



SUPREME COURT OF CANADA

CITATION: Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5

APPEALS HEARD: December 7 and 8, 2022

JUDGMENT RENDERED: February 9, 2024

DOCKET: 40061

BETWEEN:

Attorney General of Quebec
Appellant

and

Attorney General of Canada, Assembly of First Nations Quebec-Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, Makivik Corporation, Assembly of First Nations, Aseniwuche Winewak Nation of Canada and First Nations Child & Family Caring Society of Canada
Respondents

AND BETWEEN:

Attorney General of Canada
Appellant

and

Attorney General of Quebec
Respondent

- and -

Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of the Northwest Territories, First Nations Child & Family Caring Society of Canada, Aseniwuche Winewak Nation of Canada, Assembly of First Nations, Makivik Corporation, Assembly of First Nations Quebec-Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, Grand Council of Treaty #3, Innu Takuaikan Uashat mak Mani-utenam, Federation of Sovereign Indigenous Nations, Peguis Child and Family Services, Native Women's Association of Canada, Council of Yukon First Nations, Indigenous Bar Association in Canada, Chiefs of Ontario, Inuvialuit Regional Corporation, Inuit Tapiriit Kanatami, Nunatsiavut Government, Nunavut Tunngavik Incorporated, Nunavut Community Council, Lands Advisory Board, Métis National Council, Métis Nation — Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, Métis Nation of Ontario, Les Femmes Michif Otipemisiwak, Listuguj Mi'gmaq Government, Congress of Aboriginal Peoples, First Nations Family Advocate Office, Assembly of Manitoba Chiefs, First Nations of the Maa-Nulth Treaty Society, Tribal Chiefs Ventures Inc., Union of British Columbia Indian Chiefs, First Nations Summit of British Columbia, British Columbia Assembly of First Nations, David Asper Centre for Constitutional Rights, Regroupement Petapan, Canadian Constitution Foundation, Carrier Sekani Family Services Society, Cheslatta Carrier Nation, Nadleh Whuten, Saik'uz First Nation, Stelat'en First Nation, Council of Atikamekw of Opitciwan, Vancouver Aboriginal Child and Family Services Society and Nishnawbe Aski Nation
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR The Court
JUDGMENT:
(paras. 1 to 137)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* Brown J. did not participate in the final disposition of the judgment.

**IN THE MATTER OF a Reference to the Court of Appeal for Quebec concerning
the constitutionality of the *Act respecting First Nations, Inuit and Métis children,
youth and families*, S.C. 2019, c. 24**

Attorney General of Quebec

Appellant

v.

**Attorney General of Canada,
Assembly of First Nations Quebec-Labrador,
First Nations of Quebec and Labrador Health
and Social Services Commission,
Makivik Corporation, Assembly of First Nations,
Aseniwuche Winewak Nation of Canada and
First Nations Child & Family Caring Society of Canada**

Respondents

- and -

Attorney General of Canada

Appellant

v.

Attorney General of Quebec

Respondent

and

**Attorney General of Manitoba,
Attorney General of British Columbia,**

**Attorney General of Alberta,
Attorney General of the Northwest Territories,
First Nations Child & Family Caring Society of Canada,
Aseniwuche Winewak Nation of Canada,
Assembly of First Nations, Makivik Corporation,
Assembly of First Nations Quebec-Labrador,
First Nations of Quebec and Labrador Health
and Social Services Commission,
Grand Council of Treaty #3,
Innu Takuaikan Uashat mak Mani-utenam,
Federation of Sovereign Indigenous Nations,
Peguis Child and Family Services,
Native Women’s Association of Canada,
Council of Yukon First Nations,
Indigenous Bar Association in Canada,
Chiefs of Ontario, Inuvialuit Regional Corporation,
Inuit Tapiriit Kanatami, Nunatsiavut Government,
Nunavut Tunngavik Incorporated,
Nunavut Kavut Community Council,
Lands Advisory Board, Métis National Council,
Métis Nation — Saskatchewan, Métis Nation of Alberta,
Métis Nation British Columbia, Métis Nation of Ontario,
Les Femmes Michif Otipemisiwak, Listuguj Mi’gmaq Government,
Congress of Aboriginal Peoples,
First Nations Family Advocate Office, Assembly of Manitoba Chiefs,
First Nations of the Maa-Nulth Treaty Society,
Tribal Chiefs Ventures Inc.,
Union of British Columbia Indian Chiefs,
First Nations Summit of British Columbia,
British Columbia Assembly of First Nations,
David Asper Centre for Constitutional Rights,
Regroupement Petapan, Canadian Constitution Foundation,
Carrier Sekani Family Services Society,
Cheslatta Carrier Nation, Nadleh Whuten,
Saik’uz First Nation, Stelat’en First Nation,
Council of Atikamekw of Opitciwan,
Vancouver Aboriginal Child and Family Services Society and
Nishnawbe Aski Nation**

Intervenors

Indexed as: Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*

File No.: 40061.

2022: December 7, 8; 2024: February 9.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Aboriginal peoples — Child and family services — Parliament enacting statute establishing national standards to protect Indigenous children and affirming Indigenous peoples’ inherent right of self-government in relation to child and family services — Whether statute is ultra vires Parliament’s jurisdiction under Constitution of Canada — Constitution Act, 1867, s. 91(24) — Act respecting First Nations, Inuit and Métis children, youth and families, S.C. 2019, c. 24.

In keeping with its commitments relating to the *United Nations Declaration on the Rights of Indigenous Peoples* (“Declaration”), which has been incorporated into Canada’s domestic positive law, and in response to the calls to action made by the Truth and Reconciliation Commission of Canada, Parliament enacted the *Act respecting First Nations, Inuit and Métis children, youth and families* (“Act”). The Act establishes national standards and provides Indigenous peoples with effective

* Brown J. did not participate in the final disposition of the judgment.

control over their children's welfare. In ss. 9 to 17, it sets out national standards and principles, which establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. In ss. 8(a) and 18(1), it affirms that the inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act, 1982* includes legislative authority in relation to Indigenous child and family services. As well, the Act establishes a framework within which Indigenous groups, communities or peoples may exercise the jurisdiction affirmed in ss. 8(a) and 18(1) of the Act. It also specifies how its provisions and the jurisdiction it affirms will interact with other laws. Section 21 incorporates by reference the laws made by Indigenous groups, communities or peoples and gives them the force of law as federal law, and s. 22(3) states for greater certainty that the laws of Indigenous groups, communities or peoples prevail over provincial laws to the extent of any conflict or inconsistency.

Following the Act's enactment, the Attorney General of Quebec referred the question of its constitutional validity to the Quebec Court of Appeal, asking whether the Act is *ultra vires* Parliament's jurisdiction under the Constitution of Canada. The Court of Appeal held that the Act is constitutionally valid except for ss. 21 and 22(3), provisions that give the laws of Indigenous groups, communities or peoples priority over provincial laws. In its view, these provisions exceed Parliament's jurisdiction because they impermissibly alter Canada's constitutional architecture. The Attorney General of Quebec and the Attorney General of Canada appeal from the opinion given by the Court of Appeal.

Held: The appeal of the Attorney General of Quebec should be dismissed, and the appeal of the Attorney General of Canada should be allowed.

The Act as a whole is constitutionally valid. The essential matter addressed by the Act involves protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advancing the process of reconciliation with Indigenous peoples. The Act falls squarely within Parliament's legislative jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

Parliament embarked on a process of legislative reconciliation by means of an innovative statute. Under this statute, Indigenous governing bodies and the Government of Canada will work together to remedy the harms of the past and create a solid foundation for a renewed nation-to-nation relationship in the area of child and family services, binding the Crown in its dealings with the country's Indigenous peoples. In this way, Parliament not only immediately meets the commitment made by Canada to implement the Declaration and respond to the call to action of the Truth and Reconciliation Commission of Canada, but also avoids the uncertainties of constitutional negotiations, the slowness of treaty settlements and the inevitable conflicts associated with court settlements.

There are two stages in determining the constitutional validity of a law. At the first stage of the analysis, which involves characterizing the law, a court identifies the purpose and effects of the law in order to determine its main thrust or dominant

characteristic. In looking at the purpose of the law, the court considers both intrinsic evidence, such as the law's preamble, provisions and title, and extrinsic evidence, such as parliamentary debates. In looking at effects, the court must be concerned with legal effects, which flow directly from the provisions of the law itself, and practical effects, which are the side effects flowing from the law's application. Next, at the second stage of the analysis, the court classifies the law by reference to the heads of power listed in ss. 91 and 92 of the *Constitution Act, 1867*.

Given that the question referred to the Court of Appeal in this case did not relate to any specific provision of the Act, it is the Act in its entirety that must be first characterized and then classified. To begin with, the pith and substance of the Act flows from an examination of its aims and effects. The pith and substance of the Act, taken in its entirety, is to protect the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, to advance the process of reconciliation with Indigenous peoples.

First, the intrinsic evidence taken as a whole suggests that the Act's overarching purpose is to protect the well-being of Indigenous children, youth and families in three interwoven ways: affirming Indigenous communities' jurisdiction in relation to child and family services; establishing national standards applicable across Canada; and implementing aspects of the Declaration in Canadian law. Second, the purpose identified from the intrinsic evidence is confirmed by the extrinsic evidence. Excerpts from the debates point to the seriousness of the problem of overrepresentation

of Indigenous children in child and family services systems. They also clarify how the Act's fundamental purpose is closely linked to the three aims identified from the intrinsic evidence. Affirming the legislative authority of Indigenous groups, communities and peoples and adopting national standards were viewed as an integral part of implementing aspects of the Declaration. Similarly, the affirmation of legislative authority was also seen to sit comfortably alongside the national standards articulated by Parliament, because Indigenous communities had been participants in formulating the standards and were expected to be participants in implementing them thereafter. The three elements are aims that are mutually reinforcing to protect the well-being of Indigenous children, youth and families.

The legal effect of the Act is to establish a uniform scheme for protecting the well-being of Indigenous children, youth and families through the affirmation of Indigenous legislative authority, through national standards and through concrete implementation measures. Practically speaking, the Act may reasonably be expected to protect the well-being of Indigenous children, youth and families and to advance reconciliation with Indigenous peoples. It is reasonable to expect that Indigenous children and families will receive services that are more appropriate to their cultural realities, which will reduce the overrepresentation of Indigenous children in child and family services settings. It is also reasonable to think that the Act will help avoid the waste of time and resources involved in prolonged litigation or negotiations over whether and, if so, to what extent a particular Indigenous group, community or people

has jurisdiction in relation to child and family services. The effects of the three interrelated categories of provisions are along the same lines.

The provisions affirming the right of self-government have substantive legal effects because of the relationship that exists between legislation and government. The logical corollary of parliamentary sovereignty is that Parliament and the legislatures may bind the Crown through legislation. In conjunction with s. 7 of the Act, which expressly makes the Act binding on the Crown in right of Canada or of a province, Parliament's binding affirmation about the scope of s. 35 of the *Constitution Act, 1982* binds the federal government to the position it has affirmed as a matter of statutory positive law. Parliament undertakes to act as though Indigenous peoples enjoy an inherent right of self-government in relation to child and family services and ensures that the Crown also undertakes to act in accordance with its position by expressly binding the Crown through s. 7. Insofar as the affirmation in s. 18(1) of the Act is found in a law that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867*, Parliament's affirmation and the Crown's corollary undertaking have effect. The combined operation of ss. 7, 8(a) and 18(1) of the Act could also have other legal effects by requiring the Crown to act as though the principle of the honour of the Crown is engaged. With regard to practical effects, the affirmation performs the pedagogical or educational function of the law. It may in part be viewed as a step toward changing or adjusting the culture underlying the actions of the federal and provincial governments and may help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples in Canada.

The provisions setting out national standards establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. Some of these principles guide the courts' interpretation of the Act and the administration of the Act by governments. This normative framework is binding on federal and provincial providers of such services, as well as on Indigenous providers in certain cases. Pending the full realization of Indigenous jurisdiction as recognized, many of the national standards laid down may, on a practical level, operate to ensure that the child and family services provided in relation to Indigenous children are culturally appropriate for them and are in their best interests. It may reasonably be expected that the standards that are preventive will lessen the historical propensity of child welfare systems to apprehend Indigenous children and thus that they will help such children remain, where possible, in the environment they are from. As for the standards that come into play after a decision has been made to place a child, they are likely capable of reducing the disproportionate mass placement of Indigenous children outside their families and their communities. Addressing overrepresentation protects the well-being of Indigenous children, youth and families.

The provisions setting out concrete implementation measures facilitate the adoption by Indigenous groups, communities or peoples of legislative measures in relation to child and family services. An anticipated practical effect of the Act is to make Canadian law more consistent with the Declaration. The Act also puts in place mechanisms to facilitate and encourage, from a forward-looking perspective, the negotiation of agreements between the Crown and Indigenous communities. It may also

be anticipated that the Act's provisions will advance reconciliation with Indigenous peoples and accelerate certain aspects of this process of reconciliation. It may be expected that Canada will move closer to the goal of establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples.

With regard to the second stage of the analysis, which involves classifying the Act, Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* is a sound basis for its enactment. Binding the federal government to the affirmation set out in s. 18(1), establishing national standards and facilitating the implementation of the laws of Indigenous groups, communities or peoples are all measures that are within Parliament's powers under s. 91(24). The Act does not alter Canada's constitutional architecture.

First of all, the incidental effects of the national standards on the provinces' exercise of their powers, including on the work of their public servants, have no impact on the Act's constitutional validity. The national standards are within federal jurisdiction and can accordingly be binding on the provincial governments. The double aspect doctrine allows for the concurrent application of both federal and provincial legislation in relation to the same fact situation.

Moreover, nothing prevents Parliament from affirming that Indigenous peoples' inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act, 1982* includes legislative authority in relation to child and family services. In doing so, Parliament is not unilaterally amending s. 35 of the *Constitution*

Act, 1982. Rather, it is stating in the Act, through affirmations that are binding on the Crown, its position on the content of this constitutional provision, which the division of powers and the separation of powers do not prevent it from doing. The correctness of its position does not have to be determined to answer the reference question, and the classification of the affirmation under one of the heads of power in the *Constitution Act, 1867* must, in the context of this question, be determined by the classification of the Act as a whole.

It is also constitutionally open to Parliament to use anticipatory incorporation by reference of provisions adopted by other entities as a legislative drafting technique if Parliament has the legislative jurisdiction required to enact the law it seeks to referentially incorporate. Here, through s. 21, Parliament has validly incorporated by reference the laws, as amended from time to time, of Indigenous groups, communities or peoples in relation to child and family services. Parliament has independent legislative authority to enact such laws pursuant to its jurisdiction over Indians and lands reserved for the Indians under s. 91(24) of the *Constitution Act, 1867*. Therefore, s. 21 of the Act, which is simply an incorporation by reference provision, does not alter the architecture of the Constitution either.

Lastly, it is equally open to Parliament to affirm that the laws of Indigenous groups, communities or peoples will prevail over other laws in the event of a conflict. Section 22(3) of the Act is simply a legislative restatement of the doctrine of federal paramountcy, under which the provisions of a valid federal law prevail over conflicting

or inconsistent provisions of a provincial law. Although paramountcy is a judicial doctrine whose scope and application are matters for the courts rather than Parliament or the legislatures, this does not prevent Parliament from declaring its understanding of federal paramountcy. It is ultimately for the courts to adjudicate any alleged conflict between federal law and provincial law and to make any necessary declaration of paramountcy. Therefore, the s. 22(3) paramountcy provision does not alter the architecture of the Constitution.

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APPEALS from a judgment of the Quebec Court of Appeal (Thibault, Morissette, Bich, Bouchard and Mainville JJ.A.), 2022 QCCA 185, [2022] AZ-51828978, [2022] J.Q. n° 727 (Lexis), 2022 CarswellQue 6265 (WL), in the matter of a reference concerning the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*. The appeal of the Attorney General of Quebec is dismissed and the appeal of the Attorney General of Canada is allowed.

Samuel Chayer, Francis Demers, Tania Clercq and Hubert Noreau-Simpson, for the Attorney General of Quebec.

Bernard Letarte, François Joyal, Andréane Joannette-Laflamme and Lindy Rouillard-Labbé, for the Attorney General of Canada.

Franklin S. Gertler, Hadrien Burlone, Leila Ben Messaoud and Mira Levasseur Moreau, for the Assembly of First Nations Quebec-Labrador and the First Nations of Quebec and Labrador Health and Social Services Commission.

Kathryn Tucker, Nuri G. Frame and Robin Campbell, for the Makivik Corporation.

Stuart Wuttke and Adam Williamson, for the Assembly of First Nations.

Claire Truesdale, for the Aseniwuche Winewak Nation of Canada.

Naiomi W. Metallic, David P. Taylor and Alyssa Holland, for the First Nations Child & Family Caring Society of Canada.

Heather Leonoff, K.C., and Kathryn Hart, for the intervener the Attorney General of Manitoba.

Leah Greathead and Heather Cochran, for the intervener the Attorney General of British Columbia.

Nicholas Parker, Matthew Parent and Angela Croteau, for the intervener the Attorney General of Alberta.

Trisha Paradis, Sandra Jungles and John C. T. Inglis, for the intervener the Attorney General of the Northwest Territories.

Robert Janes, K.C., and Naomi Moses, for the intervener the Grand Council of Treaty #3.

Marie-Claude André-Grégoire, James A. O'Reilly, Michelle Corbu and Vincent Carney, for the intervener Innu Takuaikan Uashat mak Mani-utenam.

Michael Seed, Nicholas Dodd and Rosa Victoria Adams, for the intervener the Federation of Sovereign Indigenous Nations.

Earl C. Stevenson and Hafeez Khan, for the intervener the Peguis Child and Family Services.

Sarah Niman and Kira Poirier, for the intervener the Native Women's Association of Canada.

Tammy Shoranick, James M. Coady, K.C., and Daryn Leas, for the intervener the Council of Yukon First Nations.

Paul Seaman and Cam Cameron, for the intervener the Indigenous Bar Association in Canada.

Maggie Wente, Krista Nerland and Jesse Abell, for the intervener the Chiefs of Ontario.

Katherine Hensel, Kristie Tsang and Todd Orvitz, for the intervener the Inuvialuit Regional Corporation.

Alyssa Flaherty-Spence, Brian A. Crane, K.C., Graham Ragan and Kate Darling, for the interveners Inuit Tapiriit Kanatami, the Nunatsiavut Government and Nunavut Tunngavik Incorporated.

Jason T. Cooke and Ashley Hamp-Gonsalves, for the intervener the Nunavut Community Council.

William B. Henderson, for the intervener the Lands Advisory Board.

Jason T. Madden, Alexander DeParde and Emilie N. Lahaie, for the interveners the Métis National Council, the Métis Nation — Saskatchewan, the Métis

Nation of Alberta, the Métis Nation British Columbia, the Métis Nation of Ontario and Les Femmes Michif Otipemisiwak.

Zachary Davis and *Ryland N. Weyman*, for the intervener the Listuguj Mi'gmaq Government.

Andrew Lokan and *Glynnis Hawe*, for the intervener the Congress of Aboriginal Peoples.

Joëlle Pastora Sala and *Allison Fenske*, for the intervener the First Nations Family Advocate Office.

David Outerbridge, *Craig Gilchrist* and *Rebecca Amoah*, for the intervener the Assembly of Manitoba Chiefs.

Maegen M. Giltrow, K.C., *Lisa C. Glowacki* and *Natalia Sudeyko*, for the intervener the First Nations of the Maa-Nulth Treaty Society.

Aaron Christoff and *Brent Murphy*, for the intervener Tribal Chiefs Ventures Inc.

Gib van Ert and *Fraser Harland*, for the interveners the Union of British Columbia Indian Chiefs, the First Nations Summit of British Columbia and the British Columbia Assembly of First Nations.

Jessica Orkin, Natai Shelsen and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

François G. Tremblay, Christina Caron, Benoît Amyot and Thomas Dougherty, for the intervener Regroupement Petapan.

Jesse Hartery, Simon Bouthillier and Allison Spiegel, for the intervener the Canadian Constitution Foundation.

Scott A. Smith, for the interveners the Carrier Sekani Family Services Society, the Cheslatta Carrier Nation, Nadleh Whuten, the Saik'uz First Nation and the Stelat'en First Nation.

Frédéric Boily, Keven Ajmo, Stéphanie Ajmo and Jean-François Delisle, for the intervener the Council of Atikamekw of Opitciwan.

Keith Brown and Maxime Faille, for the intervener the Vancouver Aboriginal Child and Family Services Society.

Julian N. Falconer, Christopher Rapson and Mitchell Goldenberg, for the intervener the Nishnawbe Aski Nation.

English version of the judgment delivered by

I. Introduction

[1] In an order in council made on December 18, 2019, the Government of Quebec gave the province’s Attorney General a mandate to challenge, through a reference to the Court of Appeal, the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (“Act”), on the ground that it exceeds the jurisdiction of the Parliament of Canada. Stating that the federal statute [TRANSLATION] “raises fundamental constitutional issues with regard particularly to the division of legislative powers and the constitutional architecture of Canada”, the government referred the following constitutional question to the Quebec Court of Appeal:

[TRANSLATION] Is the Act respecting First Nations, Inuit and Métis children, youth and families *ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?

(Order in council 1288-2019, (2020) 152 G.O. II, 154, at p. 155)

In answer to this question, the Court of Appeal held that the Act is constitutionally valid except for ss. 21 and 22(3), provisions that give the laws of Indigenous groups, communities or peoples priority over provincial laws and, as a result, exceed Parliament’s jurisdiction.

[2] With the same question before it, this Court is of the opinion that the Act as a whole is constitutionally valid. It falls within Parliament's legislative jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. Since it concerns relationships within Indigenous families and the control exercised by Indigenous communities over Indigenous children, the impugned Act relates first and foremost to what is called Indigeneity or "Indianness", that is, Indigenous peoples as Indigenous peoples, which requires its classification under s. 91(24) of the *Constitution Act, 1867*.

[3] The Act is part of a broader legislative program introduced by Parliament to achieve reconciliation with First Nations, the Inuit and the Métis "through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership" (preamble). The framework serving as the foundation for this reconciliation initiative by Parliament is the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 ("Declaration" or "UNDRIP"), adopted by the United Nations General Assembly in 2007. That international instrument provides that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs" (art. 4). Among the matters dealt with in the Declaration, the provisions setting out "the right of indigenous families and communities to retain shared responsibility for the upbringing . . . and well-being of their children, consistent with the rights of the child" (preamble; see also art. 14) are of particular relevance to this reference. The Declaration also refers

to the right of Indigenous peoples to transmit their histories, languages and cultures to future generations (art. 13(1)), in addition to emphasizing the right not to be subjected to any act of violence, including “forcibly removing children of the group to another group” (art. 7(2)).

[4] While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take, “in consultation and cooperation with indigenous peoples, . . . the appropriate measures, including legislative measures, to achieve the ends” of the Declaration (art. 38). Recognized by Parliament as “a universal international human rights instrument with application in Canadian law”, the Declaration has been incorporated into the country’s positive law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“*UNDRIP Act*”), s. 4(a). This statute recognizes that the Declaration “provides a framework for reconciliation” (preamble); s. 5 of the same statute requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take “all measures necessary to ensure that the laws of Canada are consistent with the Declaration”. The statute’s preamble expressly provides that the implementation of the Declaration in Canada “must include concrete measures to address injustices” facing, among others, Indigenous youth and children.

[5] The Act challenged in this reference is therefore directly in keeping with Canada’s commitment to “implementing the United Nations Declaration on the Rights of Indigenous Peoples”, as the first recital of its preamble confirms. The preamble to

the Act also refers to the calls to action of the Truth and Reconciliation Commission of Canada asking governments to “implement the United Nations *Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation” (*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 191, call to action No. 43). This echoes one of the calls for justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls (see *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), vol. 1b, at pp. 167-218). At the centre of this process of reconciliation, the Act specifically addresses the harm caused to Indigenous children and their families. Its preamble states that “Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices”. In the preamble, Parliament also recognizes the “disruption” that Indigenous women and girls have experienced in their lives in relation to child services and “the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services”. To achieve these aims, Parliament affirms the need “to respect the diversity of all Indigenous peoples, including the diversity of their laws”, and “to eliminate the over-representation of Indigenous children in child and family services systems”.

[6] Parliament embarked on this process of legislative reconciliation in favour of Indigenous children by taking an [TRANSLATION] “unusual” approach, as the Court

of Appeal put it (2022 QCCA 185, at para. 515 (CanLII)). Section 8 sets out the three elements of the Act’s purpose, which are all distinct legal avenues that are combined into an organic whole and have the same reconciliatory purpose: the affirmation for Canada, made by Parliament and binding on the Crown, of the vitality of Indigenous peoples’ legislative authority in relation to child and family services, and the provision of such services on the basis of national standards. First, the Act’s purpose is to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services” (s. 8(a)). This affirmation relates to what the Act calls the “laws” of Indigenous groups, communities or peoples, and it expresses the idea that these would be the most appropriate laws to govern the situation of Indigenous children and families. Second — and somewhat in counterpoint to the first purpose mentioned — the Act sets out “principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children” (s. 8(b)). The development by Parliament of national legislative standards to protect Indigenous children is a direct response to the fourth call to action made by the Truth and Reconciliation Commission. Third, the Act’s purpose is also to “contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (s. 8(c)). Again, this purpose responds to the Truth and Reconciliation Commission’s call for the Government of Canada to develop an action plan and other concrete measures to achieve the objectives of the Declaration.

[7] The three elements of the purpose set out in s. 8 reflect Parliament’s openness to using three different types of legal norms that will be interwoven in this

framework for reconciliation to ensure the well-being of Indigenous children: the legislative authority of Indigenous peoples in relation to child and family services, the legislative provisions enacted by Parliament to establish national standards, and the international standards referred to in the Declaration. The metaphor of “braiding” together these three types of norms has been helpfully proposed to explain how the Declaration should be implemented in Canada, so as to “work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope” (G. Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP”, in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (2017), 48, at p. 48; see also O. Fitzgerald and R. Schwartz, “Introduction”, *ibid.*, 1, at p. 3).

[8] Announced in s. 8 and carried out by the Act as a whole, Parliament’s effort to braid this “rope” with three strands constitutes the specific framework for reconciliation when it comes to Indigenous child and family services, in the spirit of the Declaration. Canada’s commitment to implementing the Declaration and responding to the Truth and Reconciliation Commission’s call to action is thus met immediately; this avoids the uncertainties of constitutional negotiations, the slowness of treaty settlements entered into on a piecemeal basis by the Crown and each of the various Indigenous communities concerned, and the inevitable conflicts associated with court settlements (on this point, see the explanations given by K. Wilkins, “Strategizing UNDRIP Implementation: Some Fundamentals”, in J. Borrows et al.,

eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (2019), 177).

[9] Nothing prevents Parliament from affirming, as it does in s. 18(1) of the Act, that Indigenous peoples have jurisdiction to make laws in relation to child and family services. This “affirmation”, through which Parliament declares that the inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act, 1982* includes “legislative authority” in relation to Indigenous child and family services, certainly represents a legislative commitment that Parliament must honour in its conduct toward Indigenous peoples. Furthermore, nothing prevents Parliament from declaring, as it does in s. 7, that this commitment, like the others made toward Indigenous peoples in the Act for the protection of children, “is binding” on His Majesty. This is of signal importance, because no enactment is binding on His Majesty or affects His Majesty or His Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment, as is the case with s. 7 (see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Wilkins, at p. 184, citing *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at paras. 1 and 19-21). It is equally open to Parliament to affirm that the laws of Indigenous groups, communities or peoples will prevail over other laws in the event of a conflict. Moreover, it is clear that issues relating to the scope of s. 35 of the *Constitution Act, 1982* and to the application of the doctrine of federal paramountcy are ultimately matters for the courts under Canadian law, not the legislative branch, since they raise questions of constitutional interpretation. Plainly, Parliament may not, by enacting an ordinary statute, amend the Constitution,

including the rights protected by s. 35 of the *Constitution Act, 1982*, or alter the division of powers in the *Constitution Act, 1867*. That being said, Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* is a sound basis for enacting federal legislation that contains such affirmations and imposes such obligations on His Majesty, just as it is a sound basis for imposing national standards for child and family services for Indigenous children (s. 8b)). Contrary to what the Attorney General of Quebec argues, this in no way undermines the "constitutional architecture" of Canada.

II. Context

[10] For most of Canada's history, lawmakers have wrongly employed a policy of assimilation aimed at "lifting [Indigenous peoples] out of [their] condition of tutelage and dependence, and . . . prepar[ing] [them] for a higher civilization" (*Annual Report of the Department of the Interior for the Year Ended 30th June, 1876*, reproduced in *Sessional Papers*, vol. X, No. 7, 4th Sess., 3rd Parl., 1877, No. 11, at p. xiv, quoted in *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at p. 277; see also *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 — Origins to 1939* (2015), at pp. 107-9). This history, which includes the residential schools policy, the "Sixties Scoop" and the harm and intergenerational trauma that resulted therefrom, is detailed in several reports published in recent decades (see, e.g., *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, *Canada's Residential Schools: The History, Part 1 —*

Origins to 1939 and The History, Part 2 — 1939 to 2000 (2015); *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), vol. 1a).

[11] The effects of these government policies are still being felt today. “In tandem with the residential school system, the child welfare system . . . became a site of assimilation and colonization by forcibly removing children from their homes and placing them with non-Indigenous families” (*Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, at p. 282). The statistics on the overrepresentation of Indigenous children in child welfare systems are quite simply staggering. According to 2016 census data, about 7.7 percent of children under the age of 15 in Canada are Indigenous, but they represent 52.2 percent of children in foster care in private homes (Indigenous Services Canada, *The Government of Canada announces the coming into force of an Act respecting First Nations, Inuit and Métis children, youth and families*, September 10, 2019 (online)).

[12] Over time, Canada has abandoned its policy of assimilation in favour of a policy of reconciliation. Parliament established the Truth and Reconciliation Commission of Canada and gave it a dual mandate to “reveal to Canadians the complex truth about the history and the ongoing legacy of the church-run residential schools” and to “guide and inspire a process of truth and healing, leading toward reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal

communities, churches, governments, and Canadians generally” (*Honouring the Truth, Reconciling for the Future*, at p. 23).

[13] The Truth and Reconciliation Commission of Canada issued several calls to action relating to the welfare of Indigenous children. Notably, in call to action No. 4, the Commission

call[s] upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

- i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
- ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
- iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

(*Honouring the Truth, Reconciling for the Future*, at pp. 143-44)

The Commission also called upon governments to adopt and implement the UNDRIP in its entirety as a “framework for reconciliation” (*Honouring the Truth, Reconciling for the Future*, at pp. 187-91, calls to action Nos. 43-44).

[14] In 2016, Canada made a commitment internationally to support the UNDRIP “without qualification” and to implement it (C. Bennett, *Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10, 2016* (online)). The UNDRIP gives particular recognition to “the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education

and well-being of their children, consistent with the rights of the child” (preamble). It states in arts. 3 and 4, respectively, that Indigenous peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural development”, as well as the right, in exercising their right to self-determination, “to autonomy or self-government in matters relating to their internal and local affairs”. Article 7(2) of the UNDRIP states that “Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.” Article 13(1) of the UNDRIP recognizes that Indigenous peoples have “the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures”, a right that is reinforced by the correlative duty of states to take measures to ensure that it is protected (art. 13(2)). Further, art. 38 of the UNDRIP provides that “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of th[e] Declaration.”

[15] In 2021, Parliament enacted the *UNDRIP Act*, s. 4(a) of which affirms the Declaration “as a universal international human rights instrument with application in Canadian law”. It is therefore through this Act of Parliament that the Declaration is incorporated into the country’s domestic positive law. In s. 4(b), the statute states that its purpose is also to “provide a framework for the Government of Canada’s implementation of the Declaration”. In s. 5, it provides that the “Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures

necessary to ensure that the laws of Canada are consistent with the Declaration”. Further, s. 6(2)(b) provides that the minister responsible for the statute must prepare and implement an action plan, which must include “measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration”. More generally, in the preamble to this statute, Parliament emphasized the Government of Canada’s commitment to “taking effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration”. Parliament also referred in the preamble to the call for it to implement the UNDRIP made by the Truth and Reconciliation Commission in its calls to action and by the National Inquiry into Missing and Murdered Indigenous Women and Girls in its calls for justice.

[16] The call for lawmakers to pass legislation affirming self-government for Indigenous peoples and facilitating the exercise of these rights has been echoed in other contexts. Internationally, for example, the importance of such measures has been repeatedly pointed out (see, e.g., UNDRIP, art. 38; United Nations, General Assembly, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, U.N. Doc. A/HRC/9/9, August 11, 2008; United Nations, Office of the High Commissioner for Human Rights, *Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples*, James Anaya, October 15, 2013 (online)).

[17] Taking legislative measures of this kind has been described as being part of a process that some have termed “legislative reconciliation”, that is, the enactment of legislation “to respect, promote, protect, and accommodate inherent rights through mechanisms or frameworks elaborated upon within the statute” (see N. S. W. Metallic, “Aboriginal Rights, Legislative Reconciliation, and Constitutionalism” (2023), 27:2 *Rev. Const. Stud.* 1, at p. 5). In other words, legislation of this kind does not purport to be the source of the rights in question, but rather proceeds on the premise that these rights exist. Similar initiatives have also been described as “recognition legislation”, including in the *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at p. 314 (see also S. Grammond, “Recognizing Indigenous Law: A Conceptual Framework” (2022), 100 *Can. Bar Rev.* 1, at pp. 20-21).

[18] Certain legislative initiatives predicated on the recognition of Indigenous rights have been adopted. For instance, the *Indigenous Languages Act*, S.C. 2019, c. 23, begins by stating in its preamble that “the recognition and implementation of rights related to Indigenous languages are at the core of reconciliation with Indigenous peoples and are fundamental to shaping the country, particularly in light of the Truth and Reconciliation Commission of Canada’s Calls to Action”.

III. Overview of the Act

[19] In keeping with its commitments relating to the UNDRIP, Parliament decided to enact innovative legislation that establishes national standards and provides

Indigenous peoples with effective control over their children's welfare. From the outset, Parliament recognizes in the Act's preamble itself that a comprehensive reform of Indigenous child and family services is needed to address the overrepresentation of children in family services systems. This reform, which includes an affirmation of Indigenous peoples' jurisdiction in relation to such services, will be an important step on the path to reconciliation. The purpose of the Act includes affirming the inherent right of self-government (s. 8(a)) and, as s. 9(2) specifies, the Act is to be interpreted in accordance with the principle of "cultural continuity" for Indigenous peoples. Parliament places the child at the centre of this idea of cultural continuity for obvious reasons: ensuring that Indigenous peoples themselves exercise control over child services will help to avoid the intergenerational trauma and assimilation policies of the past (see the preamble). The fact that a child resides with members of his or her family and community strengthens the transmission of Indigenous culture and often promotes the child's best interests (s. 9(2)). Of course, a legislative affirmation regarding the interpretation to be given to a constitutional norm is not binding on the courts.

[20] The collaboration between Indigenous peoples and government bodies that led to the enactment of the Act, which contains express declaratory provisions, highlights Parliament's firm commitment to establishing a new legislative structure for reconciliation. Under this framework created by the Act, Indigenous governing bodies and the Government of Canada will work together to remedy the harms of the past and create a solid foundation for a renewed nation-to-nation relationship in the area of child

and family services, binding the Crown in its dealings with the country's Indigenous peoples.

[21] The Act therefore represents one more step toward reconciliation. Indeed, its preamble expressly acknowledges much of the context set out above. It states that the Act is intended to “implemen[t] the United Nations Declaration on the Rights of Indigenous Peoples”, to recognize “the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices”, and to respond to the calls to action made by the Truth and Reconciliation Commission of Canada.

[22] Section 8 states that the purpose of the Act is to

- (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
- (b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
- (c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

These three interwoven elements of the purpose can be found in various places in the Act, which “is binding on Her Majesty in right of Canada or of a province” (s. 7).

[23] For instance, the affirmation of the inherent right of self-government made in s. 8(a) also appears in s. 18(1):

Affirmation

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

[24] This affirmation is also reflected in s. 2 of the Act, which requires that the Act be interpreted in a way that upholds all rights under s. 35 of the *Constitution Act, 1982*. Indeed, Parliament states in s. 2 that the Act “is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them”.

[25] Further, the “principles applicable, on a national level,” referenced in s. 8(b) find expression in ss. 9 to 17, which establish national standards for the provision of child and family services in relation to Indigenous children. Section 9 states that the Act “is to be interpreted and administered in accordance with the principle of the best interests of the child” and emphasizes the principles of cultural continuity and substantive equality. Section 10(3) sets out the factors to be considered in determining the best interests of an Indigenous child. Section 11 provides that child and family services are to be provided in a manner that takes into account a child’s needs and culture, allows the child to know his or her family origins, and promotes substantive equality. Section 12(1) requires a service provider to give notice to a child’s parent and the relevant Indigenous governing body before taking any significant measure in relation to the child. Section 13 establishes the right of the parents, the care provider and the Indigenous governing body to make representations in the context “of

a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child”. Section 14 prioritizes preventive care, including prenatal services. Section 15 prohibits apprehending an Indigenous child “solely on the basis of his or her socio-economic conditions”. Sections 16 and 17 establish an order of priority for the placement of a child, “to the extent that it is consistent with the best interests of the child”.

[26] As well, the Act establishes a framework within which Indigenous groups, communities or peoples may exercise the jurisdiction affirmed in ss. 8(a) and 18(1). The Act provides that Indigenous governing bodies intending to exercise such jurisdiction may give notice to and request to enter into coordination agreements with the responsible federal minister and the provincial governments concerned (s. 20(1) and (2)). When they enter into such an agreement, or when they make reasonable efforts to do so during a period of one year after their request, their “law, as amended from time to time . . . also has, during the period that the law is in force, the force of law as federal law” (s. 21(1)). The provisions respecting child and family services in the laws made by Indigenous groups, communities or peoples apply “in relation to an Indigenous child except if the application of the provision[s] would be contrary to the best interests of the child” (s. 23).

[27] The Act also specifies how its provisions and the jurisdiction it affirms will interact with other laws. First, s. 19 states that “[t]he *Canadian Charter of Rights and Freedoms* applies to an Indigenous governing body in the exercise of jurisdiction in

relation to child and family services on behalf of an Indigenous group, community or people.” Second, s. 3 stipulates that the provisions of existing treaties or self-government agreements that contain provisions respecting child and family services prevail over the Act’s provisions to the extent of any conflict or inconsistency. Third, ss. 21(3) and 22(1) state that the only federal legislative provisions that prevail over the laws of Indigenous groups, communities or peoples made as a result of entering into a coordination agreement or after a year of reasonable efforts to enter into such an agreement are ss. 10 to 15 of the Act and the provisions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Fourth, with respect to provincial laws, s. 22(3) states, “[f]or greater certainty”, that the laws of Indigenous groups, communities or peoples made pursuant to a coordination agreement or after a year of reasonable efforts to enter into such an agreement prevail over provincial laws to the extent of any conflict or inconsistency. Where there is no conflict or inconsistency, however, the Act provides that nothing in it affects the application of any provincial statute or regulation (s. 4). Finally, s. 24(1) of the Act sets out how to resolve cases in which there is a conflict or inconsistency, in relation to an Indigenous child, between the laws of two Indigenous groups, communities or peoples.

IV. The Reference Question

[28] Following the Act’s enactment, the Attorney General of Quebec referred the following question to the Quebec Court of Appeal:

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

[29] This question involves determining whether Parliament had jurisdiction to enact the Act. To answer this question, we must also address the objections raised to the effect that the Act alters Canada's constitutional architecture. One of the recitals in the order in council concerning the reference mentions this specific aspect:

[TRANSLATION] WHEREAS this federal statute raises fundamental constitutional issues with regard particularly to the division of legislative powers and the constitutional architecture of Canada;

(Order in council 1288-2019, at p. 154)

V. Opinion of the Quebec Court of Appeal (2022 QCCA 185)

[30] In answer to the question of whether the Act is *ultra vires* Parliament, the Court of Appeal found that it is not, except for ss. 21 and 22(3) of the Act, which impermissibly alter Canada's constitutional architecture.

[31] In its analysis, the Court of Appeal divided the Act into two parts: [TRANSLATION] "Part I", including the establishment of national standards, and "Part II", including the affirmation of jurisdiction and the provisions relating to incorporation by reference and paramountcy.

[32] The Court of Appeal began by observing that [TRANSLATION] “[t]his legislative initiative was evidently guided by the [UNDRIP]” (para. 27). In light of this relationship along with the purpose and effects of the Act, the court concluded that the pith and substance of the Act is [TRANSLATION] “to protect and ensure the well-being of Aboriginal children, families and peoples by promoting culturally appropriate child services, with the aim of putting an end to the overrepresentation of Aboriginal children in child services systems” (para. 333). As a result, the Act [TRANSLATION] “is a valid exercise of federal jurisdiction over Aboriginal peoples” (para. 355). This is so despite the Act’s potential incidental effects on the work of provincial public servants and despite the provinces’ previous legislative initiatives in this area (paras. 347-49).

[33] The Court of Appeal held that Parliament [TRANSLATION] “can regulate and delineate Aboriginal rights” and “define the scope of those rights” (para. 448) and that this does not amount to amending the Constitution, because it is the courts that will have the last word in this regard. In its view, all of what it called “Part II” would be invalid if the affirmation in s. 18(1) were incorrect. This part [TRANSLATION] “is based solely on the premise that s. 35 recognizes and affirms the right to Aboriginal self-government” (para. 437). [TRANSLATION] “If s. 35 does not include this right, then Part II of the *Act* must be declared unconstitutional as a whole, because the premise on which it is based is invalid” (para. 453). The Court of Appeal therefore found that it had to consider whether the right of self-government in relation to child and family services is an Aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

[34] The Court of Appeal stated that the test from *R. v. Van der Peet*, [1996] 2 S.C.R. 507, should be adapted in the context of a claimed generic right of self-government. It reasoned that the claimed Aboriginal right of self-government includes at least the right of self-regulation in relation to child and family services (paras. 486-94). [TRANSLATION] “[I]t is a generic right that extends to all Aboriginal peoples” (para. 494).

[35] The Court of Appeal then held that ss. 21 and 22(3) were invalid because they would have the effect of unilaterally amending the Constitution by giving the laws of Indigenous groups, communities or peoples priority over provincial laws (paras. 538, 541 and 543-44). The court explained that laws made in reliance on the s. 35 right of self-government [TRANSLATION] “are not federal laws enacted under s. 91 and subject to the doctrine of federal paramountcy, but rather Aboriginal laws that serve Aboriginal imperatives” (para. 540).

VI. Appeals

[36] The Attorney General of Quebec and the Attorney General of Canada appeal from the opinion given by the Quebec Court of Appeal. The Attorney General of Quebec argues that the entire Act is *ultra vires* Parliament because it impermissibly intrudes on certain areas of exclusive provincial jurisdiction, especially the province’s power to direct its own agencies, and because the Act represents an attempt to unilaterally amend the Constitution. The Attorney General of Canada counters that the Act constitutes a valid exercise of Parliament’s legislative authority under s. 91(24) of

the *Constitution Act, 1867*. He also submits that the incorporation by reference and paramountcy provisions are not problematic because incorporation by reference is a long-accepted legislative technique and the paramountcy provision merely states for greater certainty what constitutional law already provides.

VII. Analysis

[37] There are two stages in determining the constitutional validity of a law: identifying its pith and substance and then classifying it by reference to the heads of power listed in ss. 91 and 92 of the *Constitution Act, 1867* (*Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, at para. 22, citing *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 26).

[38] The following analysis concerns the Act *as a whole*. This means that, in determining the Act's constitutional validity, we are not distinguishing between what the attorneys general have called Part I (ss. 1 to 17, except s. 8(a)) and Part II (ss. 8(a) and 18 to 26). Given that the question referred to the Quebec Court of Appeal did not relate to any specific provision of the Act, it is therefore the Act in its entirety that must be first characterized and then classified.

A. *Characterization: What Is the Pith and Substance of the Act?*

(1) Analytical Framework

[39] At the first stage of the analysis, which involves characterizing the law, a court identifies the purpose and effects of the law in order to determine its main thrust or dominant characteristic (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (“*Greenhouse Gas References*”), at para. 51, citing *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 31). In looking at the purpose of the law, the court considers both intrinsic evidence, such as the law’s preamble and provisions, and extrinsic evidence, such as Hansard and the minutes of parliamentary committees (*Greenhouse Gas References*, at para. 51, citing *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53, and *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 27). In looking at effects, the court is concerned with legal effects, which flow directly from the provisions of the law itself, and practical effects, which are the “side” effects flowing from the law’s application (*Greenhouse Gas References*, at para. 51, citing *Kitkatla*, at para. 54, and *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 480).

[40] While it is helpful to consider the context in which the law was enacted, the law itself must remain at the centre of the characterization exercise. As Kasirer J. noted in *Reference re Genetic Non-Discrimination Act*, “the court’s inquiry into pith and substance must be anchored in the text of the impugned legislation” (para. 165). Moreover, “the pith and substance of a challenged statute or provision should capture the law’s essential character in terms that are as precise as the law will allow”

(*Greenhouse Gas References*, at para. 52, citing *Reference re Genetic Non-Discrimination Act*, at para. 32).

(2) Pith and Substance of the Act

[41] In our view, the Act protects the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advances the process of reconciliation with Indigenous peoples. This is the Act’s pith and substance, which flows from the purpose and effects of this legislation.

(a) *Purpose of the Act*

(i) Intrinsic Evidence

[42] A law’s preamble and purpose clauses can be considered to determine the purpose of the law in question (*Greenhouse Gas References*, at paras. 51 and 59). Here, s. 8 sets out the three elements of the Act’s purpose, which the Act’s preamble assists in interpreting.

[43] First, the Act’s purpose is to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services” (s. 8(a)). The preamble places this purpose in a broader context, stating that “Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of

self-government, which includes jurisdiction in relation to child and family services”. This affirmation is repeated in the substantive provisions of the Act (s. 18(1)) and grounds Parliament’s recognition of the laws of Indigenous groups, communities or peoples. To this end, the Act seeks “to achiev[e] reconciliation with First Nations, the Inuit and the Métis through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, cooperation and partnership” (preamble).

[44] Second, the Act’s purpose is to set out national standards for the provision of child and family services in the Indigenous context (s. 8(b) and preamble) in order to ensure respect for the dignity of Indigenous children. The preamble indeed emphasizes the importance of this step, noting that “the Truth and Reconciliation Commission of Canada’s Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children”. The preamble’s reference to call to action No. 4 suggests that Parliament’s intention with respect to the national standards was not to impose them unilaterally, without regard for the perspective of Indigenous groups, communities or peoples. Indeed, the preamble sets out the Government of Canada’s commitment to “engaging with Indigenous peoples and provincial governments to support a comprehensive reform of child and family services that are provided in relation to Indigenous children”. The Act therefore supports the view that the intention is for the national standards to be developed collaboratively and applied

across the country to “help ensure that there are no gaps in the services that are provided in relation to [Indigenous children], whether they reside on a reserve or not” (preamble).

[45] Third, the Act’s purpose is to “contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (s. 8(c)). Parliament chose to give particular importance to this aim by beginning the Act’s preamble with a reference to the Government of Canada’s commitment to implementing aspects of the UNDRIP. The text of the Act also suggests that Parliament intended the Act as a whole to be a concrete legislative measure to implement the UNDRIP in Canadian law.

[46] Moreover, this Court has stated that “[a] law’s title . . . is an important form of intrinsic evidence” (*Reference re Genetic Non-Discrimination Act*, at para. 35; see also *Greenhouse Gas References*, at para. 58). In this case, the title “*An Act respecting First Nations, Inuit and Métis children, youth and families*” confirms that Indigenous children, youth and families are the Act’s main concern. The preamble sets out a large number of aims with respect to these persons: to “reunit[e] Indigenous children with their families and communities”, to “address [their] needs” in order to ensure that “there are no gaps in the services that are provided in relation to them”, to “eliminate [their] over-representation . . . in child and family services systems”, and to “support [their] dignity and well-being . . . as well as the achievement of their full potential”. These aims all reflect the Act’s fundamental purpose, which is to promote the well-being of Indigenous children, youth and families.

[47] Taken as a whole, the intrinsic evidence suggests that the purpose of the Act is to protect the well-being of Indigenous children, youth and families. This overarching purpose has three elements: affirming Indigenous communities' jurisdiction in relation to child and family services; establishing national standards applicable across Canada; and implementing aspects of the UNDRIP in Canadian law. As the extrinsic evidence of Parliament's intention makes plain, however, these three elements are interwoven.

(ii) Extrinsic Evidence

[48] The purpose identified from the intrinsic evidence is confirmed by the extrinsic evidence, including various excerpts from Hansard. These excerpts first point to the seriousness of the problem of overrepresentation of Indigenous children in child and family services systems, a problem that many described as a "humanitarian crisis" during the debates (*House of Commons Debates*, vol. 148, No. 392, 1st Sess., 42nd Parl., March 19, 2019, at p. 26135 (Hon. S. O'Regan); *House of Commons Debates*, vol. 148, No. 409, 1st Sess., 42nd Parl., May 3, 2019, at pp. 27325 (D. Vandal) and 27350 (A. Virani)). Indeed, at second reading of Bill C-92, the Minister of Indigenous Services, referring to the fact that Indigenous children make up 52 percent of those in care in child welfare systems even though less than 8 percent of Canada's population is Indigenous, said that this "statistic is horrifying [and] appalling" (*House of Commons Debates*, March 19, 2019, at p. 26135). We noted above that the preamble to the Act reflects a commitment to comprehensively reviewing the approach previously taken to

child welfare. The Minister made comments to the same effect, noting that the “western and urban model” must be reconsidered, for otherwise “we will continue to cause serious harm to individuals and communities” (*ibid.*). In this respect, the extrinsic evidence confirms that the Act’s purpose is fundamentally directed at protecting the well-being of Indigenous children, youth and families.

[49] The debates also clarify how the fundamental purpose of the Act — promoting the well-being of Indigenous children, youth and families — is closely linked to the three aims identified from the intrinsic evidence.

[50] First, the Minister of Indigenous Services stated that the bill was intended to provide a “clear” affirmation of “the inherent right of first nations, Inuit and Métis to exercise their own jurisdiction in relation to child and family services” (*House of Commons Debates*, vol. 148, No. 425, 1st Sess., 42nd Parl., June 3, 2019, at p. 28448). He emphasized the importance of this affirmation, saying:

Now is the time to follow through on our promises to indigenous children, families and communities. Our promise is that the same old broken system that needlessly separates so many children from their families, that removes them from their culture, that cuts them off from their land and their language, not be allowed to continue and that we affirm and recognize that indigenous families know what is best for indigenous children.

...

... [Indigenous peoples] have always had this right, and now we are recognizing and affirming it. We are making it a reality and allowing them the opportunity to come up with effective, local, grassroots solutions to those problems. We know that they will be more effective. [Emphasis added.]

(*ibid.*, at pp. 28449-50)

[51] Second, with respect to the national standards sought by the Truth and Reconciliation Commission in its call to action No. 4, the Parliamentary Secretary to the Minister of Indigenous Services noted that the standards are meant to ensure that “all services for first nation, Inuit and Métis children are provided in a manner that takes into account the individual child’s needs, including the need to be raised with a strong connection to the child’s family, culture, language and community” (*House of Commons Debates*, May 3, 2019, at p. 27324). He also emphasized the fact that not only were the standards articulated during an extensive engagement process involving some 2,000 individuals and community, regional and national organizations, but they could be “built upon and adapted by [Indigenous] communities to meet their unique cultures as well as their unique traditions” (*ibid.*).

[52] Third, the extrinsic evidence also confirms that the Act was intended to implement certain aspects of the UNDRIP in Canadian law and that this implementation was seen as closely linked to both the affirmation of Indigenous peoples’ right of self-government and the establishment of national standards for the provision of child and family services in relation to Indigenous children. For example, the Parliamentary Secretary to the Minister of Justice and Attorney General of Canada and to the Minister of Democratic Institutions stated that the concept of “inherent jurisdiction” is “fundamental to . . . UNDRIP” (*House of Commons Debates*, May 3, 2019, at p. 27353). Likewise, at third reading of the bill, Member of Parliament Mike

Bossio noted that the national standards are themselves “aligned with the United Nations Declaration on the Rights of Indigenous Peoples” (*House of Commons Debates*, June 3, 2019, at p. 28459).

[53] The extrinsic evidence thus reveals that the various elements of the Act’s purpose were considered to be interwoven. Affirming the legislative authority of Indigenous groups, communities and peoples and adopting national standards were viewed as an integral part of implementing aspects of the UNDRIP. Similarly, the affirmation of Indigenous legislative authority was also seen to sit comfortably alongside the national standards articulated by Parliament, because Indigenous communities had been participants in formulating the standards and were expected to be participants in implementing them thereafter. Thus, each of the three elements of the Act’s purpose set out in s. 8 is bound up in the other two. They are aims that are mutually reinforcing to protect the well-being of Indigenous children, youth and families. The section that follows examines the legal and practical effects of the Act in the pursuit of these interwoven aims.

(b) *Effects of the Act*

(i) Legal Effects

[54] A law’s legal effects are discerned from its provisions by asking “how the legislation as a whole affects the rights and liabilities of those subject to its terms” (*Greenhouse Gas References*, at para. 70, quoting *Morgentaler*, at p. 482).

[55] In this case, the Act's provisions may be loosely grouped into three categories, which are necessarily interrelated: (1) provisions affirming the right of self-government; (2) provisions establishing national standards; and (3) provisions setting out concrete implementation measures. Taken together, the provisions in these three categories create a uniform national scheme for protecting the well-being of Indigenous children, youth and families.

1. *Provisions Affirming the Right of Self-Government*

[56] Sections 8(a) and 18(1) contain affirmations about the scope of s. 35 of the *Constitution Act, 1982* that are binding on the Crown (s. 7). These affirmations have substantive legal effects. This is because of certain basic postulates concerning the relationship that exists between legislation and government, which we will set out below before turning to how these postulates inform the interpretation of the Act's legal effects.

[57] One fundamental postulate of our constitutional architecture is parliamentary sovereignty (see, e.g., *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 56-58). This general principle of parliamentary sovereignty in Canada is explained as follows by Professors Hogg and Wright: "Not only may the Parliament or a Legislature, acting within its allotted sphere of competence, make any law it chooses, it may repeal any of its earlier laws" (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 12:9 (footnote omitted)). The logical corollary of this postulate is that Parliament and

the legislatures may bind the Crown through legislation (see, e.g., P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 396-97). They may do so expressly or by necessary implication (*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318, at pp. 326-30). Through this power to bind the Crown, parliamentary sovereignty is thus exercised over government actors of all sorts. By imposing limits on these actors through legislation that is binding on the Crown, lawmakers can shape how public powers are exercised (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28; see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at paras. IX.39-IX.41). Government actors are bound by legislative limits imposed on them by Parliament and the legislatures, subject to constitutional imperatives. It is in light of these foundational principles that the legal effects of ss. 8(a) and 18(1) must be interpreted.

[58] Here, s. 7 expressly makes the Act binding on the Crown in right of Canada or of a province. This provision therefore “clearly lift[s]” the rule that “[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner” (*Thouin*, at para. 20; *Interpretation Act*, s. 17). The question, for the purposes of analyzing the Act’s constitutional validity, is what the legal effects of ss. 8(a) and 18(1) are when these provisions are considered in conjunction with s. 7. As the Court of Appeal noted, [TRANSLATION] “[a]dmittedly, the process is unusual. Of course, when drafting laws, legislatures naturally act on the basis of their belief in what the Constitution allows them to do, but express legislative affirmation of the meaning or scope of a constitutional provision is out of the ordinary”

(para. 222). Indeed, the Court of Appeal noted that this declaratory approach is [TRANSLATION] “uncommon, if not unusual” (para. 515). This reference provides an opportunity to explain the legal effects of these provisions.

[59] By enacting a binding affirmation, Parliament has bound the federal government to the position it has affirmed as a matter of statutory positive law (see, e.g., Wilkins, at pp. 184-85). This is because, as explained above, government actors are bound by laws that create, structure and limit their powers. The obligation imposed by s. 7 is a statutory one. It binds the Crown, both federal and provincial, because it “clearly lift[s]” Crown immunity in a statute that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867* (see *Thouin*, at para. 20).

[60] It is true that Parliament affirms, in the Act, the inherent right of self-government, a right that, as specified in the preamble, includes jurisdiction in relation to child and family services. Parliament also states in s. 2 that the Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by s. 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them. Although Parliament cannot bind the courts — in their capacity as guardians of the Constitution — or the provinces as regards the definitive interpretation to be given to s. 35, these legislative affirmations are very meaningful on the ground, where issues relating to the well-being of children are decided. By setting out its understanding of the scope of this constitutional provision in s. 18(1) of the Act, Parliament undertakes to act as though Indigenous peoples enjoy an inherent right of self-government in

relation to child and family services. Moreover, by making this affirmation expressly binding on the Crown through s. 7, Parliament ensures that the Crown also undertakes to act in accordance with its position that this right of self-government was recognized. The fact remains, of course, that all actors in the system, including the provinces, can go to court to challenge Parliament's understanding of the scope of the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*. Indeed, it is quite possible that a province's reading of s. 35 will differ from the one indicated in s. 18(1) of the Act. Ultimately, it is the courts that will have the last word on the scope of s. 35, given its constitutional nature.

[61] Insofar as the affirmation in s. 18(1) is found in a law that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867*, Parliament's affirmation and the Crown's corollary undertaking have effect. Parliament's affirmation that the government intends to act in accordance with its position that child services fall under an inherent right of self-government also seems to be consistent with the policy put in place by the federal government in this regard as a result of the outcome of the 1992 Charlottetown Accord (see the explanations given by P. W. Hogg and M. E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 *Can. Bar Rev.* 187, at p. 189).

[62] Accordingly, one effect of s. 7 of the Act is that the federal government can now no longer assert, in any proceedings or discussions, that there is no Indigenous right of self-government in relation to child and family services. Although few

legislative frameworks have thus far circumscribed the Crown's actions with respect to Indigenous peoples (J. Promislow and N. Metallic, "Realizing Aboriginal Administrative Law", in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 129, at p. 141), Parliament has now established such a constraint through this statutory affirmation that is binding on His Majesty.

[63] The combined operation of ss. 7, 8(a) and 18(1) of the Act could also have other legal effects by requiring the Crown to act as though the principle of the honour of the Crown is engaged. As the Court noted in the context of a treaty, the honour of the Crown is "always at stake" when it deals with Indigenous peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41). As its name suggests, the principle of the honour of the Crown refers to the "special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, citing *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 67, and B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 436).

[64] It is open to Parliament to affirm, as it has in s. 18(1), what it considers to be the constitutional requirements for reconciliation, even if it cannot, by doing so, unilaterally amend the Constitution. By linking the affirmation in s. 18(1) to s. 35 of the *Constitution Act, 1982*, particularly its first subsection, Parliament has nevertheless intentionally embarked on a particular path to reconciliation. Indeed, it has set out, in

an ordinary statute, its understanding of the scope of a constitutional provision, and it has done so while ensuring that the Crown is bound to act on the basis of this same understanding, that is, in accordance with the legislative affirmation that the inherent right of self-government has constitutional status and with the idea that, from a jurisdictional standpoint, this right includes the jurisdiction of Indigenous governing bodies in relation to child and family services. The honour of the Crown is thus engaged.

[65] The affirmation in ss. 8(a) and 18(1) will inform the context and content of the resulting obligations, as if this affirmation was enshrined in the Constitution. As the Court has explained, “[the Constitution] is at the root of the honour of the Crown” (*Manitoba Metis*, at para. 70). Under the Act, the government formally undertakes to act in accordance with the position that this right has constitutional status (see *Manitoba Metis*, at paras. 69-70). The honour of the Crown is not a mere “incantation”, but rather “finds its application in concrete practices”; it “gives rise to different duties in different circumstances” (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 16 and 18, quoted in *Mikisew Cree*, at para. 24). As the Court stated in *Manitoba Metis*, “the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it” (para. 75).

[66] The fact that s. 7 of the Act requires the Crown to act as though the right of self-government described in s. 18(1) had been proved therefore implies that the

Crown must take a broad approach to the interpretation of this right and must act diligently to implement it, as long as this affirmation is part of the law in force. The fact is that the legislative affirmation regarding the scope of s. 35 “represents a promise of rights recognition, and ‘[i]t is always assumed that the Crown intends to fulfil its promises’”, in this case the promise to act as though Indigenous peoples’ right of self-government in relation to child and family services were recognized, while awaiting a formal court ruling on the question (*Haida Nation*, at para. 20, quoting *Badger*, at para. 41).

2. *Provisions Establishing National Standards*

[67] The national standards and principles set out in ss. 9 to 17 of the Act establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. Under s. 7, this normative framework is binding on federal and provincial providers of such services, as well as on Indigenous providers in certain cases (s. 22(1)).

[68] Some of these principles guide the courts’ interpretation of the Act and the administration of the Act by governments. These include the best interests of the child (s. 9(1)), cultural continuity (s. 9(2)) and substantive equality (s. 9(3)).

[69] The standard relating to the principle of the best interests of an Indigenous child, in particular, is described in considerable detail (s. 10). The Act specifies certain circumstances in which this principle must be a primary consideration or the paramount

consideration in decisions or actions in relation to an Indigenous child (s. 10(1)). It also sets out a non-exhaustive list of relevant factors that must be considered in determining the best interests of an Indigenous child, including “the importance to the child of preserving the child’s cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs” (s. 10(3)(d)).

[70] Other provisions directly govern the delivery of child and family services in relation to Indigenous children, irrespective of the nature of the services provided (ss. 11 to 15.1). Some of these standards are procedural in nature. For instance, in certain circumstances the provisions require service providers to give notice to a child’s parents and the relevant Indigenous governing body (s. 12). A right to make representations in civil proceedings in respect of the provision of child and family services in relation to an Indigenous child is also created (s. 13). Other standards govern the nature of the child and family services that are provided in relation to Indigenous children. For example, service providers are required in some circumstances to give priority to preventive care (s. 14) and are prohibited from apprehending a child “solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider” (s. 15). Further, before apprehending an Indigenous child, the service provider is required to demonstrate that reasonable efforts have been made to have the child continue to reside with his or her parents or another adult family member, unless immediate apprehension is consistent with the child’s best interests (s. 15.1).

[71] Finally, the Act establishes a priority order and related standards to govern the placement of Indigenous children by federal and provincial service providers (ss. 16 and 17).

3. *Provisions Setting Out Concrete Implementation Measures*

[72] The Act creates various mechanisms to facilitate the exercise of Indigenous peoples' right of self-government (ss. 20 to 24). In this regard, the Act provides that an Indigenous governing body may enter into a coordination agreement with the federal and provincial governments (s. 20(2)). Such an agreement may concern any measure related to the exercise of the right of self-government by the Indigenous group, community or people on whose behalf the governing body is acting. Moreover, where such an agreement is entered into — or where reasonable efforts have been made to enter into one — the law related to the agreement has the force of law as federal law (s. 21(1)) and prevails over the vast majority of federal legislation (s. 22(1)).

[73] The Act affirms as well that the laws of Indigenous groups, communities or peoples have independent normative force in Canadian law. Section 21(1) states that these laws “also” have “the force of law” regardless of whether they are incorporated as federal law. In addition, it is confirmed by s. 20(1) and (2) that an Indigenous group, community or people may exercise its “legislative authority in relation to child . . . services” without having entered into a coordination agreement. Both the federal government and the provincial governments are bound by this legislative recognition (s. 7).

[74] Lastly, the Act provides for several other mechanisms that accompany the affirmation set out in s. 18(1), including the favoured process for resolving conflicts between two laws of different Indigenous groups, communities or peoples (s. 24). Essentially, these mechanisms facilitate the adoption by Indigenous groups, communities or peoples of legislative measures in relation to child and family services.

(ii) Practical Effects

[75] The usefulness of practical effects in characterizing the Act is relative, because the Act was enacted only recently and its “actual or predicted” effects, to use the language of *Morgentaler* (at p.483), cannot be determined with precision. However, it is reasonable to expect that Indigenous children and families will receive services that are more appropriate to their cultural realities (see, e.g., Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), c. 14). This in turn may reasonably be expected to reduce the overrepresentation of Indigenous children in child and family services settings and to help protect the well-being of Indigenous children, youth and families.

[76] It is reasonable to think that the Act will help avoid the “waste of time and resources” involved in prolonged litigation or negotiations over whether and, if so, to what extent a particular Indigenous group, community or people has jurisdiction in relation to child and family services (see, e.g., *Metallic*, at pp. 14 and 20-22). In this way, the Act may be a practical means of advancing reconciliation with Indigenous

peoples. Constitutional litigation and negotiated settlements also undoubtedly remain essential tools for moving reconciliation forward. They are not, however, the only path. Legislative initiatives designed to advance reconciliation are also possible and, in certain respects, may have advantages.

[77] Certain practical advantages of proceeding through legislation rather than through the courts and constitutional litigation are apparent. Avoiding the need to prove an Aboriginal right on the basis of judicially devised tests can skip over “years, if not decades” of litigation during which Indigenous children and families “continue to suffer as the status quo continues” (R.F., *Aseniwuche Winewak Nation of Canada*, at para. 87; R.F., *First Nations Child & Family Caring Society of Canada*, at para. 94; see also I.F., *Indigenous Bar Association in Canada*, at para. 18; I.F., *Métis National Council et al.*, at para. 10). Avoiding a whole cycle of litigation “allows Indigenous groups and the Crown to use their time and resources to focus on the actual substance of the issue: caring for children” (I.F., *Carrier Sekani Family Services Society et al.*, at para. 11). As this Court has recognized, “[t]rue reconciliation is rarely, if ever, achieved in courtrooms” (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24). It is for this reason that the Court has encouraged reconciliation efforts outside of the courts (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186).

[78] In a similar way, the legislative process chosen by Parliament may have advantages over negotiated settlements. As scholars have recognized, “modern treaties

have typically required years, if not decades, of very expensive negotiations” (see, e.g., Wilkins, at p. 184). Legislative initiatives can proceed more quickly, with less expense and with a wider scope (*ibid.*; see also Metallic, at p. 14).

[79] Thus, the Act has the expected practical effects of helping to protect the well-being of Indigenous children, youth and families and advancing reconciliation with Indigenous peoples. The practical effects of the three interrelated categories of provisions considered above are along the same lines.

1. *Provisions Affirming the Right of Self-Government*

[80] The affirmation performs, as a practical effect, what scholars call the [TRANSLATION] “pedagogical, educational function” of the law (J. Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur* (10th ed. 2001), at p. 155). Through this function, laws [TRANSLATION] “play a part in forming mores, which will be internalized and sublimed into ethics” (Carbonnier, at p. 157). With this function in mind, it is plain that legislation does not simply lay down a “set of orders or directions or commands”; it also establishes “a set of topics, a set of terms in which those topics can be discussed, and some general directions as to the process of thought and argument by which the statute is to be applied” (J. B. White, “Rhetoric and Law: The Arts of Cultural and Communal Life”, in J. B. White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (1985), 28, at p. 41).

[81] The affirmation contained in the Act may in part be viewed as a step toward changing or adjusting the culture underlying the actions of the federal and provincial governments (see Christie, at p. 51). But through statutes and their preambles, Parliament “[also] engage[s] in dialogue with both courts and society”, as Professor Kent Roach said about the use of preambles (“The Uses and Audiences of Preambles in Legislation” (2001), 47 *McGill L.J.* 129, at p. 159). In a pedagogical spirit, Parliament has used the Act to communicate to the courts and society its position that the law must recognize the importance of Indigenous self-government in relation to child and family services. Thus, the “unusual” use of affirmations of the right of self-government can be explained in part by the fact that Parliament is attempting to persuade other institutions to adopt the position it has now embraced. In areas where Parliament cannot order, direct or command institutions to adopt its position, this pedagogical function may nevertheless, in time, help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples in Canada.

[82] Whether and, if so, how this initiative will unfold is beyond the courts’ institutional capacity to assess. But it is an anticipated practical effect that helps in understanding the “essential matter” that the Act seeks to address.

2. *Provisions Establishing National Standards*

[83] It is possible that Indigenous groups, communities or peoples will not wish to exercise the jurisdiction affirmed in s. 18 of the Act immediately. In this and other

regards, Parliament seeks to “respect the diversity of all Indigenous peoples” (Act, preamble). As with other aspects of reconciliation, the full realization of Indigenous jurisdiction as recognized in the Act “will take some time” (*Honouring the Truth, Reconciling for the Future*, at p. vi). On a practical level, however, many of the national standards laid down may operate to ensure that the child and family services provided in the interim in relation to Indigenous children are culturally appropriate for them and are in their best interests.

[84] Some of the standards are preventive, which means that they come into play *before* any important decision is made or any action is taken in the provision of child and family services in relation to an Indigenous child. It may reasonably be expected that these standards will lessen the historical propensity of child welfare systems to apprehend Indigenous children and thus that they will help such children remain, where possible, in the environment they are from (see, e.g., *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5, *Canada’s Residential Schools: The Legacy* (2015), at p. 55). Other standards come into play *after* a decision has been made to place a child. These standards are likely capable of reducing the disproportionate mass placement of Indigenous children outside their families and their communities. Addressing overrepresentation protects the well-being of Indigenous children, youth and families.

3. *Provisions Setting Out Concrete Implementation Measures*

[85] The concrete implementation measures provided for in the Act must be interpreted in light of the UNDRIP. In keeping with the obligations imposed on it by the country's positive law, the Government of Canada "must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" (*UNDRIP Act*, s. 5). To this end, the minister "must . . . prepare and implement an action plan to achieve the objectives of the Declaration" (s. 6(1)) and prepare an annual report on the progress made in fulfilling this obligation (s. 7(1)). The first annual progress report discussing these measures emphasized the link between the Act and the broader commitment to implementing the UNDRIP (Department of Justice Canada, *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (2022), at pp. 15, 34-36 and 39-41).

[86] There is little doubt that an anticipated practical effect of the Act is to make Canadian law more consistent with the UNDRIP. As scholars have noted, the UNDRIP speaks to the connection between child and family services and Indigenous peoples' rights (see, e.g., S. Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018), 28:1 *J.L. & Soc. Pol'y* 132, at p. 133). Indeed, the preamble to the UNDRIP is explicit in this regard: the General Assembly recognized "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child". Several of the rights set out in the UNDRIP express aspects of this right. For instance, art. 4 sets out the right of Indigenous peoples to autonomy or self-government

in matters relating to their internal and local affairs. Article 7 affirms, among other things, the right of Indigenous peoples not to be subjected to the forcible removal of children to another group. Article 13 recognizes the right of Indigenous peoples to transmit their cultures to future generations and the correlative duty of states to take effective measures to ensure that this right is protected.

[87] Further, art. 38 declares that “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of [the UNDRIP].” The Government of Canada has made a commitment to take such measures (*UNDRIP Act*, preamble). The Act is one more step toward living up to this commitment.

[88] Moreover, it should be noted that this initiative by Parliament is consistent, in two ways, with the idea already put forward by this Court that “[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests” (*Clyde River*, at para. 24, quoting *Haida Nation*, at para. 14; see also *R. v. Desautel*, 2021 SCC 17, at para. 87). Indeed, not only is the Act the result of a long process of consultation and cooperation with Indigenous peoples, but it also puts in place mechanisms to facilitate and encourage, from a forward-looking perspective, the negotiation of agreements between the Crown and Indigenous communities (see Act, ss. 20 to 22).

[89] It may also be anticipated that the Act’s provisions setting out concrete measures to implement the aspects of the UNDRIP related to Indigenous children will

advance reconciliation with Indigenous peoples. As the preamble to the *UNDRIP Act* recognizes, the “Truth and Reconciliation Commission of Canada calls upon federal, provincial, territorial and municipal governments to fully adopt and implement the Declaration as the framework for reconciliation”. This call was echoed by the National Inquiry into Missing and Murdered Indigenous Women and Girls (*Final Report*, vol. 1b, at p. 177, call for justice 1.2(v)). It may be expected that, by taking concrete measures in this regard, Canada will move closer to the goal of “establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country” (*Honouring the Truth, Reconciling for the Future*, at p. 6).

[90] Even though the Act is expected to accelerate certain aspects of the process of reconciliation, it is still important to recognize that reconciliation is a long-term project. It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist (see J. Leclair, “Zeus, Metis and Athena: The Path Towards the Constitutional Recognition of Full-Blown Indigenous Legal Orders” (2023), 27:2 *Rev. Const. Stud.* 77; cf. H. Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (2009), at pp. 37-38; see also J. Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges”, in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (2017), 20).

(c) *Conclusion on the Pith and Substance of the Act*

[91] In sum, the purpose of the Act is to protect the well-being of Indigenous children, youth and families in three interwoven ways: affirming Indigenous communities' jurisdiction in relation to child and family services; establishing national standards applicable across Canada; and implementing aspects of the UNDRIP in Canadian law. The legal effect of the Act is to establish a uniform scheme for protecting the well-being of Indigenous children, youth and families through the affirmation of Indigenous legislative authority, through national standards and through concrete implementation measures. Practically speaking, the Act may reasonably be expected to protect the well-being of Indigenous children, youth and families and to advance reconciliation with Indigenous peoples. The pith and substance of the Act flows from the examination of these aims and effects.

[92] In our view, these factors imply that the essential matter addressed by the Act involves protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advancing the process of reconciliation with Indigenous peoples. The affirmation of Indigenous legislative authority, the national standards and the concrete measures to implement aspects of the UNDRIP are all integral parts of this unified whole.

B. *Classification Under Section 91(24) of the Constitution Act, 1867*

[93] The Act falls squarely within s. 91(24) of the *Constitution Act, 1867*. Binding the federal government to the affirmation set out in s. 18(1), establishing

national standards and facilitating the implementation of the laws of Indigenous groups, communities or peoples are all measures that are within Parliament's powers under s. 91(24).

[94] The jurisdiction provided for in s. 91(24) is broad in scope and relates first and foremost to what is called "Indianness" or Indigeneity, that is, Indigenous peoples as Indigenous peoples.

[95] The foregoing is sufficient to conclude that the Act is *intra vires* Parliament under its jurisdiction over "Indians". However, the Attorney General of Quebec has raised other objections to the constitutional validity of the Act, which we reject for the reasons that follow.

(1) Sections 1 to 17 of the Act Need Not Be Classified Under Section 92 of the Constitution Act, 1867

[96] The Attorney General of Quebec argues that the pith and substance of ss. 1 to 17 of the Act is to determine, through the adoption of minimum national standards, how provincial jurisdiction over youth protection is to be exercised in relation to Indigenous children. He also contends that these standards interfere with the work of the provincial public service, whose independence is essential to the existence of two levels of government that are coordinate, with no subordination of one to the other. Essentially, he argues, the provinces are being told how they must provide child

services to Indigenous peoples within their borders. For the reasons that follow, the Attorney General of Quebec's position cannot be accepted.

[97] It is trite law that Parliament can bind the Crown in right of the provinces (see, e.g., *Attorney-General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204 (P.C.)); see also Brun, Tremblay and Brouillet, at paras. IX.95-IX.96; Hogg and Wright, at § 10:21). However, Parliament can do so only within areas of federal jurisdiction.

[98] The minimum national standards are within federal jurisdiction and can accordingly be binding on the provincial governments. The double aspect doctrine allows for “the *concurrent application* of both federal and provincial legislation” in relation to the “same fact situation” (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 66 (emphasis in original); *Greenhouse Gas References*, at para. 129). Youth protection in the Indigenous context has a double aspect, since it can be approached from two different perspectives: protection of the ties between Indigenous families and communities, in a spirit of cultural survival, under s. 91(24) (*Canadian Western Bank*, at para. 61; see also *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 787, per Beetz J.); or child and family services and youth protection, under s. 92(13) and (16) (*NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696, at paras. 36-40, per Abella J., and at paras. 74-78, per McLachlin C.J. and Fish J., concurring; see also J. Woodward, *Aboriginal Law in Canada* (loose-leaf), at

§ 4:16). While the provinces are generally “the keeper[s] of constitutional authority over child welfare” (*NIL/TU,O*, at para. 24), the federal government also has jurisdiction to legislate in relation to child and family services for Indigenous children. As Professors Hogg and Wright have noted, “[i]f s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary” (§ 28:2).

[99] Child welfare in the Indigenous context is not only a field in which Parliament and the provinces can act, but also one in which concerted action by them is necessary. The importance of cooperation in this area between these two levels of government is illustrated, for example, by Jordan’s Principle, according to which intergovernmental disputes may not interfere with the right of Indigenous children to access the same services as other children in Canada. With regard to such disputes, the Truth and Reconciliation Commission noted that the federal government and the provincial governments have historically tended to shift responsibility for Indigenous child welfare services to one another (*Honouring the Truth, Reconciling for the Future*, at pp. 142-43). However, today it is recognized that providing such services is the responsibility of both levels of government, which must act in a concerted fashion (*House of Commons Debates*, vol. 142, No. 31, 2nd Sess., 39th Parl., December 5, 2007, at p. 1780 (S. Blaney)). Since there is overlapping federal and provincial jurisdiction with respect to Indigenous children, it was entirely open to Parliament to legislate as it did (see, e.g., Grammond (2018), at pp. 137-38).

[100] We would add that while the provinces are validly bound by the national standards, these standards are not so precise and inflexible that they regulate all aspects of the provision of child and family services in the Indigenous context. Given the degree of generality with which these standards have been formulated, provincial public servants retain significant discretion in making decisions concerning Indigenous children. Moreover, the national standards apply to all service providers, whether they are provincial public servants or not. Finally, far from interfering with provincial initiatives, the national standards appear to be largely complementary to them. Indeed, the example of the *Youth Protection Act*, CQLR, c. P-34.1 (“*YPA*”), many of whose provisions bear a striking similarity to the national standards, is instructive in this regard.

[101] The remarks made about the Act by the Deputy Minister, Department of Indigenous Services, during the proceedings of the Standing Committee on Indigenous and Northern Affairs are particularly enlightening. The Deputy Minister noted on that occasion that Parliament’s approach had been inspired by the child welfare initiatives taken by Quebec in relation to Indigenous children, including the amendments made to the *YPA* by the National Assembly of Quebec. He stated the following:

We’re using the results of the work that Quebec is already doing with indigenous people, particularly on the principles. We could end up with very positive approaches in Quebec, which wouldn’t necessarily be changed by the legislation. The legislation doesn’t call into question the positive aspects. Instead, it sets minimum standards. Moreover, in many cases, we have the impression that these standards are already being met or even exceeded.

(House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence*, No. 146, 1st Sess., 42nd Parl., April 30, 2019, at p. 9)

[102] The various principles set out in Chapter V.1 of the *YPA*, which is entitled “Provisions Specific to Indigenous People”, including the principle of cultural continuity, are in line with the national standards. Both the Act and the *YPA* envision the concept of well-being of Indigenous children on the basis of the idea that “Indigenous persons are best suited to meet the needs of their children in the manner that is the most appropriate” (*YPA*, preamble).

[103] It follows from all of the foregoing that the national standards have only “incidental” effects on the provinces’ exercise of their powers, including on the work of their public servants. As this Court has reiterated many times, effects of this kind have no impact on the constitutional validity of the legislation from which they arise (*Canadian Western Bank*, at para. 28, quoting *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23).

(2) Sections 8(a) and 18(1) and the Associated Provisions Do Not Purport to Amend the Constitution

[104] In this reference, the Attorney General of Quebec also submits that the Act is *ultra vires* because Parliament cannot itself, through legislation, establish the existence of an Indigenous right under s. 35, determine its scope or define its content. The Attorney General maintains that, to have full effect, the affirmations found in various places in the Act require either an amendment to the Constitution or prior

judicial recognition. In this regard, the Quebec Court of Appeal was of the view that the Act is based expressly on the premise that Indigenous peoples' right of self-government is recognized and affirmed by s. 35(1), and that this right includes child and family services. According to the Court of Appeal, given that such a right does indeed exist, the Act is thus constitutionally valid, subject to the provisions on the incorporation of laws of Indigenous groups, communities or peoples into federal law and on federal paramountcy.

[105] The Attorney General of Quebec states that what he calls [TRANSLATION] "Part II" of the Act represents an attempt to amend the Constitution unilaterally. In particular, he claims that, through ss. 8 and 18 to 26 of the Act, Parliament has tried to create a third level of government, thereby accomplishing unilaterally what many rounds of constitutional negotiations failed to entrench. He shares the Court of Appeal's view that the affirmations [TRANSLATION] "rais[e] some questions, particularly with respect to the division of powers between the legislative and judicial branches" (para. 515).

[106] It is, of course, true that Parliament does not have the power to amend s. 35 of the *Constitution Act, 1982* unilaterally. On this point, it should be noted that s. 35.1 commits the federal and provincial governments to the principle that any amendment to s. 35 (among other provisions) will be preceded by a first ministers' conference convened by the Prime Minister of Canada (s. 35.1(a)). Further, representatives of the Indigenous peoples of Canada will be invited to participate in the discussions on agenda

items related to any proposed amendment (s. 35.1(b)). More generally, Part V of the *Constitution Act, 1982* sets out the amending formulas that apply in respect of different aspects of the Constitution. Only s. 44 provides for the possibility of unilateral amendments by Parliament, which must be “in relation to the executive government of Canada or the Senate and House of Commons”. But even with regard to the bodies referred to in s. 44, Parliament’s power to amend unilaterally is not without limits (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 48). Moreover, as in other contexts, Parliament acting alone cannot shield a constitutional amendment from the requirements of the Constitution by asserting that the amending provision is declaratory (*Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at paras. 105-6). Thus, it is evident that Parliament cannot amend s. 35 unilaterally.

[107] However, in this case, Parliament is not unilaterally amending s. 35 of the *Constitution Act, 1982*. Rather, it is stating in the Act, through affirmations that are binding on the Crown (s. 7), its position on the content of this constitutional provision. Section 8(a) provides that the purpose of the Act is to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services”. Likewise, under the heading “Affirmation”, s. 18(1) states that the “inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services”. The words “affirm” and “includes” in ss. 8(a) and 18(1) do not convey any intention to amend s. 35, nor could they have this effect. Instead, they “state as a fact” (*Canadian Oxford Dictionary* (2nd

ed. 2004), *sub verbo* “affirm”) Parliament’s position on the scope of s. 35. The affirmations take this position [TRANSLATION] “as true” (*Le Grand Robert de la langue française* (electronic version), *sub verbo* “affirmer”), without any need for an amendment. Thus, the effect of these provisions is to affirm, not to amend.

[108] While the word “affirmed” (“*confirmé*” in French) is also used in ss. 16.1(2) and 35(1) of the *Constitution Act, 1982*, the above discussion must not be read as identifying the meaning of these two provisions or as altering this Court’s jurisprudence. Here, the focus is on the language used in the Act and on the question of whether Parliament had legislative jurisdiction to enact it.

[109] An affirmation is not an amendment, even if the subject of the affirmation is a provision of the Constitution. As this Court has stated in different contexts, the Constitution “is not some holy grail which only judicial initiates of the superior courts may touch” (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 70, per McLachlin J., dissenting, quoted with approval in *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 29). For this reason, “[c]ourts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups” (*R. v. Mills*, [1999] 3 S.C.R. 668, at para. 58).

[110] Here, Parliament has affirmed its position on the content of s. 35 of the *Constitution Act, 1982*. It is clear that, in this case, this affirmation is set out not in the Constitution but in an ordinary statute. The division of powers and the separation of

powers provided for in the Constitution — between Parliament and the legislatures, in the former case, and between legislative bodies and the judiciary, in the latter — do not prevent Parliament from acting in this manner. Parliament, like the legislatures, can enact legislation that affirms its position on the meaning of the Constitution. As mentioned above, it is for the courts to interpret the Constitution where a case so requires (see, e.g., *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at paras. 9-11; *Greenhouse Gas References*, at para. 220).

[111] The task that falls to the Court in the context of a reference invites caution: “. . . care must be taken that the interpretation of a question does not amount to a new question” (*Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 555). Such restraint is called for particularly in constitutional cases: “It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen” (*Phillips*, at para. 9). In our view, caution is especially warranted here: the correctness of the position stated by Parliament with respect to the scope of s. 35 does not have to be determined to answer the question asked by the Attorney General of Quebec.

[112] It should be noted that the Attorney General of Canada, as well as a number of the interveners before this Court, argued that s. 35(1) protects Indigenous peoples’ inherent right of self-government “in relation to child and family services”, as the very wording of the Act affirms. This Court has not yet addressed the question, and it is

unnecessary for it to do so in this case to provide the requested opinion on the constitutionality of the Act. The Court has noted that rights of self-government, insofar as they exist, “cannot be framed in excessively general terms” and cannot extend to a matter — for example, the regulation of gambling — that is not an integral part of the distinctive culture of the First Nations in question (see *Delgamuukw*, at para. 170; see also *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at paras. 27-28). But the Court has never had to consider a matter as fundamental to the culture and identity of Indigenous peoples as the field of child and family services. While it has not discussed the question from the standpoint of an Aboriginal right of self-government, the Court has nonetheless referred to the collective dimension of the exercise of certain rights held by Indigenous communities, including: their right to enter into treaties (*R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1056); their rights incidental to Aboriginal title (*Delgamuukw*, at paras. 115 and 166; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 75); and their Aboriginal rights, such as the right to fish (*R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 17; *R. v. Nikal*, [1996] 1 S.C.R. 1013, at para. 104) or the right to harvest wood (*R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 46). For its part, Parliament has declared — through a legislative affirmation — that it considers such a right to be recognized in relation to child and family services. This affirmation is part of the ongoing dialogue on the question among Parliament, the legislatures, Indigenous peoples and the courts (see P. W. Hogg and A. A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997), 35 *Osgoode Hall L.J.* 75, at pp. 79-80).

[113] This Court’s jurisprudence recognizes the close link that exists between “cultural continuity” for Indigenous peoples, a principle to which the Act expressly refers in s. 9(2), and keeping Indigenous children in their community. As the Court stated in *Canadian Western Bank* with respect to s. 91(24) of the *Constitution Act, 1867*, “relationships within Indian families and reserve communities [can] be considered absolutely indispensable and essential to their cultural survival” (para. 61). These relationships are “at the centre of what they do and what they are” (*Delgamuukw*, at para. 181, quoting *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 320). Indeed, the Crown has always clearly understood the role played by family in the survival of Indigenous culture. It is no coincidence that the Crown targeted Indigenous children when, at the height of its imperialism, it was seeking to destroy Indigenous cultures (see C.A. reasons, at para. 85).

[114] Ultimately, it will be for the courts to determine, on the basis of the evidence adduced, whether s. 18(1) of the Act falls within the confines of s. 35 of the *Constitution Act, 1982*. In this regard, Indigenous culture will certainly be a major factor in the analysis, because s. 35(1) “serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty” (*Desautel*, at para. 31). As the Court has stated, s. 35 recognizes and affirms “a constitutional framework for the protection of the distinctive cultures of aboriginal peoples” (*Sappier*, at para. 22).

[115] Moreover, the fact that this Court has not yet recognized the existence under s. 35(1) of a right of self-government does not mean that Parliament lacks the means to deal with the question of Indigenous child and family services. It is important to note that, in exercising its jurisdiction under s. 91(24), Parliament chose to affirm that the right of self-government with respect to this matter is directly tied to s. 35(1) of the *Constitution Act, 1982*. The Crown is also expressly bound by this affirmation along the path to reconciliation (Act, s. 7). In recent decades, as the Court of Appeal noted, Parliament has received numerous [TRANSLATION] “studies, reports and surveys on various aspects of the situation of Aboriginal peoples” (para. 108), including from the Truth and Reconciliation Commission and the Royal Commission on Aboriginal Peoples. Indeed, the latter devoted 277 pages of its report to the issue of self-government (*Delgamuukw*, at para. 171). Parliament is therefore particularly well positioned to act on the basis of its understanding of the content of s. 35(1) and, more broadly, of the imperatives of reconciliation.

[116] In this regard, it should be noted that the process of enacting the Act was initiated after the Minister of Indigenous Services called an urgent meeting to address problems related to discrimination within the child and family services provided to Indigenous peoples (see C.A. reasons, at para. 173). This process led to nearly 65 meetings in which the federal government consulted with some 2,000 community, regional and national organizations, as well as individuals (see para. 176). Therefore, the Act does not merely speak to Indigenous peoples but also seeks to express their voice. The Act is thus intended to recognize the validity of Indigenous peoples’ stated

needs and to provide reassurance that reconciliation will not be imposed on them but will be achieved through cooperation. As stated by the National Chief of the Assembly of First Nations, Perry Bellegarde, whose words were quoted by the then Minister of Indigenous Services: “This legislation will recognize First Nations jurisdiction so they can build their own systems based on their own governance, laws and policies” (*House of Commons Debates*, March 19, 2019, at p. 26137).

[117] While it is unnecessary to determine the limits of s. 35(1) for the purposes of this reference, it is nevertheless worth noting that Parliament, after thoroughly inquiring into the matter, chose to advance reconciliation by affirming that the right of self-government in relation to child and family services is “inherent” as well as “recognized and affirmed by section 35 of the *Constitution Act, 1982*”. This affirmation, set out in s. 18(1), is therefore an important factor in deciding this reference. The importance of this affirmation will undoubtedly also be a factor to consider when the courts are called upon to formally rule on the scope of s. 35.

[118] In any event, the classification of the affirmation under one of the heads of power in the *Constitution Act, 1867* must, in the context of the reference question before this Court, be determined by the classification of the Act as a whole. Nevertheless, some discussion of the potential effect of the affirmation on the provincial governments is warranted. Although valid federal legislation may bind the provincial Crown (see, e.g., *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at p. 72; *The Queen in the Right of the*

Province of Ontario v. Board of Transport Commissioners, [1968] S.C.R. 118, at p. 124; Wilkins, at p. 185), it is not clear on the face of ss. 7, 8(a) and 18(1) whether the affirmation is meant to bind the provincial governments. However, it is open to the courts to give a narrow meaning to legislation that would otherwise exceed the jurisdiction of the level of government that enacted it (see, e.g., *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 296). This interpretive approach can be justified by the presumption that legislation is consistent with the division of powers (*Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 33; see also Brun, Tremblay and Brouillet, at para. VI-2.56; Hogg and Wright, at § 15:13). To the extent that binding the provinces to the position that Parliament has affirmed exceeds federal jurisdiction (a point not directly argued before this Court), it would accordingly be necessary to read down ss. 8(a) and 18(1).

(3) The Incorporation Provisions in Section 21 Do Not Alter the Architecture of the Constitution

[119] The Attorney General of Quebec argues that ss. 21 and 22(3) of the Act alter the architecture of the Constitution (R.F., at para. 26). The Court of Appeal reached the same conclusion, holding that these provisions purport to extend the application of the doctrine of federal paramountcy to the laws of Indigenous groups, communities or peoples in relation to child and family services and are therefore *ultra vires* s. 91(24) of the *Constitution Act, 1867* (paras. 537, 540-42 and 571). The Court of Appeal stated that the laws of Indigenous groups, communities or peoples are not

federal laws enacted under s. 91(24) but rather Indigenous laws that serve Indigenous imperatives (para. 540).

[120] In our view, given that this Court has not yet addressed the question of whether the right described in s. 18(1) has been proved, neither s. 21 nor s. 22(3) of the Act alters the architecture of the Constitution; both of these provisions were validly enacted under s. 91(24) of the *Constitution Act, 1867*. Confining our remarks to the specific context of this reference, we discuss the validity of s. 21 in this section of our reasons and the validity of s. 22(3) in the next section.

[121] The main aspect of s. 21 of the Act that the Court of Appeal found to be unconstitutional was subs. (1), which provides as follows: “A law, as amended from time to time, of an Indigenous group, community or people . . . also has, during the period that the law is in force, the force of law as federal law.” The Court of Appeal held that federal legislation enacted under s. 91(24) of the *Constitution Act, 1867* cannot give a law of an Indigenous group, community or people the force of law as federal law (paras. 540-41). We disagree.

[122] Section 21 of the Act is simply an incorporation by reference provision. It incorporates by reference the laws adopted by an Indigenous group, community or people and gives them the force of law as federal law. Moreover, because such laws may be amended, s. 21 incorporates the amendments that may be made to them in the future, on an *anticipatory* basis. Such an anticipatory incorporation by reference provision is constitutional.

[123] Professors Hogg and Wright describe incorporation by reference as a “technique which is occasionally used by legislative bodies, especially where it is desired to enact the same law as another jurisdiction” (§ 14:12; see also Brun, Tremblay and Brouillet, at para. VI-1.80; G.-A. Beaudoin, in collaboration with P. Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, Charte canadienne des droits et libertés* (3rd ed. 2004), at pp. 317-18). They note that “[i]nstead of repeating in full the desired rules, the drafter may simply incorporate by reference, or adopt, the rules of another jurisdiction” (§ 14:12). As a drafting technique, incorporation by reference avoids the need for the legislative body, in the exercise of its legislative jurisdiction, to replicate in a separate statute rules already adopted by another entity.

[124] Legislative bodies have broad power to referentially incorporate provisions adopted by other entities, including other legislative bodies or non-governmental bodies. For example, Parliament can incorporate by reference a law enacted by a province (*Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, at p. 575; *R. v. Smith*, [1972] S.C.R. 359, at p. 366; *Dick*, at p. 328; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 114 and 136; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, at paras. 53 and 61). This Court has also upheld the validity of a provincial legislature’s incorporation by reference of laws made by the Parliament of the United Kingdom (*Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, at p. 152). Parliament may also referentially incorporate standards set by a non-governmental body (*Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, at pp. 230 and 234). Once Parliament

has incorporated by reference provisions adopted by another entity, the “relevant provisions apply as federal law” (*Wewaykum Indian Band*, at para. 114). There is no doubt about the constitutionality of the drafting technique of incorporation by reference.

[125] Incorporation by reference may also be anticipatory: a legislative body can incorporate another entity’s provisions as amended from time to time, on an anticipatory basis. In *Scott*, for example, an Ontario statute incorporated both current and future English rules related to the enforcement of spousal and child support orders. Professors Hogg and Wright note that in *Scott*, this Court “recognized, but did not attach particular importance to, the fact that the Ontario statute adopted not only the English rules in existence at the time of the enactment of the Ontario statute, but the English rules in existence from time to time in the future” (§ 14:13; see also Beaudoin, at p. 318; N. Finkelstein, *Laskin’s Canadian Constitutional Law* (5th ed. 1986), at p. 43). It is uncontroversial that legislation may be enacted “by reference to the legislation as it may from time to time be” of another legislative body (*Scott*, at p. 143 (emphasis added); see also *Coughlin*, at p. 575; *Smith*, at p. 366; *Dick*, at p. 328).

[126] A legislative body’s broad power to incorporate by reference is, however, subject to limits. For example, the legislative body cannot abdicate its legislative role: it cannot permit another entity “to enact general, or generally, laws” for it (*Scott*, at p. 143; see also Finkelstein, at p. 43). The legislative body must also have the legislative jurisdiction required to enact the law it seeks to referentially incorporate (see

Scott, at p. 143; Hogg and Wright, at § 14:14; Finkelstein, at p. 43). Moreover, one level of government cannot delegate legislative powers to another level of government (see *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, at p. 34; Hogg and Wright, at § 14:10; Brun, Tremblay and Brouillet, at para. VI-1.78; Beaudoin, at pp. 314-15; Finkelstein, at p. 42; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 402). Administrative inter-delegation is permitted, however: one level of government may validly delegate powers to an administrative body created by another level of government (*P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at pp. 1223-24; Hogg and Wright, at § 14:11; Brun, Tremblay and Brouillet, at para. VI-1.78; Beaudoin, at p. 315; Finkelstein, at pp. 45-46).

[127] One commentator has expressed doubts about the possibility that the incorporation by reference of the laws of Indigenous groups, communities or peoples could be invalid, “since Parliament could easily adopt them piecemeal as they arise without violating subsection 91(24) of the *Constitution Act, 1867*” (Leclair, at p. 98 (footnote omitted)). We agree. Here, s. 21(1) of the Act validly incorporates by reference the laws in relation to child and family services, as amended from time to time, of an Indigenous group, community or people referred to in s. 20(3). As concluded above, Parliament has independent legislative authority to enact such laws pursuant to its jurisdiction over “Indians, and Lands reserved for the Indians” under s. 91(24) of the *Constitution Act, 1867*. To answer the reference question before the

Court, it suffices to say that the laws of Indigenous groups, communities or peoples derive force of law from s. 91(24) of the *Constitution Act, 1867* and from compliance with the requirements set out in ss. 20 and 21 of the Act. That being said, the Court is taking care not to exclude the possibility that the right of self-government has a distinct constitutional source. In particular, our conclusion certainly does not negate the possibility that such a right of self-government may be recognized under s. 35 of the *Constitution Act, 1982*. This remains an open question.

[128] Parliament has also used appropriate language to incorporate by reference the laws of Indigenous groups, communities or peoples as they may be amended from time to time. Section 21(1) of the Act provides that such laws “ha[ve] . . . the force of law as federal law” once they have come into force. They apply as federal law from the time they are incorporated (*Wewaykum Indian Band*, at para. 114). Section 21(1) operates in tandem with s. 20(3), which conditions the application of s. 21 on the Indigenous governing body in question having entered into a coordination agreement or made reasonable efforts to do so. These mechanisms effect a valid anticipatory incorporation by reference.

[129] Questions relating to the implementation of laws incorporated by reference may be raised in the future and may need to be addressed. For example, there may be some uncertainty about the territorial scope of an Indigenous governing body’s jurisdiction or about whether an entity is an Indigenous nation or an “Indigenous governing body” for the purposes of the Act. Potential future challenges arising from

such issues are, however, beyond the scope of this reference, which raises a broad and general question about the *constitutional validity* of the Act as a whole. As the Court recently stated, “[i]t is not this Court’s role to express opinions about the substance, arguments or merits of future challenges” (Greenhouse Gas References, at para. 220).

[130] In summary, it is constitutionally open to Parliament to use anticipatory incorporation by reference as a legislative drafting technique. Through s. 21, Parliament has validly incorporated by reference the laws, as amended from time to time, of Indigenous groups, communities or peoples in relation to child and family services. As a result, s. 21 does not alter the architecture of the Constitution.

(4) The Section 22(3) Paramountcy Provision Does Not Alter the Architecture of the Constitution

[131] The Attorney General of Quebec argues that s. 22(3) of the Act, the paramountcy provision, alters the architecture of the Constitution. In our view, this is not the case. Section 22(3) provides as follows: “For greater certainty, if there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services that is in a provincial Act or regulation, the provision that is in the law of the Indigenous group, community or people prevails to the extent of the conflict or inconsistency.” The laws of Indigenous groups, communities or peoples that are incorporated by reference will have the force of law as federal law: laws incorporated into federal law apply as federal law (*Wewaykum Indian Band*, at

para. 114). Section 22(3) is simply a legislative restatement of the doctrine of federal paramountcy.

[132] Under the doctrine of federal paramountcy, the provisions of a valid federal law prevail over conflicting or inconsistent provisions of a provincial law (see *Canadian Western Bank*, at paras. 32 and 69; Hogg and Wright, at § 16:1; Brun, Tremblay and Brouillet, at para. VI-2.69; Monahan, Shaw and Ryan, at p. 133; Beaudoin, at p. 354; G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at §5.73). Although paramountcy is a judicial doctrine whose scope and application are matters for the courts rather than Parliament or the legislatures (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 98; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 56), this does not prevent Parliament or a legislature from declaring its understanding of federal paramountcy “[f]or greater certainty”, as Parliament has done in s. 22(3), where these words precede its explanation. But it is ultimately for the courts to adjudicate any alleged conflict between federal law and provincial law and to make any necessary declaration of paramountcy.

[133] As a result, s. 22(3) of the Act does not alter the architecture of the Constitution.

VIII. Conclusion

[134] Developed in cooperation with Indigenous peoples, the Act represents a significant step forward on the path to reconciliation. It forms part of the implementation of the UNDRIP by Parliament. It also responds to call to action No. 4 made by the Truth and Reconciliation Commission, which calls upon the federal government to establish national standards and to affirm the role of Indigenous governments in the area of child and family services. The Act creates space for Indigenous groups, communities and peoples to exercise their jurisdiction to care for their children. The recognition of this jurisdiction invites Indigenous communities to work with the Crown to weave together Indigenous, national and international laws in order to protect the well-being of Indigenous children, youth and families.

[135] The pith and substance of the Act, taken in its entirety, is to protect the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, to advance the process of reconciliation with Indigenous peoples. This important legislative initiative falls squarely within Parliament's legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[136] For these reasons, the following reference question:

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

is answered as follows:

No.

[137] Accordingly, we dismiss the appeal of the Attorney General of Quebec and allow the appeal of the Attorney General of Canada.

Appeal of the Attorney General of Quebec dismissed. Appeal of the Attorney General of Canada allowed.

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