

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Popular Press

Faculty Scholarship

2020

NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union' and Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto

Naiomi Metallic

Dalhousie University Schulich School of Law, naiomi.metallic@dal.ca

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Other Law Commons](#)

Recommended Citation

"NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union' and Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto" in Kent McNeil & Naiomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence*, (Saskatchewan: Canadian Native Law Reporter, Indigenous Law Center, 2020).

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Schulich Law Scholars. It has been accepted for inclusion in Articles, Book Chapters, & Popular Press by an authorized administrator of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

NIL/TU,O Child and Family Services Society (Appellant)
 v
B.C. Government and Service Employees' Union; (Respondent)
and
Communications, Energy and Paperworkers Union of Canada (Appellant)
 v
Native Child and Family Services of Toronto (Respondent)

[Indexed as: **NIL/TU,O and Native Child v BCGSEU and CEPUC**]

*Indigenous Nations Court, Metallic J, February 1, 2020**

Neutral Citation: 2020 INC 2

In NIL/TU,O and Native Child, the Supreme Court of Canada held that unions applying for certification to represent employees of Indigenous-run child and family agencies ought to be certified under provincial labour relations legislation. The majority in both cases applied a presumptive rule that labour relations are generally provincial matters. This presumption was not displaced by the fact that both agencies were Indigenous-run organizations. The Indigenous nature of the organizations, their clientele, staff, and governance, or their own preferences for labour regimes made no difference to the Court's analysis.

Held: Appeals Allowed.

1. The appeals should be allowed. Treating Indigenous peoples merely as subjects has, for too long, facilitated both federal and provincial government neglect of matters that are of fundamental importance to Indigenous nations and has failed to protect Indigenous communities against assimilative forces. In other words, the old approach has caused Indigenous communities harm. Nowhere is this perhaps more apparent than in the context of child welfare. The Supreme Court failed to be sensitive in these cases to the unique Indigenous context and the interplay of a number of constitutional principles, including treaty federalism, federalism, subsidiarity, the presumption of conformity with international law, substantive equality, reconciliation, and the honour of the Crown. Indigenous groups are governments in their own right, with their own law-making powers and responsibilities. The Canadian conception of federalism, read in harmony with other constitutional principles, is capable of accommodating this change.

METALLIC J:**

1. Introduction

[1] We are called upon to rule on appeals from the decisions of the Supreme Court of Canada (SCC) in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union and Communications, Energy and*

* The Indigenous Nations Court (INC) is not a real court and this is not an actual appeal.

** Naomi Metallic, the author of this "judgment," is an Assistant Professor and the Chancellor's Chair in Aboriginal Law and Policy at the Schulich School of Law, Dalhousie University. She is not a judge.

Paperworkers Union of Canada v. Native Child and Family Services of Toronto.¹ Both cases were framed in the courts below as involving the question of whether, as a matter of division of jurisdictional powers in ss 91 and 92 of the *Constitution Act, 1867*, provincial or federal labour laws ought to apply to employees of Indigenous-run agencies providing services to Indigenous clientele in the area of child welfare services. In the courts below, the NIL/TU,O agency, serving seven First Nations communities situated on reserve lands in British Columbia, resisted the application of provincial laws in favour of the federal labour regime applying to its employees. Conversely, Native Child, serving the urban Indigenous community in Toronto, resisted federal jurisdiction over its labour relations in favour of provincial jurisdiction.

[2] All the judges of the SCC agreed in the result that provincial labour laws ought to apply to both agencies. All agreed that the past division-of-powers precedent established that jurisdiction over labour relations is presumptively provincial and only exceptionally federal. The only point of disagreement between the judges was when the exception is triggered. A majority of six judges preferred an approach that first assessed whether the day-to-day functions of the agencies indicated sufficient federal involvement in their operations in order to trigger the exception. Assuming this was shown, a second assessment would occur asking whether the nature of the activities of the agencies (here the delivery of culturally-informed child welfare services to an Indigenous clientele) went to the ‘core of Indianess’ of the federal constitutional power over “Indians, and Lands reserved for the Indians” in s 91(24) of the *Constitution Act, 1867*. The majority judges concluded that the provinces retained ultimate decision-making control over these agencies under provincial child welfare law and that federal involvement was less prominent. There was, therefore, no need to proceed to a ‘core of Indianess’ analysis. In separate reasons concurring in the result, a minority of judges preferred an analytical approach that would go straight to a ‘core of Indianess’ consideration. Assessing this ‘core’ narrowly, these judges determined that child welfare services delivered by Indigenous peoples and aimed at Indigenous clientele were not within this core.

[3] The disagreement between the judges at the SCC appears to only be one of degree. Both camps focused exclusively on determining, as between the federal and provincial governments, who exercised the most control over the operations of these agencies, and in the case of the minority judges, whether the exercise of federal control in the circumstances went to the essence of federal power to control “Indians, and Lands reserved for the Indians.” There was no consideration of the perspective of either of these Indigenous agencies or the bodies that govern them on which labour regime they wanted. Nor was any mention made of the possibility that Indigenous communities could control their own labour relations or child welfare services and why this might be important to the vitality of these communities.

[4] It is apparent from their written reasons that the SCC was unprepared to

¹ *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees’ Union*, 2010 SCC 45 [*NIL/TU,O*] and *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2010 SCC 46 [*Native Child*].

entertain the notion of creating space for the exercise of Indigenous choice or jurisdiction within s 91(24). This is clear from the majority judges' statement that "[t]here is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s 91(24) is at issue. The fundamental nature of the inquiry is—and should be—the same as for any other head of power."² On this, we disagree.

[5] On their face, these cases do not raise any issues of Aboriginal or treaty rights or invoke s 35 of the *Constitution Act, 1982*. This might lead some to question why these appeals would be heard by the Indigenous Nations Court. The answer is simple: when it comes to issues of the constitutional division of powers between the federal and provincial governments, the jurisdiction of Indigenous nations is the other side of the coin. The interpretation of the Canadian constitution as dividing up all the jurisdictional space between the federal and provincial governments leaves no jurisdictional space for Canada's Indigenous peoples and effectively erases their inherent right to choose their own destinies as peoples. A number of considerations, many of these modern interpretive and constitutional principles, require us to now acknowledge that questions of federal and provincial jurisdictional powers relating to Indigenous peoples inevitably implicate issues of Indigenous self-determination and self-government.³ Further, we must recognize that Indigenous self-determination is inextricably tied to the well-being of Indigenous peoples.

[6] For the last 153 years, Canadian division-of-powers cases have been decided as though the inherent right of self-determination held by Indigenous peoples did not exist, and the only jurisdiction Indigenous peoples are capable of possessing is that (seldom) granted to them by other governments. The SCC has also granted the provinces powers that are virtually concurrent with federal powers in relation to Indigenous peoples. It is now clear that this approach contributes to the harms that Indigenous peoples continue to experience in this country. Most seriously, it has aided and abetted in equal measures the assimilation and neglect of Indigenous peoples by Canadian governments. In the context of child welfare, policies of assimilation and government neglect have combined to contribute to the devastating overrepresentation of Indigenous children in state care. Additionally, in the contexts of employment, labour, and human rights jurisdiction, the SCC's approach to

² *NIL/TU,O*, *ibid* at para 20.

³ Self-determination is the right of Indigenous peoples to choose their destinies. In Canada, it means that First Nations, Inuit, and Métis have the right to negotiate the terms of their relationship with Canada and choose governmental structures that meet their needs: see *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996) (RCAP), vol 2, pt 1 c 3 at 158 [RCAP]. Self-determination includes the right to self-government: *ibid* at 159; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, vol III, UN Doc A/61/49 (2008) 15, art 4 [UNDRIP]. Self-government is the ability of Indigenous peoples to enforce their own rules, resolve disputes, problem-solve, and establish their own governing institutions to carry out these tasks: see Stephen Cornell, Catherine Curtis & Miriam Jorgenen, *The Concept of Governance and Its Implications for First Nations – A Report to the British Columbia Regional Vice-Chief, Assembly of First Nations*, JOPNA no 2004-02 (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2004). For simplicity, we will simply refer to 'self-determination' in the remainder of this judgment; however, this is intended to include the Indigenous right to self-government.

s 91(24) has resulted in a confusing maze of federal and provincial laws and tribunals having jurisdiction over different sub-units of an Indigenous government.

[7] While the current approach to s 91(24) is supported by long-standing precedent, it is based on an interpretation of our Constitution that is at odds with the numerous principles that Canadian governments and courts have both affirmed are fundamental to our legal system and our identity as a country. These include ‘treaty federalism’, conformity with the *Charter* and the principles of federalism, subsidiarity, reconciliation and the honour of the Crown, and the presumption of conformity with international law. These principles demand a different interpretation of s 91(24).

2. Analysis

A. The Current Approach

i. No Space for Indigenous Jurisdiction

[8] Since Confederation, the courts have interpreted s 91(24) as according the federal government nearly unlimited power over “Indians, and Lands reserved for the Indians.” (Despite the use of the word “Indians” in s 91(24), we will use the term “Indigenous peoples” to refer to those peoples contemplated in the provision, as this reflects the fact that Inuit, Métis, and ‘non-status Indians’ have been deemed to be within its scope and because it reflects the terminology used in the *United Nations Declaration on the Rights of Indigenous Peoples*.⁴) It is clear that, from Confederation to the present, no contemplation was given by our courts to the federal power being shared or limited by decisions or laws made by Indigenous peoples, despite the two preceding centuries of ‘nation-to-nation’ and treaty relations wherein the British recognized and committed themselves to respecting Indigenous claims to sovereignty and their lands.⁵ This judicial amnesia is evidenced in *St. Catherine’s Milling & Lumber Co. v R*, where the Privy Council described the rights of the Indigenous people in their unsundered lands as having been granted to them by

4 See *Reference re: British North America Act, 1867* (UK), s 91, [1939] SCR 104 [*Re Eskimos*]; *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99 [*Daniels*]; *UNDRIP, ibid.*

5 See Brian Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” in Menno Boldt & J. Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 114; Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) McGill LJ 308 (Ryder); James Sákéj Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241 (Henderson); John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), c 1; Brian Slattery, “The Aboriginal Constitution” (2015) 67 SCLR (3d) 319; Joshua Nichols, “Sui Generis Sovereignties: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Sovereignty,” in Oonagh E. Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada’s Past, Present and Future in International Law* (Montreal & Kingston: McGill-Queen’s University Press, 2018), 131 [Nichols, “Sui Generis Sovereignties”]; Alan Hanna, “Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape” (2018) 51 UBC L Rev 105.

the Crown and entirely “dependent upon the good will of the Sovereign.”⁶ This approach to s 91(24) assumed that the Crown obtained absolute sovereignty over all land and power in Canada through the doctrine of discovery and its associated legal fiction of *terra nullius*.⁷

[9] Although in the last half-century there has been some acknowledgement of Aboriginal rights at common law,⁸ which are now recognized and affirmed by s 35, this has not lead to a re-examination of Crown sovereignty or s 91(24), nor to any real coming to terms with the doctrines of discovery and *terra nullius*. On the contrary, in its first case on s 35, *R v Sparrow*, the SCC emphasized that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”⁹ As observed by Kent McNeil in relation to *Sparrow*, “[t]he colonial vision of the Canadian Constitution, based on parliamentary sovereignty and exhaustive distribution of powers between the federal and provincial governments, was still influencing the judges.”¹⁰ The SCC has thus far evaded robust recognition of the right to self-government.¹¹ In this regard, the Truth and Reconciliation Commission (TRC) has stated that s 35 jurisprudence continues “to subjugate Aboriginal peoples to an absolute sovereign Crown.”¹²

6 (1888) 14 App Cas 46 [*St. Catherine’s Milling*]. See Kent McNeil, *Flawed Precedent: The St. Catherine’s Case and Aboriginal Title* (Vancouver: UBC Press, 2019).

7 See John Borrows, “Canada’s Colonial Constitution,” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017), 17 [Borrows, “Canada’s Colonial Constitution”]; Nichols, *supra* note 5; Joshua Ben David Nichols, *Reconciliation without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

8 See *Calder v Attorney-General of British Columbia*, [1973] SCR 313.

9 *R v Sparrow*, [1990] 1 SCR 1075 at 1103.

10 Kent McNeil, “Envisaging Constitutional Space for Aboriginal Governments,” (1993) 19 Queen’s LJ 95 at 126. See also Borrows, “Canada’s Colonial Constitution,” *supra* note 7, and Nichols, “Sui Generis Sovereignties,” *supra* note 5.

11 In *R v Pamajewon*, [1996] 2 SCR 821 at para 24, the Supreme Court held, “without deciding that s 35(1) includes self-government claims,” that if self-government was included in s 35, any such rights would have to be proven by the same test used to prove other Aboriginal rights, established in *R v Van der Peet*, [1996] 2 SCR 507. The restriction placed on the right of Aboriginal self-government in *Pamajewon* has been roundly criticized as unduly limiting First Nations’ ability to self-govern: see, for example, BW Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997) 42 McGill LJ 1011; Peter Scott Vicaire, “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context” (2013) 58 McGill LJ 607 at 656–657; JE Dalton, “Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21:1 Can J L & Soc’y 11 at 19–20. However, the Court has yet to revisit its ruling, although it has had at least two opportunities to do so. In 2008, the Court denied leave to hear a case which would have required it to squarely reconsider its decision in *Pamajewon*: see *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al.*, 2008 CanLII 18945 (SCC). In 2011, it denied leave to hear a case that would have allowed it to directly address the right of self-government again: see *Chief Mountain et al. v Attorney General of Canada, et al.*, 2013 CanLII 53406 (SCC).

12 *Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 202–203.

ii. Ample Space for Provincial Jurisdiction

[10] Not only have the courts ignored the possibility of Indigenous jurisdiction in their interpretation of s 91(24), but they have consistently eroded the exclusive federal jurisdictional power over Indigenous peoples by according significant powers to provincial governments in this area. This is contrary to what many regard as the main purpose of s 91(24): to protect Indigenous peoples' lands and interests from encroachment by local settlers, whose interest in acquiring lands and jurisdiction for purposes of settlement was in direct conflict with preserving the lands and interests of the Indigenous peoples.¹³

[11] This objective of protecting Indigenous peoples from colonial encroachment has its roots in the legal framework established through the nation-to-nation, treaty relationships that had unfolded during the 200 years leading to confederation.¹⁴ Referred to as 'treaty federalism', this framework positions s 91(24) as empowering the federal government to protect Indigenous interests without granting it plenary power to control all aspects of Indigenous peoples' lives. Rather, the provision empowers the federal government to enter treaties with Indigenous peoples to achieve consensual arrangements for harmonious co-existence and shared responsibilities, recognizing that Indigenous peoples have the right to self-determination, including self-government and the right to consent to decisions that affect them.¹⁵

[12] Unfortunately, treaty federalism has yet to be embraced by Canadian courts. Instead, the courts' preoccupation with prioritizing provincial interests can be seen as early as the first two s 91(24) cases of *St. Catherine's Milling*¹⁶ and *Ontario Mining Co. v Seybold*.¹⁷ In these cases, the Privy Council interpreted sections 91(24) and 109 of the *Constitution Act, 1867* as preventing the federal government from implementing its treaty promises to set aside reserve land, and instead required provincial involvement in the process. At the same time, however, the Privy Council held that provinces had no strict legal duty to cooperate with the federal government in the implementation of treaty promises. Based on these decisions, courts would neither compel Canada to unilaterally fulfil a treaty promise relating to land nor compel provinces to cooperate with Canada's attempt to fulfil such treaty promises.¹⁸

[13] Post-WWII would see the SCC carve out even more constitutional space for provincial jurisdiction in relation to Indigenous peoples. At this time, the federal

13 See Peter Hogg, *Constitutional Law of Canada*, 2014 Student Edition (Toronto: Thomson Reuters Canada Limited, 2014), c 28 at 2-3; Cathy Bell, "Have You Ever Wondered Where s 91(24) Comes From?" (2003) 17 Can J Const L 285.

14 See Henderson, *supra* note 5, and Borrows, "Canada's Colonial Constitution," *supra* note 7.

15 For more of this, see Henderson, *ibid*, and Nichols, "Sui Generis Sovereignties," *supra* note 5.

16 *Supra* note 6.

17 [1903] AC 73.

18 See Leonard I Rotman, "Provincial Fiduciary Obligations to First Nations: the Nexus between Governmental Power and Responsibility" (1994) 32 Osgoode Hall LJ 735. These decisions left Indigenous treaty signatories without any legal recourse for enforcing key treaty promises for decades.

government took the bold step of adding a provision to the *Indian Act* (today s 88 of the *Indian Act*, RSC 1985, c I-5) that, subject to a few exceptions,¹⁹ adopts provincial laws of general application as federal laws applicable to Indians. We will say more about this below, but the main effects of s 88 have been characterized as “severely limit[ing] First Nations’ political power in Canada” and “creat[ing] very few incentives for the federal government to work with First Nations to pass legislation recognizing and affirming their Aboriginal and treaty rights throughout the country.”²⁰

[14] For the first 30 years of its existence, s 88 of the *Indian Act* was generally viewed as being the sole basis for the application of provincial laws to First Nations. However, in the 1985 case of *Dick v R*, the SCC decided that most provincial laws of general application apply of their own force (*ex proprio vigore*) to Indigenous peoples, relegating s 88 to a much-reduced role of reinvigorating those provincial laws that touched on the ‘core of Indianess’ (invoking the doctrine of interjurisdictional immunity).²¹ In other words, the SCC effectively converted the problematic approach of expansive application of provincial laws permitted by s 88 into a default constitutional rule in *Dick*.

[15] In the last fifty years, there have been a small number of cases where the SCC has recognized the federal government’s exclusive law-making powers.²² The general trend, however, has been for the SCC to give provinces ever-increasing powers over Indigenous peoples. Most notably, in *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*,²³ the SCC all but eliminated the constitutional rule known as ‘singling out’, which prevented provinces from passing laws that explicitly set policies in relation to Indigenous peoples (either for their benefit or detriment).²⁴ On the effect of this decision, Jean Leclair has commented: “the Supreme Court confined Parliament’s exclusive jurisdiction over Indians to such a narrow compass that most aboriginal issues can now be said to have a double aspect.”²⁵

[16] Finally, in *Tsilhqot’in Nation v British Columbia* and *Grassy Narrows First Nation v Ontario (Natural Resources)*, the SCC reversed earlier rulings holding that Aboriginal and treaty rights are within the exclusive jurisdiction of the federal government, virtually obliterating the concept of a ‘core of Indianess.’²⁶ Building

19 These include the terms of treaties, other federal laws, the *Indian Act*, and regulations and bylaws passed thereunder.

20 Borrows, “Canada’s Colonial Constitution,” *supra* note 7 at 25; see also Kerry Wilkins, “Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty” (2000) 38(2) *Alta L Rev* 458.

21 *Dick v R*, [1985] 2 SCR 309.

22 Indian status in *Natural Parents v Superintendent of Child Welfare et al.*, [1976] 2 SCR 751; reserve lands in *Derrickson v Derrickson*, [1986] 1 SCR 285; and Aboriginal and treaty rights in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] and *R v Morris*, 2006 SCC 59 [*Morris*].

23 [2002] 2 SCR 146.

24 See *R v Sutherland*, [1980] 2 SCR 451.

25 See Jean Leclair, “The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters” (2003) 20 *SCLR* (2d) 1 at 31–32.

26 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in*]; *Grassy Narrows First Nation*

on *Kitkatla*, the Court further suggested that provincial law specifically legislating in relation to Aboriginal title would be valid.²⁷ Scholars have criticized these cases for prioritizing provincial interests over the protection of Indigenous rights and abandoning expectations that s 91(24) would be used as a vehicle to advance treaty federalism and reconciliation.²⁸

[17] Cumulatively, these decisions conceive the Crown as having plenary power over Indigenous peoples and give the provinces powers over Indigenous peoples that are essentially concurrent with federal powers.

B. The Current Approach Causes Harm

[18] What we wish to emphasize in this section is both the damage that has been done to Indigenous peoples by the courts' approach to s 91(24) in general, as well as specific harms this has caused in both the areas of child welfare and labour relations. We believe that courts must be attentive to situations where their interpretation of the Constitution is causing Indigenous peoples harm. Addressing harm is central to reconciliation. The TRC defined reconciliation as "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."²⁹ The TRC said this requires "awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour."³⁰ Canadian courts have acknowledged that reconciliation with Indigenous peoples is a priority of constitutional law.³¹

i. Harms Caused by Federal Control

[19] The harmful impacts of interpreting s 91(24) as giving the federal government nearly unlimited powers over Indigenous peoples and their lands have been revealed through several recent commissions of inquiry, including the TRC.³² Pursuant to such an interpretation, the federal government passed the *Indian Act* and a number of related policies aimed at attempting to assimilate First Nations, the most notorious among these being the Indian Residential Schools (IRS) system. Provisions in the *Indian Act* sanctioned the operation of these schools and the forced

v Ontario (Natural Resources), 2014 SCC 48.

27 See *Tsilhqot'in*, *ibid* at para 116. One is hard-pressed to identify an area that is not overlapping these days. Even the most stalwart area—jurisdiction over reserve land—now appears up for question. See Nigel Bankes and Jennifer Koshan, "The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands," (28 October 2014), *Ablawg* (blog), online: <<https://ablawg.ca/2014/10/28/the-uncertain-status-of-the-doctrine-of-interjurisdictional-immunity-on-reserve-lands/>>.

28 See Borrows, "Canada's Colonial Constitution," *supra* note 7 at 31–32. See also Bruce McIvor & Kate Gunn, "Stepping into Canada's Shoes: Tsilhqot'in, Grassy Narrows and the Division of Powers" (2016) 67 UNBLJ 146; Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*" (2017) 55 *Alta L Rev* 91.

29 *Supra* note 12 at 6.

30 *Ibid* at 7.

31 See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." See also *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at para 10.

32 See *RCAP*, *supra* note 3, vol 1, *Looking Forward, Looking Back*, chs 9–12, and TRC, *supra* note 12.

attendance of Indigenous children (these were not formally repealed until 2014!).³³ Other examples include displacement from traditional homelands, placement on reserves, relocations and centralization, bans on cultural and spiritual practices, replacement of traditional forms of governance, loss of language and culture and various abuses experienced by students at Indian Day Schools, enfranchisement provisions that robbed thousands of people of their Indian status, restrictions on obtaining legal representation, and restrictions on the sale and trade of the harvest from farming and hunting, to name a few.

[20] The harms from the IRS system, chronicled by the TRC, include physical, emotional, and sexual abuse of individual students; loss of language, culture, traditions, and laws; loss of pride and self-respect by Indigenous peoples; stereotyping and prejudice by non-Indigenous Canadians; and long-lasting intergenerational impacts on families, languages, education, and health.³⁴ The harmful impacts of Canada's other assimilative policies have had similar effects.

[21] Granted, the federal government passed the *Indian Act* in 1876 and was already implementing it by the time of the Privy Council's decision in *St. Catherine's Milling*, the decision confirmed the Crown's absolute sovereignty and gave wind to the sails of Canada's colonial project.

ii. Harms Caused by Jurisdictional Neglect

[22] While it is obvious that the current interpretation of s 91(24) facilitated the exercise of extraordinary control over the lives of First Nations peoples by the federal government, the other (less-known) side of this coin is the extraordinary neglect of Indigenous peoples' needs and well-being that the governments' and courts' interpretation of s 91(24) has facilitated.

[23] Although the *Indian Act* touches upon many areas of First Nations' peoples' lives, there are in fact several policy areas over which it is largely silent, including the areas of child welfare, social assistance, education (outside the IRS system), housing, water, policing, emergency services, and land claims, to name a few.³⁵ In addition, the *Indian Act* also excludes application to Inuit and Métis, as well as First Nations not registered under the *Indian Act*. Since Confederation, this has raised questions about which government (federal or provincial) has the responsibility to create legislation and policy and delivery of services in the areas covered by these omissions.³⁶

33 *Indian Act*, RSC 1985 c I-5, ss 114–121. Most of these were repealed by the *Indian Act Amendment and Replacement Act*, SC 2014, c 38.

34 These various harms are discussed throughout the TRC Report. A helpful overview of policies is provided in the introduction to the Executive Summary, *supra* note 12 at 1–22.

35 For more on this, see Janna Promislow & Naomi Metallic, "Realizing Administrative Aboriginal Law," in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed (Emond Publishing: Toronto, 2017), c 3.

36 The SCC eventually provided clarity by indicating that s 91(24) includes jurisdiction over Inuit (*Re Eskimos*, *supra* note 4) and Métis and non-status Indians (*Daniels*, *supra* note 4). There continues to be uncertainty, however, about the extent of the federal responsibility in regards to Métis and non-status Indians. Arguably, the Supreme Court added to this uncertainty by confirming that the federal government has no "duty to legislate" in respect of these groups (see *Daniels*, *supra*

[24] By signalling the possibility of concurrent power over Indians and their lands early on, the courts introduced a significant degree of uncertainty that both the federal and provincial governments have since used to their advantage. Generally, as it relates to matters requiring government expenditure of resources (as opposed to the *taking* of resources), the provinces argue that Indigenous matters are a federal responsibility, while the federal government argues that those areas not covered in the *Indian Act* are within provincial jurisdiction. This denial of responsibility by both levels of government is unique to s 91(24), as observed by Kent McNeil:

In other division of powers situations, the federal government and the provinces usually fight one another for jurisdiction, each trying to amass as much authority as possible. But when it comes to jurisdiction in relation to Aboriginal peoples, exactly the opposite phenomenon occurs.³⁷

[25] Such denials became especially prominent after the rise of the administrative state post-WWII when governments began to provide basic, essential services to citizens. These are the conditions that led to the addition of s 88 to the *Indian Act*. Following WWII, the federal government was under mounting pressure to provide essential services to First Nations, and it appears that s 88 was a unilateral attempt to delegate this responsibility to the provinces.³⁸ Generally, the provinces did not accept this delegation where it required the expenditure of money for service delivery. Instead, they insisted on cost-sharing arrangements with the federal government, where Canada absorbed all or the majority of costs, before extending services. This occurred only in a limited number of areas, namely, child welfare, policing (in the 1990s), and, in Ontario, social assistance.

[26] The resulting jurisdictional arrangement in these circumstances is complex. There is an agreement between the federal government and provincial governments for extension of provincial laws and services to First Nations in exchange for full or majority federal funding. Often the federal government will also have funding agreements with First Nations to deliver these services (either through the Band administration or agencies) in accordance with provincial laws (a phenomenon known as ‘program devolution’). Sometimes, provincial governments will also have agreements to recognize First Nations service agencies, like the NIL/TU,O and Native Child, as designated service providers under provincial laws.³⁹

[27] In those areas where provinces have been unwilling to extend their services to First Nations, such as in the case of social assistance, assisted living, water, health

note 4 at para 15).

37 Kent McNeil, “Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples,” *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 309.

38 See Hugh Shewell & Annabel Spagnut, “The First Nations of Canada: Social Welfare and the Quest for Self-Government” in John Dixon & Robert P Scheurell, eds, *Social Welfare with Indigenous Peoples* (London: Routledge, 1995); AC Hamilton and CM Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry in Manitoba*, vol 1 (Winnipeg: Queen’s Printer, 1991) at 515–20.

39 For more information see Naomi Metallic, “A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the Caring Society Case” (2019) 28:2 JLS 4.

services, emergency services, and housing, the federal government has been left to provide such services to First Nations across the country. Canada has done so begrudgingly; it resists adopting clear legislative standards for fear of appearing to have accepted jurisdiction over such areas. Instead, the federal government has ‘regulated’ these areas by means of Treasury Board directives and policies and, later, funding agreements with First Nations to deliver such services themselves. Often, the federal government has simply imposed provincial standards via its policies for the delivery of services on reserve, and First Nations have been bound to follow these as a term of their funding agreements.⁴⁰

[28] The above described ‘systems’ of the delivery of essential services to First Nations have been criticized by scholars and the Auditor General of Canada as being confusing, developed without consultation with First Nations, largely excluding First Nations from policy development, being assimilative in nature, not responsive to First Nations’ particular needs and circumstances, not an adequate substitute for self-government, allowing for systemic underfunding and under-servicing of First Nations’ essential services, making it difficult to hold federal and provincial governments accountable, and preventing First Nations’ access to justice in the case of disputes over service delivery.⁴¹

[29] In our view, there is a direct link between these various problems and harms attributed to the above described ‘systems’ and the current approaches to s 91(24), s 88 of the *Indian Act*, and the SCC’s ‘constitutionalization’ in *Dick* of the s 88 approach of transferring authority over “Indians” to the provinces. This is illustrated clearly in the case of child welfare, which we discuss further below.

40 See Promislow & Metallic, *supra* note 35 at 98–99. While this description of essential service to First Nations peoples largely maintains up to the present, a small but important development has been the passing of the *Department of Indigenous Services Act*, SC 2019, c 29, in the summer of 2019. Section 6(2) of the Act lists nine service areas over which the federal Minister of Indigenous Services is responsible (child and family services, education, health, social development, housing, infrastructure, emergency management, and governance). The Act’s preamble also prioritizes certain standards in the delivery of these services and s 7 mandates collaboration with Indigenous organizations in the development, provision, assessment, and improvement of these services. For more information on the new Act, see Naomi Metallic, “Making the Most Out of Canada’s New Department of Indigenous Services Act” (12 August 2019) *Yellowhead Institute Briefs*, online: <<https://yellowheadinstitute.org/2019/08/12/making-the-most-out-of-canadas-new-department-of-indigenous-services-act/>>. Heretofore, Canada had been unwilling to acknowledge even this level of responsibility in relation to services to Indigenous peoples and maintained that any services provided to First Nations outside the *Indian Act* were undertaken as a matter of good public policy and not due to any legal obligation. See Canada, Indian and Northern Affairs Canada, *Income Assistance Program National Manual* (Ottawa: Indian and Northern Affairs Canada, 2005) at 15. See also Constance MacIntosh, “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in Colleen Flood, ed, *Frontiers of Fairness* (Toronto: University of Toronto Press, 2005) 193 at 197.

41 See Judith Rae, “Program Delivery Devolution: A Stepping Stone of Quagmire for First Nations?” (2009) 7:2 *Indigenous LJ* 1; MacIntosh *ibid*; Auditor General of Canada, 2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, “Programs for First Nations on Reserves”; Constance MacIntosh, “Indigenous Peoples and Mental Health: The Role of Law and Policy” in Colleen Flood & Jennifer Chandler, eds, *Law and Mind: Mental Health Law and Policy* (LexisNexis Canada, 2016); and Metallic, *supra* note 39.

[30] We note that the recent report of the National Inquiry into Missing and Murdered Indigenous Women and Girls linked jurisdictional neglect and lack of cooperation between governments as a key contributor to the poverty experienced by Indigenous women which, in turn, makes them vulnerable to becoming murdered and missing. The National Inquiry goes so far as to assert that the harms caused by jurisdictional neglect violate the s 7 *Charter* rights to life, liberty, and security of the person of Indigenous women and girls:

Canada has failed, partially through a lack of interjurisdictional cooperation, to ensure that Indigenous Peoples have access to adequate resources and the supports necessary to have their human dignity, life, liberty, and security protected. As this report has already shown, *the particular constitutional responsibilities for First Nations, associated with the long-time lack of constitutional recognition of other Indigenous groups, alongside the realities of provincial and territorial service delivery in key areas like education and health, have all resulted in a complicated jurisdictional landscape.* The complexity of the landscape, however, doesn't mean that rights can simply be ignored.

Interjurisdictional neglect represents a breach of relationship and responsibility, as well as of a constitutionally protected section 7 Charter right to life, liberty, and security of the person. Denials of protection and the failure of Canada to uphold these rights – specifically, the right to life for Indigenous women, girls, and 2SLGBTQQIA [Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual] people – are a breach of fundamental justice. These deficits, then, are about much more than the organization of services, or the specifics of their delivery: they are about the foundational right to life, liberty, and security of every Indigenous woman, girl, and 2SLGBTQQIA person.⁴²

[31] Correlative to the mounting evidence that interjurisdictional neglect and the imposition of provincial laws and standards is causing harm to Indigenous peoples, there is growing scholarship and empirical data that points to a clear link between the exercise of meaningful self-government and improvement in Indigenous peoples' well-being.⁴³ This is highlighted in the work of John H. Hylton, who states:

The conclusion of the analysis is inescapable—existing social programs that have been imposed on Aboriginal people by the governments of the dominant society have failed Aboriginal people and the Canadians who have supported them. Programs designed and run by Aboriginal people for Aboriginal people, on the other hand, have generally proved to be more effective and no more costly.⁴⁴

iii. Specific Harms in Relation to Child Welfare

[32] Although some authors have been raising alarm bells over the impact of the child welfare system on Indigenous children and families for decades,⁴⁵

42 *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Canada, 2019) at 567. Emphasis added.

43 See, for example, the articles in *Aboriginal Self-Government in Canada: Current Trends and Issues*, John H Hylton, ed, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999); Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children – Protecting the Vulnerable Under International Law* (Burlington: Ashgate Publishing Company, 2012) at 11–12; Martin Papillon, “Aboriginal Quality of Life under a Modern Treaty” (August 2008) 14:9 IRPP Choices 4.

44 John H Hylton, “The Case for Self-Government: A Social Policy Perspective,” in *Aboriginal Self-Government in Canada – Current Trends and Issues*, *ibid* at 78.

45 See Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development in association with James Lorimer & Company, 1983); and Rose-Alma J McDonald et al., *First Nations Child and Family Services: Joint National Policy Review* (Ottawa:

developments in the last five years have finally made this a topic of national attention. Recent statistics reveal that Aboriginal people account for almost half of all children in foster care and that they are overrepresented in the child welfare system in every province and territory.⁴⁶ One recent study also noted the link between Indigenous children in the child welfare system and overrepresentation of Indigenous peoples within the criminal justice system, dubbing this connection the “child-welfare-to-prison-pipeline.”⁴⁷

[33] In a 2017 class action, the Ontario Superior Court confirmed the federal government’s liability in negligence for loss of culture and identity caused to thousands of Indigenous children who had been taken into permanent care and placed in non-Indigenous foster homes from the 1960s to the 1980s (known as the ‘Sixties Scoop’).⁴⁸ A similar class action on behalf of Indigenous children taken into permanent care from the 1980s forward was initiated in March 2019.

[34] As we discussed above, although s 88 of the *Indian Act* did not automatically result in delegating child welfare authority to the provinces, this was the federal government’s intent and it is what eventually transpired (through intergovernmental agreements). Accordingly, many credit s 88 for being the first cause of the ‘Sixties Scoop’ and today’s current overrepresentation of Indigenous children in the child welfare system.⁴⁹ In our view, the Supreme Court’s interpretation of s 91(24) as giving the federal government nearly unlimited power over Indigenous peoples, as well its willingness to allow extensive provincial overlap, became the fertile ground in which s 88 could grow. The SCC has now gone further by constitutionalizing the effect of s 88 in *Dick*.

[35] It is now clear that the current approach to Indigenous child welfare, endorsed by the majority judges in *NIL/TU,O* as “an example of flexible and co-operative federalism at work and at its best,”⁵⁰ is having disastrous impacts on Indigenous children and families. Recent developments, discussed below, have highlighted the highly assimilative nature of the child welfare system in Canada as it relates to Indigenous peoples. They have also revealed far less ‘cooperation’ between federal and provincial governments than the SCC judges supposed.

[36] The TRC has stated that “Canada’s child-welfare system has simply continued the assimilation that the residential school system started,” and its first five Calls to Action were directed at addressing significant problems identified with Indigenous child welfare in Canada.⁵¹ The TRC highlighted jurisdictional disputes

Assembly of First Nations & Indian and Northern Affairs Development, 2000).

46 See Statistics Canada, “Study: Living Arrangements of Aboriginal Children Aged 14 and Under, 2011”, in *Insights on Canadian Society*, Catalogue No 75-006-X (Ottawa: Statistics Canada, 13 April 2016); *Aboriginal Children in Care Working Group: Report to Canada’s Premiers* (July 2015) at 7.

47 See Ontario Human Rights Commission, *Report, Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare* (Toronto: Ontario Human Rights Commission, February 2018) at 28.

48 See *Brown v Canada (Attorney General)*, 2017 ONSC 251.

49 See Johnston, *supra* note 45.

50 *NIL/TU,O*, *supra* note 1 at para 44.

51 TRC, *supra* note 12 at 138.

and neglect in relation to Indigenous child welfare as a key problem:

Jurisdictional responsibility for child welfare is intensely contested. Historically, the federal government and provincial and territorial governments have tried to shift responsibility for Aboriginal child services from one level of government to another. The federal position is that responsibility for child and family services lies solely within the jurisdiction of the provinces and territories. Canada contends that the federal government is responsible for funding only on-reserve services. In contrast, the provinces maintain that the federal government has constitutional responsibility for ‘Indians,’ and argue that Ottawa has off-loaded that responsibility to the provinces to provide services to an increasingly urban, non-reserve population.

The result is that there are often disputes over which level of government or department is responsible for paying costs. The repercussions of these disputes can be serious, with Aboriginal children paying the highest price—in particular, children with complex developmental, mental health, and physical health issues.⁵²

[37] In the 2016 *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* case, the Canadian Human Rights Tribunal (CHRT) found that Canada had discriminated against First Nations children by knowingly underfunding the delivery of child welfare services in First Nations communities.⁵³ Consistent with a more nuanced understanding of the complexities of child welfare delivery on reserve discussed above, the CHRT, unlike the SCC in the cases at bar, found that primary jurisdiction (and human rights liability) over First Nations child welfare fell to the federal government under s 91(24). The CHRT recognized that Canada had the power to legislate over First Nations child welfare and chose not to, instead taking “a programing and funding approach” to child welfare on reserve.⁵⁴ The CHRT also recognized that the application of provincial child welfare legislation and standards through the enactment of s 88 of the *Indian Act* was a deliberate choice of the federal government. According to the CHRT, the fact that Canada did not directly deliver the service on reserve could not be the end of the matter and could not be used as an excuse to allow Canada to escape scrutiny because,

... despite not actually delivering the service, [Canada] exerts a significant amount of influence over the provision of those services. Ultimately, it is [Canada] that has the power to remedy inadequacies of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon....⁵⁵

[38] The CHRT further found that Canada’s underfunding of First Nation child welfare services creates an incentive to take First Nations children into care as a first resort rather than a last resort, thereby contributing to the mass overrepresentation of First Nations children in state and foster care across the country. This led the CHRT to liken today’s child welfare system to the IRS system, by removing children from their families, languages, cultures, and communities, and also by continuing the pervasive pattern of government control over the lives of Indigenous peoples:

Similar to the Residential Schools era, today, the fate and future of many First Nations

52 *Ibid* at 142.

53 *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Caring Society*].

54 *Ibid* at para 83.

55 *Ibid* at para 85.

children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces.⁵⁶

[39] Finally, the CHRT found that the federal government's stated policy approach of funding levels similar to the provinces (a standard which the CHRT found Canada had, on the facts, failed to meet) was *itself* discriminatory. On this, the CHRT held that an approach that seeks to mirror funding provided by the provinces and territories is not consistent with substantive equality as it does not consider "the distinct needs and circumstances of First Nations children and families living on reserve, including their cultural, historical and geographical needs and circumstances."⁵⁷ This finding was based on both international and domestic human rights principles.⁵⁸ According to the CHRT, in order to meet the governing standard of equality, both funding and services on reserve must meet the needs of First Nations children and families and be culturally appropriate. Such a principle likely has application to other service areas affecting Indigenous peoples.

[40] This understanding of substantive equality is supported by precedent. The principle of substantive equality respects and celebrates difference, recognizing that all human beings are equally deserving of concern, respect, and consideration.⁵⁹ In cases involving services provided to Anglophone and Francophone communities, the SCC has affirmed that substantive equality can mean distinctive content in the provision of similar services, depending on the nature and purpose of the services in issue, as well as the characteristics of the population to be served.⁶⁰ Further, in the recent case of *Ewert v Canada* about corrections services to Indigenous peoples, the SCC held that it is a "long-standing principle of Canadian law that substantive equality requires more than simply equal treatment."⁶¹

[41] In our view, by stating that child welfare services must meet the actual needs and circumstances of First Nations children and families, and not be assimilative in nature, the CHRT's decision effectively recognizes that First Nations must exercise meaningful control over the design and delivery of child welfare as a matter of domestic human rights law. In other words, *Caring Society* implicitly frames the exercise of Indigenous self-determination as a matter of substantive equality and human rights.

[42] Further, we understand this principle to require more than simply having provincial governments accommodate Indigenous peoples within their laws. Although such an approach was commended by the SCC in *NIL/TU,O*,⁶² in practice this often leads to a patchwork of laws across the country, with some Indigenous

56 *Ibid* at para 426.

57 *Ibid* at para 465.

58 *Ibid* at paras 431–455.

59 See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 166; *R v Beaulac*, [1999] 1 SCR 768 at paras 22–24; *R v Kapp*, 2008 SCC 41 at paras 15–16.

60 See *DesRochers v Canada (Industry)*, [2009] 1 SCR 194, and *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21.

61 2018 SCC 30 at para 54.

62 *NIL/TU,O*, *supra* note 1 at paras 41–42.

groups receiving greater protections than others.⁶³ More importantly, this continues control by a non-Indigenous government, which is assimilative in principle. The problem has been succinctly stated as follows by a Carrier Sekani Tribal Council member in 1983: “Only Indian people can design systems for Indians. Anything other than that is assimilation.”⁶⁴

[43] The principle we have distilled from the *Caring Society* decision (effectively, a human right for Indigenous people to exercise meaningful control over the design and delivery of essential services) is in tension with service regimes that place all legislative power over Indigenous peoples in federal and provincial governments. Thus, although the CHRT did not go so far as to say that s 88 and the *Dick* decision result in discriminatory treatment of Indigenous peoples (as those legal questions were not directly raised in the case before it), this appears to us to be a clear implication of the ruling.⁶⁵

iv. Specific Harms in Relation to Labour Jurisdiction

[44] In the decisions below, the question of jurisdiction over labour matters was seen to be merely incidental to, or flowing from, the determination of which government had authority over the primary activity of the employees in question (e.g., delivery of child and family services). This treats labour and employment jurisdiction as not independently important to Indigenous peoples. Similarly, it was argued that, since none of the contested labour regimes in issue (those of Canada, British Columbia, and Ontario) were very different from each other, the choice of provincial jurisdiction over federal jurisdiction was of no real consequence to the affected Indigenous organizations. This ignores the fact that, although the substantive standards between the contested legislation might be similar, Indigenous nations and agencies may nonetheless have good reason to resist the imposition of one over the other.

[45] On one level, Indigenous resistance may be a principled stand against an outside entity’s imposition of identities and systems upon them. As observed by Maggie Wente:

The positions taken by Native Child in its argument to the Supreme Court demonstrate clear resistance to the non-Aboriginal third party, the Communications, Energy, and Paperworkers Union (CEP) purporting to define the aspects that are at the core of Aboriginal people’s identities and aspirations, and specifically attempting to define for the Court the purposes and aspirations of Native Child as an agency. It is obvious to most people familiar with Aboriginal peoples that the attempted imposition of identity and aspirations by a non-Aboriginal party strikes at the heart of the modern political struggles

63 See *Metallic*, *supra* note 39.

64 See Canada, House of Commons, *Report of the Special Committee on Indian Self-Government in Canada*, Keith Penner, Chairman (Ottawa: Queen’s Printer, 1983) at 29.

65 On June 21, 2019, the Parliament gave royal assent to *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2019 SC c 24. The Act affirms the inherent right of self-government of Indigenous peoples, which includes jurisdiction in relation to child and family services, and sets out a process whereby Indigenous governing bodies can exercise self-government over child welfare. Through the Act, the federal government also legislated minimum national standards in respect of Indigenous child welfare that will overlay provincial laws, where an Indigenous governing body opts not to exercise self-government over child welfare.

of Aboriginal peoples for self-determination in a “post-colonial” world.⁶⁶

Wente also suggests that another source of resistance may be “scepticism of settler-imposed methods of alternative dispute resolution in the workplace.”⁶⁷

[46] At another level, there are practical reasons why an Indigenous organization might choose one labour regime over another. One obvious reason is to have a consistent set of rules apply to all agencies and entities operating under one Indigenous government. The SCC’s ruling in the decisions below did not provide a clear, consistent rule for First Nation governments, but continued the problem of arbitrarily subjecting different sub-units of a First Nation government to different labour regimes. This is described by Wente:

There are myriad other kinds of Aboriginal organizations that will not fit into the neatly defined box of “unquestionably provincial” activities defined by the Supreme Court in these cases. For instance, it is not clear how, for example, First Nations-controlled organizations that provide technical advisory services (likely provincial in nature) to First Nations reserve communities (likely federal in nature) about resource development (likely federal in nature) that occurs on lands subject to treaty (while the lands are provincial in nature, developments may affect Aboriginal and Treaty rights, which are federal in nature) will fit neatly into either box after the functional test is carried out.

... In reality, it seems the result may be that the same First Nation’s employment relations could be provincially regulated for some branches of their operations, while remaining federally regulated for others. NIL/TU,O, in its argument to the Court, pointed out this absurdity.⁶⁸

[47] As the *NIL/TU,O* analysis is also applied by the courts to determine which government has jurisdiction over human rights complaints, First Nations experience similar problems regarding human rights jurisdiction. Wente points out that this can result in First Nations governments arbitrarily benefiting from certain protections of Indigenous collective rights and legal traditions for some sub-units of its operations and not for others. This includes specific protections for Aboriginal and treaty rights and legal traditions in the *Canadian Human Rights Act* that came into effect in 2008.⁶⁹

[48] In our view, Indigenous governments that are re-building their governance capacity and overcoming the impacts of colonialism do not need additional barriers impeding the management of their affairs.

C. An Alternative Approach

[49] We start by pointing out the obvious: interpretations of the Constitution can evolve. It is a long-held principle of constitutional interpretation that the written Constitution (including *both* the *Constitution Act, 1867* and the *Constitution Act, 1982*) must be given a broad interpretation that is attuned to changing circumstances.

66 Maggie Wente, “Case Comment on *NIL/TU,O Child and Family Services Society v BC Government and Service Employees’ Union and Communication Energy and Paperworkers of Canada v. Native Child and Family Services of Toronto*” (2011) 10:1 Indigenous LJ 133 at 137–138. See also Craig Mazerolle, “Crafting an Aboriginal Labour Law” (2016) 74 UT Fac L Rev 9 at 20–21.

67 Wente, *ibid* at 140.

68 *Ibid* at 142–143.

69 *Ibid* at 143.

This has been variously called “progressive interpretation” or a “living tree” interpretation.⁷⁰

[50] Arguments for a shift in the interpretation of s 91(24) are not new. In 1991, Professor Bruce Ryder wrote that “there is significant unexplored potential within the existing framework of Canadian constitutional law for promoting the autonomy of ... the First Nations.”⁷¹ As discussed earlier, a number of scholars have called upon the courts to adopt an interpretation of s 91(24) consistent with treaty federalism based on the historic, nation-to-nation relationship that existed on these lands long before Confederation. We agree that this historic relationship militates in favour of a new approach.

[51] In addition to treaty federalism, however, a number of other legal principles militate in favour of a new interpretation of s 91(24). These principles all point in one direction and their cumulative force leads to the inescapable conclusion that this change is both necessary and overdue. We reject any suggestion that such a change requires a constitutional amendment and is beyond the purview of the courts; quite the contrary, the exercise here is one of constitutional interpretation—the bread and butter of the courts.

i. Conformity with the *Charter*

[52] It is clear that the interpretation of one part of the Constitution should be mindful of the rest of its text. In other words, courts must strive to harmonize their interpretation of a provision, such as s 91(24), to be consistent with the rest of the text, including provisions within the *Charter*.⁷²

[53] We devoted significant attention in part 2B of our analysis to describing the harms that have been inflicted upon Indigenous peoples by the courts’ current interpretation of s 91(24). We saw that the National Inquiry into Missing and Murdered Indigenous Women and Girls characterized interjurisdictional neglect of Indigenous peoples (which the current approach to s 91(24) facilitates) as a violation of s 7 of the *Charter*. The CHRT in *Caring Society* suggested that the imposition of provincial standards on Indigenous groups violates substantive equality, which is protected under both s 15 of the *Charter* and quasi-constitutional human rights legislation. Consistent with the interpretive principles discussed above, we ought to discard an interpretation of s 91(24) that implicates serious *Charter* rights violations.

70 See *Edwards v Attorney General of Canada*, [1930] AC 124, and *Reference re Same Sex Marriage*, [2004] 3 SCR 698.

71 See Ryder, *supra* note 5 at 381.

72 See *R v Wigglesworth*, [1987] 2 SCR 541 and *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713. While one part of the Constitution cannot be interpreted to invalidate the existence of another constitutional power or right (see *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at para 62), this is not what we are proposing. An alternative approach to s 91(24) that respects Indigenous peoples’ right to self-determination does not mean the federal or provincial governments will have *no* powers to legislate in respect of Indigenous peoples, but rather that such powers will be tempered in so far as any unilateral exercise of such power (e.g., imposed without Indigenous groups’ consent) will have to be reconciled with Indigenous jurisdiction.

ii. The Principles of Federalism, Protection of Minorities and Subsidiarity

[54] In *Reference re Secession of Quebec*, the SCC confirmed that the “Constitution of Canada” is not limited to its constitutional texts but embraces unwritten rules that guide the interpretation of the written text.⁷³ Here, a number of unwritten principles support an interpretation of s 91(24) that respects Indigenous self-determination.

[55] In *Refre Secession*, the SCC emphasized the significance of federalism as a fundamental principle underlying our Constitution and underlined that the principle promotes diversity in governance.⁷⁴ The SCC linked the principle of federalism with the protection of distinct cultural and political traditions:

Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today.... The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.⁷⁵

As noted by Ryder, Indigenous groups have a claim similar to that of the provinces: that the federalism principle supports their autonomy/self-determination in governance, given the important goal of protecting their distinctive cultural and political traditions.⁷⁶

[56] This notion of diversity underlying federalism was expanded in *Refre Secession* to inform a further independent constitutional principle of respect for minorities. The SCC observed that the protection of minority rights was clearly an essential consideration in the constitutional structure at the time of Confederation, and that principle was further reflected in a number of provisions in both the *Constitution Acts, 1867 and 1982*. We believe that this principle of respect for minorities bolsters the need to interpret s 91(24) consistent with substantive equality, which (according to the principle emerging from *Caring Society* and other precedents) is linked to Indigenous peoples’ right to self-determination.

[57] Finally, the principle of federalism, through promoting diversity in governance, spawned yet another principle, that of subsidiarity. This principle first emerged (though unnamed) in *Refre Secession* when the Court noted that “the federal structure of our country facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.”⁷⁷ Later in *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, the SCC named this the “principle of subsidiarity” and set out its contours more specifically: “[t]his is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population

73 *Reference re Secession of Quebec*, [1998] 2 SCR 217 [“*Refre Secession*”] at paras 32 and 54.

74 *Ibid* at para 58.

75 *Ibid* at para 43.

76 Ryder, *supra* note 5 at 319–320.

77 *Refre Secession*, *supra* note 73 at para 43.

diversity.”⁷⁸ The principle of subsidiarity reinforces an interpretation of s 91(24) that recognizes a right of Indigenous governments to self-determine in matters affecting Indigenous peoples.

iii. Reconciliation and the Honour of the Crown

[58] In *Daniels*, a 2016 case about the interpretation of s 91(24), the Supreme Court clarified that several recent actions taken by Canada signal an overall goal to achieve reconciliation:

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that reconciliation with all of Canada’s Aboriginal peoples is Parliament’s goal.⁷⁹

Based on this, Parliament’s overall goal of reconciliation ought to inform the interpretation of the Constitution, meaning we ought to be prepared to discard the older, problematic interpretation of s 91(24) in favour of ones that do not perpetuate assimilation and cause harm to Indigenous peoples.⁸⁰

[59] Further to this, the honour of the Crown has been called a “constitutional principle.”⁸¹ It has been employed to impute certain conduct to the Crown, including giving a broad and purposive interpretation to Crown promises and imputing a desire on the Crown to diligently fulfil such promises.⁸² Based on this, we believe the honour of the Crown is relevant here to compel us to prefer interpretations of the Constitution that are consistent with commitments made by the governments in recent years (and not simply viewing these as empty political commitments). This includes Canada’s commitment to reconciliation, reviving the nation-to-nation relationship, and respecting the *United Nations Declaration on the Rights of Indigenous Peoples* (the *Declaration*).

[60] In July 2017, the government of Canada released a policy setting out ten principles it intends to honour in respect of its relationship with Indigenous peoples.⁸³ The very first principle recognizes that relations with Indigenous peoples need to be based on their right to self-determination, including the inherent right to self-government. The fourth principle recognizes that “Indigenous self-government is a part of Canada’s evolving system of cooperative federalism and distinct orders

78 114957 *Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.

79 *Daniels*, *supra* note 4 at para 37.

80 Reading in a ‘reconciliation’ interpretive principle from *Daniels* (*ibid*) was proposed by the First Nation Caring Society as an intervener in *Canadian Human Rights Commission v Canada*, court file no. 37280, at paras 29–30.

81 *Beckman v Little Salmon/Carmacks First Nation*, *supra* note 31 at para 42.

82 *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 75.

83 Department of Justice Canada, News Release, “Government of Canada Sets a Principled Foundation for Advancing Renewed Relationship with Indigenous Peoples based on the Recognition of Rights” (14 July 2017), online: Government of Canada <https://www.canada.ca/en/department-justice/news/2017/07/government_of_canadasetsaprincipledfoundationforadvancingrenewed.html>. See also Canada, *Principles respecting the Government of Canada’s relationship with Indigenous peoples* (Ottawa: Minister of Justice and Attorney General of Canada, 2018) [10 Principles].

of government.”⁸⁴ Other principles emphasize the importance of reconciliation and respecting the *Declaration*. Canada’s policy commitments ought to inform the honour of the Crown.⁸⁵

[61] In our view, these public and policy commitments weigh in favour of an interpretation of s 91(24) that respects self-determination and favours a horizontal as opposed to a hierarchical relationship between Aboriginal peoples and the federal and provincial governments.

iv. The Presumption of Conformity with International Law

[62] Finally, compliance with public international law militates in favour of a new approach to s 91(24). The federal government has committed to respect the substantive rights to equality, security, and health and well-being of minorities within Canada in a variety of international instruments.⁸⁶ As suggested in part 2, the current approach to s 91(24) has failed to do this, while a new interpretation of s 91(24) as protecting Indigenous self-determination would.

[63] Further, since 2016, Canada has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* without qualification. The *Declaration* makes it clear that commitments to protect the basic minimum rights of peoples include Indigenous peoples. Further, a central principle of the *Declaration* is the right to self-determination. In this regard, Article 3 provides that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

[64] It is a well-established rule of statutory interpretation that Canadian law, including the Constitution, will be presumed to conform to international law unless the federal government has explicitly provided otherwise within the text of a law.⁸⁷ Consistent with this rule, there have been a number of cases where the SCC has used international law instruments to interpret the Constitution.⁸⁸ Although some have questioned whether the *Declaration* benefits from this rule given its status as a declaration as opposed to a ratified convention or treaty, it is clear that the SCC has used other analogous international declarations to interpret the Constitution; thus, such arguments are without foundation.⁸⁹

84 10 Principles, *ibid*.

85 For support for arguments that Canada should be honour-bound to these commitments, see Gib van Ert, “Three Good Reasons Why UNDRIP Can’t be Law – and One Good Reason Why it Can,” (2017) 75:1 *The Advocate* 29.

86 See *International Convention on the Elimination of all forms of Racial Discrimination*, GA Res 2106 (XX) CERD (1965) (Can. 1970) and *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI) CCPR (1996) (Can. 1976).

87 See *R v Hape*, 2007 SCC 26 at para 53.

88 See *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 503; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at paras 59–75; *United States v Burns*, [2001] 1 SCR 283; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76; *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016 at paras 16 and 27; *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391 at paras 69–79.

89 See Brenda L Gunn, “Overcoming Obstacles to Implementing the *UN Declaration on the Rights*

[65] In any event, the principle of self-determination itself is binding in Canada because it is explicitly recognized under instruments that Canada has already ratified, separate and apart from the *Declaration*. For example, Article 1 of the *International Covenant on Civil and Political Rights*, ratified by Canada on May 19, 1976, recognizes that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Further, in addition to the principle of self-determination Canada has publicly committed to recognize, the right to self-determination is now widely acknowledged as international customary law, meaning it is binding on Canada irrespective of ratification through a convention or a treaty.⁹⁰

[66] Thus, we find that the customary law principle of self-determination, the *Declaration*, and other international commitments made by Canada support a new interpretation of s 91(24) that respects Indigenous self-determination.

3. Conclusion

[67] The Indigenous people for whom the NIL/TU,O and Native Child agencies were created ought to have the *right to choose* which labour relations regime should govern their employees. This is the *minimum* right to which an interpretation of s 91(24) that respects self-determination entitles them. For NIL/TU,O, their choice is the federal regime, and for Native Child, it is Ontario’s regime.

[68] We emphasize that the right to self-determination also includes the right to choose a labour regime created pursuant to the exercise of self-government by Indigenous communities, where such regimes exist. In the cases at bar, however, neither Indigenous agency asserted that the labour relations regime developed by their Indigenous governments should prevail (as neither had yet developed such legal regimes). This does not preclude them from making such arguments at a later date when such regimes are in existence.

[69] Further, we would add that, given the harm that the denial of Indigenous jurisdiction has caused to Indigenous peoples and that reconciliation mandates that such harm be atoned for and action be taken to change behaviour, federal and provincial governments therefore have responsibilities to support Indigenous peoples in the development and running of such regimes (if that is the aspiration of the Indigenous nation in question).⁹¹ This is also consistent with Article 4 of the *Declaration*, which states: “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, as well as ways and means for financing their autonomous functions.”

of Indigenous Peoples in Canada” (2013) 31 Windsor YB Access Just 147; Paul Joffe, “*UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*” (2010) 26 Nat’l J Const L 121.

90 See Joffe, *ibid* at 200–208.

91 On the argument that financing First Nation self-government is also a fiduciary obligation, see Kent McNeil, “The Crown’s Fiduciary Obligations in the Era of Aboriginal Self-Government” (2009) 88 Can Bar Rev 1 at 17–18.

[70] We acknowledge that shifting our approach to s 91(24) inevitably raises a number of questions, such as: What is the full extent of Indigenous peoples' jurisdiction? Do the limits on government power in the *Charter* apply to Indigenous law-making, or should other instruments (international law or Indigenous constitutions) supply the parameters between individual and collective rights? When is Indigenous jurisdiction exclusive and when it is concurrent with provincial or federal powers? When there is concurrent jurisdiction, when will Indigenous law supersede provincial or federal laws and vice versa? What legal test governs questions of 'conflicts' between laws? Given our disposition in this case, it is not necessary for us to answer these questions.

[71] That said, we wish to emphasize that these varied and complex questions should not dissuade us from making this long-overdue change. Judicial courage is required here. We must remind ourselves that human beings have a remarkable capacity to adapt to changes in their societies. In the same way that they adapted to same-sex marriage and Indigenous treaty rights to fish for a moderate livelihood, to give but two examples, Canadians will adapt to the idea of Indigenous peoples as another order of government with both the power to choose what laws will apply to them as well as the ability to exercise their inherent law-making powers. In this regard, they can look to our neighbours to the south for reassurance. Although not perfect, U.S. law has included much more robust recognition of Indigenous peoples' inherent right of self-determination for many years.⁹²

[72] Moreover, it is unnecessary to answer these questions all at once. Like the development of other constitutional doctrines, a body of law on these issues can be developed over time as cases are heard by the courts.

[73] In the NIL/TU,O appeal, we find that the British Columbia Labour Relations Board does not have jurisdiction over NIL/TU,O labour relations because NIL/TU,O has not consented to the Board having jurisdiction. Likewise, in the Native Child appeal, we find that the Canada Industrial Relations Board does not have jurisdiction because Native Child has not consented to its jurisdiction. In each case, the Indigenous child and family agencies can choose which labour regime they want to be governed by until such as time as they develop their own.

Appeals allowed with costs throughout.

92 See John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States," in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016), 474; Vicaire, *supra* note 11.