500-09-028751-196

COURT OF APPEAL OF QUEBEC

(Montreal)

REFERENCE TO THE COURT OF APPEAL OF QUEBEC IN RELATION WITH THE ACT RESPECTING FIRST NATIONS, INUIT and METIS CHILDREN, YOUTH AND FAMILIES (SC 2019, c24)

Order in Council 1288-2019
dated December 18, 2019

BRIEF OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Dated April 29, 2021

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PART I – OVERVIEW AND FACTS

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

2. Canada has the constitutional power to legislate to promote the well-being of First Nations children and families. Canada also has a duty to do so, informed, *inter alia*, by reconciliation, *Charter* values regarding substantive equality, and domestic and international human rights obligations. The scope of s. 91(24) surely includes the power to legislate in relation to First Nations children and families as this Act[2] does.

3. The Caring Society shares the Attorney General of Canada's view that there is abundant evidence of the "humanitarian crisis" of the overrepresentation of Indigenous children in child and family services systems, including the overwhelming and utterly disproportionate share of First Nations children who have been removed from their parents and are placed in the care of child protection services.

4. However, it is vitally important to understand that the mischief the Act seeks to address is, in large measure, of Canada's own creation. Canada is now taking steps to

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[1] The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the TRC* ["*TRC Report Summary*"], Expert Report of Christiane Guay, Annex 4, **Record of the Attorney General of Canada ("AGCR"), Vol 14, 5025**; *First Nations Child & Family Caring Society et al v Attorney General of Canada*, 2019 CHRT 39 at paras 13, 18, 234.
[2] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 ["the Act"].

address the damage it caused, spurred by legal orders made by the Canadian Human Rights Tribunal (the "Tribunal"). The Act provides a vehicle for First Nations, Inuit and Métis communities to promote the wellbeing of their children and families, without resorting to litigation. The Constitution, including its underlying principles and values, allows and indeed, promotes such reconciliatory action.

5. As addressed in more detail below, the story of First Nations child and family services in Canada is not a happy one. Indian Residential Schools were one of the earliest, most enduring and tragic forms of federal First Nations child welfare. In the wake of the enactment of s. 88 of the *Indian Act*,[3] proclaimed in 1951, provincial authorities gradually began to deliver child and family services to First Nations children. Bereft of any cultural training, these officials removed thousands of First Nations children from their families from 1960-1990, in what is known as the Sixties Scoop. Beginning in the 1970s, First Nations began establishing First Nations Child and Family Services Agencies ("FNCFS Agencies") to stem the tide of First Nations children being removed from their families. However, the federal government seriously under-funded these Agencies and the provinces, including Quebec, did little to make up this shortfall.

6. By the early 2000s, there were approximately three times the number of First Nations children in state care than there were at the height of Indian Residential Schools in the 1940s.[4] This overrepresentation of First Nations children in care has not significantly abated. This ongoing story of harm, Canada's responsibility for it, and Quebec's active complicity, must all inform this Court's analysis of constitutional authority over the Act's subject matter. Legislative efforts to address long-standing harm must be interpreted as being consistent with s. 91(24)'s goal of reconciliation,[5] as well as furthering the *Charter* and human rights values of substantive equality.

7. Federal and provincial governments routinely use division of powers arguments to

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[3] RSC 1985, c I-5.
[4] *Wen:De – We are Coming to the Light of Day*, Sworn Declaration of Cindy Blackstock, ("Blackstock Affidavit"), Ex CB-5, **Record of the First Nations Child and Family Caring Society ("CSR") Vol 2, p 232.**
[5] *Daniels v Canada*, 2016 SCC 12 at para 37 [*Daniels*].

avoid accountability for paying for substantively equal public services for First Nations children.[6] This jurisdictional buck passing has immediate and devastating effects on children. Jordan's Principle is the legal antidote to this discriminatory conduct, mandating that jurisdictional wrangling must not result in First Nations children being adversely differentiated or denied public services. Jordan's Principle ought to inform this Court's analysis of the constitutional issues at play in this Reference.

8. The Act's recognition of self-government by Indigenous governing bodies is also necessary for Canada to meet its human rights and equality obligations to further the well-being and substantive equality of First Nations, Inuit and Métis children and families.

PART II – ISSUES IN DISPUTE

9. The reference question stated in the Order in Council is the following:

> Is the *Act Respecting First Nations, Inuit and Métis children, youth and families ultra vires* of the jurisdiction of the Parliament of Canada under the Constitution of Canada?

10. The Intervener First Nations Child and Family Caring Society of Canada argues that the answer is no. The Act is an effort by Canada to use its s. 91(24) jurisdiction to address harms arising from its own colonial actions. While Canada's colonial history yields few examples of Canada using this jurisdiction to protect and promote the well-being of First Nations, Inuit and Métis children and families, there is nothing in our Constitution or its architecture that prevents this. To the contrary: numerous constitutional principles and values firmly support Canada's use of its s. 91(24) jurisdiction to pass the Act.

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[6] This continues up to the present. In *Pruden v Manitoba*, 2020 MBHR 6, Manitoba was ordered to provide health care services to the complainants, who were residents of a First Nations community. The province's reasonable justification argument based on the division of powers was rejected (at para 25). Manitoba is seeking judicial review of this decision (MB Queen's Bench File No. CI-01-28403).

PART III – SUBMISSIONS

A. A proper interpretation of section 91(24) must recognize the federal role in First Nations child and family services

1. Canada has long been actively involved in First Nations child and family services

11. Contrary to what is suggested by the Attorney General of Quebec, Canada has a lengthy history of active involvement in First Nations child and family services. This history cannot be understood without recognizing the impact of Indian Residential Schools, which were devastating to First Nations peoples in Canada and a precursor to the modern child and family services system for First Nations children.

12. The Indian Residential Schools system operated in Canada from 1879 to 1996.[7] Canada played a central role in the administration and funding of Indian Residential Schools, including by creating the legal foundation for the forcible taking of First Nations children from their families for placement in these schools. One such underpinning was the enactment of regulations in 1895, pursuant to the *Indian Act*, authorizing the removal of any child between the age of 6 and 16 who was "not being properly cared for or educated" and whose parent was "unfit or unwilling to provide for the child's education."[8]

13. Gaps in services to First Nations, including services for children and families, were noted as early as 1946-48, when a Special Joint Committee of the Senate and House of Commons examined the *Indian Act*.[9] The Joint Committee urged provinces to increase their involvement in providing services to "Indian" peoples to fill gaps resulting from disruptions to traditional patterns of community care, which are now understood to have been caused by colonial policies like reserve creation, displacement of populations

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[7] Blackstock Affidavit at para 19, **CSR, Vol 1, p 5**. For a description of the harms of the Residential School system, see *First Nations Child and Family Caring Society v Attorney General of Canada*, 2016 CHRT 2 at paras 405-427 [*Caring Society*].
[8] Blackstock Affidavit, Ex CB-14, **CSR, Vol 4, pp 862-65**.
[9] See Fourth Report of the Joint Committee of the Senate and House of Commons appointed to continue and complete the examination of the Indian Act and amendments thereto (1947-1948), Affidavit of Dennie Michielsen, Ex DM-3, **Record of Makivik Corporation, Vol 1, p 295.**

towards urban centres, Indian Residential Schools, and Canada's unwillingness to provide welfare services before and after World War Two.[10] Such gaps in on-reserve services were again noted by a second Joint Committee examining the *Indian Act* in 1959-61.[11]

14. Canada chose to exercise its jurisdiction under s. 91(24) by amending the *Indian Act* to include s. 87 (now s. 88) in 1951, incorporating by reference provincial legislation of general application to apply to "Indians." Canada's reliance on provincial legislation has been characterized as an attempt to unilaterally delegate responsibility over social programs, including child and family services, to the provinces.[12]

15. As the Tribunal found in *First Nations Child and Family Caring Society v Attorney General of Canada*, discussed further below, through the 1950s to mid-1960s, the provinces were reluctant to provide child and family services on-reserve pursuant to s. 88 of the *Indian Act*, both because of the costs of doing so and because of federal jurisdiction under s. 91(24).[13] This provincial disengagement, combined with Canada's own inaction, led to a profound gap between the quality and quantity of services available on- and off-reserve. A patchwork picture emerged in the 1960s though the 1980s where "some provinces only provided services if they were compensated by the federal government and only in life-and-death situations."[14] This patchwork of services produced a common outcome: the mass removal of First Nations children from their homes, known as the "Sixties Scoop".[15]

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[10] Blackstock Affidavit at para 21, **CSR, Vol 1, pp 5-6**.
[11] Blackstock Affidavit at para 24, **CSR, Vol 1, p 6**.
[12] Naiomi Walqwan Metallic, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case" (2019) JL & Soc Pol'y 28 at 9-10 [Metallic 2019]; see also Hugh Shewell, "Why Jurisdiction Matters: Social Policy, Social Services and First Nations" (2016) 36:1 The Canadian Journal of Native Studies, 179.
[13] *Caring Society*, *supra* note 7 at para 48; see also Metallic 2019.
[14] First Nations Child and Family Services Joint National Policy Review, *Final Report* (June 2020) (Blackstock Affidavit, Ex CB-3**, CSR, Vol 1, p 100**); see also *Caring Society*, *supra* note 7 at para 48. Beginning in 1965, Canada and other provinces entered into agreements under which Canada would reimburse provinces for the delivery of child and family services to First Nations children and families. These agreements and their effects are discussed in depth in *Caring Society*, *supra* note 7 at paras 217-253.
[15] The impact of this large-scale removal of First Nations children was "horrendous, destructive, devastating and tragic", and in 2017, Canada was found liable in tort to Sixties Scoop survivors in Ontario: *Brown v*

16. While provinces slowly ramped up child welfare services to "Indians",[16] Indian Residential Schools increasingly served as child welfare placements.[17] For example, the 1967 Caldwell report, commissioned by Indian Affairs, studying a sample of residential schools in Saskatchewan, found that 80% of children were placed there for child welfare reasons. The report noted that provincial child welfare services were unavailable to First Nations families, despite the application of child welfare legislation to them:

> While provincial child welfare services supposedly are non-discriminatory, in reality they are not available to the Indians of Saskatchewan. The reasons for this seem to go back into history when the prevalent attitude in the [Indian Affairs] Branch, readily accepted by the province, was that the Indian is the exclusive responsibility of the federal government. This approach has been challenged and the legal rights of Indians under provincial law is spelled out in Section 87 of the *Indian Act* – R.S.C. 1952 [now s. 88].
>
> However, officials of both the Branch and the provincial department […] agree that at present there is only minimal service provided to Indian families and children. Indeed, it is felt that it would require a massive investment of staff and funds to provide adequate service.[18]

17. The report noted that "[t]he Indian family, like any other, should have available to it the best system of family and child welfare service that a modern state can provide."[19] It

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Canada (Attorney General), 2017 ONSC 251 at para 7. Survivors of the Sixties Scoop brought 23 different actions against Canada in provincial superior courts and the Federal Court. These actions were ultimately consolidated into an omnibus Federal Court action, settlement of which was approved by order of the Federal Court in *Riddle v Canada*, 2018 FC 641 (as amended by 2018 FC 901), and by the Ontario Superior Court of Justice in *Brown v Canada (Attorney General)*, 2018 ONSC 3429. See also The Sixties Scoop Healing Foundation, *National Survivor Engagement Report* (Blackstock Affidavit, Ex CB-31, **CSR, Vol 10, pp 2674-2733**); *Caring Society*, *supra* note 7 at paras 218, 237, 242; Transcript of Theresa Stephens' evidence before the Tribunal, Blackstock Affidavit, Ex CB-24A, **CSR, Vol 9, pp 2202-04, 2254-56**.

[16] The provinces began providing more expansive services in the 1990s. However, because these were not tailored to First Nations, they resulted in further mass removals that have extended into the 21st century. These removals are known as the "Millennial Scoop": Peter W. Choate, "The Call to Decolonise: Social Work's Challenge for Working with Indigenous Peoples" (2019) 49 British J Social Work 1081 at 1094.

[17] *Caring Society*, *supra* note 7 at paras 413-14; see also Transcript of Dr. John S. Milloy's evidence before the Tribunal, Blackstock Affidavit, Ex CB-18A, **CSR, Vol 5, pp 1123-25**. Dr. Milloy was qualified as an expert on the history of Indian Residential Schools before the Tribunal, which accepted his evidence as fact: *Caring Society*, *supra* note 7 at para 406.

[18] George Caldwell, "Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan" (1967), Blackstock Affidavit, Ex CB-16, **CSR, Vol 4, pp 950-51** ["Caldwell Report"].

[19] *Ibid*, Blackstock Affidavit, Ex CB-16, **CSR, Vol 4, p 953**.

called on Canada to invest more funding for services to prevent residential school placements and, where necessary, to support the "Indian" community to provide alternative care for the child.

18. In the 1970s and early 1980s, First Nations began voicing concerns about services that were either lacking or utterly inappropriate.[20] As the Tribunal noted, "the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities."[21] As a result, Canada began funding *ad hoc* community-specific arrangements in which First Nations agencies took over child and family services, with unclear and inconsistent federal funding. In 1986, Canada put a moratorium on these *ad hoc* arrangements. No new agencies were created until Canada unilaterally created the First Nations Child and Family Services Program ("FNCFS Program") under Directive 20-1 in 1991, which required FNCFS Agencies to operate pursuant to provincial child welfare laws, with federal funding. The creation of the FNCFS Program spurred the establishment of over 100 FNCFS Agencies across Canada.[22]

19. This history illustrates that Canada has been an active agent in the field of child and family services for First Nations children. Indeed, Canada's conduct has done an enormous amount of harm to First Nations children, families and communities and the provinces have done little to meaningfully remediate that harm.[23]

20. This neglect is not just a matter of history. On January 26, 2016, after nine years of litigation, the Tribunal released the *Caring Society* decision, holding that Canada

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[20] Blackstock Affidavit, para 27, **CSR, Vol 1, p 7**.
[21] *Caring Society*, *supra* note 7 at para 50.
[22] Blackstock Affidavit at paras 27-28, **CSR, Vol 1, p 7**. Regarding the role of, and challenges faced by, First Nations Child and Family Services Agencies generally, see Transcript of Dr. Blackstock's evidence before the Tribunal, Blackstock Affidavit, Ex CB-32A **CSR, Vol 10, pp 2853-67;** and Transcript of Elizabeth Kennedy's evidence before the Tribunal, Blackstock Affidavit, Ex CB-33, **CSR, Vol 12, pp 3314-15, 3319-24, 3376-77**.
[23] In Quebec, the Viens Commission found in 2019 that "the current youth protection system has been imposed on Indigenous peoples from the outside, taking into account neither their cultures nor their concepts of family. Even worse, many believe the youth protection system perpetuates the negative effects of the residential school system, in that it removes a significant number of children from their families and communities each year to place them with non-Indigenous foster homes": *Viens Commission Report*, Expert Report of Christiane Guay, Ex 2, **AGCR, Vol 11, p 4079**.

discriminates against First Nations children in the provision of child and family services and via its failure to properly implement Jordan's Principle.

21. *Caring Society*, and the many remedial orders that have followed, illustrate how little has changed since the Caldwell Report was commissioned in 1967. The Tribunal found that without the FNCFS Program, related agreements and funding provided under those agreements, "First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities."[24] Further, the Tribunal found that "[t]he activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon."[25] This decision, issued in 2016 and still not fully implemented by Canada, demonstrates that provincial child and family services remain inadequate for, and largely unavailable to, First Nations children.

22. *Caring Society* also illustrates that Canada's involvement in child and family services is both necessary and inadequate. The Tribunal made two key findings in this respect. First, the Tribunal held that Canada was not just a passive funder of First Nations child and family services.[26] Canada's involvement shapes the services provided to First Nations children through provinces/territories and FNCFS Agencies, such that federal involvement determines "whether and to what extent" these services are provided to First Nations on reserves and in the Yukon.[27] Although Canada's involvement occurs through tripartite and bilateral programs and agreements, "at the end of the day it is AANDC's involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard."[28] Canada's funding and policy decisions have very real consequences for the availability and quality of child and family services for First Nations children.

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[24] *Caring Society*, *supra* note 7 at para 59 (emphasis added).
[25] *Ibid.*
[26] *Ibid* at para 66.
[27] *Ibid* at para 71.
[28] *Ibid* at para 73 (emphasis added).

23. Ultimately, the Tribunal found that Canada's actions in relation to First Nations child and family services fell within Canada's s. 91(24) jurisdiction and were not merely an exercise of the federal spending power.[29] That Canada acted via a programing/funding approach, as opposed to legislation, did not change this conclusion:

> Instead of legislating in the area of child welfare on First Nations reserves, pursuant to […] section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities.[30]

24. Second, the Tribunal found serious problems with Canada's approach to First Nations child and family services, and that these problems directly contributed to the large numbers of First Nations children entering and staying in care. The Tribunal found that Canada's funding formula drastically underfunded First Nations child and family services, particularly for early intervention and prevention services, and that Canada's funding formulae "are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner."[31] These adverse impacts are a direct result of Canada's control over child and family services on reserves.[32]

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

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[29] *Caring Society, supra* note 7 at paras 34, 78.
[30] *Ibid* at para 83 (emphasis added).
[31] *Ibid* at para 349.
[32] *Ibid*. Regarding the experience of a Residential Schools survivor, see *Ibid* at paras 409-410, and Transcript of Chief Robert Joseph's evidence before the Tribunal, Blackstock Affidavit, Ex CB-22, **CSR, Vol 8, pp 2090-91, 2102-14, 2140-43**.

26. Present-day child and family services for First Nations families cannot be separated from the legacy of Indian Residential Schools.[33] As the Tribunal noted, Canada's FNCFS Program has focused on bringing First Nations children into care, perpetuating the harms and intergenerational trauma caused by Indian Residential Schools.[34] The Tribunal observed that "[s]imilar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces."[35] The mechanism has changed, but the removal of children continues.

27. Two clear principles emerge from the Tribunal's decision. First, systems that perpetuate historic disadvantage and assimilation endured by Indigenous peoples are discriminatory and have no place in Canada.[36] Second, First Nations children and families have a legal right to substantive equality, respect and celebration of difference, and recognition that all human beings are equally deserving of concern, respect, and consideration.[37] The Tribunal held that mirroring provincial and territorial funding (a standard the Tribunal found Canada failed to meet) is inconsistent with substantive equality as it does not consider "the distinct needs and circumstances of First Nations children and families living on reserve, including their cultural, historical and geographical needs and circumstances."[38] According to the Tribunal, substantive equality requires that

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[33] See Transcript of Dr. Milloy's evidence before the Tribunal, Blackstock Affidavit, Ex CB-18A, **CSR, Vol 5, pp 1308-09**.
[34] *Caring Society*, *supra* note 7 at para 422. See also Expert report of Dr. Amy Bombay submitted to the Tribunal, Blackstock Affidavit, Ex CB-20, **CSR, Vol 7, p 1758-77**; and Transcript of Dr. Bombay's evidence before the Tribunal, Blackstock Affidavit, Ex CB-21A, **CSR, Vol 8, pp 1864-99**.
[35] *Caring Society*, *supra* note 7 at para 426 (emphasis added).
[36] Metallic 2019, *supra* note 12 at p 30.
[37] See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171; *R v Beaulac*, [1999] 1 SCR 768 at paras 22–24; *R v Kapp*, 2008 SCC 41 at paras 15–16; and *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 30-52. In *Ewert v Canada*, 2018 SCC 30 at para 54 (a case concerning corrections services to Indigenous peoples) the Supreme Court of Canada held that it is a "long-standing principle of Canadian law that substantive equality requires more than simply equal treatment."
[38] *Caring Society*, *supra* note 7 at para 465. For a description of these greater needs in Quebec, see for example Transcript of Sylvain Plouffe's evidence before the Tribunal, Blackstock Affidavit, Ex CB-25, **CSR, Vol 9, pp 2475-83**.

both funding and services meet the actual needs of First Nations children and families and be culturally appropriate.

28. *Caring Society* illustrates that Canada has a long history of getting First Nations child and family services wrong, falling far short of the legal standard of substantive equality. While Canada has repeatedly failed to live up to this responsibility and to act on its jurisdiction under s. 91(24), Canada's involvement is – and always has been – essential to the delivery of child and family services to First Nations families. The division of powers analysis must recognize Canada's central role, for good or for ill.

2. Canada has the power and responsibility to enact legislation in relation to the well-being of First Nations children

29. Canada's jurisdiction under s. 91(24) includes the jurisdiction to make laws in relation to First Nations child and family services—a point on which Canada and Quebec agree.[39] In fact, in July 2019, Parliament specifically legislated in regards to its Department of Indigenous Services' responsibility over First Nations, Inuit and Métis "child and family" services, as well as over several other essential service areas, in its new *Department of Indigenous Services Act*.[40] Canada's jurisdiction includes the power to pass laws concerning First Nations child and family services that are different from the provincial laws in this area.[41] Canada's jurisdiction also includes the power to make laws aimed at the protection and well-being of First Nations children.[42] Although Canada has long ignored this role, the scope of s. 91(24) should be understood in light of the goal of

[39] Attorney General of Canada Brief at para 85 ["AGC Brief"]; Attorney General of Quebec Brief at para 34.
[40] *Department of Indigenous Services Act*, SC 2019, c 29, s 336, s 6(2)(a).
[41] AGC Brief at para 86, citing Hogg ch 28(1)(b), and *Attorney General of Canada v Canard*, [1976] 1 SCR 170 at 191 (per Ritchie J) and 193 (per Pigeon J).
[42] Scholars have long called upon Canada and the courts to embrace an interpretation of s. 91(24) that sees the federal role guided by a nation-to-nation commitment to protect the rights of Indigenous nations: see, for example, Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill LJ 308 at 362-380; and John Borrows, "Canada's Colonial Constitution," in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017).

reconciliation[43] and interpreted in light of Canada's legal obligations with respect to human rights and substantive equality,[44] as well as the best interest of the child.[45]

30. Parliament has repeatedly been called on to legislate in this area.[46] Since 1994, the Auditor General of Canada has raised concerns about the lack of legislative frameworks for program delivery on reserve.[47] In 2015, the Truth and Reconciliation Commission called for the "federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that [a]ffirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies […]".[48] Indeed, the evidence before the Tribunal was that Canada itself recognized that the lack of a legislative base for its actions was an obstacle to reforming its program.[49]

31. A protection and well-being-focused conception of federal power was recently articulated by the United States Court of Appeals for the Fifth Circuit in *Brackeen v Haaland*, a case dealing with the constitutionality of federal legislation governing child and family services for American Indians. Although *Brackeen* arose in the American

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[43] *Daniels*, *supra* note 5 at paras 34, 37.

[44] This is consistent with a living tree or progressive interpretation of the division of powers, which was confirmed in *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at paras 26-30. There, the Supreme Court of Canada affirmed an interpretation of marriage in s 91(26) of the *Constitution Act*, *1867* that was informed by s 15(1) of the *Charter*.

[45] The Supreme Court of Canada has affirmed that child protection legislation exists to protect and further the interests of children. This requires lawyers, judges, mediators and assessors to hold the best interests as a central concept when making decisions under these statutes. The same should hold true in any division of powers analysis regarding the authority to enact such legislation. See: *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at paras 45-48.

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

[47] *1994 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-10, **CSR, Vol 3, p 746;** *2006 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-11, **CSR, Vol 3, p 771;** *2008 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-8, **CSR, Vol 3, p 650;** *2011 Report of the Auditor General of Canada*, Blackstock Affidavit, Ex CB-9, **CSR, Vol 3, p 691.**

[48] TRC Report Summary, Expert Report of Christiane Guay, Annex 4, **AGCR, Vol 14, pp 5165-6**.

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

constitutional context, the Court of Appeals highlighted the history of American Indian children being forcibly removed from their families, communities and culture by federal and state governments, and the existential threat this "plundering of tribal communities' children" poses.[50] The Court of Appeals held that, in enacting the *Indian Child Welfare Act* in 1978, the federal government aimed to "combat an evil threatening the very existence of tribal communities, and it would be difficult to conceive of federal legislation that is more clearly aimed at the Government's enduring trust obligations to the tribes."[51]

32. The Act is Canada's response to a similar crisis linked to government abuses of power facing First Nations children, families and communities. Far from being Canada's foray into the provinces' authority over child and family services, it is Canada's attempt to address the harms it caused through its actions in this very field. If Canada had the constitutional authority to impose the Indian Residential Schools system, and to cause profound harm through its approach to First Nations child and family services, it can only follow that Canada can, under the same constitutional authority, try to repair those harms and to fulfill the promise of its constitutional responsibility to protect First Nations, Métis and Inuit children pursuant to legislation under s. 91(24) of the *Constitution Act, 1867*.

B. Jordan's Principle should inform the scope of both federal and provincial jurisdiction and responsibility for child and family services

1. Jordan's Principle is a legal principle and obligation

33. Jordan's Principle is named after Jordan River Anderson of Norway House Cree Nation, in Manitoba. Jordan was born in 1999 and had to remain in hospital for the first two years of his life for medical reasons. At the age of 2, doctors cleared Jordan to live in a specialized foster home as part of a transition plan for Jordan to return to his family in Norway House. The services Jordan needed would have been provided by Manitoba had he not been a First Nations child. Instead, the governments of Canada and Manitoba argued over which government should pay for Jordan's at-home care and left Jordan to

[50] *Brackeen v Haaland*, No 18-11479 (5th Cir 2021) at 60, per Judge Dennis.
[51] *Ibid* at 61, per Judge Dennis. Although the Court of Appeals divided on various issues in this decision, Judge Dennis wrote for the majority on this issue.

languish in the hospital for over 2 years as the jurisdictional wrangling continued. Tragically, Jordan died at the age of 5, never having the opportunity to live in a family home because neither Manitoba nor Canada wanted to pay for a First Nations child.[52]

34. Jordan's Principle requires that First Nations children have access to substantively equal public services. The first government contacted must provide the service to meet the standard of substantive equality and seek reimbursement from the other level of government, if needed, after the child has received the service.[53]

35. The House of Commons unanimously adopted a motion endorsing Jordan's Principle on December 12, 2007.[54] The motion stated as follows:

> In the opinion of the House, the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.[55]

36. With the adoption of this motion, Canada undertook to implement Jordan's Principle,[56] although its early approach only entrenched the discrimination Jordan's Principle was intended to ameliorate. Many provincial governments subsequently endorsed Jordan's Principle, albeit to differing standards.[57]

37. For its part, Quebec has not adopted Jordan's Principle, arguing in correspondence in 2009 that it was not needed in Quebec.[58] Yet in the 2019/20 fiscal year alone, Canada approved 2,826 services for individual children and 26,299 services under group requests

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[52] Blackstock Affidavit at para 57, **CSR, Vol 1, pp 12-13**; *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 at para 17 [*Pictou Landing*]; *Malone v Canada (Attorney General)*, 2021 FC 127 at para 6 [*Malone*].
[53] Blackstock Affidavit at para 60, **CSR, Vol 1, p 13**; see also *Pictou Landing*, *supra* note 52 at paras 18, 106; and *Malone*, *supra* note 52 at para 8.
[54] Blackstock Affidavit at para 63, **CSR, Vol 1, p 14.**
[55] Blackstock Affidavit at para 62, **CSR, Vol 1, p 14**, referencing Private Members Motion of Jean Crowder, Member of Parliament for Nanaimo-Cowichan, Motion No. 296, introduced May 18, 2007, adopted December 12, 2007, 39th Parl 2nd Sess. See also *Pictou Landing*, *supra* note 52 at para 83.
[56] *Pictou Landing*, *supra* note 52 at paras 83-84, 106, quoting Steven Blaney, a member of the governing Conservative party (see House of Commons, Proceedings, 39th Parl, 2nd Sess, December 5,2007).
[57] Blackstock Affidavit at paras 64-69, **CSR, Vol 1 pp 14-15**.
[58] Blackstock Affidavit at para 70, **CSR, Vol 1, p 15;** letter from Pierre Laflamme to Jessie-Lane Metz dated June 16, 2009, Blackstock Affidavit, Ex CB-44, **CSR, Vol 12, p 3505**.

in Quebec.[59] Quebec nonetheless continues to refuse to adopt Jordan's Principle. Instead, it has only expressed a vague commitment to work through existing processes to achieve Jordan's Principle's goals.[60] Despite calls for Quebec to implement Jordan's Principle, including from the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec (the Viens Commission), Quebec has not done so.[61]

38. The Federal Court confirmed the binding nature of Jordan's Principle in *Pictou Landing*, a 2013 case involving a First Nations child with multiple disabilities who was denied funding for in-home health care.[62] The Court found that Canada, having adopted Jordan's Principle, was required to apply it in that case, and to fund the care.[63] The Court stated that "Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdictional disputes between different levels of government."[64] The Truth and Reconciliation Commission's third Call to Action, issued in 2015, confirms the importance of Jordan's Principle and calls "upon all levels of government to fully implement Jordan's Principle".[65]

39. In *Caring Society*, the Tribunal found Canada both discriminates against First Nations children in the provision of child and family services, and has failed to properly implement Jordan's Principle, to the detriment of First Nations children. The Tribunal ordered the government to cease its discriminatory practices and to cease applying its unduly narrow definition of Jordan's Principle.[66] The Tribunal has since made a number

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[59] Indigenous Services Canada Presentation re Jordan's Principle, August 2020, Blackstock Affidavit, Ex CB-45, **CSR Vol 12, p 3514-15**.
[60] The Canadian Pediatric Society has repeatedly noted Quebec's failure to implement Jordan's Principle: Canadian Pediatric Society 2007 Status Report (excerpt), Blackstock Affidavit, Ex CB-38A, **CSR, Vol 12, pp 3480-81;** Canadian Pediatric Society 2009 Status Report (excerpt), Blackstock Affidavit, Ex CB-38B, **CSR, Vol 12, pp 3483-84**; Canadian Pediatric Society 2012 Status Report (excerpt), Blackstock Affidavit, Ex CB-38C, **CSR, Vol 12, pp 3486-87**.
[61] See Call for Action No. 105, *Viens Commission Report,* Expert Report of Christiane Guay, Ex 2, **AGCR, Vol 11, p 4149.**
[62] *Pictou Landing*, *supra* note 52 at paras 17-18, 81-87, 106-111.
[63] *Ibid* at paras 113, 120.
[64] *Ibid* at para 17.
[65] Truth and Reconciliation Commission Calls to Action, Expert Report of Christiane Guay, Annex 4, **AGCR, Vol 14, p 5166.**
[66] *Caring Society, supra* note 7 at paras 341-382, 458, 474-481.

of orders requiring Canada to take concrete steps to implement the full meaning and scope of Jordan's Principle.[67] As a result of these orders, Canada slowly started to discharge its obligations under Jordan's Principle in 2016 by responding to requests for services in order to meet unmet needs and to fill service gaps.[68]

40. Jordan's Principle is a legal and human rights principle, binding both Canada and the provinces. The *Pictou Landing* and Tribunal decisions affirm Jordan's Principle as a "fundamental guarantee for equality in the provision of services to First Nations children."[69]

2. Jordan's Principle should inform the constitutional analysis in this Reference

41. Jordan's Principle exemplifies both the problem the Act seeks to address and the constitutional principles that must inform this Court's analysis. Both levels of government have jurisdiction in the area of First Nations child and family services. Both have been resistant to robustly exercise it. This jurisdictional neglect led to service gaps, disruptions and denials. Jordan's Principle is a direct response to this retreat from jurisdiction—and financial responsibility—for First Nations children's welfare.[70] It is both a jurisdictional principle and a rights-based principle, pertaining both to jurisdiction and the obligation to discharge public service responsibilities for First Nations children in a substantively equal manner, taking full account of their unique cultures and circumstances.

42. Jordan's Principle, as a human rights principle emphasizing that the federal and provincial governments are jointly responsible for providing substantively equal services to First Nations children, is relevant to the constitutionality of the federal legislation.

43. The Act takes for granted that Indigenous child welfare is an area of concurrent jurisdiction between the federal and provincial governments, as well as First Nations, Inuit

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[67] See 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 14; 2017 CHRT 35; 2019 CHRT 7; 2020 CHRT 20; 2020 CHRT 36.
[68] Blackstock Affidavit at para 72, **CSR, Vol 1 p 16**. Canada's data indicates that, in 2019/20, 35% of requests approved related to First Nations children living off-reserve.
[69] Colleen Shepherd, "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 26:4 Constitutional Form constitutionnel 3 at 4 [Shepherd].
[70] *Ibid* at 6.

and Métis governments. This approach is consistent with the dominant tide of federalism, as well as the Indigenous context. It avoids a jurisdictional vacuum, which the Supreme Court of Canada has described as "not desirable." [71] For child and family services, a jurisdictional vacuum has real, immediate and devastating consequences for First Nations children. It by no means violates the 'architecture' of the Constitution for the Act to be responsive to this reality, and further, is consistent with the principle of federalism.[72]

44. Although Canada could legislate its own separate child welfare system for First Nations, Inuit and Métis peoples, occupying the field and ousting the provinces entirely, the history of jurisdictional neglect related above, and Jordan's Principle, underscore that both the federal and provincial governments play important roles in maintaining the well-being of First Nations children and families. The Act is an innovative attempt by Canada to use its s. 91(24) power to clarify jurisdictional lines and accountabilities between the federal, provincial and First Nations, Inuit and Métis governments, and dictate minimum service requirements in order to protect and further the well-being of Indigenous children and families. Such an approach is responsive and reflective of Jordan's Principle.

C. Recognition of self-government is necessary for Canada to meet its legal obligations

45. The Indian Residential Schools system and Canada's inadequate provision of child and family services illustrate that federal authority under s. 91(24) has been used, throughout Canadian history, as a vehicle for colonial violence against First Nations peoples and for the infringement of Aboriginal rights. This history does not have to be Canada's future. Federal authority under s. 91(24) can be – and, if reconciliation is to be

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[71] In general, see *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 21-24. In the Indigenous context, see *Dick v La Reine*, [1985] 2 SCR 309; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31; and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44. See also the 2015 report of the Council of the Federation's Aboriginal Children in Care Working Group, "Aboriginal Children in Care: Report to Canada's Premiers", Blackstock Affidavit, Ex CB-29, **CSR, Vol 10, pp 2616-69**, recognizing the federal government's overarching fiduciary responsibility for the provision of a range of services and supports to "Aboriginal Canadians".

[72] See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 55-60, emphasizing that federalism promotes diversity in governance and linking this principle to protection of distinct cultural and political traditions and respect for minorities. See also Naiomi Metallic, "Indian Act By-Laws: A Viable means for First Nations to (Re) Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211 at 223-224.

achieved, must be – an instrument that enables Canada to address these harms and create a framework for the provision of effective and culturally appropriate child and family services to First Nations children.

46. Such a framework cannot simply replicate services that are provided to the public at large or seek to continue to unilaterally impose solutions on First Nations, Inuit and Métis peoples. Such an approach runs afoul of the Tribunal's finding in *Caring Society* that systems that the perpetuate historic disadvantage and assimilation of First Nations are discriminatory. Such a framework would also be inconsistent with the principle of substantive equality affirmed by the Tribunal. As noted above, the upshot of the Tribunal's decision in this regard is that, in order to meet the governing standard of substantive equality, both funding and services must meet the needs of First Nations children and families and be culturally appropriate.

47. Canada cannot alone create a framework that will meet its legal obligations under human rights law. As the Tribunal recognized, to meet the actual needs of First Nations children and families and not be assimilative, First Nations must exercise meaningful control over the design and delivery of child welfare as a matter of human rights law. In other words, *Caring Society* implicitly frames the exercise of self-government by First Nations, Inuit and Métis peoples as a matter of substantive equality and human rights.[73]

48. This approach should be understood to require more than simply having provincial or territorial governments accommodate First Nations, Inuit and Métis peoples within their laws. Although the Supreme Court of Canada commended such an approach in *NIL/TU,O*,[74] in child and family services this often leads to a patchwork of laws across the country, with some Indigenous groups receiving greater protections than others.[75] More importantly, this approach continues control by a non-Indigenous government, which is assimilative in principle. As stated by a Carrier Sekani Tribal Council member, highlighted

[73] See Metallic 2019, *supra* note 12.
[74] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 at paras 41–42.
[75] See Metallic 2019, *supra* note 12 at 19-21; see also the tables illustrating the inconsistency between jurisdictions at paras 15 and 24 of the Brief of Aseniwuche Winewak Nation of Canada.

in the 1983 Penner Report, "Only Indian people can design systems for Indians. Anything other than that is assimilation."[76]

49. This is not merely a matter of academic interest. Upholding the Act's approach to Aboriginal rights, which attempts to turn the page on Canada's history of infringement and instead use federal jurisdiction as a mechanism for recognition, has real consequences for First Nations children and families. As the Tribunal noted,

> The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.[77]

50. The Act's recognition of self-government by Indigenous governing bodies is consistent with human rights law and *Charter* values, and is a necessary response to the crisis Canada created.[78] This recognition is not just an abstraction; it will further the well-being of First Nations, Inuit and Métis children and families.

PART IV – CONCLUSIONS

51. Quebec's challenge to the constitutionality of the Act is one of many jurisdictional battles that have been fought between the federal and provincial governments over who bears responsibility for First Nations peoples. Canadian history shows that these jurisdictional disputes directly harm First Nations children and families, as they invariably result in the provision of inadequate and inappropriate services, or in no services at all.

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[76] See Report of the Special Committee on Indian Self-Government in Canada, 1983, Ex 36, **Record of the Attorney General of Quebec, Vol 3, p 883.**

[77] *Caring Society*, *supra* note 7 at para. 426. See also Report of the Royal Commission on Aboriginal Peoples, Expert Report of Christiane Guay, Ex 6, **AGCR, Vol 18, p 6763**, which found that authority for child welfare should lie with "Aboriginal" nations, who are better positioned to provide services and funding that reflects the needs and culture of their communities.

[78] Recognition of self-government is also consistent with Canada's international obligations, as set out in Part III(C)(2) of the Brief of Assembly of First Nations Quebec-Labrador and First Nations of Quebec and Labrador Health and Social Services Commission, at paragraphs 80-83 of the Brief of the Assembly of First Nations, and at Part III(B) of the Brief of Makivik Corporation.

As the Tribunal found in *Caring Society* and the many remedial orders that have followed, Canada's failure to meet its legal obligations to First Nations children and families continues to this day. The disproportionately high number of First Nations children in care is a direct consequence of this failure.

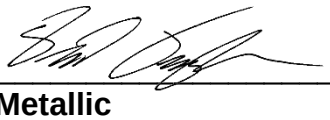
52. The Act marks an important departure from Canada's history of neglecting its jurisdiction to legislate for and protect First Nations peoples. Despite this, Quebec asks this Court to unduly constrain the actions of two orders of government – federal and Indigenous – whose involvement the Tribunal found is essential to stemming the crisis of the overrepresentation of First Nations, Inuit and Métis children in care. If adopted, Quebec's approach will cause further harms to First Nations, Inuit and Métis children and families. This cannot be how Canada's constitution operates.

53. For these reasons, the Intervener asks this Court of Appeal to:

RESPOND in the negative to the question in the present Reference;

THE WHOLE without costs.

Ottawa, April 29, 2021



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PART V – AUTHORITIES

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ATTESTATION OF THE AUTHOR OF THE BRIEF

I, the undersigned, David P. Taylor, attest to the brief's conformity with the *Rules of* the *Civil Practice Regulation of the Court of Appeal* and that the depositions that I have had transcribed are at the disposal of the adverse party, free of charge, in paper or technological format.

The time requested for the presentation of my oral argument is 15 minutes.

On April 29, 2021, in Ottawa

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COURT OF APPEAL
DISTRICT OF MONTRÉAL
PROVINCE OF QUÉBEC

IN THE MATTER:

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 1288-2019 dated December 18, 2019

BRIEF OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

April 29, 2021

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