SCC File No. 40061

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

-and-

ATTORNEY GENERAL OF CANADA,
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

RESPONDENTS

-and-

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INTERVENERS
(CONTINUED)

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. It is widely recognized among federal, provincial, and Indigenous governments that the overrepresentation of Indigenous children in child and family services systems is a critical issue requiring urgent action. It is undeniable that the legacy and harms of colonial policies and practices have been tragically borne by Indigenous children. The vital question raised by this appeal is how federal, provincial, and Indigenous laws in relation to children and families properly relate to one another within Canada's constitutional framework. How does our constitution make space for those best placed to protect and support Indigenous children and families to exercise their historic responsibility to do so, alongside compatible federal and provincial legislation?

2. British Columbia supports *An Act respecting First Nations, Inuit, and Métis children, youth and families* ("Federal Act")[1] and is actively working with Indigenous groups and the federal government under this legislation. In particular, BC agrees with the underlying premise of the Federal Act that Indigenous peoples have an inherent right protected by s. 35 of the *Constitution Act, 1982* to make laws concerning their children and families.[2] BC recognizes that Indigenous self-government is an inherent right and part of Canada's evolving system of cooperative federalism and distinct orders of government.[3]

3. In addition to working with Indigenous groups under the Federal Act, BC is actively reforming its own child and family services legislation—the *Child, Family and Community Service Act* ("CFCSA")[4]—to better support the rights of Indigenous peoples, including Indigenous Governments, as they deliver child and family services under their own laws.[5]

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[1] SC 2019 c 24 [Federal Act].
[2] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[3] British Columbia, Government of British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, (British Columbia: 2018) [Relationship Principles], at 2-3.
[4] RSBC 1996 c 46 [CFCSA].
[5] British Columbia, Ministry of Child and Family Development, *Honouring Past Wisdom: Child & Family Service Legislative Reform*, (Victoria: Strategic Child Welfare & Reconciliation Policy

These reforms will align BC's laws not only with the Federal Act but also with the *United Nations Declaration on the Rights of Indigenous Peoples* (the "UN Declaration"),[6] as required by the Province's *Declaration on the Rights of Indigenous Peoples Act* (the "Declaration Act").[7] The Declaration Act was unanimously passed by the British Columbia Legislative Assembly in November 2019, making BC the first jurisdiction in Canada to create a framework for implementing the UN Declaration. The Declaration Act advances the UN Declaration as the framework for reconciliation, as recommended by the Truth and Reconciliation Commission of Canada.[8]

4. The Attorney General of BC ("AGBC") intervenes on this appeal to submit that the national standards set out in the first part of the Federal Act are valid and that s. 35 includes a right of Indigenous peoples to make laws with respect to their children and families. Further, treaties and other agreements provide opportunities for Indigenous and Crown governments to develop a cooperative relationship based on a well-structured approach to the coordination of laws. Treaties and other agreements provide a means to exemplify this Court's guidance that "[n]egotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights".[9] Negotiations can "'produc[e] outcomes that are better suited to the parties' interests'."[10] They can also create institutions for self-government and create "the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities".[11]

B. Statement of facts

5. AGBC takes no position on the facts underlying the appeal, but provides the following as factual context in support of his submission.

Team, 2022).
[6] UN Doc A/RES/61/295 (2007) [UN Declaration].
[7] SBC 2019 c 44 [Declaration Act].
[8] Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), Call to Action 43.
[9] *R v Desautel*, 2021 SCC 17 [*Desautel*] at para 87.
[10] *Desautel* at para 87 (quoting S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at 139).
[11] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] at paras 9-10; see also *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 10.

(i) ***United Nations Declaration on the Rights of Indigenous Peoples***

6. As noted above, BC became the first jurisdiction in Canada to create a framework for implementing the UN Declaration in 2019, with the coming into force of the Declaration Act. Among other things, the Declaration Act affirms that the UN Declaration has application to the laws of British Columbia and requires the Province to work "in consultation and cooperation" with Indigenous peoples in BC to take all measures necessary to ensure those laws are consistent with the UN Declaration.[12] The Declaration Act ensures that embedding the UN Declaration into BC's laws, policies and practices is a cross-government responsibility, and that this work is undertaken with Indigenous peoples. This is a significant shift. As the Chief Justice of British Columbia has observed (extrajudicially), "[t]he affirmation of the applicability of [the UN Declaration] to British Columbia and Canadian law and the government's commitment to its implementation requires all elements of the state to engage with and implement its principles".[13]

7. A Declaration Act Secretariat has been established as a dedicated body to guide and assist the Province in meeting its obligation to ensure legislation is consistent with the UN Declaration, and is developed in consultation and cooperation with Indigenous peoples.[14] BC has begun the process of aligning its laws with the Declaration, including in the area of children and families.[15] Moreover, and consistent with this, BC's *Interpretation Act* now explicitly requires that all provincial acts and regulations "be construed as being consistent with the Declaration".[16] The Declaration Act also enables the Province to enter into a

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[12] Declaration Act, ss 2(a), 3.
[13] The Honourable Robert J Bauman, "A Duty to Act" (Remarks delivered at the Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law, Vancouver, 17 November 2021) [unpublished, archived at the Courts of British Columbia, <https://www.bccourts.ca/>].
[14] British Columbia, Ministry for Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act 2021-2022 Annual Report* (June 2022) [*2021-2022 Annual Report*] at 13.
[15] *2021-2022 Annual Report* at 7-8.
[16] *Interpretation Act*, RSBC 1996 c 238, s 8.1(3).

broad range of agreements with Indigenous governing bodies, including but not limited to consent and statutory decision-making agreements.[17] The UN Declaration is also a foundation of BC's treaty negotiations framework, discussed further below.[18]

(ii) Provincial legislation in relation to children and families

8. BC has enacted and administered child welfare legislation since 1901.[19] As noted above, the CFCSA is the contemporary form of this legislation. "Child and family services" as defined under the Federal Act includes all services provided, or authority exercised under, the CFCSA; it may also include some services under the Province's *Adoption Act*.[20]

9. BC has been working for decades to return historic responsibilities for child protection and family support to Indigenous communities. Through delegation of a director's powers, duties and functions pursuant to s. 93(1)(g)(vii) of the CFCSA, employees of Indigenous Child and Family Service ("ICFS") Agencies are given authority to undertake administration of all or parts of the CFCSA.[21] The Province entered into the first delegation agreement in 1985;[22] today, 117 First Nations in BC are represented by 24 ICFS Agencies that administer all or part of the CFCSA and manage their own child and family services.[23]

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[17] Declaration Act, ss 6-7.
[18] British Columbia, Government of British Columbia, *Recognition and Reconciliation of Right Policy for Treaty Negotiations in British Columbia* (4 September 2019), [*Recognition and Reconciliation of Rights Policy*] at para 8.
[19] *An Act for the Protection and Reformation of Neglected and Dependent Children*, 1901 c 9.
[20] RSBC 1996 c 5.
[21] See *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,*O] at paras 24-25.
[22] "The history of Indigenous child welfare in BC", online: Indigenous Child and Family Service Directors <https://ourchildrenourway.ca>.
[23] Ministry of Child and Family Development, "Indigenous Child and Family Service Agencies/Delegated Aboriginal Agencies in BC", online: BC Government <https://www.gov.bc.ca>.

10. Recent amendments to the CFCSA are aimed at addressing the overrepresentation of Indigenous children in care.[24] In particular, amendments to the CFCSA which came into force in 2019 focused on supporting Indigenous children to remain at home or in their community through measures including promoting the involvement of Indigenous communities in child welfare matters prior to removal;[25] enabling greater information-sharing between a director under the CFCSA and Indigenous communities;[26] expanding the requirements to notify Indigenous communities of proceedings involving children from those communities;[27] recognizing the shared responsibilities Indigenous communities and Indigenous families have for the upbringing and well-being of their children;[28] and affirming the importance of Indigenous children learning about and practicing their traditions, customs, and languages, and belonging to their Indigenous communities.[29]

11. Those amendments also include changes which enable a director under the CFCSA to make agreements with Indigenous communities, supporting greater collaboration in planning and decision-making for Indigenous children, youth and families under the CFCSA.[30] The first such child welfare agreement, Tcwesétmentem: Walking Together, was signed in April 2022 with Simpcw First Nation.[31] While the Tcwesétmentem agreement is made under provincial legislation, it is also consistent with the national standards in the Federal Act.[32]

12. Later amendments to the CFCSA bring it closer into alignment with the Federal Act by permitting the disclosure of information necessary for the administration of the Federal Act or Indigenous laws regarding child and family services, and enabling the minister

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[24] British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 136 (14 May 2018) at 4665 (Hon Katrine Conroy).
[25] Bill 26, *Child, Family and Community Service Amendment Act*, 3rd Sess, 41st Parl, British Columbia, 2018 [Bill 26], cl 7-10 (assented to May 31, 2018).
[26] Bill 26, c 6-7, 9-10, 41, 45.
[27] Bill 26, c 21, 28.
[28] Bill 26, cl 2.
[29] Bill 26, cl 2, 4, 19, 23, 40, 43.
[30] CFCSA, s 92.1.
[31] "Simpcw First Nation signs first co-created child welfare agreement in B.C. history", (12 April 2022), online: BC Gov News <https://news.gov.bc.ca> [*Simpcw News Release*].
[32] *Simpcw News Release*.

responsible for the CFCSA to enter into coordination and information agreements contemplated by the Federal Act.[33] As of July 7, 2022, two Indigenous governing bodies in BC had given notice of their intention to exercise their legislative authority in relation to child and family services under the Federal Act and six had requested a coordination agreement.[34]

13. Amendments to the CFCSA currently under development are aimed at better supporting the rights of Indigenous peoples, including Indigenous governing bodies, as they deliver child and family services under their own laws. These amendments aim to align the CFCSA not only with the Federal Act, but also the UN Declaration, as required by the Declaration Act. The amendments were prepared in a co-development process with Indigenous peoples in BC. The Province has engaged with Indigenous partners and rightsholders throughout this reform process, including the First Nations Leadership Council, First Nations, Modern Treaty Nations, organizations and Indigenous service providers.[35]

(iii) Modern treaties

14. As this Court has observed, "modern treaties… attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities".[36] Four modern treaties are now in effect with eight Indigenous Nations in BC. BC is also party to numerous forms of non-treaty agreements with Indigenous peoples. In 2019, BC, Canada and the First Nations Summit endorsed the "Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia" to support, improve and enable the negotiation of treaties, agreements and other constructive arrangements.[37] The policy recognizes the inherent rights of Indigenous

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[33] CFCSA, ss 79.1, 90.1; Federal Act, ss 20(2), 28.
[34] "Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families", (7 July 2022), online: Indigenous Services Canada <www.sac-isc.gc.ca>.
[35] Government of British Columbia, *Child and Family Services Legislative Reform* (2022) online: govTogetherBC <https://engage.gov.bc.ca>.
[36] *Beckman* at para 10.
[37] *Recognition and Reconciliation of Rights Policy* at para 9.

Nations and endorses the UN Declaration as a foundation of BC's treaty negotiations framework.[38] While the four modern treaties now in effect pre-date BC's adoption of the UN Declaration, the Province continues to work with its treaty partners to renew and advance commitments to treaty implementation in the context of the UN Declaration, and to ensure the Declaration Act is implemented in a manner consistent with modern treaty rights.[39]

15. Modern treaties are tripartite agreements and are implemented by both federal and provincial legislation.[40] The treaties recognize institutions of Indigenous self-government and allow the Crown and treaty nations to set out government-to-government understandings, responsibilities, and obligations around the intersection of their laws and governance. Modern treaties provide for concurrent law-making authority in many areas, including in relation to children and families. Some of the subject matters on which the treaties provide for Indigenous law-making include services offered under the CFCSA. Each of the modern treaties in BC includes provisions enabling the creation of Indigenous laws governing child protection or child and family services that apply to treaty First Nation children living on treaty settlement lands.[41]

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[38] *Recognition and Reconciliation of Rights Policy* at paras 1, 3, 8, 9, 20.
[39] *2021-2022 Annual Report* at 21.
[40] *Nisga'a Final Agreement Act*, SBC 1999 c 2; *Nisga'a Final Agreement Act*, SC 2000 c 7; *Tsawwassen First Nation Final Agreement Act*, SBC 2007 c 39; *Tsawwassen First Nation Final Agreement Act*, SC 2008 c 32; *Maa-nulth First Nations Final Agreement Act*, SBC 2007 c 43; *Maanulth First Nations Final Agreement Act*, SC 2009 c 18; *Tla'amin Final Agreement Act*, SBC 2013 c 2; *Tla'amin Final Agreement Act*, SC 2014 c 11.
[41] *Nisga'a Final Agreement*, Nisga'a Nation, Canada and British Columbia, 27 April 1999 (entered into effect 11 May 2000) [Nisga'a Final Agreement], chapter 11 ss 89, 92; *Tsawwassen First Nation Final Agreement*, Tsawwassen First Nation, Canada and British Columbia, 6 December 2007 (entered into effect 3 April 2009) [Tsawwassen Final Agreement], chapter 16 ss 69, 74; *Maa-nulth First Nations Final Agreement*, Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe Government, Yuułu?ił?atḥ Government, Canada and British Columbia, 9 December 2006 (entered into effect 1 April 2011) [Maa-nulth Final Agreement], ss 13.16.2, 13.16.8; *Tla'amin Final Agreement*, Tla'amin Nation, Canada and British Columbia, 21 October 2011 (entered into effect on 5 April 2016) [Tla'amin Final Agreement], chapter 15 ss 73, 79.

16. Treaty First Nations' laws operate alongside federal and provincial laws. Accordingly, the treaties include carefully calibrated rules addressing conflicts between laws. These rules vary by subject matter and by treaty: in some cases of conflict the treaty First Nation's law prevail; in others, federal or provincial law prevails.[42]

PART II: ISSUES

17. AGBC will make submissions on the constitutional validity of the national standards set out in the first part of the Federal Act and the Act's underlying premise that s. 35 recognizes and affirms an inherent right of Indigenous peoples to make laws with respect to their children and families. AGBC takes the position that the national standards set out in the first part of the Federal Act are valid, and that s. 35 of the *Constitution Act, 1982* includes a right of Indigenous peoples to make laws with respect to their children and families.

PART III: ARGUMENT

A. The national standards set out in sections 1-17 of the Federal Act are valid

18. The first part of the Federal Act establishes national standards respecting best interests of the child,[43] procedural rights,[44] apprehensions,[45] prevention services,[46] preservation of family ties,[47] and placement priorities.[48] BC embraces these standards as being consistent with the UN Declaration, and agrees that the best interests of the child are of paramount importance. As the Court of Appeal observed, relying on this Court's decision in *Canadian Western Bank,* "[f]ederal jurisdiction over Aboriginal peoples is very broad" and

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[42] See for example Nisga'a Final Agreement, chapter 11 ss 89, 96; Tsawwassen Final Agreement, chapter 16 ss 56-58, 69-72; Maa-nulth Final Agreement, ss 13.15.3, 13.16.3-13.16.4; Tla'amin Final Agreement, chapter 15 ss 74-75, 122-129.
[43] Federal Act, ss 9-11.
[44] Federal Act, ss 12, 13.
[45] Federal Act, s 15.
[46] Federal Act, s 14.
[47] Federal Act, s 17.
[48] Federal Act, s 16.

includes "what the case law refers to as 'Indianness'" and "interpersonal relationships between Aboriginal persons, such as adoptions and family relationships".[49]

19. However, broad federal jurisdiction over Aboriginal peoples "does not imply that Parliament can invade areas of provincial jurisdiction on a massive scale and with impunity under the guise of s. 91(24)".[50] It is well established that s. 91(24) does not bar valid provincial schemes that do not impair the core of federal power, and that where possible, the ordinary operation of statutes enacted by both levels of government should be favoured.[51] This Court recently upheld federal legislation imposing national standards, noting that such schemes are premised on the fact that "Canada and the provinces are both free to legislate in relation to the same fact situation … but the federal law is paramount".[52]

20. BC is in the process of reforming the CFCSA to bring it into alignment with the Federal Act and the UN Declaration and to support the effective exercise of Indigenous jurisdiction by removing barriers and creating greater harmonization between the CFCSA and Indigenous child and family services laws. BC will continue to serve Indigenous peoples in the province under the CFCSA including, for example, where they do not yet have a child and family service law, there are limitations in the scope or application of Indigenous laws, the community is not yet delivering a particular service or is unable to provide services province-wide, or families seek access to voluntary services under the CFCSA.

B. Section 35 includes an Aboriginal right to make laws in relation to children and families

21. Sections 8 and 18 of the Federal Act affirm that the inherent right of self-government recognized and affirmed by s. 35 includes jurisdiction in relation to child and family services. BC accepts and embraces that Indigenous peoples have an inherent right to make

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[49] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 [QCCA] at paras 322-324; *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*] at para 61.
[50] QCCA at para 328.
[51] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1983, App II, No 5 [*Constitution Act, 1867*], *NIL/TU,O* at para. 3; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 51; *Canadian Western Bank* at para 37.
[52] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 129.

laws concerning their children and families, and recognizes that all relations with Indigenous peoples need to be based on the recognition and implementation of such inherent rights.[53] This right is not contingent on the law-making powers of either the federal or provincial government but rather arises out of Indigenous peoples' own sovereignty. Consistent with this, the Federal Act does not rely on s. 91(24) to delegate to Indigenous governing bodies the power to make law with respect to their children and families; rather, the Federal Act is premised on an inherent right of Indigenous peoples to make laws concerning their children and families.[54]

22. The Court of Appeal correctly concluded that Indigenous peoples have a constitutionally protected right of self-government "at least with respect to child and family services", flowing from their historical relationship with the Crown.[55] This finding is consistent with long-standing judicial recognition of Indigenous law-making powers in relation to children and families and with international human rights instruments, including the UN Declaration.

(i) Judicial recognition of Indigenous law-making in relation to children and families

23. Indigenous legal traditions are "among Canada's legal traditions" and form "part of the law of the land".[56] This Court has repeatedly emphasized that "s. 35(1) did not create Aboriginal rights", but rather gave constitutional protection to Aboriginal practices, customs and traditions that long pre-date 1982.[57] Canadian law—and indeed English law before it—"accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation".[58] As this Court explained in *Mitchell*,

> [A]boriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of

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[53] British Columbia, Government of British Columbia, *Joint Agenda: Implementing the Commitment Document* (2018), at 3; Relationship Principles at 2-3.
[54] Federal Act, ss 1-2.
[55] QCCA at para 364.
[56] *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8.
[57] *Desautel* at para 34.
[58] *Mitchell v MNR*, 2001 SCC 33 [*Mitchell*] at para 9.

> sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them... Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.[59]

24. Consistent with this, in *Campbell*, the Supreme Court of British Columbia ruled that the assertion of sovereignty by the British Crown did not extinguish Aboriginal powers of self-government, and that these are now constitutionally guaranteed by s. 35.[60]

25. As the Court of Appeal noted, "Canadian courts have generally recognized Aboriginal customary law and, by inference, the right of Aboriginal peoples to govern themselves in certain fields of jurisdiction".[61] One area in which Canadian courts have long given effect to Indigenous laws and legal traditions is in matters related to children and families, most notably marriages and adoptions. It is clear that Indigenous peoples have, and have always had, families, and a system of laws to govern these social relationships. Professor Napoleon put the point succinctly in her expert report in the Court of Appeal: "… if there were not laws to govern families and care of children, both central to the health and continuation of one's society, what point would there be in having rules of any other kind?"[62]

26. In July 1867, just nine days after confederation, Justice Monk of the Quebec Superior Court, recognized for the purpose of the laws of Quebec the validity of a marriage that had been conducted according to Cree Nation custom between an Indigenous Cree Nation woman and a non-Indigenous man.[63] Canadian courts first recognized customary adoption in 1961, when the Northwest Territories Territorial Court concluded that adoptions in accordance with "Eskimo" and "native" custom have not been abrogated and should be recognized by the court, as adoptions "made according to the laws of the Territories".[64] By

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[59] *Mitchell* at para 10 (citations omitted).
[60] *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 [*Campbell*] at paras 179-181.
[61] QCCA at para 380.
[62] QCCA at para 479.
[63] *Connolly v Woolrich* [1867] 17 RJRQ 75 (QC Sup Ct).
[64] *Re Adoption of Katie E7-1807* [1961] NWTJ No 2 (QL), 32 DLR (2d) 686, (NWT TC) at 687, 690.

the time the issue of customary adoption reached the BC Court of Appeal in *Casimel*, the court concluded that "there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption".[65] The court found on the facts before it that the customary adoption in question

> Was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People, (though, of course, other societies may well have shared the same custom or variations of that custom), and as such, gave rise to aboriginal status rights that became recognized, affirmed and protected by the common law and under s. 35.[66]

27. Following *Casimel*, BC's *Adoption Act* was amended to expressly allow courts to recognize customary adoptions that have the same effect as an adoption under the *Adoption Act*.[67]

(ii) International recognition of Indigenous law-making in relation to children and families

28. The interpretation of s. 35 as including an Aboriginal right of self-government in relation to children and families is also supported by international instruments. The UN Declaration recognizes in its preamble "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children". Article 4 of the UN Declaration enshrines the right of Indigenous peoples "to self-government in matters relating to their internal and local affairs", while Article 5 sets out their right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions". Articles 7 and 8 of the UN Declaration affirm the rights of Indigenous peoples to be free from forced assimilation and the removal of the children of

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[65] *Casimel v Insurance Corp of British Columbia*, [1993] BCJ No 1834 (QL), 106 DLR (4th) 720 (BCCA) [*Casimel*] at para 42.
[66] *Casimel* at para 52.
[67] *Adoption Act*, SBC 1995 c 48, s 46.

one group to another[68]—precisely what colonial policies targeting Indigenous children led to, and against which contemporary reforms to the CFCSA are directed at guarding.

29. The *Convention on the Rights of the Child* (the "CRC") similarly protects the rights of an Indigenous child "not [to] be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language".[69] Further, the *Convention on the Prevention and Punishment of the Crime of Genocide* (the "Genocide Convention") defines the crime of genocide as including the forcible transfer of the children of "a national, ethnical, racial or religious group" to another group, when done "with intent to destroy" the group "in whole or in part".[70] As international human rights instruments ratified by Canada, the CRC and the Genocide Convention attract a presumption that Canada's constitution should be interpreted in conformity with the obligations they set out.[71] Moreover, this Court has recognized the legal principles underlying the Genocide Convention as part of customary international law, in accordance with which Canada's domestic law must be interpreted.[72] Notably, the Federal Act expressly references Canada's ratification of the CRC in its preamble.

30. There are compelling reasons why this Court should draw on the UN Declaration here, and why it should be accorded greater weight than the Court of Appeal identified. The Court of Appeal observed that the UN Declaration is "a universal international human rights instrument whose values, principles and rights are a source for the interpretation of Canadian law".[73] As noted above, some of the UN Declaration's provisions overlap with provisions of international human rights instruments and customary international law that

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[68] UN Declaration at preamble and arts. 4-5, 7-8.
[69] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 27531, art 30, Can TS 1992 No 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) at 30.
[70] *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951, 78 UNTS 277, Can TS 1949 No 27 (entered into force 12 January 1952, ratified by Canada 3 September 1952) [*Genocide Convention*] at I, II(e).
[71] *R v DB*, 2008 SCC 25 at para 60; *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 [*Quebec*] at paras 31-34.
[72] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras 74-75; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 82.
[73] QCCA at para 507.

are binding on Canada, not merely an interpretive source. In other respects, the UN Declaration assists in delineating the scope of constitutional rights as a "relevant and persuasive, but not determinative, interpretive too[l]", consistent with the approach recently confirmed by this Court in *Quebec (Attorney General) v. 9147-0732 Québec Inc.*[74] While this Court was specifically addressing *Charter* rights in *9147-0732 Québec Inc.*, there is no principled reason why the same approach would not inform the interpretation of s. 35. Indeed, this Court has described s. 35 as a "sister provisio[n]" of the *Charter*, noting that both set out rights held against government.[75]

31. There are other reasons why attention must be paid to the UN Declaration in this case. The Federal Act itself acknowledges Canada's commitment to implement the UN Declaration in the first paragraph of the Act's preamble. In June 2021, Canada enacted its own legislation on the implementation of the UN Declaration to federal laws.[76] Section 8(c) of the Federal Act expressly states that one of the Act's purposes is to contribute to the UN Declaration's implementation. Accordingly, the Court should have specific regard to the UN Declaration in concluding that rights recognized under s. 35 include an inherent Aboriginal right of self-government in relation to children and families.

C. Modern treaties advance reconciliation and understandings of legal pluralism

32. As the Court of Appeal observed, "[i]n many cases, it is quite possible that Aboriginal legislation and federal or provincial legislation will be complementary and work together".[77] Indeed, such complementarity is the imperative of the Declaration Act, where BC has committed to work "[i]n consultation and cooperation with Indigenous peoples" to "take all measures necessary to ensure the laws of British Columbia are consistent with the [UN] Declaration".[78] Further, and with specific regard to children and families, complementarity is the aim of BC's current collaboration with Indigenous peoples on the development of amendments to the CFCSA.

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[74] *Quebec* at para 35.
[75] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 142.
[76] *United Nations Declaration of the Rights of Indigenous Peoples Act*, SC 2021 c 14.
[77] QCCA at para 496.
[78] *Declaration Act*, s 3.

33. BC embraces the opportunity to address the relationship between Indigenous and provincial laws in its legislation. Doing so calls for a process of involving Indigenous partners in the development of legislation, which this Court has acknowledged is not only constitutionally permissible, but prudent.[79] When provincial laws are based on the recognition of Indigenous jurisdiction and designed to make space for and support the exercise of that jurisdiction, conflicts are less likely to arise. This approach also allows the Province and Indigenous governments to take a more nuanced approach to the relationship between their respective laws.

34. BC also embraces the opportunity to address the relationship between federal, provincial and Indigenous laws in agreements negotiated with its Indigenous and federal partners, including treaties. As noted above, this Court has recognized the role modern treaties play in advancing reconciliation, which is "the grand purpose of s. 35".[80] The Federal Act generally encourages negotiation between Indigenous governing bodies, the federal government and the provinces. Treaties and other agreements exemplify a constitutionally permissible way to prioritize Indigenous, provincial, and federal laws. The treaties, necessarily tripartite, "recogniz[e] concurrent jurisdiction supplemented with prevailing-law rules".[81] The constitutionality of BC's modern treaties, including their conflict provisions, has been upheld.[82] Where priority is given to the treaty First Nation's law, it is treated as a law of the treaty First Nation, consistent with recognizing treaty First Nations as part of Canada's evolving system of cooperative federalism and distinct orders of government and a recognition of Aboriginal self-government rights protected by s. 35.[83]

35. BC continues to work with its treaty partners to ensure the treaties are implemented in a manner consistent with the UN Declaration. Indeed, the UN Declaration expressly affirms that "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States… and to have States honour and respect such treaties, agreements and other constructive arrangements".[84]

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[79] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 145, Brown J (concurring) and 167, Rowe J (concurring).

36. As this Court has observed, negotiations can "'produc[e] outcomes that are better suited to the parties' interests'".[85] Negotiated agreements like treaties can also provide for dispute resolution mechanisms that lessen the parties' reliance on courts where conflicts arise. As this Court has emphasized, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms".[86]

PART IV: COSTS

37. The AGBC asks that no costs be awarded for or against him.

PART V: ORDER SOUGHT

38. The AGBC takes no position with respect to the disposition of this appeal.

PART VI: SUBMISSIONS ON PUBLICATION (NOT APPLICABLE)

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF OCTOBER, 2022

Leah R. Greathead
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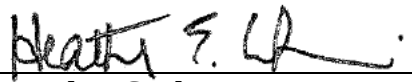

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[80] *Beckman* at para 10.
[81] *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 [*Chief Mountain*] at para 86.
[82] *Chief Mountain* at paras 83-84, 86; see also *Campbell* at para 185.
[83] See for example Tla'amin Final Agreement, chapter 2 s 7.
[84] UN Declaration at 37(1).
[85] *Desautel* at para 87 (quoting S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at 139).
[86] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24.

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