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COURT OF APPEAL OF QUÉBEC

(Montréal)

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

Order in Council No.: 1288-2019

ASENIWUCHE WINEWAK NATION OF CANADA'S BRIEF

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ASENIWUCHE WINEWAK NATION OF CANADA'S ARGUMENT

PART I – FACTS

A. Aseniwuche Winewak Resilience

1. Aseniwuche Winewak is a distinct Indigenous community located near Grande Cache, Alberta, in Treaty 8 territory with ancestry from Cree, Mohawk (Iroquois or Haudenosaunee), Beaver, Shuswap, Sekani, Assiniboine (Sioux), Saulteaux (Anishinaabe) and Métis lineages.[1] Their traditional territory covers 39,000 km^2 from what is now the eastern boundary of Jasper National Park to the upper Smoky River just north of the present hamlet of Grande Cache.[2]

2. In Cree, Aseniwuche Winewak means "Rocky Mountain People".[3] Although the majority of Aseniwuche Winewak members identify as non-status Indians, their central identity is associated with their distinct culture as the "Rocky Mountain People," rather than with categories of Indigeneity imposed by the Crown.[4] The Aseniwuche Winewak speak a distinct dialect of Cree, reflecting their unique culture and relative isolation from other Cree peoples. Most Aseniwuche Winewak adults speak Cree as their first language and continue to live their traditional way of life.[5]

3. Aseniwuche Winewak's history is one of maintaining a strong, rich culture despite displacement from their traditional lands and neglect by the Crown.[6] The Aseniwuche Winewak largely lived on the land as they always had, until they were threatened with the establishment of a town and coal mine in their midst in the 1970s.[7] At that time, the Aseniwuche Winewak and the Province of Alberta signed six unique agreements, creating seven land bases to be held collectively in fee simple title by six cooperatives and enterprises.[8] Over 500 members reside on these lands, and another 150 live in nearby Grande Cache.[9]

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1 Affidavit of Thomas McDonald #2, affirmed November 27, 2020 [**McDonald Affidavit**], at paras 16-17, Evidence Record of Aseniwuche Winewak Nation of Canada [**AWN's Evidence**], p 4.
2 McDonald Affidavit at para 22, AWN's evidence, p 5.
3 McDonald Affidavit at para 18, AWN's evidence, pp 5-6.
4 McDonald Affidavit at para 20, AWN's evidence, p 5.
5 McDonald Affidavit at para 21, AWN's evidence, p 5.
6 McDonald Affidavit at paras 23-25, AWN's evidence, p 6.
7 McDonald Affidavit at paras 25-26, 30, AWN's evidence, p 6.
8 McDonald Affidavit at para 27, AWN's evidence, pp 6-7.
9 McDonald Affidavit at paras 27-28, AWN's evidence, pp 6-7.

B. The Aseniwuche Winewak's Fraught Relationship with the Crown

4. The Aseniwuche Winewak have never been given the opportunity to sign or adhere to Treaty 8, despite their presence within the boundaries of the treaty as a distinct Indigenous people at the time of treaty making in 1899. Canada has never recognized the Aseniwuche Winewak as a band under the *Indian Act*.[10]

5. Crown officials have historically referred to the Aseniwuche Winewak as too Indian to be Métis, while at other times identified them as Métis or "halfbreeds."[11] The Crown has recognized the Aseniwuche Winewak as Indians in some instances, but denied they are a distinct community. In *Daniels v Canada,* the Supreme Court of Canada recognized that the Aseniwuche Winewak, appearing as an intervenor, were caught in a "jurisdictional wasteland" between federal and provincial governments who each denied having the jurisdiction to provide them with the protection, programs and services available to *Indian Act* bands and status Indians.[12]

6. The Aseniwuche Winewak have outstanding litigation against Canada and Alberta seeking, among other things, recognition as "Indians" under s. 91(24) of the *Constitution Act, 1867,* the right to adhere to Treaty 8 and the rights, protections and benefits of that treaty. This litigation is in abeyance to allow for negotiations.[13]

7. Aseniwuche Winewak shares common strengths and experiences with other Indigenous groups in Canada. It also faces similar pressures; but receives none of the essential services (as imperfect as they may be) afforded those who are recognized as *Indian Act* bands. A lack of culturally relevant child and family services is just one of the gaps Aseniwuche Winewak faces.

C. The Aseniwuche Winewak's Governing Body

8. The Aseniwuche Winewak Nation of Canada ("AWN") is a registered society under the *Societies Act*[14], created in 1994 to act as a representative body of the Aseniwuche

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10 McDonald Affidavit at para 37, AWN's evidence, p 9.
11 McDonald Affidavit at para 38, AWN's evidence, p 9; *Indian Act,* RSC, 1985, c I-5 [***Indian Act***].
12 McDonald Affidavit at para 40, AWN's evidence, p 9; *Daniels v Canada (Indigenous Affairs and Northern Development)*, 2016 SCC 12 [***Daniels***] at paras 14-15, 20.
13 McDonald Affidavit at paras 41-42, AWN's evidence, pp 9-10.
14 *Societies Act*, RSA 200, c S-14.

Winewak people. It is governed by a Board of Directors consisting of one President and six Directors from each cooperative and enterprise and an Elders Council. AWN represents the Aseniwuche Winewak in consultations and negotiations with government and industry regarding impacts to their Aboriginal rights and interests, administers social housing, provides cultural education, provides programming for children and families, and employs a child and family advocate to advocate on behalf of Aseniwuche Winewak children and families.[15] AWN is designated as the Indigenous governing body of the Aseniwuche Winewak for the purposes of *An Act respecting First Nations, Métis and Inuit Children, Youth and Families*[16] (the "Federal Act").[17]

D. Aseniwuche Winewak's Work with Children and Families

9. AWN's governance development and revitalization work is an example of the Aseniwuche Winewak's rich and distinct culture. Grounded in the teachings of community elders, seven Cree Foundational Principles (the "Principles") guide the Aseniwuche Winewak in decision-making.[18] The Principles are listed below with the best English translation possible:

a. ᓀᐦᐃᔭᐤ ᐱᒪᑎᓯᐧᐃᓐ *nehiyaw pimatisiwin* – Cree way of Life;

b. ᓀᐦᐃᔭᐁᐧᐃᓐ *nehiyawewin* – Cree language;

c. ᐊᐧᐦᑯᑐᐧᐃᓐ *wahkôtowin* – Relatedness and interdependence;

d. ᒥᔪ ᐧᐃᓂᐧᐃᐧᐃᓐ *miyo-wîcihtowin* – Creating good relationships;

e. ᓯᐦᐧᐃᓄᐧᐃᐧᐃᓐ *sihtoskâtowin* – Supporting each other;

f. ᒪᓇᑎᐧᐃᐧᐃᓐ *manâcihtâwin* – Respect, care or non-interference/conservation; and

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15 McDonald Affidavit at para 65, AWN's evidence, p 16.
16 *An Act respecting First Nations, Inuit and Métis children, Youth and Families*, SC 2019, c 24, [***Federal Act***], s 1 "Indigenous governing body".
17 McDonald Affidavit at para 88 and Exhibit D, AWN's evidence, pp 21, 53.
18 McDonald Affidavit at para 45, AWN's evidence, p 10.

g. ᑕᐯᐧᐃᐧᐣ *tapwewin* – Honesty and truthfulness.[19]

10. These Principles are not discrete concepts. For example, "*nehiyawewin"* (Cree language) is interconnected with and inseparable from "*nehiyaw pimatisiwin"* (Cree way of life) and the connection to traditional lands that way of life includes.[20]

11. AWN incorporated the Principles into a Child and Family Wellbeing Policy and Cultural Connection Plan template[21], which it provided to the Alberta Ministry of Children's Services to be used with all Aseniwuche Winewak children. AWN's objective is that any child who is out of family care outside the community will have a plan to keep them connected to their Aseniwuche Winewak community, family, land, language, knowledge and culture.[22] This work is part of AWN's efforts to improve the experience of its children with child and family services and assert self-government.

12. Aseniwuche Winewak's children and families have been devastated by the intervention of child and family services that fail to adequately protect their cultural continuity and Indigenous identity.[23] As discussed later in these submissions, the patchwork of provincial legislation across Canada is inconsistent both in its content and in its application to non-status Indians. AWN is in the precarious position of relying on relationships within the public service, instead of legislative protection.[24]

PART II – ISSUES

13. This reference asks whether the *Act respecting First Nations, Inuit and Métis children, youth and families* is *ultra vires* the jurisdiction of the Parliament of Canada under the

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19 As Thomas McDonald mentions in his affidavit, some of the concepts are difficult to translate and may not be perfectly reflected in their English equivalent: McDonald Affidavit at paras 47-57, AWN's evidence, pp 11-14; Expert report of Johanne Johnson, November 25, 2020 [**Johnson Report**], AWN's evidence, pp 154-208.

20 McDonald Affidavit at para 50, AWN's evidence, p 12.

21 McDonald Affidavit at paras 59-62, and Ex B, AWN's evidence, pp 14-15 and pp 28-45.

22 McDonald Affidavit at para 62, AWN's evidence, p 15.

23 See Wanyandie Affidavit, especially paras 18-28, 95-101, AWN's evidence, pp 84-87, 101-102; Affidavit of Wyatt Wall-O'Reilly, sworn November 26, 2020 [**Wall-O'Reilly Affidavit**] at paras 2-4, 7-16, AWN's evidence, pp 150-153.

24 McDonald Affidavit at paras 66-76, AWN's evidence pp 16-18.

Constitution of Canada. AWN submits that the minimum national standards established by the Federal Act are a valid exercise of federal power. There are strong legal and policy reasons to uphold the minimum national standards in the Federal Act as constitutional:

a. To find the Federal Act *ultra vires* would deny non-status Indians the promise of *Daniels*: federal protection from provincial failure or inability to provide for their unique circumstances and needs;

b. Given inter-provincial mobility, protecting Indigenous children's cultural continuity and identity requires a coordinated approach; and

c. National standards are a constitutionally valid tool to address matters of overlapping jurisdiction with national aspects.

PART III – SUBMISSIONS

A. The Patchwork of Provincial Regimes is Inconsistent and Excludes Non-Status Communities

14. Inconsistent provincial regimes for Indigenous child and family services negatively impact non-status Indian children, family and communities in two main ways. First, the minimum legislated standard of cultural protection for Indigenous children, families and communities varies across Canada, which creates particularly negative effects when families and children move, or are moved, to other provinces. Second, provincial legislation does not consistently recognize non-status Indian and Métis children, families and communities. Because of this, the provincial regimes alone fall short of protecting non-status Indians' connection to their families, communities, land, language, knowledge and culture ("cultural continuity and Indigenous identity").

1. The patchwork of provincial regimes fails to provide consistency

15. The protections provided for Indigenous children's cultural continuity and Indigenous identity in child and family services legislation vary widely province to province. There is no consistent minimum standard of protection provided for Indigenous children, like

priority placement with their community, or communities, like rights of notice and representation. A comparison of the protections provided by provincial legislation is provided in Table 1, below.

Table 1: Indigenous-specific provisions in child and family services legislation across Canada[25]

Type of provision	BC [26]	AB [27]	SK [28]	MB [29]	ON [30]	QC [31]	NB [32]	NS [33]	PEI [34]	NL [35]	YK [36]	NWT [37]	NU [38]	Federal [39]
Child-specific provisions														
Indigenous cultural/familial connection included in BIOC[40]	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y
Priority placement with Indigenous family or community	Y	N	N	N	N	Y	N	N	N	Y	Y	N	N	Y

25 This table builds on the work of Metallic, Naiomi Walqwan, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case," *Journal of Law and Social Policy* 28, (2018): 4-41, who noted this patchwork at pp 19-20 and 40-41 (Appendix C).

26 *Child, Family, and Community Service Act*, RSBC c 46 [***BC Act***], 2(f), 3(b), 4(2), 33.1(4), 34(3), 35(1), 36(2.1), 38(1), 39(1), 42.1(1), 70(1.1), 71(1), 71(3).

27 *Child, Youth and Family Enhancement Act*, RSA 2000, Chapter C-12 [***AB Act***], ss 1.1(c), 2(1)(c)(j)(iii), 3.1, 52-53, 56(1), 57.01, 58.1, 63, 67, 71.1.,107.

28 *The Child and Family Services Act*, SS 1989 C-7.2 [***SK Act***], ss 15, 23(1)(b), 37(10)–(11), 53. Saskatchewan includes culture in the best interests of the child, but it is not specific to Indigenous culture (see s. 4(c)).

29 *The Child and Family Services Act*, CCSM 1985, C80 [***MB Act***], ss 2(1)(h), 9, 17(3), 30, 38, 54, 77. Manitoba includes culture in the best interests of the child but it is not specific to Indigenous culture (see s. 2(1)(h)).

30 *Child, Youth and Family Services Act*, SO 2017 c 14, 3 [***ON Act***], ss (1)(b), 35(1), 64(1)(a)(iii), 74(3)–(4), 80, 109(2), 187(1).

31 *Youth Protection Act*, CQLR c P-34.1 [***QC Act***] ss 2.4(5)(c), 3, 4, 37.5, 71.3.1–2, 81.1.

32 *Family Services Act*, SNB 1980 c F-2.2 [***NB Act***], ss 1(g), 45(3)(a). New Brunswick includes cultural needs in the best interests of the child and placement, but it is not specific to Indigenous culture.

33 *Children and Family Services Act*, SNS 1990, C 5 [***NS Act***], ss 2(g), 3(1)(kb)(kc), 36(3), 47(a), 68(11), 76(1), 78(4). Nova Scotia includes culture in the best interests of the child, but it is not specific to Indigenous culture (see s. 2(g)).

34 *Child Protection Act*, RSPEI 1988, c C-5.1 [***PEI Act***], ss 2(j), 12(3.1), 13(7),13(8), 16, 29(2), 35(1).

35 *Children, Youth and Families Act*, SNL 2018, C-12.3 [***NL Act***], ss 9(2)(f), 65(3), 65(4). Indigenous communities may apply to be heard but have no *right* to be heard in proceedings under this Act.

36 *Child and Family Services Act*, SY 2008, c 1 [***YK Act***], ss 2(d)(e), 4(2), 7(1)(c), 27(1), 28, 32(d), 47, 48, 88(1)(i), 89, 134, 186(1).

37 *Child and Family Services Act*, SNWT 1997, c 13 [***NWT Act***], ss 3, 12.3, 27(2), 29(2).

38 *Consolidation of Child and Family Services Act*, SNWT 1997 c 13 [***NWT Reg (Nu)***], ss 3(c), 25(c).

39 *Federal Act*, ss 2, 3(f), 10(2), 10(3), 12(1), 13, 14(1), 15, 16, 20.

40 "Best interests of the child."

Type of provision	BC [26]	AB [27]	SK [28]	MB [29]	ON [30]	QC [31]	NB [32]	NS [33]	PEI [34]	NL [35]	YK [36]	NWT [37]	NU [38]	Federal [39]
Placement must take into account Indigenous culture and/or require cultural connection plan	Y	Y	Y	N	Y	Y	N	Y	N	Y	N	N	N	Y
Periodic review of placements outside family	N	N	N	Y	Y	N	N	N	N	N	Y	N	N	Y
Provides for preventative care	N	N	N	Y	Y	N	N	N	N	N	N	N	N	Y
Prevents apprehension on basis of socio-economic conditions	N	N	N	Y	N	N	N	N	N	N	N	N	N	Y
Community-specific provisions														
Recognition of importance of cultural continuity	Y	Y	N	N	Y	N	N	Y	Y	N	Y	Y	N	Y
Notice of hearing and/or measures taken	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	Y
Right to make representations at hearing	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	N	Y
Involvement in service planning or delivery	Y	Y	N	N	Y	N	N	N	N	N	Y	N	N	Y
Customary adoptions/kinds hip placements	Y	N	N	N	Y	Y	N	Y	N	N	Y	N	N	Y
Involvement in creation of/recognition of cultural connection plan	N	Y	N	N	N	N	N	N	N	N	N	N	N	Y
Possibility of agreement to develop own child protection program	N	N	N	N	N	Y	N	N	N	N	N	N	N	Y

Y= the legislation includes this type of provision **N =** the legislation does not include this type of provision

2. The patchwork of provincial regimes excludes non-status Indian communities

16. This patchwork of provincial child protection regimes has a uniquely negative impact on non-status Indian children, families and communities, as they are not uniformly recognized in child and family services legislation across Canada. Indigenous-specific provisions of this legislation typically fall under one of two categories: (1) protections aimed at the individual Indigenous child ("child-specific provisions") and (2) rights for communities that allow the community to participate in the protection of the child's cultural safety ("community-specific provisions").[41]

17. Child-specific provisions may recognize a child's rights to their Indigenous culture, require consideration of their connection to family, community and culture in assessing the best interests of the child, prioritize placement with an Indigenous family or community, and planning to facilitate cultural connection.

18. Community-specific provisions designed to ensure community involvement in an Indigenous child's protection and well-being include:

a. mandatory notice of child protection proceedings or significant measures like guardianship or adoption;

b. rights to make representations in proceedings; and

c. opportunities to make agreements with the province and/or family regarding the care of the child.

19. In each province in Canada, to varying degrees, child and family legislation excludes non-status children, families and communities from some or all of the Indigenous-specific provisions or leaves their application to those groups ambiguous.[42]

20. In the Québec legislation, the Indigenous-specific provisions apply to "Native" children and communities, or in French, to "les autochtones."[43] These terms are undefined

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41 These categories are used only for ease of reference. The protection of the child's access to cultural continuity and identity and the community's cultural continuity and identity are intimately related.

42 While this factum does not specifically address the plight of Métis or Inuit children and communities, the same criticism largely applies to their underrepresentation in provincial legislation.

43 *QC Act*.

and are arguably broad enough to include non-status Indians. However, without definition, application of these provisions is left to individual decision makers on a case-by-case basis. This makes the inclusion of non-status Indians unclear and leaves them vulnerable to inadequate cultural protection.

21. In Alberta, the home of the Aseniwuche Winewak, child-specific provisions apply to all Indigenous children.[44] However, most community-specific provisions apply only to *Indian Act* bands, not non-status Indian communities, nor Métis and Inuit.[45]

22. Legislation in British Columbia[46], Ontario[47], Yukon[48], Northwest Territories[49], and Newfoundland[50] each contain child-specific provisions that apply to non-status Indians. The community-specific provisions in these jurisdictions are broad enough to include non-status Indian communities, but are limited to only some provisions[51] and/or to a prescribed list of communities in the legislation or regulations.[52]

23. In Saskatchewan[53], Manitoba[54], PEI[55] and Nova Scotia (with the one exception of Mi'kmaq children recognized according to band custom and law)[56] Indigenous-specific

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44 *AB Act,* ss 1 (m.01), 2(1)(c), 2(1)(j)(3), 52(1.3), 56(1.2), 57.01, 58.1(d).

45 *AB Act*, ss 1 (a.4), (j.3), (m.01), 53(1.1), 53.1, 107; Right to involvement in preparation of a cultural connection plan does apply to all Indigenous people in Alberta, see s 52(1.3).

46 *BC Act,* ss 1 "Indigenous child", 2, 3, 4(2), 35(1)(b), 42.1(5), 70(1.1), 71(3), but if non-status or Métis, the community has to be identified by the child (if over 12 yrs) or a parent (if child under 12 yrs) (ss 1 "Indigenous child").

47 *ON Act,* ss 69, 70(1), 72, 79(1), 80, 101(5), 104(2) and (4), 109(7), (10) and (13), 113, 186, 187.

48 *YK Act,* ss "First Nation", "member of a First Nation", 47(1), 48(1), 98(2).

49 *NWT Act,* ss 3, 12.3, 27(2), 29(2).

50 Including requiring that the importance of preserving an Indigenous child or youth's unique cultural identity be considered in determining the best interests of the child (s 9), and creation of a cultural connection plan (s 29(3)(iv)), and requiring priority placement of the child with kin or community, s. 65(3) *NL Act.*

51 *BC Act*, ss 5-8, 12.2, 16(2)(v), 16(2.4), 33.01(a), 38(1)(d), 39(1), 48(1.1)(a), 49(2)(d), 50(4)(e), 50.01, 54.01(3), 54.1(2), 60(1), 92.1(2), 92.1(1), 107(6); Some provisions require the child or the child's parent to identify the Indigenous community.

52 *BC Act*, 16(1)(b), 16(2)(d), 33.1(4), 34(3), 36(2.1)(e); *ON Act*, s 2 "First Nations, Inuit or Métis community", Reg. 159/18: List of First Nations, Inuit and Métis Communities; *NL Act,* ss 2(1)(o), 2(1)(p), 25(3), 27, 36, 43 45(2), 50, Schedule. *NWT Act,* ss 12.3(2), 25(2), 29.3(2), *Child and Family Services Regulations*; NWT Reg (Nu) 142-98 at s 41; *YK Act,* ss 2(d), 7(1)(c), 27(1), 28(1), 32(1)(d), 41(1)(b), 47(1), 48(1)(b), 89(1)(3), 98(1)(2).

53 *SK Act*, ss 2(1)(a.1), 2(1)(s), 23(1), 37(2), (3), (10), (11).

54 *MB Act,* ss 30(1), 77(2), Declaration of principles, Principle 11.

55 *PEI Act,* ss 1(a), 12(3.1) and (3.2), 13(7) and (8), 18.1(1) and (2), 24(1.2) and (1.3), 27(1), (1.1) and (2), 29(2), 32(2) and(3), 35, 37(2), 37(4), 39(2).

56 *NS Act*, ss 3(1)(a), (kb), (kc) and (oa), 36(3), 36(4A), 39(4)(da), 42(1)(ca), 42(3)(b), 44(3)(e).

provisions apply only to children who are status Indians and communities that are *Indian Act* bands. Nunavut's legislation refers only to Inuit children.[57] New Brunswick's legislation provides no specific protections at all for Indigenous children, families and communities when Indigenous children are taken into care.[58]

24. The gaps in the provincial legislative patchwork have particularly devastating consequences for non-status Indian communities like the Aseniwuche Winewak, as discussed further below. This is in stark contrast to the Federal Act, which applies to all Indigenous peoples in Canada.[59] It is the only statute that clearly mandates the same minimum standards for all status, non-status, Inuit and Métis children, families and communities. The protections for non-status Indians in the provincial and federal schemes are summarized in Table 2, below.

Table 2: Inclusion of non-status Indians in Indigenous-specific provisions in provincial and territorial legislation

Type of provision	BC	AB	SK	MB	ON	QC	NB	NS	PEI	NL	YK	NWT	NU	Federal
Child-specific provisions apply to all non-status Indians	Y	Y	N	N	Y	Y	N	N	N	Y	Y	N	N	Y
Community-specific provisions apply to non-status Indian communities	S	S	N	N	S	Y	N	S	N	S	S	S	N	Y

Y = yes non-status Indians protected in all provisions **N =** non-status Indian protected in no provisions
S = non-status Indians protected in some provisions or provisions apply only to prescribed list of communities

B. The Promise of *Daniels* is Federal Protection from Provincial Failure

1. *Daniels v Canada* recognized the protective aspect of federal jurisdiction

25. The Supreme Court of Canada's most recent decision on s. 91(24) demonstrates that reconciliation with all Indigenous peoples in Canada is the overarching goal of

57 *NWT Act*, s 25.
58 *NB Act*.
59 *Federal Act*, s 1 "Indigenous", "Indigenous governing body", "Indigenous peoples".

s. 91(24)[60], and that the scope of this section includes a protective element. As the Attorney General of Canada ("AGC"), notes, this is by necessity a broad power, applying to all Indigenous peoples, wherever they are in Canada.[61]

26. In determining the scope of the federal power in *Daniels*, the trial judge identified the historical purposes of s. 91(24), which the Supreme Court of Canada affirmed[62]:

a. To honour the Crown's responsibilities to Indigenous peoples, including obligations under the Royal Proclamation of 1763[63];

b. To control Indigenous people and communities to facilitate the development of the Dominion[64];

c. To civilize and assimilate Indigenous peoples[65]; and

d. The resulting need for a coordinated approach to all Indigenous peoples rather than "balkanized colonial regimes".[66]

27. These purposes reveal that reconciling the interests of Indigenous and non-Indigenous societies has always been a goal of s. 91(24). It is society's views on what reconciliation means and the acceptable methods of carrying it out that have shifted. As the trial judge in *Daniels* noted, "history helps to understand perspectives on the purpose but does not necessarily determine the purpose for all time."[67] The "living tree" approach to constitutional interpretation provides that, while powers must be interpreted in a manner consistent with their legal context and having regard to historical elements[68], our constitution is subject to a large and liberal or progressive interpretation that accommodates and addresses modern life.[69]

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60 *Daniels* at paras 34, 37 and 49.
61 AGC Factum para 85 citing *Daniels* and *Four B Manufacturing v United Garmet Workers*, [1980] 1 SCR 1031, 102 DLR (3d) 385.
62 *Daniels* at para 5.
63 *Daniels v Canada*, 2013 FC 6, [2013] 2 FCR 268 [***Daniels* FC**] at paras 353, 539.
64 *Daniels* FC at paras 353, 539, 566.
65 *Daniels* at paras 353, 567.
66 *Daniels* FC at para 539.
67 *Daniels* FC at para 538.
68 *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at 30, cited by Phelan J. in *Daniels* at 543.
69 *Reference re Same-Sex Marriage*, 2004 SCC 79 [***Re Same-Sex Marriage***] at paras 22-23, cited by Phelan J. in *Daniels* FC at 538.

28. Recognition and protection of Indigenous culture and self-government, not assimilation, are now accepted moral imperatives of reconciliation.[70] If s. 91(24) historically included the power necessary for a coordinated approach to "civilize" and assimilate Indigenous peoples, surely the modern expression of s. 91(24) includes the power to undo the harms of assimilation. The modern focus is to reconcile Indigenous and non-Indigenous societies by recognizing and protecting Indigenous peoples' core social institutions, identity, cultural continuity and ways of life.

29. That s. 91(24) contains a protective element is not new. The historical purposes behind the federal power clearly include a protective aspect. For example, in the Royal Proclamation, the Crown committed to protect Indigenous peoples from being "molested or disturbed" in the possession of their lands, and assumed a protective role by inserting itself between Indigenous peoples and land speculators, declaring the Crown the only lawful purchaser of Indigenous lands.[71] Parliament's protective role in this regard remains reflected in the *Indian Act.* The Crown holds reserve lands for the benefit of Indian bands, and only the Crown can dispose of legal interests in those lands, which gives rise to a fiduciary duty.[72]

30. The protective element of s. 91(24) is also evident in the nature of the problem which gave rise to the *Daniels* case. The case arose in the context of a failure by both levels of government to provide necessary protections to non-status Indians and Métis peoples. Each level of government denied it had jurisdiction over these groups, such that they became "political footballs."[73] Citing a Cabinet memorandum, the trial judge described the problem that gave rise to the litigation in this way:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern

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70 Canada, TRC, Summary of the Final Report of the Truth and Reconciliation Commission of Canada: *Honouring the Truth, Reconciling for the Future* (Winnipeg: TRC, 2015) [**TRC Summary**] at p 17, 130-131, 153-156, 160, 163, 190, 204, 209, 226-227, 246-247 in AGC's Evidence Vol. 14 p 5041, 5153-5154, 5175-5178, 5182, 5185, 5212, 5226, 5231, 5248-5249, 5268-5269; Canada, TRC, *Calls to Action* (Winnipeg: TRC, 2015); TRC summary at pp 13-17, 22, 42, 43-44, 45 50, 61, 84.

71 King George III of England, "Royal Proclamation, 1763," *Exhibits*, accessed online on April 26, 2021, at: https://exhibits.library.utoronto.ca/items/show/2470; *R v Guerin,* 1984 2 SCR 335, 1984 CanLII 25 [***Guerin***] at 383. This has been noted by Peter Hogg, see AGC Factum at para 88 and TRC Summary, p 212.

72 *Guerin* at 376; *Indian Act*, ss 28(1), 37, 38, 53(1), 58.

73 *Daniels* FC at para 86.

> Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[74]

Phelan J. concluded that:

> …the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed.[75]

31. The Supreme Court of Canada adopted the latter passage finding that these Indigenous communities were left in a "jurisdictional wasteland with significant and obvious disadvantaging consequences."[76] The promise of *Daniels* was to lead non-status Indians and Métis out of this jurisdictional wasteland by confirming the federal power under s. 91(24) to protect them from a provincial failure or inability to provide for their unique status, circumstances and needs. Protection of Indigenous children, families and communities' cultural continuity and Indigenous identity requires a coordinated approach that only the federal government can provide.

2. Provincial legislation alone fails to protect non-status Indian communities

32. The Aseniwuche Winewak and other non-status communities are largely excluded from even the meagre protections afforded other Indigenous communities in provincial child and family legislation. As Aseniwuche Winewak are not a "band" under the *Indian Act*, the majority of the community-specific provisions of Alberta's *Child, Youth and Family Enhancement Act* (the "Alberta Act") do not apply. Under the legislation, AWN has no legal right to notice when a child from their community is apprehended, to involvement in what happens to that child, or to make representations in any proceedings relating to that child.[77]

33. Even at the point of adoption, where an Aseniwuche Winewak child is permanently legally severed from their family and cultural identity, no notice is required.[78] While a child

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74 *Daniels* FC at para 84.
75 *Daniels* FC at para 108.
76 *Daniels* at para 14.
77 *AB Act*, ss 1(1)(a.4), (j.3), (m.01), 53(1.1), 53.1, 107.
78 *AB Act*, ss 1(1)(a.4), 64, 67(1).

with Indian status under the *Indian Act* at least retains their right to register for Indian status, any associated rights to band membership and the connection that may provide[79], an Aseniwuche Winewak, or other non-status, Inuit or Métis child, is legally severed from their Indigenous community. This occurs with no notice to or representations from that child's family or Indigenous governing body.

34. Instead, AWN relies on relationships with certain offices and individuals in the Alberta child welfare system to obtain policy flexibilities and opportunities for involvement in the care of their children on an *ad hoc* basis. Not surprisingly, the inclusion of AWN in action taken by provincial authorities has varied widely, resulting in inconsistent and arbitrary application of legislative protections to Aseniwuche Winewak children, families and communities.[80] This increases the risk that the children will lose their connection to their culture and Indigenous identity as their particular needs as Indigenous children have inadequate legal protection.

35. If *Daniels* is to have any practical impact for non-status Indians, then federal powers under s.91(24) must include the authority to legislate a coordinated national approach on urgent matters like Indigenous-specific measures in child and family services for Indigenous children. *Daniels* promises that when non-status and Métis peoples' needs as "Indians" are not being served in provincial law, they can turn to the federal government for redress.[81] In this case, it is simply beyond the capacity of any one province or territory to fill the interprovincial gaps in child and family services for Indigenous families.

C. The Federal Act is a Constitutionally Valid Exercise of Power to Address a Matter Requiring National Action

1. Children suffer when they lose protections at provincial borders

36. No one provincial legislature can ensure there is an equitable minimum standard of protection of Indigenous children's needs for cultural continuity and Indigenous identity wherever they are. Indigenous children and families are mobile and cross, or are moved

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79 *Natural Parents v Superintendent of Child Welfare et al.*, [1976] 2 SCR 751, 1975 CanLII 143 [***Natural Parents***] at pp 765-766.

80 McDonald Affidavit at paras 66-77, AWN's evidence, pp 16-18.

81 *Daniels* at paras 15 and 50.

across, provincial borders. While Indigenous communities are deeply tied to their land[82], their children may be uprooted by child and family services intervention or family choices and moved to other provinces.

37. Without the protections of the Federal Act, the movement of children across provincial borders combined with inconsistent provincial legislation and a lack of legislated national minimum standards results in the loss of protections for Indigenous children, families and communities that were available to them in their province of origin. This impact is even worse for non-status Indian children because of the failure of many provincial acts to include them within the ambit of Indigenous-specific provisions, as discussed above.

38. Aseniwuche Winewak Child #4 and her family felt the impact of interprovincial gaps in cultural protection first-hand. Her family initially agreed to her temporary placement in Québec with a non-Indigenous non-family member related by marriage, because of a close relationship and frequent visits in the past. They expected that (1) her guardian would keep her promises to keep the child connected to her culture and Aseniwuche Winewak identity[83]; and (2) that child and family services in either or both provinces (Alberta and Québec) would notify and include the family and community in assessing the long-term suitability of the placement and ensuring the child's familial relationship and cultural continuity were properly protected prior to any permanent order.[84]

39. As an Indigenous child of Alberta, Child #4 would be entitled to a cultural connection plan to ensure her connection to her Aseniwuche Winewak culture and family before any orders were made granting private guardianship or adoption.[85] The child's needs for cultural continuity had not changed, but because the child was now in Québec, which does not require cultural connection plans[86], she lost her rights to that protection. Without such a plan, her family and community could rely only on the good intentions of her guardian, which later faded.[87] Québec and Alberta officials were not responsive to family

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82 See e.g. McDonald Affidavit at paras 48, 50, 52, AWN's evidence, pp 11-13; Expert Report of Jessica Ball at p 20, AGC Cahier de prevue, p 2989.
83 Wanyandie Affidavit at para 58, AWN's evidence, p 93.
84 Wanyandie Affidavit at para 59, 63-65,68-70, AWN's evidence, pp 93-96
85 Wanyandie Affidavit at para 59, AWN's evidence, p 93; *AB Act* at s 52(1.3), 58.1(d).
86 The Québec Act contains no provisions requiring the preparation of a cultural connection plan or something similar.
87 Wanyandie Affidavit at paras 66-67, 89, AWN's evidence, pp 95, 100.

and community queries or requests for a meeting. Despite repeated attempts to raise their concerns, the community was ignored.[88]

40. Without notice to the family or community, the child was adopted in Québec.[89] The child's Indigenous identity was legally erased and replaced with the non-Indigenous identity of the adoptive parent, with no mitigating plan or order in place to maintain her cultural continuity and Aseniwuche Winewak identity. These are the kind of circumstances found to cause "great harm" to Indigenous children all across Canada in *Brown v Canada*[90] and which caused the generational losses of culture, language and belonging described by Aseniwuche Winewak member Wyatt Wall-O'Reilly in his evidence.[91] The child, family and community were left in a new kind of jurisdictional wasteland, the minimum protection of the law they could rely on in their home jurisdiction having evaporated in a far away province.

41. Had the Federal Act been in force at the time Child #4 went into care, her story might have been very different:

a. her family and community would have received notice of any significant measure taken with respect to her care by either Alberta or Québec[92];

b. her parents and AWN would have had the right to make representations in any proceedings with respect to Child #4 including placement and adoption proceedings[93];

c. placement with an Indigenous family member or in her community would have been given priority[94];

d. placement with her siblings would have been given priority, which may have kept her in or closer to her community[95];

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88 Wanyandie Affidavit at paras 69-88, 93-98, AWN's evidence, pp 95-102.
89 Wanyandie Affidavit at para 90, AWN's evidence, p 100.
90 *Brown v Canada*, 2017 ONSC 251 *at* paras 3-7.
91 Wall-O'Reilly Affidavit at paras 7-16, AWN's evidence, pp 151-153; see also Wanyandie Affidavit at paras 18-28, AWN's evidence, pp 84-87.
92 *Federal Act*, s 12.
93 *Federal Act*, s 13.
94 *Federal Act*, s 16.
95 *Federal Act*, s 16(2).

e. her placement would have been reassessed regularly to see if she could return home to her family and community[96]; and

f. any inter-jurisdictional disputes would have less impact as she would be subject to the same minimum standard of protection regardless of which jurisdiction accepted responsibility for responding to her family's concerns.

42. If a minimum standard of protection for an Indigenous child's and community's cultural continuity is lost when a child is moved across provincial borders, the effectiveness of the federal power over "Indians" will be undermined, and the object of s. 91(24), reconciliation with all of Canada's Indigenous peoples, wherever they are, will not be achieved. The Federal Act seeks to avoid the "balkanized colonial regimes" the trial judge warned against in *Daniels.* This is a problem of national scope with cross-border implications, requiring a national solution. To deny the constitutionality of the Federal Act would lead to the absurd result that s. 91(24) would not provide the power to establish a coordinated approach in matters that most require it: those that cannot be fully addressed by any one province or territory.

2. National minimum standards are a valid exercise of federal power

43. Provided the legislation falls within the ambit of s. 91(24), national minimum standards are a valid exercise of federal power, including where there is overlapping jurisdiction with the provinces and effects on the provincial public service. The Federal Act is clearly within Parliament's legislative competence. Relationships within Indigenous families and communities are essential to their cultural survival, which is why laws relating to these matters have been found to touch on the core of "Indianness" in s. 91(24).[97] It is

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96 *Federal Act*, s 16(3); Given her guardians reluctance to keep her connected to her community and the resulting willingness of other family members to take custody, this may very well have brought her home. See Wanyandie Affidavit at paras 66-68, AWN's evidence p 95.

97 Binnie and LeBel J. (concurring with majority) *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 61, citing *Natural Parents, Derrickson, Paul v Paul*, [1986] 1 SCR 306, 1986 CanLII 57; The Supreme Court of Canada has acknowledged that families are a core social institution of fundamental importance. See, for example, both the majority and dissent in *Walsh v Bona*, 2002 SCC 83, at paras 12, 102, 193-195. L'Heureux-Dubé J. in dissent, explained the family is a core social institution in society which is "a matrix of relationships through which values are transmitted, members are socialized, and children are raised" (para 126).

unnecessary in this case for the court to determine that the Federal Act is at the core of Indianness, but it is squarely within s. 91(24).

44. The Court in *Daniels* specifically anticipated overlap between federal and provincial jurisdictions in the provision of programs and services to non-status Indians and Métis, reminding us that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government"[98], in line with the modern approach to division of powers and the principle of cooperative federalism. While in many instances, the two levels of government enter into agreements to manage the practical realities of cooperative federalism, it is, as the PGQ admits, not a constitutional requirement.[99] As the Supreme Court of Canada noted, the principle of cooperative federalism does not:

> [l]imit the scope of legislative authority or impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.[100]

45. There are other areas of overlapping federal and provincial jurisdiction where national minimum standards fill gaps and ensure federal jurisdiction remains effective. For example, Parliament's jurisdiction over marriage[101] overlaps with the provincial jurisdiction over the solemnization of marriage[102] and property and civil rights.[103] As Professor Hogg explains, if marriage and divorce were provincial responsibilities, and the provinces had different rules about the basic requirements, one could not be confident that a marriage or divorce performed in one province would be recognized in another.[104] The same reasoning applies to the Federal Act and s. 91(24). Without federal action, Indigenous children, families and

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98 *Daniels* at para 51.
99 PGQ factum at paras 67 and 75.
100 *Québec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 17-20.
101 *The Constitution Act*, 1867, 30 & 31 Vict, c 3 [***Constitution Act***] at s 91(26).
102 *Constitution Act* at s 91(12).
103 *Constitution Act* at s 92(13).
104 Peter Hogg, *Constitutional law of Canada* 5th ed (Toronto: Carswell, 2007) at p 27-2.

communities cannot be confident that their basic minimum rights to cultural continuity and Indigenous identity in their home province will be respected in another.

46. While there are limits to what Parliament can validly legislate without usurping provincial power over solemnization[105], the *Civil Marriage Act* sets out minimum national standards for marriages. For example, marriage is between two persons (of any gender)[106], consent is required[107], and no person under the age of 16 years may contract marriage.[108] This has impacts on the provincial jurisdiction over the solemnization of marriage, and the provincial public service, which must comply with these national minimum standards in issuing marriage licences, registering marriages and solemnizing marriages. These are considered incidental effects on areas of provincial jurisdiction and do not invalidate the federal law.[109]

47. This modern approach to the division of powers does not lead to confusion or trample on democracy. Contrary to the PGQ's suggestion that people will not know to whom they are to bring concerns about child welfare in the Indigenous context[110], the answer is clear. If their objection is to the federal law, their quarrel is with the federal government. If their objection is to the way the federal law is implemented, it is with the provincial or Indigenous service provider. If they are unsure, or if their objection is to the effectiveness of the scheme as a whole*, Daniels* confirms that it is the federal government who holds the "political football" as the level of government with the jurisdiction to legislate specifically with respect to Indigenous peoples.[111]

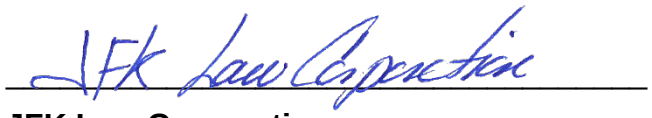
PART IV – CONCLUSIONS

48. Reconciliation between the Crown and all Indigenous peoples of Canada can only occur if all Indigenous peoples are entitled to the same minimum protections for their

105 *Re Questions Concerning Marriage* [1912] AC 880, at 887; *Re Same-Sex Marriage* at para 18.
106 *Civil Marriage Act*, SC 2005, c 33 [***Civil Marriage Act***] at s 2.
107 *Civil Marriage Act* at s 2.1.
108 *Civil Marriage Act* at s 2.2.
109 *Re Same-Sex Marriage* at paras 31-34.
110 PGQ Factum at para 70.
111 *Daniels* at para 50. This would also be consistent with Jordan's Principle, as discussed in the factum of the intervenor the First Nations Child and Family Caring Society.

cultural continuity and Indigenous identity. In the area of child and family services, Canada has chosen minimum national standards as the mechanism to fill gaps in the provincial schemes. This is a valid exercise of federal power and one that serves to fulfill the promise of *Daniels* to non-status Indians that Parliament has a protective power to provide for their particular needs and concerns. It is a promise this court should honour. This court must answer the reference question in the negative.

Victoria, April 30, 2021



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PART V – AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence

Jurisprudence *(cont'd)* **Paragraph(s)**

Secondary Sources

ATTESTATION

We undersigned, JFK Law Corporation, hereby attest that the above Aseniwuche Winewak Nation of Canada's Brief is in compliance with the requirements of the *Civil Practice Regulation of the Court of Appeal*.

Time requested for the oral arguments: 30 minutes

Victoria, April 30, 2021

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