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COURT OF APPEAL OF QUÉBEC

(Montréal)

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

Order in Council No.: 1288-2019

ATTORNEY GENERAL OF CANADA'S BRIEF

Unofficial translation

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ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Québec Regional Office
TSA-6060
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Per: Me Bernard Letarte

Tel.: 613 946-2776
Fax: 613 952-6006
bernard.letarte@justice.gc.ca

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Québec Regional Office
East Tower, 5th Floor
Guy-Favreau Complex
200 René-Lévesque Blvd. West
Montréal, Québec
H2Z 1X4

Per: Me Lindy Rouillard-Labbé
Me Andréane Joanette-Laflamme
Me Amélia Couture

Tel.: 514 283-7179
Fax: 514 496-7876
lindy.rouillard-labbe@justice.gc.ca
andreane.joanette-laflamme@justice.gc.ca
amelia.couture@justice.gc.ca

Lawyers for the Attorney General of Canada

Me Francis Demers
Me Samuel Chayer
Me Gabrielle Robert
Bernard, Roy (Justice-Québec)
Suite 8.00
1 Notre-Dame Street East
Montréal, Québec H2Y 1B6

Tel.: 514 393-2336
Fax: 514 873-7074
francis.demers@justice.gouv.qc.ca
samuel.chayer@justice.gouv.qc.ca
gabrielle.robert@justice.gouv.qc.ca

Me Jean-François Beaupré
Me Tania Clercq
Me Hubert Noreau-Simpson
Constitutional and Aboriginal Law Directorate (Justice-Québec)
4th Floor
1200 route de l'Église
Québec, Québec G1V 4M1

Tel.: 418 643-1477
Fax: 418 644-7030
jean-francois.beaupre@justice.gouv.qc.ca
tania.clercq@justice.gouv.qc.ca
hubert.noreau-simpson@justice.gouv.qc.ca

Lawyers for the Attorney General of Quebec

Me David Taylor
Conway Baxter Wilson LLP
Bureau 400
411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Tel.: 613 691-0368
Fax: 613 688-0271
dtaylor@conway.pro

Me Naiomi W. Metallic
Burchells LLP
6061 University Avenue
PO Box 15000
Halifax, Nova Scotia B3H 4R2

Tel.: 902 403-2229
Fax: 902 420-9326
nmetallic@burchells.ca

Lawyers for the First Nations Child and Family Caring Society of Canada

Me Claire Truesdale
JFK Law Corporation
Suite 816
1175 Douglas Street
Victoria, British Columbia V8W 2E1

Tel.: 250 405-3467
Fax: 250 381-8567
ctruesdale@jfklaw.ca

Lawyer for Aseniwuche Winewak Nation of Canada

M^e Stuart Wuttke
M^e Julie McGregor
M^e Adam Williamson
Legal Affairs and Justice Directorate
Suite 1600
55 Metcalfe Street
Ottawa, Ontario K1P 6L5

Tel.: 613 241-6789
Fax: 613 241-5808
swuttke@afn.ca
jmcgregor@afn.ca
awilliamson@afn.ca

Lawyers for Assembly of First Nations

M^e Jameela Jeeroburkhan
M^e Nicholas Dodd
Dionne Schulze Attorneys LLP
Suite 502
507 Place d'Armes
Montréal, Québec H2Y 2W8

Tel.: 514 842-0748, ext. 227 / 225
Fax: 514 842-9983
jjeeroburkhan@dionneschulze.ca
ndodd@dionneschulze.ca

Lawyers for Makivik Corporation

M^e Franklin S. Gertler
M^e Gabrielle Champigny
Franklin Gertler Étude légale
Suite 1701
507 Place d'Armes
Montréal, Québec H2Y 2W8

Tel.: 514 798-1988
Fax: 514 798-1986
franklin@gertlerlex.ca
gchampigny@gertlerlex.ca

M^e Mira Levasseur Moreau
Assembly of First Nations Quebec-Labrador
Suite 201
250 Chef-Michel-Laveau Street
Wendake, Québec G0A 4V0

Tel.: 418 842-5020
Fax: 418 842-2660
mlmoreau@apnql.com

Lawyers for the Assembly of First Nations Quebec-Labrador (AFNQL) and First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)

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ATTORNEY GENERAL OF CANADA'S ARGUMENT

OVERVIEW

1. *An Act respecting First Nations, Inuit and Métis Children, Youth and Families* (the **Act**) is one of the measures taken by Parliament to advance reconciliation with Indigenous Peoples. Broadly speaking, it is aimed at addressing the critical issue of the overrepresentation of Indigenous children in child and family services systems while recognizing that Indigenous communities are in the best position to identify and implement solutions to this issue.

2. The Act has two components. First, it establishes national principles for Indigenous child and family services that put the interests of Indigenous children at the heart of decisions made in their regard and that recognize the importance for these children to maintain continuous relationships with their families, their culture and the communities of which they are part.

3. Second, the Act affirms the inherent right of Indigenous people of self-government, recognized and affirmed by section 35 of the *Constitution Act, 1982* (CA 1982), which includes jurisdiction in relation to child and family services. The Act provides Indigenous communities with a framework aimed at facilitating the exercise of this jurisdiction. By providing for negotiations with the federal and provincial governments and for the incorporation of Indigenous laws into federal legislation, this framework encourages a rapid, efficient and harmonious implementation of that legislative authority.

4. The pith and substance of the Act is therefore to protect and ensure the well-being of Indigenous children, families and communities by promoting culturally sensitive child services, with the goal of putting an end to the overrepresentation of Indigenous children in child and family services systems.

5. A statute having such pith and substance falls within the federal jurisdiction over "Indians" as set out in subsection 91(24) of the *Constitution Act, 1867* (CA 1867). This

jurisdiction is broad in scope and allows Parliament to legislate in respect of any matter concerning Indigenous people and the lands that are reserved for them, including on matters that generally fall under provincial jurisdiction, such as property and civil rights.

6. The Attorney General of Quebec (**AGQ**) does not dispute that Parliament can legislate on matters that concern Indigenous child and family services. It claims, however, that the Act exceeds federal jurisdiction because its first component would have the effect of dictating the manner in which provinces are to provide these services to Indigenous people.

7. However, the AGQ greatly exaggerates the Act's impact on Quebec's public service. The AGQ has failed to show that these impacts are of such significance that the pith and substance of the national principles would fall under provincial jurisdiction rather than under subsection 91(24). Indeed, the national principles are very general in nature. They do not set the practical terms and conditions for the delivery of these services to children, nor do they govern service providers' internal management or labour relations.

8. Moreover, it is established that Parliament has the authority to set national standards in areas that fall under its jurisdiction. To the extent that the pith and substance of a statute setting out such standards is within federal jurisdiction, Parliament can bind the provincial Crown, and its legislation may impact the manner in which provincial public servants carry out their duties without affecting its validity.

9. Lastly, the second component of the Act does not constitute an attempt to amend the Constitution, contrary to the AGQ's assertions. Parliament is well aware of the fact that it cannot dictate the content of the rights recognized by section 35. However, when it is legislating pursuant to its jurisdiction under subsection 91(24), it may do so on the basis of what it considers to be recognized and affirmed by section 35.

10. Rather than proceed by delegating legislative powers to Indigenous communities, Parliament decided to legislate by way of an affirmation of constitutional rights, which it has the authority to do, it being understood that the affirmation does not bind the courts with respect to interpreting the Constitution.

PART I – FACTS

1. Historical background

11. Child and family services provided to Indigenous people (child services) should be viewed within the wider context of the relationship between the Crown and Indigenous peoples.

12. In the late 19th century, the federal government enacted a number of policies, formal and informal, that had far-reaching impacts on Indigenous peoples. In particular, Indian residential schools resulted in the separation of many Indigenous children from their parents and their communities.[1] The residential school system saw a significant expansion in the first half of the 20th century. From the 1940s onwards, some residential schools increasingly served as orphanages and child-welfare facilities.[2]

13. In the 1950s, following an amendment to the *Indian Act*,[3] the federal government began to enter into agreements with the provinces and territories under which the latter, or their children's aid societies, would provide child services on reserves and would be funded by the federal government.[4] In 1965, about 75% of registered Indians lived on reserves.[5]

14. It was later observed that Indigenous children were overrepresented in child services systems.[6] By the late 1960s, about 30 to 40% of children placed in child services in

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1 Expert Report by Christine Guay, **AGC's Evidence, vol 10 at p 3411**.

2 *Ibid* at 3412.

3 *Act respecting Indians*, SC 1951, c 29 (15 Geo VI), s 87 (now s 88); Statement of Nathalie Nepton, para 17, **AGC's Evidence, vol 7 at p 2299**.

4 Statement of Nathalie Nepton, para 18 and footnote 1, **AGC's Evidence, vol 7 at p 2299**: Agreements were reached with Ontario in 1956 and in 1965; the Yukon in 1959; Nova Scotia in 1962; agencies in western Manitoba in 1962; agencies in western and central Manitoba in 1964; Newfoundland and Labrador in 1965; and certain diocesan agencies in Québec from 1967 on.

5 W.T. Stanbury, "Reserve and Urban Indians in British Columbia: A Social and Economic Profile" (1975) 26 BC Studies 39 at 40.

6 Expert Report by Christine Guay, **AGC's Evidence, vol 10 at p 3414**.

Canada were Indigenous, while they accounted for only 4% of Canadian children overall.[7] This overrepresentation has continued to rise over the years, and Quebec has been no exception to this trend.[8]

15. Faced with the mass removal of Indigenous children from their families and communities, Indigenous communities across the country called for more control over child services.[9] Starting in the 1970s and 1980s, the federal government and the provinces entered into agreements with First Nations communities or agencies established by them so that they would be able to provide child services in their communities.[10]

16. At the federal level, this practice led to the implementation of the *First Nations Child and Family Services Program* in 1991.[11] The program funds First Nations Child and Family Services agencies (**FNCFS agencies**) — or, in their absence, the provinces and territories — which provide child services to First Nations members living on reserves, in accordance with legislation and standards in force in the province or territory.[12]

17. In the three decades that followed, the federal Program underwent a number of transformations and federal funding increased considerably, reaching $1.7 billion in 2020.[13] At the same time, provinces continued to adjust their legislation so that child services took into account the needs and context specific to Indigenous children and

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7 Expert Report by Christine Guay, citing Fournier and Crey 1997, in Marlyn Bennett and Cindy Blackstock, *A Literature Review and Annotated Bibliography Focusing on Aspects of Aboriginal Child, First Nations Research Site of the Centre of Excellence for Child Welfare*, First Nations Child & Family Caring Society of Canada, 2002, **AGC's Evidence, vol 10, p 3414**.

8 *Ibid*, p 3414.

9 *Ibid*, p 3416.

10 See generally Statement of Nathalie Nepton, paras 18–19, **AGC's Evidence, vol 7 at p 2299**.

11 Statement of Nathalie Nepton, para 15, 43, **AGC's Evidence, vol 7 at pp 2298–99, 2305**.

12 *Ibid* at para 19, 30, 43, **AGC's Evidence, vol 7 at pp 2299–2300, 2302, 2305**; Terms and Conditions of First Nations Child and Family Services Program, Exhibit NN-1, **AGC's Evidence, vol 7 at pp 2352 *et seq.***

13 Statement of Nathalie Nepton, para 48, **AGC's Evidence, vol 7 at p 2306**.

families.[14] Nevertheless, the number of Indigenous children in the care of child services continued to climb.[15] In 2016, 52.2% of the children in care were Indigenous, while they made up only 7.7% of all children under 15 in Canada.[16]

18. Numerous reports, commissions of inquiry and regional consultations have documented issues of overrepresentation of Indigenous children in the child services system. These have all determined that there is a need to reform the system and to recognize Indigenous communities' jurisdiction in this area.[17]

2. Current functioning of Indigenous child services

19. Child services are provided to Indigenous children and families across Canada not only through provincial and territorial structures, but also via FNCFS agencies. These services are funded in part by the federal government and in part by the provinces and territories.

20. In Canada, about 500 First Nations communities, out of approximately 670, are served by an FNCFS agency.[18] These agencies administer and manage, in whole or in

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14 See, in general, Expert Report by Christine Guay, **AGC's Evidence, vol 10 at pp 3416–19**.

15 Statement of Nathalie Nepton, para 48, **AGC's Evidence, vol 7 at p 2306**; Expert Report by Christine Guay, **AGC's Evidence, vol 10 at p 3422**.

16 Expert Report by Christine Guay, **AGC's Evidence, vol 10 at p 3409**; Statement of Isa Gros-Louis, para 15, **AGC's Evidence, vol 5 at p 1757**.

17 See in particular Report of the Royal Commission on Aboriginal Peoples, Ottawa, 1996, **AGC's Evidence, vol 18 at pp 6740, 6763, 6769-71**; The Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the TRC, 2015, **AGC's Evidence, vol 14 at pp 5165-66**; Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec: listening, reconciliation and progress, chaired by the Honourable Jacques Viens, September 30, 2019 (Viens Commission), **AGC's Evidence, vol 11 at pp 4128-31**; *Review Committee on Indian and Metis Adoptions and Placements* Report (Kimelman Report, 1985) discussed in the Expert Report by Christine Guay, **AGC's Evidence, vol 10 at p 3415**; Statement of Isa Gros-Louis, para 25, **AGC's Evidence, vol 5 at p 1761**; Joint National Policy Review Final Report, Exhibit CB-3, **First Nations Child and Family Caring Society of Canada's Evidence, vol 1 at pp 76–77**; Wen:De – We are Coming to the Light of Day, Exhibit CB-5, **First Nations Child and Family Caring Society of Canada's Evidence, vol 2 at pp 273–81**; Wen:De – The Journey Continues, Exhibit CB-6, **First Nations Child and Family Caring Society of Canada's Evidence, vol 3 at p 468**.

18 Statement of Nathalie Nepton, para 21, **AGC's Evidence, vol 7 at p 2300**.

part, child services in the community.[19] They are funded directly by the federal government and are mandated by the province to provide services.[20]

21. The other First Nations communities (about 170) receive child services, also funded by the federal government, from public servants in the province or territory in which they are located. In addition, three quarters of these communities receive funding from the federal government to provide certain preventive services.[21]

22. In fact, the network of child services for First Nations living on reserve is founded upon various agreements entered into between the federal government, the provinces and Indigenous communities or FNCFS agencies. The content of these agreements may vary from one province or community to another. Generally speaking, however, the agreements contemplate two things: first, they provide federal government funding on the condition that the agency be mandated by the province; and second, they provide for a delegation of powers (or another designation) by the province to the FNCFS agency.[22]

23. First Nations children living off reserve and Métis and Inuit children receive services from provincial or territorial governments, and occasionally from FNCFS agencies.[23] The federal government provides funding to the provinces and territories for that purpose through social program transfers.[24]

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19 See Table on how First Nations child and family services are provided in each region, Exhibit NN-2, **AGC's Evidence, vol 7 at pp 2388 *et seq.***; Statement of Nathalie Nepton, paras 13, 21, **AGC's Evidence, vol 7 at pp 2298, 2300**; these FNCFS agencies occasionally provide services to children and families living off reserve.

20 Statement of Nathalie Nepton, paras 19, 43–44, **AGC's Evidence, vol 7 at pp 2299, 2305–06**; Exhibit NN-1, **AGC's Evidence, vol 7 at pp 2352 *et seq.***

21 Statement of Nathalie Nepton, para 21, **AGC's Evidence, vol 7 at p 2300**.

22 See Table on how First Nations child and family services are provided in each region, Exhibit NN-2, **AGC's Evidence, vol 7 at p 2388**; Terms and Conditions of First Nations Child and Family Services Program, Exhibit NN-1, **AGC's Evidence, vol 7 at pp 2352 *et seq.***

23 Statement of Nathalie Nepton, para 13, **AGC's Evidence, vol 7 at p 2298**.

24 With the exception of the Yukon, which receives its funding via the FNCFS program, and Nunavut and the Northwest Territories, for which federal funding is delivered through general transfer payments. See Statement of Nathalie Nepton, paras 13, 42, 45, **AGC's Evidence, vol 7 at pp 2298, 2305–06**.

24. In Quebec, 18 First Nations communities are served by FNCFS agencies.[25] The federal government reached an agreement with the province which stipulates that Quebec will provide protection services in the eight (8) other First Nations communities, and it directly funds these communities in order to enable them to provide certain prevention services.[26] Indigenous children living off reserve receive services from the province, which are partially funded by the federal government through social program transfer payments.

25. Thus, contrary to what the AGQ suggests, the provinces are far from being the sole players involved in providing Indigenous child services. FNCFS agencies play a significant role in this regard, as does the federal government through its funding.[27]

3. Description of Act

26. Following the numerous calls from commissions of inquiry for reforms to Indigenous child services[28] and the repeated demands from Indigenous representatives for such reforms,[29] the federal government made a commitment in 2018 to discuss the development of Indigenous child services legislation with Indigenous groups and the provinces.[30] These parties were consulted, through various mechanisms, in order to work together on developing the bill that would become the Act.[31]

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25 Statement of Nathalie Nepton, para 35, **AGC's Evidence, vol 7 at p 2303**.

26 *Ibid*.

27 See generally Statement of Nathalie Nepton on FNCFS Program, **AGC's Evidence, vol 7 at pp 2296 *et seq.***, and Terms and Conditions of FNCFS Program, Exhibit NN-1, **AGC's Evidence, vol 7 at pp 2352 et seq.** FNCFS Program implemented under the *Department of Indigenous Services Act*, SC 2019, c 29, s 336.

28 See note 17.

29 See Report on Children and Families Together: An Emergency Meeting on Indigenous Child and Family Services, Exhibit IGL-3, **AGC's Evidence, vol 6 at pp 1923 et seq.**; Statement of Isa Gros-Louis, para 13, 16, **AGC's Evidence, vol 5 at pp 1757–58**.

30 Statement of Isa Gros-Louis, paras 17–18, **AGC's Evidence, vol 5 at pp 1758–59**; Federal government's commitment to take action on Indigenous Child and Family Services reform, Exhibit IGL-4, **AGC's Evidence, vol 6 at pp 1987 *et seq.***; Progress with regard to 6 measures aimed at addressing overrepresentation of Indigenous children in care, Exhibit IGL-5, **AGC's Evidence, vol 6 at pp 2002 et seq.**

31 Statement of Isa Gros-Louis, paras 27–38, **AGC's Evidence, vol 5 at pp 1761–64**.

27. The Act deals with "child and family services" for Indigenous people,[32] that is, services that are provided to protect Indigenous children against mistreatment and negligence and to help keep Indigenous families together.[33] These services include, among others, prevention services, which can be targeted at families or provided more generally within the community;[34] early interventions for at-risk Indigenous children and families; and protection services where the safety or well-being of an Indigenous child is compromised. However, child services do not extend to matters covered by other federal statutes, such as the *Youth Criminal Justice Act*.[35]

28. The Act contains two main components. In its first component, it sets out national principles for Indigenous child services. Essentially, these principles are the following:

a) Fundamental principles: The Act must be interpreted and administered in accordance with the best interests of the Indigenous child, substantive equality and cultural continuity, which includes, among other things, the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples. The Act recognizes that cultural continuity is essential to the well-being of Indigenous children, families and communities (s 9).

b) Best interests of the Indigenous child: This must be a primary consideration when making decisions and taking action related to the provision of Indigenous

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32 Act, SC 2019, c 24, s 1, defines "Indigenous" as, "when used in respect of a person, also describes a First Nations person, an Inuk or a Métis person."

33 Act, *supra* note 32, s 1: "child and family services: services to support children and families, including prevention services, early intervention services and child protection services." See also Preamble to the Act, 5th whereas statement.

34 Such services may include, for example, learning activities related to parenting, addiction treatment and healing centres, home care, and treatment for victims of sexual assault. See "Report on Children and Families Together: An Emergency Meeting on Indigenous Child and Family Services", Exhibit IGL-3, **AGC's Evidence, vol 6 at pp 1896 *et seq.*** See also as an example of prevention services funded by the FNCFS Program, Terms and Conditions of FNCFS Program, Exhibit NN-1, **AGC's Evidence, vol 7 at pp 2364-2365, 2367**.

35 *Youth Criminal Justice Act*, SC 2002, c 1. The situation in Quebec whereby the Director of Youth Protection acts as provincial Director under this Act is unique in Canada (See *Youth Protection Act*, CQLR c P-34.1, s 33.3).

child services. The Act sets out the main factors that must be considered when determining the best interests of the Indigenous child, namely, the child's physical, emotional and psychological safety, as well as the importance, for that child, of having an ongoing relationship with his or her family and community and preserving the child's connection to his or her culture (s 10).

c) Participation of parents, care providers and communities: Before taking any significant measure in relation to the child, the service provider must provide notice of the measure to the child's parents and the care provider[36] as well as to the Indigenous governing body that acts on behalf of the community to which the child belongs. They may also make representations in legal proceedings and, in the case of parents and caregivers, be parties to the proceedings (ss 12–13).

d) Priority to preventive care: Preventive care services, including prenatal care, must be given priority (s 14). An Indigenous child must not be apprehended solely on the basis of his or her socio-economic conditions (s 15), and reasonable efforts must be made before apprehending a child (s 15.1).

e) Placement: The placement of an Indigenous child must take into account the customs and traditions of the Indigenous community with regard to adoption. It must occur in the following order of priority: with one of the child's parents, a member of the child's family, an adult who belongs to the community, an adult who belongs to another Indigenous community or with another adult. The situation of a child placed with a person other than his or her parent must be reassessed on an ongoing basis (ss 16–17).

29. In its second component, the Act affirms that the inherent right of self-government is recognized and affirmed by section 35 CA 1982 and includes jurisdiction in relation to

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[36] Act, *supra* note 32, s 1: "care provider means a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child's parent, including in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs."

child services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority (s 18). Sections 20 *et seq.* put in place a framework that Indigenous communities may use to facilitate the exercise of their legislative authority in relation to child services.

30. Under this framework, an Indigenous community that holds a section 35 right must first authorize an "Indigenous governing body" to act on its behalf.[37] The Indigenous governing body may then give notice to the Minister of Indigenous Services (the Minister) and to the government of each province[38] in which the community is located indicating that it intends to exercise legislative authority (s 20(1)).

31. The Indigenous governing body may also request that the Minister and provinces concerned enter into a coordination agreement in relation to the exercise of its legislative authority (s 20(2)). Such a request would then lead to tripartite discussions to enter into a coordination agreement, which would establish the transition, coordination, funding and support measures the Indigenous governing body needs to exercise its legislative authority.[39]

32. If a coordination agreement is entered into, or if the Indigenous governing body has made reasonable efforts to do so during the period of one year after the day on which the request is made,[40] the Indigenous law in relation to child services will have force of law as federal law.[41] This is an incorporation by reference in federal law of the Indigenous law which, in the event there is a conflict or inconsistency with a provincial Act or regulation, dictates that such an Indigenous law prevails, as confirmed in subsection 22(3).

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37 Act, *supra* note 32, s 1: "Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982."

38 The Act uses the term "province", which must be read so as to include the provinces, Yukon, the Northwest Territories and Nunavut: *Interpretation Act*, RSC 1985, c I-21, s 35.

39 Technical Information Kit, IGL-8, **AGC's Evidence, vol 6 at p 2177**.

40 Act, *supra* note 32, s 20(3).

41 *Ibid,* s 21(1). Communities may postpone the coming into force of their law (s 21(1)) or enter into a coordination agreement after the coming into force of their law (s 20(7)).

33. The Act provides that if there is a conflict or inconsistency between an Indigenous law incorporated into federal law and provisions in federal statutes respecting child services, the Indigenous law will prevail, except in the case of sections 10 to 15 of the Act. Moreover, the *Canadian Human Right Act* prevails over such Indigenous laws where there is a conflict with that Act (s 22(1)). Agreements entered into prior to the coming into force of the Act, including treaties and agreements on self-government, also prevail over the Act if there is a conflict or inconsistency (s 3).

PART II – ISSUE IN DISPUTE

34. 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?**

35. The Attorney General of Canada (AGC) submits that this question should be answered in the negative in light of the fact that all of the provisions of the Act fall within Parliament's jurisdiction over "Indians" in subsection 91(24) LC 1867. Furthermore, sections 18 to 26 do not amend the Constitution. Parliament has the authority to legislate on the basis of an affirmation of constitutional rights, it being understood that this affirmation is not binding on the courts with respect to the interpretation of the Constitution.

PART III – SUBMISSIONS

A. ANALYTICAL FRAMEWORK APPLICABLE TO VALIDITY OF ACT

36. As the Supreme Court has stated on multiple occasions, a matter involving the constitutionality of a statute in light of the division of powers is resolved by means of the "pith and substance" doctrine. This requires identifying the pith and substance of the Act and then categorizing it to determine whether it falls under a head of power of the legislative body that enacted it.[42]

37. The Supreme Court has described pith and substance as being a law's "dominant purpose", its "true subject matter"[43] or its "dominant and most important characteristic".[44] To determine the pith and substance of a statute, one must examine its purpose, that is, what Parliament wanted to accomplish,[45] as well as its legal and practical effects.[46] One has to ask oneself, "[w]hat in fact does the law do and why?"[47]

38. If, by its pith and substance, a statute falls within Parliament's jurisdiction, it may have incidental effects which are nonetheless of significant practical importance to matters under provincial jurisdiction without impacting its constitutionality.[48]

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42 *Canadian Western Bank v Alberta,* 2007 SCC 22, [2007] 2 SCR 3 at para 25 [*Canadian Western Bank*]; *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17 at para 26; *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 49, 51.

43 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189 at para 86 [*Securities Reference (2018)*]; *Reference re Genetic Non-Discrimination Act supra* note 42 at para 28.

44 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 at para 184; *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3 at 62.

45 *Ward v Canada (AG)*, 2002 SCC 17, [2002] 1 SCR 569 at para 17.

46 *Reference re Genetic Non-Discrimination Act*, *supra* note 42 at para 30.

47 *Reference re Assisted Human Reproduction Act, supra* note 44 at para 22.

48 *Canadian Western Bank*, *supra* note 42 at para 28; *British Columbia v Imperial Tobacco Canada Ltd.,* 2005 SCC 49, [2005] 2 SCR 473 at para 28; *R v Morgentaler,* [1993] 3 SCR 463 at p 486.

39. In the case at hand, the AGQ has strayed from this classic analytical framework, without explaining the reasons for doing so. However, according to the case law of the Supreme Court, this analytical framework must be applied in all cases in which the validity of a stature is at issue, including where an act is challenged on the grounds that its effects on matters that fall under provincial jurisdiction are substantial.[49]

40. A thorough analysis of the purpose of the Act and its effects shows that its pith and substance is to protect and ensure the well-being of Indigenous children, families and communities by promoting culturally sensitive child welfare services, with the goal of putting an end to the overrepresentation of Indigenous children in child services systems.

41. The Act contemplates two means to this end: first, by adopting national principles for child services (ss 9–17);[50] and second, by affirming Indigenous peoples' jurisdiction in relation to this subject matter and creating a framework to facilitate the exercise of that jurisdiction (ss 18–26).

42. We will begin by analyzing the constitutionality of the national principles. On this point, the AGQ's analysis is completely centred on the effects the national principles are alleged to have on a matter of provincial jurisdiction, namely the provincial public service. That analysis not only ignores the purpose of the Act, but also exaggerates the Act's effects on the provinces. Moreover, it fails to take into account the effects that the Act seeks to have on Indigenous children, families and communities.

43. We will follow this by addressing the AGQ's arguments with respect to interjurisdictional immunity, and we will explain why the national principles for child services are constitutionally applicable to the provinces.

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49 *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783 at para 49; *Quebec (AG) v Canada (GG)*, 2015 SCC 14, [2015] 1 SCR 693 at paras 28 and 34.

50 The AGQ refers to sections 1 to 17 in its first ground of challenge. It should be noted that the national principles are found in sections 9 to 17 of the Act, while sections 1 to 8 deal with the interpretation and application of the Act as a whole, particularly definitions, interpretation clauses, a clause stating that the Act is binding on the federal Crown and the provinces, and the purpose clause.

44. Lastly, we will examine the validity of the second component of the Act (the affirmation of rights and the implementation framework). This second component shares the same purpose as the national principles. The effects of these legislative provisions confirm that the pith and substance of the Act is the protection of Indigenous children, families and communities.

B. SECTIONS 1 TO 17 OF THE ACT ARE *INTRA VIRES* PARLIAMENT'S JURISDICTION PURSUANT TO SUBSECTION 91(24) CA 1867

1. Pith and substance of sections 1 to 17 of Act

a) Purpose of Act: protection and well-being of Indigenous children, families and communities

45. The analysis of the pith and substance of a statute begins with an examination of its purpose. Although the pith and substance doctrine focuses on both the purpose and effect of an act, the purpose of the statute is often the key element of constitutionality.[51] The purpose of a statute is often apparent from its text, but it may also be established from outside sources such as Hansard, government publications and the events leading up to the statute's enactment.[52] The purpose may also be apparent from an examination of the "mischief" that the statute addresses, that is, the problem that the legislative body sought to remedy.[53]

46. In this case, the Act has a single purpose, namely the protection and well-being of Indigenous children, families and communities by reducing the number of children in child services systems. This purpose is evident in the language of the entire Act, including the preamble, which states a desire to address the overrepresentation of Indigenous children

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51 *R. v Morgentaler, supra* note 48 at 481.

52 *Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 42 at para 62; *Reference re Firearms Act, supra* note 49 at para 17; *Canadian Western Bank*, *supra* note 42 at para 27.

53 *Reference re Firearms Act, supra* note 49 at paras 17, 21.

in child services. In addition, the purpose clause in section 8 sets out how this is to be achieved, namely by creating nationally applicable principles and affirming the inherent right of self-government, including jurisdiction over child services.

47. The Act is intended to address what has been described as a "humanitarian crisis",[54] that is, the overrepresentation of Indigenous children in the child services system and their too frequent separation from their families and communities.[55] The preamble makes specific reference to these concerns.[56]

48. On the third reading of Bill C-92 in the House of Commons, the Minister noted the problem of overrepresentation of Indigenous children in child services systems, stating that "[m]ore indigenous children are in care now than at the height of the operation of residential schools."[57]

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54 *House of Commons Debates*, Second Reading (March 19, 2019) [Second Reading (March 19, 2019)] at 1320 (**Seamus O'Regan**, Minister of Indigenous Services), **AGC's Evidence, vol 1 at p 39**; *House of Commons Debates*, Second Reading (May 3, 2019) [Second Reading (May 3, 2019)] at 1020 (**Dan Vandal**, Parliamentary Secretary to the Minister of Indigenous Services) and 1225 (**Arif Virani**, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada and to the Minister for Democratic Institutions), **AGC's Evidence, vol 1 at pp 71, 78**; *House of Commons Debates*, Standing Committee on Indigenous and Northern Affairs, 42-1, No 146 (April 30, 2019) [Standing Committee (April 30, 2019)], 0835 (O'Regan); and "A report on children and families together: An Emergency Meeting on Indigenous child and family services," Exhibit IGL-3, **AGC's Evidence, vol 6 at pp 1898-99**.

55 Second Reading (May 3, 2019), *supra* note 54 at 1005–20 (**Vandal**), and 1225 (**Virani**), **AGC's Evidence, vol 1 at pp 69-71, 78**; Standing Committee (April 30, 2019), *supra* note 54 at 0835 (**O'Regan**); *House of Commons Debates,* Third Reading (June 3, 2019) [Third Reading (June 3, 2019)] at 1835 (**O'Regan**), **AGC's Evidence, vol 2 at p 434**; Senate, Standing Senate Committee on Indigenous Peoples, Committee Report, 17th Report (May 13, 2019), **AGC's Evidence, vol 3 at pp 878-79**; Record of "Children and Families Reunited: Emergency Meeting on Services for Indigenous Children and Families," Exhibit IGL-3, **AGC's Evidence, vol 6 at p 1899**.

56 Act, *supra* note 32, Preamble, 8th whereas statement, 4th paragraph.

57 Third Reading (June 3, 2019), *supra* note 55 at 1835 (**O'Regan**), **AGC's Evidence, vol 2 at p 434**.

49. The Act seeks to address this issue by "support[ing] the dignity and well-being of Indigenous children and youth and their families and communities."[58] Quoting the National Chief of the Assembly of First Nations, the Minister summarized the focus of the Act as follows: "This legislation is first and foremost about First Nations [Inuit and Metis] children and their safety, their security and their future."[59]

50. The Act responds to several calls for a reform of child services that would focus on self-government for Indigenous peoples and national standards for culturally appropriate services.

51. As noted in the preamble to the Act, the 2015 report of the Truth and Reconciliation Commission urged federal, provincial and Indigenous governments to "commit to reducing the number of Aboriginal children in care."[60] At that time, the Commission recommended that Parliament "enact Aboriginal child-welfare legislation that establishes national standards."[61] According to the Commission, these standards should confirm "the right of Aboriginal governments to establish and maintain their own child-welfare agencies" and require "that placements of Aboriginal children into temporary and permanent care be culturally appropriate."[62]

52. These calls for action by the Commission have been followed by similar calls for reform of Indigenous child services at the national level, including by the Canadian Human Rights Tribunal,[63] the *National Inquiry on Missing and Murdered Indigenous Women and Girls*[64] and the *Commission d'enquête sur les relations entre les Autochtones et certains*

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58 Act, *supra* note 32, Preamble, 5th whereas statement.

59 *House of Commons Debates*, Second Reading (March 19, 2019) at 1340 (**O'Regan**), **AGC's Evidence, vol 1 at p 27**.

60 TRC: Calls to Action, Call to Action 1, **AGC's Evidence, vol 14 at p 5340**.

61 TRC: Calls to Action, Call to Action 4, **AGC's Evidence, vol 14 at p 5341**.

62 *Ibid.*

63 *First Nations Child and Family Caring Society of Canada et. al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 at para 463.

64 Final Report, GP-16, No 12.1, **Evidence of AFNQL-FNQLHSSC, vol 11 at p 4050**.

services publics [public inquiry commission on relations between Indigenous peoples and certain public services in Quebec] (Viens Commission).[65]

53. More generally, the Act is part of Canada's reconciliation process with First Nations, Inuit and Métis peoples.[66] It "would be a significant step forward in the process of reconciliation and in the renewal of the relationship between Canada and indigenous peoples."[67] It is also intended to contribute to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, which recognizes the right to cultural continuity and self-determination.[68]

54. Both components of the Act have the same purpose, namely the protection and well-being of Indigenous children, families and communities to reduce the number of children separated from their families and communities. The Act accomplishes this purpose by two means: first, by establishing principles "*that would guide the provision of child and family services to indigenous children*";[69] and second, by affirming the inherent right of Indigenous peoples to self-government and providing a framework to facilitate the exercise of legislative jurisdiction over child services.

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65 *Supra* note 17, **AGC's Evidence, vol 11 at pp 4079, 4128-29**. One component of the Commission's investigation dealt specifically with Indigenous youth protection services, from which stemmed calls for action that all tend to increase the autonomy of First Nations and Inuit in matters of youth protection. Many of the Commission's findings and calls to action overlap with the national principles set out in the Act: the "best interests of the child" principle not adapted to Indigenous people (vol 11 at p 4087-88); importance of ensuring cultural safety (vol 11 at pp 4089-92); First Nations- and Inuit-specific priority of placement with immediate or extended family, and if that is not possible, with members of their community or nation (vol 11 at pp 4102-04).

66 Act, *supra* note 32, Preamble, 9th whereas statement, 2nd paragraph.

67 Second Reading (May 3, 2019), *supra* note 54 at 1005 (**Vandal**), **AGC's Evidence, vol 1 at p 69**.

68 *United Nations Declaration on the Rights of Indigenous Peoples* (A/RES/61-295). See in particular articles 3 and 4, which recognize the right to self-determination of Indigenous peoples, including the right to self-government, as well as articles 7 para 2, 8 para 1, 9, 11 and 13.1, which provide for rights relating to the protection of children and the preservation of culture.

69 Second Reading (May 3, 2019), *supra* note 54 at 1005 (**Vandal**), **AGC's Evidence, vol 1 at p 70**.

b) Effects of national principles

55. At this stage of the analysis, it is necessary to consider the legal and practical effects of the Act on Canadians[70] in order to understand how it seeks to achieve its purpose. Legal effects refer to how the legislation as a whole affects the rights and obligations of those subject to it.[71] Practical effects include actual and intended effects.[72] In this case, the effects of the national principles, as well as the effects of the second component of the Act, which will be discussed in Part E of this brief, confirm the purpose of the Act identified above.

56. The primary effects of the Act's national principles are on Indigenous children, families and communities. In light of its language and its treatment to date by the courts, the Act can be expected to have legal and practical effects that can be subdivided into three categories.

57. **First**, it is expected that Indigenous children in the care of child services will maintain a strong connection to their families, communities and culture. This results in particular from sections 9(2),10(2) and 10(3)(a, c, d,f) of the Act, which place cultural continuity and continued connection to family and community at the centre of decisions about Indigenous children, along with their physical, psychological and emotional well-being, safety and security. Sections 12 and 13 also recognize the importance of community perspectives in the process. Similarly, subsection 16(1) promotes the placement of the Indigenous child with his or her family and community,[73] which will facilitate the transmission of Indigenous

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70 *Reference re Firearms Act, supra* note 49 at para 18.

71 *R v Morgentaler, supra* note 48 at 482–83; *Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 48 at para 70.

72 *Ibid* at 483; *Securities Reference (2018), supra* note 43 at para 98.

73 Second Reading (May 3, 2019), *supra* note 54 at 1005 (**Vandal**), **AGC's Evidence, vol 1 at p 70**: "The placement order is intended to ensure that children remain connected to their culture and their community and that they preserve their attachment and emotional ties to the family."

culture to the child.[74] Section 17 provides that the attachment of the child to any member of the child's family shall be encouraged, with "family" being defined in accordance with the customs of the child's community.[75]

58. Recent decisions demonstrate the effect of the Act on maintaining a child's connection to family, community and culture. Courts are now placing increased emphasis on factors such as the preservation of identity and culture and cultural continuity when making placement or access orders.[76]

59. **Second**, the Act can be expected to reduce the number of Indigenous children in the care of child services. Subsection 14(1) favours taking a preventative approach with Indigenous families, rather than having child services intervene only once the safety or well-being of the child has been compromised. It is anticipated that parenting skills, addictions control or healing programs on the land[77] will be prioritized to prevent Indigenous children from being taken into care.

60. Subsection 14(2) promotes prenatal care, which should prevent a number of Indigenous children from being taken into care at birth through the practice of "birth alerts"

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74 On the transmission of culture through everyday activities, see Expert Report by Jessica Ball, **AGC's Evidence, vol 9 at pp 2984–86**.

75 Act, *supra* note 32, s 1. On Indigenous peoples' concepts of family and Indigenous children's development of multiple attachments, see Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at pp 3433–34 and 3448**.

76 See in particular *Youth Protection — 206762*, 2020 QCCQ 7952; *British Columbia (Child, Family and Community Service) v M.J.K.*, 2020 BCPC 39; *British Columbia (Child, Family and Community Service) v S.H.*, 2020 BCPC 82; *Michif CFS v C.L.H. and W.J.B.,* 2020 MBQB 99; *Huron-Perth Children's Aid Society v A.C.,* 2020 ONCJ 251; *Kina Gbezhgomi Child and Family Services v M.A*., 2020 ONCJ 414; *Protection de la jeunesse — 204534*, 2020 QCCQ 4334; *In The Matter of A Hearing Under the Child and Family Services Act, SS 1989-90, c C-7.2*, 2021 SKQB 2.

77 See examples of prevention services in place in Uashat mak Mani-utenan, Statement of Nadine Vollant at para 16, **AFNQL's Evidence, vol 1 at p 226**. See also other examples in the Sworn Declaration of Marjolaine Sioui at paras 77–80, 83, **AFNQL's Evidence, vol 3 at pp 1024–26**.

where the child is taken from the mother within minutes of birth. This practice is decried by many, including Indigenous communities.[78]

61. Section 15 provides that an Indigenous child should not be placed in care solely on the basis of socio-economic status.[79] This provision should also help to reduce the number of Indigenous children in care, as the statistical data show that Indigenous families face a number of socio-economic challenges[80] and that these realities are sometimes associated with neglect in the context of Indigenous child services.[81]

62. Lastly, subsection 16(3) provides that the circumstances of a child place with a person other than a parent must be reviewed regularly to determine whether the child should return to the parent or a relative. This provision reflects the fact that, given their magnitude, the difficulties experienced by Indigenous families may take some time to heal.[82] It is also consistent with Indigenous concepts of healing, caring and respect for the pace of individuals.[83] It should allow Indigenous children who have been in care for some time to return to their families.

63. **Third**, and more generally, the Act's focus on making Indigenous child services more culturally appropriate should improve the effectiveness of services. Several studies have shown that culturally appropriate child services are more likely to ensure the well-being of Indigenous children, in part because they preserve identity and promote resilience.[84]

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78 Statement of Isa Gros-Louis, para 32(b), **AGC's Evidence, vol 5 at p 1763**.

79 See also Act, *supra* note 32, s 15.1.

80 Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at pp 3404–06**; Expert Report by Jessica Ball, **AGC's Evidence, vol 9 at pp 2976–78**.

81 Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at p 3453**; *Wen:De – We are Coming to the Light of Day,* Exhibit CB-5, **First Nations Child and Family Caring Society of Canada's Evidence, vol 2 at pp 232, 237–39, 284–310**; *Wen:De – The Journey Continues,* Exhibit CB-6, **First Nations Child and Family Caring Society of Canada's Evidence, vol 3 at p 459**.

82 Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at p 3453**.

83 *Ibid*, **AGC's Evidence, vol 10 at pp 3442–43, 3450–52**.

84 Expert Report by Jessica Ball, **AGC's Evidence, vol 9 at pp 2991–98**.

64. Thus, it is apparent from this analysis of the purpose and effect of sections 1 to 17 that the pith and substance of these provisions is to ensure the protection and well-being of Indigenous children, families and communities by directing the provision of child services to Indigenous people to be culturally appropriate, with the goal of reducing the number of Indigenous children in child services systems. The pith and substance of the national principles is not to regulate the provincial public service. The Act's effects on the provincial public service are incidental within the meaning of constitutional law.

c) The effects of the Act on provincial jurisdiction are purely incidental and do not affect pith and substance of the Act

65. Canadian federalism recognizes the double aspect doctrine, whereby the same subject matter may be regulated from different perspectives by both the federal and provincial governments.[85] It is not surprising, therefore, that a federal act dealing with a subject matter that has a double aspect would have incidental effects on a provincial jurisdiction and vice versa. However, the incidental effects that an act may have on the jurisdiction of the other level of government have no impact on the determination of its pith and substance. "Incidental effects" are the effects of an act that may have significant practical importance, but are incidental and secondary to the mandate of the enacting legislature.[86]

66. In this case, to the extent that the Act affects the work of provincial public servants, these effects are clearly incidental to the purpose of the Act and therefore not

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85 *Canadian Western Bank*, *supra* note 42 at para 30; *Rogers Communications Inc v Châteauguay (City of),* 2016 SCC 23, [2016] 1 SCR 467 at para 50; *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 180–83; *Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 42 at para 126; *Transport Desgagnés Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58 at para 84 [*Transport Desgagnés*].

86 *British Columbia v Imperial Tobacco Canada Ltd.*, *supra* note 48 at para 28, cited in *Canadian Western Bank, supra* note 42 at para 28.

constitutionally relevant.[87] These effects are not so significant as to lead to the conclusion that the pith and substance of the Act is to regulate Quebec's public service.

67. The purpose of the national principles is not to govern the work of provincial public servants, but rather to ensure the protection and well-being of Indigenous children, families and communities, a valid federal purpose.[88] In other words, the Act does not seek to dictate to the provinces how they should exercise their jurisdiction or use the regimes they have in place in their areas of jurisdiction,[89] but rather to establish national standards, which Parliament may do in the exercise of a constitutionally conferred power.[90]

68. The effect of the Act on Indigenous child services providers is to guide the provision of these services, where they exist. The national principles are general principles and do not regulate all the facets of activities related to child services. They do not impose duties on specific provincial public servants, nor do they dictate to service providers how their internal management should operate or how services should be delivered in practice. Moreover, the Act does not prevent the various branches of the Quebec public service from continuing to work together and with Indigenous organizations to ensure the effectiveness of the services provided.

69. Contrary to what the AGQ suggests,[91] the provinces are not the only service providers. FNCFS agencies also provide child services to many Indigenous children and families across the country. The Act does not distinguish between service providers: it applies in all cases where child services are provided in relation to an Indigenous child.

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87 *Reference re Firearms Act, supra* note 49 at para 49; *Quebec (AG) v Canada (AG)*, *supra* note 49 at para 32; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 50–52.

88 See by analogy *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at pp 468–69.

89 **AGQ's Brief at 68**.

90 *Reference re Assisted Human Reproduction Act, supra* note 44 at para 244; *Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 42 at para 207.

91 **AGQ's Brief at para 32**.

Similarly, service providers who are mandated by Indigenous legislation will also be subject to the national principles.[92]

70. Finally, the Act does not impose an obligation on anyone to provide services, nor is it intended to impose a unified or [translation] "*identical [regime] across all regions in Canada*."[93] It sets out standards that allow for diversity in provincial, territorial and Indigenous child services systems.[94] The national principles apply concurrently with provincial and territorial legislation.[95] These are minimum standards, and provinces may provide greater protection through their legislation.[96] As the Deputy Minister of Indigenous Services told the parliamentary committee, with regard to Quebec:

> *We're using the results of the work that Quebec is already doing with indigenous people, particularly on the principles. We could end up with very positive approaches in Quebec, which wouldn't necessarily be changed by the legislation. The legislation doesn't call into question the positive aspects. Instead, it sets minimum standards. Moreover, in many cases, we have the impression that these standards are already being met or even exceeded.*[97]

71. Not all provincial laws provide the same protection for Indigenous children, families

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92 Subsection 22(1) of the Act provides that sections 10 to 15 of the Act will prevail over Indigenous laws incorporated into federal law in the event of any conflict or inconsistency. Other Indigenous laws will be subject to the national principles under paragraph 8(b) of the Act.

93 **AGQ's Brief at para 47**.

94 See Second Reading (May 3, 2019), *supra* note 54 at 1015 (**Vandal**) and 1230 (**Virani**), **AGC's Evidence, vol 1 at pp 70, 78**; Third Reading (June 3, 2019), *supra* note 55 at 2000 (**Mike Bossio**, Liberal MP for Hasting-Lennox and Addington), **AGC's Evidence, vol 2 at p 445**; Standing Committee (April 30, 2019), *supra* note 54, 1020 (**Bossio**).

95 Standing Committee (April 30, 2019), *supra* note 54, 0845 **(O'Regan**).

96 Act, *supra* note 32, ss 4–5. For example, the Act provides that Indigenous governing bodies may make representations to the courts, while some provincial statutes confer party status on the representative of the Indigenous community. Ontario: *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, s 79(1)(4); British Columbia: *Child, Family and Community Service Act*, RSBC 1996, c 46, ss 33.1(6), 34(4), 36(2.3), 39(1)(2), 42.1(4.1), 42.2(2), 44(2.1), 44.1(2.1), 46(2.1), 49(3), 50.01(b), 54.01(4), 54.1(2.1), 55(3.1), 57(2.1); Yukon: *Child and Family Services Act*, SY 2008, c 1, s 48(1)(b).

97 Standing Committee (April 30, 2019), *supra* note 54, 0930 (**Jean-François Tremblay**, Deputy Minister, Department of Indigenous Services Canada).

and communities.[98] The Act seeks to ensure that Indigenous children have access to services adapted to their culture and their specific needs, regardless of where they live.

72. In Quebec, the *Youth Protection Act* (**YPA**) already incorporates many of the national principles, including the preservation of cultural identity,[99] consideration of customary adoption,[100] involvement of the child, parents and Indigenous community,[101] and placement of the child in a manner that promotes continuity with parents, extended family, their community and their nation.[102]

73. In practical terms, the Act clarifies or defines certain concepts, such as the interests of Indigenous children, cultural continuity and substantive equality. But as the Court of Québec recently stated, the two acts [translation] "*coexist and are of concurrent, even complementary application*."[103]

74. In this case, applying the Act and YPA together, the Court ordered [translation] "*that the children's personal relationships with their extended family be maintained*" and "*recommended that the [Director of Youth Protection] authorize extended stays with the extended family, in accordance with section 62.1 of the YPA, if the situation permits*,"[104] in accordance with the considerations set out in subsection 10(2) of the Act.[105]

75. The Court's order is indicative of the complementary role of the Act. The Court applied the Act while anchoring its order in the existing powers of the Director of Youth

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98 For example, all provincial and territorial statutes provide that cultural continuity is a factor in the best interests of the Indigenous child, but only one specifies that a child shall not be taken into care because of his or her socio-economic status: *The Child and Family Services Act,* CCSM c C80, s 17(3) (Man).

99 *Youth Protection Act*, RSC c P-34.1 [YPA], s 3; compare with Act, *supra* note 32, ss 9(2), 10(2), 10(3).

100 YPA, ss 2.4 (5)(c), 3 para 2; compared with Act, *supra* note 32, s 16(2.1).

101 YPA, ss 2.3 para 2, 72.6.0.1 and 81.1; compared with Act, *supra* note 32, ss 12–13.

102 YPA, s 4; compared with Act, *supra* note 32, s 16.

103 *Youth Protection — 206762 supra* note 76 at para 13.

104 *Ibid* at paras 155–56.

105 *Ibid* at paras 86, 89.

Protection under provincial law. This decision illustrates that provincial officials retain considerable discretion in how they apply the national principles of the Act.[106]

76. In this context, and to the extent that provincial legislation already requires provinces to take into account the particular circumstances of Indigenous children, the Act will not significantly affect the work of provincial public servants.

77. The AGQ also argues that the national principles set out in the Act may raise practical problems in the organization of child services,[107] but does not explain the substance of the alleged problems. The AGQ simply gives a laconic statement of the distinctions between the two statutes as to the definition of "best interests of the child" and "Indigenous governing bodies" and the scope of the concept of substantive equality.[108] Such general statements do not support the conclusion that there are any practical problems.

78. In any event, when analyzing the validity of a federal statute, the existence of a provincial statute dealing with the same subject matter cannot be relevant, even though some practical difficulties may arise from the co-existence of the two statutes and may require coordination.[109] As the Supreme Court stated in *Ontario Hydro v Ontario (Labour Relations Board)*, practical problems that may arise from overlapping jurisdictions cannot be determinative of the constitutional validity of legislation.[110]

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106 On the complementary nature of the Act and provincial legislation, see, for example, *Métis Child, Family and Community Services v HDGJ*, 2021 MBCA 18 at para 166; *Mi'kmaw Family and Children's Services of Nova Scotia v RD*, 2021 NSSC 66 at paras 28–30, 36-38; *In The Matter of A Hearing Under the Child and Family Services Act, SS 1989-90, c C-7.2*, 2021 SKQB 2 at para 85; *Children's Aid Society of London and Middlesex v T.E.*, 2021 ONSC 788.

107 **AGQ's Brief at para 50**.

108 *Ibid*.

109 *Reference re Assisted Human Reproduction Act*, *supra* note 44 at para 68; *Multiple Access Ltd. v McCutcheon, supra* note 85 at 190.

110 *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 358–59 (Lamer CJ), 374–75 (La Forest J) [*Ontario Hydro*].

79. Moreover, the fact that the Act imposes certain additional obligations on provincial child services providers is not unacceptable insofar as these obligations flow from the provisions of validly enacted federal legislation.[111] In the *Reference re Goods and Services Tax*, the Supreme Court held that, notwithstanding the administrative burden imposed by the federal *Goods and Services Tax Act* on businesses and the provincial government, the Act was valid because its effects were necessarily incidental to the valid federal tax system.[112] In other words, the challenged act had a valid federal purpose. Its purpose was not to produce these effects on matters within provincial jurisdiction.[113]

80. The same is true in this case. Sections 1 to 17 of the Act have a valid federal purpose, and their effect on provincial matters is purely incidental.

81. Despite their incidental effects, the pith and substance of these provisions is to ensure the protection and well-being of Indigenous children, families and communities. This is the only conclusion that can be reached when the pith and substance analysis is properly conducted in this case.

82. Legislation of this nature is clearly within federal jurisdiction under subsection 92(24) CA 1867, as we shall see below.

2. Classification: sections 1–17 of the Act fall under subsection 91(24) CA 1867

83. As admitted by the AGQ,[114] Parliament's jurisdiction under subsection 91(24) allows it to pass laws related to Indigenous child services, even though the provinces have jurisdiction to make laws of general application for child services in the province. Indeed, Indigenous child services are a matter with a double aspect.[115]

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111 *Reference re Goods and Services Tax*, *supra* note 88 at 483 (Lamer J for the majority).

112 *Ibid*.

113 *Ibid* at 468.

114 **AGQ's Brief at para 34**.

115 On the overlapping jurisdictions over Indigenous child services, see in particular *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696 at paras 42–44 [*NIL/TU,O*].

84. In this case, given the pith and substance of the Act, the national principles are within the jurisdiction of the Federal Parliament under subsection 91(24).

a) Nature and scope of Parliament's jurisdiction under subsection 91(24) CA 1867

85. Parliament's jurisdiction over "Indians" under subsection 91(24) is broad: it extends to First Nations, Inuit and Métis people,[116] wherever they may be in Canada,[117] and it empowers Parliament to legislate in all areas of Indigenous life,[118] including property and civil rights, as recognized by the Supreme Court in *Canada (AG) v Canard*.[119]

86. Thus, Parliament may legislate in relation to Indigenous people in areas that are otherwise within provincial jurisdiction.[120] Jurisdiction under subsection 91(24) allows Parliament, "*to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces*."[121]

87. When it comes to child services, Indigenous people are in a different position from other residents of a province because of, among other things, their traditions, languages and cultures, Canada's colonial history and its impact, including intergenerational

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116 *Daniels v Canada (Indigenous Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 at para 35 [*Daniels*].

117 *Four B Manufacturing Ltd.* v *United Garment Workers of America*, [1980] 1 SCR 1031 at 1049-50; Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, Yvon Blais, 6th ed, 2014, VI-2.249 [Brun, Tremblay and Brouillet].

118 Brun, Tremblay and Brouillet, *supra* note 117, VI-2.251.

119 *Attorney General of Canada v Canard,* [1976] 1 SCR 170 [*Canard*] (provisions of the federal *Indian Act* governing estates were declared constitutional).

120 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed, (Thomson Reuters, 2007), chapter 28.1(b) [Hogg]; *Canard supra* note 119 (regarding succession); *Natural Parents v Superintendent of Child Welfare*, [1976] 2 SCR 751 at p 774 (regarding adoption); *NIL/TU,*O, *supra* note 115 at para 2 (regarding labour relations); *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture),* 2002 SCC 31, [2002] 2 SCR 146 at para 78 (regarding heritage protection).

121 Hogg, *supra* note 120, chapter 28(1)(b); *Canard*, *supra* note 119 at 191 (Ritchie J) and 193 (Pigeon J).

trauma,[122] and the overrepresentation of Indigenous children in child services systems. The provisions of the Act setting out national principles directly address these unique considerations for Indigenous people.

88. Subsection 91(24) also contains a protective aspect that is expressed here in the national principles. At the time of Confederation, one of the purposes of subsection 91(24) was to protect Indigenous peoples and the lands reserved for them by placing jurisdiction over them at a level of government more removed from local interests in the expansion of settlements.[123]

89. Parliament's power to legislate under subsection 91(24) to protect Indigenous people remains an important feature today, but it must take a different form in light of the changing political, social and cultural realities of Canadian society.[124] It is with this in mind that the first component of the Act was passed.

90. As discussed above, the provisions enacting national principles are intended to ensure the protection and well-being of Indigenous children, families and communities, wherever they are in Canada, in order to foster stronger family and community ties and to reduce the number of Indigenous children in the care of child services.

91. These provisions concern relationships within Indigenous families and communities and are intended to ensure the continuity of their cultures. There can be no doubt that such measures fall within federal jurisdiction over "Indians" under subsection 91(24).[125]

92. The AGQ alleges that the Act regulates an area of activity that has been under exclusive provincial jurisdiction since Confederation.[126]

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122 Act, *supra* note 32, Preamble, 3rd whereas statement.
123 Hogg, *supra* note 120, chapter 28.1(a).
124 *Daniels*, *supra* note 116 at para 49; *Canadian Western Bank supra* note 42 at para 23; *Delgamuukw v British Columbia (AG)*, [1997] 3 SCR 1010 at para 176 [*Delgamuukw*].
125 *Canadian Western Bank*, *supra* note 42 at para 61; *NIL/TU,O*, *supra* note 115 at para 71.
126 **AGQ's Brief at paras 10, 31**.

93. Contrary to what the AGQ suggests, the Act does not constitute entry by the federal government into a new field.[127] Indigenous children and families have been the focus of federal policy and legislation since at least the late 19th century.[128] In fact, it was essentially only after the addition of section 87 (now 88) of the *Indian Act* in 1951, which provided that provincial laws of general application apply to "Indians",[129] and the conclusion of agreements with the provinces and territories, that the latter began to provide federally funded child services to Indigenous people on reserves. In addition, in the 1990s, the federal government established federal programs such as the *First Nations Child and Family Services Program*.[130]

94. In any event, the fact that Parliament did not legislate directly in relation to Indigenous child services until the Act was passed, and that provincial child services legislation has applied to Indigenous people since the 1950s, does not affect federal jurisdiction under section 91(24).[131] The omission of one level of government to exercise

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127 *Reference re Firearms Act, supra* note 49 at para 53.

128 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42,* SC 1869, c 6, s 18 (provides for the appointment of a tutor for the minor children of a deceased "Indian enfranchised under this Act"); *The Indian Act,* 43 Victoria, 1886, c 43, s 76(g) (authorizes band chiefs to adopt rules on children's school attendance); *An Act to amend the Indian Act*, 57–58 Victoria, 1894, c 32, s 11 (makes school attendance mandatory for all children aged 15 and under); *The Indian Act*, 14–15 George VI, 1951, c 29, s 52 (authorizes the Minister to administer children's property); *First Nations Land Management Act*, SC 1999, c 24, ss 20(1)(c), 20(2.1)–20(2.2) (allows First Nations to adopt rules on matrimonial real/immovable property in accordance with their land code); *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 (sets out a mechanism allowing First Nations to create their own laws on matrimonial real/immovable property and provides a set of interim federal rules offering rights and protections regarding matrimonial real/immovable property to spouses and common-law partners living on First Nations reserves that have not established their own laws).

129 Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at p 3413**; Statement of Nathalie Nepton, para 17, **AGC's Evidence, vol 7 at p 2299**.

130 Statement of Nathalie Nepton, paras 15, 43, **AGC's Evidence, vol 7 at pp 2298–99, 2305**; First Nations Child and Family Services Program Terms and Conditions, Exhibit NN-1, **AGC's Evidence, vol 7 at p 2352**. On federal programs to maintain the culture of off-reserve Indigenous children, see Statement of Jessica Corbière, **AGC's Evidence, vol 7 at p 2445**.

131 *Daniels*, *supra* note 116 at para 15; *Canadian Western Bank*, *supra* note 42 at para 34.

a power or the omission to act when another level of government is legislating on the matter is not determinative of the constitutional analysis.[132] The mere fact that Indigenous child services are governed primarily by provincial legislation does not mean that the power to govern them should be left to the provinces as a matter of convenience.[133]

b) Underlying principles of Constitution do not impose limits on otherwise valid exercise of federal legislative jurisdiction

95. The architecture and underlying principles of the Constitution invoked by the AGQ do not displace the primacy of the written Constitution, which remains one of the fundamental precepts of our constitutional system.[134]

96. These underlying principles, including federalism, have inspired the development of constitutional doctrines, such as the pith and substance analysis or double aspect,[135] which apply to this case. As the Supreme Court has stated, "*the constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power*."[136] As for the principle of democracy, it argues "*very strongly [in] favour [of] upholding the validity of legislation that conforms to the express terms of the Constitution*."[137]

97. Although Parliament's jurisdiction under subsection 91(24) is broad, it is necessarily limited to "Indians and lands reserved for the Indians". It is not ambiguous and does not require clarification by reference to the underlying principles of the Constitution. Contrary to what the AGQ appears to argue, there is no reason to fear that this jurisdiction would

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132 *Ontario Hydro*, *supra* note 110 at 357 (Lamer J).
133 *Ibid* at 358 (Lamer CJ) and 374 (La Forest J).
134 *Quebec (AG) v Canada (AG)*, *supra* note 49 at para 18; *Ontario Hydro, supra* note 110 at 370.
135 *Canadian Western Bank*, *supra* note 42 at para 24.
136 *Ibid*.
137 *British Columbia v Imperial Tobacco Canada Ltd., supra* note 48 at para 66.

eviscerate or empty provincial jurisdictions, as opposed to the federal jurisdiction over traffic and commerce referred to in the *Reference re Securities Act.*[138]

98. The underlying principles of the Constitution do not limit the scope of subsection 91(24) based on who is bound by the Act.

99. Thus, when the AGQ argues that, because of the constitutional architecture,[139] the Act [translation] "*must not apply to the provinces as service providers*" in order to be valid,[140] the AGQ confuses validity and constitutional applicability of the Act. An attenuated interpretation of the Act that would make it inapplicable to the provinces does not fall within the purview of the pith and substance doctrine. Rather, it must be determined under the doctrine of interjurisdictional immunity.

100. The scope of federal jurisdiction under subsection 91 CA 1867 (and hence the validity of legislation enacted pursuant to that jurisdiction) does not fluctuate depending on the identity of the person bound by the act, whether that person is an individual, a corporation or a provincial government. This would contradict the well-established principle that Parliament can bind the provincial Crown when it acts within its jurisdiction.[141] It would also introduce elements of unpredictability and uncertainty into the division of powers, since the extent of federal jurisdiction under subsection 91(24) would then depend on how a province chose to structure the provision of services (by assigning responsibility to their public services or to private agencies).

101. The arguments made by the AGQ amount to a thinly veiled challenge to the constitutional applicability of the Act to the provinces. The reading down proposed by the

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138 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at paras 70–71 [*Securities Reference (2011)*].

139 **AGQ's Brief at para 54**.

140 **AGQ's Brief at para 77**.

141 *Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission),* [1989] 2 SCR 225 at 275 [*Alberta Government Telephones*]; *Her Majesty in rights of the Province of Alberta v Canadian Transport Commission,* [1978] 1 SCR 61 at 72 [*PWA*].

AGQ can only fall within the realm of interjurisdictional immunity, with all the constraints that this doctrine implies.[142] For the reasons that follow, the criteria allowing this doctrine to be applied have clearly not been met.

C. THE DOCTRINE OF INTERJURISDICTIONAL IMMUNITY DOES NOT APPLY

102. The AGQ argues in the alternative that, under the doctrine of interjurisdictional immunity, the Act is constitutionally inapplicable to provincial public servants who provide children's services.[143] However, this doctrine does not apply, since the AGQ has failed to identify a delineated "core" of provincial jurisdiction over the public service[144] and has not, in any event, succeeded in demonstrating any impairment on that jurisdiction or the work of provincial public servants.[145]

103. Despite its significance in Canadian federalism, recent jurisprudence has confined the doctrine of interjurisdictional immunity to a form constrained by principle and precedent.[146] In particular, the Supreme Court is reluctant to identify new areas to which the doctrine would apply, especially where the party invoking the doctrine has failed to identify a delineated "core" of a jurisdiction and where the application of the doctrine would create legal vacuums.

104. In practical terms, a two-part test must be met in order to apply this doctrine. In the first part, it must be determined whether the law in question trenches on the "core" of the jurisdiction of the other level of government. If so, it must then be determined in a second part whether the encroachment is sufficiently serious to be an impairment.[147] Neither part of the test is satisfied in this case.

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142 *Canadian Western Bank, supra* note 42 at para 76.

143 **AGQ's Brief at para 80**.

144 *Canada (Attorney General) v PHS Community Services Society*, *supra* note 87 at para 68.

145 *Canadian Western Bank*, *supra* note 42 at para 48.

146 *Canadian Western Bank*, *supra* note 42 at paras 36–37, 77; *Canada (Attorney General) v PHS Community Services Society*, *supra* note 87 at paras 61, 65; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 at para 50.

147 *Canadian Western Bank*, *supra* note 42 at para 48; *Marine Services International Ltd v Ryan Estate*, *supra* note 146 at para 54; *Transport Desgagnés*, *supra* note 85 at para 92.

105. The AGQ describes the core of the jurisdiction under subsection 92(4) as including, at a minimum, [translation] "*control over the duties of employees and the way in which the public services they provide are organized*."[148] This description is overly broad and is unsupported by case law.[149] As well, the description fails to identify a delineated "core" of provincial jurisdiction.[150]

106. Moreover, such a broad description of the core of this jurisdiction would have significant implications for the division of powers and would give rise to significant legal vacuums.[151] If this line of reasoning were followed, federal laws would not apply to the activities of provincial Crowns even though they may be operating in areas of federal jurisdiction such as shipping, international trade or nuclear energy, where federal standards exist.[152]

107. To accept that such federal standards are inapplicable to the provincial government because they would involve a [translation] "loss of control" or a change in the duties of provincial public servants would be clearly contrary to settled case law that states, "*if Parliament has the legislative power to legislate or regulate in an area, emanations of the provincial Crown should be bound if Parliament so chooses*."[153]

108. Moreover, the AGQ has failed to demonstrate that the national principles are an

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148 **AGQ's Brief at para 80**.

149 *Transport Desgagnés, supra* note 85 at para 93. The case law recognizes that the jurisdiction pursuant to section 92(4) includes the power to make rules to control the political activities of provincial public servants (*Attorney General for Ontario v OPSEU*, [1987] 2 SCR 2 at 34, 49 (Beetz J), 15 (Lamer J)) and to make rules for the functioning of provincial courts (*Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at para 71).

150 *Canada (Attorney General) v PHS Community Services Society*, *supra* note 87 at para 68.

151 *Canadian Western Bank*, *supra* note 42 at para 44; *Canada (Attorney General) v PHS Community Services Society*, *supra* note 87 at para 69.

152 For examples of federal laws that impose obligations in these areas, see *Canadian Navigable Waters Act*, RSC 1985, c N-22; *Nuclear Safety and Control Act*, SC 1997, c 9; *Freezing of Assets of Corrupt Foreign Officials Act*, SC 2011, c 10; *Prohibition of International Air Services Act*, RSC 1985, c P-25; and *International Bridges and Tunnels Act*, SC 2007, c 1.

153 *Alberta Government Telephones*, *supra* note 141 at 275; *PWA*, *supra* note 141 at 72.

intrusion on what he describes as the core of the Province's jurisdiction over its public servants pursuant to subsection 92(4).[154]

109. The AGQ asserts, without providing details, that the Act prescribes procedures and modifies the duties of provincial public servants,[155] and the AGQ fails to explain how the Act would prevent the Province from organizing and managing its public service effectively under subsection 92(4). However, as mentioned above, the AGQ is overstating the effects of the Act on Quebec's public service. The national principles are general in nature, and they do not regulate every aspect of Indigenous child services or the way in which service providers are organized. They do not dictate the details of how these services are to be provided, nor do they dictate how service providers will function in terms of internal management and labour relations. In short, Quebec retains control over its public service. Simply put, when providing Indigenous child services, Quebec public servants must also apply the national principles set out in the Act, which are designed to achieve objectives similar to those of the Quebec legislation. The AGQ has therefore failed to demonstrate any impairment on the jurisdiction over the Province's public service.

D. SECTIONS 18 TO 26 ALSO FALL UNDER SUBSECTION 91(24) AND DO NOT AMEND CONSTITUTION

110. When legislating under subsection 91(24), Parliament may choose to do so by means of an affirmation of rights, taking into account the rights recognized and affirmed in section 35 CA 1982.

111. With respect to child services, there is every indication that section 35 of CA 1982 recognizes, as an existing aboriginal right, the jurisdiction of Indigenous peoples over this

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154 *Canadian Western Bank*, *supra* note 42 at para 48; *Marine Services International Ltd v Ryan Estate*, *supra* note 146 at para 60.

155 **AGQ's Brief at para 80**.

matter. Historic Indigenous societies,[156] which were "organized, distinctive societies",[157] necessarily had the ability to protect and provide for the well-being of their children. This ability is intrinsically linked to the very concept of an Indigenous people. A group of individuals who share a common way of life and a distinctive culture and who look to the future as a people have to be able to ensure the well-being of the next generation. Section 35, which aims to ensure the survival of Indigenous communities and the continuity of their culture,[158] therefore necessarily recognize their ability to protect their children.[159] This is the premise of the second component of the Act.

112. Through sections 18 to 26 of the Act, Parliament affirms Indigenous peoples' jurisdiction over child services and creates a framework to facilitate the exercise of that jurisdiction. This approach does not alter the pith and substance of the Act.

113. Although the AGQ agrees that the Federal Parliament may legislate with respect to Indigenous child services, the AGQ objects to Parliament's choice of legislating by means of an affirmation of rights; the AGQ argues that, in doing so, Parliament has amended the Constitution and usurped the role of the courts. This argument is based on a flawed understanding of the Act.

114. The Act is, in effect, an expression of Parliament's position that section 35 already recognizes, as an *existing* right, jurisdiction in relation to child services as an aspect of

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156 That is, prior to contact with Europeans (*R v Van der Peet,* [1996] 2 SCR 507 at para 61 [*Van der Peet*]) or, for the Métis, prior to effective European control (*R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at paras 14, 18 [*Powley*]).

157 *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 9 [*Mitchell*]; *Calder v British Columbia (AG)*, [1973] SCR 313 at 328.

158 *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 at paras 26, 33 [*Sappier*].

159 See *Indian Child Welfare Act*, 25 USC, c 21 § 1901(3), by which the United States Congress recognizes that Indian children are the most vital resource for ensuring the existence and integrity of tribes. On the *Indian Child Welfare Act*, see generally Suzianne D Painter-Thorne, "One Step Forward, Two Giant Steps Back: How the Existing Indian Family Exception (Re)Imposes Anglo-American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy" (2008) 33:2 Am Indian L Rev 329 at 356–66; Barbara Ann Atwood, "Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance" (2002) 51:2 Emory LJ 587 at 605–18.

the right of self-government. It is not creating aboriginal rights, and it is not binding on the courts, which remain responsible for interpreting section 35 and applying it in a specific factual context.

1. Sections 18 to 26 of Act constitute valid exercise of jurisdiction under subsection 91(24)

a) Pith and substance of sections 18 to 26 of the Act

i. Purpose of the Act

115. The purpose of the Act, stated above, is also reflected in sections 18 to 26, which seek to protect and ensure the well-being of Indigenous children, families and communities, with the goal of reducing the number of Indigenous children separated from their families and communities.

116. The legislative debates show that Parliament believed that affirming the inherent jurisdiction of Indigenous peoples over child services could alleviate the problem of overrepresentation of Indigenous children.[160] The Act is based on the premise that Indigenous communities and "families know what is best for Indigenous children."[161] Thus, it "would provide flexible pathways for Indigenous groups across Canada to determine a way forward that would best meet the needs of their children, families and communities."[162]

117. The pith and substance of the Act is also evident from the effects of sections 18 to 26.

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160 Standing Committee (30 April 2019), *supra* note 54 at 0835 (**O'Regan**); Second Reading (3 May 2019), *supra* note 54 at 1225 (**Virani**), **AGC's Evidence, vol 1 at p 78**; Third Reading (3 June 2019), *supra* note 55 at 1835 (**O'Regan**), **AGC's Evidence, vol 2 at p 434**. On self-government as a promising approach to overrepresentation, see also Expert Report by Christiane Guay, **AGC's Evidence, vol 10 at pp 3457–64**.

161 Third Reading (3 June 2019), *supra* note 55 at 1845 (**O'Regan**), **AGC's Evidence, vol 2 at p 436**.

162 Second Reading (3 May 2019), *supra* note 54 at 1005 (**Vandal**), **AGC's Evidence, vol 1 at p 70**.

ii. Effects of sections 18 to 26 of the Act

- Sections 18 to 19 of the Act affirm Parliament's position on rights recognized and affirmed by section 35

118. Subsection 18(1) states, "The inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority." In section 19, Parliament goes on to state its position that the exercise of this jurisdiction is subject to the Canadian Charter.

119. As the preamble to the Act states, the aim of Parliament's statement of position on section 35 is "achieving reconciliation" with Indigenous peoples.[163] The affirmation of Indigenous peoples' jurisdiction is an important element for Indigenous communities that has been emphasized at various stages of the joint development of the draft Act.[164]

120. The affirmations in sections 18 and 19 affect the interpretation and application of the Act. Because they express Parliament's position on what it considers to be the source of Indigenous peoples' jurisdiction, these sections provide a useful reference point for courts, which may be called upon to determine the intent of Parliament.

121. Moreover, because the executive branch is bound by the Acts of Parliament,[165] sections 18 and 19 also influence how the Act will be administered by the federal government. For example, in its dealings with Indigenous communities under the Act, the government will act in accordance with the affirmation in section 18.

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163 Act, *supra* note 32, Preamble, 9th whereas statement, 2nd paragraph.

164 Sworn Declaration of Isa Gros-Louis at paras 16, 20, 29, 30(a), 35, **AGC's Evidence, vol 5 at pp 1758–64**.

165 *Reference re Pan-Canadian Securities Regulation* (2018), *supra* note 43 at paras 55, 58. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Reference re Secession*].

122. The affirmation by Parliament of rights recognized and affirmed by section 35 is not without precedent. For example, the *Indigenous Languages Act* also contains an affirmation of the Indigenous language rights recognized and affirmed by section 35.[166] As well, the approach taken in the Act is similar to certain provisions in federal legislation implementing agreements between the Crown and an Indigenous people. Indeed, some laws implementing such agreements contain a provision affirming that the agreement is or is not a treaty within the meaning of section 35.[167] In the event of a third-party challenge, however, the position of Parliament as expressed in legislation is not binding on the courts, which remain responsible for determining, in light of the agreement and the applicable analytical framework, whether the agreement is a treaty that has created treaty rights within the meaning of section 35.[168]

123. Similarly, sections 18 and 19 express the position of Parliament without, of course, being binding on the courts with respect to the issue, as will be explained below.

- Sections 20 to 26 of Act establish a framework to facilitate exercise of jurisdiction over child services

124. These provisions establish an optional framework for Indigenous communities that hold a section 35 right[169] and choose to exercise legislative authority in relation to child services. The framework's main effect is to foster the timely, effective and harmonious implementation of jurisdiction in relation to child services. The framework offers advantages over the unilateral exercise of an aboriginal right, litigation or treaty negotiations.

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166 *Indigenous Languages Act*, SC 2019, c 23, s 6.

167 See for example *Nisga'a Final Agreement Act*, SC 2000, c 7, ss 3, 13(2), 14(6); *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27, ss 3, 9.

168 On the definition of a treaty, see *R v Badger*, [1996] 1 SCR 771 at paras 41, 76; *R v Sioui*, [1990] 1 SCR 1025 at 1063. The Court pays close attention to the terms of modern treaties (*Quebec (AG) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 at para 7).

169 See Act, *supra* note 32, s 1 "Indigenous governing body", which refers to an Indigenous group, community or people that holds rights recognized and affirmed by section 35 CA 1982.

125. First, the Act does not require that a community holding a section 35 right demonstrate, before enacting a law, that it has jurisdiction in relation to child services as an aspect of a right of self-government recognized by section 35. To the extent that the law is enacted by a community that has a section 35 right (whatever the nature of that right may be), the Act assumes that the law is the product of jurisdiction recognized and affirmed by section 35.[170]

126. As well, the framework helps to ensure that "there are no gaps"[171] in the services that are provided in relation to Indigenous children by involving the relevant federal and provincial governments through the negotiation of a coordination agreement. The purpose of the agreement is to put in place measures for the "effective exercise of the legislative authority."[172] The agreement may deal with funding, measures for a smooth transition to the implementation of Indigenous laws, and the application of Indigenous laws alongside provincial laws. The Act also promotes the harmonious exercise of legislative authority by providing for public access to Indigenous laws that have the force of federal law.[173]

127. Lastly, the framework provides a degree of predictability by clarifying the rules governing the interaction of Indigenous laws with each other and with provincial and federal laws. Since Indigenous laws are incorporated into federal law, federal paramountcy applies where there is an inconsistency between such an Indigenous law and a provincial law.[174] The Act further provides that such Indigenous laws prevail in the event of a conflict with federal laws on the same matter (except for sections 10 to 15 of the Act and the *Canadian Human Rights Act*).[175] It also provides that where there is an

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170 Sworn Declaration of Isa Gros-Louis at paras 75–77, **AGC's Evidence, vol 5 at p 1775**.
171 Act, *supra* note 32, Preamble, 8th whereas statement, 3rd paragraph.
172 Act, *supra* note 32, s 20(2)(d).
173 *Ibid*, s 26.
174 *Ibid*, s 22(3).
175 *Ibid*, s 22(1).

inconsistency between two Indigenous laws, the law of the community with which the child has closer ties will prevail.[176]

128. The framework of the Act has significant advantages, for all parties involved, compared with the exercise of aboriginal rights outside the framework. First, the Act encourages holding tripartite discussions before an Indigenous law has the force of federal law, while under section 35, Indigenous peoples do not have to satisfy such obligations prior to exercising their aboriginal rights.

129. Child protection disputes, which occur in a context requiring urgent action, do not lend themselves to the lengthy debates necessary to obtain judicial recognition of an Indigenous community's jurisdiction in relation to child services. By assuming that a community holding a section 35 right has this jurisdiction, the Act facilitates the exercise of the jurisdiction, while involving the federal and provincial governments in the discussion in order to avoid future disputes as much as possible.[177]

130. Second, the Act makes the effective exercise of legislative authority in a short period of time possible: Indigenous laws can be incorporated into federal law as soon as a coordination agreement is entered into or, if reasonable efforts have been made to achieve an agreement, one year after the request is made.[178] By contrast, negotiating treaties to provide for the implementation of section 35 often takes years or even decades of effort. Of course, the Act does not preclude the possibility of entering into treaties or other agreements in relation to child services, and this approach continues to be encouraged by the federal government. In fact, the Act recognizes the benefits of that

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176 *Ibid*, s 24. This rule applies whether or not the law in question has the force of law as federal law.

177 On negotiation as the preferred process for achieving reconciliation, see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, at para 38.

178 *Ibid*, s 20(3). The community may postpone the coming into force of its law beyond the one-year period (s 21(1)) and may enter into a coordination agreement after the coming into force of its law, which has the force of federal law (s 20(7)).

approach by giving precedence to treaties and agreements entered into before the Act came into force.[179]

131. However, in the specific context of the Indigenous child services crisis, the framework of the Act offers an alternative for the timely, effective and harmonious exercise of Indigenous jurisdiction in this matter, while making coordination with the federal and provincial governments a priority.

b) Classification: Sections 18 to 26 are a valid exercise of jurisdiction under subsection 91(24)

132. As demonstrated above and acknowledged by the AGQ, subsection 91(24) authorizes Parliament to legislate in relation to Indigenous child services.[180]

133. Parliament could have passed comprehensive legislation governing child services in the various Indigenous communities concerned. It could also have delegated its legislative power to Indigenous communities pursuant to its jurisdiction under subsection 91(24).[181]

134. However, in the current context—especially with the Truth and Reconciliation Commission's calls to action in 2015 and Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples in 2016—Parliament has chosen not to delegate its own legislative powers. Instead, in an effort to "break with the past"[182] and move forward toward reconciliation,[183] Parliament has chosen instead to affirm Indigenous peoples' jurisdiction in relation to child services and create a framework to facilitate the exercise of that jurisdiction. This framework provides for the incorporation by

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179 *Ibid*, s 3.

180 **AGQ's Brief at para 34**.

181 On delegation, see *Securities Reference (2018)*, *supra* note 43 at paras 73–74; Reference re *Greenhouse Gas Pollution Pricing Act*, *supra* note 42 at paras 84–85.

182 Third Reading (3 June 2019), *supra* note 55 at 2005 (**Bossio**), **AGC's Evidence, vol 2 at p 446**.

183 Act, *supra* note 32, Preamble, 9th whereas statement, 1st paragraph.

reference of laws enacted by Indigenous communities exercising their own legislative authority.

135. As stated in *Daniels*, section 91(24) "is about the federal government's relationship with Canada's Aboriginal peoples."[184] It therefore enables Parliament to establish the nature of its relationship with Indigenous peoples, in accordance with the rights recognized by section 35.[185] As such, Parliament may choose to legislate in relation to Indigenous child services on the basis of an affirmation of rights and to establish its relationship with Indigenous peoples on that basis. There is nothing in the Constitution to prevent Parliament from doing so. On the contrary, this approach is consistent with an evolving interpretation of the Constitution that must take into account the new political, social and cultural realities of Canadian society.[186]

136. As the Supreme Court stated in *Daniels*, subsection 91(24) should be read together with section 35.[187] This section enshrines in the Constitution the goal of "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[188] Subsection 91(24) enables Parliament to enact the second component of the Act to fulfill the "promise of reconciliation"[189] in section 35 with respect to child services.

137. The fact that Indigenous laws prevail over conflicting provisions of provincial laws does not disrupt the division of legislative powers either. The paramountcy of Indigenous laws stems from their incorporation by reference, a valid and commonly used legislative

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184 *Daniels*, *supra* note 116 at para 49.

185 On the limits aboriginal rights place on legislative powers, see *Tsilhqot'in Nation v British Columbia (AG)*, 2014 SCC 44, [2014] 2 SCR 256 at paras 118–19, 139–42 [*Tsilhqot'in*]. See also *NIL/TU,O*, *supra* note 115 at para 41.

186 *Canadian Western Bank*, *supra* note 42 at para 23; *Edwards v Canada*, [1930] 1 DLR 98 at 106–7, 1929 CanLII 438 (UK JCPC); *Reference re Secession*, *supra* note 165 at paras 33, 52, 150; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at para 22; *Securities Reference (2011)*, *supra* note 138 at para 56.

187 *Daniels*, *supra* note 116 at para 34. See also *R v Sparrow*, [1990] 1 SCR 1075 at 1109 [*Sparrow*].

188 *Daniels*, *supra* note 116 at para 34. See also *Van der Peet*, *supra* note 156 at para 44.

189 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 121.

technique.[190] In this regard, it is well established that Parliament, when acting within its jurisdiction, has the power to incorporate by reference any text other than its own.[191] Moreover, Indigenous laws would enjoy the same paramountcy if Parliament had used a delegation of authority rather than an affirmation of rights.[192] In both cases, Parliament is legislating pursuant to its powers under subsection 91(24).

2. Sections 18 to 26 affirm existing rights and do not amend Constitution

138. Subsection 35(1) protects "existing" aboriginal rights, that is, rights which existed at the time of its coming into force (April 17, 1982) and which were previously recognized by the legal doctrine of aboriginal rights in common law.[193] Indeed, these rights arise from the existence of distinctive, organized Indigenous societies prior to contact with Europeans.[194] These aboriginal rights exist independently of a judicial recognition.[195] Declaratory judgments and treaties are used to define the scope of aboriginal rights, but Parliament may legislate with respect to what it considers to be an aboriginal right, even in the absence of a judicial decision or treaty.[196]

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190 Pierre-André Côté, *Interprétation des lois*, 4th ed (Montréal: Thémis, 2009) at paras 286-306.

191 *Coughlin v The Ontario Highway Transport Board*, [1968] SCR 569 at 575; *British Columbia (AG) v Canada (AG)*, [1994] 2 SCR 41 at 110; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 116; *Fédération des producteurs de volailles du Québec v Pelland*, [2005] 1 SCR 292 at paras 53–61.

192 *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49 at para 90.

193 *Mitchell*, *supra* note 157 at paras 9-11. See also *Van der Peet*, *supra* note 156 at paras 28-31; *Sparrow*, *supra* note 187 at 1091–92; *Delgamuukw*, *supra* note 124 at paras 133-36.

194 *Sappier*, *supra* note 158 at para 45. For the Métis, see *Powley*, *supra* note 156 at paras 14, 18.

195 *Van der Peet*, *supra* note 156 at paras 28–31; *R v Côté*, [1996] 3 SCR 139 at paras 51–52; *Mitchell supra* note 157 at paras 9–11. Obviously, in the event of a challenge, the courts have the power to determine whether or not an aboriginal right exists.

196 *Tsilhqot'in*, *supra* note 185 at para 129, cited at **para 95 of the AGQ's Brie**f, does not support the argument that an aboriginal right must be recognized in a judicial decision before Parliament can make laws in respect of that right. In this excerpt, the Supreme Court simply stated that forestry on Aboriginal title land possess a double aspect. Moreover, *NIL/TU,O*, *supra* note 115, cited at **para 140 of the AGQ's Brief**, does not support the argument that an agreement must be signed first before Indigenous self-government can be exercised in relation to child services. That case did not concern the exercise of aboriginal rights recognized under section 35, but rather jurisdiction over an FNCFS agency's labour relations.

139. Following the jurisprudence of the Supreme Court on aboriginal rights and the nature of the rights at issue, there is every indication that jurisdiction over child services is recognized and affirmed in section 35 as an aspect of the right of self-government.

140. Furthermore, the purpose of the Act is not to amend the Constitution; it affirms the position of Parliament on existing aboriginal rights and establishes a framework based on that premise.

a) Jurisdiction over child services is an existing aboriginal right recognized and affirmed in section 35 CA 1982

141. Although he does not take a direct position on the issue,[197] the AGQ presupposes that section 35 does not recognize the right of self-government, including jurisdiction over child services, as an existing aboriginal right. Indeed, in suggesting that such a jurisdiction can only be constitutionally protected through a constitutional amendment or the conclusion of a treaty, the AGQ starts from the premise that such a right does not already exist. However, such a position is contrary to the case law on aboriginal rights and the nature of the rights in issue here.

142. In the mid-1990s, the Supreme Court recognized the possibility that section 35 could encompass a right of self-government. Beginning in 1996 in *Pamajewon*, when case law on aboriginal rights was still in its infancy, the Supreme Court acknowledged the possibility that section 35 could recognize rights in the nature of self-government.[198] However, the Court dismissed the claim in that case, which involved the right to regulate gambling activities on the reserve, as the evidence was inconclusive.

143. The following year, in *Delgamuukw*, the Supreme Court heard an appeal from a judgment of the Court of Appeal of British Columbia, which had held, by a majority, that self-government could not be protected by section 35 because it was inconsistent with

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197 **AGQ's Brief at para 148**.

198 *R v Pamajewon*, [1996] 2 SCR 821 at paras 23–30.

the Constitution and had been extinguished by the Crown's assertion of sovereignty.[199] The Supreme Court refrained from adopting this reasoning and instead referred the issue of whether the claim to self-government was supported by the evidence back to the trial judge.[200] The Court thus left open the possibility that section 35 could protect aspects of the right of self-government.

144. The Supreme Court has not been asked to rule on the issue of self-government since then. Nonetheless, its decisions with respect to section 35 show a certain flexibility in the application of the criteria for determining aboriginal rights developed in *Van der Peet*,[201] which have been modified for certain categories of rights (aboriginal title[202]) or certain peoples (the Métis[203]).[204]

145. Similarly, it can be inferred from decisions involving aboriginal title as a species of aboriginal right that it incidentally involves certain internal governance rights.[205] As collective rights, aboriginal rights necessarily include the right to establish institutions and

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199 *Delgamuukw v British Columbia* (1993), 104 DLR (4th) 470, 1993 CanLII 4516 (BCCA) at paras 166–75 (McFarlane JA), at paras 479–85 (Wallace JA) and, *contra*, at paras 1018-30 (Lambert JA, dissenting) and at paras 1163–73 (Hutcheon JA).

200 *Delgamuukw*, *supra* note 124 at paras 170–71. See also the comments in *Campbell v British Columbia*, 2000 BCSC 1123 at para 133. A new trial was never held because the parties entered negotiations.

201 *Van der Peet*, *supra* note 156 at para 46. The test requires examining whether an activity can be shown to have continuity with a practice, custom or tradition integral to the distinctive culture of the aboriginal group prior to contact with Europeans.

202 *Delgamuukw*, *supra* note 124 at paras 141–42. For aboriginal title, the integral to a distinctive culture test is subsumed by the requirement of occupancy and the time for the identification of rights is the time at which the Crown asserted sovereignty rather than the time of first contact.

203 *Powley*, *supra* note 156 at paras 14, 18. For the Métis, the relevant moment is the effective imposition of European control.

204 On flexibility in applying the *Van der Peet* criteria, see John Borrows, "Constitutional Cases 2011 (Ab) Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 at paras 37–44.

205 *Tsilhqot'in*, *supra* note 185 at paras 67, 73–74; *Delgamuukw*, *supra* note 124 at paras 115, 117, 166. See also Douglas Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 UBC LR 249 at 268.

internal procedures to manage the exercise of said rights by members of the community—the management of the right to harvest, for instance.[206]

146. The case law of the Supreme Court also recognizes that pre-contact Indigenous communities lived in "organized, distinctive societies with their own social and political structures."[207] These societies were based on systems of law[208] and "governed themselves by their own laws".[209] Given that aboriginal rights must be interpreted flexibly so as to permit their evolution over time and ensure the cultural survival of aboriginal peoples,[210] this social, political and legal organization must be able to be the basis of an aboriginal right of self-government for the modern representatives of these historical societies.

147. Thus, it is clear from the case law that section 35 has the ability to protect some form of right of self-government[211] with regard to the internal affairs of communities and the

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206 *Ibid.* See also *R v Marshall*, [1999] 3 SCR 533 at paras 17; *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [2013] 2 SCR 227 at paras 33–35; *Bernard v R*, 2017 NBCA 48, at para 58; *Campbell v British Columbia*, *supra* note 200 at paras 114, 134–37.

207 *Mitchell*, *supra* note 157 at para 9. For the Métis, section 35 aims to recognize their special status as peoples that emerged between first contact and the effective imposition of European control. *Powley*, *supra* note 156 at para 17.

208 *Delgamuukw*, *supra* note 124 at paras 126, 147; *Tsilhqot'in*, *supra* note 185 at para 41; *Sappier*, *supra* note 158 at para 45. See also Expert Report of Val Napoleon, **AGC's Evidence, vol 9 at pp 3286–94**.

209 *Van der Peet*, *supra* note 156 at para 37, citing *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

210 *Sparrow*, *supra* note 187 at 1093; *Mitchell*, *supra* note 157 at para 13; *Sappier*, *supra* note 158 at paras 23, 48–49.

211 On the fact that section 35 already recognizes the right of self-government, see in particular Report of the Royal Commission on Aboriginal Peoples, Ottawa, 1996, **AGC's Evidence, vol 17 at pp 6621-24, 6638-39, 6664**; Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Rev Bar Can 187; Hogg, *supra* note 120 at para 28.11; Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatic of Advocacy" (1999–2000) 27 Man LJ 241 at 247 and citations referenced in note 7; *Campbell v British Columbia*, *supra* note 200 at paras 81, 195.

preservation of their culture.[212] This Court need not decide in this case whether section 35 protects a general right of self-government or rather specific rights of self-government[213] since, regardless of the nature of the protected right of self-government, it necessarily involves jurisdiction over child services.

148. Indeed, this jurisdiction is inherent in the very notion of Indigenous communities. To be a distinctive and organized Indigenous society implies the ability to ensure its cultural continuity and its survival as a community—this is precisely the purpose of section 35.[214] To maintain their distinctive character, Indigenous societies had to be able to protect their children, ensure their well-being and pass on their culture.[215]

149. Jurisdiction over child services is rooted in a community's culture, including its understanding of family, education, well-being and healing. While each Indigenous people has its own culture and it is impossible to generalize, they maintain a connection to the

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212 It should be noted that the federal government has recognized, since 1995, that section 35 CA 1982 recognizes and affirms Indigenous peoples' aboriginal right of self-government with regard to matters integral to their cultures or internal to their groups (Federal Policy Guide on Aboriginal Self-Government, Ottawa, 1995, **AGQ's Evidence, vol 5 at p 1549**). The Policy Guide provided examples of matters that the federal government considered to be integral to Indigenous culture or internal affairs, including "adoption and child welfare" (p 1552). The Policy also identified matters that, in the government's view, could not be characterized as being integral to Indigenous culture or internal affairs. These included powers related to Canadian sovereignty, defence, and foreign affairs, as well as powers of national interest (pp 1553–54).

213 On the distinction between a general and a specific right of self-government, see in particular Brian Slattery, "A Taxonomy of Aboriginal Rights" in Hamar Foster, Heather Raven, and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver, UBC Press, 2007, 111 at 120–21; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 196; Stephen M. McGilligan, "Self-Government Agreements and Canadian Courts" in Jerry P. White et al, ed, *Aboriginal Policy Research*, Thomson, vol 10, 167.

214 *Sappier*, *supra* note 158 at paras 26, 33.

215 On the fact that jurisdiction over child services allows for the transmission, preservation and promotion of an Indigenous community's culture, see Expert Report by Jessica Ball, **AGC's Evidence, vol 9 at pp 2984–86, 2991–98, 3002–09**.

land, a conception of family, educational strategies, and an approach to health and healing that characterize them and directly influence their approaches to child services.[216]

150. In this sense, when we look at the "way of life" of historical Indigenous societies, as the Supreme Court urges us to do,[217] it stands to reason that this necessarily involved the ability to protect children. Jurisdiction over child services was therefore an "integral part of the distinctive culture"[218] of Indigenous peoples.

151. Historically, Canadian jurisprudence has recognized Indigenous customary laws relating to children and families, including customary adoption for the protection of a child.[219] These decisions indicate that this jurisdiction was recognized by the common

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216 Expert Report of Christiane Guay, **AGC's Evidence, vol 10 at pp 3428–51**. In particular, many Indigenous peoples have a collective vision of the responsibility for the upbringing and protection of Indigenous children, and this approach is exemplified in the practice of customary adoption, which is a characteristic way in which many Indigenous peoples ensure the protection and well-being of children. Similarly, the understanding of healing among many Indigenous peoples influences the pace and approach of interventions in child and family services. See also Expert Report of Val Napoleon, **AGC's Evidence, vol 9 at pp 3294–3305, 3313–18**, on approaches to revitalizing Indigenous customary law on child services that illustrate the distinctive approaches in this regard.

217 *Sappier*, *supra* note 158 at para 45.

218 *Van der Peet*, *supra* note 156 at para 46.

219 *Casimel v Insurance Corp. of British Columbia*, 106 DLR (4th) 720, 1993 CanLII 1258 at paras 29–44. On marriage, see *Connolly v Woolrich*, (1867) 17 RJRQ 75 (Qc Sup Ct) aff'd *Johnstone v Connelly* (1869), 17 RJRQ 266 (Qc QB); *R. v Nan-E-Quis-A-Ka* (1889), 1 Terr LR 211, 1889 CarswellNWT 14 (NWTSC); *R v "Bear's Shin Bone"* (1899), 4 Terr LR 173, 1899 CanLII 111 (NWTSC); *R v Williams* (1921), 30 BCR 303, 1921 CanLII 623 (BC SC); *Re Noah Estate* (1961), 32 DLR (2d) 185, 1961 CanLII 442 (NWTSC); (customary marriage); *Manychief v Poffenroth*, 1994 CanLII 9073 (AB QB). *Contra*: *R v Cote* (1971), 5 CCC (2d) 49, 1971 CanLII 782 (SK CA).
On customary adoption, see *Re Katie's Adoption Petition* (1961), 32 DLR (2d) 688, 1961 CanLII 443 (NWT TC); *Re Beaulieu's Adoption Petition* (1969), 3 DLR (3d) 479, 1969 CanLII 844 (NWT TC); *Kitchooalik v Tucktoo (Re Deborah)* (1972), 27 DLR (3d) 225 (NWT SC), aff'd (1972), 28 DLR (3d) 483, 1972 CanLII 977 (NWT CA); *Re Wah-Shee* (1975), 57 DLR (3d) 743, 1975 CanLII 1200 (NWT SC); *Re Tagornak*, [1984] 1 CNLR 185 (NWT SC); *McNeil v MacDougal*, 1999 ABQB 945 at paras 16–19; *Prince & Julian v HMTQ et al*, 2000 BCSC 1066 (dismissed for lack of evidence); *M.R.B. (In The Matter Of)*, [2002] 2 CNLR 169 (QC CQ); *Papatsie Estate*, 2006 NUCJ 5 at para 15; *Estate of Samuel Corrigan*, 2013 MBQB 77. *Contra*: *Mitchell v Dennis*, 1983 CarswellBC 415, 1983 CanLII 670 (BCSC); *P (D-F)*, 2000 CanLII 17505 at para 8 (QC CQ). See also Mark Walters, "The Judicial Recognition of Indigenous Legal Traditions: Connolly v. Woolrich at 150" (2017) 22 Review of Constitutional Studies 347; Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, Carswell, Toronto, 2013 at 374–99; Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 CNLR 1.

law. Since the coming into force of the *Constitution Act, 1982*, this jurisdiction has acquired constitutional status as a result of section 35. Federal and Quebec legislation also recognizes Indigenous jurisdiction over customary adoption, giving effect to customary adoptions practised according to the customs of Indigenous communities.[220]

152. Given the Supreme Court's case law on aboriginal rights and the nature of the jurisdiction over child services, the AGC submits that this jurisdiction is constitutionally protected as an aspect of the right of self-government and that, in legislating, Parliament has taken this constitutional protection into account.[221]

b) Sections 18 to 26 of the Act neither amend Constitution nor usurp power of courts

153. Section 18 of the Act sets out Parliament's position that section 35 recognizes, as an *existing* aboriginal right, the right of self-government, including jurisdiction over child services. This is not a matter of [translation] "establishing"[222] aboriginal rights—which Parliament cannot do—but of affirming their existence from Parliament's perspective. Section 19 sets out Parliament's position that the exercise of this jurisdiction is subject to the *Charter*, as is the exercise of any other government authority in Canada.[223]

154. Of course, the courts will not be bound by Parliament's affirmation with respect to the right recognized by section 35. "As guardians of the Constitution",[224] the courts remain responsible for its interpretation, particularly with regard to the nature and scope of the

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220 *Indian Act*, s 2(1), "child"; *Civil Code of Québec*, arts 199.10, 543.1. See also *Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, SQ 2017, c 12.

221 It should be noted that a right recognized and affirmed in section 35 does not confer an absolute right, nor does it grant immunity from federal and provincial laws. See *Sparrow*, *supra* note 187 at 1109–10; *Tsilhqot'in*, *supra* note 185 at paras 151–52.

222 **AGQ's Brief at paras 95, 97–98**.

223 *Canadian Charter of Rights and Freedoms*, s 32; CA 1982, s 52; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras 35–44; *Reference re Secession*, *supra* note 165 at para 72.

224 *Hunter et al. v Southam Inc*., [1984] 2 SCR 145 at 155.

aboriginal rights recognized in section 35.[225] In the event of a challenge to an Indigenous law, the courts retain the authority to determine whether the law in question constitutes an exercise of jurisdiction over child services as an aspect of the right of self-government recognized under subsection 35(1).

155. Section 18 also sets out the premise upon which sections 20 to 26 are based. Indeed, the framework established by these provisions is applicable to the extent that section 35 recognizes and affirms, as an aspect of an existing aboriginal right, jurisdiction over child services.

156. As explained above, the affirmation in section 18, and thus the premise of the framework established by the Act, is well-founded. However, this Court need not decide here whether this premise will hold true for each and every Indigenous community that will seek to rely on the framework established by the Act. This case concerns the constitutional validity of sections 18 to 26 of the Act, not the constitutional validity of Indigenous laws that will be adopted under the Act's framework.[226]

157. Only if this Court were to reject the premise of section 18 entirely—that is, the possibility that any Indigenous people could hold an aboriginal right of self-government, including jurisdiction over child services, recognized by section 35—would sections 18 to 26 of the Act become, not invalid, but of no practical use.[227] Indeed, if the Court were to reject this premise entirely, sections 18 to 26 would be valid, but no Indigenous group could validly enact child services legislation within the framework provided by the Act.

158. Obviously, such a conclusion appears untenable in light of the nature of the right at

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225 *Reference re Supreme Court of Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 at para 89 [*Reference re Supreme Court of Act*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 55–56; *Ontario (Attorney General) v G*, 2020 SCC 38 at para 88.

226 On the need to distinguish between the validity of a statute and its applications, see *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 at para 71.

227 See, by analogy, *Securities Reference (2018)*, *supra* note 43 at paras 62–67.

issue and the case law on aboriginal rights, notably *Pamajewon* and *Delgamuukw*, where the Supreme Court refused to reject a similar premise.

159. Nor do the AGQ's arguments concerning attempts to amend the Constitution,[228] treaties[229] or past federal government positions[230] provide any basis for rejecting the premise of the Act.

160. As for constitutional discussions, the fact that a proposed constitutional amendment regarding a particular subject did not materialize is not evidence that the subject is not already constitutionally protected, as the Supreme Court stated in *Reference re Supreme Court Act*.[231] This is particularly relevant in light of the fact that in this case, the Charlottetown Accord specifically provided that the right of Indigenous self-government could still be recognized by the courts as an aboriginal right protected by subsection 35(1),[232] despite the proposed addition of section 35.1, which explicitly recognized the inherent right of self-government.[233]

161. With respect to treaties and self-government agreements, it is true that some provide for legislative authority over child services, subject to certain conditions for its exercise. These agreements demonstrate that self-governing Indigenous governments with jurisdiction over matters such as child services can exist within the Constitution. However,

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228 **AGQ's Brief at paras 99–126**.

229 *Ibid* at paras 127–42.

230 *Ibid* at paras 89, 111–15, 118, 129–33.

231 *Reference re Supreme Court of Act*, *supra* note 225 at paras 102–3.

232 35.3(2): "For greater certainty, nothing in subsection (1) prevents the justiciability of disputes in relation to: (a) any existing rights that are recognized and affirmed in subsection 35(1), including any rights relating to self-government, when raised in any court," Constitutional Conferences Secretariat, Charlottetown Accord (1992), Ottawa, October 8, 1992, **AGQ's Evidence, vol 5 at p 1532**.

233 The same principle is applicable to the Constitutional Conferences of the 1980s, despite the fact that the language of subsection 37(2) CA 1982 provided that the first constitutional conference was to deal with "constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada." See *R v Sparrow* (1986), 36 DLR (4th) 246 (BCCA) at 267–68, aff'd *Sparrow, supra* note 187.

it cannot be inferred from these agreements that the right of self-government is not an aboriginal right recognized by section 35. Section 35 recognizes and affirms both aboriginal and treaty rights. The fact that the right of self-government may be recognized as a treaty right within the meaning of section 35 does not preclude it from also being an aboriginal right recognized and affirmed by section 35, for the signatory people or for other Indigenous peoples.[234]

162. Finally, the AGQ focuses on positions taken by the federal government in the past, notably in the constitutional discussions of the 1980s and 1990s. These are not relevant to the debate in this case. If, as the AGC and the AGQ agree, the current position of Parliament and the federal government cannot determine the content of section 35, then the same is true of past federal positions. Canada's relationship with Indigenous peoples and the state of the law have changed significantly since the 1980s, such that the federal government's positions have also changed.

163. For all these reasons, the Act, which aims to protect and ensure the well-being of Indigenous children, families and communities, constitutes a valid exercise of federal jurisdiction under subsection 91(24).

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[234] See *Campbell v British Columbia*, *supra* note 200 at para 181; ***Sga'nism Sim'augit (Chief Mountain) v Canada (AG)***, *supra* note 192 at paras 51–52. The relationship between a treaty and pre-existing aboriginal rights varies according to the terms of the treaty.

PART IV – CONCLUSIONS

164. For these reasons, the Court should answer the reference question in the negative.

Montréal, April 16, 2021

Department of Justice Canada

Department of Justice Canada
(Me Bernard Letarte)
(Me Andréane Joanette-Laflamme)
(Me Lindy Rouillard-Labbé)
(Me Amélia Couture)
Lawyers for the Attorney General of Canada

PART V – AUTHORITIES

Jurisprudence *(suite)* **Paragraph(s)**

Jurisprudence *(suite)* **Paragraph(s)**

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Jurisprudence *(suite)* **Paragraph(s)**

Jurisprudence *(suite)* **Paragraph(s)**

Jurisprudence *(suite)* **Paragraph(s)**

Doctrine

Doctrine *(suite)* **Paragraph(s)**

Doctrine *(suite)* **Paragraph(s)**

ATTESTATION

We undersigned, Department of Justice Canada, hereby attest that this Attorney general of Canada's Brief is in compliance with the requirements of the *Civil Practice Regulation of the Court of Appeal.*

Time requested for the oral arguments: 120 minutes

Montréal, April 16, 2021

Department of Justice Canada

Department of Justice Canada
(M^e^ Bernard Letarte)
(M^e^ Andréane Joanette-Laflamme)
(M^e^ Lindy Rouillard-Labbé)
(M^e^ Amélia Couture)
Lawyers for the Attorney General of Canada