**500-09-028751-196**
**COURT OF APPEAL OF QUEBEC**
(Montreal)

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

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# BRIEF OF THE INTERVENER MAKIVIK CORPORATION

Dated April 30, 2021

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**TABLE OF CONTENTS**

## PART I. FACTS

### A. Nunavik Inuit

> We are Inuit! We will never become Qallunaat (White People), even if our present-day lives no longer resemble how our ancestors lived. Many aspects of Qallunaat civilization are now incorporated into much of how we live. However, our ancestry, our culture, our language, and our identity define who we are, vis-à-vis the dominant societies in Canada and in Quebec. We will always be Inuit. We have to assert our pride in all aspects of our identity, and convince those who govern our lands to respect our Inuit-ness.[1]

1. "For centuries prior to the arrival of Europeans in North America, Inuit took care of themselves, without any need of the outside world. Our culture enabled us to survive in one of the harshest climates on Earth."[2] For many Inuit, settlement in year-round villages did not take place until the 1950s as a result of government policies regarding school attendance and family allowances.[3]

2. As will be discussed below, up until the early 1960s, the provincial government played no role in the lives of Nunavik Inuit.[4] In 1975, Inuit, Cree, and the provincial and federal governments (and their agents) entered into the *James Bay and Northern Quebec Agreement* ("JBNQA").[5] This treaty was not a demonstration of government generosity but rather the result of Inuit and Cree fighting to protect their homelands and their way of life.[6]

3. Makivik Corporation ("Makivik") was created by Special Act of the National Assembly following the JBNQA.[7] It represents Nunavik Inuit in the

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[1] A Nunavik Inuk cited in Parnasimautik Consultation Report, Exh. CW-5, **Makivik Book of Evidence ("MBE")**, **vol. 1, p. 118**.
[2] Affidavit of C. Watt, para. 10, **MBE, vol. 1, p. 2**.
[3] Parnasimautik Consultation Report, Exh. CW-5, **MBE, vol. 1, p. 106-107**, **119-120**; Indian and Northern Affairs Canada, *Canada's Relationship with Inuit: A History of Policy and Program Development* (2006) ("INAC, *Canada's Relationship with Inuit*"), Exh. DM-5, **MBE, vol. 1, p. 335-338**.
[4] Affidavit of C. Watt, para. 26-29, **MBE, vol. 1, p. 5-6**; Zebedee Nungak, *Wrestling with Colonialism on Steroids: Quebec Inuit Fight for their Homeland* ("Nungak"), Exh. CW-4, **MBE, vol. 1, p. 38-53**.
[5] *Quebec (Attorney General) v. Moses*, 2010 SCC 17.
[6] Affidavit of C. Watt, para. 25-39, **MBE, vol. 1, p. 5-8**; Nungak, *supra* note 4, Exh. CW-4, **MBE, vol. 1, p. 56-97.**
[7] *Act respecting the Makivik Corporation*, CQLR c S-18.1.

implementation and protection of their treaty rights and has among its objects "to foster, promote, protect and assist in preserving the Inuit way of life, values and traditions."[8]

4. Makivik represents the approximately 14,292 Inuit beneficiaries of the JBNQA and the *Nunavik Inuit Land Claims Agreement* (which addresses Inuit rights in the offshore region).[9] While the vast majority reside within Nunavik, there are presently approximately 826 that reside outside of Nunavik, in Montreal and in other provinces. Many of these absences are forced: there are no CEGEPs or universities in Nunavik, and the health clinics in the region are unable to provide most second or third-line health services.[10] For Inuit overall, approximately 25% live outside Inuit Nunangat (the Inuit homeland).[11]

5. Inuit living in the South struggle to navigate a jurisdictional "patchwork" when it comes to accessing child and family services, an issue which was brought to the attention of Parliament during its consideration of Bill C-92.[12]

6. Since entering into the JBNQA, Nunavik Inuit have continued to work towards self-government and self-determination, and have had significant discussions with both the federal and provincial governments in this regard. Nunavik Inuit remain committed to achieving true Inuit government in Nunavik.[13]

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[8] *Ibid*., s. 5.
[9] Affidavit of C. Watt, para. 2-3, **MBE, vol. 1, p. 1**.
[10] Affidavit of C. Watt, para. 16, **MBE, vol. 1, p. 3**; Submission of the NRBHSS to the Viens Commission, Exh. DM-14, **MBE, vol. 4, p. 1314**.
[11] Expert Report of J. Ball, **Attorney General of Canada Book of Evidence ("AGCBE"), vol. 9, p. 2983 (footnote 38)**.
[12] Standing Senate Committee on Aboriginal Peoples, Proceedings, April 30, 2019 and May 1 and 2, 2019 (May 2, 2019), **AGCBE, vol. 2, p. 755** (N. Obed, President, Inuit Tapiriit Kantami, ("Obed")). See also, **pp. 679-680** (J. LeBlanc, Executive Director, Tungasuvvingat, ("Leblanc")).
[13] Affidavit of C. Watt, para. 40-59, **MBE, vol. 1, p. 8-11**.

### B. The struggles of Nunavik Inuit with the provincial youth protection system

7. In 2019, the Viens Commission concluded that "the current youth protection system has been imposed on Indigenous peoples from the outside, taking into account neither their cultures nor their concepts of family."[14] The law encodes certain presumptions about the nature of attachment, the nature of a "good family," and the interests of the child that "put the youth protection system at odds with Indigenous cultural values, which leads to discrimination."[15]

8. Nunavik Inuit are deeply affected by the provincial youth protection system: in 2018-19, there were approximately 400 Inuit children under the youth protection regime and 99 in foster care outside of Nunavik.[16]

9. The evidence in this file provides many examples of the gaps between the provincial youth protection system and Inuit culture and realities. The first interaction most Inuit children and families have with the youth protection system is with youth protection workers from the South. It is challenging for these youth protection workers to understand and engage with Inuit culture, family ties, community structures, and communication codes.[17] This lack of cultural competency can, among other deleterious effects, blind them to the important relationships that Inuit children maintain with members of their extended family and to the necessity, from the Inuit point of view, of involving these persons with the protection and care of a child experiencing difficulties.[18]

10. Youth protection workers also, in many cases, do not understand the practical

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[14] *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec: listening, reconciliation and progress: Final Report* ("Viens Commission Final Report"), **AGCBE, vol. 11, p. 4079**.
[15] *Ibid.*, **AGCBE, vol. 11, p. 4080, 4080-4089**.
[16] Affidavit of C. Watt, para. 12, 14, **MBE, vol. 1, p. 2-3**.
[17] Presentation made to the Viens Commission entitled *Nunavimmi Ilagiit Papatauvinga: Nunavummiut reappropriation of the youth protection services in Nunavik* ("NIP presentation"), Exh. DM-13, **MBE, vol. 4, p. 1273**; Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1143, 1162-1163, 1168**.
[18] Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1167**; Transcript Nov. 23 2018, hearing Viens Commission, Exh. DM-15, **MBE, vol. 5, p. 1413-1415**.

realities of Inuit life in the North. For example, they do not realize that, in light of the catastrophic housing shortage in Nunavik, it is normal for many members of a family to share the same room. Nor, more fundamentally, do these workers have any sense of the significant trauma many Inuit have faced in their lives.[19]

11. Inuktitut is the mother tongue of 97.2% of Nunavik Inuit,[20] who often speak English, rather than French, as a second language; the majority of children speak only Inuktitut.[21] Despite this, Inuit are often forced to deal with and discuss extremely painful, private, and complex issues with youth protection workers who do not speak Inuktitut and whose grasp of English is weak.[22] This issue plagues both preventative services and the Court process, where language barriers reduce Inuit understanding and ability to participate.[23]

12. Systemic discrimination is apparent in the adoption of laws such as Bill 21[24] which, by reserving certain activities to certain professional orders, had the effect of removing from the system Inuit workers that could provide culturally-secure services to Inuit in their mother tongue.[25]

13. These factors are compounded by the incredibly high turnover of youth protection workers in Nunavik, a phenomenon which generates distrust and hopelessness amongst Inuit;[26] in one case a child had had six different youth protection workers in one year.[27]

14. Nunavik Inuit communities have implemented Inuit-based initiatives and

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[19] Affidavit of N. Etok, para. 45-49, **MBE, vol. 1, p. 167-168**.
[20] Parnasimautik Consultation Report, Exh. CW-5, **MBE, vol. 1, p. 113.**
[21] Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1168**.
[22] Affidavit of N. Etok, para. 42-44, **MBE, vol. 1, p. 167**.
[23] Affidavit of N. Etok, para. 53**, MBE, vol. 1, p. 168-169**; Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1168**.
[24] *An Act to amend the Professional Code and other legislative provisions in the field of mental health and human relations*, SQ 2009, c 28.
[25] Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1137-1139**; Presentation made to the Viens Commission entitled “L’application du PL-21 au Nunavik”, Exh. DM-12, **MBE, vol. 4, p. 1254**.
[26] Affidavit of N. Etok, para. 36-41, **MBE, vol. 4, p. 165-167**; Transcript Nov. 23 2018, hearing Viens Commission, Exh. DM-15, **MBE, vol. 5, p. 1380**.
[27] Exh. DM-15, *ibid.*

services that are better suited to supporting Inuit children and families. Qarmaapik Family House is an organization in Kangiqsualujjuaq that provides culturally appropriate preventative services to children and families and that also operates a safe house for individuals experiencing a difficult situation in their home. It was established in response to the high number of children that were being placed in foster homes outside of the community and losing their language and culture as a result; the founders hoped to be able to provide services and tools to enable these children to stay, and to work with provincial authorities to this end.[28]

15. However, the experience of Qarmaapik Family House demonstrates the difficulty of establishing, within the current system, approaches that are more respectful of Inuit realities. Despite providing much needed services in a way that respects the children and families it serves, and winning the Arctic Inspiration Prize in 2016, the system has yet to meaningfully integrate the services offered by Qarmaapik House in the way that its founders hoped. Instead of being called in to help deescalate difficult situations or provided with an opportunity to assist youth protection workers in seeking alternatives to removing children from Kangiqsualujjuaq, Qarmaapik House representatives are cut out from interactions or told that they cannot participate due to confidentiality concerns.[29]

### C. The importance of children and families to Inuit and other Indigenous peoples

16. "To this day, the care, support, well-being, and linguistic and cultural education of Inuit children, families, and communities go to the core of Inuit identity as an Indigenous people."[30] A key Inuit value "is that of being *ilagiit*, being part of a family whose meaning includes that of an extended family. This Inuit concept is what many say sets [Inuit] apart from non-Inuit, because the Inuit family is

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[28] Affidavit of N. Etok, para. 8-35, **MBE, vol. 1, p. 161-165**; Transcript Nov. 23 2018, hearing Viens Commission, Exh. DM-15, **MBE, vol. 5, p. 1384-1427**.
[29] *Ibid.*
[30] Affidavit of C. Watt, para. 11, **MBE, vol. 1, p. 2**.

special."[31]

17. The extensive evidence adduced before this Court demonstrates that provincial youth protection regimes affect all Indigenous peoples at the core of who they are. The evidence shows:

a. "the absolute centrality of families and children within each [Indigenous] legal order" and the continued persistence of these orders.[32]

b. That while this is not the goal of provincial youth protection systems, their application in Indigenous communities leads to « *une dévalorisation et une marginalisation des cutures autochtones et un obstacle majeur à la transmission des langues, des pratiques culturelles et des savoirs autochtones* ».[33]

c. The fundamental differences in the conception of family, community, and the place of the individual in the world that exist between Indigenous cultures and Eurocentric Canadian society. [34] These latter principles are enshrined in Quebec's *Youth Protection Act*, and it is this incompatibility that leads to the discrimination noted by the Viens Commission.[35]

d. That the approach to parenting based on positive reinforcement and indirect means that is favoured by many Indigenous peoples[36] is perceived by outsiders to be a lack of supervision and parental discipline ("negligence", in the language of youth protection).[37]

e. "just how much the ideological differences between Indigenous and non-Indigenous ways of conceptualizing education, parenthood, care and social intervention practices and the transmission of cultural values

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[31] Parnasimautik Consultation Report, Exh. CW-5, **MBE, vol. 1, p. 134**.
[32] Expert report of Prof. Val Napoleon, **AGCBE, vol. 9, p. 3295**.
[33] Expert Report of C. Guay, **AGCBE, vol. 10, p. 3427**.
[34] Expert Report of C. Guay, **AGCBE, vol. 10, p. 3428-3439**.
[35] Viens Commission Final Report, Chap 11, p. 408, **AGCBE, vol. 11, p. 4080**.
[36] Affidavit of M. Sioui, para. 17 et seq, **Book of Evidence of the APNQL-CSSSPNQL, vol. 3, p. 1009-1011**.
[37] Expert Report of C. Guay, **AGCBE, vol. 10, p. 3439-3440**; Expert report of N. Tromé, **Book of Evidence of the APNQL-CSSSPNQL, vol. 12, p. 4237**.

contribute to substantial misunderstandings in youth protection situations."[38]

### D. Inuit believe in the benefits of implementing Inuit-led youth and family services

18. Inuit believe that a continuum of services to youth and families is necessary but insist that such services "be thought and created by Inuit, for Inuit."[39] Nunavik Inuit have already engaged in extensive reflection and consultation regarding what services based on Inuit values should be implemented.[40]

19. On January 7, 2020, Makivik, with the support of other Nunavik organizations, wrote to the federal and provincial government to provide notice under s. 20(1) of the *Act respecting First Nations, Inuit and Métis children, youth and families* ("FNIMCYF Act") that Nunavik Inuit intend in the future to exercise their inherent legislative authority over child and family services.[41]

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## PART II. ISSUES IN DISPUTE

20. The Intervener Makivik submits that the following issues are at stake:

- Is there any constitutional bar to the recognition of Indigenous self-government by the federal government through legislation?

- Does Parliament's jurisdiction over "Indians, and Lands reserved for the Indians," as established by s. 91(24) of the *Constitution Act, 1867*, authorize the adoption of the FNIMCYF Act?

21. Makivik will demonstrate, in sections A through C below, why the recognition of Indigenous self-government in the FNIMCYF Act is in accordance with the principles of Canadian and international law. Makivik will then, in section D,

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[38] Viens Commission Final Report, Chap. 11, p. 416, **AGCBE, vol. 11, p. 4088**.
[39] NIP presentation, *supra* note 17, Exh. DM-13, **MBE vol. 4, p. 1271.**
[40] *Ibid*.
[41] Affidavit of C. Watt, para. 20-21, **MBE vol. 1, p. 4**; Letter of Jan. 7, 2020, Exh. CW-2, **MBE vol. 1, p. 15**.

explain the breadth of federal government jurisdiction under s. 91(24) and why the position of the Attorney General of Quebec ("AGQ") in this reference must be rejected.

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## PART III. SUBMISSIONS

### A. There is no constitutional bar to Parliament recognizing Aboriginal rights

#### 1. The inherent right to self-government is clearly included in s. 35

22. "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."[42] According to the Supreme Court, "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty."[43]

23. Inasmuch, an inherent right to self-government or Indigenous jurisdiction is foundational to the common law doctrine of Aboriginal rights and is constitutionally enshrined in s. 35 of the *Constitution Act, 1982*.[44]

24. The inherent sovereignty of Indigenous peoples was recognized by the United States Supreme Court in the seminal decisions of Chief Justice John Marshall.[45] These decisions:

a. accepted that Indigenous people "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and **to use it according to their own discretion**"[46] and that they retain their status as a "**distinct people**";[47]

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[42] *Pastion v. Dene Tha' First Nation*, 2018 FC 648, para. 8.
[43] *Mitchell v. M.N.R.*, 2001 SCC 33 ("Mitchell v. M.N.R."), para. 10.
[44] See generally J. Borrows, "Indigenous Legal Traditions in Canada," 19 WASH. U. J. L. & POL'Y 167 (2005) ("Borrows, 2005"), available online April 2021.
[45] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) ("*Johnson v. M'Intosh*"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) ("*Cherokee Nation*"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (*Worcester v. Georgia*").
[46] *Johnson v. M'Intosh*, *ibid*., p. 574, emphasis added.
[47] *Ibid*, p. 596, emphasis added.

b. accepted that Indigenous peoples could be "domestic dependant nations"[48] but, on another view, were "sovereign state[s]," having been "treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same";[49]

c. founded the doctrine of Aboriginal rights in North America on a view of the territory as occupied by distinct self-governing peoples.[50]

25. Justice Hall cited this last principle in his dissent in *Calder v. British Columbia*:[51]

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws.*[52]

26. As Bradford Morse has observed of the Aboriginal rights doctrine of the Marshall court: "The sovereignty of Indian Nations is inherent in the tribe itself as it pre-exists contact with Europeans and originates in the people rather than in any external source such as a constitution."[53]

27. The Supreme Court of Canada has incorporated the "general principles" of the Marshall decisions into the doctrine of Aboriginal rights in Canada[54] and into the fabric of s. 35 of the *Constitution Act, 1982*.[55] For the Court, the reason s. 35 exists is to acknowledge the fact that, prior to European arrival, Indigenous peoples in North America were "living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[56] At the

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[48] *Cherokee Nation*, *supra* note 45, p. 17 (Marshall CJ for the majority).
[49] *Cherokee Nation*, *supra* note 45, p. 53 (Johnson J, dissenting).
[50] *Worcester v. Georgia*, *supra* note 45, p. 542-544.
[51] *Calder et al. v. Attorney-General of British Columbia,* [1973] SCR 313 ("*Calder*").
[52] *Ibid*., p. 383, Hall J.'s emphasis, citing *Worchester v. Georgia*, *supra* note 45, pp. 542-544.
[53] B. W. Morse, "Permafrost Rights: Aboriginal Rights and the Supreme Court in *R. v. Pamejewon*," [1997] 47 McGill L.J 1101, p. 1033 ("Morse").
[54] *R. v. Van der Peet*, [1996] 2 SCR 507, para. 35 ("*Van der Peet*").
[55] See *Van der Peet*, *ibid*, para. 36-37 (Lamer C.J.), 107 (L'Heureux-Dubé J., dissenting), 267 (McLachlin J., dissenting); see also *Calder*, supra note 51, p. 346-347, 380-385 (Hall J., dissenting).
[56] *Van der Peet*, *ibid*, para 30.

source of their Aboriginal title are their "pre-existing systems of aboriginal law."[57]

28. Section 35, therefore, exists to reconcile the distinctive societies and laws of Indigenous peoples with the law and sovereignty of the Crown,[58] or "pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[59] In other words, the very reason s. 35 exists is because Indigenous communities are self-governing.[60]

29. Although the focus of Aboriginal rights jurisprudence has been on pre-contact society and pre-sovereignty occupation of land, the purpose of s. 35 and, in fact, its "promise of rights recognition"[61] for Indigenous peoples, is equally positioned to a future that ensures their survival as contemporary communities.[62]

30. This Court has recognized that an Aboriginal right includes the incidental right to teach the exercise of that right to Indigenous youth. As this Court observed: "*sans un tel enseignement, il est possible d'argumenter que c'est l'exercise même du droit qui pourrait éventuellement être menacé de disparition*."[63]

31. Thus, this Court has afforded constitutional protection to the right of Indigenous communities to teach their children cultural practice because it is an evident means of cultural preservation. This is a recognition that Aboriginal rights depend on inter-generational relationships within nations and communities to ensure their meaningful exercise.

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[57] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para. 114, 126 ("*Delgamuukw*")
[58] *Van der Peet*, *supra* note 54, para. 31.
[59] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 20 ("*Haida*"); see also Ian Peach, "More than a Section 35 right: Indigenous Self-Government as Inherent in Canada's Constitutional Structure" (2011), available online (Canadian Association of Political Science website, 2020).
[60] See Borrows, 2005, *supra* note 44, p. 201-204.
[61] *Ibid*, *Haida*, para. 20. See also *R. v. Sparrow*, [1990] 1 SCR 1075, para. 1.
[62] See J. Borrows, "The Trickster: Integral to a Distinctive Culture," (1997) 8:2 Constitutional Forum, pp. 27-32, p. 31: "Reconciliation should not require peoples to concede those practices which allow them to survive as a contemporary community."
[63] *R. c. Côté*, 1993 CanLII 3913, p.68 (QC CA) ("Côté, QCCA"), rev'd by *R. c. Côté*,1996 CanLII 170 (SCC), but not on this point, which is aff'd at para. 27, 56.

### 2. The jurisprudential recognition of self-government with respect to children and families

32. Even prior to the adoption of s. 35 of the *Constitution Act, 1982*, Canadian courts recognized the customary institutions maintained collectively by Indigenous peoples – and by the Inuit in particular – to care for children and families.[64] According to the BC Court of Appeal, Indigenous customary institutions, in particular the institution of customary adoption, were integrated into Canadian common law and given legal effect by the courts. The Court determined that, as the modern statutes of British Columbia had not explicitly sought to extinguish these institutions, they gained constitutional protection under s. 35.[65] There is, therefore, jurisprudential precedent for the recognition of Indigenous jurisdiction over child and family matters as being protected by s. 35.

33. Legislative recognition of Indigenous jurisdiction, as either the express recognition of an inherent right recognized and affirmed by s. 35 or simply to give legal effect to existing Indigenous normative institutions, is a valid means to reconcile Indigenous legal institutions with those of the Canadian State, provided it is done in consultation with Indigenous peoples.

### 3. Legislative recognition of inherent Indigenous jurisdiction is not unprecedented

34. The underlying premise of the AGQ's argument is that the FNIMCYF Act's recognition Indigenous peoples' inherent jurisdiction is unprecedented, but this is not the case, as the following two examples illustrate.

35. Following the amendments to the civil status provisions of the *Civil Code of Quebec* in 1994, Quebec facilitated the continued exercise of Inuit customary adoption via a process that took place completely outside the *Code*. To

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[64] See, for example, *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211; 2 C.N.L.C. 368; *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.S.C.); *Re Katie's Adoption Petition* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Deborah*, (1972), 27 D.L.R. (3d) 225 (N.W.T.S.C.).

[65] *Casimel v. Insurance Corp. of British Columbia*, 1993 CanLII 1258 (BC CA), para. 42, 52.

complete an adoption under this process and have its effects recognized by Quebec law, the birth parent(s) and adoptive parent(s) had to complete a form entitled "Declaration of Inuit Customary Adoption," which was then attested by officials in the relevant communities. The form was sent to the Director of Civil Status, which modified the birth certificate in consequence, relying entirely on the affirmation by the community representatives that the adoption was in accordance with custom. This process represented a simple and efficient means of facilitating the exercise by Inuit of their inherent rights over youth and family.[66]

36. In 2017, the National Assembly took this effective recognition of Inuit jurisdiction over customary adoption a step further and amended the *Civil Code* to make explicit the legal effect of these adoptions when attested by the "competent authority" as "designated by the Aboriginal community or nation."[67] In so doing, Quebec unilaterally[68] recognized through legislation the judicial and executive roles of otherwise undefined Indigenous "competent authorities." These Indigenous authorities effectively recognize customary adoptions in Québec, independently from any Court intervention.[69] They additionally execute that recognition by certifying the adoption.[70]

37. The second example is the recognition of customary electoral codes under the *Indian Act*. Under the *Indian Act*, a First Nation's governing council is "chosen according to the custom of the band"[71] unless the *Indian Act*'s election

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[66] *Rapport du groupe du travail sur l'adoption coutumière en milieu autochtone* (2012), **AGQBE vol. 7, p. 2631-2642**

[67] Article 543.1 of the *Civil Code of Quebec* ("C.C.Q"). For similar recognition of Indigenous jurisdiction over Aboriginal custom related to suppletive tutorship, see article 199.10 C.C.Q.

[68] Although the government action is ultimately unilateral, as in the case of the FNIMCYF Act, government engaged in consultation with potentially affected Indigenous communities prior to adopting the legislation: see *Rapport du groupe du travail sur l'adoption coutumière en milieu autochtone* (2012), **AGQBE vol. 7, pp. 2572-2574**.

[69] See articles 566 et seq. C.C.Q and article 37, *Code of Civil Procedure* (C.C.P.).

[70] Article 543.1, al. 3, C.C.Q.

[71] *Indian Act*, RSC 1985, c I-5, s. 2(1).

provisions are specifically made applicable to that First Nation.[72]

38. "Custom" in this sense is understood "to mean the norms that are the result of the exercise of the inherent law-making capacity of a First Nation."[73] It "does not necessarily mean law rooted in practice or historical tradition."[74] Moreover, the validity and legal force of customary codes flows from the inherent authority of First Nations communities, rather than the *Indian Act* – the *Act* merely recognizes the outcome.[75]

39. While customary election laws need not be written, courts have generally accepted that a written election law adopted by a majority of a First Nation community constitutes "custom" within the meaning of the *Indian Act*.[76] In such cases, the role of the Courts is not to conduct a *Van der Peet* analysis, but to ensure that the "conditions in which the vote was taken were satisfactory."[77]

### 4. Aboriginal rights include governance over people

40. Throughout its factum, the AGQ implies that the lack of a territorial limit to the self-government right recognized in the FNIMCYF Act is problematic, despite not citing any authority in support of this assertion.[78] However, s. 35 rights "fall along a spectrum with respect to their degree of connection with the land."[79] In *Mitchell v. M.N.R.*,[80] the Supreme Court of Canada described certain Aboriginal rights as "free-ranging rights, such as the general right to trade." Such rights "lack an inherent connection to a specific tract of land." On confining such a right to a specific territory, the Court stated: "Such a restriction would unduly cement the right in its pre-contact form and frustrate its modern exercise, contrary to the

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[72] *Bertrand v. Acho Dene Koe First Nation*, 2021 FC 287, para. 36. See also *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536, para. 34.
[73] *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, para. 32.
[74] *Ibid*, para. 32.
[75] *Ibid*, para. 71, 76.
[76] *Bertrand v. Acho Dene Koe First Nation*, *supra* note 72, para. 39.
[77] *Ibid*, para. 39.
[78] AGQ Factum, para. 84, 88.
[79] *Delgamuukw*, *supra* note 57, para. 138.
[80] *Mitchell v. M.N.R.*, *supra* note 43.

principles set out in *Van der Peet*."[81] Personal jurisdiction extending beyond the territory of the group has also been enshrined in the treaties of several Yukon First Nations.[82]

41. Similarly, the inherent right to exercise jurisdiction with respect to Inuit children and families must necessarily be "free-ranging," as it attaches to those children and families wherever they might be located across Canada. To limit the jurisdiction of Nunavik Inuit to Nunavik would defeat the importance of exercising Inuit jurisdiction for the benefit of all children and families, including those who are forced to leave Nunavik for education or health care because the province has not seen fit to provide such services in the region.[83]

42. Internationally, the U.N. Special Rapporteur on the Rights of Indigenous Peoples has observed Indigenous peoples exercising sector-specific self-government outside of their traditional territories through "functional autonomy arrangements." In the context of migration and urbanization within States, such autonomy has become particularly important with respect to "education laws and policies…for indigenous children residing outside the traditional territory."[84]

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[81] *Ibid*, para. 56.
[82] Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) *Canadian Bar Review* 74(2), p. 199-200.
[83] See Obed and LeBlanc evidence before the Senate: *supra* note 12.
[84] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, UNHRC, 74th sess, UN Doc A/HRC/74/149 (17 July 2019), para. 21 ("Tauli-Corpuz, 2019").

### 5. Underlying constitutional principles favour the recognition of Indigenous self-government by the Crown rather than its denial

43. In its attack on the validity of the FNIMCFY Act as an appropriate exercise of s. 91(24) jurisdiction, the AGQ seeks to rely on the "internal architecture"[85] of the Canadian Constitution to undermine federal paramountcy and deny Indigenous peoples the legislative support of s. 91(24) in matters that go to the core of their existence as peoples.

44. In its analysis, the AGQ relies exclusively on the principles of federalism and democracy,[86] eliding other constitutional values such as the protection of Aboriginal rights.[87] Although the Court in the *Quebec Secession Reference* was primarily concerned with the relationship between Quebec and the other Crowns within the federal order, it would be contrary to the principles espoused by the Court in relation to the evolution of the Constitution[88] to deny the promise of federalism to Indigenous peoples in Canada. Federalism is the promise to reconcile diversity with unity.[89] By providing an optional federal framework for incorporating Indigenous laws into federal law,[90] the FNIMCYF Act recognizes the diversity of Indigenous realities within Confederation and undertakes to support them. Federal paramountcy is an integral part of that support.

45. The contradiction cannot be lost on the AGQ that it seeks to argue against self-government for Indigenous peoples on the grounds that it is contrary to democracy.[91] Who better to represent Indigenous peoples than their duly-selected governing bodies?

46. Absent from the AGQ's analysis of fundamental constitutional principles is any

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[85] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), para. 50 ("Quebec Secession Reference").
[86] AGQ Factum, para. 60-70.
[87] *Quebec Secession Reference*, *supra* note 85 para. 82. See also *Campbell et al v. AG BC/AGC & Nisga'a Nation et al*, 2000 BCSC 1123, para. 81.
[88] *Quebec Secession Reference*, *ibid*, para. 33, 43, 52 and 63.
[89] *Ibid*, para. 43.
[90] See articles 21-22 of the Act.
[91] AGQ Factum, para. 64.

mention of the "protection of minorities." Although Indigenous peoples in Canada hold their own place in the Canadian constitution, separate from other minority groups,[92] there is a common rationale for the constitutional protection of their rights: "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[93]

47. Legislative recognition of Indigenous jurisdiction over children and families is an important tool for Indigenous groups working to preserve and promote their cultures, languages and collective well-being within the constitutional fabric of Canada. An optional federal legislative framework for exercising that inherent jurisdiction facilitates the application of the rule of law by making existing or renewed Indigenous laws cognizable to the Canadian state. Moreover, democracy is enhanced by acknowledging Indigenous groups' responsibility for their children and families, making laws more responsive to their needs and reinforcing Indigenous law-makers' accountability to the communities they serve.

### 6. The constitutional discussions of the 1980s and 1990s have little to tell us about today's world

48. The AGQ relies on the content of constitutional discussions of the 1980s and 1990s as proof of the legal status of Indigenous rights to self-government. However, these discussions took place in an environment where:

a. prejudice towards and misunderstanding of Indigenous peoples was so widespread that the 1983 Special Committee felt the need to affirm that, were all Canadians to hear the evidence that it had, they would learn, as the Committee members had, that Indians "*n'étaient pas des peoples païens, sans aucune culture*";[94]

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[92] *Quebec Secession Reference*, *supra* note 85, para. 82; *Van der Peet*, *supra* note 54, para. 30.
[93] *Quebec Secession Reference*, *ibid*, para. 74.
[94] Penner Report, **AGQBE, vol. 3, p. 869.**

b. "the commitment of some governments to, and their understanding of, the 1982 constitutional amendments regarding aboriginal peoples were weak" and that "not all parties to the negotiations wanted a constitutional amendment … Political will, for whatever reasons, was obviously lacking."[95]

49. The AGQ asks this Court to convert the views of the 1980s and early 1990s into law; in other words, to find that what a group of non-Indigenous politicians were willing to contemplate as Aboriginal rights defines what these rights must be. For evident reasons, this submission must be rejected.

50. Moreover, the AGQ draws the wrong conclusion from these events: the failure to adopt the various proposed amendments does not mean that the right to self-government is not recognized in the constitution, but rather that the federal and provincial governments do not have an explicit constitutional right to limit and control the exercise of self-government (setting aside limits that may be justified based on the *Sparrow* test).

51. Each of the constitutional amendments proposed between 1982 and the Charlottetown Accord sought to control the exercise of this right, for example by requiring negotiation of an agreement delimiting the right, or by limiting its justiciability.[96] These proposed limits were driven by the fear that the recognition of an inherent right could undermine the territorial integrity of Canada.[97] However, without these amendments, Quebec and Canada have no presumptive right to put the brakes on Aboriginal self-government.

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[95] D. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?*, Institute of Intergovernmental Relations (1989), **AGQBE, vol. 5, p. 1731-1732**.

[96] Proposed 1984 Constitutional Accord, s. 35.2(b) and (c), **AGQBE, vol. 3, p. 1087**; *Projet d'accord de 1985 concernant les peuples autochtones du Canada*, s. 35.01, **AGQBE, vol. 3, p. 1128**; *Projet fédéral – Annexe – Modification de la Constitution du Canada* (1987), s. 35.01(2) and 35.02, **AGQBE, vol 4, p. 1133-1134**; Canada, *Bâtir ensemble l'avenir du Canada – Propositions*, **AGQBE, vol. 4, p. 1163**; *Charlottetown Accord*, s. 35.2 and 35.3, **AGQBE, vol. 5, p. 1531-1532.**

[97] RCAP, *The Right of Aboriginal Self-Government and the Constitution: A Commentary*, **AGQBE, vol. 4, p. 1224**.

### 7. The problem is the Youth Protection Act itself

52. In its factum, the AGQ suggests that the autonomy that is granted to the Nunavik Regional Board of Health and Social Services ("NRBHSS") under the JBNQA somehow changes the analysis of the issue.[98] Although the NRBHSS may enjoy a certain level of autonomy in its operations and affairs, that autonomy is very limited when it comes to the implementation of the *Youth Protection Act*, and as a result this *Act* is presently applied in Nunavik as it is in the rest of the province.[99]

## B. Legislative recognition of inherent Indigenous jurisdiction is a valid means to implement Canada's international obligations to Indigenous peoples

53. The FNIMCYF Act was adopted in consideration of Canada's commitment to the rights set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[100] the International Convention on the Elimination of All Forms of Racial Discrimination (Racial Discrimination Convention)[101] and the Convention on the Rights of the Child (CRC).[102] Section 8(c) of the Act states expressly that the implementation of UNDRIP is among its purposes.

54. UNDRIP sets out the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Article 43). Among these minimum standards is the right to self-determination, expressed most clearly in the preamble[103] and at Articles 3 and 4.

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[98] AGQ factum, para. 138.
[99] Submission of the NRBHSS to the Viens Commission, Exh. DM-14, **MBE vol. 4, p. 1318-1319**; Transcript Nov. 21 2018, hearing Viens Commission, Exh. DM-11, **MBE, vol. 4, p. 1164, 1169**.
[100] GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) ("UNDRIP").
[101] 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ("Racial Discrimination Convention").
[102] 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990) ("CRC").
[103] See, in particular: "**Acknowledging** that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples…"

55. Article 3 of UNDRIP explains that self-determination is intrinsic to Indigenous peoples' future development: "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

56. In public international law, self-determination is a fundamental human right. The right to self-determination of Indigenous peoples is situated in a tradition of international law and human rights instruments that apply to all peoples.[104] As recently reiterated by the U.N. Special Rapporteur on the Rights of Indigenous Peoples: "Its realization is indispensable for indigenous peoples to enjoy all the collective and individual human rights pertaining to them."[105]

57. Article 4 of UNDRIP connects "the right to autonomy or self-government in matters relating to their internal and local affairs" to the broader right of self-determination. The Special Rapporteur notes as follows: "The recognition and implementation of the right (to self-government) **entails obligations for States, including the adequate incorporation of the right into national law**, as well as the assumption of responsibilities by indigenous peoples themselves."[106]

58. However, the Special Rapporteur cautions that self-government needs to be defined by Indigenous peoples themselves, as "a starting point" for the adoption of positive legal, policy and administrative measures by the State. "[I]nsufficient attention has been devoted to the interpretation by indigenous peoples themselves of those rights and to their own initiatives to realize them."[107]

59. The Special Rapporteur recommends that States "enshrine the right of indigenous peoples to self-determination and the related right to autonomy or self-government in their national legal systems, including in their national

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[104] *Quebec Secession Reference*, *supra* note 85, para. 113-122.
[105] See Tauli-Corpuz, 2019, *supra* note 84, para. 15.
[106] *Ibid*, para. 16 (emphasis added).
[107] *Ibid*, para. 18. See also J (Sa'ke'j) Youngblood Henderson, "The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems," in A. Craft et al. (eds), *UNDRIP Implementation More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Saskatchewan: Centre for International Governance Innovation and Wiyasiwewin Mikiwahp Native Law Centre, 2018) pp. 9-16.

constitutions," and that all special measures taken by the State to provide social services to address basic human rights be evaluated by "whether they strengthen indigenous peoples' self-determination, or, on the contrary, force them into schemes that lead to integration or assimilation…"[108]

60. Several other rights set out in UNDRIP are furthered by the FNIMCYF Act, including the right to the development and maintenance by Indigenous peoples of their "juridical systems or customs" (Article 34) and the delivery of economic and social programmes for Indigenous people through their own institutions (Article 23).

61. In 2018, the Special Rapporteur found that:

> Indigenous governance systems have often proven to be better than external actors in providing services to and ensuring the well-being and rights of Indigenous peoples. Furthermore, they contribute to conflict reduction, climate adaptation, conservation and protection of nature, culturally appropriate social services, economic progress and many other positive outcomes.[109]

62. Parliament's recognition, at s. 18 of the FNIMCYF Act, that Indigenous peoples' constitutionally-protected inherent right to self-government includes legislative, administrative, enforcement, and dispute resolution authority aligns with certain key aspects of Indigenous self-determination and autonomy as provided for in UNDRIP and as advocated by the U.N. Special Rapporteur. It integrates the right to self-government with respect to child and family matters into domestic law and recognizes its inherent place within the existing constitutional framework.

63. Makivik, in conjunction with Inuit Tapiriit Kanatami, has expressed concerns about Parliament's failure to include funding guarantees in the FNIMCYF Act.

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[108] *Ibid*, para. 81(a) and (f). Article 8 of UNDRIP defends against forced assimilation and the destruction of Indigenous culture, including by recognizing positive obligations on the state to effectively prevent and provide redress for such assimilation.

[109] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, UNHRC, 73rd sess, UN Doc A/HRC/73/176 (17 July 2018), para. 94 ("Tauli-Corpuz, 2018").

While paragraph 20(2)(c) of the Act provides that fiscal arrangements shall be addressed in coordination agreements, this mechanism may leave Indigenous governing bodies seeking funding vulnerable to Crown pressures to alter the content of their laws in a manner contrary to Indigenous self-determination. Were this to occur, it would frustrate the purpose of the Act in upholding UNDRIP and, in particular, the right to "to ways and means" for financing self-government as provided at Article 4.

64. As the FNIMCYF Act was adopted by Parliament with the express intent of implementing UNDRIP, UNDRIP is crucial to the Act's interpretation. In any event, even international law instruments not adopted by Parliament "may help inform the contextual approach to statutory interpretation and judicial review."[110]

65. Nunavik Inuit have joined other members of the Inuit Circumpolar Council to declare their commitment to Inuit sovereignty and Inuit self-determination as provided for in UNDRIP and in other international human rights instruments.[111]

66. The Preamble of the FNIMCYF Act also refers to Canada's ratification of the CRC. Canada ratified the CRC in 1991 with interpretive statements regarding how the Convention should apply to Indigenous children and families. In adoption matters, Canada reserved the right not to apply provisions of Article 21 of the CRC, "to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada."[112] Article 21 designates the best interest of the child as the paramount consideration in adoption matters and sets certain procedures and principles for ensuring it. Canada's reservation, thus,

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[110] *Baker v. Canada*, 1999 CanLII 699 (SCC), para. 70. See also *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at 349-350 (Dickson C.J., dissenting); *National Corn Growers v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, pp. 1371-1372; *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, para. 431-438, 452-453. See also F. Gomez Isa, "The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights," in S. Lagoutte et al. (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016), pp. 185-211.

[111] *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*, on behalf of Inuit in Greenland, Canada, Alaska and Chukotka, adopted by the Inuit Circumpolar Council, April 2009.

[112] See Canada's Reservation and Statement of Understanding to its ratification of the CRC, online at the site of the United Nations Treaty Collection (accessed April 2021) : UNTC

acknowledged that Indigenous adoption customs and customary laws could take precedence over aspects of Article 21.

67. Additionally, Canada issued a Statement of Understanding that its implementation of the CRC with respect to Indigenous children required it to "take into account the provisions of article 30."[113] Article 30 of the CRC expressly protects the right of Indigenous children to enjoy their culture, profess their religion and use their language with other members of their community.

68. Canada's ratification of the CRC, therefore, affirmed its commitment to protecting Indigenous children's distinct relationship with their community. Article 30 also informs certain substantive principles in the FNIMCYF Act in relation to cultural continuity (s. 8(2)) and priority of placement of Indigenous children with their family and community members (s. 16(1)).

69. Finally, the Racial Discrimination Convention is reflected in and can inform an interpretation of the provisions in the federal Act regarding substantive equality, including the principle of non-discrimination as it applies to the participation of Indigenous children, their family members and their Indigenous governing body in decisions that affect the child, family and community (s. 9(3)(b), (c) and (d)) and as it applies to prevent apprehension of children solely on the basis of socio-economic conditions (s. 15).

### C. Recognition of the inherent right to self-government is not an invitation to undermine the effects of Act

70. The affirmations made by the Attorney General of Canada ("AGC") at para. 154 to 157 of its memorandum could be interpreted as an invitation for the courts to re-examine the constitutional basis of each and every Indigenous law adopted under the Act. This Court should affirm that this is not the correct process because Indigenous laws adopted under the Act, like all other laws in this country, benefit from a presumption of validity.

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[113] *Ibid.*

71. The FNIMCYF Act incorporates certain Indigenous laws as federal law.[114] Statutory recognition is one means by which Indigenous laws may be given effect in Canadian domestic law,[115] in addition to other means recognized by the AGQ such as treaty, court declarations, and constitutional amendment.[116]

72. As federal laws, Indigenous laws adopted under the Act must benefit from a presumption of validity such that the party who contests the law's validity (or the validity of specific provisions) bears the burden of proving that the law is not supported by the Indigenous people's section 35 rights.

73. The presumption of validity applies to legislative enactments generally, including to municipal by-laws.[117] "Under the presumption of validity, it is presumed that legislation has *in fact* been validly enacted and therefore is to be given legal effect unless and until a court with the jurisdiction to do so declares it to be invalid."[118]

74. This presumption is intimately related to the rule of law, which requires obedience to existing laws until they are set aside by a court.[119] "[T]o allow persons in our society to ignore the law simply on the basis that they have arguments that they wish to present at a later point in time is to invite mayhem and engender a disregard for the rule of law."[120]

75. To put Indigenous laws on a lesser footing than other laws would be to invite disregard for the rule of law generally. For this reason alone, Indigenous laws deserve the same level of judicial respect as any other Canadian laws.

76. Moreover, if the constitutional basis of each Indigenous law adopted under the FNIMCYF Act were subject to systematic re-examination by the courts such that

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[114] AGC Factum, para. 32, 134, 137.
[115] *Alderville First Nation v. Canada*, 2014 FC 747, para. 39.
[116] AGQ Factum, para. 149.
[117] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 21.
[118] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis, 2014) at 16.3.
[119] *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466, para. 47, 49.
[120] *Ibid,* para. 15 citing trial judgment *Peachland (District) v. Peachland Self Storage Ltd., Vancouver No. S105503*. See also para. 32 citing *Kent (District) v. Storgoff*,1962 CanLII 697 (BC SC).

any Indigenous people could be required to demonstrate its jurisdiction over child and family services under the *Van der Peet* framework as soon as an objection arose, then the Act would serve virtually no practical purpose.

77. Indeed, Indigenous peoples would be left to prove their constitutional rights through costly and time-consuming court proceedings in the same manner as if the FNIMCYF Act had never been adopted. This cannot have been Parliament's intent and is also not an outcome suitable to addressing a "humanitarian crisis"[121] where the survival of Indigenous peoples is at stake.[122]

### D. The social welfare of Indigenous Peoples has always been primarily the jurisdiction of the federal government

78. Turning now to the division of powers issues, the AGQ's submissions fail to engage with the history of Canada and, for that reason, risk misleading this Court as to the true ambit of s. 91(24). As demonstrated below, the federal government has, with the consent and support of the provinces, but to the detriment of Indigenous peoples, exercised its jurisdiction under s. 91(24) to assert control over every aspect of Indigenous peoples' lives.

#### 1. The example of *Re: Eskimos*

79. In or around 1929, the federal government began providing assistance to Inuit in Quebec, who were struggling to survive as a result of a collapse in the price of furs and a low number of caribou in the region.[123] Quebec at first reimbursed the federal government for these expenditures, but later changed course and refused, on the grounds that providing assistance to Inuit was a federal responsibility in accordance with s. 91(24) of the *Constitution Act, 1867*.[124]

80. The issue was referred to the Supreme Court, where Quebec argued in favour

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[121] Affidavit of Dr. Turpel-Lafond, **AFNBE, vol.1, pp. 1-13**.
[122] Affidavit of C. Watt, para. 19, **MBE, vol. 1**, **pp. 3-4**.
[123] C. Backhouse, Colour-Coded: *A Legal History of Racism in Canada, 1900-1950*, (Toronto: Osgoode Society for Canadian Legal History, 1999), p. 34; INAC, *Canada's Relationship with Inuit*, *supra* note 3, Exh. DM-5, **MBE, vol. 1, p. 331-333**.
[124] *Ibid*.

of federal responsibility for this issue, pleading, among other things, the importance of having one order of government responsible for all Indigenous peoples in Canada, for reasons including that the territories of Indigenous peoples do not coincide with provincial boundaries and that the Fathers of Confederation cannot have meant for assistance to Indigenous peoples to be fractured between the provinces.[125]

81. The Supreme Court decided that Inuit are captured under s. 91(24), with the result that the federal government was exclusively responsible for providing the social assistance that Inuit then required. A key factor in the Court's reasoning was that, not long after Confederation, the government of Sir John A. McDonald agreed to provide relief to Inuit (and Innu) on the Lower North Shore of Quebec:

> That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, **is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *British North America Act,* at that time and shortly thereafter**.[126] (emphasis added)

82. The decision in *Re: Eskimos* was rendered less than a year after the Court's judgment in *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*,[127] the principal authority on which Quebec relies to argue that such areas are primarily provincial jurisdiction. Placed together, these two cases demonstrate that, while social welfare legislation for non-Indigenous Canadians is within the jurisdiction of the provinces, primary jurisdiction for social welfare for Indigenous peoples lies with Parliament under s. 91(24). This case and the examples described below also

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[125] Factum of the AGQ in Re: Eskimos, Exh. DM-2, **MBE, vol. 1, p. 291**.
[126] *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec*, [1939] SCR 104, p. 123 ("Re: Eskimos").
[127] *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398.

demonstrate that the AGQ has significantly overstated the *ratio decidendi* of the Supreme Court's decision in *NIL/TU,O*, which is about provincial jurisdiction over labour relations and not about the breadth of s. 91(24).[128]

### 2. The stipulations of the 1912 Boundaries Extension Acts

83. Nunavik was not included in Quebec until 1912. In 1912, Parliament and the National Assembly, without consulting or even informing Inuit,[129] adopted laws to extend Quebec's borders north to the Hudson Strait.[130] Both the federal and provincial acts provided that "the trusteeship of the Indians in said territory … shall remain in the Government of Canada, subject to the control of Parliament."[131]

84. This provision recognized "the continued responsibility of Parliament for the **welfare and guardianship** of the Indians under s. 91(24)" and was "political shorthand for the general wardship/guardianship responsibility of the federal government" with respect to Indians.[132]

### 3. The province's assertion of authority is very recent

85. Up until the mid-1960s, there was no provincial presence in Nunavik. During this time, all public services, including housing, education, social assistance, and health care, were delivered by the federal government.[133]

86. Beginning in the mid-1960s, with the rise of Quebec nationalism, Quebec became interested in Inuit lands for their resource potential. It christened the

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[128] AGQ Factum, para. 31, 140, and 154; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45.
[129] Nungak, *supra* note 4, Exh. CW-4, **MBE, vol. 1, p. 38-40, 46-49**.
[130] *An Act to extend the Boundaries of the Province of Quebec*, SC 1912, c 45; *Loi concernant l'agrandissment du territoire de la province de Québec par l'annexation de l'Ungava*, SQ 1912, c 7.
[131] S. 2(e) of the federal act (in french: « que la tutelle des sauvages dans ledit territoire … restera à la charge du gouvernement du Canada, subordonnément au contrôle du Parlement »). The provincial act accepted this condition: s. 1.
[132] *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801, para. 1448, 1449 (emphasis added).
[133] Affidavit of C. Watt, para. 26, 28, **MBE, vol.1, p. 5-6**; Nungak, *supra* note 4, Exh. CW-3, **MBE, vol. 1, p. 38-55**.

area, “Nouveau Québec,” and began providing public services to Inuit to compete with federal services, with the result that, for a time, there were competing school systems in Nunavik: a federal system and a provincial system. Both federal and provincial services were of very poor quality.[134]

87. This was the situation when Quebec announced the James Bay project. Inuit and Cree organized to fight this project, and these efforts resulted in the JBNQA. In negotiating the agreement, Inuit attempted to ensure that the residents of Nunavik received quality public services similar to what other residents of the province received and made a deliberate choice to opt for non-ethnic public institutions that would provide services to all residents of Nunavik, regardless of their ethnic background. For Inuit, the fact that they were required to limit some of their rights to land to receive the public services that non-Indigenous Quebecers received without question continues to constitute a significant injustice.[135]

88. In 1981, following the JBNQA, the provincial government agreed to accept the: « *responsabilités présentement assumées par le ministre des Affaires indiennes et du Nord canadien dans la dispensation aux Inuit du Nouveau-Québec des services de logement, d'approvisionnement en électricité et en eau, d'installations sanitaires et des services municipaux connexes* ».[136]

89. As these examples demonstrate, it has long been accepted that s. 91(24) clothes Parliament with a wide and plenary jurisdiction to address all issues linked with the welfare of Indigenous peoples.

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[134] Affidavit of C. Watt, para. 29, **MBE, vol.1, p. 6**; Nungak, *ibid*.; The Final Report of the Truth and Reconciliation Commission: Vol. 2: *Canada's Residential Schools: The Inuit and Northern Experience* (“TRC: Inuit Experience”), Exh. DM-6, **MBE, vol. 2, p. 419-420**.

[135] Affidavit of C.Watt, para. 30-36, **MBE, vol.1, p. 6-7;** Nungak, *supra* note 4, Exh. CW-3, **MBE, vol. 1, p. 96-97**; Parnasimautik Consultation Report, Exh. CW-5, **MBE, vol. 1, p. 107-108**.

[136] 1981 Transfer Agreement between the Government of Canada and Quebec, Exh. DM-4**, MBE, vol. 1, p. 299**.

### 4. The many endeavours undertaken pursuant to s. 91(24)

90. In addition to the foregoing, Inuit were subjected to incredible hardship by the federal government through two programs in particular: the High Arctic relocation, and the residential school system.

91. In the High Arctic relocation, which began in 1953, Inuit families were coerced by the federal government to move from Inukjuak, Quebec, and Pond Inlet, Nunavut, to islands in the High Arctic. The purpose of the move was to force Inuit to return to a subsistence lifestyle, rather than rely on income from the fur trade, and to support Canadian assertions of sovereignty in the High Arctic.[137]

92. For Inuit from Quebec, this represented a move of approximately 2,000km to the north. Not being familiar with the environmental conditions and wildlife patterns in the area, and provided with next to no government assistance, the relocatees struggled to survive.[138] Yet at no time did Quebec assert its supposed jurisdiction in this area to protect the well-being of these Inuit families.

93. The residential school system began later in the North than in Southern Canada, only really being established after the Second World War.[139] "[B]ecause the history of these schools is so recent … the intergenerational impacts and legacy of the schools … are particularly strongly felt in the North."[140]

94. Under this system, the federal government would take children from their homes and send them to schools that were usually located far away, with the express goal of eliminating their Indigenous culture. Inuit from Nunavik were sometimes sent thousands of kilometers away, to schools in Churchill (Manitoba) and Yellowknife,[141] and all this despite the provincial government's exclusive

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[137] RCAP, *The High Arctic Relocation: A Report on the 1953-55 Relocation*, Exh. DM-9, **MBE, vol 3, p. 625-831.**
[138] *Ibid*.
[139] TRC: Inuit Experience, *supra* note 134, Exh. DM-6, **MBE, vol. 2, p. 351-352**.
[140] *Ibid.*, **p. 352**.
[141] *Ibid.*, **p. 391-392**; Affidavit of C. Watt, para. 27, **MBE, vol. 1, p. 5**.

jurisdiction over education.[142]

95. By failing to engage with historical reality regarding the exercise of federal jurisdiction under s. 91(24), Quebec risks providing this Court with a misleading picture regarding the true breadth of this federal head of power. Moreover, having failed to take any action to protect Inuit from federal government actions that caused incredible suffering, it is dishonourable for Quebec to intervene now to limit Parliament's range of action under s. 91(24) when, for one of the first times in the history of this country, Parliament has used this power to attempt to improve the welfare of Indigenous peoples.

### E. Conclusion

96. In the present reference, the AGQ asks this Court to invalidate the FNIMCYF Act because, amongst other things, the Act recognizes Inuit and other Indigenous peoples in Canada as possessing an inherent right to self-government with respect to children and families. The approach proposed by the AGQ would mean that Inuit and other Indigenous peoples in Canada, despite governing themselves for centuries prior to the arrival of Europeans, would now need to seek the approval of the State to continue to govern themselves as peoples. Such an approach to Indigenous self-government runs contrary to foundational principles in Canadian common law and constitutional law related to Aboriginal rights. It also frustrates almost four decades of international efforts to ensure protection of the basic human right of self-determination of Indigenous peoples.

97. The AGQ's position is that the provinces hold approval powers: that they get to say "yes" or "no" to how Indigenous peoples choose to organize themselves. This asymmetrical power relationship that has been imposed on Indigenous-Crown relations since Confederation cannot continue if Canada hopes to move beyond its colonial past and become something better and fairer. The FNIMCYF

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[142] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 93.

Act, and its recognition of the inherent jurisdiction of Indigenous peoples in relation to child and family services, is one small step towards correcting this dynamic. The confirmation by this Court that the Act is constitutional affirms the potential of s. 91(24) as a tool of reconciliation founded upon mutual respect.

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## PART IV. CONCLUSIONS

FOR THESE REASONS, THE INTERVENER MAKIVIK CORPORATION ASKS THIS HONOURABLE COURT TO:

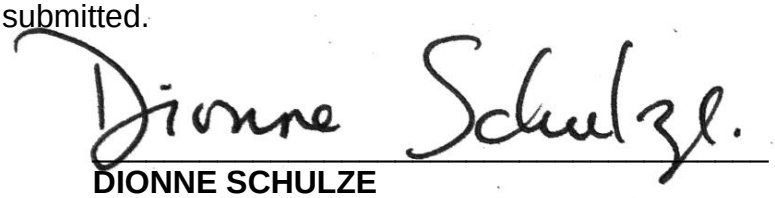
**RESPOND IN THE NEGATIVE** to the Attorney General of Quebec's question in the present Reference.

**CONFIRM** that *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, is *intra vires* the jurisdiction of the Parliament of Canada.

**THE WHOLE** without legal costs.

The whole of which is respectfully submitted.

Montreal, the 30th of April, 2021



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## PART V. AUTHORITIES

**DOCTRINE**

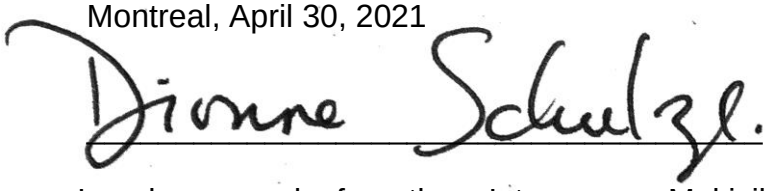
Authorities

**ATTESTATION**

We, the undersigned, Dionne Schulze, attest to the brief's conformity with the *Rules of* the *Civil Practice Regulation of the Court of Appeal*

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

Montreal, April 30, 2021



Legal counsel for the Intervener Makivik Corporation