persons by opening up the labour market to them, it is more than likely that the means adopted by

³³⁵ *Constitution Act 1867*, s. 92(4).

³³⁶ *Youth Protection Act*, ss. 37.5, 37.6 and 37.7.

Parliament to achieve this end would be found unconstitutional as being too great an encroachment on provincial jurisdiction under s. 92(4) of the *Constitution Act, 1867*.

[347] Ultimately, it appears that the *Act's* effects on the work of provincial public servants are incidental effects that in no way affect its pith and substance and are constitutionally of no consequence, as the Supreme Court noted, in another context, in *Lacombe*:

[36] [...] The incidental effects rule, by contrast, applies when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body. [...] ³³⁷

[348] Moreover, in *Alberta Government Telephones*, the Supreme Court recognized that Parliament has the power to bind emanations of the provincial Crown:

In my view, it would be wrong to accept a theory of constitutional inter-governmental immunity. If Parliament has the legislative power to legislate or regulate in an area, emanations of the provincial Crown should be bound if Parliament so chooses. I agree with the observation of Laskin C.J. in *PWA*, *supra*, at p. 72:

It is, of course, open to the federal Parliament to embrace the provincial Crown in its competent legislation if it chooses to do so...

It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives. ³³⁸

[Emphasis added]

[349] In short, ss. 9-17 of the *Act* are directed to relationships within Aboriginal families and peoples. They seek to ensure the continuity of their cultures and Indianness, a purpose which, as we have seen, is entirely consistent with the core of federal jurisdiction over Aboriginal peoples. The Court therefore concludes that these legislative provisions fall within the authority of Parliament, notwithstanding that in *NIL/TU, O* the Supreme Court

³³⁷ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, para. 36. See also: *Canadian Western Bank*, para. 28.

³³⁸ *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225, p. 275. See also: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, para. 51.

recognized that the provinces are constitutionally empowered to provide child care services to Aboriginal families.³³⁹ In this era of cooperative federalism, this is not unusual. The “incidental effects” rule and “double aspect” doctrine discussed above acknowledge the inevitable overlap between federal and provincial competencies.³⁴⁰

[350] The Attorney General of Quebec, however, also argues that the *Act* offends the principles of federalism and democracy which underlie the Constitution in that it imposes obligations on provincial public servants despite the fact that, in our federal system, provinces are not subordinate to the central government.

[351] Since the Supreme Court’s recent decision in *Toronto (City) v. Ontario (Attorney General)*,³⁴¹ this argument cannot stand. While, admittedly, the Canadian Constitution contains unwritten principles, these principles cannot invalidate otherwise valid legislation such as the *Act*, which is grounded on s. 91(24) of the *Constitution Act, 1867*.

[352] Lastly, the Attorney General of Quebec argues, subsidiarily, that the *Act*, if not invalid, is inapplicable to provincial public servants, based on the doctrine of interjurisdictional immunity, which protects the core of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867* from the adverse impact of a law adopted by the other level of government.³⁴²

[353] In the Court’s view, this doctrine, which must be applied with restraint,³⁴³ does not apply to the present matter, because, even if the Attorney General of Quebec were correct in arguing that control over the duties of provincial public servants is the core of the jurisdiction under s. 92(4) of the *Constitution Act, 1867*—a claim for which he provides no persuasive precedent—³⁴⁴he has, as explained above, failed to demonstrate that this core is impaired by the national standards set out in ss. 9 to 17 of the *Act*. As Binnie and LeBel, JJ. noted in *Canadian Western Bank*:

[48] [...] It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “impairing” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.³⁴⁵

³³⁹ *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, para. 41.

³⁴⁰ *Id.*, para. 42.

³⁴¹ 2021 SCC 34, paras. 51 and 63.

³⁴² *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, paras. 90-93; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, para. 58; *Canadian Western Bank*, paras. 33 *et seq.*

³⁴³ *Canadian Western Bank*, para. 67.

³⁴⁴ *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, para. 93.

³⁴⁵ *Canadian Western Bank*, para. 48.

[354] In short, in light of the fact that there is no impairment as defined by the Supreme Court, the doctrine of interjurisdictional immunity does not apply.

[355] Given the finding of the Court, it is not necessary to rule on the argument made by the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission that the *Act* is also valid under the national dimensions doctrine.³⁴⁶ There is no question that the *Act* is a valid exercise of federal jurisdiction over Aboriginal peoples. Consequently, judicial restraint is required.

5- Second part of the analysis: the right of Aboriginal self-government and the regulation of child and family services

[356] While the Attorney General of Quebec acknowledges that it may be desirable for the Aboriginal peoples of Canada to govern themselves in areas of jurisdiction of particular interest to them, he argues, first, that such governance can result only from express delegations of legislative powers by Parliament and the provincial legislatures, from agreements between the governments concerned and Aboriginal peoples themselves, or from a constitutional amendment expressly providing therefor. In so doing, the Attorney General of Quebec does not recognize that the right to self-government of Aboriginal peoples, including the right to regulate their child and family services, already forms part of the Aboriginal rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

[357] Moreover, the Attorney General of Quebec submits that if such a right were indeed an Aboriginal right included in s. 35, it could only be recognized by the courts—not Parliament acting alone—and only after court proceedings demonstrating the existence of that right on a case-by-case basis, with a degree of specificity appropriate to each particular Aboriginal people.

[358] The Attorney General of Quebec thus maintains that in adopting the *Act*, Parliament either added a right to s. 35 of the *Constitution Act, 1982* that was not provided for therein, or it usurped the role of the courts by declaring the existence of such a right without that right first having been considered in court proceedings on a case-by-case basis for each of the Aboriginal peoples of Canada.

[359] This reference therefore raises the issue of the recognition, within Canada's constitutional order, of the right of Aboriginal self-government as an Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*—including, more specifically, the right of Aboriginal peoples to regulate their child and family services. The reference also raises the issue as to whether such a right, if it does exist, is “generic” to all Aboriginal peoples or, instead, specific to each of them, such that it can vary in scope

³⁴⁶ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras. 89 *et seq.*

from one Aboriginal people to another. Much has been written on these two issues in recent years.

[360] Based on the approach adopted in some Canadian judicial decisions,³⁴⁷ the sovereignty exercised by the Crown over the territory of Canada is constitutionally incompatible with the very notion of an Aboriginal right of self-government. According to this point of view, while Aboriginal peoples may historically have exercised a form of self-government as political bodies quasi-independent of the Crown, over time any remnant of Aboriginal sovereignty was erased. Aboriginal persons, therefore, are subject to the same political structures as their fellow non-Aboriginal citizens, as those are set out in the *Constitution Act, 1867*, namely, a federal Parliament and provincial legislatures acting within their respective spheres of jurisdiction. More specifically, the *Indian Act* and the resulting political subjugation of Aboriginal peoples—whether or not this was morally justified—extinguished any hint of even residual Aboriginal sovereignty.

[361] Moreover, according to this view, the division of powers between the federal government and the provincial governments as set out in the *Constitution Act, 1867* is also incompatible with the very notion of an Aboriginal right of self-government. The *Constitution Act, 1867* sets out and allocates all legislative powers, leaving no possibility of another legislative source within Canada, except through an agreement or a delegation of powers to that effect agreed to by the governments concerned.

[362] This school of thought therefore views the issue of Aboriginal governance as largely political rather than legal. Thus, although Aboriginal governance may be politically and socially desirable, it can be recognized only if Parliament and the provincial legislatures agree to do so, each within its own respective fields of jurisdiction or cooperatively. It is a political choice legislators could make in response to requests from Aboriginal citizens to establish a system for the delegation of powers in certain agreed-upon fields of jurisdiction, whether through agreements or legislation. Viewed from this perspective, courts cannot recognize any claim to Aboriginal self-government without government approval.

[363] Conversely, the other point of view posits that Aboriginal peoples have always maintained a form of self-government that flows from their original sovereignty over the Canadian territory before the Crown's assertion of sovereignty over the same territory became effective. Consequently, Aboriginal peoples have a special legal status as distinct peoples with specific autonomy within Canadian society, which s. 35 of the *Constitution Act, 1982* recognizes. According to this school of thought, although the political subjugation of Aboriginal peoples pursuant to the *Indian Act* and other legal instruments is an indisputable historical fact, it did not extinguish a fundamental right to

³⁴⁷ See, in particular, the remarks of McEachern, C.J. in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, 1991 CanLII 2372 (BC SC) and those of the majority in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, 1993 CanLII 4516 (BC CA).

self-government within Canada, a right which is now recognized and affirmed as an Aboriginal right by s. 35 of the *Constitution Act, 1982*.

[364] For the reasons set out below, the point of view that ought to be accepted is the second one, which asserts that Aboriginal peoples have a right of self-government within Canada, based on the historical relationship between them and the Crown, such right forming part of the Aboriginal rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*. As will be seen, this is not an absolute or unlimited right, but it does indeed exist within the contemporary Canadian constitutional architecture, at least with respect to child and family services, and it is constitutionally protected under s. 35.

[365] This finding flows from the history of the relationship between the Crown and Aboriginal peoples, with which we will begin our analysis. Subsequently, we will see that Canadian jurisprudence has not taken a firm position on the issue, but that, read in light of this historical relationship, it must be construed as recognizing the right of self-government as an Aboriginal right which, at the very least, entitles Aboriginal peoples to regulate their child and family services.

(a) Historical basis of the right of Aboriginal self-government

[366] It is no longer disputed that the Aboriginal peoples of Canada functioned independently from the Crown until sometime in the 19th century. The colonial powers recognized their autonomy as peoples on a *de facto*, if not *de jure*, basis for the purpose of maintaining commercial dealings—such as fur trading—and preserving military alliances with them in the many conflicts among the colonial powers as to which would control North America.³⁴⁸

[367] Indeed, the autonomy of Aboriginal peoples is an implicit fact that underlies the *Royal Proclamation* of 1763,³⁴⁹ which established a vast “Indian territory” that was gradually surrendered through treaties entered into with Aboriginal peoples. The issue of the territorial rights arising from the *Royal Proclamation* of 1763 was addressed in detail by the Supreme Court of Canada and the Privy Council in *St. Catherine’s Milling*.³⁵⁰ We must now turn to the rights of governance stemming from the *Royal Proclamation* of 1763 and from the common law.

³⁴⁸ Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1, pp. 49-53; Royal Commission on Aboriginal Peoples, *Report*, vol. 1, pp. 94-108 and 112-124. See also: Michel Morin, *L’usurpation de la souveraineté autochtone : le cas des peuples de la Nouvelle-France et des colonies anglaises de l’Amérique du Nord*, Montreal, Boréal, 1997, particularly pp. 126-127; John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation”, (1994) 28:1 *U.B.C. L. Rev.* 1; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims”, (1991) 29:4 *Osgoode Hall L.J.* 681; Brian Slattery, “Understanding Aboriginal Rights”, (1987) 66:4 *Can. Bar. Rev.* 727.

³⁴⁹ *The Royal Proclamation, 1763* (U.K.), 3 Geo. 3, reprinted in R.S.C. 1985, App. II, No. 1.

³⁵⁰ *St. Catharines Milling and Lumber Co. v. R.* (1887), 13 S.C.R. 577, affirmed in *St. Catherine’s Milling & Lumber Company v. The Queen* (1888), [1889] 14 A.C. 46 (PC).

[368] Relying on the *Royal Proclamation* of 1763 and the historical relationship between the British Crown and the Aboriginal peoples of North America, the United States Supreme Court recognized not only the right of Aboriginal peoples to land—which Canadian law recognizes through the constitutional protection afforded by Aboriginal title—but also their right to govern themselves under the sovereignty of the United States. It did so through the doctrines of “dependent domestic nation” and “residual aboriginal sovereignty”, which were developed in the early 19th century by Chief Justice Marshall in the *Johnson v. M’Intosh*,³⁵¹ *Cherokee Nation v. Georgia*³⁵² and *Worcester v. Georgia*³⁵³ trilogy of cases and have since been consistently reiterated in United States jurisprudence. Although, as a general rule, United States jurisprudence does not apply in Canada, the Marshall trilogy of cases has been cited extensively in Canadian rulings on Aboriginal rights, including numerous references by the Supreme Court of Canada.³⁵⁴ It sets out persuasive principles and therefore merits attention when considering the right of Aboriginal self-government.

[369] In this trilogy, Marshall, C.J. of the United States Supreme Court noted that the claims to sovereignty over North American territories made by European colonial powers inevitably conflicted with the effective sovereignty exercised over those same territories by the Aboriginal peoples who occupied them. He also noted that, over time, effective sovereignty over these territories devolved to the European powers, however unjust and unfounded this historical outcome may have been. The proclamation of sovereignty by a European power and its effective implementation, however, did not entail the complete suppression of Aboriginal sovereignty. While Aboriginal sovereignty was certainly significantly diminished, it was not entirely eliminated. Marshall, C.J. found that there was “residual aboriginal sovereignty”—a concept not fully articulated—pursuant to which Aboriginal peoples could continue to govern themselves in areas of jurisdiction that did not challenge or contradict the superior sovereignty of the European power and its successors, in this case, respectively, the British Crown and the United States of America. Thus, although Aboriginal peoples are nations subject to the sovereign, they retain a residual right of self-government which they exercise with the benevolence and under the oversight of the sovereign. This is known as the doctrine of “domestic dependent nation”.

[370] Marshall, C.J. viewed this residual sovereignty not as the result of a delegated power, but rather as a historical right of self-government. In the United States, Aboriginal

³⁵¹ (1823), 21 U.S. (8 Wheat) 543.

³⁵² (1831), 30 U.S. (5 Pet.) 1.

³⁵³ (1832), 31 U.S. (6 Pet.) 515.

³⁵⁴ *St. Catharines Milling and Lumber Co. v. R.* (1887), 13 S.C.R. 577, pp. 610-613 and 633-635; *Calder*, pp. 320-321 and 380-385; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [“*Guerin*”], pp. 377-378; *R. v. Sioui*, [1990] 1 S.C.R. 1025 [“*Sioui*”], pp. 1053-1054; *Sparrow*, p. 1103; *Van der Peet*, paras. 35-37 and 107; *Mitchell v. M.R.N.*, 2001 SCC 33, [2001] 1 S.C.R. 911 [“*Mitchell*”], paras. 165-169; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 [“*Wewaykum Indian Band*”], para. 75.

powers lost to the benefit of the sovereign are defined restrictively, such that residual Aboriginal sovereignty is quite extensive.³⁵⁵

[371] Thus, in the United States, absent compelling reasons to the contrary or federal legislation to the contrary, Aboriginal peoples are presumed to have retained their residual right of self-government.³⁵⁶ The Marshall trilogy therefore firmly recognized the right of internal Aboriginal self-government, subject to any contrary action by the U.S. Congress. This right has been reaffirmed repeatedly by the United States Supreme Court.³⁵⁷ It should be noted that this right of self-government flows from the common law and can therefore be limited by legislation passed by the U.S. Congress insofar as that legislation is clear and unambiguous for that purpose.³⁵⁸ Indeed, in the United States, unlike in Canada, Aboriginal rights are not protected under the Constitution.

[372] In Canada, until the mid-19th century, the British Crown recognized Aboriginal peoples as having broad autonomy, as Professor Slattery explains in his seminal 1987 article entitled *Understanding Aboriginal Rights*:

A review of the Crown's historical relations with aboriginal peoples supports the conclusion that the Crown, in offering its protection to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws, unless the terms of the treaties ruled this out or legislation was enacted to the contrary. Native groups would retain a measure of internal autonomy, allowing them to govern their own affairs as they found convenient, subject to the overriding authority of the Crown in Parliament. [...] ³⁵⁹

[Emphasis added]

[373] This historic relationship between the British Crown and Aboriginal peoples is well documented and need not be discussed at length in this reference.³⁶⁰ Suffice it to note

³⁵⁵ Rennard Strickland *et al.* (ed.), *Felix S. Cohen's Handbook of Federal Indian Law*, Charlottesville, Virginia, The Michie Company, 1982, pp. 245-246.

³⁵⁶ *Iowa Mutual Insurance Co. v. LaPlante* (1987), 480 U.S. 9, p. 14.

³⁵⁷ *United States v. Kagama* (1886), 118 U.S. 375, pp. 380-384; *Jones v. Meehan* (1899), 175 U.S. 1, p. 10; *United States v. Quiver* (1916), 241 U.S. 602, pp. 605-606; *Santa Clara Pueblo v. Martinez* (1978), 436 U.S. 49, pp. 55-56; *United States v. Wheeler* (1978), 435 U.S. 313, p. 323; *Washington v. Confederated Tribes of Colville Indian Reservation* (1980), 447 U.S. 134, pp. 152-153; *Merrion v. Jicarilla Apache Tribe* (1982), 455 U.S. 130, p. 137; *Duro v. Reina* (1990), 495 U.S. 676, pp. 685-686; *Blatchford v. Native Village of Noatak* (1991), 501 U.S. 775, p. 782; *United States v. Lara* (2004), 541 U.S. 193, pp. 197-198; *Plains Commerce Bank v. Long Family Land & Cattle Co.* (2008), 554 U.S. 316, p. 327; *Michigan v. Bay Mills Indian Cmty* (2014), 572 U.S. 782, p. 788.

³⁵⁸ See, in particular: *Michigan v. Bay Mills Indian Cmty* (2014), 572 U.S. 782, p. 788 and the cases cited therein.

³⁵⁹ Brian Slattery, "Understanding Aboriginal Rights", (1987) 66:4 *Can. Bar. Rev.* 727, p. 736.

³⁶⁰ Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1, pp. 54-56; Royal Commission on Aboriginal Peoples, *Report*, vol. 1, pp. 108-112, 134 and 239-242.

that until the first quarter of the 19th century, British agents adopted a policy of military and economic alliances with Aboriginal peoples. To the extent possible, these Crown agents did not intervene in internal Aboriginal matters, allowing Aboriginal political structures to remain in place without undue interference.³⁶¹

[374] In *Sioui*, Lamer, J. stated the following with respect to the autonomy of Aboriginal peoples on the eve of the *Royal Proclamation* of 1763:

I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. [...] ³⁶²

[Emphasis added]

[375] The Crown's recognition of Aboriginal autonomy is all the more evident from the numerous treaties entered into both before and after the *Royal Proclamation* of 1763 came into force.³⁶³ The signing of treaties presupposes the existence of a people and authorities having the ability to bind that people under the treaty. It is interesting to note that the Crown continued to sign treaties with Aboriginal peoples until the first quarter of the 20th century,³⁶⁴ which, some would argue, justifies viewing these treaties as one of the foundations of Canadian federalism.³⁶⁵

[376] The policy of acknowledging Aboriginal self-government gradually changed over the course of the 19th century with the reduced strategic role of Aboriginal military alliances, the diminishing economic importance of the fur trade, and the delegation of

³⁶¹ Robert S. Allen, *His Majesty's Indian Allies – British Indian Policy in the Defence of Canada, 1774-1815*, Toronto, Dundurn Press, 1992.

³⁶² *Sioui*, pp. 1052-1053. See also: *R. v. Côté*, [1996] 3 S.C.R. 139 [“Côté”], para. 48.

³⁶³ John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right”, (2005) 38:2 *U.B.C. L. Rev.* 285, pp. 296-298; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims”, (1991) 29:4 *Osgoode Hall L.J.* 681, pp. 684 and 690-691.

³⁶⁴ The last historical treaty signed by Canada is the 1921 Treaty No. 11. The first so-called modern treaty, also referred to as a “comprehensive land claims agreement”, was the *James Bay and Northern Quebec Agreement*, which was signed in 1975.

³⁶⁵ Jean Leclair, “Federal Constitutionalism and Aboriginal Difference”, (2006) 31:2 *Queen's L.J.* 521, p. 529; Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada”, (1996) 34:1 *Osgoode Hall L.J.* 101, p. 111.

responsibility for dealing with Aboriginal peoples to local Canadian authorities. Over time, it was slowly taken over by a policy of displacement, settlement and, ultimately, assimilation of Aboriginal peoples.³⁶⁶

[377] The goal of this new policy was to effectively remove Aboriginal peoples from much of the Canadian territory to make way for massive European immigration during the 19th and 20th centuries.

[378] As we have already noted, this policy took many forms and has been studied by numerous commissions of inquiry.³⁶⁷ There is no need to describe it again in minute detail. Suffice it to note that it involved the surrender of Aboriginal territory via unequal treaties, the settlement of Aboriginal populations in “reserves”, the setting aside of traditional political institutions in favour of “band councils” with limited powers that were strictly overseen by state agents, the prohibition against traditional cultural practices, the assimilation of Aboriginal women through marriages to non-Aboriginal men, the assimilation of Aboriginal men through a policy of enfranchisement, and the assimilation of Aboriginal children through various means, including the residential schools.

[379] This policy of assimilation was met with great resistance, including several armed uprisings—such as the 1869 Red River Rebellion and the 1885 North-West Rebellion, to name but a few. In addition, Aboriginal peoples resisted on a day-to-day basis, maintaining their cultures and traditional political institutions—often at their peril. Ultimately, despite all the efforts put into this assimilationist policy, it did not succeed.

[380] For example, despite the federal government’s assimilationist policy, Canadian courts have generally recognized Aboriginal customary law and, by inference, the right of Aboriginal peoples to govern themselves in certain fields of jurisdiction.³⁶⁸

[381] Thus, marriages celebrated according to Aboriginal customs have been recognized by the courts many times, including the Quebec Superior Court in 1867, in *Connolly v. Woolrich*,³⁶⁹ and this Court in 1869, in the appeal from that judgment,³⁷⁰ as well as in *R. v. Nan-E-Quis-A-Ka*,³⁷¹ *R. v. Bear’s Shin Bone*³⁷² and *Re Noah Estate*,³⁷³

³⁶⁶ *Daniels*, paras. 4-5, citing Phelan, J. in *Daniels v. Canada*, 2013 FC 6.

³⁶⁷ Truth and Reconciliation Commission, *Final Report*, vol. 1, part 1, pp. 56-62, 105-110, 126-131 and 162-167; Royal Commission on Aboriginal Peoples, *Report*, vol. 1, pp. 134-138, 165-173, 242-289 and 313-319.

³⁶⁸ Mark D. Walters, “The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150”, (2017) 22:3 *Rev. Const. Stud.* 347; Norman K. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases”, (1984) 4 *C.N.L.R.* 1.

³⁶⁹ (1867), 17 R.J.R.Q. 75, [1867] Q.J. No. 1 (QC SC).

³⁷⁰ (1869), 17 R.J.R.Q. 266, [1869] J.Q. No. 1 (QC KB).

³⁷¹ (1889), 1 Terr. L.R. 211, 1889 CarswellNWT 14 (NWT SC).

³⁷² (1899), 4 Terr. L.R. 173, 1899 CanLII 111 (NWT SC).

³⁷³ (1961), 32 D.L.R. (2d) 185, 1961 CanLII 442 (NWT TC).

three cases decided in the Northwest Territories between 1889 and 1961, and in *R v. Williams*,³⁷⁴ a 1921 British Columbia decision.

[382] Customary Aboriginal adoptions have also been recognized in many court decisions, including in *Re Adoption of Kathie* in 1961, *Re Beaulieu's Adoption Petition* in 1969, *Re Tucktoo et al. and Kitchoalik et al.* in 1972, *Re Wah-Shee* in 1975, *Tagornak Adoption Petition* in 1983, *McNeil v. MacDougal* in 1999, *M.R.B. (In the matter of)* in 2001, *RE: Papatsie Estate* in 2006, and *Estate of Samuel Corrigan* in 2013.³⁷⁵

[383] In *Casimel v. Insurance Corp. of British Columbia*, the British Columbia Court of Appeal even unanimously held that the Aboriginal adoption law or custom had survived assimilation policies, should be recognized by the courts and was a right recognized and affirmed by s. 35 of the *Constitution Act, 1982*:

[42] I conclude that there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption. That body of authority is entirely consistent with all of the reasons for judgment of the members of this court in *Delgamuukw v. The Queen* as those reasons discuss the jurisprudential foundation for aboriginal rights in British Columbia.

[...]

[52] In my opinion, by the customs of the Stellaquo Band of the Carrier People, Ernest Casimel became the son of Louise Casimel and Francis Casimel, and Louise and Francis Casimel became the parents of Ernest Casimel. Such a customary adoption was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People, (though, of course, other societies may well have shared the same custom or variations of that custom), and as such, gave rise to

³⁷⁴ (1921), 30 B.C.R. 303, 1921 CanLII 623 (BC SC); *contra*: *R. v. Cote* (1971), 22 D.L.R. (3d) 353, 1971 CanLII 782 (Sask. CA).

³⁷⁵ *Re Adoption of Kathie E7-1807* (1961), 32 D.L.R. (2d) 686, 1961 CanLII 443 (NWT TC); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 1969 CanLII 844 (NWT TC); *Re Tucktoo et al. and Kitchoalik et al.* (1972), 27 D.L.R. (3d) 225, 1972 CanLII 1223 (NWT TC), affirmed in *Re Kitchoalik et al. and Tucktoo et al.* (1972), 28 D.L.R. (3d) 483, 1972 CanLII 977 (NWT CA); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743, 1975 CanLII 1200 (NWT SC); *Tagornak Adoption Petition* (1983), [1984] 1 C.N.L.R. 185, [1983] N.W.T.J. No. 38 (NWT SC); *McNeil v. MacDougal*, 1999 ABQB 945, paras. 16-19; *M.R.B. (In the matter of)* (2001), [2002] 2 C.N.L.R. 169, AZ-01036248 (QC CQ); *RE: Papatsie Estate*, 2006 NUCJ 5, para. 15; *Estate of Samuel Corrigan*, 2013 MBQB 77. *Contra*: *Mitchell v. Dennis*, [1984] 2 W.W.R. 449, 1983 CanLII 670 (BC SC); *Dans la situation de : P. (D.-F.)*, J.E. 2001-549, 2000 CanLII 17505, para. 8 (QC CQ).

aboriginal status rights that became recognized, affirmed and protected by the common law and under s.35 of the *Constitution Act, 1982*.³⁷⁶

[384] While there is a distinction between Aboriginal customary law and the right to regulate or modify that custom, the latter right is but one step removed. We turn now to the state of Canadian jurisprudence on the right of Aboriginal peoples to govern themselves.

(b) The state of Canadian law on the issue of Aboriginal self-government

[385] In 1973, in *Calder*, the Supreme Court of Canada was called upon to decide whether Aboriginal title was recognized under the common law and not simply pursuant to the *Royal Proclamation* of 1763, as the Privy Council had held in 1888 in *St. Catherine's Milling & Lumber Company*.³⁷⁷ The Court also had to decide whether Aboriginal title still existed in British Columbia, notwithstanding incompatible provincial legislation. Relying in particular on the American trilogy of cases decided by Marshall, C.J., six of the seven justices found that Aboriginal title was a right recognized at common law and that it arose not only out of the *Royal Proclamation* of 1763, but also, and primarily, out of the historical relationship between Aboriginal peoples and the Crown.

[386] The Supreme Court, however, was divided on the issue of extinguishment of Aboriginal title by virtue of incompatible provincial legislation, three justices ruling it had been extinguished, three others ruling it had survived and the seventh choosing not to opine on that issue. It was not until 1997, in *Delgamuukw*, which will be discussed further below, that the Supreme Court held that Aboriginal title could not be extinguished by incompatible provincial legislation.³⁷⁸

[387] In the 1984 decision in *Guerin*, Dickson, J. summarized the scope of the *Calder* ruling with respect to Aboriginal title. It is useful to reproduce that summary in its entirety:

In *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. With Judson and Hall JJ. writing the principal judgments, the Court split three-three on the major issue of whether the Nishga Indians' aboriginal title to their ancient tribal territory had been extinguished by general land enactments in British Columbia. The Court also split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. Judson and Hall JJ. were in agreement, however, that aboriginal title existed in Canada (at least where it had not been extinguished by

³⁷⁶ *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720, 1993 CanLII 1258, paras. 42 and 52 (BC CA).

³⁷⁷ *St. Catherine's Milling & Lumber Company v. The Queen* (1888), [1889] 14 A.C. 46 (PC).

³⁷⁸ *Delgamuukw*, paras. 173-183.

appropriate legislative action) independently of the Royal Proclamation. Judson J. stated expressly that the Proclamation was not the “exclusive” source of Indian title (pp. 322-23, 328). Hall J. said (at p. 390) that “aboriginal Indian title does not depend on treaty, executive order or legislative enactment”.

The Royal Proclamation of 1763 reserved “under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid” (R.S.C. 1970, Appendices, p. 123, at p. 127). In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M’Intosh*, 8 Wheaton 543 (1823), and *Worcester v. State of Georgia*, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.

In *Johnson v. M’Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians’ rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. Marshall C.J. explained this principle as follows, at pp. 573-74:

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans would interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal

as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. [Emphasis [by Dickson, J].]

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council, supra*; *Tito v. Waddell (No. 2), supra*, and the other “political trust” decisions are inapplicable to the present case. The “political trust” cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.³⁷⁹

[Emphasis added, unless otherwise stated]

[388] In 1973, in response to *Calder*, the federal government adopted its *Comprehensive Land Claims Policy*, which is still in force.³⁸⁰ The purpose of the policy is to negotiate the surrender of Aboriginal land rights (such as Aboriginal title, hunting, fishing and gathering rights and other rights related to occupancy of the land) in exchange for financial compensation and treaty rights. It is under this policy that comprehensive land claims agreements are entered into, the first being the 1975 *James Bay and Northern Quebec Agreement*.³⁸¹ The policy does not address the issue of self-government, among other

³⁷⁹ *Guerin*, pp. 376-379.

³⁸⁰ See: Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, Gatineau, Aboriginal Affairs and Northern Development Canada, 2014.

³⁸¹ To date, the policy has resulted in the signing of another 29 agreements: *The Northeastern Quebec Agreement* (1978); *Inuvialuit Final Agreement* (1984); *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27; *Gwich'in Comprehensive Land Claim Agreement* (1992); *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (1993); *Champagne and Aishihik First Nations Final Agreement* (1993); *First Nation of Nacho Nyak Dun Final Agreement* (1993); *Teslin Tlingit Council Final Agreement* (1993); *Vuntut Gwitchin First Nation Final Agreement* (1993); *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (1993); *Selkirk First Nation Final Agreement* (1997); *Little Salmon/Carmacks First Nation Final Agreement* (1997); *Tr'ondëk Hwëch'in Final Agreement* (1998); *Nisga'a Final Agreement* (1999); *Ta'an Kwach'an Council Final Agreement* (2002); *Kluane First Nation Final Agreement* (2003); *Westbank First Nation Self-Government*

reasons because it was not discussed in *Calder*. However, the agreements entered into further to this policy recognize and govern the scope of the powers of the signatory Aboriginal peoples to manage their traditional territories.

[389] In the early 1980s, following strong opposition from Aboriginal peoples to the enactment of the *Canadian Charter* and to a constitutional amending formula that disregarded their rights—an opposition that led to a legal challenge before the British courts³⁸²—the plan for the patriation of the Canadian Constitution was ultimately amended so as to incorporate a constitutional recognition of these rights. However, the content and specific scope of these rights were to be determined through subsequent constitutional discussions.

[390] The relevant sections of the *Constitution Act, 1982* were worded as follows when they came into force:

PART 1 Canadian Charter of Rights and Freedoms

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

PARTIE 1 Charte canadienne des droits et libertés

25 Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

b) aux droits ou libertés acquis par règlement de revendications territoriales.

Agreement (2003); *Land Claims and Self-Government Agreement Among the Tłı̨ch̄o and the Government of the Northwest Territories and the Government of Canada* (2003); *Kwanlin Dun First Nation Final Agreement* (2005); *Labrador Inuit Land Claims Agreement* (2005); *Carcross/Tagish First Nation Final Agreement* (2005); *Nunavik Inuit Land Claims Agreement* (2006); *Tsawwassen First Nation Final Agreement* (2007); *Maa-nulth First Nations Final Agreement* (2007-2009); *Eeyou Marine Region Land Claims Agreement* (2010); *Yale First National Final Agreement* (2013); *Sioux Valley Dakota Nation Governance Agreement* (2013); *Tla'amin Final Agreement* (2014); *Déjı̨ne Final Self-Government Agreement* (2015).

³⁸² *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (Court of Appeal of England and Wales, Lords Denning, Kerr and May).

PART II Rights of the Aboriginal Peoples of Canada

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.

PART IV Constitutional Conference

37 (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects

PARTIE II Droits des peuples autochtones du Canada

35 (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, *peuples autochtones du Canada* s'entend notamment des Indiens, des Inuit et des Métis du Canada.

PARTIE IV Conférence constitutionnelle

37 (1) Dans l'année suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même.

(2) Sont placées à l'ordre du jour de la conférence visée au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada, notamment la détermination et la définition des droits de ces peuples à inscrire dans la Constitution du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.

(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à toute question placée à l'ordre du jour de la conférence visée au paragraphe (1) et qui, selon lui, intéresse directement le

the Yukon Territory and the Northwest Territories.

territoire du Yukon et les territoires du Nord-Ouest.

PART VII General

PARTIE VII Dispositions générales

54 Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

54 La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi.

[Emphasis added]

[391] The constitutional conference contemplated in s. 37 of the *Constitution Act, 1982* was held, but no agreement was reached regarding the scope of the Aboriginal rights set out in s. 35. Instead, participants agreed on the following constitutional amendments:

- (1) a commitment to hold other constitutional conferences before April 18, 1987 on matters that directly affect Aboriginal peoples (ss. 37.1 and 54.1);
- (2) amendments to ss. 25 and 35 to specify that all land claims agreements are protected thereunder and to further specify that Aboriginal and treaty rights are guaranteed equally to male and female persons; and
- (3) a commitment to the principle that no amendment to s. 91(24) of the *Constitution Act, 1867*, or to s. 25 or s. 35 of the *Constitution Act, 1982* will be made before a constitutional conference is held in which representatives of Aboriginal peoples have been invited to participate (s. 35.1).³⁸³

[392] It should be noted that the issues of Aboriginal title and Aboriginal self-government were raised at every constitutional conference contemplated by ss. 37 and 37.1 of the *Constitution Act, 1982*.³⁸⁴ None of these conferences, however, resulted in the adoption of a constitutional text providing a more specific definition of Aboriginal rights. As author (now Senator) Renée Dupuis wrote, [TRANSLATION] “[t]he issue of including the recognition of ‘Aboriginal self-government’ and ‘Aboriginal title’ in the Constitution remained at the

³⁸³ See: *Constitution Amendment Proclamation, 1983*, SI/84-102, reprinted in R.S.C. 1985, Appendix II, No. 46.

³⁸⁴ See: Kathy L. Brock, “The Politics of Aboriginal Self-Government: A Canadian Paradox”, (1991) 34:2 *C.P.A.* 272; David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* Kingston, Institute of Intergovernmental Relations, 1989; Norman K. Zlotkin, “The 1983 and 1984 Constitutional Conferences: Only the Beginning”, (1984) 3 *C.N.L.R.* 3.

heart of discussions and was not resolved in the course of the constitutional process designed for that purpose between 1982 and 1987”.³⁸⁵

[393] In the context of these failed constitutional conferences, the courts were called upon to provide a more precise normative content for the Aboriginal rights set out in s. 35 of the *Constitution Act, 1982*. Though extensive jurisprudence has developed on this issue, for the purposes of this reference, we need only focus on a few landmark rulings.

[394] The Supreme Court of Canada ruled on the scope of s. 35 of the *Constitution Act, 1982* for the first time in the 1990 decision in *Sparrow*, finding that an Aboriginal right can be an “existing” right within the meaning of that section, even if it has been heavily regulated in the past. It also found that Aboriginal rights cannot be defined based on such regulation, but should instead be interpreted flexibly so as to allow their evolution over time, thereby rejecting the proposition that these are frozen rights. Indeed, the Supreme Court concluded that these rights can evolve in order to meet the contemporary needs of Aboriginal persons.

[395] The Supreme Court also firmly rejected the argument that s. 35 is merely a preamble to future constitutional negotiations and therefore provides no protection unless the rights set out therein are more specifically defined in subsequent constitutional provisions:

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future. . . . To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the

³⁸⁵ Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien*, Scarborough, Carswell, 1999, p. 129.

history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R.29. . .³⁸⁶

[396] The Supreme Court concluded instead that s. 35 gives Aboriginal rights constitutional status and priority, such that governments are required to justify any regulatory interference with the exercise of those rights.³⁸⁷ Before describing how the Supreme Court defined the characteristics of Aboriginal rights, it is therefore important to consider briefly the justificatory test which was developed in *Sparrow* and which has since evolved. This test is an integral part of the relational dynamic arising under s. 35 of the *Constitution Act, 1982*:

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the

³⁸⁶ *Sparrow*, pp. 1106-1107. In the judgment appealed to the Supreme Court, the British Columbia Court of Appeal had also explained that nothing in ss. 37 and 37.1 of the *Constitution Act, 1982* indicated that the constitutional conferences contemplated therein had to result in a consensus in order for an Aboriginal right to be recognized by s. 35: *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246, pp. 267-268, [1986] B.C.J. No. 1662, paras. 62-64 (BC CA).

³⁸⁷ *Sparrow*, p. 1110.

burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).³⁸⁸

[Emphasis added]

[397] The test requires that the government pursue a valid objective and that it try to achieve this using regulation consistent with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples—that is, regulation respectful of the fiduciary obligation of the Crown when it infringes an Aboriginal interest.³⁸⁹ The circumstances and the nature of the Aboriginal right at issue will determine how these concepts are interpreted.³⁹⁰ Thus, “both the Aboriginal interest and the broader public objective”³⁹¹ must be considered in determining whether the regulatory objective is valid, such that assessing whether the test has been met will differ in the case of fishing rights for livelihood purposes and the case of fishing rights for commercial purposes.³⁹² Under no circumstances, however, can interference be justified by relatively unimportant reasons.³⁹³

[398] As regards respect for the contemporary relationship between Aboriginal peoples and the Crown, as Cory, J. wrote in *Nikal*, generally speaking, the question is whether the government reasonably took account of the Aboriginal rights, that is, whether, in light of the particular circumstances of each case, it infringed the rights as little as possible and it reasonably satisfied its procedural duty to consult prior to such infringement.³⁹⁴ Moreover, the adverse effects of federal or provincial regulation on an Aboriginal right must not outweigh the benefits that may flow from its application.³⁹⁵

[399] Although the Supreme Court refers to the “infringement” of Aboriginal rights, the Court’s justificatory test cannot be viewed from the solely adversarial perspective this word suggests—pitting rights against each other—but instead requires a reconciliation of Aboriginal and non-Aboriginal interests. As McLachlin, C.J. stated in *Tsilhqot’in Nation*, “the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification”.³⁹⁶

[400] The purpose of the justificatory test set out for the first time in *Sparrow* is to determine “what constitutes legitimate regulation of a constitutional aboriginal right”,³⁹⁷ in

³⁸⁸ *Ibid.*

³⁸⁹ *Id.*, p. 1108.

³⁹⁰ *Id.*, pp. 1111-1112. See also: *R. v. Gladstone*, [1996] 2 S.C.R. 723 [“*Gladstone*”], para. 56.

³⁹¹ *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 [“*Tsilhqot’in Nation*”], para. 82.

³⁹² *Gladstone*, paras. 69-75.

³⁹³ *Delgamuukw*, para. 161.

³⁹⁴ *R. v. Nikal*, [1996] 1 S.C.R. 1013 [“*Nikal*”], para. 110. See also: *Gladstone*, para. 63.

³⁹⁵ *Tsilhqot’in Nation*, para. 87.

³⁹⁶ *Id.*, para. 82.

³⁹⁷ *Sparrow*, p. 1113.

order to “ensure recognition and affirmation”³⁹⁸ of such rights within the complex and interdependent political community in which they are exercised, a notion also referenced by Lamer, C.J. in *Gladstone*,³⁹⁹ Cory, J. in *Nika*⁴⁰⁰ and McLachlin, C.J. in *Tsilhqot’in Nation*.⁴⁰¹ This power of governments to regulate Aboriginal rights, within strict and well-defined limits, is therefore fundamental to achieving the objective of reconciling Aboriginal and non-Aboriginal interests as provided for in s. 35. From a broader reconciliation perspective, the justificatory test ensures an ongoing relationship between Aboriginal peoples and provincial and federal governments so that the latter properly take account of the rights recognized and affirmed by s. 35. In the words of Binnie, J. in *Little Salmon/Carmacks First Nation*, the reconciliation contemplated by s. 35 is that of “Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship”.⁴⁰²

[401] When the Supreme Court laid the groundwork for the analysis to be used in determining how state regulation could be reconciled with the assertion of Aboriginal rights provided for under s. 35, it had not yet established the process for identifying the Aboriginal rights recognized and affirmed by that section. It did that in 1996, in *Van der Peet*, where, for the first time, it focused on defining the framework for recognizing s. 35 Aboriginal rights. Lamer, C.J., writing for the majority and relying on the American trilogy of cases decided by Marshall, C.J., on Canadian jurisprudence and on the writings of commentators, stated that Aboriginal rights are based on the prior presence of Aboriginal peoples living as distinctive societies and that these rights have been recognized under the common law notwithstanding the Crown’s proclamation of sovereignty over the territory that is now Canada.⁴⁰³

[402] Aboriginal rights, therefore, were not created by the Crown or through legislation. Rather, they are recognized under the common law because “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries”.⁴⁰⁴ Consequently, s. 35 does not create these rights, but rather elevates them to constitutional status so that they “cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out [...] in *Sparrow*”.⁴⁰⁵ The purpose of this constitutional provision is

³⁹⁸ *Id.*, p. 1110.

³⁹⁹ *Gladstone*, para. 73.

⁴⁰⁰ *Nikal*, para. 92.

⁴⁰¹ *Tsilhqot’in Nation*, paras. 81-82.

⁴⁰² *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 [*“Little Salmon/Carmacks First Nation”*], para. 10.

⁴⁰³ *Van der Peet*, paras. 35-43.

⁴⁰⁴ *Id.*, para. 30 [emphasis in the original]. See also: *Calder*, pp. 328 and 383.

⁴⁰⁵ *Van der Peet*, para. 28.

“the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.⁴⁰⁶

[403] In light of this objective, Lamer, C.J. was of the view that the test for identifying the Aboriginal rights recognized and affirmed by s. 35 must “aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans”.⁴⁰⁷ Lamer, C.J. therefore set out the following test: “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right”.⁴⁰⁸ He then listed the factors to be considered in applying this test:

- courts must take into account the perspective of Aboriginal peoples themselves;⁴⁰⁹
- courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right;⁴¹⁰
- in order to be integral, a practice, custom or tradition must be of central significance to the Aboriginal society in question;⁴¹¹
- the practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;⁴¹²
- courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims;⁴¹³
- claims to Aboriginal rights must be adjudicated on a specific rather than general basis;⁴¹⁴
- for a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists;⁴¹⁵

⁴⁰⁶ *Id.*, para. 31.

⁴⁰⁷ *Id.*, para. 44.

⁴⁰⁸ *Id.*, para. 46.

⁴⁰⁹ *Id.*, paras. 49-50.

⁴¹⁰ *Id.*, paras. 51-54.

⁴¹¹ *Id.*, paras. 55-59.

⁴¹² *Id.*, paras. 60-67.

⁴¹³ *Id.*, para. 68.

⁴¹⁴ *Id.*, para. 69.

⁴¹⁵ *Id.*, para. 70.

- the integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct;⁴¹⁶
- the influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence;⁴¹⁷ and
- courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.⁴¹⁸

[404] The day after judgment was rendered in *Van der Peet*, the Supreme Court delivered its reasons in *Pamajewon*, where it had to decide whether the right to self-government forms part of the existing Aboriginal rights contemplated in s. 35. Although the self-government claim was broadly worded, it actually concerned the regulation of gambling activities. Writing for the majority, Lamer, C.J. concluded that it was unnecessary to decide whether or not s. 35 of the *Constitution Act, 1982* includes the right to self-government, because, even assuming that it does, that right could not apply to the regulation of gambling, given that gambling activities did not constitute a custom, practice or tradition integral to the distinctive culture of the Aboriginal group in question.

[405] Lamer, C.J. explained as follows:

[24] The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet, supra*. Assuming 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 against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet, supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.

[25] In *Van der Peet, supra*, the test for identifying aboriginal rights was said to be as follows, at para. 46:

⁴¹⁶ *Id.*, paras. 71-72.

⁴¹⁷ *Id.*, para. 73.

⁴¹⁸ *Id.*, para. 74.

. . . in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

In applying this test the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) “a defining feature of the culture in question” prior to contact with Europeans.⁴¹⁹

[Emphasis added]

[406] This judgment therefore suggests that the right to self-government, if it does exist as an Aboriginal right, must satisfy the *Van der Peet* test in order to be recognized as a s. 35 Aboriginal right.

[407] The following year, however, in *Delgamuukw*, the Supreme Court had to define the content of Aboriginal title. Both the issue of Aboriginal title and that of the right to self-government were raised at each court level—at trial, on appeal and before the Supreme Court. In addition to recognition of Aboriginal title, the Aboriginal parties sought judicial declarations confirming that they also had a form of residual sovereignty that included the right to regulate the use of lands and resources in their ancestral territories as well as all persons residing therein.

[408] In essence, Chief Justice McEachern of the Supreme Court of British Columbia (as he then was) dismissed all of the Aboriginal parties’ claims, whether land-related or governance-related. McEachern, C.J. rejected the possibility that s. 35 acknowledged the right to self-government, because, in his view, it was a right that could be recognized only through an agreement for that purpose made with the governments:

The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same law and the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself.

This is not to say that some form of self-government for aboriginal persons cannot be arranged. That, however, is possible only with the agreement of both levels of

⁴¹⁹ *Pamajewon*, paras. 24-25.

government under appropriate, lawful legislation. It cannot be achieved by litigation.⁴²⁰

[409] On appeal to the British Columbia Court of Appeal, Macfarlane, Taggart and Wallace, J.J.A. recognized that the Aboriginal plaintiffs had certain limited and non-exclusive Aboriginal rights, but, for reasons similar to those of McEachern, C.J., they dismissed the plaintiffs' claims to Aboriginal title and self-government. Lambert and Hutcheon, J.J.A., however, were of a contrary opinion, both with respect to Aboriginal title and the right to self-government.

[410] Let us consider their respective viewpoints.

[411] Macfarlane, J.A., with Taggart, J.A. concurring, concluded that the claim to self-government entailed the establishment, in Canada, of a new order of government holding legislative powers.⁴²¹ According to Macfarlane, J.A., "[i]t was on the date that the legislative power of the Sovereign was imposed that any vestige of aboriginal law-making competence was superseded".⁴²² Moreover, "a continuing aboriginal legislative power is inconsistent with the division of powers found in the Constitution Act, 1867 [...]. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada".⁴²³

[412] In concurring reasons, Wallace, J.A. based his findings on the incompatibility between the right to Aboriginal self-government and the Crown's proclamation of sovereignty. He was of the view that "any claim to aboriginal jurisdiction would require that rights of jurisdiction, that is, governmental powers such as legislative and judicial powers, were recognized and became enforceable by the common law".⁴²⁴ Although, prior to the Crown's acquisition of sovereignty over British Columbia, Aboriginal peoples exercised their sovereign jurisdiction in the territory in accordance with their own social organization, "once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants".⁴²⁵ Indeed, "upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament".⁴²⁶ Like Macfarlane and Taggart, J.J.A., Wallace, J.A. further found that "[a]ny possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation pursuant to the *Terms of Union, 1871*. Sections 91 and 92 of the Constitution Act, 1867 which provide

⁴²⁰ *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, pp. 454-455, 1991 CanLII 2372 (BC SC).

⁴²¹ *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, p. 518, 1993 CanLII 4516, para. 165 (BC CA).

⁴²² *Id.*, p. 519, para. 167.

⁴²³ *Id.*, p. 519, para. 168.

⁴²⁴ *Id.*, p. 591, para. 478.

⁴²⁵ *Id.*, pp. 591-592, para. 479.

⁴²⁶ *Id.*, p. 592, para. 481.

for this division of powers have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures”.⁴²⁷

[413] In dissenting reasons, Lambert, J.A. was of the view that s. 35 of the *Constitution Act, 1982* protects the right to self-government,⁴²⁸ which, contrary to the trial judge’s conclusion, was not extinguished by the Crown’s proclamation of sovereignty.⁴²⁹ Echoing the words in the Marshall trilogy, he was of the view that only the rights of Aboriginal peoples that were inconsistent with the Crown’s assertion of sovereignty were extinguished, which left room for a form of residual internal Aboriginal self-government. In his opinion, the right asserted was not a claim for sovereignty over traditional Aboriginal territory or a claim to govern the conduct of all persons in that territory, but rather a claim to internal self-government. The division of powers between the federal government and the provincial governments thus did not negate the right of internal Aboriginal self-government.

[414] Lambert, J.A. summarized his reasons as follows:

[1029] I propose to summarize. The Gitksan and Wet’suwet’en peoples had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on the customs, traditions and practices of those peoples to the extent that they formed an integral part of their distinctive cultures. The assertion of British Sovereignty only took away such rights as were inconsistent with the concept of British Sovereignty. The introduction of English Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet’suwet’en customary law would be expected to render much of the newly introduced English Law inapplicable to the Gitksan and Wet’suwet’en peoples, particularly since none of the institutions of English Law were available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet’suwet’en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet’suwet’en people, and Federal laws, particularly the *Indian Act*, would also have applied to them. But to the extent that Gitksan and Wet’suwet’en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial laws of general application nor by Federal laws, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in Parliament to abrogate the Gitksan or Wet’suwet’en customary laws. Subject to those over-riding considerations, Gitksan and Wet’suwet’en customary laws of self-government and self-regulation have continued to the

⁴²⁷ *Id.*, pp. 592-593, para. 482.

⁴²⁸ *Id.*, p. 686, para. 845.

⁴²⁹ *Id.*, pp. 679-681, paras. 812-824.

present day and are now constitutionally protected by s. 35 of the *Constitution Act, 1982*.⁴³⁰

[415] Lastly, Hutcheon, J.A., dissenting in part, was of the opinion that the Aboriginal peoples in the matter before him had not lost their right to self-regulation, which he distinguished from self-government:

[1163] [...] I think the phrase “right to self-government” refers, in the main, to the traditions of an aboriginal society considered by its members to be binding on them. I would avoid reference to “aboriginal laws” because the word “laws” carries with it the notion that the traditions were enforceable by some state authority. For the same reason I have used “self-regulation” in preference to self-government.⁴³¹

[416] The Supreme Court of Canada allowed the appeal from the judgment of the British Columbia Court of Appeal. It chose to intervene in order to define the legal content of Aboriginal title and set out the evidentiary rules for establishing it in court. It also decided to refer the matter back to the court of first instance for a new trial that would take its comments into account.

[417] While specifying that Aboriginal title is an existing Aboriginal right under s. 35 whose source is “the relationship between common law and pre-existing systems of aboriginal law”⁴³² and that it is held communally,⁴³³ Lamer, C.J., writing for the majority, significantly reworked the test and the factors he had set out in *Van der Peet*. He adapted them to the particular nature of this land title, given that it is a “distinct species of aboriginal right that was recognized and affirmed by s. 35(1)”.⁴³⁴

[418] Lamer, C.J. thus rejected the argument that Aboriginal title merely encompasses the right to engage in activities which are aspects of Aboriginal practices, customs and traditions which are integral to the distinctive Aboriginal culture of the group claiming the right. Aboriginal title therefore permits the use of the lands to which it applies for any purpose, whether or not related to customs, practices or traditions which are integral to the distinctive culture of the aboriginal group holding that title, subject, however, to two limits: (1) “lands held pursuant to [that] title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands”⁴³⁵ and (2) “lands

⁴³⁰ *Id.*, p. 730, para. 1029.

⁴³¹ *Id.*, p. 761, para. 1163.

⁴³² *Delgamuukw*, para. 114.

⁴³³ *Id.*, para. 115.

⁴³⁴ *Id.*, para. 2. See also: *Desautel*, para. 28 (where the Supreme Court acknowledged that the test for proving Aboriginal title is “a variation” of the *Van der Peet* test); Catherine Bell, “New Directions in the Law of Aboriginal Rights”, (1998) 77 *Can. Bar. Rev.* 36, pp. 60-61; David W. Elliott, “*Delgamuukw*: Back to Court?”, (1998) 26:1 *Manitoba L.J.* 97, pp. 112-114.

⁴³⁵ *Delgamuukw*, para. 125.

held by virtue of aboriginal title may not be alienated”, in that they can only be surrendered to the Crown.⁴³⁶

[419] Lamer, C.J. expressly acknowledged this adaptation of the *Van der Peet* test and factors:

[140] In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]

Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

[141] This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly. I anticipated this possibility in *Van der Peet* itself [...].

[...]

Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s. 35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s. 35(1) — prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.

[142] The adaptation of the test laid down in *Van der Peet* to suit claims to title must be understood as the recognition of the first aspect of that prior presence. However, as will now become apparent, the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of

⁴³⁶ *Id.*, para. 129.

the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.⁴³⁷

[Emphasis in the original]

[420] As with any other Aboriginal right, Aboriginal title may be infringed, both by the federal government and the provincial governments, but only if such infringement satisfies the test of justification which was set out in *Sparrow* and which has since been consistently applied and further elaborated.⁴³⁸

[421] In *Delgamuukw*, however, the Supreme Court declined to adjudicate the issue of the right to self-government due to “[t]he errors of fact made by the trial judge, and the resultant need for a new trial [...] [and due to the] broad nature of the claim at trial [...]”.⁴³⁹ Moreover, it did not indicate whether the *Van der Peet* test and factors should be adapted when considering the right to self-government, as it had done with respect to Aboriginal title, nor did it add anything to what it had already said in *Pamajewon*. Thus, to date, the Supreme Court of Canada has not ruled on the existence or content of the right to Aboriginal self-government nor has it considered at length the application of the *Van der Peet* test and factors in the context of the right to self-government.

[422] While *Pamajewon* may suggest that the right to self-government is not a generic right with uniform legal characteristics, but rather a specific right that varies from one Aboriginal group to another according to the particular circumstances of each group, the remarks of Lamer, C.J. in *Pamajewon* must be understood in light of his subsequent comments in *Delgamuukw*. As Professor Slattery has noted:

The crucial point to note is that [in *Delgamuukw*] the Supreme Court treats aboriginal title as a *uniform right*, whose basic dimensions do not vary from group to group according to their traditional ways of life. All groups holding Aboriginal title have fundamentally the same kind of right, subject only to minor variations stemming from the inherent limit. In effect, the Court recognizes that Aboriginal title is not a *specific right* of a kind envisaged in *Van der Peet* or even a bundle of specific rights. Aboriginal title is what we may call a *generic right* – a right of a standardized character that is basically in all Aboriginal groups where it occurs. The fundamental dimensions of the right are determined by the common law doctrine of Aboriginal rights rather than by the unique circumstances of each group.

⁴³⁷ *Id.*, paras. 140-142.

⁴³⁸ *Id.*, para. 160.

⁴³⁹ *Id.*, paras. 170 and 171. See also the remarks of La Forest, J. at para. 205.

In short, in *Van der Peet* and *Delgamuukw*, the Supreme Court of Canada recognized two different kinds of Aboriginal rights – specific rights and generic rights. Specific rights are rights whose nature and scope are defined by factors pertaining to a particular Aboriginal group. As such, they vary in character from group to group. Of course, different Aboriginal groups may have similar specific rights, but this is just happenstance. It does not flow from the nature of the right. By contrast, generic rights are rights of a universal character whose basic contours are established by the common law of Aboriginal rights. All Aboriginal groups holding a certain generic right have basically the same kind of right. The essential nature of the rights does not vary according to factors peculiar to the group.

[...]

In light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights. In this view, the right of self-government is governed by uniform principles laid down by Canadian common law. The basic scope of the right does not vary from group to group. However, its application to a particular group differs depending on the circumstances. [...]⁴⁴⁰

[Underlining added; italics in the original]

[423] Indeed, although in *Van der Peet* the Supreme Court stated that “[a]boriginal rights are not general and universal” and that “their scope and content must be determined on a case-by-case basis”,⁴⁴¹ it significantly nuanced this statement in *Delgamuukw*, concluding that Aboriginal title is a right identical in scope for all holders of that title.

[424] It is also useful to note that in a subsequent case in which the Supreme Court was called upon to identify the s. 35 Aboriginal rights of the Métis, it once again modified the approach it had adopted in *Van der Peet*, so as “to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims”.⁴⁴² It thus concluded that the purpose of s. 35 as it relates to the

⁴⁴⁰ Brian Slattery, “A Taxonomy of Aboriginal Rights”, in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 111, pp. 113-114 and 121. See also: Kent McNeil, “Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence”, in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 129, pp. 135-136; John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right”, (2005) 38:2 *U.B.C. L. Rev.* 285, pp. 306-307; Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001, pp. 173-174; Brian Slattery, “Making Sense of Aboriginal and Treaty Rights”, (2000) 79:2 *Can. Bar. Rev.* 196, pp. 211-215.

⁴⁴¹ *Van der Peet*, para. 69.

⁴⁴² *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, para. 14.

Métis cannot rest on recognizing their occupation of the land prior to European settlement, but instead must be adapted “to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country’s original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors”.⁴⁴³ The Court also set out a method for identifying the Métis communities holding such rights, as well as their members, which takes into account the unique status of the Métis.

[425] The right to self-government also requires an adaptation of the *Van der Peet* framework. As with Aboriginal title, the right to self-government is similar in scope for all Aboriginal peoples, a position which Binnie, J. seemed to support in *Mitchell*.

[426] In that 2001 decision, Binnie, J., in concurring reasons, chose to deal briefly with the right to Aboriginal self-government. In *Mitchell*, the Aboriginal right claimed was the right to bring goods into Canada without paying customs duties. While Binnie, J. was of the opinion that the claim was incompatible with Canadian sovereignty, he nevertheless suggested that this type of incompatibility would not necessarily apply to an Aboriginal right based on the right to self-government, which he viewed as the right of an Aboriginal people to govern its internal affairs. Drawing heavily on the American trilogy of cases decided by Marshall, C.J. and on the doctrine of “domestic dependent nation”, Binnie, J. appears to have taken a broad—rather than specific—view of such a right:

[165] In reaching that conclusion, however, I do not wish to be taken as either foreclosing or endorsing any position on the compatibility or incompatibility of *internal* self-governing institutions of First Nations with Crown sovereignty, either past or present. I point out in this connection that the sovereign incompatibility principle has not prevented the United States (albeit with its very different constitutional framework) from continuing to recognize forms of *internal* aboriginal self-government which it considers to be expressions of residual aboriginal sovereignty. The concept of a “domestic dependent nation” was introduced by Marshall C.J. in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), at p. 17, as follows:

... it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

[...]

[169] I refer to the U.S. law only to alleviate any concern that addressing aspects of the sovereignty issue in the context of a claim to an international trading and mobility right would prejudice one way or the other a resolution of the much larger

⁴⁴³ *Id.*, para. 29.

and more complex claim of First Nations in Canada to *internal* self-governing institutions. The United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), was decided almost 170 years ago.⁴⁴⁴

[Emphasis in the original]

[427] One last judgment addressing the right to self-government merits attention, that of the Supreme Court of British Columbia in *Campbell*.⁴⁴⁵ In this case, the plaintiffs—all of them members of the Legislative Assembly of British Columbia—challenged the constitutionality of the self-government provisions of an agreement entered into between the Nisga'a Nation and the governments of Canada and British Columbia. They argued that the division of powers between Parliament and the provincial legislatures, as set out in the *Constitution Act, 1867*, did not allow for the recognition of a right to self-government of Aboriginal peoples—whether as an Aboriginal right or as a right acquired by way of agreement—without a formal amendment to the Canadian Constitution to that effect.

[428] Relying on the Supreme Court of Canada's purposive approach to Canadian federalism in the *Reference re Secession of Quebec*,⁴⁴⁶ Williamson, J. rejected the notion that the purpose or effect of the division of powers was to extinguish Aboriginal rights, including the right to self-government.⁴⁴⁷ He referred to the American trilogy of cases decided by Marshall, C.J., to Canadian jurisprudence and to the purposes of s. 35 of the *Constitution Act, 1982*, concluding instead that the common law includes a right to Aboriginal self-government and that this right is now constitutionally protected by s. 35 as an Aboriginal right.⁴⁴⁸

[429] To date, with the exception of *Campbell*, Canadian courts have not ruled definitively on the right to Aboriginal self-government, although some judgments, relying on the *Van der Peet* test and factors, have dismissed claims based on that right in the context of challenges to labour relations and taxation legislation.⁴⁴⁹

[430] This right, however, has been recognized many times in the Canadian political arena, as already noted above.

⁴⁴⁴ *Mitchell*, paras. 165 and 169.

⁴⁴⁵ *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123.

⁴⁴⁶ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁴⁴⁷ *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123, paras. 78-79 and 81.

⁴⁴⁸ *Id.*, paras. 88-96, 137-143 and 178-184.

⁴⁴⁹ *Robertson v. Canada*, 2017 FCA 168; *Conseil des Innus de Pessamit c. Association des policiers et policières de Pessamit*, 2010 FCA 306; *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814, leave to appeal to the Supreme Court refused, April 24, 2008, No. 32452.

[431] Thus, all of the participants in the 1992 Charlottetown Accord recognized that the Aboriginal peoples of Canada have an inherent right of self-government within Canada.⁴⁵⁰ Although the Charlottetown Accord was defeated in a referendum on October 26, 1992, this does not mean that the rights set out therein were not already entrenched in the Constitution of Canada. Indeed, the notion that the failure of a constitutional proposal—including the proposals in the Charlottetown Accord—leads to the conclusion that the subject contemplated in the proposal is not otherwise protected by the Canadian Constitution was firmly rejected by the Supreme Court in the *Reference re Supreme Court Act*.⁴⁵¹

[432] After the Charlottetown Accord was defeated, the federal government adopted its *Self-Government Policy* in 1995. We have already outlined its broad strokes, but it is worth reiterating that the policy is grounded on recognition of a judicially enforceable right to self-government as an existing Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*. However, given the practical difficulties of litigating this type of right, Canada's policy is based instead on the negotiation of self-government agreements as treaty rights within the meaning of s. 35. The policy also contemplates other mechanisms for the effective exercise of the right to self-government, including legislation, contracts and non-binding memoranda of understanding. Regardless of the approach chosen, the federal policy maintains that financing self-government is a shared responsibility among federal and provincial governments, which implies the active participation of the latter in the negotiation process.⁴⁵² Excerpts from this policy were reproduced earlier in this opinion and it is not necessary to do so again.

[433] At the international level, the *UN Declaration* adopted by the United Nations General Assembly in 2007 also recognizes that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs.⁴⁵³ We will return to this later.

[434] Moreover, most Canadian legal commentators who have expressed an opinion on this issue are of the view that the right to Aboriginal self-government is implicitly, but necessarily, recognized and affirmed by s. 35 of the *Constitution Act, 1982*.⁴⁵⁴

⁴⁵⁰ Canada, *Draft legal text. October 9, 1992*, Ottawa, Office of the Privy Council, 1992, s. 29 amending the *Constitution Act, 1982* in order to add ss. 35.1 to 35.7.

⁴⁵¹ *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, paras. 102-103.

⁴⁵² *Self-Government Policy*, pp. 14-15. See also: Canada, "Canada's collaborative self-government fiscal policy", 2019; Aboriginal Affairs and Northern Development Canada, *Canada's Fiscal Approach for Self-Government Arrangements*, s. 10.1, Aboriginal Affairs and Northern Development Canada, 2015.

⁴⁵³ *UN Declaration*, arts. 3-5.

⁴⁵⁴ Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape", (2018) 51:1 *U.B.C. L. Rev.* 105, pp. 121-128 and 138-141; Richard Stacey, "The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism", (2018) 46:4 *Fed. L. Rev.* 669, pp. 683-687; Patrick Macklem, "L'identité constitutionnelle des peuples autochtones au Canada : groupes à statut particulier ou acteurs fédéraux?", (2018) 51:2-3 *R.J.T.* 389, pp. 406-415; Jean Leclair,

[435] Having briefly described the law as it stands, we turn now to the constitutionality of Part II of the *Act*.

(c) Analytical framework

[436] The Attorney General of Quebec argues that Part II of the *Act* is invalid because its purpose and effect are to unilaterally define the rights protected by s. 35 of the

“Penser le Canada dans un monde désenchanté : réflexions sur le fédéralisme, le nationalisme et la différence autochtone”, (2016) 25:1 *Forum Const.* 1, p. 10; Kirsten Anker, “Reconciliation in Translation: Indigenous Legal Traditions and Canada’s Truth and Reconciliation Commission”, (2016) 33:2 *Windsor Y.B. Access Just.* 15, pp. 22-25; Clayton Cunningham, “Aboriginal Powers, Privileges, and Immunities of Self-Government”, (2013) 76:2 *Sask. L. Rev.* 315, pp. 340-347; Tony Penikett and Adam Goldenberg, “Closing the Citizenship Gap in Canada’s North: Indigenous Rights, Arctic Sovereignty, and Devolution in Nunavut”, (2013) 22:1 *Mich. St. Int’l. L. Rev.* 23, pp. 40-46; Merrilee Rasmussen, “Honouring the Treaty Acknowledgment of First Nations Self-Government: Achieving Justice through Self-Determination”, in John D. Whyte (ed.), *Moving Toward Justice: Legal Traditions and Aboriginal Justice*, Saskatoon, Purich/Saskatchewan Institute of Public Policy, 2008, 49, pp. 49-50; Kent McNeil, “Judicial Approaches to Self-Government since *Calder*. Searching for Doctrinal Coherence”, in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 129, pp. 143-150; Mark D. Walters, “The Morality of Aboriginal Law”, (2006) 31:2 *Queen’s L.J.* 470, pp. 513-517; John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right”, (2005) 38:2 *U.B.C. L. Rev.* 285; Ghislain Otis, “Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada”, (2004) 49:2 *McGill L.J.* 393, pp. 397-398; Doug Moodie, “Thinking outside the 20th Century Box: Revisiting ‘Mitchell’ – Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government”, (2003) 35:1 *Ottawa L.R.* 1, pp. 15-21 and 25-39; Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001, pp. 49-51, 110-112, 117-119 and 172-175; Christopher D. Jenkins, “John Marshall’s Aboriginal Rights Theory and Its Treatment in Canadian Jurisprudence”, (2001) 35:1 *U.B.C. L. Rev.* 1, pp. 34-40; Kerry Wilkins, “Take Your Time And Do It Right: *Delgamuukw*, Self-Government Rights And the Pragmatics of Advocacy”, (1999-2000) 27:2 *Manitoba L.J.* 241, p. 247; Catherine Bell and Michael Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation”, in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Vancouver, University of British Columbia Press, 1997, 38, pp. 64-74; John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government”, in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Vancouver, University of British Columbia Press, 1997, 155, particularly at p. 165; Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada”, (1996) 34:1 *Osgoode Hall L.J.* 101, pp. 108-112; Peter W. Hutchins, with Carol Hilling and David Schulze, “The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine”, (1995) 29:2 *U.B.C. L. Rev.* 251, pp. 268-288; Donna Greschner, “Aboriginal Women, the Constitution and Criminal Justice”, (1992) 26 (Special Edition) *U.B.C. L. Rev.* 338, pp. 344-348; Alan Pratt, “Aboriginal Self-Government and the Crown’s Fiduciary Duty: Squaring the Circle or Completing the Circle?”, (1992) 2 *N.J.C.L.* 163, pp. 167-169 and 182; Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71:2 *Can. Bar. Rev.* 261, pp. 270-275 and 277-279; Mark Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*”, (1992) 17:2 *Queen’s L.J.* 350, pp. 376-384, 388-393 and 410-413; Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*”, (1991) 29:2 *Alta. L. Rev.* 498, pp. 505-508; Shaun Nakatsuru, “A Constitutional Right of Indian Self-Government”, (1985) 43:2 *U. T. Fac. L. Rev.* 72, pp. 85-89.

Constitution Act, 1982. In support of this position, he raises several grounds, which can be grouped into three submissions.

[437] First, he alleges that Part II of the *Act* is based solely on the premise that s. 35 recognizes and affirms the right to Aboriginal self-government.⁴⁵⁵ He is correct.

[438] Indeed, the *Act* is based explicitly on this premise and is particularly clear in that regard. In its preamble, Parliament “affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services”. Paragraph 8(a) of the *Act* states that its purpose is to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services”. Subsection 18(1) of the *Act* provides that “[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services”. As for ss. 19 to 26 of the *Act*, they set out a framework for the exercise of this Aboriginal jurisdiction.

[439] Second, the Attorney General of Quebec argues that Parliament does not have the power to amend or to unilaterally determine the scope or content of s. 35 of the *Constitution Act, 1982*. He is of the view that it is not for Parliament to declare the existence of an Aboriginal right because, in so doing, it usurps the role of the judiciary.⁴⁵⁶

[440] Thirdly, the Attorney General of Quebec outlines the Canadian historical, political and legal context and submits that Parliament attempted to unilaterally amend the Constitution merely by way of statute, thus including the right to Aboriginal self-government in s. 35 of the *Constitution Act, 1982* through legislative means.⁴⁵⁷ Consequently, he submits, the *Act* is invalid as being contrary to s. 52(3) of the *Constitution Act, 1982*, which pertains to the constitutional amendment process.⁴⁵⁸

[441] Notwithstanding the very broad scope of his second and third submissions, however, the Attorney General of Quebec adds that this Court need not opine on whether or not s. 35 of the *Constitution Act, 1982* recognizes a right to Aboriginal self-government in relation to child and family services.⁴⁵⁹ It would be sufficient for the Court to declare the unconstitutionality of the *Act* on the ground that Parliament does not have the power to legislate this right into existence.

[442] We cannot accept this argument. Nothing in the Constitution precludes Parliament from adopting legislation on the basis of the rights set out in it, prior to a court ruling on the matter. Such an approach, in fact, misconceives the role of the judiciary: as “guardians

⁴⁵⁵ Argument in the brief of the Attorney General of Quebec, paras. 84-91.

⁴⁵⁶ *Id.*, paras. 92-99.

⁴⁵⁷ *Id.*, paras. 100-148.

⁴⁵⁸ *Id.*, paras. 149-153.

⁴⁵⁹ *Id.*, para. 148 *in fine*.

of the Constitution”,⁴⁶⁰ courts must determine the constitutionality of legislation when it is challenged. Although all legislation enacted by either level of government must, in principle, be based on the state of the law as already determined by the courts, Parliament and the provincial legislatures are not precluded from legislating even if the courts have not yet ruled definitively on a matter. Indeed, such a requirement would effectively paralyze the provincial legislatures and Parliament, which, it appears, would have no choice but to act by way of court reference before enacting constitutionally uncertain legislation.

[443] Given this context, it is helpful to analogize with the role of the legislative and executive branches in connection with the implementation of the *Canadian Charter*.⁴⁶¹ In that regard, in *Mills*, the Supreme Court stated that “[c]ourts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups”.⁴⁶² Governments have similar flexibility with respect to Aboriginal rights because, as we will see very shortly, in the case of the Aboriginal rights contemplated in s. 35 of the *Constitution Act, 1982*, the honour of the Crown requires governments to delineate those rights so they can be implemented in a tangible way.

[444] The Supreme Court has repeatedly held that the honour of the Crown—which is a constitutional principle⁴⁶³—imposes the duty on governments to delineate the Aboriginal rights recognized by s. 35 of the *Constitution Act, 1982* so as to give effect to the promise to recognize these rights, which is the *raison d’être* of this constitutional provision. As Rowe, J. recently reiterated in *Desautel*, “[t]he honour of the Crown requires that Aboriginal rights be determined and respected [...]”.⁴⁶⁴ This is so because refusing to delineate these rights can result in the *de facto* denial of their very existence or, at the very least, make them ineffective or inoperative. Requiring long and costly litigation prior to recognizing an Aboriginal right can have the same effect.

[445] In *Haïda Nation*, the Supreme Court held that governments have the duty to take account of Aboriginal rights, even when the rights at issue have not yet been defined or recognized by the courts, insofar as such rights may potentially be recognized:

[25] Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are

⁴⁶⁰ *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, p. 169.

⁴⁶¹ Argument in the brief of the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission, paras. 63-64.

⁴⁶² *R. v. Mills*, [1999] 3 S.C.R. 668, para. 58.

⁴⁶³ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, para. 69, citing *Little Salmon/Carmacks First Nation*, para. 42.

⁴⁶⁴ *Desautel*, para. 30.

protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.⁴⁶⁵

[Emphasis added]

[446] As McLachlin, C.J. and Rowe, J. explained in *Ktunaxa Nation*, s. 35 of the *Constitution Act, 1982* “also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests”.⁴⁶⁶ If the Crown were required to wait until all Aboriginal claims have been settled by the courts or by way of agreements before implementing measures for reconciling Aboriginal rights with the Crown’s assertion of sovereignty, it would be remiss in its obligations. To paraphrase Cory, J. in *Nikal*,⁴⁶⁷ it is for the Crown— both federal and provincial—to determine how Aboriginal rights interact with the individual and collective rights of the population as a whole.

[447] This interpretation of the honour of the Crown is compatible with the power of governments, as recognized numerous times by the Supreme Court, to regulate Aboriginal rights, provided such regulation is in keeping with s. 35 of the *Constitution Act, 1982*. Indeed, this section does not undermine the government’s legislative authority to interfere with the rights there recognized, but limits that authority by imposing a justificatory test.⁴⁶⁸ Moreover, there is no doubt that governments can enact legislation to give effect to Aboriginal rights.

[448] That said, if a legislature can regulate and delineate Aboriginal rights, it goes without saying that it can define the scope of those rights, including by setting out a framework within which those rights can be exercised efficiently. This does not mean that, in doing so, the legislature is amending the Constitution or usurping the role of the judiciary, because, ultimately, it is the courts that will determine if the legislative framework abides by the promise of s. 35 of the *Constitution Act, 1982*. The fact that the legislature does not have the last word on the definition and scope of Aboriginal rights does not mean that it is not entitled to contribute thereto, insofar as its contribution respects the rights of Aboriginal peoples. This approach achieves the reconciliation objective that is the purpose of s. 35 much more readily than a multitude of legal proceedings. As

⁴⁶⁵ *Haida Nation*, para. 25. See also: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paras. 35-36, 38 and 40.

⁴⁶⁶ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, para. 78.

⁴⁶⁷ *Nikal*, para. 92.

⁴⁶⁸ *Sparrow*, p. 1109.

Karakatsanis and Brown, JJ. stated in *Clyde River (Hamlet)*,⁴⁶⁹ “[t]rue reconciliation is rarely, if ever, achieved in courtrooms”.

[449] Although the Supreme Court favours agreements for achieving reconciliation, it is difficult to see why a statutory scheme that sets out the manner in which s. 35 rights are to be exercised could not be another tool available to governments to further the promise of that section.⁴⁷⁰ As the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission point out,⁴⁷¹ a legislative approach has advantages in many situations, particularly in the case of an Aboriginal right of self-government in a field of jurisdiction that is generic to all Aboriginal peoples.

[450] This does not in any way prevent the courts, as guardians of constitutional rights, from ruling definitively on those rights and their scope. In *Desautel*, Rowe, J. reiterated the role of the judiciary in this regard:

[84] This Court has to be mindful of its proper role in the vindication of Aboriginal rights. As this Court held in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, “the courts are guardians of the Constitution and of individuals’ rights under it”. The role of giving an authoritative interpretation of laws and of the Constitution belongs to the courts (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 808-9, no. X.11 and X.13).

[85] When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to “give effect to that national commitment” (*R. v. Marshall*, [1999] 3 S.C.R. 533 (“*Marshall No. 2*”), at para. 45). As the majority of this Court recently confirmed in *Uashaunnuat*, at para. 24:

Although s. 35(1) recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”, defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation.
[Emphasis added [by Rowe, J.], citation omitted.]

[86] In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. It is for Aboriginal peoples, however, to define

⁴⁶⁹ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para. 24.

⁴⁷⁰ See, in this regard: Ghislain Otis, “La protection constitutionnelle de la pluralité juridique : le cas de ‘l’adoption coutumière’ autochtone au Québec”, (2011) 41:2 *R.G.D.* 567, pp. 587-590.

⁴⁷¹ Argument in the brief of the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission, para. 65.

themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.⁴⁷²

[Emphasis added, unless otherwise stated]

[451] The role of the courts as the final arbiter results from the constitutional supremacy established in s. 52(1) of the *Constitution Act, 1982*.⁴⁷³ It is the courts that have the final say in determining whether or not a legal rule is consistent with the provisions of the Canadian Constitution. This means that it is ultimately up to the courts to determine the existence, scope and effects of the Aboriginal rights recognized and affirmed by the Constitution. To conclude otherwise would be tantamount to allowing the legislature to constrain the courts in their role of interpreting and applying the provisions of the Constitution. In short, while legislatures can take initiatives and enact laws accordingly, it is ultimately for the judiciary to decide the constitutionality of such initiatives, because those initiatives must respect the architecture of the Constitution, including the rights set out therein and the division of powers. This is how Canadian constitutional law operates.

[452] It seems to us, therefore, that in order to properly answer the reference question submitted by the Government of Quebec, the Court must first determine whether the premise for Part II of the *Act* is valid, namely, whether the right of Aboriginal peoples to regulate child and family services is indeed recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

[453] If s. 35 does not include this right, then Part II of the *Act* must be declared unconstitutional as a whole, because the premise on which it is based is invalid. If, however, this right is indeed entrenched in s. 35, the Court must then determine whether the framework established by the *Act* for circumscribing its exercise is constitutionally valid.

(d) Is the premise of the Act to the effect that the right of Aboriginal peoples to self-government is recognized and affirmed by s. 35 of the Constitution Act, 1982 and includes jurisdiction in relation to child and family services incorrect?

[454] This question raises four sub-questions: (1) Are the Crown's proclamation of sovereignty over the territory of Canada and the division of powers set out in the *Constitution Act, 1867* compatible with the recognition of the right to Aboriginal self-government? (2) If so, does the expression "existing aboriginal rights" in s. 35 of the *Constitution Act, 1982* include the right of Aboriginal peoples to regulate child and family services? (3) If so, is this a "generic" right, or is it a specific right which varies from one Aboriginal people to another according to the particular circumstances of each one and

⁴⁷² *Desautel*, paras. 84-86.

⁴⁷³ *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433, para. 89.

which must therefore be determined on a case-by-case basis? (4) Lastly, can this right be regulated by governments, and if so, how?

The sovereignty of the Crown and the division of powers

[455] As the sharply divergent reasons of the justices of the British Columbia Court of Appeal in *Delgamuukw* demonstrate, one of the first obstacles to the recognition of the right to Aboriginal self-government is the notion that such a right is fundamentally incompatible with Canadian sovereignty. Moreover, the principle of the exhaustiveness of the distribution of powers between federal and provincial governments is an additional obstacle to the recognition of such a right.

[456] Taking into account the historical relationship between the Crown and the Aboriginal peoples of Canada, Canadian jurisprudence teaches us, however, that the mere assertion by the Crown of its sovereignty over the Canadian territory is not an impediment to the recognition of Aboriginal rights. In light of this Canadian jurisprudence, it is difficult to argue that the right to Aboriginal self-government, if it is indeed an Aboriginal right, did not also survive the assertion of Crown sovereignty.

[457] Largely echoing the American trilogy of cases decided by Marshall, C.J., the Supreme Court of Canada did not hesitate to conclude in *Mitchell* that Aboriginal peoples lived in “organized, distinctive societies with their own social and political structures”,⁴⁷⁴ and that “aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them”.⁴⁷⁵

[458] To the extent that the right of self-government can be shown to be an Aboriginal right, those elements of that right that are not inconsistent with the assertion of sovereignty by the Crown, that have not been surrendered or extinguished by treaty, or that have not been extinguished by the government, can be recognized by the common law and, since 1982, are also recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

[459] The issue, then, is not so much whether the right of Aboriginal peoples to govern themselves survived the Crown’s proclamation of sovereignty, but whether that right was subsequently extinguished. Moreover, is this right fundamentally inconsistent with the

⁴⁷⁴ *Mitchell*, para. 9. See also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 [“*Mikisew Cree First Nation*”], para. 88; *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, para. 45; *Côté*, para. 48; *Van der Peet*, paras. 31, 40, 43 and 44; *Sparrow*, p. 1094; *Sioui*, pp. 1052-1053; *Calder*, pp. 328 and 375-376.

⁴⁷⁵ *Mitchell*, para. 10. See also: *Wewaykum Indian Band*, para. 75; *Côté*, paras. 51-54; *Van der Peet*, para. 37, citing *Worcester v. Georgia* (1832), 31 U.S. (6 Pet.) 515; *Roberts v. Canada*, [1989] 1 S.C.R. 322, p. 340; *Guerin*, pp. 377-378; *Calder*, pp. 382-383 and 387-389.

Constitution Act, 1867, which sets out the division of powers, and with the constitutional architecture underlying that division?

[460] Although prior to the coming into force of s. 35 of the *Constitution Act, 1982*, the Crown had the power to extinguish an Aboriginal right without the consent of Aboriginal peoples, it could only do so through “clear and plain” language.⁴⁷⁶ Moreover, as the Supreme Court of Canada concluded in *Delgamuukw*, after Confederation, an Aboriginal right could be extinguished without Aboriginal consent only by clear and plain legislation enacted by the Canadian Parliament, not by provincial legislation.⁴⁷⁷ In *Watt*, Strayer, J. summarized the state of the law as follows:

[13] However, the Motions Judge determined this matter in 1994 and since that time the jurisprudence, particularly that of the Supreme Court of Canada, has considerably evolved in the direction of narrowing the concept of extinguishment of Aboriginal rights. I understand that jurisprudence, at least as of this date, to mean the following:

1. Parliament or the government must have demonstrated a “clear and plain intention” to extinguish the right in question. To this end it must have been able to identify the right and to determine whether it should be extinguished. A general regulatory scheme which may affect the exercise of Aboriginal rights does not constitute their extinguishment. As was said in *R. v. Gladstone*:

. . . the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.

2. The burden of proof to establish the existence of such a right is of course on he who asserts it, although he may not be subject to the same standards of proof expected of other claimants in the Court. The mere fact that the relevant sovereign power did not recognize the existence of such a right is not enough to negate its existence.

3. If the existence of a specific Aboriginal right is established by these rules, then legislation necessarily inconsistent with that right is not, *per se*, enough to establish extinguishment nor is mere regulation of the right.⁴⁷⁸

[References omitted]

⁴⁷⁶ *Delgamuukw*, para. 183; *Gladstone*, paras. 34-36; *Sparrow*, p. 1099; *Guerin*, p. 377; *Calder*, pp. 402-404; *Watt v. Liebelt*, [1999] 2 F.C.R. 455, para. 13 (FCA); *R. v. Jacob* (1998), [1999] 3 C.N.L.R. 239, 1998 CanLII 3988, paras. 107-109 (BC SC); Brian Slattery, “Understanding Aboriginal Rights”, (1987) 66:4 *Can. Bar. Rev.* 727, pp. 748-749 and 765-766.

⁴⁷⁷ *Delgamuukw*, paras. 173-183.

⁴⁷⁸ *Watt v. Liebelt*, [1999] 2 F.C.R. 455, para. 13 (FCA).

[461] None of the parties referred us to any pre-Confederation statutes or to any post-Confederation federal legislation whose purpose and effect were to clearly and plainly extinguish the right to Aboriginal self-government, including the right of Aboriginal peoples to regulate their child and family services. We will return to this point later.

[462] Let us now consider the division of powers argument.

[463] When it came into force, the *Constitution Act, 1867*—then known as the *British North America Act* (“*BNA Act*”)—did not give Parliament and the provincial legislatures exclusive jurisdiction over all of the law applicable in Canada.⁴⁷⁹ Not only was the Imperial Crown explicitly given the right to reserve and disallow the laws passed by Parliament,⁴⁸⁰ but Imperial laws also continued to apply in Canada, albeit under certain conditions.⁴⁸¹ The Imperial royal prerogative also continued to generate law in certain areas, such as international relations, including international treaties.⁴⁸² In addition, British common law, including the common law relating to Aboriginal law, continued to apply in Canada after the coming into force of the *BNA Act*.⁴⁸³

[464] Although Canada’s legal detachment from Great Britain was subsequently achieved little by little, it was not until the *Statute of Westminster*⁴⁸⁴ in 1931 and, finally, the *Constitution Act, 1982*, that it was completed. It is therefore inaccurate and anachronistic to argue that the division of powers under the *BNA Act* precluded any other source of law and thereby excluded the recognition of Aboriginal self-government as an Aboriginal right. Canada’s constitutional history is much more nuanced than that.

[465] To the extent that the rights of Aboriginal peoples were incorporated into Canadian common law upon the Crown’s proclamation of sovereignty—as the Supreme Court of Canada has unambiguously affirmed—nothing in the *BNA Act* leads to the conclusion that the Imperial Parliament intended to set aside these rights within the British colony of Canada. Rather, the opposite intention is apparent, since the provisions of this Imperial statute did not set aside the British common law, including the common law applicable to the rights of Aboriginal peoples.

⁴⁷⁹ *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, particularly at pp. 794, 797 and 799-801; *Reference Re: Offshore Mineral Rights*, [1967] S.C.R. 792, pp. 814-816; *Croft v. Dunphy*, [1933] A.C. 156 (PC); *Nadan v. The King*, [1926] A.C. 482, p. 492 (PC); Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision 1 by Wade K. Wright, July 2021), pp. 3-1 to 3-3; Brian Slattery, “The Independence of Canada”, (1983) 5 *S.C.L.R.* 369, pp. 392-394.

⁴⁸⁰ *Constitution Act, 1867*, ss. 55-57.

⁴⁸¹ *Id.*, s. 129; *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63.

⁴⁸² Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision 1 by Wade K. Wright, July 2021), pp. 1-25 to 1-28.

⁴⁸³ Brian Slattery, “Understanding Aboriginal Rights”, (1987) 66:4 *Can. Bar. Rev.* 727, p. 739. See also, to the same effect: *Desautel*, para. 68; *Haïda Nation*, paras. 57-59; *Calder*, pp. 401-404.

⁴⁸⁴ *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. V, c. 4, reprinted in R.S.C. 1985, App. II, No. 27.

[466] If the right to self-government is recognized as an Aboriginal right, it is difficult to see how the division of powers between Parliament and the provincial legislatures could have rendered this right completely inoperative. On the contrary, the historical relationship between the Crown and Aboriginal peoples, both before and after the *Constitution Act, 1867*, establishes that Aboriginal peoples have always been recognized as peoples—and not merely as subjects⁴⁸⁵—and that they continue to be governed by their own laws and customs in those areas of jurisdiction that do not conflict with the Crown’s assertion of sovereignty, that have not been voluntarily surrendered by treaty, or that have not been extinguished by the government. At least that is what the Supreme Court of Canada has concluded, relying in this regard on the American trilogy of cases decided by Marshall. C.J.⁴⁸⁶

[467] Consequently, the division of powers did not extinguish the right of Aboriginal peoples to govern themselves, at least as regards the regulation of child and family services, provided such right can be recognized as an Aboriginal right.

The right of Aboriginal self-government and the regulation of child and family services

[468] We turn now to the second sub-question, namely, whether the right to self-government in the area of child and family services is an existing Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*.

[469] This calls for a clarification and one word of caution. For the purposes of this reference, it is neither necessary nor helpful to address all the areas of jurisdiction that could give rise to Aboriginal regulation under the right of Aboriginal self-government. While said right may include one particular area of jurisdiction, this does not necessarily mean that it extends to another area of jurisdiction. Indeed, it is possible for such a right to be incompatible with Crown sovereignty in one area of jurisdiction—military matters, for example, as Binnie, J. concluded in *Mitchell*⁴⁸⁷—while being compatible in another—such as Aboriginal hunting and fishing rights⁴⁸⁸ or Aboriginal languages.⁴⁸⁹ It is also

⁴⁸⁵ In fact, Canada continued to make treaties with Aboriginal peoples even after 1867, thereby recognizing their status as self-governing peoples.

⁴⁸⁶ *Mitchell*, paras. 9-10. See also: *Wewaykum Indian Band*, para. 75, citing, in particular, *Johnson v. M'Intosh* (1823), 21 U.S. (8 Wheat.) 543, pp. 573-574; *Van der Peet*, para. 37, citing *Worcester v. Georgia* (1832), 31 U.S. (6 Pet.) 515; *Guerin*, pp. 377-378, citing, in particular, *Johnson v. M'Intosh* (1823), 21 U.S. (8 Wheat.) 543 and *Worcester v. Georgia* (1832), 31 U.S. (6 Pet.) 515; *Calder*, pp. 382-383 and 387-389, which relies on the same two American judgments.

⁴⁸⁷ *Mitchell*, paras. 151-153.

⁴⁸⁸ *Nikal*, paras. 88-89 and 103-104. See also: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, paras. 30-33; *R. v. Marshall*, [1999] 3 S.C.R. 533, para. 17.

⁴⁸⁹ See: *Indigenous Languages Act*, S.C. 2019, c. 23.

possible that the exercise of this right in a particular area of jurisdiction was extinguished by valid federal legislation enacted before 1982.⁴⁹⁰

[470] The areas of jurisdiction covered by this right could therefore be very broad. Conversely, they could be very limited. In this reference, however, it is not the Court's role to decide this point. The only issue here is jurisdiction over child and family services. Beyond this specific area of jurisdiction, it is not appropriate for the Court to delineate the other areas of jurisdiction in which the right of self-government could be exercised by the Aboriginal peoples of Canada, nor the scope of those areas of jurisdiction or the manner in which that right could be exercised.

[471] The following analysis leads to the conclusion that the purposes of s. 35 of the *Constitution Act, 1982*, as well as the criteria established by the Supreme Court of Canada for recognizing an existing Aboriginal right, are entirely consistent with the recognition of the right of the Aboriginal peoples of Canada to regulate their own child and family services.

[472] The main purpose of s. 35 is reconciliation between Aboriginal peoples and Canadian society as a whole. In an oft-quoted paragraph from *Van der Peet*, Lamer, C.J. stated it clearly:

[31] More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.⁴⁹¹

[473] The Supreme Court has described s. 35 as “a commitment that must be given meaningful content, recognizing both the ancient occupation of land by Aboriginal peoples and the contribution of those peoples to the building of Canada”.⁴⁹² It has also stated that the purpose is “a mutually respectful long-term relationship”.⁴⁹³

[474] This reconciliation requires, among other things, “ensuring the continued existence of these particular aboriginal societies” and “provid[ing] cultural security and continuity for

⁴⁹⁰ *Delgamuukw*, para. 173.

⁴⁹¹ *Van der Peet*, para. 31. See also: *Desautel*, paras. 22, 26 and 31; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 207; *Haida Nation*, para. 26; *Mitchell*, para. 80.

⁴⁹² *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 21; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 82; *Sparrow*, p. 1108.

⁴⁹³ *Little Salmon/Carmacks First Nation*, para. 10.

the particular aboriginal society”.⁴⁹⁴ The criteria established by the Supreme Court for recognizing an Aboriginal right are strongly influenced by cultural considerations related to Aboriginal identity.

[475] In *Van der Peet*, Lamer, C.J. noted that Aboriginal rights “arise from the fact that aboriginal people are aboriginal”,⁴⁹⁵ and Binnie, J., in *Little Salmon/Carmacks First Nation*, pointed out that s. 35 represents a commitment by Canadians “to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal”.⁴⁹⁶ We would add that these rights are also rooted in the fact that Aboriginal peoples are peoples and that the commitment set out in s. 35 is also intended to protect them so that they can express themselves and flourish as peoples.

[476] In order to maintain their distinctiveness as peoples and ensure both their cultural security and continuity, Aboriginal peoples are in the best position to decide what measures are required to protect their children, ensure their well-being and pass on their distinctive cultural values. The ability to protect Aboriginal children and ensure their connection to the distinctive culture of their Aboriginal community is therefore an essential aspect of the survival of Aboriginal peoples as distinct peoples.

[477] It is Aboriginal *culture, values* and *identity* that form the basis of the distinctiveness of Aboriginal peoples. This culture, these values and this identity can hardly be communicated from one generation to the next if the main transmission link—the family environment—is severed. While caring for children within families is a characteristic of almost all human groups, the evidence shows that in the case of Aboriginal peoples, they were subjected to an organized and sustained attempt at cultural expropriation by weaning children from their families. In the not too distant past, governments literally ripped Aboriginal children from their families in order to cut them off from their culture in a misguided attempt to assimilate them, with all the individual and collective trauma that followed. In contemporary times, government providers of services to Aboriginal children and families, however well-intentioned they may have been, effectively perpetuated, often unconsciously, an ideology of erasing and devaluing Aboriginal culture, values and identity. It is within this factual and historical context that the issue of the right to self-government arises in this reference.

[478] The evidence submitted by the Attorney General of Canada and the interveners establishes the importance of child protection, child care and family practices to Aboriginal cultures.

⁴⁹⁴ *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, paras. 26 and 33.

⁴⁹⁵ *Van der Peet*, para. 19 [emphasis in the original].

⁴⁹⁶ *Little Salmon/Carmacks First Nation*, para. 33. See also: *Mitchell*, para. 164, citing Donna Greschner, “Aboriginal Women, the Constitution and Criminal Justice”, (1992) 26 (Special Edition) *U.B.C. L. Rev.* 338, p. 342.

[479] In her expert report, Val Napoleon describes several Aboriginal legal regimes dealing with children and families and concludes that, although they have been greatly affected and weakened by Canada's past colonialist and assimilationist policies, they survive to this day and Aboriginal communities are firmly committed to their revitalization:

Through the detailed examples from three Indigenous peoples in Canada, I find that the nurturing of families, their interaction with each other, and the care of children are central to the continued existence and thriving of Indigenous societies. It is within the iterative workings of the whole legal order that these central purposes are realised.

Each child is nested within such legal entities as her family, her lineage and such wider embracing groups as extended biological relations, nominal relations, father's lineages, spouse's lineages, and place-based communities. Specific laws govern all such relations such that each child has a network of obligations that together act to provide a secure place within each community and society.

The existence of Indigenous laws governing children and families should not come as a surprise. When one regards the centrality of families and children in Indigenous social, political, economic, and legal lives (and arguably in other societies), it is helpful to analogize from an observation made by Hadley Friedland, who wrote, "Because some people can become harmful or destructive to others, and because we are vulnerable beings, Hart is right to ask, "If there were not these rules [prohibiting violence, bodily harms and killing] then what point would there be for beings such as ourselves in having rules of *any other kind?*"" By analogy, if there were not laws to govern families and care of children, both central to the health and continuation of one's society, what point would there be in having rules of any other kind?

[...]

Across Canada, Indigenous peoples are developing and implementing, or have established various legal and political arrangements with the state for the care and protection of their children. Employing different approaches and methodologies, many of these initiatives draw on historic Indigenous legal orders, laws, institutions, and practices.

As the Gitksan, Cree, and Secwepemc examples provided here amply demonstrate, the families and the care of children are central to Indigenous societies. Expressed through their own societal structures and constructs, the Gitksan, Cree, and Secwepemc peoples all have developed laws, rights and obligations, legal processes and responses, and institutions that essentially form their governance to ensure their survival as peoples. However, the hard work of

rebuilding Indigenous legal orders must start from the reality of where Indigenous peoples are now without idealization.⁴⁹⁷

[Underlining added; italics in the original; references omitted]

[480] In her expert report, Christiane Guay explains the importance of Aboriginal values related to families and children and how these are intimately embedded in traditional Aboriginal practices:

[TRANSLATION]

It is primarily from this connection to the land and from the systems of thought that flow from it that it is possible to understand family practices and most of the choices that Aboriginal families make about raising children. No doubt, the way of life of Aboriginal families has changed profoundly in recent decades. However, it would be a mistake to believe that Aboriginal families necessarily evolve in the same direction as Western societies and that they adopt, for example, the same educational or conflict management methods as those found in the dominant society.

On the contrary, the results of our research with the Innu and those of other researchers such as Martin (2009), Bousquet (2005) and Poirier (2009) show that Aboriginal peoples in Quebec, as in the rest of Canada, are taking back control over their development by relying mainly on their systems of thought, without, however, turning their backs on what the modern world can offer (Guay, 2017). Thus, although Aboriginal families are changing and being influenced by elements of modernity, Aboriginal beliefs, traditions and values **persist** and **continue** to animate the lives of most Aboriginal families (Brant Castellano, 2002). It is these values that, in a concrete way, direct and guide the choices of Aboriginal parents in educating, caring for and even protecting their children (Guay, 2015; Guay, Ellington and Vollant, work in progress).⁴⁹⁸

[Bold in the original; underlining added]

[481] In its report, the *Royal Commission on Aboriginal Peoples* also noted that Aboriginal families are the foundational institution of Aboriginal peoples, and their preservation and revitalization are intimately tied to the development and survival of distinctive Aboriginal cultures:

Detailed presentations on the Aboriginal family were more likely to focus on evidence of distress and breakdown, except when the revitalization of culture and

⁴⁹⁷ Expert report from Val Napoleon, October 9, 2020, pp. 24-25 and 32.

⁴⁹⁸ Expert report from Christiane Guay, October 7, 2020, pp. 38-39.

the renewal of community were at issue. Then, family appeared repeatedly as part of a formula for transforming reality, where individual, family, and community are the three strands that, when woven together, will strengthen cultures and restore Aboriginal people to their former dignity. We saw that sometimes individuals undergo healing and strengthen families, while sometimes families nurture healthier individuals, but families consistently occupied the central position between individual and community. We heard that land reform, self-government and social institutions that deal fairly are all important, but it was the vision of restoring the vitality of individuals, families and communities *in concert* that mobilizes the energy of the vast majority of Aboriginal people who spoke to us.⁴⁹⁹

[Underlining added; italics in the original]

[482] Drawing on the report of the *Truth and Reconciliation Commission* and that of the *Viens Commission*, expert Christiane Guay's report also describes how Aboriginal values are largely ignored, if not dismissed, by government child and family services systems:

[TRANSLATION]

Child welfare laws are not neutral. Indeed, they are based on Western conceptions of family that leave little room for different cultural concepts (Guay and Ellington, 2019a).

[...]

Taken together, these aspects result in decisions that, in many cases (1) perpetuate the ideology of assimilating and erasing Aboriginal peoples (QNW, 2015); (2) continue to result in loss of language and identity (TRC, 2015, CERP, 2019); and (3) contribute to exacerbating social problems within Aboriginal communities (Guay, 2015).

In short, even with the best of intentions, service providers, whether non-Aboriginal or Aboriginal, must apply a law whose founding principles are at odds with the principles and values underlying the Aboriginal ways of child rearing, conflict resolution and healing. Any attempt to adapt child welfare laws to make them culturally sensitive and to adjust practices so as to make them compatible with Aboriginal cultures will not address the fundamental problem. Current child welfare laws and systems are too steeped in non-Aboriginal culture for peripheral adjustments to be sufficient (CERP, 2019; Guay and Ellington, 2019a).

This is why the Truth and Reconciliation Commission stated that the application of child welfare systems to Aboriginal peoples only perpetuates the assimilation

⁴⁹⁹ Royal Commission on Aboriginal Peoples, *Report*, vol. 3, pp. 9-11.

begun by the residential schools (TRC, 2015). Similarly, in his report, Justice Viens wrote: “I have no doubt that, for Indigenous peoples, the youth protection system has reached its limit. [...] I believe that, by continuing to impose or develop policies that ignore the will of Indigenous people, the government is helping to keep communities fragile and merely delaying an internal transformation that is already well under way.” (CERP, 2019, pp. 487, 491).⁵⁰⁰

[483] Christiane Guay concludes that regulation of this field of jurisdiction by Aboriginal peoples themselves is necessary for ensuring the reconciliation process:

[TRANSLATION]

In short, self-determination in matters of child welfare allows Aboriginal peoples to build societal projects in which social services are no longer seen as an exogenous institution, but instead as the product of the culture itself (Guay, 2017). This means recognizing the capacity of Aboriginal peoples to develop laws and schemes that are not a carbon copy of provincial models. It is also about allowing different Aboriginal groups to define laws and schemes that reflect their respective knowledge systems. Given the significant cultural differences between Aboriginal groups, a uniform law and scheme is not an option.

Over the last few decades, several reports, commissions of inquiry and regional consultations have identified the issues experienced by Aboriginal communities with respect to child welfare systems and have all reiterated the need to recognize the jurisdiction of Aboriginal nations in child welfare matters and to entrust them with the complete management of these services (FNQLHSSC, 1998; RCAP, 1996; TRC, 2015, CERP, 2019). In the most recent inquiry on the subject, Commissioner Viens pointed out the following in his report:

Based on the evidence before the Commission, a fundamental change is needed. The right of Quebec’s Aboriginal peoples to develop their own child welfare system must be recognized and we must accept that this system should not be modelled on the current Quebec system. Current actors in the Quebec system, including the DYPs, CISSS/CIUSSS and MSSS, must relinquish their authority to judge the capabilities of Aboriginal peoples and the adequacy of Aboriginal child welfare systems—just as those in charge of the Ontario child welfare system have no business judging the Quebec system.

In short, given the continuing deleterious effects within Aboriginal communities, the option of legislating, developing and administering their own child welfare services appears to hold the most promise for ensuring the best interests and well-being of

⁵⁰⁰ Expert report from Christiane Guay, October 7, 2020, pp. 50 and 62-63.

Aboriginal children and their families. For the majority of Aboriginal groups, it is the basis for the reconciliation process.⁵⁰¹

[484] Moreover, as described above, Canadian courts have recognized Aboriginal customary law in matters relating to Aboriginal conjugal relationships, family and children, including in *Connolly v. Woolrich*⁵⁰², confirmed by this Court in *Johnstone c. Connolly*,⁵⁰³ and in the British Columbia Court of Appeal judgment in *Casimel*.⁵⁰⁴ This customary law is also recognized in legislation,⁵⁰⁵ notably in the *Civil Code of Québec* provisions on adoption⁵⁰⁶ and in the *Youth Protection Act*.⁵⁰⁷ The existence of these normative systems, therefore, cannot be denied. The fact that they have been recognized by the courts and in legislation shows that they have not been extinguished and still maintain their vigour.

[485] Taken together, this leads to the conclusion that the regulation of child and family services comes very close to being “an element of a practice, custom or tradition integral to the distinctive culture” of the Aboriginal peoples of Canada within the meaning of *Van der Peet* and *Pamajewon*.⁵⁰⁸ Indeed, the regulation of these services is intimately tied to the flourishing and cultural survival of Aboriginal peoples as distinct peoples.

Is this a generic right or a specific right?

[486] As with Aboriginal title, the *Van der Peet* test and factors should be adapted to reflect the particular nature of the right to self-government allowing for the regulation of child and family services. By its very nature, this right pertains to Aboriginal peoples as peoples. As we have just seen, this is a right which is intimately tied to the cultural survival of Aboriginal peoples, but is not necessarily based on the practice of distinctive cultural activities in the strict sense. As with Aboriginal title, the factors to be considered in recognizing the right of Aboriginal peoples to regulate child and family services must therefore be tailored to take into account the particular characteristics of that right.

[487] Like Aboriginal title, one of these necessary adaptations entails recognizing the generic nature of the right to self-government in relation to child and family services, that is, the generic right to regulate those services. This is so because this jurisdiction is essential to the cultural security and survival of each Aboriginal people. The tragic history

⁵⁰¹ *Id.*, pp. 69-70.

⁵⁰² (1867), 17 R.J.R.Q. 75, [1867] Q.J. No. 1 (Sup. Ct.).

⁵⁰³ (1869), 17 R.J.R.Q. 266, [1869] J.Q. No. 1 (KB).

⁵⁰⁴ *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720, 1993 CanLII 1258 (BC CA).

⁵⁰⁵ *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1, s. 2(1), definition of “customary care”, and s. 80; *Child and Family Services Act*, S.Y. 2008, c. 1, s. 134; *Adoption Act*, R.S.B.C. 1996, c. 5, s. 46(1); *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26, s. 2(1); *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 78A(1).

⁵⁰⁶ Art. 543.1 C.C.Q.

⁵⁰⁷ Section 2.4(5)(c).

⁵⁰⁸ *Pamajewon*, paras. 24-25; *Van der Peet*, para. 46.

of colonial policies that led to residential schools and other assimilationist measures targeting Aboriginal children is a telling demonstration of this, as is the disproportionate number of Aboriginal children currently living in protective care compared to other Canadian cultural communities.

[488] Like the right to make treaties, to enjoy Aboriginal traditions, or to be connected to the Crown under a fiduciary relationship, the right to regulate child and family services extends to all Aboriginal peoples, given its purpose. Professor Slattery explains generic rights as follows:

Generic rights are not only *uniform* in character, they are also *universal* in distribution. They make up a set of fundamental rights presumptively held by all Aboriginal groups in Canada. There is no need to prove in each case that a group has the right to conclude treaties with the Crown, to enjoy a customary legal system, to benefit from the honour of the Crown, to occupy its ancestral territory, to maintain the central attributes of its culture, or to govern itself under the Crown's protection. It is presumed that every Aboriginal group in Canada has these fundamental rights, in the absence of valid legislation or treaty stipulations to the contrary. This situation is hardly surprising, given the uniform application of the doctrine of Aboriginal rights throughout the various territories that make up Canada, regardless of their precise historical origins or previous positions as French or English colonies.

The generic rights held by Aboriginal peoples resemble the set of constitutional rights vested in the provinces under the general provisions of the *Constitution Act, 1867*. Just as every province presumptively enjoys the same array of government powers, regardless of its size, population, wealth, resources, or historical circumstances, so also every Aboriginal group, large or small, presumptively enjoys the same range of generic Aboriginal rights. [...] ⁵⁰⁹

[Emphasis in the original; reference omitted]

[489] As we have seen, s. 35 of the *Constitution Act, 1982* establishes legal guarantees that are intrinsically tied to the cultural continuity of Aboriginal peoples. Since the

⁵⁰⁹ Brian Slattery, "A Taxonomy of Aboriginal Rights", in Hamar Foster, Heather Raven and Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, University of British Columbia Press, 2007, 111, p. 123. See also, to the same effect: Senwung Luk, "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada", (2009-2010) 41:1 *Ottawa L.R.* 101, particularly at pp. 126-127; Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government", (2003) 22 *Windsor Y.B. Access Just.* 329, p. 359; Catherine Bell and Michael Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation", in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Vancouver, University of British Columbia Press, 1997, 38, pp. 64-74.

regulation of child and family services is intimately tied—if not essential—to the cultural continuity and survival of Aboriginal peoples as distinct peoples, whether as a whole or taken individually, it follows that the right to regulate those services belongs to all Aboriginal peoples, as well as to each of them. This aspect is central to the cultural security and survival of every Aboriginal people.

[490] Moreover, although Aboriginal child and family services have been heavily regulated in the past by governments, this does not mean that such non-Aboriginal regulation has extinguished the right of Aboriginal peoples to regulate these services themselves, nor does it mean that this right cannot be reaffirmed in a contemporary form. In this regard, the remarks of Dickson, C.J. and La Forest, J. in *Sparrow* are particularly relevant:

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. [...]

As noted by Blair J.A., academic commentary lends support to the conclusion that “existing” means “unextinguished” rather than exercisable at a certain time in history.

[...]

Far from being defined according to the regulatory scheme in place in 1982, the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery’s expression, in “Understanding Aboriginal Rights,” *supra*, at p. 782, the word “existing” suggests that those rights are “affirmed in a contemporary form rather than in their primeval simplicity and vigour”. Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate “frozen rights” must be rejected.⁵¹⁰

[491] The Supreme Court has reiterated that regulation of an Aboriginal right, however narrow and prohibitive, is not sufficient to extinguish it.⁵¹¹ Parliament’s conduct must reveal a clear and plain intention to extinguish the right.⁵¹² The standard is “quite high”.⁵¹³ Parliament, however, has never passed any legislation related to child and family services in an Aboriginal context. The federal government’s assimilationist policies in the 19th and 20th centuries, including the residential school system, were certainly significant

⁵¹⁰ *Sparrow*, pp. 1091-1093. See also: *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, paras. 49-51; *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, paras. 23 and 48-49; *Van der Peet*, paras. 54 and 64-65.

⁵¹¹ *Gladstone*, para. 34. See also the dissenting reasons of L’Heureux-Dubé, J. in: *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, paras. 76-79.

⁵¹² *Sparrow*, p. 1099.

⁵¹³ *Delgamuukw*, para. 180.

impediments to the exercise of the right of Aboriginal self-government in relation to child and family services. Be that as it may, Parliament never officially endorsed these policies. There is no legislation that clearly and plainly states Parliament's intention to extinguish this right. Moreover, as noted above, it cannot be argued that the right of Aboriginal self-government in relation to child welfare services was extinguished as a result of the refusal of governments to recognize this right.⁵¹⁴ As Lamer, C.J. noted in *Gladstone*, "the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right".⁵¹⁵

[492] In any event, as Rowe, J. seems to have suggested in *Desautel*, it would be contrary to the purpose of s. 35 to conclude that an Aboriginal right can be extinguished through non-use if the fact it could not be exercised resulted from assimilationist policies that impeded that exercise. This would be tantamount to perpetuating "the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies".⁵¹⁶

[493] Lastly, unlike the regulation of military activities discussed by Binnie, J. in *Mitchell*, it cannot seriously be argued that Aboriginal regulation of their own child and family services would pose an existential threat to Canadian sovereignty or to the Canadian legal order, or that it would be incompatible with either of those.

[494] It follows that the regulation of child and family services is an existing Aboriginal right for purposes of s. 35 of the *Constitution Act, 1982* and that it is a generic right that extends to all Aboriginal peoples.

The regulation of this right

[495] As with any other Aboriginal right, s. 35 of the *Constitution Act, 1982* prevents Parliament and the provincial legislatures from interfering with the implementation of the Aboriginal right to regulate child and family services, unless there are substantial and compelling reasons to do so. On this subject, in *Sparrow*, Dickson, C.J. stated that "[t]he nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1)".⁵¹⁷ It follows that "[t]he government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)".⁵¹⁸ This justification is guided by rules developed by the Supreme Court of Canada that govern the reconciliation

⁵¹⁴ *Id.*, para. 183; *Gladstone*, paras. 34-36; *Sparrow*, p. 1099; *Watt v. Liebelt*, [1999] 2 F.C.R. 455, para. 13 (FCA).

⁵¹⁵ *Gladstone*, para. 36.

⁵¹⁶ *Côté*, para. 53 [emphasis added], cited in: *Desautel*, para. 64.

⁵¹⁷ *Sparrow*, p. 1101 [emphasis in the original].

⁵¹⁸ *Id.*, p. 1110. See also: *Tsilhqot'in Nation*, paras. 13 and 18; *R. v. Adams*, [1996] 3 S.C.R. 101, para. 56; *R. v. Badger*, [1996] 1 S.C.R. 771, para. 74; *Van der Peet*, para. 28 *in fine*.

of Aboriginal rights and interests with those of society as a whole. These rules are at the very heart of the purpose of s. 35. In the context of the right to Aboriginal self-government in relation to child and family services, those rules may be expressed as follows.

[496] The first step is to determine whether there is an actual conflict between Aboriginal and government legislation.⁵¹⁹ In many cases, it is quite possible that Aboriginal legislation and federal or provincial legislation will be complementary and work together. Thus, Aboriginal legislation may adapt or temper the application of federal or provincial legislation to the Aboriginal context rather than contradict it. It may also guide how administrative or judicial discretion set out in federal or provincial legislation is to be exercised.⁵²⁰ In such cases, the Aboriginal legislation and the federal or provincial legislation may complement, rather than contradict, each other.

[497] Where there is a real conflict between Aboriginal and federal or provincial legislation, one must conclude that there is an infringement of the Aboriginal right. Since the Aboriginal right is recognized and affirmed by s. 35, the Aboriginal legislation must prevail. Concluding otherwise would render s. 35 meaningless. Thus, in principle, Aboriginal legislation prevails over incompatible federal or provincial legislation, unless the government concerned can establish that the infringement is justified.

[498] In such a case, the government must demonstrate that it discharged its procedural duty to consult, that the infringement is justified by a compelling and substantial public purpose, and that the infringement is consistent with the Crown's fiduciary obligation to the Aboriginal peoples concerned.⁵²¹

[499] The duty to consult is a procedural duty that flows from the honour of the Crown.⁵²² Where the Crown, whether federal or provincial, becomes aware of Aboriginal child and family services legislation, or the intention of an Indigenous governing body to enact such legislation—as provided by the notice and discussion mechanisms set out in ss. 20(1) and (2) of the *Act*—the Crown then has a duty to consult and accommodate in order to find the appropriate *modus vivendi* to ensure that the Aboriginal legislation can be implemented in harmony with its own legislation.

[500] If the incompatibility between the Aboriginal legislation and that of the federal or provincial government concerned cannot be resolved by accommodation following good

⁵¹⁹ *Côté*, paras. 73-75; *Sparrow*, pp. 1111-1113.

⁵²⁰ *R. v. Marshall*, [1999] 3 S.C.R. 456, paras. 63-64; *Côté*, paras. 76-80; *R. v. Adams*, [1996] 3 S.C.R. 101, paras. 53-54.

⁵²¹ *Tsilhqot'in Nation*, para. 77. See also: *R. v. Marshall*, [1999] 3 S.C.R. 533, paras. 40-45; *Delgamuukw*, paras. 165-169; *Nikal*, para. 110.

⁵²² *Mikisew Cree First Nation*, paras. 20-27; *Little Salmon/Carmacks First Nation*, paras. 38, 52 and 61; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paras. 51 and 57; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, paras. 21-22, 24-25 and 42; *Haïda Nation*, paras. 16-25.

faith consultation, then the Aboriginal legislation must prevail, unless the government concerned, acting within its sphere of jurisdiction, can demonstrate that its own legislation, while incompatible with that of the Indigenous governing body, pursues a compelling and substantial public objective and respects the honour of the Crown, such that it must override the Aboriginal legislation in whole or in part.

[501] This is a stringent test, as we will now explain.

[502] The government concerned must demonstrate that it is pursuing a compelling and substantial public objective that is consistent with the goal of reconciliation underlying s. 35 and that takes into account both Aboriginal interests and the interests of society as a whole.⁵²³ It must then establish that the interference with the Aboriginal legislation is in keeping with the Crown's fiduciary obligation to Aboriginal peoples.

[503] Thus, the government concerned must act in a manner that respects the right to Aboriginal self-government in relation to child and family services and must take into account that this right is intended to preserve and maintain the distinctive cultures of Aboriginal peoples and their survival as distinctive communities.

[504] Moreover, the fiduciary duty requires that the government's actions in achieving the stated compelling and substantial public objective be proportionate. The government, therefore, can override Aboriginal legislation only to the extent strictly required to achieve this purpose. The principles of minimal and proportionate impairment must be respected.

[505] Consequently, when reconciling federal and provincial legislation with Aboriginal legislation enacted pursuant to the right of self-government, federal and provincial governments must act within the limits imposed by s. 35 of the *Constitution Act, 1982*. It is this test, therefore, that must be used when considering the application of federal or provincial laws or regulations that are incompatible with Aboriginal child and family services legislation, the objective being to protect the Aboriginal right of self-government in this area of jurisdiction, while at the same time reconciling the Aboriginal interests this right is intended to protect with the interests of society as a whole.

The UN Declaration

[506] The *Act's* preamble and its s. 8(c) both refer expressly to the *UN Declaration*. The *UN Declaration* recognizes that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs:

⁵²³ *Tsilhqot'in Nation*, para. 82; *Delgamuukw*, para. 186.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

[507] While the *UN Declaration* does not impose binding international law obligations on Canada,⁵²⁴ it is nevertheless a universal international human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law. The preamble and s. 4(a) of the *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* state this clearly with respect to federal matters:⁵²⁵

Preamble

[...]

Whereas the Declaration is affirmed as a source for the interpretation of Canadian law;

[...]

Préambule

Attendu :

[...]

qu'il y a lieu de confirmer que la Déclaration est une source d'interprétation du droit canadien;

[...]

⁵²⁴ The proclamation by the United Nations General Assembly states that its text is a “standard of achievement to be pursued”: “*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect” [emphasis in the original;].

⁵²⁵ S.C. 2021, c. 14.

4 The purposes of this Act are to

- (a)** affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
- (b)** provide a framework for the Government of Canada's implementation of the Declaration.

4 La présente loi a pour objet :

- a)** de confirmer que la Déclaration constitue un instrument international universel en matière de droits de la personne qui trouve application en droit canadien;
- b)** d'encadrer la mise en œuvre de la Déclaration par le gouvernement du Canada.

[508] In *R. v. Hape*⁵²⁶, LeBel, J. addressed the presumption of conformity with international principles, reiterating the well-established rule of interpretation that legislation is presumed to conform to international law and to Canada's international obligations, unless the legislature's intention clearly compels otherwise.⁵²⁷ The presumption extends to the *Canadian Charter* where its wording is capable of supporting such a construction.⁵²⁸

[509] There is no reason for not extending this presumption to s. 35 of the *Constitution Act, 1982*, given that it pertains primarily to the protection of the fundamental rights of Aboriginal peoples.

[510] As Brown and Rowe, JJ. recently pointed out, however, these international norms—particularly when non-binding⁵²⁹—usually play a limited role in constitutional interpretation, by supporting or confirming the result reached by a court through purposive interpretation,⁵³⁰ the reason for such limitation being the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty.⁵³¹ Binding international instruments ratified by Canada necessarily carry more weight in the analysis than non-binding instruments.⁵³²

[511] How is this applicable to the matter at hand?

⁵²⁶ 2007 SCC 26, [2007] 2 S.C.R. 292, para. 53.

⁵²⁷ *Ibid.*

⁵²⁸ *Id.*, para. 56. See also: *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, paras. 31-36; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, p. 349.

⁵²⁹ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, paras. 35-36.

⁵³⁰ *Id.*, para. 22.

⁵³¹ *Id.*, para. 23.

⁵³² *Id.*, para. 38.

[512] As noted above, the *UN Declaration*—which is non-binding internationally, but has been implemented as part of the federal normative order through the *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*—states that Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs.⁵³³ It adds that Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.⁵³⁴ It specifies that Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of that community or nation.⁵³⁵ Moreover, it states that Indigenous peoples have the right to maintain and develop their political, economic and social systems and institutions.⁵³⁶

[513] Construing s. 35 of the *Constitution Act, 1982* as including, within the existing Aboriginal rights recognized and affirmed by that section, the right of Aboriginal peoples to regulate child and family services seems entirely consistent with the principles set out in the *UN Declaration*. This bolsters and confirms the correctness of such an interpretation.

(e) Is the framework established by the Act for delineating the exercise of the right of Aboriginal peoples to regulate child and family services constitutionally valid?

[514] As we have just concluded, s. 35 of the *Constitution Act, 1982* recognizes and affirms that the right of Aboriginal peoples to regulate their child and family services is an Aboriginal right. Thus, by stating in s. 18 of the *Act*, which flows from s. 8(a), that “[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority”, Parliament has not created a new constitutional right, but has merely noted the existence of such a right within the existing constitutional architecture of Canada. It follows that the premise on which Part II of the *Act* is based is sound. The Court, however, must ascertain whether the framework established by the *Act* for delineating the exercise of that right is also constitutional.

[515] Before doing so, however, it should be noted that the declaratory approach taken by Parliament in the *Act* is uncommon, if not unusual. Indeed, it is rare that legislation has as its purpose to set out the scope of a constitutional provision. This admittedly raises some questions, particularly with respect to the division of powers between the legislative and judicial branches. Be that as it may, for the reasons set out above, the *Act* should not be invalidated based on this ground alone, especially since the context in which it was

⁵³³ *UN Declaration*, art. 4.

⁵³⁴ *Id.*, art. 8(1).

⁵³⁵ *Id.*, art. 9.

⁵³⁶ *Id.*, art. 20(1).

enacted—the affirmation of the right of the Aboriginal peoples to regulate their child and family services—is particularly suited to federal legislative action.

[516] In order to determine whether the framework established by the *Act* for delineating the exercise of the right set out therein is constitutional, the Court must consider three aspects of the *Act*. The first concerns the limits set by the *Act* for the exercise of the right in question; the second, the provision of the *Act* which states that Aboriginal legislation has the force law as federal law; and the third, the principle set out in the *Act* which provides that Aboriginal legislation prevails over any conflicting or inconsistent provision of provincial legislation, thereby making Aboriginal legislation absolute.

Are the limits set by the Act for the exercise of the right permitted?

[517] Although the right of Aboriginal peoples to regulate child and family services is recognized and affirmed by s. 35 of the *Constitution Act, 1982*, as we concluded above, this does not prevent Parliament from establishing a framework for the exercise of that right pursuant to its powers under s. 91(24) of the *Constitution Act, 1867*.⁵³⁷ This is, in fact, what Parliament has done in the *Act*. In principle, this federal legislation is valid, unless it infringes the exercise of the right, in which case, as explained above, the infringement must be justified under the Supreme Court of Canada's test set out in *Sparrow* and in subsequent decisions, which test ensures the integrity of the rights recognized by s. 35 of the *Constitution Act, 1982*.

[518] That being said, it is undeniable that certain aspects of the *Act* do indeed infringe the right of Aboriginal peoples to regulate child and family services.

[519] The *Act* specifies that Aboriginal legislation cannot apply to an Aboriginal child if doing so would be contrary to the best interests of the child,⁵³⁸ thereby providing broad discretion to override the application of Aboriginal legislation in a particular case.

[520] The *Act* also requires that the Indigenous governing body exercising authority over child and family services do so in compliance with the rights protected under the *Canadian Charter*.⁵³⁹

[521] Moreover, the *Act* implies that federal laws would prevail over Aboriginal legislation in cases in which the Indigenous governing body has not availed itself of the right to request a coordination agreement as provided for in s. 20(2) of the *Act*. The *Act* also states that where an Indigenous governing body has availed itself of the possibility of entering into such a coordination agreement, the legislation enacted by the Indigenous governing body will prevail over federal legislation, but will nevertheless be subject to

⁵³⁷ *Daniels*, para. 34; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, para. 110; *Delgamuukw*, para. 181; *Sparrow*, p. 1110.

⁵³⁸ *Act*, s. 23.

⁵³⁹ *Id.*, s. 19.

compliance with the national standards set out in ss. 10 to 15 of the *Act* and with the provisions of the *Canadian Human Rights Act*, whether or not a coordination agreement has been entered into.⁵⁴⁰

[522] These are significant limits on the exercise of Aboriginal legislative authority. Nonetheless, they appear *prima facie* justified under the principles of reconciliation that lie at the heart of the purpose of s. 35 of the *Constitution Act, 1982*. These constraints pertain primarily to the priority given to the best interests of the child (a notion elaborated in s. 10 of the *Act*) and to compliance with the fundamental rights of individuals and with the national standards set out in the *Act*. At first glance, these are compelling and substantial objectives which impose a balanced and minimal limit on the exercise of the right of Aboriginal peoples to regulate child and family services. This being said, if challenged in court, the validity of these constraints could be decided on a case by case basis.

[523] The application of the *Canadian Charter* is a more complex issue. Section 32 of the *Canadian Charter* specifies that it applies “(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament [...]; (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”. Since, by its very nature, the right of Aboriginal peoples to regulate child and family services arises from an Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, does the *Canadian Charter* apply to an Indigenous governing body exercising its authority pursuant to this right?

[524] Aboriginal legislation established pursuant to this right is not legislation of the Parliament or the Government of Canada nor of a provincial legislature or provincial government, but rather legislation of an Aboriginal people exercising an Aboriginal right. Section 25 of the *Canadian Charter* also states that this *Charter* “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”. Some would argue that, as a result of these provisions, the *Canadian Charter* does not apply to Indigenous governing bodies, because s. 32 does not mention them and s. 25 gives them immunity when they exercise a right protected by s. 35.⁵⁴¹ Should we accept such an argument?

[525] As La Forest, J. pointed out, “interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical

⁵⁴⁰ *Id.*, ss. 21(3) and 22(1).

⁵⁴¹ See, in particular: Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001, pp. 194-233; Kerry Wilkins, “... But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government”, (1999) 49:1 *U.T.L.J.* 53; Kent McNeil, “Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*”, (1996) 34:1 *Osgoode Hall L.J.* 61.

perspective”.⁵⁴² The *Canadian Charter* has been found to apply to a variety of public bodies. Moreover, the *Canadian Charter* applies even to private entities when they perform certain governmental acts, such as when they implement specific governmental policies or programs.⁵⁴³

[526] In *Greater Vancouver Transportation Authority*, Deschamps, J. drew on the remarks of La Forest, J. in *Eldridge* to conclude that the *Canadian Charter* applies to any entity carrying on governmental activities, whether or not it is part of the federal government or a provincial government:

[15] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J. reviewed the position the Court had taken in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (university), *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (university), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (hospital), *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (college), and *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (college), on the issue of the status of various entities as “government”. Writing for a unanimous Court, he summarized the applicable principles as follows (at para. 44):

. . . the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the Charter, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

⁵⁴² *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, para. 48. See also: *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, paras. 13-16.

⁵⁴³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, paras. 41-44.

[16] Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.⁵⁴⁴

[Emphasis added]

[527] Although Indigenous governing bodies do not act as federal or provincial public bodies when regulating child and family services pursuant to the Aboriginal right of self-government, they are nevertheless engaged in a governmental activity within Canada. While they are not directly contemplated in s. 32 of the *Canadian Charter*, when they exercise that authority, they must nevertheless respect the rights of individuals, whether Aboriginal or non-Aboriginal, as Canadian citizens. Indeed, "[a]s citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the Charter as all other citizens", including protection from violations by their own Aboriginal governments.⁵⁴⁵ In this regard, while the application of the *Canadian Charter* to Indigenous governing bodies does in fact impose certain limits on how they regulate or provide these services, this is not tantamount to abrogating or derogating from the right to self-government or from the other rights protected by s. 25 and s. 35.

[528] Consequently, there is nothing precluding Parliament from enacting legislation specifying that the rights and freedoms set out in the *Canadian Charter* apply to an Indigenous governing body, provided that, as set out in s. 25 of that *Charter*, the application of those rights and freedoms in a particular case does not infringe the rights and freedoms that pertain to the Aboriginal peoples of Canada. Any infringement of the right to self-government will have to be justified based on the reconciliation of rights test established by the Supreme Court of Canada pursuant to s. 35 of the *Constitution Act, 1982*. It stands to reason that, in such a case, the *Canadian Charter* must be interpreted and applied in a way that takes into account the perspective of the Aboriginal people in question so as to preserve its distinct status within the Canadian Constitution.⁵⁴⁶

[529] At first sight, then, and subject to any future challenges in specific cases, there is nothing that leads us to conclude that, within the scope of this reference, the constraints

⁵⁴⁴ *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, paras. 15-16.

⁵⁴⁵ *Taypotat v. Taypotat*, 2013 FCA 192, paras. 38-39, reversed in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, but not on this point.

⁵⁴⁶ Ghislain Otis, "La gouvernance autochtone avec ou sans la *Charte canadienne*", (2005) 36:2 *Ottawa L.R.* 207, p. 256; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71:2 *Can. Bar. Rev.* 261, pp. 286-287.

the *Act* places on the exercise of the right of Aboriginal peoples to regulate child and family services are unconstitutional.

Can Parliament confer the force of law, as federal law, on Aboriginal legislation in relation to child and family services?

[530] The *Act* says is silent about conflicts of laws which might arise where an Indigenous governing body avails itself of the right to regulate child and family services without first holding discussions for the purpose of entering into a coordination agreement. The *Act*, however, is more specific where an Indigenous governing body engages in a process to negotiate a coordination agreement.⁵⁴⁷ In such a case, ss. 21 and 22 of the *Act* apply as soon as a coordination agreement has been entered into or, failing same, one year after the Indigenous governing body's request to enter into such an agreement, provided it has made reasonable efforts for this purpose.⁵⁴⁸

[531] More specifically, s. 21 of the *Act* specifies that, in such a case, the Aboriginal legislation has the force law as federal legislation. It is useful to reproduce that section once again:

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.

(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.

(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.

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.

(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.

(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.

⁵⁴⁷ *Act*, s. 20(2).

⁵⁴⁸ *Id.*, ss. 20(3) and (4).

[532] This provision, which gives the force of law, as federal law, to Aboriginal legislation, has as its primary purpose to allow that legislation to benefit from the doctrine of federal paramountcy. Indeed, this purpose is consistent with s. 22(3) of the *Act*, which will be discussed below.

[533] As noted above, Parliament can regulate the Aboriginal rights contemplated by s. 35 of the *Constitution Act, 1982* within certain limits. In so doing, however, it cannot unilaterally amend that section, including its scope, nor the fundamental architecture of the Canadian Constitution. But such an amendment is precisely what s. 21 of the *Act* achieves.

[534] The notion of the architecture of the Constitution expresses the principle that the individual elements of the Constitution are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole.⁵⁴⁹ In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement.

[535] The doctrines governing the interaction between laws enacted by the various levels of government are at the heart of this structure. They are a concrete manifestation of federalism—the “fundamental guiding principle”⁵⁵⁰ of the Canadian Constitution—and they “permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers”.⁵⁵¹ As Wagner, C.J. and Brown, J. recently noted in *Toronto (City) v. Ontario (Attorney General)*:

[53] [...] federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act, 1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. [...] ⁵⁵²

[Emphasis in the original]

[536] The doctrine of federal paramountcy therefore reflects the very structure of ss. 91 and 92 of the *Constitution Act, 1867*, while contributing to the balance of federalism by allowing federal laws to override provincial laws, but only where there is an irreconcilable

⁵⁴⁹ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, para. 26; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 50.

⁵⁵⁰ *Canadian Western Bank*, para. 21, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 55.

⁵⁵¹ *Canadian Western Bank*, para. 24.

⁵⁵² *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 53.

conflict between them. In other words, under the doctrine of federal paramountcy, where two irreconcilable laws are valid and applicable, but in conflict with respect to provincial and national interests, the law stating the national interest prevails.

[537] However, the purpose of this doctrine, which underlies the constitutional architecture of ss. 91 and 92 of the *Constitution Act, 1867*, does not allow the federal government to grant that same constitutional priority to the legislation of an Indigenous governing body acting pursuant to an Aboriginal right of self-government. Indeed, it only pertains to federal legislation validly enacted in a field of federal jurisdiction. It pertains to ss. 91 and 92, not s. 35.

[538] While it is established that Parliament is entitled to adopt the legislation of another jurisdictional body for its own federal purposes,⁵⁵³ that is not the objective of s. 21 of the *Act*. Instead, it seeks to extend the doctrine of federal paramountcy to the exercise of the right to Aboriginal self-government in relation to the regulation of child and family services.

[539] Indigenous governing bodies acting pursuant to the right of Aboriginal self-government are not, by their very nature, emanations of the federal government nor are they a federal board, commission or other tribunal—they are Indigenous entities acting pursuant to an Aboriginal right of governance recognized and affirmed by s. 35 of the *Constitution Act, 1982*. While, in some cases, Indigenous governing bodies may be “band councils” within the meaning of the *Indian Act*, they are not acting pursuant to the authority conferred by that federal statute nor as a federal board, commission or other tribunal. Rather, they draw their authority as governing bodies not from non-Aboriginal governments, but rather from the right to self-government recognized and affirmed by s. 35.

[540] Thus, the laws they enact 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. This Aboriginal legislation is rooted in an Aboriginal jurisdiction recognized and affirmed by s. 35 of the *Constitution Act, 1982*, not in a federal power under s. 91(24) of the *Constitution Act, 1867*.

[541] By adopting s. 21 of the *Act*, Parliament is attempting to go beyond the ambit of s. 91(24) of the *Constitution Act, 1867* so as to extend the application of the doctrine of federal paramountcy to an Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. This is also confirmed by s. 22(3) of the *Act*, which we will discuss shortly. In so doing, it significantly alters the architecture of the Canadian Constitution. This process cannot be endorsed.

⁵⁵³ *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 S.C.R. 546; *Wewaykum Indian Band*, para. 116; *Coughlin v. Ontario Highway Transport Board et al.*, [1968] S.C.R. 569; *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137.

[542] If Aboriginal legislation enacted pursuant to the exercise of the right to Aboriginal self-government overrides incompatible federal and provincial legislation, it does so not because the *Act* states that it does or because the doctrine of federal paramountcy so provides, but by virtue of the constitutional recognition and affirmation of that right as a result of s. 35 of the *Constitution Act, 1982*. It is s. 35 which confers this legislative supremacy and defines its scope, not federal legislation enacted under s. 91(24).

Can Parliament make an Aboriginal right an absolute right in relation to provincial legislation?

[543] Section 22(3) of the *Act* applies as soon as a coordination agreement has been entered into or, failing same, one year after the Indigenous governing body's request to enter into such an agreement, whether or not such an agreement has been entered into.⁵⁵⁴ This subsection provides that Aboriginal legislation prevails over any conflicting or inconsistent provisions of provincial legislation. It is effectively the counterpart to s. 21 of the *Act*, but it states the rule directly rather than through the doctrine of federal paramountcy. It is useful to reproduce s. 22(3) once again:

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.

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.

[544] The effect of this provision is to make Aboriginal laws absolute in relation to provincial laws. Although Parliament has the power under s. 91(24) of the *Constitution Act, 1867* to regulate an Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, that power does not include the authority to confer absolute priority on that right. As the British Columbia Court of Appeal noted in *Chief Mountain*, "[t]he fact of the matter is that in light of the constitutional principles that govern the application of s. 35, neither level of government could by statute constitutionally make s. 35 rights of any description absolute".⁵⁵⁵

⁵⁵⁴ *Act*, s. 20(3).

⁵⁵⁵ *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49, para. 77, leave to appeal to the Supreme Court refused, August 22, 2013, No. 35301.

[545] In *Tsilhqot'in Nation*, McLachlin, C.J. concluded that the specific framework under s. 35 of the *Constitution Act, 1982* is the appropriate one for addressing conflicts between the exercise of an Aboriginal right and the application of federal or provincial legislation. As with the rights set out in the *Canadian Charter*, s. 35 of the *Constitution Act, 1982* places limits on the exercise of federal and provincial legislative authority. The *Canadian Charter* requires its own specific framework for determining when and how the limits set out therein should apply, and so too does s. 35.

[546] For this reason, McLachlin, C.J. partially set aside the reasoning in the 2006 Supreme Court ruling in *Morris*⁵⁵⁶—in which the majority had held that s. 91(24) of the *Constitution Act, 1867* and s. 88 of the *Indian Act* precluded the provinces from regulating treaty rights—favouring, instead, the specific framework tailored to s. 35:

[150] [...] To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[...]

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.⁵⁵⁷

[Emphasis added]

⁵⁵⁶ *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915.

⁵⁵⁷ *Tsilhqot'in Nation*, paras. 150 and 152.

[547] Similar reasoning was applied in *Grassy Narrows First Nation*, a case in which a province had sought to take up certain Aboriginal lands that had been surrendered by treaty to Canada:

[37] Section 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes, such as forestry, mining, or settlement. Thus, s. 91(24) does not require Ontario to obtain federal approval before it can take up land under Treaty 3. While s. 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians that may have incidental effects on provincial land, the applicability of provincial legislation that affects treaty rights through the taking up of land is determined by *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and by s. 35 of the *Constitution Act, 1982*.⁵⁵⁸

[Emphasis added]

[548] A similar approach is required with respect to the right to self-government. Parliament cannot use its authority under s. 91(24) of the *Constitution Act, 1867* to restrict or broaden the scope of s. 35 of the *Constitution Act, 1982*. In the case at hand, through s. 22(3) of the *Act*, Parliament has elevated the Aboriginal right to regulate child and family services to the status of an absolute right, at least with respect to provincial legislation. In so doing, it has amended the purpose and scope of s. 35 of the *Constitution Act, 1982*—which are grounded in principles of mutual respect and reconciliation—without provincial approval.

[549] As the Attorney General of Quebec submits in his reply, historically, s. 91(24) of the *Constitution Act, 1867* has been closely connected to objectives of Canadian territorial expansion and was initially intended to provide the government of Canada with control over Aboriginal peoples to that end, including by assimilating them. As Abella, J. noted in *Daniels*:

[5] Accordingly, the purposes of s. 91(24) were “to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people”: para. 353. Since much of the North-Western Territory was occupied by Métis, only a definition of “Indians” in s. 91(24) that included “a broad range of people sharing a Native hereditary base” (para. 566) would give Parliament the necessary authority to pursue its agenda.⁵⁵⁹

⁵⁵⁸ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447, para. 37.

⁵⁵⁹ *Daniels*, para. 5, citing Phelan, J. in *Daniels v. Canada*, 2013 FC 6.

[550] By contrast, the purpose of s. 35 of the *Constitution Act, 1982* is to reconcile the interests of Aboriginal peoples and their prior occupation of the territory that became Canada with the interests of Canadian society as a whole and with the Crown's sovereignty.⁵⁶⁰ Aboriginal peoples and the Crown as a whole—which, of course, includes not only the federal Crown, but the provincial Crowns as well—are responsible for achieving this objective.⁵⁶¹

[551] Therefore, from the moment s. 35 of the *Constitution Act, 1982* came into force, the relationship between Aboriginal peoples and the Crown has been governed by a new constitutional paradigm founded on objectives of mutual respect and reconciliation.⁵⁶² This paradigm involves both the provincial governments and the federal government, each of which must, in their respective spheres of jurisdiction, advance the process of reconciliation in a manner consistent with the honour of the Crown.

[552] Indeed, the underlying objectives of s. 35 could not be properly met without provincial involvement, particularly in areas primarily under provincial jurisdiction, such as child and family services. It has long been recognized that there are certain subject matters which cannot be completely and satisfactorily addressed by one level of government alone.⁵⁶³ The context in which the rights of Aboriginal peoples are exercised is no exception to this very concrete reality. For example, in *Wewaykum*, the Supreme Court pointed out that the reserve-creation process required the participation of the provinces and that “[a]ny unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid”.⁵⁶⁴ The need for such cooperation is strikingly evident in the context of Aboriginal child and family services, where, in many cases, services are provided by the provinces, which have the necessary resources and expertise, as illustrated in *NIL/TU,O Child and Family Services Society*.⁵⁶⁵

[553] Thus, in resolving conflicts between provincial legislation and Aboriginal legislation implemented pursuant to the exercise of the Aboriginal right of self-government in relation to child and family services, which is a s. 35 right, the framework consistent with the constitutional architecture underlying that constitutional provision must be applied. The

⁵⁶⁰ *Mikisew Cree First Nation*, para. 58; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, para. 42; *Delgamuukw*, para. 81; *Van der Peet*, paras. 26-43.

⁵⁶¹ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447, paras. 35 and 50; *Tsilhqot'in Nation*, para. 139; *Haïda Nation*, paras. 57-59; *R. v. Marshall*, [1999] 3 S.C.R. 533, para. 24.

⁵⁶² *Little Salmon/Carmacks First Nation*, para. 10.

⁵⁶³ *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, paras. 130-133; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, paras. 37-38; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, paras. 153-154; *Reference re Natural Products Marketing Act, 1934 (1937)*, 1 D.L.R. 691, pp. 694-695 (PC).

⁵⁶⁴ *Wewaykum Indian Band*, para. 15 [reference omitted].

⁵⁶⁵ *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, para. 43.

principles and criteria that define this architecture were developed by the Supreme Court of Canada in a long line of jurisprudence. In the case of Aboriginal rights, including the right to self-government, the applicable principles and criteria are set out in *Sparrow* and in the many other decisions that followed, all of which are based on reconciliation and mutual respect and require all governments to justify any legislation that would infringe an Aboriginal right, regardless of its nature.

[554] We must avoid reinforcing the idea that Aboriginal peoples are passive subjects of law whom the federal and provincial governments can regulate according to their respective areas of jurisdiction as set out in ss. 91 and 92 of the *Constitution Act, 1867*. Like the *Canadian Charter*, s. 35 of the *Constitution Act, 1982* introduces a paradigm shift in the Canadian constitutional architecture. Section 35 therefore decisively alters the relational dynamic between Aboriginal peoples and the Crown by giving Aboriginal peoples a special status as distinct social and political actors within Canada, a status they already held but which was put on hold by the colonial assimilation policies implemented from the late 19th century until the third quarter of the 20th century.

[555] The notion that ss. 91 and 92 of the *Constitution Act, 1867* occupy all areas of jurisdiction and prevent Aboriginal peoples from regulating themselves in matters of particular interest to them cannot be accepted if the objective of reconciliation arising from s. 35 of the *Constitution Act, 1982* is to be taken seriously. Moreover, the idea that reconciliation with Aboriginal peoples can be achieved by the federal government acting alone, without the active participation of provincial governments, must also be rejected.

[556] The history of relations between Aboriginal peoples and governments illustrates the deleterious effects and the impracticality of jurisdictional disputes and unilateral approaches, particularly regarding services to Aboriginal children and families. When the federal government attempted to act on its own in this area, it did so through an assimilationist and racist policy that placed Aboriginal children in residential schools without providing the expertise or resources to ensure their well-being. Faced with the federal government's inability and lack of genuine willingness to provide adequate services to Aboriginal children, the provinces that did so often acted reluctantly, calculating their actions based on available federal funding, which, as the CHRT noted, was chronically inadequate:

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the

way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.⁵⁶⁶

[Emphasis added]

[557] This disturbing finding was not challenged by the federal government in its pleadings before the Federal Court.⁵⁶⁷

[558] Too often, Aboriginal children have been the victims of squabbles between the two levels of government, which have taken turns refusing to intervene to ensure their safety and well-being on the pretext that they do not have the jurisdiction or financial responsibility to do so. The disastrous results of the approach based on the federal government's exclusive and plenary jurisdiction over Aboriginal peoples and the disengagement of the provinces show that this approach is simply not suited to nor consistent with the structure of government established by the Constitution as it stands today in light of s. 35 of the *Constitution Act, 1982*. Jordan's Principle, which has been adopted by the governments of Canada and several provinces,⁵⁶⁸ confirms that a rigid interpretation of provincial and federal jurisdictions is largely outdated—in this area as in others—and must give way to the interests of Aboriginal children and families.⁵⁶⁹

[559] Cooperation between the federal and provincial governments in recognizing and implementing Aboriginal rights is necessary to ensure the harmonious exercise of these rights. This cooperation flows from the constitutional principle of the honour of the Crown.⁵⁷⁰ Applied to the present matter, this principle requires that governments

⁵⁶⁶ *Caring Society*, para. 388. See also: Truth and Reconciliation Commission, *Final Report*, vol. 5, pp. 21-24; Affirmed declaration of Jonathan Thompson, December 8, 2020, paras. 15-29; Melisa Brittain and Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis*, Edmonton, First Nations Children's Action Research and Education Service, 2015, pp. 77-81.

⁵⁶⁷ *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, para. 28, notice of appeal, October 29, 2021, No. A-290-21 (appeal proceedings suspended).

⁵⁶⁸ Solemn declaration of Cindy Blackstock, December 4, 2020, paras. 62-70. See also: House of Commons, *House of Commons Debates.*, 39th Parl., 2nd Sess., Vol. 142, No. 12, October 31, 2007, p. 642 (J. Crowder); House of Commons, *Journals*, 39th Parl., 2nd Sess., No. 36, December 12, 2007, pp. 307-309 (Division No. 27).

⁵⁶⁹ Johanne Poirier and Sajeda Hedaraly, "Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who *Can* and *Should* do What?", (2019-2020) 24:2 *Rev. Const. Stud.* 171, pp. 202-205.

⁵⁷⁰ *Mikisew Cree First Nation*, para. 42; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447, para. 35; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, para. 73; *Haïda Nation*, para. 20.

coordinate the exercise of their respective powers with regards to Aboriginal child and family services through federal–provincial and Aboriginal collaboration.

[560] The premise of s. 35 is that Aboriginal peoples are founding partners of Canada with a right to self-government in certain areas of jurisdiction of particular interest to them, the exercise of which right must be coordinated and reconciled with the powers of the federal and provincial governments. In order to do so, it is essential that these governments be able to take action within their own fields of jurisdiction so as to reconcile the interests of the population as a whole which they represent with those of Aboriginal peoples. This is what is called for under the test developed in *Sparrow*, and subsequently elaborated, which limits the power of governments to regulate s. 35 rights but without precluding it entirely.

[561] As the Supreme Court confirmed in *Tsilhqot'in Nation* and *Grassy Narrows*, both levels of government must be involved in the delicate task of reconciling their own interests with those of Aboriginal peoples. Indeed, the concrete issues regarding Aboriginal children and families do not fall solely under the jurisdiction of one level of government to the exclusion of the other.

[562] Thus, a new approach is required, based on federal–provincial collaboration and the inclusion of Aboriginal peoples as political actors and creators of law. It is this approach that must prevail, not only with respect to legislative initiatives, but with respect to their implementation as well, including their funding.

[563] Even if the federal government has jurisdiction under s. 91(24) of the *Constitution Act, 1867* and Aboriginal peoples hold special rights recognized by s. 35 of the *Constitution Act, 1982*, Aboriginal persons are also Canadian citizens and, as such, they are entitled to benefit from the services provided by the provinces, with which the federal government must coordinate its efforts so as to take account of the particularities of Aboriginal peoples. Only in this way can the objectives of the modern law of Aboriginal rights—reconciliation and mutual respect—be achieved.

[564] As the Supreme Court implied in *Daniels* and *NIL/TU,O*, federal jurisdiction over Aboriginal peoples under s. 91(24) of the *Constitution Act, 1867* does not preclude the application to them of valid provincial schemes of general application, such as child and family welfare systems, insofar as they do not impair the core of the federal power.⁵⁷¹

[565] Valid provincial laws of general application apply to Aboriginal peoples *ex proprio vigore* and therefore do not require any enabling federal legislation to do so.⁵⁷²

⁵⁷¹ *Daniels*, para. 51; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, para. 3.

⁵⁷² *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 66-71; *R. v. Francis*, [1988] 1 S.C.R. 1025, pp. 1028-1029. See also: *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031, pp. 1048-1049; *Kruger et al.*

It is only to the extent that provincial legislation affects “Indianness” that s. 88 of the *Indian Act* comes into play: in such as case, it incorporates by reference the provisions of the provincial legislation that affects Indianness, thereby allowing these provisions to apply to Indians within the meaning of the *Indian Act*.⁵⁷³

[566] While the Supreme Court has suggested that “relationships within Indian families” are at the core of Parliament’s jurisdiction over Aboriginal peoples,⁵⁷⁴ it has never concluded that the provision of provincial child and family services in general—more specifically those ordinarily provided to residents of a province—is part of “Indianness”. Provincial child and family welfare schemes therefore apply to Aboriginal peoples *ex proprio vigore* and not by virtue of s. 88 of the *Indian Act*.

[567] Although such a conclusion may have been questioned in the middle of the last century, it does not conflict in any way with the Supreme Court’s 1939 opinion in *In re Eskimo*,⁵⁷⁵ where it ruled that the word “Indian” in s. 91(24) of the *Constitution Act, 1867* includes the Inuit. Although the backdrop to this case was the provision of services to the Inuit, the Court’s opinion was limited to the issue before it. Its reasons focused on the analysis of pre- and post-Confederation documents—in order to determine what the meaning of “Indian” was at that time—and said nothing about the role that provinces can play in providing services to Aboriginal peoples.

[568] Indeed, it is noteworthy that in *NIL/TU,O*, McLachlin, C.J. and Fish, J., in their concurring reasons, concluded that “[t]he function of NIL/TU,O is the provision of child welfare services under the umbrella of the province-wide network of agencies providing similar services”⁵⁷⁶ and that its operations “viewed from a functional perspective, do not fall within the protected core of s. 91(24)”.⁵⁷⁷

[569] Thus, if we accept that, in connection with child and family services, all governments must be involved in the objective of s. 35, the federal government cannot dictate every aspect of the provinces’ dealings with Aboriginal peoples, nor can it completely disregard the provinces. The Canadian constitutional architecture is built on

v. The Queen, [1978] 1 S.C.R. 104; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, pp. 702-703.

⁵⁷³ *Delgamuukw*, para. 182; *Dick v. The Queen*, [1985] 2 S.C.R. 309, pp. 326-328. See also: *R. v. Francis*, [1988] 1 S.C.R. 1025, pp. 1030-1031; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, p. 297.

⁵⁷⁴ *Canadian Western Bank*, para. 61.

⁵⁷⁵ *Reference as to whether “Indians” includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104.

⁵⁷⁶ *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, para. 76.

⁵⁷⁷ *Id.*, para. 80.

the basis of coordinated—not subordinated—governments, with the aim of guaranteeing each government autonomy “to pursue [its] own unique goals”.⁵⁷⁸

[570] In this modern constitutional context, the approach advocated by s. 22(3) of the *Act* cannot be endorsed. By elevating the right of Aboriginal peoples to regulate child and family services to the status of absolute right and setting aside the reconciliation test specific to s. 35 of the *Constitution Act, 1982*, Parliament is amending the existing constitutional architecture.

Conclusion

[571] For these reasons, in answer to the reference question, which reads as follows:

[TRANSLATION]

Is the *Act respecting First Nations, Inuit and Métis children, youth and families ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?

the Court answers as follows:

No, except for section 21 and subsection 22(3) of the *Act*.

FRANCE THIBAUT, J.A.

YVES-MARIE MORISSETTE, J.A.

MARIE-FRANCE BICH, J.A.

JEAN BOUCHARD, J.A.

ROBERT M. MAINVILLE, J.A.

⁵⁷⁸ *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 21. See also: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 49; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, paras. 78 and 82; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, para. 71.

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Hearing dates: September 14, 15 and 16, 2021

APPENDIX A

SOME OF THE AGREEMENTS NEGOTIATED AND STATUTES ENACTED PRIOR TO 1995 UNDER FEDERAL LAND CLAIMS POLICIES, WITH PROVINCIAL PARTICIPATION IN CERTAIN CASES.

- The ***James Bay and Northern Quebec Agreement (1975)*** and the ***Northeastern Quebec Agreement (1978)***, which do not use the expression “self-government”, but do provide for the establishment of “local authorities”. Various agreements and legislation were grafted onto them over the years, including the *Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada* (2017), which is discussed below in Appendix B.
- The ***Inuvialuit Final Agreement***, a bilateral agreement entered into in 1984 between the Government of Canada and the Inuvialuit people (Northwest Territories and the Yukon) in order to settle certain land claims. This agreement (which contains a waiver of Aboriginal rights provision, s. 3) came into effect pursuant to the *Western Arctic (Inuvialuit) Claims Settlement Act* (S.C. 1984, c. 24), whose s. 4 provides that “[w]here there is any inconsistency or conflict between this Act or the Agreement and the provisions of any other law applying to the Territory, this Act or the Agreement prevails to the extent of the inconsistency or conflict”. See also s. 3(3) of that statute, which pertains to the extinguishment of “[a]ll native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Inuvialuit, wherever they may be”.
- The ***Sechelt Indian Band Self-Government Act*** (S.C. 1986, c. 27) refers very explicitly to the commitment of “Parliament and the government of Canada [...] to enabling Indian bands that wish to exercise self-government on lands set apart for those bands to do so” (preamble) and to the purposes of the statute, which are to “enable the Sechelt Indian Band to exercise and maintain self-government on Sechelt lands and to obtain control over and the administration of the resources and services available to its members” (s. 4).⁵⁷⁹ This statute provides for the establishment of a Sechelt constitution by the band council, whose legislative powers (s. 14) include the power to make laws in relation to social services for children (s. 14(1)(h)). In relation to the subject matters over which it has jurisdiction under s. 14(1) of the statute, the band council also has the power, if it prefers, “to adopt any laws of British Columbia as its own law” (s. 14(3)), and it may also exercise “any legislative power granted to it by or pursuant to an Act of the legislature of British Columbia” (s. 15). Sections 37 and 38 of the statute provide, respectively, that

⁵⁷⁹ A document prepared by the federal government describes the statute as follows: “The Sechelt Agreement of 1986 introduced the concept of Indigenous self-government to the larger Canadian public. An obscure and ill-defined concept at the time of the Constitution’s repatriation from England in 1982, the *Sechelt Indian Self-Government Act* provided an early operational definition.” (Aboriginal Affairs and Northern Development Canada, “Evaluation of the Impacts of Self-Government Agreements – Project Number: 14078”, 2016, p. 15).

all federal laws of general application continue to apply to the Band and its members, “except to the extent that those laws are inconsistent with this Act”, and that the “[l]aws of general application of British Columbia apply to or in respect of the members of the Band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Band or a law of the Band”. That being said, s. 3 of the statute specifies that it does not abrogate or derogate from any rights protected by s. 35 of the *Constitution Act, 1982*.

- The ***Gwich'in Land Claim Settlement Act*** (S.C. 1992, c. 53) states that “the *Constitution Act, 1982* recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada” (preamble). As its title indicates, it gives effect to the *Gwich'in Comprehensive Land Claim Agreement*, which was signed between the Gwich'in and the Government of Canada in 1992. This agreement, whose preamble generically recognizes the existence of the Aboriginal rights protected by s. 35 of the *Constitution Act, 1982*, specifies that the parties agree to negotiate self-government agreements in accordance with terms of the framework agreement set out in its Appendix B (ss. 1.1.9 and 5), so as to enable these nations “to govern their affairs and to administer resources, programs and services, as appropriate to [their] circumstances” (s. 1.1 of Appendix B). The following agreement between the Vuntut Gwitchin First Nation, the Government of Canada and the Government of the Yukon, was subsequently entered into pursuant to the framework agreement: *Vuntut Gwitchin First Nation Self-Government Agreement* (1993), which provides for the establishment of a constitution and sets out its content (s. 10.0) as well as the right of this First Nation to make laws in relation to a number of matters (s. 13.0), including the provision of social and welfare services and the adoption, guardianship, custody, care and placement of children (ss. 13.2.4, 13.2.6 and 13.2.7). The agreement also contains a series of rules to deal with conflicts of laws (ss. 8.0 and 13.5.0).

- The ***Sahtu Dene and Metis Comprehensive Land Claim Agreement*** (1993), which came into effect pursuant to the *Sahtu Dene and Metis Land Claim Settlement Act* (S.C. 1994, c. 27), also contains provisions, found in its s. 5 (ss. 5.1.1 to 5.1.12), that provide for the negotiation of a self-government agreement in accordance with the terms set out in Appendix B (“self-government framework agreement”).

- The ***Yukon First Nations Self-Government Act*** (S.C. 1994, c. 35) also bears mentioning. This statute, which was enacted in 1994 (shortly before the *Self-Government Policy* was developed), also follows the signing of an umbrella agreement (like the agreement with the Vuntut Gwitchin First Nation) and gives effect to various final agreements entered into with certain First Nations occupying land in the Yukon (while specifying that “other first nations of Yukon may conclude self-government agreements” (preamble, fifth recital)). Eleven First Nations are now party to an agreement provided for by this statute. Section 8 of the statute provides that each of these First Nations will have a constitution that includes a number of elements, and its s. 11 provides that each such

First Nation may make laws in relation to the matters assigned to it in its self-government agreement (see Schedule III of the statute, which sets out the broad range of legislative powers, including the “[p]rovision of social and welfare services to citizens”, “[g]uardianship, custody, care and placement of children of citizens of the first nation, excluding regulation and licensing of facility-based services outside the settlement land of the first nation”, and the administration of justice). With few exceptions, the *Indian Act* no longer applies to the First Nations concerned or to their citizens (s. 17), who are now governed by the laws enacted by their own governing bodies. The statute also sets out rules for the application of federal and territorial laws, as well as rules governing conflicts of laws (ss. 3, 16, 19 and 23).

- Lastly, we must mention the ***Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada***, entered into in May 1993 and brought into effect by the *Nunavut Land Claims Agreement Act* (S.C. 1993, c. 29), which led to the adoption of the *Nunavut Act* (S.C. 1993, c. 28) and to the creation of the territory and government of Nunavut on April 1, 1999, the whole subject to the rights protected by s. 35 of the *Constitution Act, 1982*. The following are some of the provisions of this agreement, which provides for the establishment of a legislature and a public government over a territory of which more than 80% of the inhabitants are Inuit (a model that some, however, have not accepted, preferring a nation-based governance model—see below):

4.1.1 The Government of Canada will recommend to Parliament, as a government measure, legislation to establish, within a defined time period, a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories.

4.1.1. Le gouvernement du Canada recommandera au Parlement, à titre de mesure gouvernementale, une mesure législative visant la création, dans un délai déterminé, du nouveau territoire du Nunavut, lequel sera doté de sa propre assemblée législative et de son propre gouvernement public, distinct du gouvernement du reste des Territoires du Nord-Ouest.

4.1.2 Therefore, Canada and the Territorial Government and Tungavik Federation of Nunavut shall negotiate a political accord to deal with the establishment of Nunavut. The political accord shall establish a precise date for recommending to Parliament legislation necessary to establish the Nunavut Territory and the Nunavut Government, and a transitional process. [...]

4.1.2 En conséquence, le gouvernement du Canada, le gouvernement territorial et la FTN négocient un accord politique visant l'établissement du Nunavut. Cet accord politique précise la date à laquelle est recommandée au Parlement l'adoption de la mesure législative nécessaire à la création du territoire du Nunavut et du

gouvernement du Nunavut, et établit les
mécanismes de transition. [...]

It should be noted that some consider that this agreement, as well as the legislation giving effect thereto, is not an example of Aboriginal governance. See, for example: Letter dated May 17, 2019, from Aluki Kotierk, President of Nunavut Tunngavik Inc., to the Honourable Elisapee Sheutiapik, Minister of Family Services of the Government of Nunavut, regarding Bill C-92, which became the *Act*.

APPENDIX B

SOME OF THE AGREEMENTS THAT INCLUDE THE RECOGNITION OF THE RIGHT TO SELF-GOVERNMENT AS AN ABORIGINAL RIGHT (SECTION 35 OF THE CONSTITUTION ACT, 1982)

- **Westbank First Nation Self-Government Agreement** (2003; bipartite agreement between this First Nation and the Government of Canada), whose preamble states that “the Government of Canada recognizes that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*” (although the statute bringing this agreement into effect does not mention it). Section 1 of the agreement states that its “purpose [...] is to implement aspects of the inherent right of self-government by Westbank First Nation on Westbank Lands”, without defining or limiting this right (ss. 1(b), 6 and 8), and that it reflects “a government-to-government relationship [...] within the framework of the Constitution of Canada and with the recognition that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*” (s. 3). Section 20 states that “Westbank First Nation [which must establish a constitution in compliance with ss. 42 *et seq.* of the agreement] has legal capacity to govern itself in accordance with this Agreement”, which includes the authority to make laws in relation to all the subject matters provided for therein, in compliance with the *Canadian Charter* (s. 32). The agreement contains a detailed chapter on the application of laws and on conflicts of laws (ss. 29 to 41).

- **Tsawwassen First Nation Final Agreement** (2007; tripartite agreement between this First Nation, the Government of Canada and the Government of British Columbia), whose preamble states that “the Government of Canada has negotiated self-government in this Agreement based on its policy that the inherent right to self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*” (para. D). Pursuant to this agreement, Tsawwassen First Nation (which is also required to establish a constitution, chapter 16, ss. 8 and 9) “has the right to self-government, and the authority to make laws” (chapter 16, s. 1), including laws in relation to adoption and custody of a Tsawwassen child and in relation to child protection services (chapter 16, s. 69). The agreement sets out a specific conflict of laws scheme. In matters of child protection services, the rule provides that Tsawwassen laws prevail in the event of a conflict and to the extent of that conflict (chapter 16, s. 74), subject to exceptions (including emergencies, chapter 16, s. 73), the whole in a spirit of collaboration with the Government of British Columbia. The agreement also provides that the *Canadian Charter* applies to the Tsawwassen Government in respect of all matters within its authority (chapter 2, s. 9). It should also be noted that the agreement “exhaustively sets out the Section 35 Rights of Tsawwassen First Nation, their attributes [and] the geographic extent of those rights”, including “the other Section 35 Rights of Tsawwassen First Nation” (chapter 2, s. 12).

- ***Maa-nulth First Nations Final Agreement*** (2007-2009; tripartite agreement between these First Nations, the Government of Canada and the Government of British Columbia). Paragraph D of the preamble to this agreement (like that of Tsawwassen First Nation) states that “the Government of Canada has negotiated self-government in this Agreement based on its policy that the inherent right to self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*”. The agreement is similar in many respects to the Tsawwassen First Nation agreement (application of the *Canadian Charter*, general recognition of the right to self-government and law-making authority in a number of areas, including adoption (s. 13.15.0) and child protection (s. 13.16.0), custody (s. 13.17.0) and care (s. 13.18.0))

- ***Tla’amin Final Agreement*** (2014; tripartite agreement between this First Nation, the Government of Canada and the Government of British Columbia). The preamble to this agreement includes a provision in paragraph N that is identical to that of paragraphs D of the Tsawwassen and Maa-nulth agreements (see above) confirming the Government of Canada’s policy of recognizing an inherent right of self-government under s. 35 of the *Constitution Act, 1982*.

- ***Déljñę Final Self-Government Agreement*** (2015; tripartite agreement between this First Nation, the Government of Canada and the Government of the Northwest Territories). Abandoning the somewhat convoluted language of previous agreements, the preamble to this agreement clearly states the following in its first recital: “the Government of Canada and the Government of the Northwest Territories recognize that the inherent right of self-government is an existing aboriginal right under section 35 of the *Constitution Act, 1982*”.

Subject to the usual provisos (application of the *Canadian Charter*, adoption of a constitution, conflict of laws rules and the relationship between applicable federal, provincial and territorial laws), which are tailored to each situation, the latter two agreements (*Tla’amin* and *Déljñę*) recognize the right of self-government of the Aboriginal peoples involved and their authority to enact laws in a variety of areas, including adoption, child custody and child protection.

- ***Sioux Valley Dakota Nation Governance Agreement*** (2013; bipartite agreement between this First Nation and the Government of Canada, with which the Government of Manitoba concurred). This agreement establishes, in detail, the *Sioux Valley Dakota Oyate Government*, which has very broad jurisdiction. Its preamble states that Canada “recognizes and affirms [that] the right of self-government is an existing aboriginal right” and that it intends to provide for a “government-to-government relationship [with that First Nation] within the framework of the Canadian constitution” (which is reiterated in s. 2.02). However, s. 6.02 states that “[the] Agreement [is] not an expression of legal views on self-government”, as the parties do not take a position on how any right of self-government may be defined at law (this proviso is similar to that found in the

Westbank First Nation Self-Government Agreement (2003) and the *Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada* (2017)).

- ***Labrador Inuit Land Claims Agreement*** (2005; tripartite agreement between this Aboriginal people, the Government of Canada and the Government of Newfoundland and Labrador). While this agreement does not contain an express affirmation of the right of self-government of this people as an Aboriginal right guaranteed by s. 35 of the *Constitution Act, 1982*, it nevertheless establishes a sophisticated self-government regime (chapter 17), following a preamble which generally states that the *Constitution Act, 1982* recognizes aboriginal and treaty rights and which affirms the intention to establish “a free and democratic government for the Inuit”. It should be noted that the Nunatsiavut Government established by this agreement has jurisdiction over social, family, youth and children’s services (part 17.15, with Inuit Law prevailing, subject to some exceptions—see ss. 17.15.4 and 17.15.7), as well as adoption (ss. 17.18.9 to 17.18.13).

- Lastly, a few words about the ***Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada*** (2017; tripartite agreement between the Government of Canada, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government), in whose preamble the Government of Canada formally recognizes self-government as an inherent right protected by s. 35 of the *Constitution Act, 1982* and affirms a nation-to-nation dialogue:

WHEREAS the Parties wish to enter into a nation-to-nation agreement which will provide for the modernization of the governance regime on Category IA Land contemplated, at the local level, in Section 9 of the *James Bay and Northern Québec Agreement* and previously provided for in legislative form in the *Cree-Naskapi (of Quebec) Act*,

[...]

WHEREAS the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, and Canada recognizes the inherent right of self-government as an existing Aboriginal right;

ATTENDU QUE les Parties souhaitent conclure une entente de nation à nation qui assurera la modernisation du régime de gouvernance sur les Terres de catégorie IA envisagé, au niveau local, au chapitre 9 de la *Convention de la Baie James et du Nord québécois* et prévu précédemment sous forme législative dans la *Loi sur les Cris et les Naskapis du Québec*;

[...]

ATTENDU QUE la *Loi constitutionnelle de 1982* reconnaît et confirme les droits existants – ancestraux ou issus de traités – des peuples autochtones du Canada, et que le Canada reconnaît, à titre de droit ancestral existant, le droit

inhérent des autochtones à l'autonomie gouvernementale;

WHEREAS the Cree Nation and Canada may have different legal views as to the scope and content of the inherent right of self-government;

ATTENDU QUE les positions juridiques de la Nation crie et du Canada peuvent diverger quant à la portée et à la substance du droit inhérent à l'autonomie gouvernementale;

WHEREAS by this Agreement, the Cree Nation and Canada intend to set out Cree local and regional government arrangements on Category IA Land without taking positions about how the inherent right of self-government may be defined at law;

ATTENDU QUE par la présente Entente, la Nation crie et le Canada entendent prévoir un régime de gouvernance crie locale et régionale sur les Terres de catégorie IA sans prendre position sur la manière de définir juridiquement le droit inhérent à l'autonomie gouvernementale;

[...]

[...]

WHEREAS this Agreement is not intended to preclude the Crees from benefitting from future legislative or other measures respecting Indian government in Canada that are not incompatible with the *James Bay and Northern Québec Agreement* and this Agreement;

ATTENDU QUE la présente Entente n'a pas pour objet d'empêcher les Cris de bénéficier de toute mesure législative ou autre, compatible avec la *Convention de la Baie James et du Nord québécois* et la présente Entente, édictée à l'avenir en ce qui concerne le régime d'autonomie des Indiens du Canada;

[Emphasis added]

This agreement contains provisions for the implementation of this autonomy through the establishment of a Cree local and regional government on lands allocated to this First Nation, requires the development of a Cree constitution (chapter 3), allows each Cree First Nation as well as the Cree Nation Government to make laws in all areas of jurisdiction provided for and other areas that may be added subsequently (s. 4.25), and provides that, subject to certain provisos, Cree laws will prevail over provincial laws of general application in the event of inconsistency or conflict (s. 4.3), but not over federal laws (ss. 4.4, 4.5 and 4.24). The areas of legislative authority are divided between the various Cree First Nations (chapters 5 and 6) and the Cree Nation Government (chapters 7 and 8). These legislative powers must be exercised in a manner consistent with the *Canadian Charter* (s. 2.9), it being understood that the agreement does not limit or alter the rights protected by s. 35 of the *Constitution Act, 1982* (s. 2.8).

- As regards the post-2019 period, of interest is the **Manitoba Métis Self-Government Recognition and Implementation Agreement** (2021; bipartite agreement between this First Nation and the Government of Canada), whose preamble states that “[t]he right to self-determination is recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*, and the inherent right to self-government is recognized and affirmed by section 35 and protected by section 25 of the *Constitution Act, 1982*” (recital (G) and that “Parliament has enacted legislation affirming the right to self-determination of Indigenous peoples, including the inherent right of self-government” (recital N). Section 5 of this agreement defines its purpose as follows:

5. The purpose of this Agreement is to: 5. La présente Entente a pour objet de :

a. recognize, support, and advance the exercise of the Manitoba Métis’ right to self-determination, and its inherent right to self-government recognized and affirmed by section 35 and protected by section 25 of the *Constitution Act, 1982*, in a manner that is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, through a constructive, forward-looking, and reconciliation-based arrangement that is premised on rights recognition and implementation;

[...]

d. provide a foundation for continuing to address on a government-to-government basis the remedying of “the ongoing rift in the national fabric” caused by Canada’s failure to act diligently to fulfill the obligations set out in section 31 of the *Manitoba Act, 1870* as a result of which “the Métis did not receive the intended head start, and following the influx of

a. reconnaître, soutenir et promouvoir l’exercice du droit des Métis du Manitoba à l’autodétermination, ainsi que leur droit inhérent à l’autonomie gouvernementale qui est reconnu et confirmé par l’article 35 et protégé par l’article 25 de la *Loi constitutionnelle de 1982*, d’une façon qui soit compatible avec la *Déclaration des Nations Unies sur les droits des peuples autochtones* et dans le cadre d’un arrangement constructif et tourné vers l’avenir visant à favoriser la réconciliation par la reconnaissance et la mise en œuvre des droits;

[...]

d. servir d’assise à la poursuite des efforts déployés dans le cadre d’une relation de gouvernement à gouvernement pour remédier au « clivage persistant dans notre tissu national » attribuable au défaut du Canada d’agir avec diligence pour s’acquitter de ses obligations au titre de l’article 31 de la *Loi de 1870 sur le Manitoba*, lequel a fait en sorte que « [l]es

settlers, they found themselves increasingly marginalized, facing discrimination and poverty”; and

Métis n’ont pas obtenu l’avantage escompté et, après l’arrivée massive de colons, ont été de plus en plus marginalisés et ont dû affronter la discrimination et la pauvreté »;

e. inform and continue the government-to-government relation-ship between the Parties.

e. éclairer la relation de gouvernement à gouvernement établie entre les Parties et en assurer le maintien.

Section 7 states:

7. The Manitoba Métis has the right to self-determination recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*, and the inherent right to self-government recognized and affirmed by section 35 and protected by section 25 of the *Constitution Act, 1982*.

7. Le droit des Métis du Manitoba à l’autodétermination est reconnu dans la *Déclaration des Nations Unies sur les droits des peuples autochtones*, et leur droit inhérent à l’autonomie gouvernementale est reconnu et confirmé par l’article 35 et protégé par l’article 25 de la *Loi constitutionnelle de 1982*.

The governing body of the Manitoba Métis (Manitoba Métis Federation / *Fédération Métisse du Manitoba*) has the authority to make laws in relation to all matters vested in it by the agreement (s. 34), including child and family services:

32. As affirmed by Parliament in the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, the inherent right of self-government of the Manitoba Métis includes the jurisdiction of the MMF in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

32. Comme l’a confirmé le Parlement dans la *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, L.C. 2019, ch. 24, le droit inhérent à l’autonomie gouvernementale des Métis du Manitoba donne compétence à la FMM en ce qui concerne les services à l’enfance et à la famille, et lui confère une autorité législative à l’égard de ces services ainsi que le pouvoir d’administrer et d’appliquer les lois édictées en vertu de cette autorité législative.

33. For greater certainty, any Supplementary Self-Government Agreement in respect of child and family services, may include provisions different from those in the *Act respecting First Nations, Inuit and Métis children, youth and families*, 2019 S.C. 2019, c. 24.

33. Il est entendu que toute Entente complémentaire sur l'autonomie gouvernementale concernant les services à l'enfance et à la famille peut comprendre des dispositions différentes de celles de la *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, L.C. 2019, ch. 24.