500-09-028751-196

COURT OF APPEAL OF QUEBEC

(Montreal)

REFERENCE TO THE COURT OF APPEAL OF QUEBEC
IN RELATION TO THE *ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES*

Order-in-Council No. 1288-2019

FACTUM OF THE INTERVENER ASSEMBLY OF FIRST NATIONS

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PART I – THE FACTS

Overview

1. The intervenor, the Assembly of First Nations ("AFN"), is a national organization representing more than 634 First Nations across Canada who have their own laws, languages, citizens, territories, and governance systems. Their relationships with the Crown are founded on the inherent self-governing authority of First Nations, treaties, self-government agreements, and other arrangements. Whatever form these arrangements take, they are each grounded in their nation-to-nation nature.

2. The AFN has been directly involved in the co-development of *An Act respecting First Nations, Inuit and Métis Children, Youth and Families* (the "Act")[1]. Generally, the Act is aimed at addressing the crisis levels of overrepresentation of First Nations children in child and family services systems. It does so by establishing a national baseline for the provision of First Nations child welfare services, highlighting the importance First Nations children's relationships with their families, culture and communities.

3. Most importantly, the Act turns itself to the issue of the self-determination of First Nations peoples, recognizing that on a nation-to-nation level, First Nations continue to have the inherent jurisdiction in relation to the provision of child welfare services. The Act establishes a framework by which First Nations can exercise their jurisdiction, including the negotiation of coordination agreements with the federal and provincial governments and ultimately the incorporation of First Nations laws into federal legislation.

4. The true nature of the Act, or pith and substance, is mitigating the harms associated with the historically racist and discriminatory provision of child welfare services by Canada and the provinces, as well as the crisis level of overrepresentation of First Nations children in the child welfare systems, by promoting culturally sensitive and appropriate child welfare services. This includes the implementation of minimum national standards in conjunction with the implementation of a pathway for the exercise of jurisdiction by First Nations in the area of child and family matters.

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[1] *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, S.C. 2019, c. 24 (the "Act").

5. The Attorney General of Quebec ("Quebec") recognizes that First Nations children are over-represented in Canadian child welfare systems and the associated negative outcomes, but seeks to undermine its laudable efforts citing its belief that the Act is unconstitutional as it imposes the manner in which Quebec must provide services to Indigenous children (sections 1-17). Quebec also alleges that sections 8 and 18-36 of the Act are invalid as they seek to unilaterally amend s. 35 of the Constitution Act, 1982[2].

6. The Attorney General of Canada ("Canada") takes the position that the establishment of national standards in relation to the provision of child and family services for First Nations, Métis and Inuit properly falls under its powers in subsection 91(24) of the *Constitution Act, 1867.*[3] As such, Parliament can bind the provincial Crown, and its legislation can impact the manner in which provincial public servants carry out their duties without impacting its validity. Further, the second component of the Act is not an attempt to amend the Constitution but merely legislating by way of an affirmation of constitutional rights with its authority granted further to subsection 91(24).

7. The AFN reiterates that the establishment of national standards in relation to the provision of child services to First Nations and the establishment of a pathway for the exercise of the inherent jurisdiction of First Nations over child services, are valid legislative efforts of Parliament further to its authority derived from ss. 91(24). In relation to the Act affirming the inherent rights of self-government, Parliament was not engaging in the amendment of the Constitution, but merely affirming First Nations activities and authority which predate contact with Europeans, further to the promise of reconciliation inherent in s. 35 of the *CA, 1982*. That being said, Parliament's colonial exercise of authority in no way detracts from First Nations inherent authority over their children and do not alter the basic structure of Sovereign-First Nations relations.

1. Historical Context

8. In considering the constitutionality of the Act, one must give due attention to the historical context at play, including: the exercise of First Nations jurisdiction over child and family matters as a self-determining peoples and early respect for the nation-to-nation

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[2] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*CA, 1982*")
[3] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 ("*CA, 1867*").

relationship; the implementation of Canada's notions of *parens patriae* and attempts to civilize the "savages" via its implementation of the Indian Residential School system ("IRS System"); the intergenerational social and health outcomes associated with linkages to the IRS System and its correlation to involvement in the Canadian child welfare system; and finally, the crisis level of overrepresentation of First Nations children in child and family services systems across Canada giving rise to the need for a national response.

a. Nation-to-nation relations

9. Since time immemorial, First Nation were Peoples' with their own distinct cultures, history, languages, customs, legal traditions, territories and ethnic characteristics. First Nations have their own systems for determining "citizens or members" of their Nations, as well as how to address child and family matters and disputes. Through these systems, they have established their own societal rules for governance and dispute resolution.[4] In terms of treaties, they have always sought to ensure that the rights provided therein would include their descendants in perpetuity. For example, one of the earliest recognized treaties, the *Peace and Friendship Treaty*, renewed in 1752, established that the First Nations parties thereto were entering into the terms "for themselves and their said Tribe their Heirs, and the Heirs of their Heirs forever". This text upholds that an heir, regardless of federal "Indian status", would be entitled to the benefits guaranteed by the Treaty.

10. Other Treaties, such as the Douglas Treaties, provided that the First Nations parties' understanding was that certain real property would be kept for the First Nations "own use, for the use of our children, and for those who may follow after us". The language within this text seems to clearly reflect that the determination of who would receive a benefit was ultimately up to the "Tribe" to determine.[5]

11. This deference to First Nations as being sovereign with the inherent right to self-determination persisted for some time. From 1760 forward, various First Nations maintained a mutually beneficial military alliance to defend the British. The Huron were allies to the French. The *Royal Proclamation of 1763* continued to recognize First Nations

[4] Affidavit of Jonathan Thompson at para. 7, **AFN's Evidence, Vol 2 at pg. 709.**
[5] Affidavit of Jonathan Thompson at para. 10, **AFN's Evidence, Vol 2 at pg. 709.**

as self-governing entities, with associated land rights. It established Imperial rules relating to Indian lands, undertook to protect lands from squatters, and prohibited the private purchase of Indian lands.[6]

b. Introduction of Indian Residential Schools

12. Despite this history of mutual respect for the nation-to-nation relationship, following Confederation in 1867, Canada vigorously pursued a policy of assimilation, justifying it on the basis of it being the state's "benevolent duty". The centerpiece of Canada's assimilative policy was the introduction of the IRS System.[7] The purpose of the IRS System was to disrupt traditional First Nations parenting, which had dramatic and damaging effects on First Nations cultures and the ability of First Nations parents to care for their children. By separating First Nations children from their parents, Canada viewed itself as removing the "savage" influences associated with a traditional First Nations upbringing. The chronic underfunding of the IRS System ultimately resulted in a swath of issues for the First Nations attendees, including, but not limited to, malnutrition, the spread of tuberculosis and other disease, as well as physical, mental and sexual abuses.[8]

13. The IRS system operated as a "school system" from the 1880's until the 1960's when it reclassified as a component of the child welfare system. As the educational utility of the system was in question, its rationale shifted and it became a part of a wider approach to the provision of child welfare services to First Nations. The last residential school operated by the Canadian government was finally shuttered in 1996. [9]

c. Legacy of the Indian Residential Schools System

14. Understanding the effects of the IRS System and the negative health and social outcomes associated therewith is critical to contextualizing the issues that continue to persist with the provision of child and family services to First Nations children.[10]

15. It has been demonstrated that the shared collective experiences of stress and

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[6] Affidavit of Jonathan Thompson at para. 10, **AFN's Evidence, Vol 2 at pg. 709.**
[7] Affidavit of Jonathan Thompson at para. 35, **AFN's Evidence, Vol 2 at pg. 716.**
[8] Affidavit of Jonathan Thompson at para. 36, **AFN's Evidence Vol 2 at pg. 716.**
[9] Affidavit of Jonathan Thompson at para. 37, **AFN's Evidence Vol 2 at pg. 716.**
[10] Affidavit of Dr. Bombay at para. 11, **AFN's Evidence, Vol 1 at pg. 168.**

trauma experienced by First Nations peoples, coupled with persistent socioeconomic disadvantages, have acted to increase their vulnerability to the transmission and expression of intergenerational trauma effects.[11] Historical trauma tied to linkages to the IRS system has further been found to contribute to present day disparities in well-being for First Nations.[12] For example, a significant correlation was established between parental IRS system attendance and the age in youth at risk for suicidal ideation and attempts, demonstrating the need for early interventions for large proportions of First Nations children inter-generationally affected by the IRS system.[13]

16. The shared and unique effects of the abuses experience by First Nations in the IRS system and collective impacts on First Nations communities derived therefrom establish that there are unique and varied health and social issues specific to First Nations, and that as a result, First Nations are best positioned to design systems to address the unique needs of their communities.[14]

17. IRS System linkages ultimately correlate into negative social and health outcomes for First Nations children, and unfortunately link to a higher propensity of First Nations children and families being involved with the Canadian child welfare system.[15] For example, the odds of spending time in the child welfare system are 3.27 times higher amongst those with a parent who attended IRS compared to adults with no family history of IRS. Further, it has been established that having a parent who attended IRS in addition to being personally involved with the child welfare system accounted for unique variances in terms of increased risk of depressive symptoms for First Nations.[16]

18. Those with IRS System linkages, parent or grandparent, report greater exposure to early life adversities within the household, putting them at a higher risk for being affected by the child welfare system.[17] Ultimately, this increased exposure to the child welfare system in comparison to non-Indigenous youth and adults, increases the risk of negative

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[11] Affidavit of Dr. Bombay at para. 13, **AFN's Evidence, Vol 1 at pg. 169.**
[12] Affidavit of Dr. Bombay at para. 15, **AFN's Evidence, Vol 1 at pg. 170.**
[13] Affidavit of Dr. Bombay at para. 18, **AFN's Evidence, Vol 1 at pg. 171.**
[14] Affidavit of Dr. Bombay at para. 16, **AFN's Evidence, Vol 1 at pg. 170.**
[15] Affidavit of Dr. Bombay at para. 19, **AFN's Evidence, Vol 1 at pg. 171.**
[16] Affidavit of Dr. Bombay at para. 24, **AFN's Evidence, Vol 1 at pg. 172-173.**
[17] Affidavit of Dr. Bombay at para. 21, **AFN's Evidence, Vol 1 at pg. 172.**

social and health outcomes, including, but not limited to, self-harm, suicide ideation and attempt, overdose, and psychological distress.[18]

19. The effect of early childhood adversity and trauma often tied to linkages with the IRS system makes children more vulnerable to the negative effects of stress and directly correlates to an increased likelihood of spending time in foster care.[19] Involvement in the child welfare system compounds these existing stressors, particularly as First Nations children are particularly vulnerable to being exposed to abuse, violence, racism, discrimination and professional indifference when involved in the child welfare system.[20] Over-represented First Nations involved in the child welfare system experience immediate and longer-term difficulties in life.[21]

20. Ultimately, there is a clear correlation between the intergenerational trauma associated with the IRS system and the crisis level of First Nations children involved with Canadian child welfare systems. The negative social and health outcomes associated with the mass removal of First Nations children by the state will continue unless concentrated efforts are made to end the negative cycles associated with historical, as well as modern stressors and trauma.[22] First Nations led culturally appropriate solutions have been identified as necessary to end these systemic cycles which foster the promulgation of adverse social and health outcomes for First Nations, including wide-ranging holistic and multi-faceted intervention and prevention programming at the individual, family and community level.[23]

d. Calls for Reform

21. The need for reform to the provision of child welfare services to First Nations children has also been the conclusion reached by a number of commissions, inquiries and in various related reports. The 1991 final report of the Manitoba Aboriginal Justice Inquiry identified systemic issues within Manitoba's child welfare system and made

[18] Affidavit of Dr. Bombay at para. 23, **AFN's Evidence, Vol 1 at pg. 172.**
[19] Affidavit of Dr. Bombay at para. 30, **AFN's Evidence, Vol 1 at pg. 174.**
[20] Affidavit of Dr. Bombay at paras. 32-33, 34, **AFN's Evidence, Vol 1 at pg. 174-175.**
[21] Affidavit of Dr. Mary Ellen Turpel-Lafond at para 6, **AFN's Evidence, Vol 1 at pg. 2-3.**
[22] Affidavit of Dr. Bombay at para. 25, **AFN's Evidence, Vol 1 at pg. 173.**
[23] Affidavit of Dr. Bombay at para. 25 and 38, **AFN's Evidence, Vol 1 at pg. 173, 176.**

recommendations for reforms aimed at protecting First Nations children's interest and rights. The 1996 Royal Commission on Aboriginal Peoples issued similar recommendations, acknowledging the importance of self-government for First Nations and identifying that child welfare was at the core of the issue.[24]

22. As part of the AFN's advocacy efforts, a National Policy Review of the First Nations Child and Family Services ("FNCFS") Program was conducted in June of 2000 jointly with Canada. It concluded that funding per capita was 22% lower than the average in selected provinces; that realistic maintenance funding was not being provided for agencies serving First Nations and ultimately, provided a list of 17 recommendations to the federal government to address the inequities in within the FNCFSP.[25]

23. A 2005 series of reports addressing the FNCFS Program entitled the *Wen:De Reports*, identified that the existing program was flawed and inequitable, basing funding on populations levels versus need, and noting severe funding deficiencies in a number of areas, including, but not limited to, prevention services, remoteness, capital costs, salaries, and training. The reports further identified that a new First Nations funding model was required in order to support sustained positive outcomes for First Nations children, as there were approximately three times the number of children in care than at the height of the IRS System in the 1940's. Unfortunately, the reports identified a perverse incentive in Canada's existing funding formula to take children in care versus supporting early prevention, intervention and least intrusive measures, resulting in tens of thousands of First Nations children being artificially placed into care.[26]

24. In 2010, a report entitled *Aboriginal Children and Youth in Canada: Canada Must Do Better*, prepared by the Canadian Council of Provincial and Youth Advocates, identified that a grossly disproportionally level of First Nations children were involved in the child protection system, amounting to a humanitarian crisis. A national plan was viewed as an essential response, as opposed to leaving it to the provinces, who demonstrated a consistent inability to provide adequate supports for First Nations families

[24] Affidavit of Jonathan Thompson at paras. 43-44, **AFN's Evidence, Vol 2 at pg. 718.**
[25] Affidavit of Jonathan Thompson at para. 19-20, **AFN's Evidence, Vol 2 at pg. 712.**
[26] Affidavit of Jonathan Thompson at paras. 24-28, **AFN's Evidence, Vol 2 at pg. 713-714.**

in desperate need of assistance. The report was provided to the Prime Minister and the then Minister of Aboriginal Affairs to draw attention to the crisis. [27]

25. The Truth and Reconciliation Commission's Final Report and Calls to Action reiterated the legacy of residential schools and its lasting impacts in relation to First Nations children being placed into the child welfare system. Of note, they recommended that immediate steps be taken to reducing the number of First Nations children in care; called on the federal government to establish national standards; and affirmed the right of First Nations to maintain their own child welfare regimes.[28]

26. The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls additionally identified within its Calls to Justice for federal, provincial and territorial governments to recognize First Nations inherent jurisdiction over child welfare and the accompanying obligations for First Nations governments to assert jurisdiction in the area. Additional Calls to Justice sought a national definition of the best interest of the child and maintaining cultural and family connections.[29]

e. CHRT Complaint

27. Despite these reports and their recommendations for systemic reform to the provision and funding of child welfare services for First Nations, no action was taken to correct the issues with the FNCFS Program by Canada. The AFN, in conjunction with the First Nations Child and Family Caring Society of Canada filed a complaint with the Canadian Human Rights Tribunal ("CHRT") on February 27, 2007, alleging that Canada was discriminating against First Nations children.[30]

28. On January 26, 2016, the CHRT issued its landmark decision, 2016 CHRT 2, substantiating the complaint. The decision confirmed that First Nations children and families living on reserve and in the Yukon were being discriminated against by way of Canada's provision of child welfare services. Canada was ordered to cease its discriminatory practices and reform its policies to reflect the findings of the CHRT, again

[27] Affidavit of Dr. Mary Ellen Turpel-Lafond at paras. 10-11, **AFN's Evidence, Vol 1 at pg. 4.**
[28] Affidavit of Jonathan Thompson at para. 49, **AFN's Evidence, Vol 2 at pg. 719.**
[29] Affidavit of Jonathan Thompson at para. 50, **AFN's Evidence, Vol 2 at pg. 720.**
[30] Affidavit of Jonathan Thompson at para .30, **AFN's Evidence, Vol 2 at pg. 714.**

confirming the need for major reforms within Canada for the provision of child and family services to First Nations children.[31]

2. Provision of Child Welfare Services in First Nations

29. The provision of child welfare and protection services in First Nations communities throughout Canada is delivered through: (a) First Nations agencies; and (b) provincial agencies. There are approximately 105 First Nations Child and Family Services (FNCFS) Agencies across Canada serving over 500 First Nations communities.[32] These FNCFS Agencies are First Nations organizations and are funded by Indigenous Services Canada (ISC). They operate pursuant to delegations under the applicable provincial or territorial legislation.[33] Approximately 170 First Nations are not served by FNCFS Agencies, but by mainstream provincial or territorial child and family services organizations who receive funding pursuant to federal-provincial or federal-territorial agreements.[34]

3. Development of Bill C-92

30. The ongoing calls for reform, including First Nations exercising their inherent jurisdiction; the CHRT's substantiation of discriminatory conduct in Canada's provision of child welfare services; and the unequivocal crisis levels of First Nations representation in Canadian child welfare regimes, all reflect the flawed nature of the child welfare paradigm applicable to First Nations. The provinces assumed authority over First Nations child welfare further to the application of section 88 of the *Indian Act*[35] which allowed them to apply child welfare legislation of general application to First Nations peoples without their consent. The vehicle for this assertion of jurisdiction, the *Indian Act*, which came into effect in 1876, was a consolidation of some of the most heinous colonial ordinances which had the effect of depriving First Nations people of their identities, lands and culture.[36]

31. All the provinces, including Quebec, assumed authority for the delivery of child

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[31] Affidavit of Jonathan Thompson at para. 41, **AFN's Evidence, Vol 2 at pg. 717.**
[32] Statement of Nathalie Nepton, para. 21, **AGC's Evidence, Vol 7 at p 2300**.
[33] The exception to this arrangement is in Prince Edward Island, where the Mi'kmaq Confederacy of Prince Edward Island does not hold provincial delegation and is funded by ISC to provide prevention services and contract with the government of Prince Edward Island to provide protection services.
[34] Statement of Nathalie Nepton, para. 21, **AGC's Evidence, vol 7 at p 2300**
[35] *Indian Act*, R.S.C. 1985, c-I-5 ("*Indian Act*")
[36] Affidavit of Dr. Mary Ellen Turpel-Lafond at para. 15, **AFN's Evidence, Vol 1 at pg. 5.**

welfare with respect to First Nations by virtue of s.88 of the *Indian Act*. Importantly, such authority is always subject to the federal Crown and exists only if and until a federal law is applied. This application of provincial law via the colonial mechanisms of the *Indian Act* resulted in systemically racist and discriminatory policies and ultimately, the removal of First Nations children. Flawed federal funding programs regrettably provided a perverse incentive to remove children, while deficient federal policy and law in conjunction with the general application of provincial child protection standards effectively created a federal legislative and policy vacuum in the area of First Nations child services. This vacuum was backfilled by provincial laws, having no regard to the authority, rights or values of First Nations peoples which should have been inherent in the nation-to-nation relationship.[37]

32. In response to the plight of First Nations and their disproportionate representation within Canadian child and family service regimes, Canada convened a national meeting in January of 2018 to address the humanitarian crisis of the overrepresentation of First Nations children in all Canadian child welfare systems and the repeated calls for reform.[38] Quebec's representatives were present and participated in the associated briefings with Canada but failed to voice any reservations on the co-development of federal legislation in regards to First Nations child welfare. [39]

33. After decades of advocacy, Canada was prepared to address the consensus need for reform to the provision of child welfare services to First Nations children. Canada began extensive engagement with partners on options for co-developed federal legislation on child and family services for First Nations, Inuit and Métis children, youth and families. Sixty-five meetings were held over the summer and fall of 2018 in all provinces and territories with First Nations leaders and service delivery officials. Concurrently, a Reference Group was formed with representation from the AFN, the Inuit Tapiriit Kanatami, the Métis National Council and the Government of Canada.[40]

34. Further to Canada's engagement, the AFN created its Child Welfare Legislative Working Group consisting of Chiefs appointed from each region. Its objective was to be

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[37] Affidavit of Dr. Mary Ellen Turpel-Lafond at para. 15, **AFN's Evidence, Vol 1 at pg. 5.**
[38] Affidavit of Jonathan Thompson at para. 53, **AFN's Evidence, Vol 2 at pg. 720.**
[39] Affidavit of Dr. Mary Ellen Turpel-Lafond at para 21, **AFN's Evidence, Vol 1 at pg. 8.**
[40] Affidavit of Jonathan Thompson at paras. 54-55, **AFN's Evidence, Vol 2 at pg. 721.**

unity-seeking, gathering positions that First Nations wished to include in a draft Bill, and putting together a vision of how authority between the federal, provincial and First Nations governments could be coordinated in relation to the delivery of child services. It was fundamental for First Nations that the proposed Bill's purpose would incorporate the recognition of their inherent authority over child and family services premised on their inherent right to self-determination. For First Nations, it was important to establish a reconciliatory pathway for the implementation of s. 35 rights and treaties, beyond the narrow confines of a traditional division of powers analysis in relation to the exercise of rights.[41]

35. The AFN was met with some resistance in relation to the implementation of a provision which recognized First Nations inherent rights over child services. These concerns were not so much grounded in a defense of the constitutional division of powers, but instead, reflected a resistance which appeared to be grounded from entrenched prejudices about how First Nations people parent their children and whether First Nations could be trusted in the capacity of law-maker. For the AFN, children and families have always been regulated by First Nations and the matter came down to supporting healthy and culturally appropriate policies versus the continued perpetuation of unhealthy colonial practices that lead to negative health and social outcomes for First Nations.[42]

36. Beyond the exercise of inherent jurisdiction, the AFN advocated for the incorporation of international norms, particularly those enunciated within the *United Nations Convention on the Rights of the Child* and the *United Nations Declaration on the Rights of Indigenous Peoples*, to ensure that First Nations would not to be subjected to forced assimilation or the destruction of their culture. It was clear, the issue of removal and cultural genocide were rampant in the provision of child and family services.[43]

37. Other items included the primacy of Indigenous law in relation to the provision of child and family services, subject to limited caveats; a best interest of the child definition which protected the cultural continuity for First Nations children and reversed the impact

[41] Affidavit of Dr. Mary Ellen Turpel-Lafond at paras. 23-25, **AFN's Evidence, Vol 1 at pg. 8-9.**
[42] Affidavit of Dr. Mary Ellen Turpel-Lafond at para. 26, **AFN's Evidence, Vol 1 at pg. 9-10.**
[43] Affidavit of Dr. Mary Ellen Turpel-Lafond at para. 28, **AFN's Evidence, Vol 1 at pg. 10-11.**

of provincial policies that saw children removed from their families and culture; and finally, the implementation of a mechanism with which the provinces and territories could address any concerns they held in coordinating components of the Act. Coordination tables were established as an avenue for discussion between all affected parties.[44]

38. Bill C-92 received Royal assent on June 21, 2019. Ultimately, on its own, it will not address the systemic issues which gave rise to the crisis levels of First Nations representation in Canadian child welfare regimes. However, it is a positive step forward on the path towards resolving these outstanding issues and disrupt the ongoing cycles of trauma for First Nations children and the related social and health disparities for First Nations relative to the non-Indigenous population in Canada, particularly by establishing a pathway for the exercise of their inherent jurisdiction in the area of child welfare.[45]

PART II – ISSUES IN DISPUTE

39. The question stated in the Order in Council is the following:

> **Is the Act Respecting First Nations, Inuit and Métis children, youth and families ultra vires of the jurisdiction of the Parliament of Canada under the Constitution of Canada?**

40. The AFN argues that this question should be answered in the negative. While First Nations undoubtedly have jurisdiction over their children and families based on their inherent right to self-determination, Canada was within the constitutional gambit of subsection 91(24) of the *CA, 1867*, to enact the provisions of the Act based on Parliament's jurisdiction over "Indians, and Lands Reserved for Indians".

41. Provincial authority with respect to First Nations child welfare has always been subject to federal jurisdiction and only operates by virtue of the provision of s.88 of the *Indian Act*, which itself is an exercise of the Parliament's ss. 91(24) jurisdiction.

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[44] Affidavit of Dr. Mary Ellen Turpel-Lafond at paras. 29-31, **AFN's Evidence, Vol 1 at pg. 11-12.**
[45] Affidavit of Jonathan Thompson at para. 62, **AFN's Evidence, Vol 2 at pg. 722.**

PART III– SUBMISSIONS

A. Federal Jurisdiction

42. While the constitutional question before this Court dictates that a traditional division of powers analysis be considered, including the interplay of section 35 of the *CA, 1982*, it must critically be observed that these discussions do not derogate from First Nations jurisdiction over the area of the provision of child and family services. As noted by the Supreme Court in *Mitchell v. Peguis Indian Band*[46], "From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations".[47] First Nations across Canada are Peoples' under customary international law and have the right to self-determination, self-rule and have inherent rights that were never absconded, including their rights over their children and families, despite the Crown's assimilative efforts and discriminatory practices in the provision of child welfare services.

43. With this in mind, in weighing the constitutionality of the *Act* based on the federalism grounds, the traditional Canadian division of powers test places an onus on this Court to undertake the well-established two-stage analytical approach to the review of the Act based on federalism grounds.[48] The first step determining the true subject matter of the impugned legislation, being the pith and substance of the proposed law in question, and thereafter determining whether the subject matter falls within the head of power being relied upon by the party asserting the validity of the legislation at issue.[49]

i. Pith and Substance – Characterization of the Act

44. The true nature of the *Act*, or pith and substance, is mitigating the harms associated with the historically racist and discriminatory provision of child welfare services by Canada and the provinces, as well as the crisis level of overrepresentation of First Nations children in state care, by promoting culturally sensitive and appropriate child welfare services. This

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[46] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 ["*Mitchell*"].
[47] *Mitchell* at p. 109.
[48] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 47 ["*GGPPA Reference*"].
[49] *Reference re Securities Act*, [2011] 3 SCR 837 at paras. 63-64 ["*Securities Reference*"].

includes the establishment of minimum standards, as well as the implementation of a mechanism for the exercise of jurisdiction by First Nations in the area of child and family services. This is in effect the essential character and what the *Act* is in fact "all about".[50] The *Act* does not apply to any mainstream Canadian children living off-reserve.

45. This characterization is supported by the preamble of the *Act*, which notes that Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused by colonial policies and practices; the need to eliminate the over-representation of First Nations in state care; the need to establish national standards; and ultimately, recognition of the inherent rights of First Nations to self-determination, including over child and family services, all with an eye to moving forward along the path to achieving reconciliation with First Nations.[51]

46. These points are elaborated upon at sections 2 and 8 of the Act, which provide that the Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by virtue of s. 35, of the *CA, 1982*, and that its purposes include affirming First Nations inherent right to self-determination in relation to child-services, the establishment of national principles in relation to child services for First Nations, and contributing to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*[52].

47. As noted above, the historical traumas experienced by First Nations, including intergenerational effects of the IRS System, has ultimately led to the crisis level of overrepresentation of First Nations children within child welfare systems, perpetuating the cycle of trauma for First Nations peoples and communities. Disrupting this cycle of harm is arguably a practical effect that flows from the application of the *Act*, and a proper consideration for this Court in considering the pith and substance of the Act, and supporting the AFN's characterization of the matter.[53]

48. Further, the Truth and Reconciliation Commission, the Missing and Murdered

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[50] *GGPPA Reference,* *supra* note 48 at para 52.
[51] The Act, preamble.
[52] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ["*UN Declaration*"]; Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Session, 43rd Parliament, 2020 (first reading)
[53] *GGPPA Reference,* *supra* note 48 at para 51.

Indigenous Women Inquiry, and other relevant reports, have all called up Canada to establish national standards in relation to the provision of child welfare services to First Nations, in addition to the establishment of First Nations directed child welfare services further to their inherent right to self-determination.[54] Both of these items have consistently been intertwined in calls for reform, comply with the international standards as affirmed in UNDRIP, and ultimately amount to background circumstances which are tied to the ***Act's*** enactment that contribute to the characterization of the legislation in this matter and are proper considerations for this Court.[55]

49. As noted by the Attorney General of Canada, quoting the AFN's National Chief: "This legislation is first and foremost about First Nations children and their safety, their security and their future."[56]

ii. Classification of the Act - ss. 91(24)

50. The second step of the analysis in relation to evaluation the constitutionality of impugned legislation is a determination as to whether the identified purpose of the legislation falls under the head of power said to support it. In this case, the question is therefore whether mitigating the harms associated with the historically racist and discriminatory provision of child welfare services by Canada and the provinces, as well as the crisis level of overrepresentation of First Nations children in Canadian child welfare systems, by promoting culturally sensitive and appropriate child welfare services can be classified as falling under the federal government's powers over "Indians, and Lands reserved for the Indians" as identified in ss. 91(24) of the *CA, 1867*.

51. As noted by the Supreme Court of Canada in *Canard*[57], in upholding the constitutionality of the components of the *Indian Act* addressing administration of the estates of deceased First Nations, the very object of s. 91(24) is to enable the Parliament of Canada to make legislation **applicable only to "Indians"[58],** effectively allowing it to pass laws concerning Indians which are different from the laws the provincial legislatures

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[54] Affidavit of Jonathan Thompson at paras. 49-50, **AFN's Evidence, Vol 2 at pg. 719-720.**
[55] *GGPPA Reference, supra* note 48 at para. 51.
[56] AGC Factum at para. 49.
[57] *Attorney General of Canada v. Canard* [1976] 1 SCR 170 ["*Canard*"].
[58] *Canard* at pg. 193. (emphasis added)

may enact. The term “Indian” or “Indians” in the constitutional context has a broad meaning, providing Parliament with the jurisdiction to legislate with respect to First Nations, Métis and the Inuit, as well as non-status Indians.[59]

52. The Supreme Court of Canada in *Western Bank*[60] addressed what it viewed as the essence of the federal exclusive legislative power under s. 91(24), noting that in some circumstances a vital or essential interest can exist to justify federal exclusivity because of the special position of First Nations peoples in Canadian society. In its review of the circumstances that could give rise to such exclusivity, the Court acknowledged that it was generally found in cases where 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.[61]

53. The Court has also clarified while although “Indian” people are governed by federal law exclusively, they do remain subject to laws of provincial application where such exclusivity does not exist. [62] It ultimately boils down to whether the activity in question is integrally related to what makes Indians a federal responsibility.[63] Federal authority does not bar valid provincial schemes that do not impair the core of the “Indian” power.[64]

54. Quebec has also sought to distinguish its arguments by dividing the Act into what it views as 2 Parts, the 1st being comprised of sections 1-17 in relation to the establishment of minimum standards by Parliament for the provision of child welfare services and the 2nd being comprised of sections 18-36, being those sections in relation to establishing a pathway for the exercise of First Nations jurisdiction. The fact of the matter is that these elements are intrinsically interconnected, each component supporting Canada’s efforts to mitigate the cycle of harms experienced by First Nations as reflected in the crisis level of overrepresentation in Canadian child welfare regimes, and are valid exercises of federal jurisdiction further to subsection 91(24).

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[59] *Daniels v. Canada* [2016] 1 SCR 99 at para. 35 [“*Daniels*”].
[60] *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 [“*Western Bank*”].
[61] *Western Bank* at para. 61.
[62] *Ibid*.
[63] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union* [2010] 2 SCR 696 at para. 73 [“*NIL/TU,O*”]
[64] *Daniels* at para. 51.

55. The AFN submits that each of these components of the Act are designed to ensure the protection and well-being of First Nations children, families and communities and represent an effort to curb the cycles of childhood trauma and the crisis level of First Nations children involved with Canadian child welfare regimes. They each are intrinsically tied to First Nations relationships and community and ultimately represent an effort designed to ensure the continuity of First Nations cultures, which clearly marks such measures as properly falling within the federal governments jurisdiction over "Indians" further to subsection 91(24). Furthermore, the Act provides recognition that First Nations themselves are best suited to address child protection and child safety through their own laws and practices. Beyond this the enactment of these provisions ultimately amounts to positive steps forward on the path towards reconciliation with First Nations.

56. Appropriately, Quebec does not deny Canada's ability to legislate in the area of child and family services for First Nations.[65] Instead, it attempts to muddle what should clearly be a traditional division of powers pith and substance analysis, citing that its objective is not attempting to carry out a classic analysis, but rather some variation thereof, drawing from *R. v. Comeau*,[66] a case that is clearly distinguishable as it focused on the statutory interpretation of s. 121 of the *CA, 1867*, not validity.

57. The crux of Quebec's arguments, particularly with respect to the national minimum standards imposed by the Act in what it refers to as "Part 1", appears to be its belief that the nature of the Act is to establish the way the child and family services should be provided by the provinces in relation to First Nations, Métis and Inuit children.[67] The AFN submits that this entirely mischaracterizes the true nature of the Act. As established in the pith and substance discussion above, the true characterization of the Act is mitigating the harms associated with the historically racist and discriminatory provision of child welfare services by Canada and the provinces, as well as the crisis level of overrepresentation of First Nations children in Canadian child welfare systems, by promoting culturally sensitive and appropriate child welfare services. As a result, it is a proper exercise of jurisdiction

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[65] Factum of the Attorney General of Quebec at para. 34 ("Factum of the AGQ").
[66] *R. v. Comeau*, [2018] 1 SCR 342 ["*Comeau*"].
[67] Factum of the AGQ at para. 53.

further to ss. 91(24).

58. In an effort to support its characterization of the Act, being that "Part 1" is primarily focused on establishing the way that child services should be provided by the provinces, Quebec cites *NIL/TU,O* as establishing that the primary exercise of powers over child services is the provinces.[68]

59. This case is clearly distinguishable as the Supreme Court's comments relied upon by Quebec, addressing whether the services at the heart of the matter were a federal undertaking, were restricted to whether the provision of child services by *NIL/TU,O* fell under provincial labour relations.[69] Other cases involving such labour disputes have clearly stated otherwise.[70] The AFN would submit that more importantly, the Supreme Court clearly established that *NIL/TU,O* was the product of the "brush of co-operative federalism", reflecting the inevitability of overlap between the exercise of federal and provincial competencies.[71] As noted by the Court, it was by virtue of a memorandum of understanding and a tripartite agreement that the federal government endorsed the provinces oversight of the delivery of child and family services by NIL/TU,O, which the Court affirmed was "neither an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial government" but merely an example of cooperative federalism at work.[72]

B. Proper Constitutional Principles at play

60. Quebec also alleges that Parliament is forcing the provinces to adapt to its standards without their prior consent by legislating over child and family services for First Nations, and that this somehow amounts to an improper extension of federal jurisdiction.[73]

61. The AFN submits that Quebec is erroneously attempting to argue constitutional applicability, instead of properly addressing the validity of the Act via the constitutional doctrines which are truly at issue in this matter, namely pith and substance or double

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[68] Factum of the AGQ at para. 29.
[69] *NIL/TU,O*, *supra* note 63, at para. 37.
[70] *Quebec (AG) v Picard*, 2020 FCA 74, at paras. 55-57.
[71] *NIL/TU,O, supra* note 63, at para. 42.
[72] *Ibid,* at para. 44.
[73] Factum of the AGQ at para.58

aspect, which as noted by the Supreme Court in *Western Bank* permit the appropriate balance to be struck in the overlap in rules made by Parliament and the provinces further to the principles of federalism.[74] It is by considering these main constitutional doctrines and evaluating the interplay between them that the Court ultimately facilitates the achievement of the objectives of Canada's federal structure,[75] not as Quebec appears to suggest, via the application of principles associated with the interpretation of constitutional text.[76]

62. While embracing the Courts comments on the principle of federalism within the *Securities Reference*[77], Quebec ignores the Courts affirmation that it is the "pith and substance" analysis that is used by Canadian Courts to determine the constitutional validity of legislation from a division of powers perspective.[78] Quebec also appears to neglect consideration of the double aspect doctrine, despite the fact that Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects and that this doctrine allows for the concurrent application of both federal and provincial legislation.[79]

63. Quebec relies on its interpretation of Canadian federalism to claim that Parliament cannot impose on the provinces how they should exercise their powers in relation to the public service.[80] It is well established however that if Parliament has the legislative power to legislate in an area, the provincial Crown can be bound thereto.[81]

64. Finally, with respect to Quebec's claims in relation to interjurisdictional immunity, it fails to satisfy the requisite test that adoption of the Act intrudes on the core of its jurisdiction over the public service.[82] In describing its view of the core of its jurisdiction, Quebec describes the effect of the Act as resulting in Parliament controlling the duties of

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[74] *Western Bank* supra note 60, at para. 24.
[75] *Ibid*.
[76] Factum of the AGQ at para. 62.
[77] *Securities Reference* supra note 49, at para. 7.
[78] *Ibid* at para. 63.
[79] *Ibid* at para. 66.
[80] Factum of the AGQ at paras. 68 and 71.
[81] *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225 at pg. 275.
[82] *Western Bank* supra note 60, at para. 48.

employees and the way in which the public services they provide are organized.[83] This description is unacceptably broad, and fails to account for the jurisprudence noted immediately above establishing that laws validly within Parliament's competence may affect matters within the jurisdiction of the provinces. It further fails to establish how the Act jeopardizes its jurisdiction over the public service to the point of impairment.

65. Further to the analysis completed hereinabove, Part 1 of the Act is validly within the purview of Parliament.

C. Evolving Crown-First Nations relationships

66. Quebec asserts that sections 8 and 18 to 36 of the Act, which it refers to as "Part 2", is constitutionally invalid. It premises this assertion on the basis that section 18 in its recognition and affirmation of the inherent right of self-government of First Nations contravenes the rules for amending the Constitution and usurps the role of the courts in determining the scope of a constitutional provision.

67. The AFN submits that in legislating further to ss. 91(24), Parliament may choose to include an affirmation of the rights recognized and affirmed by virtue of section 35 of the *CA, 1982*. Despite Quebec's claims, the Act is simply an expression of Parliament's proper understanding that s. 35 already recognizes First Nations inherent jurisdiction in relation to child services as part of First Nations inherent rights to self-determination, including self-government. Importantly, this expression of the s. 35 right was endorsed by the House of Commons, the Senate and the Crown through its representative, the Governor General. Legislating in this manner is also within its constitutional gambit as ss. 91(24) establishes Parliament's authority to legislate in relation to the provision of child services to First Nations, Inuit and Métis children.

68. Despite Quebec's assertions, the federal-provincial divisions that the Crown has imposed on itself with respect to authority over the provision of child and family services are internal to itself and do not alter the basic structure of Sovereign-First Nations relations.[84] First Nations, as a self-determining people, have never absconded their rights

[83] Factum of the AGQ at para. 80.
[84] *Mitchell*, *supra* note 46 at p. 109.

over their children and families, despite the Crown's assimilative efforts and discriminatory practices in the provision of child services. Ultimately, the Crown's division of powers must be reconciled and understood according to the constitutionally protected rights of Indigenous peoples. First Nations are an order of government and the right to self-determination and jurisdiction over child services must be respect and promoted.

69. First Nations rights were not created by s. 35(1).[85] S. 35 is simply the constitutional framework through which the fact that First Nations lived on the land in distinctive societies, with their own practices and traditions is acknowledged and reconciled with the sovereignty of the Crown.[86] The *Act* does nothing more but recognize the pre-existence of First Nations as distinct societies, and as with any distinct peoples, their inherent right and ability to regulate their children which without a doubt predates European contact.

70. As described by the Supreme Court in *Haida*, "put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered". The rights that flow from this fact are ultimately protected by s. 35 of the *CA, 1982*.[87]

71. The Supreme Court of Canada in *Daniels* identified that the "grand purpose" of s. 35 is ultimately the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship", noting that ss. 35 and 91(24) should be read together.[88] Reconciliation with First Nations and their respective claims, interests and ambitions with those of non-First Nations is the fundamental objective of the modern law of aboriginal and treaty rights.[89] The AFN submits that the affirmation of rights provided for in the *Act* reflects Canada's evolving relationship with First Nations, and ultimately amount to a necessary measure which will be needed to fulfill the constitutional promise of reconciliation.[90]

72. It further reflects the evolving nature of the Constitution which is ultimately grounded by the "living tree" doctrine. In discussing the powers enumerated within ss. 91 and 92 of

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[85] *R. v Desautel*, 2021 SCC 17, at para. 34 ["*Desautel*"].
[86] *R. v. Van Der Peet*, [1996] SCR 507 at para. 31 ["*Van Der Peet*"].
[87] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511 at para. 25 ["*Haida Nation*"].
[88] *Daniels* *supra* note 59, at para. 34.
[89] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para. 1 ["*Mikisew 2005*"].
[90] *R. v. Kapp*, [2008] 2 SCR 483 at para. 121.

the *CA, 1867*, the Supreme Court noted that:

> As is true of any other part of our Constitution — this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 — the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society.[91]

73. The Court further provided in *Western Bank* that in light of the "living tree" concept, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.[92]

74. The AFN submits that Parliament's decision to incorporate the rights recognition provisions within the Act clearly reflect the evolving relationship between the Crown and First Nations and mirror the changing political and cultural realities associated with the federal government's relationship with First Nations.[93] By affirming First Nations pre-existing and inherent right to self-determination and related jurisdiction over child services, Canada was simply adopting a progressive approach consistent with its obligations pursuant to s. 35, in an effort to accommodate and address the modern realities of Crown-First Nations relations.[94]

75. In recognition of this evolving relationship, Parliament took appropriate action to address the disproportionate and crisis level of representation of First Nations in child welfare systems, a unique and modern circumstance, which has direct correlation to the historical provision of such services to First Nations children by Canada and the provinces and the negative social and health outcomes associated with such previous efforts. It also is reflective of the constitutional requirements imposed on the Crown by virtue of the principle of the honour of the Crown, which has been described as the articulation of the special relationship between First Nations peoples and the Crown.[95]

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[91] *Western Bank*, supra note 60 at para. 23.
[92] *Ibid.*
[93] *Desautel, supra* note 85, at para. 34.
[94] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at para. 22.
[95] *Desautel, supra* note 85 at para. 30.

a. Honour of the Crown

76. The honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and First Nations. [96] In all dealings with First Nations, from the assertion of sovereignty to the implementation of child welfare legislation, the Crown must act honourably and that nothing less is required if the reconciliation of the pre-existence of First Nations societies with the sovereignty of the Crown is to be achieved.[97] Because of its connection with s. 35, the honour of the Crown is in essence a constitutional principle[98], which ultimately provides for the determination, recognition and respect of those rights encompassed within the ambit of s. 35. [99]

77. The AFN submits that the evolving relationship with First Nations and overarching theme of reconciliation, Parliament was faced with the unique constitutional onus, grounded in the honour of the Crown, to take proactive measures to mitigate the harms associated with the historically systemic and discriminatory provision of child welfare services by Canada and the provinces, as well as the crisis level of overrepresentation of First Nations children in Canadian child welfare systems. This constitutional onus, in conjunction with the repeated calls for national legislation acknowledging First Nations jurisdiction over the provision of child services, supports the constitutionality of Canada's inclusion of the recognition piece identified in section 18 and the pathway for the exercise of First Nations jurisdiction established in sections 18 to 36 of the Act.

b. International Norms

78. The AFN further submits that the constitutionality of the federal government's affirmation of First Nation inherent right to self-determination and the exercise of jurisdiction in the area of child services within the Act is also supported by international discourse.

79. The Government of Canada has committed to its implementation of UNDRIP "without qualification". Section 8(c) of the *Act* contributes to UNDRIP's implementation. Canada

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[96] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 SCR 765 at para. 21 ["*Mikisew*"].
[97] *Haida Nation, supra* note 87, at para. 17.
[98] *Manitoba Métis v. Canada*, [2013] 1 SCR 623 at para. 69 ["*Manitoba Métis*"].
[99] *Haida Nation, supra* note 87, at para. 25.

has recently tabled Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples ("*Bill C-15*")*, which would formally cement these international standards into Canada's domestic sphere.[100] The preamble of Bill C-15 provides that UNDRIP is affirmed as a "source for the interpretation of Canadian law".

80. As noted within the text of UNDRIP, First Nations have the inherent right to self-determination and that by virtue of this right "they freely determine their political status and freely pursue their economic, social and cultural development" Further, the UNDRIP states that First Nations in exercising this right of self-determination have the right to self-government in matters relating to their local affairs.[101]

81. Other notable UNDRIP provisions include Article 7 which establishes that First Nations have the collective right to not be subjected to the forced removal of their children; the right not to be subjected to forced assimilation or destruction of their culture in Article 8, as well as the ability to administer said programs via their own institutions. Article 21 establishes that States must take effective and special measures, where appropriate, to ensure the continuing improvement of the social conditions of First Nations, with particular emphasis on the special needs of children.

82. Despite Bill C-15 not yet being adopted, it is clear that the Act reflects an attempt by Canada to adhere to the legal presumption that its legislation should conform to international law principles, particularly in light of the *Act's* references to the implementation of UNDRIP. The presumption of conformity to international principles was addressed in *R. v. Hape* where the Supreme Court affirmed that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principle"[102] and that courts should seek to ensure compliance with Canada's binding obligations under international law.[103] The Supreme Court additionally relied on the presumption of conformity in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* as a partial basis for overturning

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[100] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016 ; Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples
[101] *UN Declaration, supra* note 52, Articles 3 and 4.
[102] *R. v. Hape*, [2007] 2 SCR 292 at para. 53 ["*Hape*"].
[103] *Hape*, at para. 56.

previous decisions excluding collective bargaining as a right constitutionality protected by the *Charter of Rights and Freedoms*.[104]

83. The legal presumption that Canadian legislation will confirm to international law principles ultimately supports the constitutionality of Canada's inclusion of the recognition piece identified in section 18 and the pathway for the exercise of First Nations jurisdiction established in sections 18 to 36 of the Act.

c. Canadian Jurisprudence does not preclude First Nations jurisdiction

84. In its proposition that the jurisdiction to affirm self-government as an inherent right lies either with the Courts or can only be accomplished by way of a constitutional amendment, Quebec makes it clear that in its opinion, despite its assertion that it does not take a position on the issue[105], that the right to jurisdiction over child services does not exist for First Nations.

85. Quebec seeks to rely on *Pamajewon*[106] and *Delgamuukw*[107] claiming that the analysis established in *Van Der Peet* is necessary for any claims to a right of self-government in accordance with s. 35 of the *CA, 1982*,.[108] It submits that further to this jurisprudence, a case-by-case analysis would be warranted in relation to each individual First Nations claiming self-government as an Aboriginal right, which would require a targeted and specific characterization of the claimed right in question.[109]

86. The AFN submits that the Supreme Court was clear in these cases that it was not precluding the right to self-government as being an aboriginal right affirmed and recognized by section 35. In *Delgamuukw*, the Supreme Court established that based on the facts before it, it was impossible to determine whether a claim to self-government had been made out and as such, it would not be the appropriate legal venue to guide future litigation on the point.[110] The Supreme Court has not been asked to rule on the issue of

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[104] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 at para. 20.
[105] Factum of the AGQ at para. 148.
[106] *R. v. Pamajewon*, [1996] 2 SCR 821 ["Pamajewon"]
[107] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 ["*Delgamuukw*"]
[108] *Pamajewon* at paras. 24-27.
[109] Factum of the AGC at para. 146.
[110] *Delgamuukw* at para. 170.

self-government since these cases.

87. The AFN submits that s. 35 constitutionally guarantees, among other things, a form of self-government which remained with First Nations following the assertion of sovereignty by the Crown. The enactment of the *CA, 1867*, was an effort by the Crown to subvert the traditionally nation-to-nation relationship by imposing European *parens patriae* ideas via its recognition that "Indians" fell under federal authority. It, in conjunction with the *Indian Act*, ultimately led to the practical diminishing, but certainly not extinguishment, of the power of self-government which remains with First Nations today.[111]

88. The inherent right in relation to self-determination flow from the fact that prior to contact with Europeans, First Nations lived on the land in distinctive societies, with their own practices and traditions.[112] They were here when Europeans came, and were never conquered. [113] Since time immemorial, they have had their own systems for determining "citizens or members" of their Nations, as well as how to address child and family matters and disputes. Through these systems, they have established their own societal rules for governance and dispute resolution.[114]

89. The Supreme Court has confirmed that European settlement did not terminate the interest of First Nations peoples arising from their historical occupation and use of the land. Rather, their interests and customary law were presumed to survive the assertion of sovereignty.[115] As recognized by the Supreme Court in *Desautel*, the exercise of sovereignty gave rise to a special relationship with First Nations which in recent jurisprudence has been articulated in terms of the honour of the Crown.[116] As a result, there remains intrinsic rights which are protected by s. 35 and the honour of the Crown places an onus on the Crown to determine, recognize and respect said rights, by engaging in the processes of negotiation.[117] The honour of the Crown is not only focused on historic impacts, but forward to the promise of reconciliation and an ongoing "mutually respectful

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[111] *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al.* 2000 BSC 1123 at paras. 180-181 ["*Campbell*"].
[112] *Van Der Peet*, *supra* note 86, at para. 31.
[113] *Haida Nation*, *supra* note 87, at para. 25.
[114] Affidavit of Jonathan Thompson at para. 7, **AFN's Evidence, Vol 2 at pg. 709.**
[115] *Mitchell v. Minister of National Revenue*, [2001], 1 SCR 911 at para 10.
[116] *Desautel*, *supra* note 85, at para. 30.
[117] *Haida Nation*, *supra* note 87, at para. 25.

long-term" Crown-First Nations relationship.

90. This respect for the ongoing process of negotiation was exemplified in Canada's commitment to over 65 consultative meetings with First Nations leadership and the formation of the Reference Group which included the AFN and its co-development efforts.[118] As noted, Quebec was provided with every opportunity to engage with the federal government and First Nations on the development of the *Act* and framework for the exercise of jurisdiction by First Nations of child services, but failed to do so.

91. The *Act* was structured to provide for a coordination table in an effort to address any ongoing concerns a province might have, which Quebec continues to ignore.[119] Drawing from the Crown's constitutionally derived onus to consult, one party's unwillingness to engage in discussions and negotiations should not be an impetus for unwinding the results of vast consultation and co-development, particularly with respect to the creation of a framework for the exercise of First Nations inherent jurisdiction. Good faith is required by both Crown actors and First Nations. [120] To engage in litigation as the first meaningful step taken, despite the opportunity to negotiate, flies in the face of the principle of reconciliation.

92. The Act's provisions for the exercise of jurisdiction by First Nations are clearly designed to ensure that they are appropriately encapsulated within the existing Constitutional Framework. Coordination agreements ensure the principle of co-operative federalism are given due effect. The Act recognizes some level of concurrent jurisdiction which are supplemented with prevailing-law rules. It also defines what occurs in the event of conflict or inconsistency, balancing First Nations, provincial and federal interests.

93. Ultimately, the exercise of First Nations jurisdiction over child services is about ensuring the cultural, linguistic, social and collective survival of their nations and the preservation of the elements associated with First Nations traditional ways of life, including ceremony, practices and traditions. First Nations, as distinct societies who were never conquered yet subjected to such perverse historical and intergenerational harms, deserve no less.

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[118] Affidavit of Jonathan Thompson at para. 53, **AFN's Evidence, Vol 2 at pg. 720.**
[119] Affidavit of Dr. Mary Ellen Turpel-Lafond at para. 21 & 31, **AFN's Evidence, Vol 1 at pg. 8, 11-12.**
[120] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at paras. 496-497.

94. As previously addressed, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve, further to the constitutional doctrine of the "living tree".[121] The exercise of jurisdiction based on the inherent right of self-government is in no way incompatible with the Crown's assertion of sovereignty and supports the constitutional validity of the provisions of the Act which establish a pathway for the exercise of First Nations jurisdiction over child services.

95. This evolving landscape of Crown-First Nations relations also precludes consideration of the positions taken by the federal government in the past upon which Quebec has sought to rely.

96. The AFN also takes issue with Quebec's assertion that only the Courts can define the existence and scope of First Nations s. 35 rights and that a Constitutional amendment is required for self-government. This would undermine and impair First Nations self-government negotiations with Canada and the provinces, making any such agreements irrelevant. Clearly this would result in an absurd outcome and cannot stand. Furthermore, First Nations themselves have the right to determine the content, scope and source of their own powers and jurisdictions.[122] After all, First Nations are subject to alien subjugation, domination or exploitation and are being denied any meaningful exercise of its right to self-determination within the state of which it forms a part.[123]

97. The "modern form of cooperative federalism" must be strived for in relation to the provision of child services for First Nations, which accommodates and encourages intergovernmental cooperation as not only between the federal and provincial governments, but First Nations as well.[124] As these efforts at cooperative federalism are within Parliaments' jurisdictional purview by virtue of ss. 91(24), no constitutional amendment is triggered, necessary, or required – just as no amendment has been required for any of the Supreme Court's s. 35(1) decisions as discussed hereinabove on treaties or inherent rights.

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[121] *Western Bank*, *supra* note 60, at para. 23.
[122] *Desautel*, *supra* note 85, at para. 86.
[123] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at p. 222.
[124] *GGPPA Reference*, *supra* note 48, at para. 50.

98. Finally, Courts across Canada have already applied the *Act* in determining child welfare matters. No constitutional crisis has occurred in these cases.[125]

d. Conclusion

99. While Quebec has proactively made changes to its child service legislation in recognition of the overrepresentation of First Nations, albeit only as of 2017[126] despite the afore-mentioned repeated calls for legislative reform, it cannot alone address the humanitarian crisis and cycles of childhood trauma for First Nations across Canada.

100. True consideration for the plight of First Nations children must include recognition that First Nations themselves are best equipped as a distinct people to address the intergenerational traumas associated with Canada and the provinces' historical provision of child services and assimilative efforts.

101. Both the implementation of national standards and the exercise of First Nations jurisdiction over child services as are within the Act are properly within Parliament's constitutional authority by virtue of s. 91(24). First Nations as a self-determining people have never absconded their rights over their children and families.

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[125] *Alberta (Child Youth and Family Enhancement Act, Director) v K.C and J.P*, 2020 ABPC 62; *Huron-Perth Children's Aid Society v A.C.*, 2020 ONCJ 251; *Mi'kmaw Family and Children's Services of Nova Scotia v. RD*, 2021 NSSC 66; *Michif CFS v. C.L.H. and W.J.B.,* 2020 MBQB 99.
[126] Factum of the AGQ at para. 12.

PART IV – CONCLUSIONS

102. For these reasons, this Honourable Court should answer the reference question in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 30 day of April, 2020.

ASSEMBLY OF FIRST NATIONS

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PART V: AUTHORITIES

Jurisprudence	**Paragraph(s)**
Mitchell v. Peguis Indian Band, [1990] 2 SCR 85.	42, 68
Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	43, 44, 48, 97
Reference re Securities Act, [2011] 3 SCR 837	43,62
Attorney General of Canada v. Canard [1976] 1 SCR 170	51
Daniels v. Canada [2016] 1 SCR 99	51, 53, 71
Canadian Western Bank v. Alberta, [2007] 2 SCR 3	52, 53, 61, 64, 72, 73, 94
NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union [2010] 2 SCR 696	53, 59
R. v. Comeau, [2018] 1 SCR 342	56
Quebec (AG) v Picard, 2020 FCA 74	59
Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission, [1989] 2 SCR 225	63
R. v Desautel, 2021 SCC 17	69, 74, 75, 89, 96
R. v. Van Der Peet, [1996] SCR 507	69, 88
Haida Nation v. British Columbia (Minister of Forests) [2004] 3 SCR 511	70, 76, 88, 89
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388	71

Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Session, 43rd Parliament, 2020 (first reading)	46
Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.	79
Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples	79

ATTESTATION

We, the undersigned, Assembly of First Nations, attest to the brief's conformity with the *Rules of* the *Civil Practice Regulation of the Court of Appeal*.

The time requested for the presentation of my oral argument is 30 minutes.

Ottawa, April 30, 2021

ASSEMBLY OF FIRST NATIONS

Legal counsel for the Intervenor Assembly of First Nations