COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-028751-196

In the matter of the:

Reference to the Court of appeal of Quebec in relation with the *Act respecting First Nations, Inuit and Métis children, youth and families* (Order in Council No: 1288-2019)

DATE: February 10, 2022

CORAM: THE HONOURABLE FRANCE THIBAULT, J.A.
YVES-MARIE MORISSETTE, J.A.
MARIE-FRANCE BICH, J.A.
JEAN BOUCHARD, J.A.
ROBERT M. MAINVILLE, J.A.

ATTORNEY GENERAL OF QUEBEC
APPLICANT
v.

ATTORNEY GENERAL OF CANADA
RESPONDENT
and

ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR (AFNQL)
FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION (FNQLHSSC)
MAKIVIK CORPORATION
ASSEMBLY OF FIRST NATIONS
ASENIWUCHE WINEWAK NATION OF CANADA
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
INTERVENERS

ENGLISH SUMMARY OF THE OPINION OF THE COURT OF APPEAL
For concurrent release with the opinion of the Court

[1] This English language summary is an in-house translation of the summary of the opinion of the panel of the Quebec Court of Appeal (the "Court") which is set out in the full reasons and forms an integral part thereof. This translation attempts to correctly translate that summary, but as is the case with all translations, it cannot always capture the precise nuances of the original version. For example, in French, the word "*autochtone*" is used to reflect both the words "Aboriginal" and "Indigenous". This translation will thus use the word "aboriginal" throughout in preference to "indigenous" (save for necessary exceptions) both to better reflect the reasons as drafted in French and to highlight that this is a constitutional reference in which the terminology used in s. 35 of the *Constitution Act, 1982* is to be preferred, *i.e.* "aboriginal peoples" and "aboriginal rights". Other terminological choices in the English translation are also guided by similar considerations. While the *Constitution Act, 1982* does not capitalize the terms "Aboriginal peoples" or "Aboriginal rights", nor, until recently, have most other texts, including the jurisprudence, we will favour the use of capitals (save for necessary exceptions), in keeping with current practice. Moreover, by their very nature, neither the French summary nor its translation, although accurate, can be exhaustive. Reference should be made to the full text of the Court's opinion in order to understand all the details and nuances the Court deemed necessary in formulating its opinion.

a) Context leading to the passage of the Act

[2] The *Act* marks a recent milestone in a process set in motion nearly two centuries ago. A general overview of the context in which it was enacted is helpful. For decades, assimilationist policies have detrimentally affected many generations of Aboriginals. Due to overlapping constitutional jurisdictions and chronic underfunding by the federal government, to this day Aboriginal peoples continue their struggle to overcome the long-term effects of this situation.

[3] Over the past forty years, several important commissions of inquiry have highlighted the drastic consequences Aboriginal peoples and their children have suffered. There was a growing need for Aboriginal peoples to take control of their own child and family services. This led to the *Act*, which came into force on January 1, 2020.

[4] Historically, certain policies of the 19th and early 20th centuries had as their goal to assimilate Aboriginal peoples by fully integrating them in Canada's non-Aboriginal society. To that end, a number of measures (which are now considered discriminatory) were implemented. These initiated a process for devaluing Aboriginal cultural identity. With the arrival of Confederation, the federal government was given legislative authority

over “Indians”. A number of laws were subsequently enacted to further that process. As one government member explained to Parliament, “[t]he Indians must either be treated as minors or as white men”. Despite what may have seemed, at the time, to be a *quid pro quo* to “Indian” status—no taxes could be collected on a reserve—the legislation effected a direct attack on the cultural identity of Aboriginal peoples by banning certain long-standing cultural and spiritual practices.

[5] As of 1883, the assimilationist policy gave rise to boarding schools, through which Aboriginal children were torn from their families. Testifying in 1920 before a parliamentary committee, one deputy minister stated that the objective was to see to it that “there is not a single Indian in Canada that has not been absorbed into the body politic”. As of the 1940s, the residential school system became a functional but very crude approximation of provincial youth protection services. There, Aboriginal children were provided with mediocre education under conditions of great deprivation, in which the use of Aboriginal languages was repressed. Due to the spread of illnesses such as tuberculosis, the mortality rate of the children in the system was abnormally high. Moreover, they were subjected to what would come to be described as unspeakable cruelty.

[6] In 1951, Parliament amended the *Indian Act* so that laws of general application in a province, including laws of a social nature, became applicable to Aboriginal persons residing in the province. The scope of this amendment is the subject of controversy.

[7] Over 150,000 Aboriginal children attended residential schools until the 1990s. Thousands of them suffered physical, psychological and sexual abuse. The gradual end of the residential school system, however, did not spell the end of the forced separation of Aboriginal children from their families. The residential schools were followed by a system in which Aboriginal children were placed in non-Aboriginal foster families, in what would come to be known at the “Sixties Scoop”. The mass adoption of Aboriginal children caused them to experience major identity and behavioural problems.

[8] In 2006, the *Indian Residential Schools Settlement Agreement* (“*IRS Settlement Agreement*”) provided for a comprehensive settlement of numerous individual and class actions related to the residential school system. Other framework settlements were entered into in *Brown* and *Riddle* in 2018.

[9] Between 1991 and 2019, four separate commissions of inquiry addressed, from a number of different perspectives, the legacy of the treatment of Aboriginal peoples: the *Royal Commission on Aboriginal Peoples*, the *Truth and Reconciliation Commission of Canada* (“*Truth and Reconciliation Commission*”), the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress* (“*Viens Commission*”) and the *National Inquiry into Missing and Murdered Indigenous Women and Girls*. The *Royal Commission on Aboriginal Peoples*, which submitted its report in 1996, indicated that the central theme of its recommendations was the idea that Aboriginal peoples must have room to exercise their

autonomy and structure their own solutions. In its 2015 report, the *Truth and Reconciliation Commission* set out a series of measures for reducing the overrepresentation of Aboriginal children within child welfare systems. The Viens Commission concluded, in 2019, that there is systemic discrimination against First Nations and that a youth protection system which places Aboriginal children with non-Aboriginal foster families is unsuitable. That same year, the *National Inquiry into Missing and Murdered Indigenous Women and Girls* made several recommendations also aimed at placing the design and implementation of culturally appropriate child and family services in the hands of Aboriginal peoples as part of the exercise of their right to self-determination.

[10] There is a consensus that the deplorable overrepresentation of Aboriginal children in youth protection systems is still very much present. The aforementioned three most recent commissions of inquiry denounced this reality, as did the *Special Commission on the Rights of the Child and Youth Protection* ("*Laurent Commission*") in 2021. This situation has numerous interrelated causes, including chronic underfunding.

[11] Funding arrangements for Aboriginal child services vary markedly from one community to another, but the federal government is the principal source of funding, either directly through First Nations Child and Family Services ("FNCFS") agencies or indirectly through the services provided by the provinces. The picture of the funding arrangements that emerges from the Court record in this reference is vague in a number of respects. That said, recent decisions of the Canadian Human Rights Tribunal ("CHRT") have clearly highlighted the discriminatory and deficient nature of existing practices.

[12] In 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a complaint in that regard with the Canadian Human Rights Commission. This complaint was the basis for the 2016 ruling in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, in which the CHRT found in favour of the complainants, concluding that the Department of Aboriginal Affairs and Northern Development Canada discriminates in providing services to First Nations members. The CHRT was of the view that there is a public relationship between that Department and First Nations children and families. The evidence that had been filed in the record showed the existence of serious deficiencies in the funding and structure of the FNCFS Program, whose budget does not account for the actual needs of FNCFS agencies in light of geographical and social differences. The CHRT was of the view that the resulting adverse impacts suffered by Aboriginal children and families were due solely to their race or national or ethnic origin. The federal government accepted the decision and committed to make the necessary reforms. Several CHRT orders, particularly on the issue of compensation to victims of these discriminatory practices, have since buttressed the 2016 decision.

[13] Jurisdictional disputes between the federal and provincial governments have also complicated, and even prevented, the provision of adequate services to Aboriginal peoples. To address this situation, Jordan's Principle, which applies a child-first principle to Aboriginal children, was developed. Having been reinforced by CHRT decisions, Jordan's Principle is now unanimously accepted.

[14] Two years after the 2016 CHRT ruling, the Minister of Indigenous Services brought together provincial, territorial and Aboriginal representatives to begin an urgent reform process. Following these discussions, the federal government made a number of firm commitments. Some 2,000 organizations were consulted and a "reference group" was established to co-develop proposed legislation, leading to the tabling of Bill C-92 on February 28, 2019. The *Act* received Royal Assent on June 21, 2019 and came into force on January 1, 2020.

b) Content of the Act

[15] The *Act* is based on two main concepts: the establishment of national standards, and recognition of the inherent right of Aboriginal self-government. The latter concept developed slowly, beginning in 1973 with the federal government's *Comprehensive Land Claims Policy*, followed by the coming into force of the *Constitution Act, 1982* and the adoption, in 1995, of the *Self-Government Policy* for Aboriginal peoples. That policy recognized the existence of the right and favoured tripartite negotiations (federal and provincial governments, Aboriginal peoples). A convergence thereafter occurred between the *Comprehensive Land Claims Policy* and the *Self-Government Policy*. Between 1997 and 2017, this led to a number of agreements which, implicitly or explicitly, touched on the right to Aboriginal self-government. In addition, some federal statutes enacted during the same period occasionally referred to that right. In short, the concept of administrative and political autonomy for Aboriginal peoples has been percolating for over 45 years.

[16] In 2018, the Department of Justice published the *Principles Respecting the Government of Canada's Relationship with Indigenous peoples*. The inherent right of Aboriginal self-government featured prominently in these principles. The *Act* is clearly in line with these *2018 Principles*, through which we see the emergence of true Aboriginal governance.

[17] Before delving into the *Act* in detail, a general overview of its content is in order. The *Act* is comprehensive; it recognizes the right of self-government and no longer sets bipartite or tripartite agreements as a prerequisite for such purpose. Favouring a bottom-up approach, the *Act* provides Aboriginal peoples with the flexibility and functional independence to choose their own solutions. In responding to the pressing need for reconciliation, the *Act* is designed to address the excessive delays of the piecemeal agreement negotiating process. This legislative initiative was evidently guided by the *United Nations Declaration on the Rights of Indigenous Peoples* (the "*UN Declaration*"). By setting out general national standards, the *Act* establishes a framework to ensure that

Aboriginal children are provided with a minimum level of services, based on an evident concern for equality across Canada as well as respect for the differences between various groups.

[18] The lengthy preamble to the *Act* echoes the recommendations of the commissions of inquiry made in 1996 and 2015. The preamble is followed by substantial definitional and interpretative provisions. These set out key concepts, such as “Indigenous governing body”, “family” and “Indigenous peoples”. The definition of “Indigenous governing body” leaves it to Aboriginal peoples themselves to decide which entities will be responsible for applying the *Act*. In addition to preventing certain legislative conflicts, the interpretative provisions specify the principal purposes of the *Act* and establish a cardinal rule: The *Act* must be read and applied in accordance with the best interests of the child and in a manner consistent with cultural continuity and substantive equality. Parliament’s intent is clearly to break with the past.

[19] Part I of the *Act* sets out the national standards alluded to above. It does so under three headings: the best interests of the Aboriginal child, the provision of child and family services, and the placement of the Aboriginal child.

[20] As regards the best interests of the Aboriginal child, which the *Act* identifies as the paramount consideration, it sets out a series of assessment factors. Among many other factors, these include the Aboriginal child’s upbringing, the child’s relationship with his or her family members, preservation of the child’s cultural identity, and the child’s own preferences. To the extent possible, these factors are to be construed in a manner consistent with applicable Aboriginal laws. Respecting the Aboriginal child’s culture and needs takes on particular significance when the child is placed outside his or her home community. It is important that the child’s parents, care provider and home community have a strong say in any decision involving the child. The *Act* prioritizes preventive care, favours having a child continue to reside with a family member and specifies that the child’s socio-economic condition alone cannot justify the child’s apprehension.

[21] Thus, placement of a child should be used only as a last resort. Placement with non-Aboriginal adults can occur only after every effort has been made to place the child (in the following order of priority) with one of the child’s parents, with a member of the child’s family, with a member of the child’s own community, or with a member of an Aboriginal group other than the one to which the child belongs. In all cases, the child’s situation must be reassessed on an ongoing basis. Lastly, in providing services, the child’s emotional ties to each member of his or her family must be promoted.

[22] The balance of the *Act* sets out the structure of the new scheme. Section 18 is a declaratory provision that affirms the existence of the right to Aboriginal self-government. It states, in particular, that the right includes legislative authority in relation to child and family services, which must be exercised in accordance with the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”). In ss. 20(1) and (2), the *Act* establishes

a procedure pursuant to which an Aboriginal governing body can choose between two courses of action. It can inform the governments concerned that it intends to exercise its authority. Alternatively, it can request that these governments enter into a coordination agreement for this purpose. Only the second course of action gives rise to the application of ss. 21 and 22 of the *Act*. Pursuant to those sections, provided certain conditions are met, Aboriginal laws pertaining to child and family services have the same force of law as federal laws and prevail over any conflicting or inconsistent provision of a federal or provincial law respecting child and family services. The same does not extend to Aboriginal laws adopted without requesting a coordination agreement, such that ss. 21 and 22 do not apply to them. From the foregoing, it appears that Parliament wishes to encourage the course of action based on negotiation.

[23] Regardless of the course of action chosen by an Aboriginal people, any law adopted by that people that is contrary to the best interests of the child will be inapplicable. Lastly, one of the *Act*'s provisions deals with resolving conflicts between two Aboriginal laws. The *Act* also contains a few additional provisions, which are less relevant for purposes of this reference.

[24] Aside from the constitutional debate arising from this reference, the *Act* itself contains ambiguities that raise a variety of questions, as a number of Aboriginal participants pointed out during parliamentary committee proceedings. Thus, disputes could conceivably arise as to which entities will qualify as an "Indigenous governing body". Other potential sources of difficulty relate to the tangible capacity of Aboriginal peoples themselves to provide the services contemplated in the *Act*, or they relate to the manner in which the dispute resolution mechanisms will operate. The issue of funding for child and family services remains critical and largely unresolved, despite the reference to "fiscal arrangements" in the list of matters that may be covered by coordination agreements entered into under s. 20(2). Several public statements by Aboriginal spokespersons have been a stark reminder of this. These aspects of the *Act* could lead to litigation. That said, there is no need to say more here given the specific question raised in this reference.

c) Respective positions of Quebec, Canada and the interveners

[25] The attorneys general presented a two-pronged argument: one based on s. 91(24) of the *Constitution Act, 1867* and the other on s. 35 of the *Constitution Act, 1982*. The Attorney General of Quebec argues that the *Act* intrudes in a provincial area of jurisdiction and unilaterally modifies the scope of s. 35. He therefore asks the Court to answer the reference question in the affirmative. The Attorney General of Canada, who contests the foregoing, is of the view that the reference calls for a negative answer, but one limited in scope.

[26] The Attorney General of Quebec relies first on the general jurisdiction that the province, as a rule, holds over child welfare. The *Act* dictates how such services are to be provided to Aboriginal persons, which, he argues, exceeds the federal powers under

s. 91(24) and jeopardizes the architecture of the Constitution. In his view, the *Act* also impairs the province's authority over its public service. Moreover, by affirming the existence of the inherent right of Aboriginal self-government, Part II of the *Act* usurps the role of the courts and unilaterally creates a third level of government in Canada. This can only be achieved through a constitutional amendment or by means of treaties protected by s. 35. It therefore follows that Part I of the *Act* is invalid under the first prong of the argument, and Part II is invalid under the second prong of the argument. These conclusions are sufficient and the Court need not opine on the scope of s. 35.

[27] After reviewing the services offered by the federal government, the Attorney General of Canada identifies the pith and substance of the *Act*, which is to protect Aboriginal children and families by reducing the number of Aboriginal children in existing child welfare systems. He is of the view that this matter undoubtedly falls within the broad powers of s. 91(24) and that the federal government's exercise of those powers in the present case does not interfere in any manner whatsoever with provincial powers. Moreover, as for the provisions relating to the right of Aboriginal self-government, nothing in the *Act* would preclude a court challenge to the validity of Aboriginal laws. Nonetheless, the interpretation of s. 35 conveyed in the *Act* is consistent with the case law.

[28] The Assembly of First Nations is of the view that the pith and substance of the *Act* is to remedy the consequences of the federal government's colonial policies. The interpretation the *Act* offers as to the inherent right of Aboriginal self-government is consistent with legal developments, with what the honour of the Crown requires and with relevant international standards.

[29] The Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission are of the view that the *Act*'s pith and substance, in addition to what the Attorney General of Canada states, is to sustain the continuity of Aboriginal culture and facilitate the exercise of the inherent right of Aboriginal self-government. Provincial laws apply to Aboriginal child and family services only by virtue of s. 88 of the *Indian Act*. The *Act* is the current expression of the federal government's responsibilities under s. 91(24). In this reference, the Court is called upon to rule on the inherent right of Aboriginal self-government.

[30] Makivik Corporation, which did not participate in the oral arguments, notes in its memorandum that, since a 1939 reference to the Supreme Court, the federal government has always had responsibility for providing services to Nunavik Inuit.

[31] The intervener Aseniwuche Winewak Nation of Canada takes a position only on Part I of the *Act* and argues that it can improve the situation of Aboriginal children who are non-status Indians or who are not members of a First Nation.

d) First part of the analysis: the constitutionality of the national standards

[32] Sections 91 and 92 of the *Constitution Act, 1867* allocate legislative authority among the federal and provincial governments. An issue regarding the constitutionality of a statute, based on the division of powers, must be decided in a two-step process. The first step is to identify the purpose and the pith and substance of the statute. This characterization stage is followed by a classification process: to which head or heads of power listed in those sections can the statute be connected? When a statute has two or more aspects, some of which appear to be connected to s. 91 and others which appear to be connected to s. 92, the court must take into account the context in which the statute was enacted as well as its practical and legal effects. In addition to identifying the dominant aspect of a statute, the double aspect doctrine can be applied to validate similar provisions in concurrent and valid federal and provincial legislation. The doctrine of interjurisdictional immunity protects the unassailable content of a power of one level of government against impairment by a statute enacted by the other level of government.

[33] Section 91(24) encompasses all Aboriginal peoples in Canada, including the Métis and the Inuit. It is a broad power conferring legislative authority over all aspects of "Indianness". The essence of this federal head of power also includes the well-being of Aboriginal persons as well as their inter-personal relationships, such as family relationships, adoptions or testamentary matters. This plenary power implies that the federal government will occasionally encroach on matters falling under s. 92, but that does not mean it can thereby invade areas of provincial jurisdiction: the two-step analysis is still required and, where possible, courts will favour the ordinary operation of statutes enacted by *both* levels of government.

[34] In the present case, the Attorney General of Quebec argues that, by virtue of its pith and substance, the *Act* dictates how provinces must provide child and family services in an Aboriginal context. In the Court's opinion, a full analysis of the *Act*, of the context in which it was adopted and of its effects reveals something entirely different. The pith and substance of the *Act* is to ensure the well-being of Aboriginal children, by fostering culturally appropriate services to reduce their overrepresentation in provincial child welfare systems. This is established by the extensive extrinsic evidence filed in the record.

[35] The Attorney General of Quebec's argument that the effects of the *Act* severely impair the province's authority over its public service does not withstand analysis. The national standards are stated in the *Act* in general terms and not as operational requirements imposed on provincial public servants for the provision of child and family services. These standards are compatible with Quebec's child welfare legislation. The possible effects of the *Act* on the work of provincial public servants are incidental and do not change its pith and substance.

[36] Lastly, the Court also rejects the propositions that the *Act* offends the principles of federalism and democracy which underlie the Constitution and that, based on the doctrine

of interjurisdictional immunity, the *Act* is inapplicable to provincial public servants. Such principles cannot prevail over legislative provisions validly enacted under s. 91(24). As for the doctrine of interjurisdictional immunity, which is of limited application, it presupposes impairment of the core of a legislative power, which the Attorney General of Quebec has not shown in the present case.

e) Second part of the analysis: the right of Aboriginal self-government and the regulation of child and family services

[37] The Attorney General of Quebec argues that Aboriginal governance can result only from delegations of legislative powers, agreements between governments and Aboriginal peoples, or a constitutional amendment. He is of the view that s. 35 of the *Constitution Act, 1982* does not recognize a right to Aboriginal self-government. If, however, the Court were to conclude otherwise, only the judiciary—and not Parliament—could decide the matter. By adopting the *Act*, Parliament is adding to s. 35 and, in so doing, is usurping role of the courts.

[38] The reference, therefore, pertains to the scope of s. 35 and raises the question as to whether a right to Aboriginal self-government in relation to child and family services, if it does exist, is “generic” or, instead, specific to each of the Aboriginal peoples and can vary from one people to another.

[39] Based on the approach adopted in one line of cases, the sovereignty exercised by the Crown in Canada is constitutionally incompatible with such an Aboriginal right, as is the division of legislative powers between the federal and provincial governments. Under this approach, while Indigenous governance may be politically desirable, it must result from a legislative choice. The opposing approach posits that Aboriginal peoples have always maintained a form of self-government that flows from their original sovereignty over the territory. This Aboriginal right is now enshrined in s. 35.

[40] For the reasons that follow, and subject to the important nuances set out in the full reasons, the second approach ought now to be adopted. This conclusion, which flows from the history of the relationship between the Crown and Aboriginal peoples, is also grounded in the jurisprudence interpreted in light of history.

[41] It is now common ground that the *de facto*, indeed *de jure*, autonomy of Aboriginal peoples was recognized until sometime in the 19th century. This crucial fact had already been reflected in the *Royal Proclamation* of 1763. Based in part on the latter, between 1823 and 1832, the United States Supreme Court developed two doctrines with respect to the situation of Aboriginal peoples (the doctrine of domestic dependent nation and that of residual aboriginal sovereignty) in three decisions often cited in Canadian jurisprudence. These doctrines flow from a historical right of self-governance and they postulate the benevolence of the sovereign, two concepts enshrined in the common law. The long history of independence of Aboriginal peoples and the many treaties made with

them, both before and after 1763, attest to a similar reality in Canada. It was only relatively recently that a policy of displacement, settlement and assimilation of Aboriginal peoples supplanted this initial state of affairs, resulting in the devastation subsequently decried by several commissions of inquiry. Yet, entire swaths of Aboriginal customary law remained intact, such as in matters of marriage or adoption.

[42] A review of Canadian jurisprudence addressing Aboriginal self-government must begin with *Calder* (1973), which dealt with the origin of Aboriginal title. This decision led to the *Comprehensive Land Claims Policy* mentioned earlier and to resulting agreements which recognized certain powers of Aboriginal peoples in managing their traditional territories. These were followed by the reform brought about by the *Constitution Act, 1982* and, in its wake, attempts to define the Aboriginal rights set out in s. 35 at constitutional conferences which were ultimately unsuccessful.

[43] The ruling in *Sparrow* (1990) firmly rejected the argument that s. 35 was merely a preamble to future constitutional negotiations. It set out what could constitute an “existing” and “aboriginal” right, and the conditions under which a government could legitimately regulate that right. Borrowing from three judgments rendered by the United States Supreme Court between 1823 and 1832 and referred to above, *Van der Peet* (1996) examined the legal framework for recognizing an Aboriginal right. The framework entails reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown by applying the test and the factors set out by the Supreme Court of Canada. Further clarification was provided in *Pamajewon* (1996).

[44] *Delgamuukw*, a case that came before the Supreme Court of Canada in 1997, simultaneously raised the issues of Aboriginal title and of Aboriginal self-government. The British Columbia Court of Appeal, sitting as a panel of five judges, had ruled on the subject in highly instructive reasons. Three of the justices had rejected the claims relating to Aboriginal title and to Aboriginal self-government. The two others had dissented, recognizing the existence of an inherent right to Aboriginal self-government. In the Supreme Court, the debate bifurcated: on the issue of Aboriginal title, the decision significantly adapted the analysis set out in *Van der Peet*, but the Court declined to rule on the issue of the right of self-government because it deemed the trial record was insufficient to do so. There are other reference points in the jurisprudence, but the issue of self-government has not yet been judicially settled. That said, the adaptations made to the *Van der Peet* test suggests that the existence of a generic right to self-government is a viable approach.

[45] The right to Aboriginal self-government has also been the subject of significant political initiatives. For example, the 1992 Charlottetown Accord participants as a whole recognized the existence of such a right. The failure of that Accord was followed in 1995 by the federal government’s *Self-Government Policy*, which, while recognizing that right, favoured a negotiating model. At the international level, the 2007 *UN Declaration* on the

rights of Indigenous peoples affirms the existence of the right to self-determination of Indigenous peoples. In addition, the vast majority of doctrinal writers in Canada have expressed the opinion that s. 35 confirms the existence of a right of self-government.

[46] The Attorney General of Quebec is correct in stating that Part II of the *Act* is based on the premise that s. 35 recognizes the right to Aboriginal self-government. He is mistaken, however, in arguing that, in the instant case, Parliament has added to the content of s. 35, that without a constitutional amendment the *Act* is invalid and that, in any event, it is sufficient for the Court to ascertain the unconstitutionality of this part of the *Act* without having to rule on whether or not s. 35 does indeed confirm the existence of the right in question. Parliament can legislate based on what is set out in the Constitution, without first having to proceed by way of a court reference each time. Ultimately, however, it is for the courts to determine the constitutional validity of Parliament's legislative choice. This necessarily implies that in ruling on the validity of the *Act*, the Court must consider the scope of s. 35 Aboriginal rights. If these do not include a right of self-government in relation to child and family services, that part of the *Act* must be declared *ultra vires*. If the right falls within s. 35, the Court must then decide whether the framework established by the *Act* for circumscribing its exercise is itself constitutionally valid.

[47] Is the *Act* incompatible with the notion of Canadian sovereignty or with the notion that the distribution of legislative powers between federal and provincial governments is exhaustive? As to the first point, we know that after 1763, Aboriginal peoples continued to live in organized and distinct societies with their own social and political structures. Admittedly, before s. 35 came into force, the Crown and Parliament could, by different means, extinguish an Aboriginal right. This, however, required clear and unambiguous action on their part, but the record contains no pre- or post-Confederation statute to that effect. As to the second point, the *Constitution Act, 1867* did not give Parliament and the provincial legislatures exclusive jurisdiction over the entirety of the law applicable in Canada: this is evidenced by the continued existence in Canada of Imperial statutes, the royal prerogative and British common law. This non-exhaustive division of powers cannot have extinguished the right of Aboriginal peoples to govern themselves insofar as that right was an Aboriginal right and remained intact.

[48] For the specific purposes of this reference, the question of whether or not there exists an Aboriginal right of self-government arises only in relation to the particular field of child and family services. The central purpose of s. 35 is to effect reconciliation and preserve a constitutional space for Aboriginal peoples so as to allow then to live as peoples—with their own identities, cultures and values—within the Canadian framework. As a normative system, Aboriginal customary law relating to children and families forms part of those values. Moreover, the evidence filed in the record by the Attorney General of Canada shows that, together, children and families are the main channel for conveying the markers of Aboriginal identity. Regulation of child and family services by Aboriginal

peoples themselves cannot be dissociated from their Aboriginal identity and cultural development.

[49] This right of self-government falls within s. 35 because it is a form of Aboriginal right. It is a generic right that extends to all Aboriginal peoples, because it is intimately tied to their cultural continuity and survival. In the past, significant barriers, such as residential schools, impeded the exercise of that right. These situations, however, were never endorsed by Parliament, which never indicated, through clear and unambiguous legislation, its intention to extinguish the right.

[50] *Sparrow* explained the conditions under which the government can regulate an Aboriginal right. These are stringent conditions. When an aspect of government regulation is inconsistent with an Aboriginal right, that right prevails, unless the government can show that it is pursuing a compelling public objective, that the legislation is in keeping with the principles of minimal impairment and proportionality and, moreover, that it upholds the honour of the Crown.

[51] It should be noted that this interpretation of s. 35 with respect to the right of self-government seems entirely consistent with the principles set out in the *UN Declaration*.

[52] Lastly, the Court must determine whether the framework established by the *Act* for circumscribing the exercise of the Aboriginal right at issue here is itself constitutionally valid. This raises three questions pertaining to: (1) the constraints the *Act* imposes on the exercise of the Aboriginal right, (2) the potential status of Aboriginal laws as federal legislation, and (3) the legislated primacy of Aboriginal laws over provincial legislation.

[53] The constraints imposed by the *Act* stem from the priority given to the best interests of the child, the requirement to comply with the national standards set out in the *Act* itself and the further requirement to respect the fundamental rights of individuals. These appear to be compelling and substantial objectives that minimally restrict the exercise of the right of self-government, albeit challenges may arise on a case by case basis. The *Act* also specifies that the *Canadian Charter* applies to a governing body in the exercise of the right of self-government on behalf of an Aboriginal people. However, read in light of the jurisprudence on s. 32 of the *Canadian Charter*, and given s. 25 of said *Charter*, it is difficult to see why this constraint would be unconstitutional.

[54] When an Aboriginal governing body attempts to enter into a coordination agreement with a government and, in accordance with the *Act*, enacts legislation in relation to child and family services, s. 21 of the *Act* specifies that the legislation has “the force of law as federal law”. The aim of this provision is to render the doctrine of federal paramountcy applicable to Aboriginal legislation. In this regard, the provision alters the fundamental architecture of the Constitution and is *ultra vires*. The doctrine of federal paramountcy, which is used to resolve irreconcilable conflicts between federal and provincial laws under certain conditions, pertains only to federal laws validly enacted

under s. 91 of the *Constitution Act, 1867.* The legislative texts in question here, however, are not enactments of the federal government, but rather enactments of Aboriginal governing bodies exercising the s. 35 Aboriginal right of self-government of their peoples. Only s. 35, as interpreted by the courts, could confer precedence on such legislative texts.

[55] The same is true of s. 22(3) of the *Act*, which provides that Aboriginal laws contemplated by s. 21, of which s. 22(3) is the counterpart, prevail over any conflicting or inconsistent provisions of provincial legislation. In exercising the powers conferred by s. 91(24) of the *Constitution Act, 1867*, Parliament can certainly regulate an Aboriginal right recognized under s. 35 of the *Constitution Act, 1982*, but it cannot thereby confer absolute priority on that right. Section 91(24) does not authorize Parliament to dictate every aspect of the provinces' dealings with Aboriginal peoples, nor can Parliament completely disregard the provinces. The Canadian constitutional architecture is built on the basis of coordinated—not subordinated—governments, with the aim of guaranteeing each government autonomy in pursuing its objectives. By giving absolute priority to the Aboriginal regulation of child and family services and setting aside the reconciliation test specific to s. 35 of the *Constitution Act, 1982*, s. 22(3) violates this principle.

[56] Recent Supreme Court of Canada jurisprudence confirms that provincial regulation of general application can apply to Aboriginal title to land. This is only possible, however, if the infringement resulting from such regulation can be justified under the existing s. 35 analytical framework. The same approach applies to the right of self-government in relation to child and family services: it is the only approach that is consistent with the constitutional paradigm based on objectives of mutual respect and reconciliation between Aboriginal peoples, the Crown and Canadian society as a whole. Consequently, although provincial child and family services schemes apply *ex proprio vigore* to Aboriginal persons on the territory of a given province, they cannot prevail over Aboriginal legislation enacted pursuant to the Aboriginal right of self-government and they cannot displace that legislation, in whole or in part, unless such provincial schemes satisfy the s. 35 impairment and reconciliation test.

[57] The answer to the reference question, therefore, is as follows: The *Act* is constitutional, except for ss. 21 and 22(3), which are not.

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Dates of hearing: September 14, 15 and 16, 2021