**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, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES**

INTERVENERS

*[Style of cause continued on next page]*

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# FACTUM OF THE INTERVENER, VANCOUVER ABORIGINAL CHILD & FAMILY SERVICES SOCIETY
**(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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## PART I—OVERVIEW OF POSITION AND FACTS

### A. Overview: the importance of the off-reserve/urban Indigenous child and family population

1. The intervener, Vancouver Aboriginal Child & Family Services Society ("**VACFSS**"), in its scope and scale, is the largest Indigenous urban child welfare agency in Canada. VACFSS services an Indigenous child and family population that is national in scope, drawn from a large number of distinct Indigenous communities across Canada. Balancing the need for basic national standards with individual community-designed approaches is at the heart of its ongoing work to help reverse and end the overrepresentation of Indigenous children in care, and to restore, maintain, and nourish cultural connection and identity of those in care.

2. The establishment of VACFSS in 1992 coincided with the federal government's abjuring of responsibility for the provision of social services to *off-reserve* Indigenous peoples, including, in particular, child and family services.[1] This off-loading of responsibility onto the provinces operated as an extension of, and helped to further, policies of assimilation and enfranchisement which regarded off-reserve Indigenous people as no longer truly Indigenous. A central purpose of the policies of assimilation and enfranchisement that arose in the 19th century was to expunge Indigenous people of their culture, identity and rights and, in so doing, relieve Canada of its obligations and commitments toward them, including in regard to social assistance. If a person "ceased to be an Indian" through those policies, that person would also cease to be of federal concern and responsibility, and would instead come under provincial responsibility.

3. Through enfranchisement laws, residential schools, and then the Sixties Scoop, the assimilationist project displaced and dispersed tens of thousands of Indigenous people, separating them from their families, communities, and identities.[2] In very large numbers, such individuals and their children and were relocated, often involuntarily, into major urban centres.[3] Also in very large numbers, these individuals arrived or were born into families in urban centres bearing the

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[1] QCCA Opinion at paras. 92, 94-95, and 98; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* vol. 3 "Gathering Strength", Ottawa, Canada Communication Group, 1996 at pp. 26-27 and 34.

[2] QCCA Opinion at paras. 85-88 and 93-97.

[3] Record of the First Nations Child and Family Caring Society of Canada, vol. 2, Exhibit CB-5 of Sworn Declaration of Dr. Cindy Blackstock, December 4, 2020, "*Wen:De – We are Coming to the Light of Day*" at p. 314; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* vol. 4 "Perspectives and Realities", Ottawa, Canada Communication Group, 1996 at pp. 383-384 and 431-432.

traumatic psychological, physical, and economic scars of those policies. This set the stage for the ongoing humanitarian crisis that is the vast overrepresentation of Indigenous children in care.

4. VACFSS's work is thus at the frontline of the Act's[4] urgent and vital purpose: to reverse and end the overrepresentation of Indigenous children in care, and to ensure cultural continuity and revitalization. This work is critical in all settings, but takes on a particular urgent and challenging dimension in the off-reserve/urban context, in which the cultural dislocations and risks of irreversible assimilation are at their highest.[5] Furthermore, the majority of Indigenous children removed from their families were resident off-reserve at the time of their removal.

5. A central aspect of VACFSS's mandate, policies and operations is to ensure that such children retain or regain their connection with their Indigenous identity and community, for the benefit of the child, their family, and their community alike. Recognition and operationalization of the inherent right of each Indigenous Nation to manage, and assume responsibility for, child and family services of their members builds an essential bridge in that regard. It serves to re-establish the bond between community, child, and family, both by giving the community the necessary tools and authority to do so and, in so doing, deepening each community's own responsibility for and accountability toward its children and families.

6. For that reason, VACFSS recognizes, honours, and operationalizes the inherent authority of each Indigenous Nation to which the children and families it serves are connected. It does so notwithstanding the significant challenges this approach represents, given that this requires working with over 100 different Indigenous Nations at any given time, including many located outside B.C. The interposition of a patchwork of provincial authorities and standards in that challenging but vital process serves no helpful purpose, and indeed acts as a hindrance.

7. VACFSS therefore regards the Act as a welcome and indeed critical return by Canada to the jurisdictional space that it had wrongfully and harmfully vacated. VACFSS submits that, by creating national standards in regards to Indigenous child and family services – a matter inextricably linked to Indigenous identity and rights of self-government – Parliament has acted

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[4] *An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019, c. 24 (the "Act").

[5] QCCA Opinion at paras. 96-97; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* vol. 3 "Gathering Strength", Ottawa, Canada Communication Group, 1996 at pp. 23-24.

within its jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. Further, Parliament's legislative recognition of Indigenous self-governance in regards to child and family services was proper and in accordance with the principles of reconciliation. Legislation is a valid and essential means of receiving into Canadian law pre-existing, inherent Indigenous rights.

8. Given the history of federal off-loading of responsibility for off-reserve Indigenous children, it is critical for this Court to make clear that the underlying federal jurisdiction and inherent Indigenous authority that the Act receives into law apply both on- and off-reserve. A contrary position would continue the pernicious work of assimilation, and cannot be countenanced.

**B. Facts**

9. VACFSS takes no position regarding the facts in these appeals.

## PART II—POSITION ON QUESTIONS RAISED

10. VACFSS takes no position on the outcome of these appeals, but makes the following three points.

11. First, the Courts are not the only constitutional actor entitled to delineate the content of s. 35 rights pursuant to the *Constitution Act, 1982*. Parliament and the legislatures, within their spheres of legislative competence under the *Constitution Act, 1867,* are empowered and indeed obligated to do so through legislative enactments, in concert with Indigenous groups. Legislation is one of the means by which pre-existing, inherent Aboriginal rights are received into Canadian law.

12. Second, legislation to set national standards, and to recognize inherent Indigenous authority in relation to Indigenous child and family services, falls within federal jurisdiction. Such matters touch on the "core of Indianness" and, as such, provincial laws do not apply *ex proprio vigore*.

13. Third, Federal jurisdiction over "Indians" under s. 91(24), as a vehicle for recognizing, implementing, and giving effect to inherent Indigenous authority in regard to child and family services, applies both on- and off-reserve.

## PART III—STATEMENT OF ARGUMENT

### A. The content of s. 35 rights may be delineated by legislation

14. Contrary to the position advanced by the Attorney General of Quebec, the courts are not the only constitutional actor that may delineate the content of s. 35 of the *Constitution Act, 1982*.

15. The purpose of s. 35(1) of the *Constitution Act, 1982* is to reconcile the prior presence of Indigenous peoples in North America with the assertion of Crown sovereignty.[6] As such, the Crown is honour-bound to reconcile its assertion of sovereignty with the pre-existing sovereignty of Indigenous peoples, including through legislative efforts towards the implementation of s. 35 rights. That the content of s. 35 may be delineated by way of legislated enactment is supported by the provision for, and the conclusion and implementation of, historical and modern treaties and their resulting constitutional protection.

16. It is well-established that inherent Aboriginal rights arise from the pre-existing sovereignty of Indigenous peoples. Therefore, such rights are independent of and do not arise from or depend upon s. 35 of the *Constitution Act, 1982,* whose role is to affirm and recognize such rights, and to afford them constitutional protection.[7] Such rights may in turn be received into Canadian law through the mechanisms provided for under our constitutional structure: by way of court decision, by exercise of Royal prerogative, or by legislative enactment. As Justice Abella summarized in her concurring reasons in *Mikisew Cree* (2018):[8]

> … Our Constitution places a responsibility on the executive and legislative branches, along with Indigenous leaders, to collaborate and reconcile competing claims and historical grievances ... This has been described as a generative constitutional order, which "mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society" … This process is supported by the judiciary's role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met…

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[6] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 141.
[7] See, e.g., *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 at para. 61; *Giesbrecht v. British Columbia (Attorney General)*, 2020 BCSC 174 at para. 34.
[8] *Mikisew Free First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 87.

17. One of the key underpinnings of modern Aboriginal law is that the Crown and Indigenous peoples ought to reconcile without court involvement, if at all possible.[9] It is clear that the *Constitution Act, 1982,* via ss. 35(1) and 35(2), contemplates the ability (and indeed, the obligation) of the Crown to enter into agreements that give legal force within the Canadian legal system to pre-existing Aboriginal rights, in providing for and affording constitutional protection to both historical and modern treaties/land claim agreements.[10] An essential feature of such treaties is the recognition and implementation of pre-existing Aboriginal rights. Once so recognized, those rights are enshrined and benefit from constitutional protection; they are not dependent on prior court determination as to their existence. Rather, their constitutional status is affirmed through a combination of the actions of the executive and Indigenous groups (through negotiating and entering treaties) and Parliament or the legislature (in passing incorporating legislation).

18. The division of powers determines which order of government has the necessary jurisdiction to afford such recognition and receive into Canadian law a particular Aboriginal right.[11] For this reason, treaties or treaty-like agreements that touch only on federal powers may be entered into by the federal Crown, while those affecting provincial powers require provincial assent.[12]

19. The law accommodates, and indeed ought to celebrate, an approach to reconciliation wherein Parliament, the executive, and Indigenous peoples work together to recognize, affirm, delineate, and implement self-government rights in the area of child and family services. Such an approach upholds the "grand purpose" of s. 35, being the reconciliation of Indigenous and non-Indigenous Canadians "in a mutually respectful long-term relationship",[13] including by: restoring ties between individuals and their communities; facilitating Indigenous groups' assumption of control over their own members in a way that is consonant with their values, teachings, and traditions; and empowering First Nations regarding accountability and care over their membership.

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[9] See, e.g., *R. v. Desautel*, 2021 SCC 17 at para. 87.
[10] See, e.g., *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 17; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 25.
[11] See, by analogy, *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 at para. 30; see also paras. 33-35.
[12] See, e.g., *Westbank First Nation Self-Government Agreement* (federal Crown only), *c.f. Nisga'a Final Agreement* (federal and provincial Crowns).
[13] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 10.

**B. Legislating in regards to Indigenous child and family services falls within federal jurisdiction and touches on the core of s. 91(24) of the *Constitution Act, 1867***

20. Legislative efforts to implement Aboriginal rights and to receive them into Canadian law must always fall within the head of power of the legislative actor concerned. VACFSS submits that the Act, which sets national standards and recognizes inherent Indigenous authority in relation to Indigenous child and family services, falls within federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*.[14] In particular, the authority to intervene in the relationship between Indigenous children, their families, and their communities is a matter fundamental to Indigenous status, identity, and collective survival, and as such goes to the "core of Indianness."

21. In *NIL/TU, O*, this Court concluded that "the core, or 'basic, minimum and unassailable content' of the federal power of 'Indians' in s. 91(24) is defined as matters that go to the status and rights of Indians,"[15] including the relationships within Indian families and their communities.[16]

22. The question in *NIL/TU, O* was whether provincial labour laws applied to the operations of an Indigenous child and family services agency. The Court looked at whether the appellant's operations fell within the protected core of s. 91(24). Despite the appellant's operations having a clear impact on Aboriginal family relationships, this Court determined that those operations did not fall within the protected core of s. 91(24) because they did not affect Indian status.[17]

23. The Québec Court of Appeal, relying on *NIL/TU, O,* states that this Court "has never concluded that the provision of provincial child and family services in general—and more specifically those ordinarily provided to residents of a province—is part of 'Indianness'."[18] This is an impoverished reading of s. 91(24), and ignores the prior determinations by this Court that the "Indian family relationship" touched on the core of s. 91(24), irrespective of Indian status being affected. Indeed,

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[14] See, e.g., *Natural Parents v. Superintendent of Child Welfare et al.,* [1976] 2 S.C.R. 751 at 760-761; see also *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 61.
[15] *NIL/TU, O Child & Family Services Society v. B.C.G.E.U*, 2010 SCC 45 at para. 70.
[16] *NIL/TU, O Child & Family Services Society v. B.C.G.E.U*, 2010 SCC 45 at para. 71.
[17] *NIL/TU, O Child & Family Services Society v. B.C.G.E.U*, 2010 SCC 45 at para. 81.
[18] QCCA Opinion at para. 566.

in *Natural Parents v. Superintendent of Child Welfare*, this Court determined that the British Columbia *Adoption Act* touched on the "core of Indianness":[19]

> It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness", to strike at a relationship integral to a matter outside of provincial competence… Counsel for the respondents cited a number of cases holding Indians to be subject to provincial legislation…These, and other like cases, are simply illustrative of the amenability of Indians off their reservations to provincial regulatory legislation, legislation which, like traffic legislation, does not touch their "Indianness". Such provincial legislation is of a different class than adoption legislation which would, if applicable as provincial legislation simpliciter, constitute a serious intrusion into the Indian family relationship.

24. This finding in *Natural Parents* was made despite this Court having expressly determined that the provincial adoption legislation in question would have no ability to deprive an Indigenous child of any status or rights which they possessed under the *Indian Act* at the time of adoption.[20]

25. *Natural Parents*, as affirmed in *Canadian Western Bank*,[21] acts as an authoritative pronouncement—and not a mere suggestion, as the QCCA characterized it[22]—that the "Indian family relationship" touches the core of Parliament's jurisdiction over Aboriginal peoples, regardless of whether Indian status is affected. This is because relationships within Indigenous families and communities constitute "matters that could be considered absolutely indispensable and essential to their cultural survival."[23] Thus, if the "Indian family relationship" strikes at the core of "Indianness", which core encompasses "the whole range of aboriginal rights that are protected by s. 35(1)"[24], and includes "practices, customs and traditions which are not tied to the

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[19] *Natural Parents v. Superintendent of Child Welfare et al.,* [1976] 2 S.C.R. 751 at 760-761 [emphasis added].
[20] *Natural Parents v. Superintendent of Child Welfare et al.,* [1976] 2 S.C.R. 751 at 775, 777, 783.
[21] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 61.
[22] QCCA Opinion at para. 566.
[23] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 61.
[24] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 178.

land"[25], it follows that the provision of child and family services, which necessarily impacts and implicates the familial relationships of Indigenous peoples, also strikes at that core.

26. Contrary to the QCCA's opinion, because the provision of provincial child and family services touches on the core of "Indianness", provincial child welfare legislation does not apply *ex proprio vigore*.[26] Rather, such legislation can apply to Indigenous persons only by way of s. 88 of the *Indian Act*,[27] which incorporates by reference provincial laws of general application.[28]

27. Pursuant to s. 88, such provincial laws are subject to the terms of "any treaty and any other act of Parliament".[29] Accordingly, provincial child welfare laws, insofar as they touch on the core of "Indianness", are subject to the Act, thereby ensuring a uniform national standard while respecting Indigenous authority. Parliament is presumed to legislate with a view to the integrity and coherence of the statute book as a whole, and not "to contradict itself or to create inconsistent schemes."[30] In that regard, it would be an absurd result to provide for the patchwork application of provincial child and family laws when a core purpose of the Act is to set national standards.

28. Further, the *ex proprio vigore* application of the laws of a particular province to an Indigenous child would operate even if that child's presence in the province arose through involuntary displacement away from their home community to an urban centre (such as Vancouver, where VACFSS operates) – a result that would be all the more unsettling.

29. Drawing on the principles of reconciliation, the relevant child and family services laws applying to displaced Indigenous children should not be those of the province in which they have found themselves, but those of the Nation to which they are tied, which might be anywhere in Canada.

### C. Federal jurisdiction over "Indians" under s. 91(24) applies both on- and off-reserve

30. The Act is a re-assertion of Parliament's competence over all Indigenous children, and makes no distinction between on-reserve and off-reserve children. However, the QCCA made no finding

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[25] *Delgamuukw v. British-Columbia*, [1997] 3 S.C.R. 1010 at para. 178.
[26] QCCA Opinion at paras. 66 and 203.
[27] *Indian Act*, R.S.C. 1985, c. I-5, s. 88.
[28] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 182.
[29] *Indian Act*, R.S.C. 1985, c. I-5, s. 88.
[30] *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at para. 7.

that the legislative competence of Parliament over "Indians" under s. 91(24), or the inherent Indigenous right to self-government over child and family services, does not apply off-reserve.

31. Given the pernicious history of federal abjuring of responsibility, and of consequent provincial overreach, in regard to off-reserve Indigenous children and families, VACFSS asks that for this Court to make clear that the Act's valid underlying federal authority, pursuant to jurisdiction over "Indians" under s. 91(24), as well as the inherent Indigenous jurisdiction which the Act validly receives into Canadian law, apply both on- and off-reserve. Despite the history of policies and viewpoints to the contrary, off-reserve Indigenous children and families are no less Indigenous.

32. Legislative competence of Parliament under s. 91(24) is not determined by the geographic location of a particular "Indian". While "Indians" and the lands reserved for "Indians" are often addressed legislatively within the same statutes, these are unique and independent constitutional matters. For example, the *Indian Act* is broadly applicable to Indians regardless of their place of residence, and s. 4(3) carves out exceptions where certain sections are inapplicable to "any Indian who does not ordinarily reside on a reserve" or other type of federally-owned land.[31]

33. To come to the contrary conclusion – that the reach of federal power ends at the borders of the reserve – would harken back to the historic and shameful policies of assimilation and enfranchisement.[32] As noted by this Court in *Corbiere*, governments have tended to neglect off-reserve Indigenous persons' "Aboriginal identity and their desire for connection to their heritage and cultural roots", and harmful stereotypes are directed toward them because "[p]eople have often been only seen as 'truly Aboriginal' if they live on reserves."[33] This Court has further noted the long history of playing jurisdictional football with off-reserve Indigenous groups, resulting in a "jurisdictional wasteland with significant and obvious disadvantaging consequences".[34]

34. It is therefore essential for this Court to make clear that federal jurisdiction underpinning the Act, the Act itself, and underlying inherent Indigenous jurisdiction validly and properly apply to both on- and off-reserve Indigenous children and families. Clarity as to this proper scope is critical, given the past off-loading of responsibility by Canada onto the provinces in regard to off-reserve Indigenous children and family services, and to counter any continued or renewed efforts by the

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[31] *Indian Act*, R.S.C. 1985 c. I-5, s. 4(3).
[32] See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 88.
[33] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 71.
[34] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 14.

provinces to interfere with the exercise and implementation of inherent Indigenous jurisdiction in this sphere.[35] Any suggestion that there is a distinction between federal and provincial responsibility predicated on whether Indigenous children and families are on- or off-reserve: (i) has no constitutional basis; and (ii) is anchored in policies of assimilation and enfranchisement.

35. Clarity as to this proper scope also has particular importance to agencies like VACFSS, whose work takes on a particularly urgent and challenging dimension in the urban context where cultural dislocations and risks of irreversible assimilation are at their highest. Indeed, in *Corbiere,* this Court noted that the off-reserve Indigenous population "experiences particular disadvantages compared to those living on-reserve because of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways because of this fact."[36]

36. As an agency whose services are directed at an off-reserve Indigenous child and family population that is national in scope, and one which draws from a number of distinct Indigenous communities across Canada, VACFSS views the Act as an essential advance and indispensable tool for balancing the need for basic national standards with individual community-designed approaches. However, without clarity that federal jurisdiction, pursuant to s. 91(24), applies off-reserve, the Act risks failing to live up to its purpose by leaving behind some of the most vulnerable Indigenous children, youth, and families that it stands to protect.

## PART IV—COSTS

37. VACFSS does not seek costs and respectfully asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, November 11, 2022.

As Agent for: Maxime Faille and Keith Brown

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

[35] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 72.
[36] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 72.

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