**SCC Court File No: 40061**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)
IN THE MATTER OF a Reference to the Court of Appeal of Québec in relation to the *Act respecting First Nations, Inuit and Métis children, youth and families* (Order in Council No.: 1288-2019)

**BETWEEN:**

**ATTORNEY GENERAL OF QUÉBEC**

APPELLANT

-and-

**ATTORNEY GENERAL OF CANADA, ASSEMBLÉE DES PREMIÈRES NATIONS QUÉBEC-LABRADOR (APNQL), COMMISSION DE LA SANTÉ ET DES SERVICES SOCIAUX DES PREMIÈRES NATIONS DU QUÉBEC ET DU LABRADOR (CSSSPNQL), SOCIÉTÉ MAKIVIK, ASSEMBLÉE DES PREMIÈRES NATIONS ASENIWUCHE WINEWAK NATION OF CANADA, SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA**

RESPONDENTS

-and-

**ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES**

INTERVENERS

*[Style of cause continued on next page]*

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

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## PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Attorney General of Manitoba ("Manitoba") acknowledges that Indigenous peoples have an Aboriginal right under s. 35(1) of the *Constitution Act, 1982* to self-govern in relation to child and family services. Manitoba also supports the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "Act"), with the exception of two provisions in the Act, sections 21 and 22(3).[1] When an Indigenous governing body attempts to enter into a coordination agreement and enacts legislation in relation to child and family services, sections 21 and 22(3) of the Act prescribe that this legislation has the "force of law as federal law" and prevails over conflicting provincial laws.

2. Manitoba intervenes in this appeal for the limited purpose of addressing the constitutional question as stated by the Attorney General of Canada in its Notice of Constitutional Question: Are sections 21 and 22(3) of the Act *ultra vires* the jurisdiction of Parliament under the Constitution of Canada? Manitoba submits that the answer to this question is "yes".

3. Sections 21 and 22(3) of the Act alter the s. 35(1) framework, and by extension, the basic constitutional architecture, by removing the ability of the provinces to enact child and family services laws that take precedence over conflicting Indigenous laws enacted pursuant to the Aboriginal right to self-government. The right of Indigenous self-government under s. 35(1) is not absolute, but rather circumscribed. Under the s. 35(1) framework, the Aboriginal right to self-government is subject to regulation by federal and provincial laws, provided the laws meet the justification test developed in *Sparrow*. As with other Aboriginal rights under s. 35(1), the right of self-government preserves constitutional space for Indigenous people to be Indigenous *within* the framework of collective or shared Canadian sovereignty. The *Sparrow* test advances the central aim of the s. 35(1) framework: reconciling Indigenous interests with the broader social, political and economic community of which Indigenous peoples are a part.

4. The *Sparrow* test should be adapted to determine how to resolve conflicts between provincial legislation and Indigenous legislation implemented pursuant to the right to self-government in relation to child and family services. The Indigenous law prevails unless the provincial government can establish that its own legislation meets the requirements of the *Sparrow* test, such that the provincial law overrides the Indigenous law. In the context of child and family services,

[1] S.C. 2019, c. 24.

this test will be stringent. Child and family services involve matters internal to Indigenous communities that lie at the core of the right of self-government. As such, it will be difficult for the provinces to justify incursions in this area of self-government.

5. Manitoba submits that it is critical for provinces to retain a limited ability to enact legislation in furtherance of child protection and safety that prevails over conflicting Indigenous law where justified. Sections 21 and 22(3) of the Act take away this ability. Pursuant to the Act, Indigenous law relating to child and family services will prevail over conflicting provincial law, even if the provincial law has a pressing and substantial objective that meets the *Sparrow* justificatory test. The effect is to greatly undermine provincial regulation of the right of Indigenous self-government in relation to child and family services, and by extension, provincial involvement in reconciliation in this area. The notion that reconciliation can be achieved by the federal government acting alone has been rejected by the s. 35(1) framework. The process of reconciliation under s. 35(1) requires provincial involvement, particularly in relation to areas primarily under provincial jurisdiction, such as child and family services.

6. By removing the ability of provincial legislation to prevail over Indigenous law relating to child and family services, sections 21 and 22(3) have the effect of enlarging the self-government right under s. 35(1) and significantly diminishing the authority of provincial governments under s. 92. Manitoba submits that these provisions in the Act unilaterally amend s. 35(1) and the basic constitutional structure, and as such, are *ultra vires*.

## PART II – RESPONSE TO QUESTIONS IN ISSUE

7. As noted, Manitoba's submissions are focussed exclusively on the constitutional question relating to sections 21 and 22(3) of the Act. Although Manitoba largely supports the constitutionality of the Act, Manitoba takes no position with respect to the other constitutional questions raised in this appeal.

## PART III – ARGUMENT

### A. Manitoba acknowledges that Indigenous peoples have a right to self-government under s. 35(1), which includes jurisdiction in relation to child and family services

8. Manitoba acknowledges that Indigenous groups have an Aboriginal right of self-government under s. 35 of the *Constitution Act, 1982*, which includes jurisdiction in relation to child and family services.

9. In support of Indigenous jurisdiction over child and family services and in response to the enactment of the Act, Manitoba recently amended its child and family services legislation to assist in the transition of child and family services to Indigenous governing bodies.[2] The amendments include allowing Indigenous service providers to access provincial information about children and families receiving services, enabling use by Indigenous service providers of the provincial Child and Family Services ("CFS") electronic system and providing access to the provincial Child Abuse Registry.[3]

10. On January 21, 2022, Peguis First Nations ("Peguis") brought into force its legislation exercising jurisdiction over child and family services pertaining to its members.[4] Peguis requested to enter a coordination agreement with Canada and Manitoba pursuant to s. 20(2) of the Act on January 12, 2021.[5] To date, a coordination agreement between Peguis, Canada and Manitoba has not been concluded.

11. Other Indigenous groups in Manitoba have expressed formal intentions of exercising jurisdiction over child and family services. As of July 7, 2022, six Indigenous governing bodies in Manitoba have provided notice of their intention to exercise legislative authority under s. 20(1) of the Act, and five Indigenous governing bodies in Manitoba (including Peguis) have requested to enter into a coordination agreement under s. 20(2).[6]

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[2] Legislative Assembly of Manitoba, Debates and Proceedings (Hansard), Vol. LXXVI, No. 60B, May 31, 2022, pp. 2602-2603.
[3] *The Child and Family Services Act*, C.C.S.M., c. C80, ss. 76.2, 76.4, 76.5(1) and 76.14(1).
[4] *Honouring Our Children, Families and Nation Act* (Peguis First Nation).
[5] Government of Canada, Notices and requests related to *An Act respecting First Nations, Inuit and Métis children, youth and families*, updated July 7, 2022.
[6] Government of Canada, Notices and requests related to *An Act respecting First Nations, Inuit and Métis children, youth and families*, updated July 7, 2022.

## B. Indigenous self-government is an Aboriginal right that must be interpreted within the constitutional framework of s. 35(1)

12. Manitoba submits that the right of self-government is an Aboriginal right that must be interpreted within the constitutional framework of s. 35(1). Section 35(1) provides the framework through which the fact that Indigenous peoples lived in distinctive societies, with their own practices, traditions, and cultures, is acknowledged and reconciled with Canadian sovereignty.[7]

13. The recognition and affirmation of Aboriginal rights under s. 35(1) is intended to ensure the continued existence of Indigenous groups as distinctive societies within Canada.[8] Section 35(1) rights "arise from the fact that aboriginal people are aboriginal" and "inhere in the very meaning of aboriginality", meaning that these rights are held by Indigenous peoples because they belong to distinctive communities and cultures.[9] As noted by this Court in *Beckman v. Little Salmon/Carmacks First Nation*, s. 35 "protect[s] and preserve[s] constitutional space for Aboriginal peoples to be Aboriginal".[10]

14. The right of Indigenous peoples to govern over internal matters in Indigenous communities is an integral part of this constitutional space that protects Indigenous identities, cultures, values and institutions. The right of Indigenous self-government under s. 35 is about the *self*, that is, it is limited to the internal affairs of Indigenous groups. It does not confer authority to regulate the population of a province or Canada as a whole. In this way, the Indigenous right to self-government is consistent with the unwritten constitutional principle of democracy, which promotes self-government while also recognizing that individuals who are affected by laws have the right to participate in the making of those laws.[11]

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[7] *R v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at para. 31; *R v. Powley*, 2003 SCC 43 at para. 15, *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam)* [*Uashaunnuat*], 2020 SCC 4 at para. 21.
[8] *R v. Sappier; R v. Gray*, 2006 SCC 54 [*Sappier; Gray*] at paras. 26 and 33; *R v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*] at para. 73.
[9] *Uashaunnuat* at para. 26, citing *Van der Peet* at para. 19.
[10] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*] at para. 33; Binnie J. (concurring) in *Mitchell v. M.N.R.*, 2001 SCC 33 [*Mitchell*] at para. 134.
[11] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*] at paras. 64-65; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paras. 76-77.

15. Further, section 35 does not confer a right to unlimited governmental powers or to complete sovereignty.[12] The central purpose of s. 35 is to preserve constitutional space for Indigenous people to be Indigenous *within* the framework of collective or shared Canadian sovereignty.[13] Section 35(1) must be read together with federal and provincial powers under s. 91 and s. 92, as Aboriginal rights exist within the general legal system of Canada.[14] As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the Constitution, which includes federal jurisdiction over Aboriginal peoples under s. 91(24) and provincial legislative authority under s. 92.[15]

16. As such, the right of Indigenous self-government under s. 35 involves circumscribed, rather than unlimited authority.[16] Aboriginal rights under s. 35 are not absolute and are subject to regulation by federal and provincial laws, provided the laws meet the justification test developed in *Sparrow*.[17] As stated by this Court 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".[18] In *Gladstone*, this Court noted that the federal and provincial regulation of Aboriginal rights, where justified, is in fact an integral part of reconciliation:

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, <u>equally</u> a necessary part of that reconciliation.[19]

17. In this shared Canadian sovereignty, Indigenous peoples are full participants with non-Indigenous peoples.[20] Indigenous peoples belong to distinctive societies, and they are also citizens and residents of provinces or territories. As noted by this Court in *Little Salmon*, "Aboriginal people

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[12] Binnie J. (concurring) in *Mitchell* at para. 134.
[13] *Little Salmon* at para. 33; Binnie J. (concurring) in *Mitchell* at paras. 133-135; *Van der Peet* at para. 49.
[14] *R v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*] at p. 1109; *Van der Peet* at para. 49.
[15] Binnie J. (concurring) in *Mitchell* at para. 134, citing the *Report of the Royal Commission on Aboriginal Peoples* (1996).
[16] Binnie J. (concurring) in *Mitchell* at para. 134, citing the *Report of the Royal Commission on Aboriginal Peoples* (1996).
[17] *Sparrow* at p. 1109; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*] at para. 119; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 160.
[18] *Tsilhqot'in Nation* at para. 82, citing *Delgamuukw* at para. 186.
[19] *Gladstone* at para. 73.
[20] Binnie J. (concurring) in *Mitchell* at para. 135; *Little Salmon* at para. 33.

do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance".[21] The constitutional objective of s. 35(1) is reconciliation, not mutual isolation: the aim of s. 35 is to protect a space for Indigenous self-government within the broader social, political and economic community of which Indigenous peoples are a part.[22]

18. In light of these underlying principles of s. 35(1), protection for Indigenous self-government may be conceived as existing on a continuum or spectrum. As with other s. 35(1) rights, the right to self-government is about preserving a constitutional space for Indigenous peoples to be Indigenous. Accordingly, at one end of this spectrum are the matters that are internal to Aboriginal communities that are integral to their unique cultures, identities, traditions, languages or institutions. Manitoba submits that the area of child and family services, which involves the protection of Indigenous children and families and their connections to their distinctive societies and cultures, would fall squarely within this category. It will be difficult for the government to justify regulation of aspects of self-government that are central to the cultural security and continuity of Indigenous communities, like child and family services. As will be explained, the government has a stringent standard to meet under the *Sparrow* justificatory test in respect of the regulation of internal matters that lie at the core of the right of self-government.

19. At the other end of the spectrum of self-government are the matters that have an internal dimension, but are further removed from the values underlying the protection of the s. 35(1) right. These aspects of self-government are at the periphery of what enables Indigenous communities to be Indigenous and relate more to the broader social, political and economic community of a province or Canada as a whole. These matters are not central or integral to the distinctive cultures, societies, or languages of Indigenous peoples. As such, regulation of these matters will be less difficult to justify under the *Sparrow* test. Assuming for the purpose of illustration that the sale of regulated products, such as non-medical cannabis, alcohol and tobacco, in stores on First Nations reserves is protected by self-government under s. 35 (which is not conceded), it is far

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[21] *Little Salmon* at para. 33; *Gladstone* at para. 73; *Delgamuukw* at para. 165; Binnie J. (concurring) in *Mitchell* at paras. 133; 135.
[22] Binnie J. (concurring) in *Mitchell* at para. 133; *Delgamuukw* at para. 165; *Tsilhqot'in Nation* at para. 82.

removed from those matters that are fundamental to the continued existence and vitality of the distinctive societies and cultures of First Nations people.

20. Further, these matters may have effects that extend beyond the internal affairs of Indigenous communities and impact individuals that did not participate in the making of the relevant rules or laws. These aspects of self-government are also at the periphery of the right, which is about the *self*—namely, the internal matters of an Indigenous community. As an example, an Indigenous community may enact legislation that permits on-reserve stores to sell regulated products to the general public at an age that may conflict with the minimum legal age set by the province. Such a law would impact the residents of the province as a whole. This Court has rejected the notion that reserves are enclaves of exclusive federal jurisdiction.[23] As noted by the Court in *Kitkatla Band*, "First Nations are not enclaves of federal power in a sea of provincial jurisdiction".[24] Reserves are not immune from provincial laws that apply generally to residents of a province and further the interests of the broader social, political and economic community of the province, which includes Aboriginal peoples. To the extent that the exercise of self-government extends beyond the internal affairs of Indigenous community and overlaps significantly with provincial legislation of general application, it will be far removed from the underlying values of the s. 35 right. As such, the burden on the province to justify its legislation under the *Sparrow* test will be less onerous.

21. At a certain point, even matters that have an internal dimension may fall entirely outside the scope of the right to self-government under s. 35(1). Manitoba submits that for the purposes of this appeal, it is not necessary to decide the full scope of the right to Indigenous self-government under s. 35(1). It is clear that the area of child and family services lie at the core of the right of self-government and that, as discussed below, regulation of this area by the federal or provincial governments will be difficult to justify under the *Sparrow* test.

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[23] *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695 at pp 702-703; *R v. Francis*, [1988] 1 S.C.R. 1025 at para. 4*; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 [*Kitkatla Band*] at para. 66.
[24] *Kitkatla Band* at para. 66.

## C. Provincial regulation of the exercise of Indigenous self-government in relation to child and family services

22. As indicated above, the jurisprudence from this Court is clear that Aboriginal rights under s. 35(1) are subject not only to federal, but also provincial regulation, provided that the justification test developed in *Sparrow* is met. In *Tsilhqot'in Nation*, this Court rejected the assertion that Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) and that provincial governments are prohibited from legislating in a way that limits Aboriginal rights.[25] The provinces can enact legislation that regulates Aboriginal rights under s. 35(1), including the right of self-government, provided that the infringement is justified in the broader public interest under the *Sparrow* test.[26] The two levels of government are thus equal partners in the process of reconciling Aboriginal interests with the broader interests of society as a whole that is the central aim of the s. 35(1) framework.

23. As noted by the Quebec Court of Appeal, reconciliation between Indigenous interests and those of the population as a whole, of which Indigenous peoples are a part, necessarily requires provincial involvement, particularly in the area of child and family services, which primarily falls under provincial jurisdiction.[27] The notion that reconciliation can be achieved by the federal government acting alone, without the active participation of provincial governments, has been rejected by the s. 35(1) framework.[28]

24. Where provincial legislation regulates the exercise of Aboriginal rights under s. 35(1), the appropriate framework through which to resolve the conflict is the justificatory test developed in *Sparrow*. As noted by this Court in *Tsilhqot'in Nation*, the s. 35(1) framework is a "complete and rational way" of confining provincial legislation affecting Aboriginal rights within constitutional bounds.[29]

25. Section 35(1) therefore permits the provinces to regulate Indigenous jurisdiction over child and family services, but as will be explained, only where the stringent justification requirements are met under the s. 35(1) framework. Manitoba submits that the *Sparrow* test should be adapted to

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[25] *Tsilhqot'in Nation* at paras. 133; 140-141.
[26] *Tsilhqot'in Nation* at para. 139.
[27] Reasons of the QCCA at para. 552.
[28] Reasons of the QCCA at para. 555.
[29] *Tsilhqot'in Nation* at para. 152.

determine how to resolve conflicts between provincial legislation and Indigenous legislation implemented pursuant to the right to self-government in relation to child and family services. Where provincial law conflicts with Indigenous legislation relating to child and family services, this amounts to an infringement of the Aboriginal right of self-government under s. 35(1). Under the s. 35(1) framework, the Indigenous law prevails unless the provincial government can establish that its own legislation is a justified limit on the right of self-government, such that the provincial law must override the Aboriginal law. In other words, a modified paramountcy test applies.

26. The infringement of the right of self-government will be justified and the provincial law will prevail where the two-part *Sparrow* justification test is met.[30] First, the provincial law must be in furtherance of 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.[31] Second, the provincial law's interference with the right of self-government must be consistent with the special fiduciary relationship between the Crown and Indigenous peoples.[32] This fiduciary relationship requires that the benefit to the public be proportionate to the adverse effect on the right of Indigenous self-government.[33] Specifically, the incursion on the right of self-government must be necessary to achieve the legislative objective (rational connection), the provincial law must go no further than necessary to achieve the objective (minimal impairment), and the benefits of the objective must not be outweighed by adverse effects on the right (balancing of effects).[34] As explained by the Court in *Tsilhqot'in*, this justificatory test "permits a principled reconciliation of Aboriginal rights with the interests of all Canadians".[35]

27. With respect to the procedural duty to consult, Manitoba submits that this duty is not a relevant consideration when determining whether provincial legislation should prevail over conflicting Indigenous legislation. As noted by this Court, the contours of the *Sparrow* justificatory test must be defined by the specific legal and factual context of each case.[36] In *Gladstone,* the Court stated

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[30] *Sparrow* at 1113-1114; *Delgamuukw* at paras. 161-162.
[31] *Tsilhqot'in Nation* at paras. 80-84; *Delgamuukw* at para. 161.
[32] *Tsilhqot'in Nation* at para. 84; *Delgamuukw* at para. 162.
[33] *Tsilhqot'in Nation* at para. 125.
[34] *Tsilhqot'in Nation* at para. 87.
[35] *Tsilhqot'in Nation* at para. 125.
[36] *Delgamuukw* at para. 162; *Gladstone* at para. 56; *R v. Desautel*, 2021 SCC 17 [*Desautel*] at para.

where the context varies significantly from that in *Sparrow*, "it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances" of the case.[37] Further, the duties that flow from the Crown's fiduciary relationship with Indigenous peoples, such as the duty to consult, vary depending on context.[38]

28. Where there is an operational conflict between provincial law and Indigenous law, courts must determine which law prevails. The modified *Sparrow* justificatory test set out above ensures that the public benefit furthered by the provincial law is proportionate to the impact on the right of self-government. This test includes an assessment of whether the provincial law impairs the exercise of the right of self-government no more than is necessary to achieve the compelling and substantial objective.

29. The duty to consult should not have a role in this modified *Sparrow* justificatory test. Where provincial legislation conflicts with Indigenous law implemented pursuant to the right of self-government, this is a distinct situation from circumstances in which legislation is enacted that infringes the discrete exercise of an Aboriginal right under s. 35. Indigenous law that is implemented pursuant to the right of self-government may involve a broad exercise of jurisdiction over a variety of internal matters pertaining to an Indigenous community. The exercise of the right of self-government is potentially much more extensive and wide-ranging than the more limited exercises of Aboriginal rights, such as the exercise of a right to fish in *Sparrow*,[39] a treaty right to hunt,[40] or Aboriginal title to specific lands.[41] In addition, several Indigenous governing bodies may decide to enact legislation pursuant to the right of self-government that may differ from other provincial laws and other Indigenous laws. In Manitoba alone, there are 63 First Nations that may choose to exercise their right of self-government through implementing Indigenous laws.[42] The potential is for 63 different laws.

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78; *Sparrow* at p. 1111.
[37] *Gladstone* at para. 56; *Desautel* at para. 78.
[38] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew*] at para. 24.
[39] *Sparrow* at p. 1101.
[40] *R v. Badger*, [1996] 1 SCR 771 at p. 793.
[41] *Tsilhqot'in Nation* at para. 67.
[42] Government of Manitoba, *Indigenous Organizations in Manitoba* (2018) at p. 21.

30. Further, this Court recently cautioned in *Mikisew* that the duty to consult doctrine is ill-suited for legislative action.[43] Applying the duty to consult during the law-making process would lead to significant judicial incursion into the workings of the legislature.[44] In *Mikisew*, Karakatsanis J., writing for two other justices, noted that the "duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes".[45] As stated by Rowe J., writing for three justices in *Mikisew*, although good public policy may involve consultation of Indigenous peoples prior to enacting legislation, pre-legislative consultation is not a constitutional requirement.[46] Ultimately, where a court is tasked with determining whether conflicting Indigenous law or provincial law should prevail, the modified *Sparrow* framework set out above should apply.

31. As indicated, where provincial legislation conflicts with Indigenous law regarding child and family services, the modified *Sparrow* test will be a stringent test. The government must show that the compelling and substantial objective of the provincial legislation is consistent with the goal of reconciliation. Further, the government must also show that this objective is proportionate to the interference with the right of Indigenous self-government, which will be significant given that child and family services are matters that are central to the cultural security and continuity of Indigenous communities and thus lie at the core of the s. 35(1) right. The government is required to establish that the legislation is not only minimally impairing of this right, but also that the benefits of the legislative objective outweigh the adverse effects on Indigenous self-government.

## D. Manitoba may seek to enact limited legislation relating to child and family services to ensure child protection and safety

32. As indicated, Manitoba supports Indigenous jurisdiction over child and family services pursuant to the right of self-government under s. 35(1) and has striven to make space for this jurisdiction

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[43] *Mikisew* at para. 32. A majority of the Court in *Mikisew* held that the duty to consult does not apply to the law-making process.
[44] *Mikisew* at para. 38.
[45] *Mikisew* at para. 38.
[46] *Mikisew* at paras. 152; 155.

through amendments to *The Child and Family Services Act*, C.C.S.M. c. C80 that assist in transitioning child and family services to Indigenous service providers.

33. However, Manitoba submits that it is critical for provinces to retain a limited ability to enact legislation in furtherance of child protection and safety that prevails over conflicting Indigenous legislation where the modified *Sparrow* justificatory test set out above is met. Manitoba may seek to enact legislation in limited areas of child and family services that are critical for child safety and protection. Where an Indigenous governing body has made a request to enter into a coordination agreement relating to the exercise of legislative authority in regard to child and family services under s. 20(2) of the Act, Manitoba would make every effort to reach a coordination agreement. Where Manitoba is unable to obtain an agreement, s. 35(1) preserves a limited role for the provinces to regulate the exercise of the right of Indigenous self-government in relation to child and family services, provided that this regulation can be justified under the *Sparrow* test.

34. In Manitoba, there are several limited, narrow areas of child and family services that may require provincial regulation to ensure the safety of children.

35. First, Manitoba strongly supports the need for all child welfare providers to disclose basic information about children and families receiving services, so that all child and family service providers have access to this information on a single electronic system. The sharing of this information permits all child and family service providers to have a full understanding of a child's history, background and current situation, which is crucial for detecting indicators of abuse or exploitation. For example, if a family moves to another region of the province and a child and family service provider investigates an allegation of abuse, the service provider will need to have access to basic information about the child and family to investigate further. As indicated, 11 Indigenous governing bodies in Manitoba have provided notice of their intention to exercise legislative authority or have requested to enter into a coordination agreement under the Act. The fact that at least 11 different Indigenous governing bodies in Manitoba intend to assume jurisdiction over child and family services indicates the need for a comprehensive database that includes information about all children and families receiving services across Manitoba.

36. Children and families in the child welfare system in Manitoba have suffered in the past from gaps in information resulting from the mobility of families in the province and the failure of service

providers to share and access critical information concerning the particular situation of a family or child. The inquiry into the death of Phoenix Sinclair, an Aboriginal child who was murdered when she was five years old in 2005, found that the protection of children in Manitoba requires a comprehensive information management system that contains up-to-date information about all children and families receiving protection services.[47] The report authored by the Commissioner of the inquiry, the Honourable Ted Hughes, states as follows:

> Information management is critical to a child welfare's system's ability to keep children safe. A reliable, robust and accessible database is indispensable. With turnover in social workers and mobility of families, there is no other way to record, track and retrieve essential information about children and families.[48]

37. The report recommended that all agencies be required to use the same comprehensive information management system, given that "families are mobile and unless all agencies are using the same information system, there may be gaps in information that can leave children vulnerable".[49] As the Commissioner stated, "all agencies require immediate access to all available information, if children are to be protected".[50] In the case of Phoenix Sinclair, service providers failed to gain access to necessary information about the child's family situation that could have prompted intervention.[51]

38. Other reports on the child welfare system in Manitoba that followed the Phoenix Sinclair inquiry have also emphasized the need for coordination and information sharing among service providers to prevent jurisdictional "siloing" and gaps in critical information about children and families.[52]

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[47] The Hon. Ted Hughes, Commissioner, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children*. Volume 2 (December 2013) at pp. 388-389.
[48] The Hon. Ted Hughes, Commissioner, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children*. Volume 2 (December 2013) at p. 385.
[49] The Hon. Ted Hughes, Commissioner, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children*. Volume 2 (December 2013) at p. 389.
[50] The Hon. Ted Hughes, Commissioner, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children*. Volume 2 (December 2013) at p. 389.
[51] The Hon. Ted Hughes, Commissioner, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children*. Volume 2 (December 2013) at p. 388. See also pp. 162; 165; 193; 202; 229; 235-236; 239.
[52] Manitoba Advocate for Children and Youth, *A Place Where It Feels Like Home: The Story of Tina Fontaine* (March 2019) at pp. 81-83; Manitoba Advocate for Children and Youth: *Documenting the Decline: The Dangerous Space Between Good Intentions and Meaningful Interventions* (October 2018) at pp. 47-49.

For example, a report by Manitoba's Advocate for Children and Youth on the death of Tina Fontaine, a 15 year old from Sagkeeng First Nation who died in Winnipeg in 2014, found that indicators that Tina Fontaine was at the risk of sexual exploitation were not shared among the multiple CFS agencies involved in her care.[53]

39. Second, it is also essential that all service providers disclose basic information concerning adults who have been found to have abused children, so that the province can maintain its Child Abuse Registry. This information can be accessed by employers, volunteer organizations and service providers to assist in protecting children. The province may seek to require all service providers to disclose this information.

40. Third, a centralized, coordinated process is required for children who are apprehended by Indigenous service providers, but who are not members of the particular Indigenous group. Under Manitoba's child and family services legislation, Indigenous service providers can apprehend any child in need of protection. However, if an Indigenous service provider apprehends a child who is not a member of the Indigenous group, a coordinated process is required in order to ensure that the child is placed with the correct Indigenous governing body, or if the child is non-Indigenous, with others.

41. Further, court or other adjudicative processes are required for the determination of certain disputes relating to Indigenous child and family services under the Act. The Act provides that where two Indigenous laws relating to child and family services conflict, the law pertaining to the Indigenous group, community, or people with which the child has "stronger ties" prevails to the extent of the conflict or inconsistency.[54] In addition, pursuant to s. 23 of the Act, an Indigenous law will not apply in relation to an Indigenous child if it would be contrary to the best interests of the child. A single, unified procedure for adjudicating these disputes is required.

42. Finally, it is important that the adjudication of a dispute relating to the placement of a child who has both Indigenous and non-Indigenous parents allows for the participation of the non-Indigenous parent. Where an Indigenous service provider apprehends a child whose parent is a member of the Indigenous group, but whose other parent is non-Indigenous, that parent has a

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[53] Manitoba Advocate for Children and Youth, *A Place Where It Feels Like Home: The Story of Tina Fontaine* (March 2019) at pp. 81-83; 92-94.
[54] S. 24(1).

right to a fundamentally just process to resolve the dispute regarding the child's placement and care. Parents are constitutionally entitled to a fair hearing when the state seeks to obtain custody of their children.[55] It may be necessary for the province to provide for such a mechanism that differs from what is set out in the Indigenous law.

43. When an Indigenous governing body attempts to enter into a coordination agreement and enacts legislation in relation to child and family services, sections 21 and 22(3) of the Act specify that this legislation has the "force of law as federal law" and prevails over conflicting provincial laws to the extent of the inconsistency. The result of these provisions is that as long as the Indigenous governing body has engaged in reasonable efforts to enter into a coordination agreement, legislation enacted by Manitoba in the very limited areas above for reasons of child protection and safety would not be operative if it conflicted with Indigenous law.[56] The Indigenous law would prevail, regardless of whether Manitoba's legislation meets the *Sparrow* justification test.

44. As explained below, Manitoba submits that ss. 21 and 22(3) of the Act that render the Indigenous law paramount to provincial legislation in the event of a conflict are unconstitutional.

## E. Sections 21 and 22(3) of the Act alter the basic constitutional architecture and are *ultra vires*

45. As discussed, s. 35 preserves constitutional space for Indigenous people to be Indigenous within a shared Canadian sovereignty. Its central purpose is to reconcile Aboriginal interests with those of the broader society, of which Aboriginal people are a part. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the Constitution. As this Court stated in *Senate Reference*,

> …the Constitution should be viewed as having an "internal architecture" or "basic constitutional structure"… The notion of architecture expresses the principle that "[t]he individual elements are linked to others, and must

[55] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 55.

[56] Under s. 20(3) of the Act, sections 21 and 22 apply only where the Indigenous governing group has entered into a coordination agreement, or has not entered into a coordination agreement but has made reasonable efforts to do so during the period of one year after the day on which the request is made.

> be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*, at para. 50 … In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement.[57]

46. The exercise of Aboriginal rights under s. 35(1), including the right of self-government, must be coordinated and reconciled with the powers of the federal and provincial governments under s. 91 and s. 92. Rights under section 35(1) are not absolute and are subject to regulation by both the federal and provincial governments where the *Sparrow* justification test is met.

47. Although the provinces can restrict the exercise of Aboriginal rights under s. 35, sections 21 and 22(3) of the Act remove the ability of the provinces to limit Indigenous laws relating to child and family services that are implemented pursuant to s. 35. Sections 21 and 22(3) render Indigenous laws relating to child and family services paramount to conflicting provincial legislation, even if the provincial legislation meets the *Sparrow* justificatory test. In doing so, these provisions enlarge the authority of the Aboriginal right to self-government in relation to child and family services under s. 35(1), and significantly diminish the legislative authority of provincial governments under s. 92. The effect of these statutory provisions is to amend s. 35(1) and the basic constitutional architecture. This cannot be constitutional.

48. The Attorney General of Canada ("Canada") argues that sections 21 and 22(3) in the Act are *intra vires* on the basis that they incorporate by reference Indigenous laws enacted through the exercise of the right of self-government under s. 35. Canada relies on this Court's decision in *Coughlin*, which held that Parliament could incorporate by reference provincial legislation respecting the licensing of intra-provincial transportation in order to regulate extra-provincial transportation.[58]

49. Manitoba disagrees that sections 21 and 22(3) constitute valid incorporation by reference. Parliament cannot by simple statute alter the basic constitutional structure by removing the provinces' ability to limit the Aboriginal right of self-government under s. 35(1). Pursuant to the s. 35(1) framework, provincial governments can infringe exercises of Aboriginal rights, provided that the *Sparrow* justification test is met. This Court has recognized that the limitation of Aboriginal rights, where justified, is in fact an integral part of the reconciliation that is the central

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[57] *Reference re Senate Reform*, 2014 SCC 32 at para. 26.
[58] *Coughlin v. Ontario Highway Transport Board et al.*, [1968] S.C.R. 569 [*Coughlin*] at p. 575.

aim of s. 35.[59] The effect of sections 21 and 22(3) in the Act is to expand the scope of the right of Indigenous self-government under s. 35 and diminish the province's constitutional authority, completely altering the s. 35 framework and undermining the objective of reconciliation. Manitoba submits that incorporation by reference does not permit one level of government to alter the constitutional authority of another level of government. Parliament cannot use the statutory mechanism of incorporation by reference to amend the s. 35(1) framework under the Constitution. In other words, Parliament cannot do indirectly what it is prohibited from doing directly.

50. Sections 21 and 22(3) of the Act are distinguishable from the legislative provisions at issue in *Coughlin*. In that case, Parliament merely "borrowed" provincial laws pertaining to the licensing of intra-provincial transportation and applied them to the regulation of extra-provincial transportation. Parliament did not alter the constitutional authority of another level of government. By contrast, as discussed, sections 21 and 22(3) of the Act expand the scope of the Aboriginal right to self-government under s. 35 and limit the ability of the provinces to regulate this right. Independent of the Act, Indigenous laws relating to child and family services that are implemented pursuant to the Aboriginal right of self-government would not be operative under the s. 35(1) framework to the extent of their inconsistency with provincial legislation, provided the requirements of the *Sparrow* test are met. The provincial law would override the Indigenous laws to the extent of the conflict. The result of sections 21 and 22(3) in the Act is to unconstitutionally expand the right to Indigenous self-government in relation to child and family services under s. 35(1) and render it absolute in relation to provincial laws.

51. Sections 21 and 22(3) also significantly diminish provincial jurisdiction over child and family services under s. 92. The restricted legislation outlined above that Manitoba may seek to introduce in furtherance of the protection and safety of children would not be operative to the extent of its conflict with Indigenous laws.

52. In addition, the provinces would be unable to override Indigenous laws relating to child and family services that have an impact on individuals who did not participate in the making of these laws, such as non-Indigenous parents. For example, if a child with an Indigenous parent and a non-Indigenous parent is apprehended under an Indigenous law, the parent who is not a member

[59] *Gladstone* at para. 73.

of that community may be bound and adversely affected by a law that they had no role in enacting. Where the right to self-government under s. 35(1) has adverse effects on those who did not participate in the making of the laws, the Province must be able to regulate this exercise of self-government to advance the broader interests of society. This is the objective of reconciliation that is the central premise of s. 35(1). It should be recalled that the unwritten constitutional principle of democracy recognizes that individuals must have the opportunity to participate in the making of laws that affect them.

53. In significantly narrowing provincial regulation of the exercise of the right of self-government in relation to child and family services under s. 35(1), the Act undermines the process of reconciliation of Aboriginal interests with the broader interests of society, of which Aboriginal people are a part. The provinces generally provide and administer child and family services in Canada, and have the necessary expertise and resources in this area. Yet, under the Act, the provinces are limited in their ability to coordinate and reconcile the exercise of Indigenous self-government in relation to child and family services with the interests of the population as a whole.

54. Ultimately, sections 21 and 22(3) of the Act have the effect of amending the s. 35(1) framework and the basic architecture of the Constitution. As such, these provisions are *ultra vires*.

55. It should be noted that a finding that sections 21 and 22(3) of the Act are constitutional could have consequences that extend far beyond the child and family services context. In future, Parliament may decide to incorporate by reference *any* Indigenous legislation enacted pursuant to a s. 35(1) right, which would then prevail over provincial legislation. This would significantly diminish provincial regulation of Aboriginal rights under s. 35(1), and allow Parliament to significantly narrow provincial powers under s. 92.

## F. Conclusion

56. Manitoba acknowledges that Indigenous peoples have an Aboriginal right to self-government that is recognized and protected by s. 35(1). However, Aboriginal rights under s. 35(1), including the right of self-government, are not absolute. Provinces can regulate the exercise of these rights, provided that this regulation is justified under the *Sparrow* test.

57. Where provincial law conflicts with Indigenous legislation relating to child and family services, a modified *Sparrow* justification analysis should apply. The Indigenous law prevails unless the

provincial government can establish that its own legislation is a justified limit on the right of self-government, such that the provincial law overrides the Indigenous law.

- This modified *Sparrow* test consists of two parts: the province must show that: (1) the provincial law is in furtherance of a compelling and substantial objective that is consistent with the goal of reconciliation underlying s. 35 and (2) that the benefit to the public is proportionate to the adverse effect on the right of Indigenous self-government. Specifically, the incursion on the right of self-government must be necessary to achieve the legislative objective, the provincial law must go no further than necessary to achieve the objective, and the benefits of the objective must not be outweighed by adverse effects on the right. The procedural duty to consult, although good public policy, is not a constitutional requirement in this context.

- Under this modified *Sparrow* test, it will be difficult for the government to justify the regulation of matters that are internal to Indigenous communities and are integral to their unique cultures, identities, traditions, languages or institutions. The adverse effects on the right of self-government will be significant with respect to internal matters that lie at the core of the right.

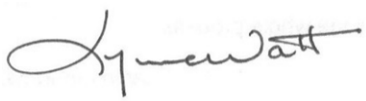
- Conversely, it will be easier for the government to justify the regulation of aspects of self-government that are not central or integral to the distinctive cultures, societies or languages of Indigenous peoples, and thus are at the periphery of the right of self-government. These aspects relate more to the broader social, political and economic community of a province or Canada as a whole.

58. The ability of the provinces to justify limitations on Aboriginal rights is a key component of the s. 35(1) framework, which has the central aim of reconciling the exercise of Aboriginal rights with the interests of the population as a whole (of which Indigenous peoples are a part). Sections 21 and 22(3) of the Act, however, have the effect of making Indigenous laws relating to child and family services absolute in relation to provincial laws. In doing so, these provisions alter the s. 35(1) framework and the basic constitutional architecture, and are *ultra vires*.

## PART IV – COSTS

59. Manitoba does not seeks costs and requests that no order of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2022.



*for:*

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**Kathryn Hart**

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