Court File No. 40061

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

ATTORNEY GENERAL OF QUÉBEC

Appellant

And:

ATTORNEY GENERAL OF CANADA

ASSEMBLÉE DES PREMIÈRES NATIONS QUÉBEC-LABRADOR (APNQL)

COMMISSION DE LA SANTÉ ET DES SERVICES SOCIAUX DES PREMIÈRES NATIONS DU QUÉBEC ET DU LABRADOR (CSSSPNQL)

SOCIÉTÉ MAKIVIK

ASSEMBLÉE DES PREMIÈRES NATIONS

ASENIWUCHE WINEWAK NATION OF CANADA

SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÈRES NATIONS DU CANADA

Respondents

(continuation of titles on the inside page)

FACTUM OF THE RESPONDENT FIRST NATIONS CHILD & FAMILY CARING SOCIETY OF CANADA

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

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

And:

ATTORNEY GENERAL OF QUÉBEC

Respondent

And:

ATTORNEY GENERAL OF MANITOBA

ATTORNEY GENERAL OF BRITISH COLUMBIA

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SOCIÉTÉ DE SOUTIEN À L'ENFANCE ET À LA FAMILLE DES PREMIÉRES NATIONS DU CANADA

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PART I – OVERVIEW AND FACTS

1. This Reference asks whether the Canadian constitutional division of powers can accommodate proactive federal efforts to right wrongs against First Nations, Inuit, and Métis peoples. It arises in the context of a long history of colonial governments placing children at the epicentre of egregious rights violations, identified as "cultural genocide" by the Truth and Reconciliation Commission ("TRC") and a "worst case scenario" by the Canadian Human Rights Tribunal ("CHRT").[1] The scale of state wrongdoing underpinning this disadvantage informs the scope of the corrective measures required. A purposive approach to s 91(24), accounting for its purpose to recognize and protect Indigenous peoples' rights, favours interpretations that promote the best interests of children and safeguards them from abuse by governments and their officials.

2. The *Act*[2] is an attempt by Canada to address long-standing harms that it and the provinces and their child welfare authorities, have caused to Indigenous children and families. Today, First Nations children are over 17 times more likely to be removed from their families than other children.[3] This disproportion is fueled by collective trauma, addictions, poverty, poor housing, and domestic violence. It is exacerbated by inadequate provision—and chronic underfunding—of services by both Canada and the provinces, and the imposition of culturally inappropriate provincial standards on First Nations that disregard self-government.[4]

3. There is a direct relationship between these harms and the long history of governments taking a discriminatory and neglectful approach to the division of powers, an approach the Attorney

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[1] The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the TRC* ["*TRC Report Summary*"], Expert Report of Christiane Guay, Annex 4, **Attorney General of Canada's Court of Appeal Record ("AGC-CAR"), Vol 14, p 5025**; *First Nations Child & Family Caring Society et al v Attorney General of Canada*, 2019 CHRT 39 at paras 13, 18, 234.

[2] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 ["the *Act*"].

[3] Barbara Fallon et al, *Denouncing the Continued Overrepresentation of First Nations Children in Canadian Child Welfare: Findings from the First Nations/Canadian Incidence Study of Reported Child Abuse and Neglect-2019* (Ontario, Assembly of First Nations, 2021) at 12. See also: Attorney General of Canada factum at para 11 [AGC Factum].

[4] Naiomi Walqwan Metallic, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case" (2018) JL & Soc Pol'y 28 [Metallic 2018] at 19-23.

General of Quebec ("AGQ") asks this Court to entrench in this appeal. AGQ's approach to the division of powers and to self-government would condemn our country to a colonial paradigm that discriminates against First Nations children, youth, and families, further entrenching discrimination and colonialism into our constitutional order. This would disregard the principles of constitutionalism and the rule of law, federalism, respect for minorities, democracy, the Honour of the Crown, and legal principles such as substantive equality and Jordan's Principle. The AGQ's colonial approach is antithetical to reconciliation and fundamentally inconsistent with the constitutional architecture of this country, which embeds the inherent right to self-government and Canada's commitment to recognize and protect it, and other Indigenous rights, in our Constitution.

4. In *Daniels*, this Court stated that "reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal."[5] The TRC defined reconciliation as "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."[6] The *Act* advances reconciliation by providing, for the first time, a legislated framework that attempts to set minimum standards to address harmful gaps in provincial child welfare regimes, facilitates the exercise and implementation of self-government of Indigenous groups in child and family services, encourages cooperation between the federal, provincial and Indigenous governments on this subject, and sets out accountability standards for child welfare actors. While the *Act* must be significantly improved in certain aspects, particularly setting out clear lines of funding responsibilities among governments,[7] it is a first effort at 'legislative reconciliation.' A purposive division of powers analysis should not reinforce the *Act*'s weaknesses, but instead enable all actors to improve the legislative regime to secure the proper implementation of First Nations child welfare laws. To this end, Canada must have the power under s 91(24) to prioritize Indigenous interests, including by extending federal paramountcy to Indigenous laws in order to shield Indigenous communities from jurisdictional skirmishes with the provinces. To move beyond the harms that

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[5] *Daniels v Canada*, 2016 SCC 12 at para 37 [*Daniels*] [emphasis in original].
[6] *TRC Report Summary*, *supra* note 1 at 6, **AGC-CAR, Vol 14, p 5030**.
[7] Naiomi Walqwan Metallic et al, "The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit and Métis Children, Youth and Families" (2019) Yellowhead Institute at 8-9; see also *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 at paras 267-78 [QCCA Decision].

our past and present are causing to Indigenous peoples, our Constitution must be interpreted to allow and encourage this and future efforts at legislative reconciliation.

5. As addressed in more detail below, the story of First Nations child and family services in Canada is not a happy one. Indian Residential Schools were one of the earliest, most enduring, and tragic forms of federal First Nations child welfare. In the wake of the enactment of s 88 of the *Indian Act*,[8] proclaimed in 1951, provincial authorities gradually began to deliver child and family services to First Nations children. Bereft of any cultural training, these officials removed thousands of First Nations children from their families from 1960-1990, in what is known as the Sixties Scoop. Beginning in the 1970s, First Nations began establishing First Nations Child and Family Services Agencies ("FNCFS Agencies") to stem the tide of First Nations children being removed from their families. However, the federal government bound them to provincial child welfare laws and seriously under-funded these Agencies and the provinces, including Quebec, took microscopic measures to make up this shortfall. By the early 2000s, there were approximately three times the number of First Nations children in state care than there were at the height of Indian Residential Schools in the 1940s.[9] This overrepresentation of First Nations children in care has not significantly abated.

6. The Caring Society shares the Attorney General of Canada's ("AGC") view that there is abundant evidence of the "humanitarian crisis" of the overrepresentation of Indigenous children in the child and family services system.[10] This ongoing story of harm, Canada's responsibility for it, and provincial governments' active complicity, must all inform this Court's analysis of constitutional authority over the *Act*'s subject matter. Legislative efforts to address long-standing harm must be interpreted as being consistent with s 91(24)'s goal of reconciliation and protection, and consistent with our constitutional architecture, underlying constitutional principles and legal principles like substantive equality and Jordan's Principle.

7. It is also vitally important to understand that the mischief the *Act* seeks to address is, in large measure, of Canada's own creation, although aided and abetted by provinces. Canada is now

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[8] RSC 1985, c I-5.
[9] *Wen:De – We are Coming to the Light of Day*, Sworn Declaration of Cindy Blackstock, ("Blackstock Affidavit"), Ex CB-5, **First Nations Child and Family Caring Society of Canada's Court of Appeal Record ("CS-CAR") Vol 2, p 232.**
[10] AGC Factum at para 57.

taking steps to address the damage it caused, spurred by legal orders made by the CHRT. The *Act* sets a national floor of minimum standards to meet Indigenous children and families' needs and circumstances and enables First Nations, Inuit, and Métis communities to promote the wellbeing of their children and families, rather than requiring them to resort to the judicial branch for affirmation of their inherent rights. The Constitution, including its underlying principles and values, allows and indeed, promotes such reconciliatory action.

PART II – QUESTIONS IN ISSUE

8. The Caring Society argues that the AGQ's first two constitutional questions should be answered in the negative. The *Act* is an effort by Canada to use its s 91(24) jurisdiction to address harms arising from its own colonial actions. While Canada's colonial history yields few examples of Canada using this jurisdiction to protect and promote the well-being of First Nations, Inuit and Métis children and families, there is nothing in our Constitution or its architecture that prevents this. To the contrary: numerous constitutional and other legal principles firmly support Canada's use of its s 91(24) jurisdiction to pass the whole Act, including recognition of the inherent right to self-government and providing a framework for its exercise. This does not amount to a constitutional amendment but merely a further step in the long process of giving shape, through constitutional interpretation, to a right that forms part of our constitutional architecture. Consequently, the AGQ's third constitutional question, regarding whether the Court of Appeal was justified in affirming that s 35 includes self-government, should be answered in the affirmative.

9. The AGC's constitutional question, regarding whether ss 21 and 22(3) of the *Act* are *ultra vires*, should be answered in the negative. The Court of Appeal's conclusion that these provisions run afoul of our constitutional architecture ignores s 91(24)'s protective purpose, misinterprets recent jurisprudence from this Court and misconstrues Jordan's Principle's impact on constitutional interpretation in this case.

PART III – ARGUMENT

A. Historic and current harms that inform this Reference

10. The *Act* is an attempt by Canada to address long-standing harms that it and the provinces and their child welfare authorities, have caused to Indigenous children and families through their approaches to the constitutional division of powers over First Nations child and family services

that have been characterized by jurisdictional neglect. It is crucial for the Court to appreciate these harms in order to assess the *Act*'s constitutional validity. As noted by the TRC, "[h]istory plays an important role in reconciliation; to build for the future, Canadians must look to, and learn from, the past."[11] Indeed, this is the 'truth' in 'truth and reconciliation.'

1. Harms of the child welfare system on First Nations

11. Canada has a lengthy history of active involvement in First Nations child and family services. This history cannot be understood without recognizing the impact of Indian Residential Schools ("IRS"), which were devastating to First Nations peoples in Canada and a precursor to the modern child and family services system for First Nations children. It also cannot be understood without recognizing the serious service gaps facing First Nations children as a result of many decades of jurisdictional delay. Both of these factors led to the historic orders of the CHRT, which are the precursor to the legislation under review on this appeal.

i. Indian Residential Schools and mass removals of First Nations children

12. The IRS system operated in Canada from 1879 to 1996.[12] Canada played a central role in the administration and funding of Indian Residential Schools, including by creating the legal foundation for the forcible taking of First Nations children from their families for placement in these schools. For instance, in 1895, Canada enacted regulations pursuant to the *Indian Act* that authorized the removal of any child between the age of 6 and 16 who was "not being properly cared for or educated" and whose parent was "unfit or unwilling to provide for the child's education."[13]

13. Gaps in services to First Nations, including services for children and families, were noted as early as 1946-48, when a Special Joint Committee of the Senate and House of Commons examined the *Indian Act*.[14] The Joint Committee urged provinces to increase their involvement in

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[11] *TRC Report Summary*, *supra* note 1 at 8, **AGC-CAR, Vol 14, p 5032**.

[12] Blackstock Affidavit at para 19, **CS-CAR, Vol 1, p 5**. For a description of the harms of the Residential School system, see *First Nations Child and Family Caring Society v Attorney General of Canada*, 2016 CHRT 2 at paras 405-427 [*Caring Society*].

[13] Blackstock Affidavit, Ex CB-14, **CS-CAR, Vol 4, pp 862-65**.

[14] See Fourth Report of the Joint Committee of the Senate and House of Commons appointed to continue and complete the examination of the Indian Act and amendments thereto (1947-1948), Affidavit of Dennie Michielsen, Ex DM-3, **Makivik Corporation's Court of Appeal Record, Vol 1, p 295.**

providing services to "Indian" peoples to fill gaps resulting from disruptions to traditional patterns of community care, which are now understood to have been caused by colonial policies like reserve creation, displacement of populations towards urban centres, IRSs, and Canada's unwillingness to provide welfare services before and after World War Two.[15] Such service gaps were again noted by a second Joint Committee examining the *Indian Act* in 1959-61.[16]

14. Canada chose to exercise its jurisdiction under s 91(24) by amending the *Indian Act* to include s 87 (now s 88) in 1951, incorporating by reference provincial legislation of general application to apply to "Indians." Canada's reliance on provincial legislation has been characterized as an attempt to unilaterally delegate responsibility over social programs, including child and family services, to the provinces.[17]

15. As the CHRT found in *First Nations Child and Family Caring Society v Attorney General of Canada*, discussed further below, through the 1950s to mid-1960s, the provinces were reluctant to provide child and family services on-reserve pursuant to s 88 of the *Indian Act*, both because of the costs of doing so and because of federal jurisdiction under s 91(24).[18] This provincial disengagement, combined with Canada's own inaction, led to a profound gap between the quality and quantity of services available on- and off-reserve. A patchwork picture emerged in the 1960s through the 1980s where "some provinces only provided services if they were compensated by the federal government and only in life-and-death situations."[19] The patchwork of services resulting from this jurisdictional neglect produced a common outcome: the mass removal of First Nations children from their homes, known as the "Sixties Scoop". The impact of this large-scale removal of First Nations children was "horrendous, destructive, devastating and tragic", and in 2017, Canada was found liable in tort to Sixties Scoop survivors in Ontario.[20]

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[15] Blackstock Affidavit at para 21, **CS-CAR, Vol 1, pp 5-6**.
[16] Blackstock Affidavit at para 24, **CS-CAR, Vol 1, p 6**.
[17] See Metallic 2018, *supra* note 4 at 9-10.
[18] *Caring Society*, *supra* note 12 at para 48; see also Metallic 2018 *ibid*.
[19] First Nations Child and Family Services Joint National Policy Review, *Final Report* (June 2020) (Blackstock Affidavit, Ex CB-3**, CS-CAR, Vol 1, p 100**); see also *Caring Society*, *supra* note 12 at paras 48, 217-253.
[20] See *Brown v Canada (Attorney General)*, 2017 ONSC 251 at para 7. See also The Sixties Scoop Healing Foundation, National Survivor Engagement Report (Blackstock Affidavit, Ex CB-31, **CS-CAR, Vol 10, pp 2674-2733**); and *Caring Society*, supra note 12 at paras 218, 237, 242.

16. Denial of services based on jurisdictional wrangling was also a feature of this period. This resulted in IRSs increasingly serving as child welfare placements.[21] For example, the 1967 Caldwell report, commissioned by Indian Affairs, studying a sample of residential schools in Saskatchewan, found that 80% of children were placed there for child welfare reasons. The report noted that provincial child welfare services were unavailable to First Nations families, despite the application of child welfare legislation to them:

> While provincial child welfare services supposedly are non-discriminatory, in reality they are not available to the Indians of Saskatchewan. The reasons for this seem to go back into history when the prevalent attitude in the [Indian Affairs] Branch, readily accepted by the province, was that the Indian is the exclusive responsibility of the federal government. This approach has been challenged and the legal rights of Indians under provincial law is spelled out in Section 87 of the *Indian Act* – R.S.C. 1952 [now s. 88].
>
> However, officials of both the Branch and the provincial department […] agree that at present there is only minimal service provided to Indian families and children. Indeed, it is felt that it would require a massive investment of staff and funds to provide adequate service.[22]

17. The report noted that "[t]he Indian family, like any other, should have available to it the best system of family and child welfare service that a modern state can provide."[23] It called on Canada to invest more funding for services to prevent residential school placements and, where necessary, to support the "Indian" community to provide alternative care for the child.

18. In the 1970s and early 1980s, First Nations voiced concerns about services that were either lacking or utterly inappropriate.[24] As the CHRT noted, "the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities."[25] As a result, Canada began funding *ad hoc* community-specific arrangements in which First Nations agencies took over child and family services, with unclear and inconsistent federal funding. In 1986, Canada put a moratorium on these *ad hoc* arrangements. No new agencies

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[21] *Caring Society*, *supra* note 12 at paras 413-14; see also Transcript of Dr. John S. Milloy's evidence before the CHRT, Blackstock Affidavit, Ex CB-18A, **CS-CAR, Vol 5, pp 1123-25**.
[22] George Caldwell, "Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan" (1967), Blackstock Affidavit, Ex CB-16, **CS-CAR, Vol 4, pp 950-51** ["Caldwell Report"].
[23] *Ibid*, Blackstock Affidavit, Ex CB-16, **CS-CAR, Vol 4, p 953**.
[24] Blackstock Affidavit, para 27, **CS-CAR, Vol 1, p 7**.
[25] *Caring Society*, *supra* note 12 at para 50.

were created until Canada unilaterally created the First Nations Child and Family Services Program ("FNCFS Program") under Directive 20-1 in 1991, which required on-reserve FNCFS Agencies to operate pursuant to provincial child welfare laws, with federal funding. The creation of the FNCFS Program spurred the establishment of over 100 FNCFS Agencies across Canada, intended to provide more culturally appropriate child welfare services to First Nations children living on-reserve.[26] It quickly became apparent, however, that the funding formula under Directive 20-1 was entirely inadequate to provide preventative and culturally appropriate services.[27] The formula did not provide funding comparable to the range of child welfare services funded in the province, and often resulted in situations where children were apprehended because alternative services could not be funded under Directive 20-1.[28]

19. While provinces began providing more expansive services starting in the 1990s, the chronic underfunding of FNCFS Agencies with the imposition of culturally inappropriate provincial standards on First Nations resulted in further mass removals that have extended into the 21st century. These removals are known as the "Millennial Scoop."[29] Indeed, taking Quebec as an example, as recently as 2019, the Viens Commission noted 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. Even worse, many believe the youth protection system perpetuates the negative effects of the residential school system, in that it removes a significant number of children from their families and communities each year to place them with non-Indigenous foster families.[30]

20. This history illustrates that Canada has been an active agent in the field of child and family services for First Nations children for many decades. Indeed, Canada's conduct has done an

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[26] Blackstock Affidavit at paras 27-28, **CS-CAR, Vol 1, p 7**.
[27] See Transcript of Dr. Blackstock's evidence before the CHRT, Blackstock Affidavit, Ex CB-32A **CS-CAR, Vol 10, pp 2853-67**; and Transcript of Elizabeth Kennedy's evidence before the CHRT, Blackstock Affidavit, Ex CB-33, **CS-CAR, Vol 12, pp 3314-15, 3319-24, 3376-77**.
[28] See *Caring Society*, *supra* note 12 at paras 124–45, 153, 157–58, 163–68, 171, 181, 187, 189, 197–98, 307–15, 344–48, 383–85, 388–91, 393–94, 425 and 458.
[29] See Peter W. Choate, "The Call to Decolonise: Social Work's Challenge for Working with Indigenous Peoples" (2019) 49 British J Social Work 1081 at 1094.
[30] Viens Commission Report, Expert Report of Christiane Guay, Ex 2, **AGC-CAR, Vol 11, p 4079**. See also: Paul Joffe, *Supporting Indigenous Peoples' Human Rights – Especially Children* (August 25, 2022), online: ABlawg (University of Calgary Faculty of Law Blog).

enormous amount of harm to First Nations children, families and communities and the provinces have done little to meaningfully remediate that harm.

ii. Jordan's Principle attempts to close service gaps faced by First Nations children

21. The long trend of jurisdictional neglect described above, and its devastating impacts for First Nations children, led to the development of Jordan's Principle, which the Court of Appeal found has been enshrined, at least in some respects, in s 9(3)(e) of the *Act*.[31] Jordan's Principle is a legal and human rights principle, named in honour of Jordan River Anderson. Jordan was a Cree boy, born with multiple disabilities, who died at the age of five, without ever being able to live outside of the hospital, in a family home. He remained in hospital after his doctors said he was medically able to leave because Canada and Manitoba squabbled for two years over who would be responsible for paying for his care once he was discharged. Jordan's Principle requires that First Nations children have access to substantively equal public services. Accordingly, the first government contacted must provide the service to meet the standard of substantive equality and seek reimbursement from the other level of government, if needed, after the child has received the service.[32] The House of Commons unanimously adopted a motion endorsing Jordan's Principle on December 12, 2007.[33] With the adoption of this motion, Canada undertook to implement Jordan's Principle, although its early approach only entrenched the discrimination Jordan's Principle was intended to ameliorate.[34] Many provincial governments subsequently endorsed Jordan's Principle, albeit to differing standards.[35] For its part, Quebec has not adopted Jordan's Principle, arguing in correspondence in 2009 that it was not needed in Quebec.[36]

22. Jordan's Principle, which the Court of Appeal described as "unanimously accepted,"[37] binds both Canada and the provinces. The *Pictou Landing* and CHRT decisions affirm Jordan's

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[31] QCCA Decision, *supra* note 7 at para 226.
[32] Blackstock Affidavit at para 60, **CS-CAR, Vol 1, p 13**; see also *Pictou Landing Band Council v Canada (Attorney General),* 2013 FC 342 at paras 18, 106; and *Malone v Canada (Attorney General),* 2021 FC 127 at para 8.
[33] Blackstock Affidavit at para 63, **CS-CAR, Vol 1, p 14;** see also QCCA Decision, *supra* note 7 at paras 167-173.
[34] On this, see *Caring Society, supra* note 12 at paras 380-391.
[35] Blackstock Affidavit at paras 64-69, **CS-CAR, Vol 1 pp 14-15**.
[36] Blackstock Affidavit at para 70, **CS-CAR, Vol 1, p 15;** letter from Pierre Laflamme to Jessie-Lane Metz dated June 16, 2009, Blackstock Affidavit, Ex CB-44, **CS-CAR, Vol 12, p 3505**.
[37] QCCA Decision, *supra* note 7 at para 23.

Principle as a "fundamental guarantee for equality in the provision of services to First Nations children."[38]

iii. The CHRT orders are part of the context leading to the Act's passage

23. The neglect described above is not just a matter of history. On January 26, 2016, after nine years of litigation, the CHRT released the *Caring Society* decision, holding that Canada discriminates against First Nations children in the provision of child and family services on-reserve by knowingly underfunding FNCFS Agencies and via its failure to properly implement Jordan's Principle. Nearly two dozen non-compliance and procedural orders have followed in this proceeding, which is ongoing.[39]

24. *Caring Society*, and the many remedial orders the CHRT has since issued, illustrate how little has changed since the Caldwell Report was commissioned in 1967. Provinces continue to deny robust responsibility over First Nations child welfare services. On this, the CHRT found that "[t]he activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon" and that the federal FNCFS Program is integral to filling this gap.[40] This demonstrates that provincial child and family services remain inadequate for, and largely unavailable to, First Nations children.

25. *Caring Society* also illustrates that Canada's involvement in child and family services is both necessary, yet inadequate. The CHRT made two key findings in this respect.

26. First, the CHRT held that Canada's involvement shapes the services provided to First Nations children through provinces/territories and FNCFS Agencies, such that federal involvement determines "whether and to what extent" these services are provided to First Nations on reserves and in the Yukon.[41] Although Canada's involvement occurs through tripartite and bilateral

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[38] See *Pictou Landing*, *supra* note 32 at 96-97; *Caring Society, supra* note 12 at paras 351-364, 374 and 391; see also Colleen Sheppard, "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 26:4 Constitutional Forum constitutionnel 3 at 4 [Sheppard].

[39] 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35, 2018 CHRT 4, 2019 CHRT 1, 2019 CHRT 7, 2019 CHRT 39, 2020 CHRT 7, 2020 CHRT 15, 2020 CHRT 20, 2020 CHRT 24, 2020 CHRT 36, 2021 CHRT 6, 2021 CHRT 7, 2021 CHRT 12, 2021 CHRT 41, 2022 CHRT 8.

[40] *Caring Society*, *supra* note 12 at para 59.

[41] *Ibid* at paras 66 and 71.

programs and agreements, "at the end of the day it is AANDC [Aboriginal Affairs and Northern Development Canada]'s involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard."[42] Canada's funding and policy decisions have very real consequences for the availability and quality of child and family services for First Nations children.

27. Ultimately, the CHRT found that Canada's actions in relation to First Nations child and family services fell within Canada's s 91(24) jurisdiction and were not merely an exercise of the federal spending power.[43] That Canada acted via a programing/funding approach, as opposed to legislation, did not change this conclusion:

> Instead of legislating in the area of child welfare on First Nations reserves, pursuant to […] section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities.[44]

In 2019, Canada finally acknowledged its responsibility over Indigenous child and family services in its *Department of Indigenous Services Act*.[45]

28. Second, the CHRT found serious problems with Canada's approach to First Nations child and family services, and that these problems directly contributed to the large numbers of First Nations children entering and staying in care. The CHRT found that Canada's funding formula drastically underfunded First Nations child and family services on-reserve, particularly for early intervention and prevention services, and that Canada's funding formulae "are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care."[46] These adverse impacts are a direct result of Canada's control over child and family services on reserves.

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[42] *Ibid* at para 73 (emphasis added).
[43] *Ibid* at paras 34, 78.
[44] *Ibid* at para 83 (emphasis added).
[45] *Department of Indigenous Services Act*, SC 2019, c 29, s 336 at s6(2)(a).
[46] *Caring Society, supra* note 12 at para 349.

29. *Caring Society* demonstrates that Canada taking an active role in First Nations child and family services is not an aberration, nor is it a recent development. It flows from Canada's role in the IRS system, which transitioned into a surrogate (and inadequate) child protection system for First Nations children, and from Canada's flawed approach to funding First Nations child and family services ever since.

30. Present-day child and family services for First Nations children, youth, and families cannot be separated from the legacy of Indian Residential Schools.[47] As the CHRT noted, Canada's FNCFS Program has focused on bringing First Nations children into care, perpetuating the harms and intergenerational trauma caused by Indian Residential Schools.[48] The CHRT observed that "[s]imilar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces."[49] The mechanism has changed, but the removal of children continues.

31. Two clear principles emerge from the CHRT's decision. First, systems that perpetuate historic disadvantage and assimilation endured by First Nations peoples are discriminatory and have no place in Canada.[50] Second, First Nations children and families have a legal right to substantive equality, respect and celebration of difference, and recognition that all human beings are equally deserving of concern, respect, and consideration.[51] The CHRT held that mirroring

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[47] See Transcript of Dr. Milloy's evidence before the CHRT, Blackstock Affidavit, Ex CB-18A, **CS-CAR, Vol 5, pp 1308-09**.

[48] *Caring Society*, *supra* note 12 at para 422. See also Expert report of Dr. Amy Bombay submitted to the CHRT, Blackstock Affidavit, Ex CB-20, **CS-CAR, Vol 7, p 1758-77**; and Transcript of Dr. Bombay's evidence before the CHRT, Blackstock Affidavit, Ex CB-21A, **CS-CAR, Vol 8, pp 1864-99**.

[49] *Caring Society*, *ibid* at para 426 (emphasis added).

[50] Metallic 2018, *supra* note 4 at 30.

[51] See *Caring Society, supra* note 12 at paras 319-328, 399, 455 and 465; and Metallic 2018, *ibid* at 31-35. See: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171; *R v Beaulac*, [1999] 1 SCR 768 at paras 22–24; *R v Kapp*, 2008 SCC 41 at paras 15–16; and *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 30-52. In *Ewert v Canada*, 2018 SCC 30 at para 54 (a case concerning corrections services to Indigenous peoples) the Supreme Court of Canada held that

provincial and territorial funding (a standard the CHRT found Canada failed to meet) is inconsistent with substantive equality as it does not consider "the distinct needs and circumstances of First Nations children and families living on reserve, including their cultural, historical and geographical needs and circumstances."[52] According to the CHRT, substantive equality requires that both funding and services meet the actual needs of First Nations children and families and be culturally appropriate.

iv. Legislative neglect exacerbates this humanitarian crisis

32. *Caring Society* illustrates that Canada has a long history of getting First Nations child and family services wrong, falling far short of the legal standard of substantive equality. While Canada has repeatedly failed to live up to its responsibility under s 91(24), Canada's involvement is – and always has been – essential to the delivery of child and family services to First Nations families. The division of powers analysis must recognize Canada's central role. If Canada had the power to cause substantial harm in the past; it must have the power to remedy that harm in the present.

33. Parliament has repeatedly been called on to legislate in this area.[53] Since 1994, the Auditor General of Canada has raised concerns about the lack of legislative frameworks for program delivery on reserve, including the fact that these gaps create confusion and uncertainty around responsibility for funding, undermines Parliamentary control and accountability, and hinders improvements in living conditions on reserve.[54] Commentators have also long called for reform,

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it is a "long-standing principle of Canadian law that substantive equality requires more than simply equal treatment."

[52] *Caring Society*, *supra* note 12 at para 465. For a description of these greater needs in Quebec, see for example Transcript of Sylvain Plouffe's evidence before the CHRT, Blackstock Affidavit, Ex CB-25, **CS-CAR, Vol 9, pp 2475-83**.

[53] See John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 474 [Borrows, "Legislation"] at 486-497; Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28:1 J L & Soc Pol'y 132.

[54] *1994 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-10, **CS-CAR, Vol 3, p 746;** *2006 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-11, **CS-**

arguing that the substance of the federal government's approach, combined with the lack of legislative frameworks for essential service delivery on reserve, including in child welfare, is dysfunctional and exacerbates the poverty and intergenerational impacts of colonialism faced by First Nations people.[55] Some have also argued that these gaps violate the rule of law.[56] In 2015, the TRC called for the "federal government to enact Aboriginal child-welfare legislation that establishes national standards […] and includes principles that [a]ffirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies […]".[57] Indeed, the evidence before the CHRT was that Canada itself recognized that the lack of a legislative base for its actions was an obstacle to reform.[58]

v. In addition to being an inherent right, self-government is a vital tool for responding to this humanitarian crisis

34. It is important for the Court to appreciate that the *Act*'s recognition of self-government by Indigenous governing bodies is a necessary response to the crisis Canada created. This recognition is not just an abstraction; it will further the well-being of First Nations, Inuit and Métis children and families. The *Act*'s approach to self-government has real consequences for First Nations children and families. In *Caring Society*, the CHRT emphasized how community-driven services are key to achieving meaningful change:

> The purpose of having a First Nation community deliver child and family services [...] is to ensure services are culturally appropriate and reflect the needs of the community. <u>This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and</u>

CAR, Vol 3, p 771; *2008 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-8, **CS-CAR, Vol 3, p 650;** *2011 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-9, **CS-CAR, Vol 3, p 691.**

[55] See Judith Rae, "Program Delivery Devolution: A Stepping Stone of Quagmire for First Nations?" (2009) 7 (2) Indigenous LJ 1.

[56] Janna Promislow and Naiomi Metallic, "Realizing Administrative Aboriginal Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017) ["Promislow & Metallic 2017"] at 101-108; Borrows, "Legislation," *supra* note 53 at 484-485; and Metallic 2018, *supra* 4, at 16-19.

[57] *TRC Report Summary*, *supra* note 1 at 143-44, **AGC-CAR, Vol 14, pp 5165-6**.

[58] Aboriginal Affairs and Northern Development Canada, "FNCFS: The Way Forward" (2012), Blackstock Affidavit, Ex CB-28, **CS-CAR, Vol 10, p 2607**.

communities that have been heavily affected by the Residential Schools system and other historical trauma.[59]

35. The CHRT found that to meet substantive equality, funding and services must meet the actual needs of First Nations children and families and not be assimilative.[60] A corollary to this is that First Nations must exercise meaningful control over the design and delivery of child welfare as a matter of human rights law. In other words, *Caring Society* implicitly frames the exercise of self-government by First Nations, Inuit, and Métis peoples as a matter of substantive equality and human rights.[61]

36. This approach should be understood to require more than simply having provincial or territorial governments accommodate First Nations, Inuit, and Métis peoples within their laws. Although this Court commended such an approach over a decade ago in *NIL/TU,O*,[62] what has clearly come to light in the subsequent decade is that such an approach to child and family services has led to a patchwork of laws across the country, with some Indigenous groups receiving much less protection than others.[63] More importantly, this approach continues control by a non-Indigenous government, which is assimilative in principle. This reinforces the *status quo*, in which, much like under the IRS, "the fate and future of many First Nations children is still being determined by the government."[64]

37. Very few Indigenous groups in Canada have been able to exercise meaningful self-government in relation to child and family services despite the existence of processes, namely the negotiation of self-government through the Inherent Rights Policy or, alternatively, through an Aboriginal right to self-government claim via *Van der Peet* and *Pamajewon*.[65] This is because

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[59] *Caring Society*, *supra* note 12 at para. 426.
[60] *Ibid* at paras 425, 344, 336 and 388.
[61] See Metallic 2018, *supra* note 4. See also Sheppard, *supra* note 38.
[62] *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 at para 44.
[63] See Metallic 2018, *supra* note 4 at 13-14 and Appendix B.
[64] *Caring Society*, *supra* note 12 at para 426.
[65] Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Ottawa, 1995, at QMP-46 Federal Policy Guide, **Attorney General of Quebec's Court of Appeal Record ("AGQ-CAR"), vol 5, p 1543** [Inherent Right Policy]; *R. v Van der Peet,* [1996] 2 SCR 507; and *R. v Pamajewon*, [1996] 2 SCR 821.

access to such avenues for change have been plagued by problems that render them largely illusory for most Indigenous groups in Canada.

2. The existing rights recognition processes have not addressed this humanitarian crisis

38. The *Act*'s recognition of self-government and provision of a framework for its exercise responds to an important practical need of many Indigenous groups in Canada for an accessible mechanism to implement self-government. This is because the existing alternative avenues of negotiating a self-government agreement or initiating constitutional litigation suffer from several challenges. These challenges echo the ones that have led to this humanitarian crisis, including jurisdictional wrangling and neglect, delays and denials, piecemeal and patchwork solutions, and lack of a legislative framework to provide guidance and accountability. The time and costs of accessing these avenues also present substantial barriers.

39. The TRC Final Report said that s 35 cannot be a vehicle for achieving meaningful reconciliation if it continues to be used as a "means to subjugate Aboriginal peoples to an absolutely sovereign Crown."[66] A key failure in this regard, emphasized by the TRC, has been the reluctance of governments and courts to appropriately recognize and respect Indigenous peoples' jurisdiction and laws.[67] Some scholars have characterized the failure of s 35 to create meaningful reconciliation as a constitutional crisis.[68]

i. Negotiations have not proved sufficient to provide a meaningful means of implementing self-government

40. Tripartite negotiations have not proved a sufficient means to ensure meaningful implementation of the right to self-government. Indeed, although the Inherent Right Policy ("IRP"), which until recently has been the primary federal means of implementing the right to self-government, clearly contemplates self-government over "adoption and child welfare," it has resulted in very few agreements on the subject.[69] For example, the Court of Appeal specifically

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[66] *TRC Report Summary*, *supra* note 1 at 203, **AGC-CAR, Vol 14, p 5225**.
[67] *Ibid* at 202-207, **AGC-CAR, Vol 14, pp 5224-5229**.**Error! Bookmark not defined.**
[68] Robert Hamilton and Joshua Nichols, (2021) "Reconciliation and the Straightjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*," 52:2 Ottawa LR 205 at 240.
[69] *Inherent Right Policy*, *supra* note 65, **AGQ-CAR, vol 5, p 1543**.

identified only four out of eight (pre-*Act*) agreements that include self-government over child protection matters.[70]

41. While some Indigenous groups may have sufficient leverage to bring the federal and provincial governments to the table, the IRP process has been critiqued as having "resulted in remarkably few agreements over the years."[71] Reasons for this include that the process does not allow for the unilateral exercise of self-government even in 'core'/internal areas of jurisdiction but instead requires a 'piecemeal' process whereby talks must be initiated by individual Indigenous groups and negotiated on a group-by-group basis.[72] The vast majority of negotiations take over 15 years to conclude, and cost millions.[73] Further, the negotiation process provides broad discretion to the federal and provincial governments to engage (or not) with Nations seeking self-government,[74] depending on political will. Particularly because the process is not legislated, Indigenous groups have no mechanism to challenge government reluctance to negotiate, nor are there any oversight mechanisms for this process to challenge delay, denials, or unreasonable positions.[75] Some scholars have flagged this as a rule of law problem.[76] Others have highlighted the steep power imbalances Indigenous groups face in the IRP process.[77]

42. Interjurisdictional wrangling between the federal and provincial governments can also impact negotiations. George Erasmus, a former National Chief of the Assembly of First Nations, explains that federal negotiators use provincial intransigence as a bargaining strategy: "[t]he policy is seen by First Nations as an effort to set up a good guy-bad guy scenario, where the provinces

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[70] QCCA Decision, *supra* note 7 at Appendix B (Tsawwassen, Maa-nulth, Déline and Labrador Inuit).

[71] Promislow & Metallic 2017, *supra* note 56 at 115; see also Naiomi Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" in Karen Drake & Brenda L Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) ["Ending Piecemeal"] at 254.

[72] Metallic "Ending Piecemeal", *ibid* at 253.

[73] *Ibid* at 256.

[74] *Ibid* at 255.

[75] Promislow & Metallic 2017, *supra* note 56, at 115.

[76] *Ibid* at 112.

[77] See Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claim Agreements?" (2006) 22 WRLSI 29 at 69–70; Hamilton and Nichols, *supra* note 68 at 240-242; Metallic, "Ending Piecemeal", *supra* note 71 at 254-257.

play the bad guy … with the federal government as the good guy encouraging First Nations to take what they can get because of the regressive provincial stand."[78] Further, the IRP's general requirement of tripartite negotiations means that the unwillingness of a province to participate can doom negotiations from the outset.

ii. Constitutional litigation has also not proved sufficient to provide a meaningful means of implementing self-government

43. This Court's existing jurisprudence on self-government has stymied the recognition of the inherent right to self-government.

44. Critiques of the appropriateness and effectiveness of the *Pamajewon* / *Van der Peet* test to prove a right to self-government are legion.[79] The test has been criticized as far too restrictive. On this, Peter Hogg and Wade Wright state, "[t]hese [*Van der Peet*] restrictions are very severe even for rights to hunt and fish, but they are singularly inappropriate for the right of self-government."[80] Kent McNeil has argued that *Pamajewon* fails to "permit Aboriginal nations to govern themselves in the modern world in accordance with their current needs and priorities" and its requirement to prove every aspect of jurisdiction separately "places an impractical burden of proof and

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[78] George Erasmus, "Introduction" in Boyce Richardson, ed., Drum Beat – Anger and Renewal in Indian Country", (Summerhill Press – The Assembly of First Nations: Toronto, 1989) at 17.

[79] See e.g.: John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," (1997), 22:1 Am Ind LR 37 at 47-48, 53-54; Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997), 42 McGill LJ 1011 at 1015–18, 1030–37, 1040–42; Mark D Walters, "The Golden Thread of Continuity: Aboriginal Customs at Common Law and under the Constitution Act, 1982" (1999) 44:3 McGill LJ 711 at 736–38, 740–52; Peter Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill L.J. 607 at 656–62; Dalton, *supra* note 77 at 54–55, 75–78; Kent McNeil & David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 SCLR 177 at 20-21, 24; Karen Drake, "*R v Pamajewon*" in Kent McNeil & Naiomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence* (Special Collection of Canadian Native Law Reporter, Indigenous Law Centre, Saskatchewan, 2021) [*Judicial Tales Retold*] 73; Mark Walters, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada," Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law - Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) 21 at 47-49.

[80] Peter Hogg and Wade Wright, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters Canada, 2020) ch 28 at ss 28:20.

unreasonable costs upon them."[81] John Borrows puts in stark terms what can be at stake for an Indigenous group in self-government litigation. Using the example of a First Nation seeking to address domestic violence in its community, he emphasizes that *Van der Peet* requires a First Nation to provide "evidence that violence against women, its prevention, and the punishment of people who engage in it" was integral to its distinctive pre-contact culture of the group, such that the First Nation "would thus find itself spending millions of dollars on experts and legal fees to shame themselves before the courts with such evidence."[82]

45. No Indigenous group has been able to successfully prove a right to self-government in the quarter-century since *Pamajewon*, in any area, let alone child welfare, though only a handful have dared to try.[83] Some authors have directly tied this lack of meaningful advancement on self-government to First Nation peoples' pervasive lower standing in socio-economic, health and well-being indicators in Canada.[84]

46. The *Pamajewon* test also creates a major disincentive for federal and provincial recognition of self-government. For example, Kerry Wilkins, a former federal Department of Justice lawyer, explains that without recognition of 'Indigenous peoples' jurisdiction in legislation, many of his colleagues are reticent to accept that s 35 provides a sufficiently firm legal foundation for inherent rights, and counsel their client against executive initiatives supporting the exercise of greater Indigenous control unless clearly authorized by a statute.[85]

47. The Court of Appeal's decision charts a new path forward, where Indigenous self-government is recognized as a reality and the federal and provincial governments are encouraged to recognize, respect, and accommodate this right through legislative action. In the more than

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[81] Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (Research Paper for the National Center for First Nations Governance, 11 October 2007) at 13–14 [McNeil, "Inherent Right Aboriginal Governments"].
[82] John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50 Osgoode Hall Law Journal 699 at 723-725.
[83] See *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; *Acadia First Nation v Canada (National Revenue)*, 2007 FC 259, aff'd 2008 FCA 119; *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306.
[84] Rae, *supra* note 55 at 4-6; Metallic 2018, *supra* note 4 at 21-22, 26-28.
[85] Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27 at 46-49.

twenty-five years since *Pamajewon*, this Court has signalled in a few different ways that its approach to self-government may be changing. This includes the Court stating more clearly that s 35 includes reconciliation with pre-existing Indigenous sovereignty,[86] recognizing alternative ways for self-government to be proven as collective rights,[87] and as common law Aboriginal rights.[88] Some scholars also suggested that departing from *Pamajewon* would meet the *Bedford/Carter* test for overturning precedent.[89]

iii. Self-government recognition legislation is a legitimate tool to address the humanitarian crisis

48. It is doubtful Parliament would have felt compelled to pass the *Act* without the crisis of Indigenous child overrepresentation in the child welfare system, which has been brought to public attention by the TRC and the *Caring Society* decision. The urgency of addressing the crisis in Indigenous child welfare in a meaningful way both explains the reason for this legislation and justifies Parliament seeking new and more effective ways to recognize and implement self-government, especially when, as noted by this Court in *Daniels*, reconciliation with all Aboriginal people is Parliament's goal. The *Act* is also passed in the spirit of a legally pluralistic recognition paradigm that, as noted by Justice Sebastien Grammond, nonetheless involves a significant role for state institutions:

> State institutions retain a significant role under [the rights recognition] model. Decisions have to be made as to which Indigenous laws should be recognized, how the contents of these laws can be conveyed to non-Indigenous legal actors, who will be subject to these laws and whether Indigenous laws or legal decisions will be subject to some form of review. These choices may be the result of legislation, agreement or judicial decision.[90]

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[86] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20; *R. v Desautel*, 2021 SCC 17 at para 22.

[87] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115; *R. v Marshall*, [1999] 3 SCR 533 at para 17; *R. v Sappier*; *R. v Gray,* 2006 SCC 54 at para 26; *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 75. See also McNeil, "Inherent Right Aboriginal Governments," *supra* note 81 at 15-19; and Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework," (2022) 100:1 Can Bar Rev 1 at 18.

[88] *Desautel*, *supra* note 86 at paras 67-70. See also Walters, "Golden Thread," *supra* note 79; and McNeil and Yarrow, *supra* note 79.

[89] See Karen Drake, *supra* note 79 at paras 20-22; Kent McNeil, "The Inherent Indigenous Right of Self-Government," (4 May 2022), *ABlawg*.

[90] Grammond, *supra* note 87 at 14-15.

49. While self-government recognition legislation is 'new' for Canada, this is not a new phenomenon. The United States has a history of passing recognition legislation dating back to the late 1960s and has since passed over forty significant pieces of legislation addressing US tribes' right to self-govern.[91] Notably, the US counterpart to the *Act*, the *Indian Child Welfare Act* ("*ICWA*"), was passed over 40 years ago in 1976. At the time of its passage, state government agencies removed 25-35% of all Indian children from their families. By 2005, Indian children represented only approximately 3% of children in care, illustrating the effectiveness of such legislation in addressing Indigenous overrepresentation.[92]

50. Such legislation can address the problems of piecemeal recognition and protection by setting out national standards for Indigenous peoples' rights, recognizing self-government and setting out the parameters of its exercise that will be recognized by the state. Legislation can also set parameters for negotiations that provide a more level playing field for Indigenous parties and establish standards for funding and accountability (e.g., reporting, legislative review, and dispute resolution) that respond to long-standing rule of law concerns in the areas of Indigenous service delivery and inherent rights negotiation.

51. Legislation also permits Parliament to impose some limits on the exercise of Indigenous self-government, for example to require adherence to *Charter* and human rights norms (as in the case of the *Act*). As held by the Court of Appeal, however, such limits ought to be scrutinized under the justified infringement framework.[93] John Borrows has argued that Indigenous governments ought to voluntarily implement the *United Nations Declaration on the Rights of Indigenous Peoples* to "ensure that their own people are both empowered by and protected from their own

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[91] John Borrows, "Legislation," *supra* note 53 at 479, note 28. See also Vicaire, *supra* note 79.

[92] Borrows, "Legislation," *ibid* at 486-87, particularly footnotes 71 and 72. While *ICWA* has faced constitutional challenges in US courts, the Court of Appeal signalled these challenges were distinguishable in the Canadian constitutional context, see: QCCA decision, *supra* note 7 at para 297.

[93] QCCA Decision, *ibid* at paras 518, 520, 528-529. See also Naiomi Metallic, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments," online: (2022) 31.2 *Constitutional Forum* at 3.

governments."[94] The passing of such legislative frameworks are also faster than the negotiation or litigation process.

52. Recognition legislation for Canada was proposed as early as the Penner Report in 1983, which the P.E. Trudeau government attempted to implement,[95] and this proposal was revisited and expanded upon by the Royal Commission on Aboriginal Peoples in 1996.[96] A Senate bill also attempted to revive this concept in 2011.[97] More generally, on numerous occasions, this Court has encouraged governments to legislate how Aboriginal rights should be accommodated.[98] This Court's interpretation of s 35 "only lays down the constitutional minimums that governments must meet in their relations with aboriginal peoples with respect to aboriginal and treaty rights. Subject to constitutional constraints, governments may choose to go beyond the standard set by s. 35(1)."[99]

53. From the perspective of furthering meaningful reconciliation, legislation protecting and facilitating the rights and interests of Indigenous peoples, far from being aberrant and unconstitutional, is an indispensable and valid tool in Parliament's toolbox, the utilization of which is long overdue.

B. The *Act* is *intra vires* s 91(24) and in harmony with Canada's constitutional architecture and underlying constitutional principles

1. The longstanding "Pith and Substance" analysis is the correct analytical framework and caution must be taken with "Architecture" arguments

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[94] John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges," in *UNDRIP Implementation – Braiding International, Domestic and Indigenous Laws – Special Report*, (Waterloo: Centre for International Governance Innovation, 2017) 20 at 25.
[95] Bill C-52, An Act relating to self-government for Indian Nations, 2nd Sess, 32nd Parl, 1984 (first reading 27 June 1984) [Bill C-52] at **AGQ-CAR vol. 3, p 1088**.
[96] Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol 2 (Ottawa: Supply and Services Canada, 1996) at **AGC-CAR, vol. 16, p 6062ff**. For a summary, see Metallic "Ending Piecemeal", *supra* note 71 at 244.
[97] Bill S-212, *An Act providing for the recognition of self-governing First Nations in Canada*, 1st Sess, 41st Parl,2011-2012 (first reading, November 1, 2012).
[98] See *R. v Adams,* [1996] 3 SCR 101 at paras 53-54; *R. v Marshall,* [1999] 3 SCR 456 at para 64; *Haida, supra* note 86 at para 51; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55-65; and *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 21.
[99] *R. v Côté*, [1996] 3 SCR 139 at para 83.

54. The entire *Act* is *intra vires* Canada's s 91(24) power. No considerations relating to constitutional architecture or underlying principles should limit Parliament's ability to assist Indigenous children, youth and families in recovering from inter-generational trauma wrought by colonial policies and practices. To the contrary, legislation like the *Act* (even with its deficiencies) is an exercise of s 91(24) that aligns with the underlying constitutional principles of constitutionalism and the rule of law, democracy, federalism, protection of minorities, and the honour of the Crown, as well as the legal principles of reconciliation, substantive equality, and Jordan's Principle. Importantly, the *Act* revives s 91(24)'s purposes of recognition and protection, which have for too long lain dormant. As explained further below, if properly implemented, such exercises of federal jurisdiction reconnect Canada to a truer and more complete constitutional narrative, going back to early treaties, the Royal Proclamation of 1763, and the Treaty of Niagara.

55. A pith and substance analysis drives to a conclusion that the entire *Act* is valid under s 91(24). The Caring Society adopts the AGC's arguments in this regard.[100] The *Act* is fundamentally about promoting the possibility of Indigenous children growing up in their homes, families and communities. The novelty of recognition and reconciliation legislation does not justify departing from settled constitutional tests.

56. Arguments based on unwritten constitutional principles, architecture and other important legal principles and values are a significant feature of this appeal. Indeed, the AGQ's arguments to invalidate the *Act* draw heavily on the principle of federalism and how it shapes our constitutional architecture, especially following the Charlottetown Accord. The Court of Appeal's decision substantially disagrees with the AGQ, and employs, in part, an alternative vision of our constitutional architecture to find that Part 2's recognition of the inherent right of self-government over child welfare is not a unilateral constitutional amendment. However, the Court of Appeal then goes on to draw on concerns about constitutional architecture, informed by the unwritten principle of federalism, to invalidate ss 21 and 22(3) of the *Act*.

57. However, in *Toronto (City) v Ontario (Attorney General)*, a majority of this Court recently held that unwritten principles and architecture alone cannot be used as bases for invalidating legislation. Rather, the proper use of unwritten principles are as interpretive aids to textual

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[100] AGC Factum at paras 51-85, 93.

provisions of the Constitution or to fill gaps where the text is silent.[101] The Court of Appeal correctly applied this guidance to the AGQ's efforts to invalidate Part 1 of the *Act* based on federalism and democracy arguments, holding these arguments could not succeed.[102] However, the Court of Appeal's own reasoning invalidating ss 21 and 22(3) of the *Act* runs afoul of this Court's guidance in *Toronto (City)*. Beyond this, the relevant constitutional principles and architecture, properly understood, support upholding the entire *Act*.

2. *AGQ's constitutional architecture arguments do not withstand scrutiny*

i. *The failure to meet the needs of Indigenous children and families is not a defining feature of our constitutional order*

58. AGQ argues that the existing processes for the recognition and implementation of self-government—negotiation through the IRP and litigation via *Pamajewon*—have become embedded in our constitutional architecture, such that Canada cannot legislate in this regard as this would amount to a constitutional amendment.

59. First, there is a clear contradiction in the AGQ, on the one hand, relying on the existing avenues for self-government as part of its argument, and, on the other, stating there must be constitutional amendment for Indigenous self-government to exist in Canada's constitutional order. Despite their inadequacy (addressed above), these existing processes are evidence in themselves that self-government is already part of Canada's constitutional order.

60. Second, the AGQ builds this argument on this Court's reasons in *Reference re Secession* and the *Reference re Supreme Court Act*.[103] However, the element that the AGQ seeks to have frozen by our history—the status quo of the processes for the recognition and implementation of self-government—is very different in kind from what was found to form part of our constitutional architecture in those cases. The underlying constitutional principles found in *Reference re Secession* were elements this Court described as "impossible to conceive our constitutional structure without" and "its lifeblood."[104] Likewise, in *Reference re Supreme Court Act*, this Court

[101] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 48-56.
[102] QCCA Decision, *supra* note 7 at paras 350-351.
[103] *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21.
[104] *Reference re Secession of Quebec, ibid* at para 51.

was described as a "keystone to Canada's unified court system," "assumed a vital role as an institution," which "emerged as a constitutionally essential institution," and is "a foundational premise of the Constitution."[105]

61. The lack of legislation protecting Indigenous children and families' well-being, including recognition of their right to self-government in this area, is not a lauded part of our history worthy of foundational constitutional status. As described in detail above, the reason no such legislation existed until now can be directly tied to lack of political will, jurisdictional wrangling and neglect by Canada and the provinces.

62. The argument that this history has become a defining part of the Constitution is perverse. This history is incompatible with our underlying constitutional principles of constitutionalism (the Constitution (s 35) shaping how government behaves and what it does),[106] the rule of law (a positive set of laws setting out rights and frameworks for government accountability),[107] and the protection of minorities (government taking active steps to protect minorities who face an imbalance of political power).[108] The role that these unwritten principles take in a case such as this should also be shaped by the context, in particular the importance of rapid action for children, for whom time passes differently than for adults given their different, more accelerated, development. Children cannot wait as long as adults for reform, such that the "positive set of laws setting out rights" associated with the rule of law has a different and more urgent meaning for children than it does for adults.

ii. Past constitutional failures do not preclude an inherent right to self-government

63. AGQ's position that a failed constitutional amendment attempt forever fixes the meaning of a constitutional provision to exclude what the amendment sought to clarify is both absurd and contrary to clear authority. In *Reference re Employment Insurance Act (Can.), ss 22 and 23*, this Court stated, "[w]hile the debates or correspondence relating to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive as to the precise scope of the

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[105] *Reference re Supreme Court Act, supra* note 103 at paras 84, 85, 87, 89.
[106] Stephen Cornell, "Wolves Have A Constitution:" Continuities in Indigenous Self-Government" (2015) 6(1) Int'l Indigenous Policy Journal Article 8 at 2-3. See also *Reference re Secession of Quebec,* supra note 103 at paras 72 and 74.
[107] See *Reference re Secession of Quebec, ibid* at paras 70-71.
[108] *Ibid* at paras 79-82.

legislative competence."[109] This Court also implicitly rejected this argument in the *Reference re Supreme Court Act.*[110] Further, this Court has already interpreted ss 35 and 91(24) to include subjects that were previously subject to failed constitutional negotiations. For example, whether Aboriginal title was recognized by s 35 was a hotly contested issue in the constitutional conferences in the 1980s and was never further clarified by amendment.[111] Nonetheless, this Court confirmed that Aboriginal title was indeed part of the broad spectrum of Aboriginal rights recognized by s 35 in *Delgamuukw*, because Aboriginal title existed at common law.[112] Similarly, adding "Métis" to s 91(24) was contemplated by the Charlottetown Accord negotiations.[113] The failure of the Charlottetown Accord did not preclude this Court from confirming in *Daniels* that the Métis fall within the jurisdiction of s 91(24).[114]

64. Nor can Canada's history of legislative neglect of its responsibilities to Indigenous children, youth and families result in Canada losing jurisdiction under s 91(24). As long ago as 1899, the Privy Council confirmed in *Union Colliery v Bryden* that "[t]he abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867."[115]

iii. The Act aligns with both federalism and our constitutional architecture

65. AGQ relies on the underlying constitutional principle of federalism to attempt to constrain the scope of federal authority under s 91(24). While federalism is a vital underlying principle with a strong textual basis,[116] neither it, nor the corollary principle of cooperative federalism, should be

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[109] *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 9.
[110] *Supreme Court Act Reference, supra* note 103 at paras 96-101.
[111] Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien* (Carswell, Scarborough, 1999), p 128, **AGQ-CAR, vol 5, p 1757**.
[112] *Delgamuukw, supra* note 87 at 133-139.
[113] Canada, Privy Council, Consensus Report on the Constitution: Final Text, Catalogue No CP22-45/1992[E] (Charlottetown: PC, 28 August 1992), s 55.
[114] *Daniels*, *supra* note 5 at 22-46.
[115] *Union Colliery v Bryden*, [1899] A.C. 580 (P.C.) at 588, quoted with approval in *Natural Parents v Superintendent of Child Welfare,* [1976] 2 S.C.R. 751 at 759-760, Laskin C.J.C. (for the plurality) and in Bell 88, ibid. at 834. See also *Canadian Pioneer Management Ltd. v Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 at 440 per Laskin C.J.C.
[116] *Toronto (City), supra* note 101 at para 50-51.

given such force as to sterilize an exclusive head of federal power. As this Court stated in *Reference re Securities Act*, "notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea [...]."[117]

66. Further, AGQ narrowly construes the federalism principle, positioning the federal and provincial governments as the only legitimate orders of government based solely on the *Constitution Act, 1867* division of powers provisions. On this conception, federalism only involves balancing power between these two levels of government.

67. This conception of federalism does not align with the Court of Appeal's finding, with which the Caring Society agrees, that Indigenous peoples' self-government became part of our constitutional architecture through the historical relationship between Indigenous peoples and representatives of the British Crown, which established early treaties and the Royal Proclamation of 1763, and through the continued existence of Indigenous jurisdiction and laws at common law.[118]

68. This constitutional history is supported by a wide number of authorities, many of which the Court of Appeal canvassed.[119] For instance, in *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte*, Lord Denning described the Royal Proclamation as "equivalent to an entrenched provision in the Constitution of the colonies in North America."[120] While the Court of Appeal noted that "the autonomy of Aboriginal peoples is an implicit fact that underlies the *Royal Proclamation of 1763*,"[121] others have gone further and noted how the text of the Proclamation itself evidences the British Crown's view of Indigenous peoples as nations maintaining their rights to autonomy.[122] In particular, Mark Walters describes how, following the

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[117] *Reference re Securities Act*, 2011 SCC 66 at para 62. See also *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, paras 18-20.
[118] See QCCA, *supra* note 7 at paras 364-427 and 462-467.
[119] *Ibid* at 365-384.
[120] *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte*, [1981] 4 CNLR 86 (Royal Crts of Justice) at 5.
[121] QCCA Decision, *supra* note 7 at para 367.
[122] Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," (1984) 32 AM J Comp L at 361 at 370, 373. See also Bruce McIvor & Kate Gunn, "From Shield to Sword: Section 91(24)

Proclamation, the imperial Lords of Trade in England developed a bill to supplement the Proclamation's terms which, though never enacted by the British Parliament, recognized "that indigenous inhabitants had policies and laws that were to be acknowledged and accommodated within the territories over which the Crown asserted exclusive rights vis-à-vis other European states."[123] In another paper, Walters details how Indigenous laws were recognized under British imperial law and came to form part of common law of British North America, and later Canada.[124] John Borrows has written that the Royal Proclamation is part of a treaty between First Nations and the Crown, which stands as a positive guarantee of First Nation self-government.[125] The other part of the treaty is contained in an agreement ratified at Niagara in 1764 between the British and 24 Indigenous nations from across the continent. Within this treaty are found conditions that underpin the Proclamation, chiefly among them being a promise by the British to respect the internal sovereignty of the Indigenous nations. Kent McNeil describes how not only the British Crown, but the French Crown as well, entered into treaties with Indigenous nations that acknowledged their political independence.[126] All of these authorities support the conclusion that Indigenous self-government and laws are part of our constitutional architecture.

69. Acknowledging this narrative within our constitutional architecture permits Canada, as a country, to distance itself from the false, colonial narrative that has long dominated our constitutional law. The colonial narrative assumes that European nations gained title and sovereignty over the territory that is now Canada simply by 'discovering' it, and that following Confederation, the federal and provincial governments were the only legitimate orders of government. John Borrows has argued, "[i]f Canadian law flows from this view, it revolves around a loathsome core. Discrimination, coercion, and inequality lie at the roots of Canada's legal system

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and the Division of Powers" (Paper delivered at Canada 150: Constitutional Law Symposium, Edmonton, Alberta, 27 October 2017) [unpublished] at 2; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill LJ 30 at 314-315; Walters, "Promise and Paradox," *supra* note 79 at 25.

[123] Walters, "Promise and Paradox," *ibid* at 25.

[124] Walters, "The Golden Thread of Continuity," *supra* note 79 .

[125] John Borrows, "Wampum at Niagara: the Royal Proclamation, Canadian Legal History and Self-Government," in Michael Ash, ed., Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference (Vancouver; UBC Press, 1997) c6.

[126] Kent McNeil, "Shared Indigenous and Crown Sovereignty: Modifying the State Model," (2020 Osgoode Digital Commons, Articles & Book Chapters, 2815 at 2, 8-10.

under this view."[127] Borrows and several other Aboriginal law scholars argue that embracing Indigenous jurisdiction and laws as part of our constitutional foundations will place our future on a more just footing.[128]

70. There is no question that the AGQ is asking this Court to confirm the centrality of our darker, colonial narrative in this case.[129] By passing the *Act*, however, Parliament has chosen another story, and this Court should respect and confirm this choice. As noted in *Toronto (City) v Ontario*, the principles of democracy and constitutionalism strongly favour upholding the validity of legislation that conforms to the text of the Constitution.[130]

71. Accepting that self-government forms part of our constitutional architecture takes AGQ's constitutional amendment argument squarely out of play by making inescapable the conclusion that Indigenous self-government is already part of Canada's Constitution. On this view, the varying levels of recognition of Indigenous self-government by state actors and courts at different points in our history, including outright denial at times, can be seen as part of a centuries-long "process of interpretation that seeks to give shape and texture to an unwritten constitutional law of intercultural relations in Canada."[131] Constitutional interpretation does not amount to constitutional amendment.

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[127] John Borrows, "Canada's Colonial Constitution," in John Borrows & Michael Coyle, eds, *The Right Relationship – Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 18.

[128] *Ibid* at 17-38; McNeil, "Shared Indigenous and Crown Sovereignty," *supra* note 125; Hamilton and Nichols, *supra* note 68; Ryder, *supra* note 121.

[129] For example, see para 101 of AGQ's factum where it argues that Indigenous governing powers were extinguished by conquest and are, in general, incompatible with Crown sovereignty. However, this Court has already stated in *Haida*, *supra* note # at para 25, that "Aboriginal peoples were here when Europeans came, and were never conquered," and indicated that sovereign incompatibility (*if* a relevant doctrine) only affects Aboriginal rights in *very* limited circumstances (see *Mitchell v M.N.R.*, 2001 SCC 33 at paras 61-64 per McLachlin J and paras 141-173 per Binnie J).

[130] *Toronto*, *supra* note 101 at para 80.

[131] Walters, "Promise and Paradox," *supra* note 79 at 49-50. See also Jean Leclair, "Zeus, Metis and Athena. The Path towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders," (June 28, 2022), online: SSRN, at 7, 14.

72. The *Act* is thus supported not only on 'living tree' and constitutional evolution arguments, but foundational arguments about the beginnings of our country. In this way, Indigenous self-government is our past, present, and our future.

73. Further, with the recognition of self-government as part of our constitutional architecture, the narrow conception of federalism advanced by the AGQ must also give way to a conception of federalism that seeks to balance power not just among the federal and provincial governments, but Indigenous governments as well. This is in line with the purpose of federalism enunciated in *Reference re Secession* to respond "to the underlying political and cultural realities that existed at Confederation and continue to exist today."[132] The entire *Act* is line with this broader conception of federalism, including ss 21 and 22(3).

3. The Court of Appeals' reasons invalidating ss 21 and 22(3) do not withstand scrutiny

74. The Court of Appeal's reasons for invalidating ss 21 and 22(3) do not withstand careful scrutiny. In particular, we submit its reasons (i) ignore s 91(24)'s protective purpose, (ii) overreach on the implications of the SCC decisions in *Tsilhqot'in*, and *Grassy Narrows*; and (iii) misconstrue how Jordan's Principle informs this case.[133]

i. Missing the protective purpose behind s 91(24)

75. While the Court of Appeal has correctly interpreted the effect of British recognition of Indigenous self-government and laws through the Royal Proclamation and the impact of early treaties on our constitutional architecture, its telling of this part of our history is incomplete. British recognition of Indigenous jurisdiction and law is only half the story. In addition to, and along with, such recognition, the British Crown committed to protecting Indigenous rights from incursion by settlers and the colonies. This is made clear from the text of the Royal Proclamation itself,[134] as well as other early sources such as the Treaty of Niagara and other treaties.[135]

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[132] *Reference re Secession*, *supra* note 103 at para 43. See also Leclair, *ibid* at 3-4.
[133] *Tsilhqot'in*, *supra* note 87 and *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.
[134] See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42; and *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 66.
[135] Borrows, "Canada's Colonial Constitution," *supra* note 126 at 22-23.

76. At Confederation, the British Crown's commitment became a commitment by the federal government to protect Indigenous lands and interests from encroachments from local populations and their governments (i.e., the provinces). A report from the mid-1800s clearly evidences that the English House of Commons believed that provincial legislative assemblies were generally adverse to Indigenous peoples and would be tempted to run roughshod over Aboriginal rights.[136] This was the driving force behind s 91(24) of the *Constitution Act, 1867*. As noted by Hogg and Wright, "[t]he idea was that the more distant level of government—the federal government—would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians…, and generally to protect the Indians against the interests of local majorities.[137] This Court has already said that this commitment of protection animates the Honour of the Crown and, further, that it is underpinned, not by paternalism, but rather a spirit of mutual aid and alliance.[138]

77. The Court of Appeal did not consider s 91(24)'s protective purpose in relation to ss 21 and 22(3) of the *Act*. In fact, the Court of Appeal appears to have exclusively relied on the purpose of 91(24), discussed in *Daniels*, related to westward expansion and assimilation.[139] However, this Court did not say in *Daniels* that this was s 91(24)'s exclusive purpose. Indeed, that would contradict the Court's further statement in *Daniels* that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.[140] Further, to accept that s 91(24)'s purpose is only about

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[136] See Bruce McIvor and Kate Gunn, "Stepping Into Canada's Shoes: *Tshilhqot'in, Grassy Narrows* and the Division of Powers," (2016) 67 UNBLJ 146 at 147 quoting Great Britain, *Select Committee on Aborigines (British Settlement)* (House of Commons Parliamentary Papers no 425) (London : The Aborigines Protection Society, 1837).

[137] Hogg and Wright, *supra* note 80, ch 28:1. See also McIvor and Gunn, "Stepping Into Canada's Shoes" *ibid* at 147-148; McIvor and Gunn, "From Shield to Sword", *supra* note 121 at 2-4; Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tstilhqot'in* and *Grassy Narrows*," (2017) 55:1 Alta L Rev 3 91 at 95-97; Ryder, *supra* note at 362-364.

[138] *Manitoba Metis Federation*, *supra* note 133 at para 66; and *Wewaykum Indian Band v Canada,* [2003] 2 SCR 259 at para 79.

[139] QCCA Decision, *supra* note 7 at paras 549 and 564. Note, as well, that the QCCA's broader discussion of s 91(24) jurisdiction fails to ascribe specific purposes of s 91(24), but simply framed it as a plenary power: see para 325. Such a 'theory' of s 91(24) describes a power without providing a legal interpretation of it. Under this 'theory', s 91(24) is what Parliament has done, and there is no reflection on how the Royal Proclamation or treaties may shape that power.

[140] *Daniels, supra* note 5 at para 37.

territorial expansion and assimilation is to privilege the colonial constitutional narrative of Canada over a narrative that promotes reconciliation and is truer to our country's origins.

78. Thus, Parliament is empowered under s 91(24) to protect the interests of Indigenous peoples from potentially harmful action (or inaction) by the provinces (which is foreseeable here, as addressed below). It is difficult to conceive of a matter more directly tied to protection "against the interests of local majorities" than the ability to maximize the number of children and youth who may remain with their families and communities. Indeed, as the CHRT has held, "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence."[141] As a result, s 91(24) ought to include extending federal paramountcy protection to Indigenous laws.

ii. Overreaching on Tsilhqot'in and Grassy Narrows

79. The Court of Appeal was wrong to interpret *Tsilhqot'in* and *Grassy Narrows* as removing paramountcy from the federal toolbox when it comes to legislating in relation to Aboriginal rights. While these decisions eliminated the doctrine of interjurisdictional immunity (IJI) in relation to Aboriginal rights (which has been highly criticized by some scholars[142] and recently called into question by the Court's statement in *Uashaunnuat* that "the provinces have no legislative jurisdiction over s. 35 rights…"[143]), their effect on paramountcy is far less clear.

80. Neither case involved federal legislation or arguments on federal paramountcy. The Court of Appeal appears to anchor its reasoning in a passage from *Tsilhqot'in* stating that the *Sparrow* framework is a "complete and rational way of confining provincial legislation affecting Aboriginal title." It also distinguishes Aboriginal rights disputes from federal/provincial disputes involving IJI and paramountcy as being "not at base one of conflict between the federal and provincial levels of government."[144]

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[141] *Caring Society*, 2018 CHRT 4 at para 452.
[142] See Wilkins, "Life Among the Ruins," *supra* note 136; see also Borrows, "Canada's Colonial Constitutional," *supra* note 126.
[143] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4 at para 65.
[144] QCCA Decision, *supra* note 7 at para 546 (quoting paragraph 152 from *Tsilhqot'in*).

81. However, the Court of Appeal's reading of this passage of *Tsilhqot'in* fails to account for the Court having clearly suggested in two earlier passages that paramountcy will be available to Parliament in future cases, including the following:

> First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.[145]

82. To our knowledge, no scholarly commentaries on *Tsilhqot'in* or *Grassy Narrows* have interpreted these decisions as taking paramountcy out of play. To the contrary, some have explicitly acknowledged paramountcy's continuing role in the federal toolbox regarding laws in relation to "Indians".[146] Furthermore, when one reads s 91(24) as including a protective function for Indigenous rights, this can clearly raise issues of conflict between the federal and provincial governments as it construes the protection of Indigenous rights as Parliament's business, including against erosion by provincial governments. In addition, the removal of IJI from the federal toolbox to pursue protection of Indigenous rights makes preservation of the paramountcy mechanism even more important.

83. The Court of Appeal's reasoning also suggests that using federal paramountcy to protect Indigenous rights is new (and aberrant). However, this overlooks the fact that the opening phrase of s 88 of the *Indian Act*, "Subject to the terms of any treaty…" has been providing paramountcy to treaty rights and First Nations exercise of jurisdiction for over 70 years.[147]

84. In *R v Côté*, this Court recognized that s 88 has a dual function of (1) re-invigorating provincial laws that are inapplicable in relation to Indians on account of interjurisdictional immunity; and (2) "according federal statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy."[148] Lamer CJ acknowledged that the effect of s 88 was to give treaty rights "broader protection from contrary

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[145] *Tsilhqot'in, supra* note 87 at para 130 (emphasis added); see also para 128.
[146] See Borrows, "Canada's Colonial Constitution," *supra* note 126 at 30; Wilkins, "Life Among the Ruins," *supra* note 136 at 123.
[147] *Indian Act*, RSC 1985, c I-5, s 88. See also Leclair, *supra* note 130 at 27.
[148] *R. v Côté*, *supra* note 99 at para 86 (emphasis added).

provincial law under the *Indian Act* than under the *Constitution Act, 1982*."[149] There is also legislative history showing a clear intention by Parliament to give treaties absolute priority over conflicting provincial legislation.[150] After its passage in 1951, s 88 was used on multiple occasions by this Court to find the terms of a treaty prevail over provincial laws, including in *R v Morris*.[151]

85. Neither *Tsilhqot'in* nor *Grassy Narrows* explicitly addresses the status of s 88. While this Court stated in *Tsilhqot'in* that *Morris* should no longer be followed "[t]o the extent that [it] stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights,"[152] this does not invalidate s 88 in general or the paramountcy protection embedded within it.[153] There is long-standing precedent of federal paramountcy being used to protect Treaty rights. This Court has never said such a provision violates our constitutional architecture. Nor should it be seen as doing so when the rights being protected are inherent in nature.

86. A further issue not discussed by the Court of Appeal is the fact that s 88 provides paramountcy protection to the exercise of First Nation jurisdiction under *Indian Act* by-laws.[154]

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[149] *Ibid* at para 87.
[150] See Kerry Wilkins, "Of Provinces and Section 35 Rights," (1999) 22 Dal LJ 185 at 222, note 176.
[151] *R. v White*, [1965] S.C.J. No. 80; *R v Simon*, [1985] 2 SCR 387; *R. v Sioui,* [1990] 1 SCR 1025; *R. v Horseman*, [1990] 1 SCR 901; *R. v Sundown,* [1999] 1 SCR 393; and *R. v Morris*, 2006 SCC 59.
[152] *Tshilhqo'tin, supra* note 87 at para 150.
[153] It is possible s 88 could still provide paramountcy protection to some treaty rights despite the demise of IJI. This would be the case if the paramountcy protection applied to provincial laws that apply to treaty rights *ex proprio vigore*. Ryder, *supra* note 121 at 376, notes that there is contradictory jurisprudence on this point, but that the balance of SCC cases on have "assumed that treaty rights will continue to prevail over inconsistent provincial legislation whether or not the provincial legislation touches on the "core of Indianness." However, such protection would not apply to all treaties, since, as noted by Kerry Wilkins in "Of Provinces and Section 35 Rights," *supra* note 149 at 211, some treaty provisions directly incorporate provincial regulatory measures in their terms.

[154] See *R v Meechance,* 2000 SKQB 156 and *R. v Blackbird,* 2005 CanLII 1624 (ON CA). See also Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re) Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.

Upholding the Court of Appeal's interpretation ss 21 and 22(3), will result in perverse scenarios where First Nations will be able to receive greater protection from provincial interference exercising delegated jurisdiction than they can for the exercise of their inherent jurisdiction. Thus, a child welfare by-law passed under the *Indian Act* will receive stronger protection than an Indigenous law recognized under the *Act*. Reconciliation ought to involve facilitating the exercise of the inherent right to self-government, not making it a less attractive option than delegated jurisdiction.

iii. Misconstruing Jordan's Principle

87. The Court of Appeal suggested that a provincial role equal to the federal government's, in terms of permitting justified infringement of the right to self-government over child and family services, will avoid the jurisdictional wrangling of the past, and aligns with Jordan's Principle:

> Too often, Aboriginal children have been the victims of squabbles between the two levels of government, which have taken turns refusing to intervene to ensure their safety and well-being on the pretext that they do not have the jurisdiction or financial responsibility to do so. The disastrous results of the approach based on the federal government's exclusive and plenary jurisdiction over Aboriginal peoples and the disengagement of the provinces show that this approach is simply not suited to nor consistent with the structure of government established by the Constitution as it stands today in light of s. 35 of the *Constitution Act, 1982*. Jordan's Principle … confirms that a rigid interpretation of provincial and federal jurisdictions is largely outdated…[155]

88. This passage shows the Court of Appeal correctly identifying jurisdictional wrangling as a major problem informing the background of this Reference. However, the Court of Appeal misunderstands the cause of this wrangling, leading it to misdiagnose the cure. The cause of Canada and the provinces' jurisdictional wrangling in relation to Indigenous peoples has not been federal "plenary jurisdiction" excluding a provincial role, leading to provincial "disengagement." Nor has there been a "rigid interpretation" of provincial jurisdiction in the circumstances.

89. On the contrary, through the introduction of s 88 in 1951, incorporating by reference provincial laws of general application to Indians as federal laws, Canada (neglecting its protective role) made clear that it wanted the provinces to take over in areas of essential services, especially in child welfare. In *Dick v La Reine*, this Court went further and stated that most laws of general application apply of their own force to Indians (and s 88's incorporation by reference was reserved

[155] QCCA, *supra note 7* at para 558 (emphasis added).

for when provincial law affected the 'core of Indianness').[156] *Kitkatla Band v British Columbia,* expanded this concurrence by recognizing a significant field in which provinces can specifically legislate in relation to "Indians."[157] *Tsilhqot'in* and *Grassy Narrows* enlarged provincial jurisdiction further by taking Aboriginal rights out of the 'core of Indianness,' thus setting aside the applicability of IJI.

90. Despite having concurrent jurisdiction in an ever-widening field, going back to the 1950s, the provinces have had little interest in assuming responsibility and have mostly refused to do so. As noted above, in child welfare, provinces were willing to extend some aspects of child protection to First Nations, but only with full reimbursement of their costs. However, the services provided were patchwork and resulted in massive overrepresentation of First Nations children in care from the 1960s onwards. The door has been wide open for the provinces to step up and do more for over 70 years, but few have done so.

91. Provinces have not been prevented or 'disengaged' from acting on account of rigid interpretations of the federal jurisdiction over "Indians." They have been disengaged because of the costs and a disturbing lack of political will in the face of the harms to First Nations peoples. Rather than broadly concurrent jurisdiction being a solution to the problem of jurisdictional wrangling, as the Court of Appeal's approach assumes it to be, it has been a leading cause of the problem. Extensive concurrence in jurisdiction has led the federal and provincial governments to largely defer to the other in lieu of taking meaningful action to protect the rights of Indigenous children, families, and communities. This has been described as "interjurisdictional neglect."[158]

92. Interjurisdictional neglect arises here due to the absence of clear lines of government authority and responsibility, fueling broad-based lack of political will to promote cultural safety and wellbeing of Indigenous children.[159] In *Daniels*, this Court emphasized the importance of drawing clear jurisdictional lines, especially where federal and provincial wrangling over

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[156] *Dick v La Reine,* [1985] 2 SCR 309.
[157] *Kitkatla Band v British Columbia,* 2002 SCC 31 (CanLII). See also Jean Leclair, "The Kitkatla Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters" (2003) 20 SCLR (2d) 1.
[158] Naiomi Metallic, "NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union' and Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto" in *Judicial Tales Retold, supra* note 62 at paras 30.
[159] *Ibid* at paras 1-48.

responsibility to Indigenous peoples results in a "jurisdictional wasteland"[160]: "Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution."[161]

93. The *Act* draws clear jurisdictional lines of authority and responsibility in important ways: (1) by the federal government exercising its jurisdiction to protect Indigenous interests by dictating minimum standards in child welfare across the country; and (2) protecting the operation of Indigenous laws from the inevitable service delays, disruptions, and denials that will arise if provinces can stall or prevent them by claiming they are justifiably infringing such laws. As a first step, Indigenous children and families desperately need such lines to be drawn. Once drawn, they need federal and provincial governments to cooperate in facilitating the exercise of this jurisdiction.

94. The Court of Appeal put much stock in the fact that Indigenous laws would take precedence under s 35 by default and their view that any justified infringement by the provinces would be difficult to prove.[162] While this may well be true in law, with respect, this grossly underestimates how power and resource imbalances between Indigenous communities and provinces will play out on the ground. Where a province refuses to recognize and respect an Indigenous law, in whole or in part, and seeks to impose its own regime on Indigenous children and families over the community's objections, the community will be forced to go to the courts. In the unlikely event the community had sufficient resources to go to court, the community would be faced with bearing the burden of first obtaining interlocutory injunctive relief and then substantiating a claim of unjustified infringement, contrary to s 35. Such litigation, even if solely confined to proving infringement and a lack of justification, would require substantial evidence, time, and resources to prove. It would likely be a matter of years before the matter is resolved, leaving Indigenous children and families to continue to suffer as the status quo continues.

95. The four decades since s 35 was entrenched in our written constitution demonstrate that it is overly optimistic to assume that all the provinces and their child welfare agencies will engage in a close study of their constitutional obligations under s 35, voluntarily come to the table to negotiate

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[160] *Daniels*, *supra* note 5, at para 14.
[161] *Ibid* at para 12.
[162] QCCA Decision, *supra* note 7 at paras 497-504 and 530-563.

and cooperate, and not adopt unsupported and unreasonable positions. Similarly, this has not transpired in the last 70 years despite s 88 and numerous court decisions empowering provinces to protect Indigenous interests. This is, however, unsurprising and was foreseen by the framers of the *Constitution Act, 1867*. It was always anticipated that provincial governments' other interests might take precedence over their regard for Indigenous rights: s 91(24) is specifically intended to allow Parliament to address such situations.

96. Jordan's Principle recognizes that extensive concurrent jurisdiction, and consequently jurisdictional wrangling, are a reality in Canada. It seeks to resolve this problem by requiring governments to use their jurisdiction to meet the real needs of First Nations children without delay. However, it does not endorse absolute equality in power between federal and provincial government vis-à-vis Indigenous people, especially where this could cause harm to Indigenous communities. Such a view misunderstands the principle.

97. As a human right and legal principle, Jordan's Principle is more than just a rule that 'the government of first contact pays first.' Rather, considering the history of jurisdictional wrangling and its impacts, particularly in the story of Jordan River Anderson, it can be unpacked to:

(1) Entrench the principle of substantive equality into the provision of government-funded or provided services for First Nations children and youth;

(2) Give primacy to the best interests of the child, taking into account their culture and the context of their communities;

(3) Require decision-makers in Canada (governments and courts) to understand our country's history of jurisdictional wrangling and its impacts on First Nations children;

(4) Discourage government actions that cause adverse differentiation, service delays, disruptions or denials in services or rights of First Nations children;

(5) Encourage solutions to potential jurisdictional disputes that lessen/mitigate harms to First Nations children (e.g., government of first contact rule); and

(6) Discourage interpretation of laws that could result in jurisdictional disputes and delays and denials of services or rights of First Nations children.

98. Understood in this way, there is no question ss 21 and 22(3) of the *Act*'s bestowing the force of federal law on First Nations child welfare laws can align with Jordan's Principle. Canada's purpose is to create an option that protects Indigenous communities from having to fight with the provinces over recognition of their child protection laws. Indigenous communities are free to

simply assert their own law, as Indigenous law, under s 20 of the *Act*, now. However, ss 21 and 22(3) give the opportunity to have the law recognized as having the force of federal law, to prevent the types of uncertainty, delays or denials that will arise if provinces are given the opportunity to disregard or challenge Indigenous law. (This is not to say that such laws absolve the federal government or provincial actors from their financial responsibilities to ensure access to substantively equal child and family services.[163]) Instead, ss 21 and 22(3) obviously serve to facilitate the exercise of Aboriginal rights. The fact that there are many Indigenous governing bodies who are choosing to negotiate at coordination tables to access the relative certainty of ss. 21 and 22(3) indicates the protective function of these provisions. The Court of Appeal's interpretation of Jordan's Principle is problematic because it favours a solution (absolute concurrency) that will only further jurisdictional wrangling instead of deterring it. This will perpetuate the very uncertainty in service delivery for First Nations children that Jordan's Principle aims to eliminate.

99. The *Act* does not shut out the provinces or prevent their participation in accommodating Indigenous rights. Provinces can play a substantial role in promoting the well-being of Indigenous communities, including by contributing to a secure financial basis for the exercise of meaningful self-government by Indigenous groups, as well as by coordinating its interactions with both the federal and Indigenous governments. They may, of course, also enact legislation that does not create an operational conflict with, or undermine the purpose of, the Indigenous legislation the *Act* protects.

100. The *Act* is premised on recognition of overlapping jurisdiction over Indigenous child welfare and anticipates that the concerns of provinces can be addressed through the negotiation of coordination agreements, and, if not, through a dispute resolution mechanism. While the *Act* does not absolve the federal government of its protective role and does not force the provinces to negotiate, the *Act* provides an important nudge to get them to the negotiation table because it

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[163] In addition to recognizing the right to self-government, article 4 of the *United Nations Declaration of Indigenous Peoples,* GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, vol III, UN Doc A/61/ 49 (2008) 15, also affirms a concomitant right to "the ways and means for financing their autonomous functions." See also Kent McNeil, "The Crown's fiduciary Obligations in the Era of Aboriginal Self-Government," (2009) 88:1 Can Bar Rev1.

removes any question that Indigenous laws will be a reality—particularly due to the effects of ss 21 and 22(3)—and the coordination agreement negotiation process is the provinces' opportunity to have their concerns dealt with. However, the *Act* also moves beyond a "nudge" to the provinces by also providing Indigenous governments with a way to bring their laws into force in the face of provincial unwillingness (albeit with potentially doubtful funding arrangements), following one year of reasonable efforts to conclude a coordination agreement. In this way, provinces are part of the process, but cannot delay or halt the coming into force of Indigenous laws through their intransigence. This solution balances provincial concerns with Canada's recognition and protection of Indigenous laws, which is, in turn, consistent with our constitutional architecture's recognition of self-government and Canada's responsibility to protect Indigenous interests and rights from harm by the provinces.

PARTS IV AND V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

101. The Caring Society was granted standing before the Court of Appeal on a no-costs basis. Accordingly, the Caring Society does not seek costs before this Court and asks that no costs be ordered against it.

102. The Caring Society asks this Court to dismiss AGQ's appeal. Pursuant to Rule 42(3) of the *Rules of the Supreme Court of Canada*, the Caring Society makes no statement as to the outcome of AGC's appeal.

PART VI – SUBMISSIONS ON CONFIDENTIALITY

103. The Caring Society has no submissions regarding confidentiality in this matter.

All of which is respectfully submitted this 9th day of September, 2022 at Ottawa, Ontario.

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