BRIEF SUBMITTED JOINTLY BY

the Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Québec and Labrador Health and Social Services Commission (FNQLHSSC)

BILL 99: An Act to Amend the Youth Protection Act and other Provisions

CULTURE: THE KEY TO FIRST NATIONS WELLNESS

Assembly of First Nations Quebec-Labrador

FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION

Brief submitted jointly by the Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC)

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Summary

The Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) are submitting this brief in support of Bill 99 with a particular emphasis on the importance of the First Nations' culture and the preservation of their ancestral customs and traditions as well as the desire of communities to be involved at the outset and throughout the delivery of youth protection services. Indeed, it was nation-to-nation collaboration within the context of a working group that led to the drafting of certain legislative provisions contained in Bill 99 the purpose of which is to preserve the cultural identity of First Nations children and provide for the communication of information to First Nations agencies and bodies responsible for the provision of child and family services.

Although these amendments are satisfactory, a number of steps remain to be taken to ensure that the First Nations' interests and rights are given better consideration in the *Youth Protection Act* (YPA). The importance of preserving cultural identity should be examined in the interpretation of exceptions to the maximum periods of foster care, with consideration given, on one hand, to the intergenerational trauma affecting the First Nations and to the fact, on the other hand, that quality services are often less accessible for the First Nations. In addition, definitions of First Nations or Inuit body, First Nations or Inuit childcare establishment, and First Nation educational body must be added to the YPA, in particular to ensure that the amendments concerning the confidentiality and sharing of information achieve the goals agreed upon by the working group. Furthermore, this brief recommends that the legislative changes surrounding the financial contribution to placement (FCP) provide an opportunity for joint review of the disparities in its application across the First Nations communities within the framework of a committee on the costs set for the services provided to these communities.

The introduction of a provision to govern agreements setting out the responsibilities of a community or a group of communities' vis-à-vis families who are providing care to children entrusted to them under the YPA is likewise welcomed. However, it is essential that the transitional provision clearly validate the de facto situations and verbal agreements currently in effect, so as to guarantee stability in the administration of the families until such as time as these agreements are renegotiated, as applicable.

In terms of autonomy and self-determination, this brief recommends that in order to improve the effectiveness of section 37.5 YPA, section 32 should be amended to allow the First Nations Child and Family Services Agencies (FNCFSA) to take charge of the orientation and review of a child's situation as well as the termination of the intervention, in addition to assessment. Such amendment would allow for an intermediate step prior to the start of negotiations leading to the transfer of responsibility for youth protection services under section 37.5 YPA. This brief further recommends that the term "Aboriginal" be replaced by the term "First Nations and Inuit" in the YPA in order to better reflect the diversity of the nations of Québec. Lastly, this document discusses the concerns of the AFNQL and the FNQLHSSC as regards the introduction of provisions addressing the interprovincial adoption of children without prior consultation with First Nations and Inuit representatives, insofar as these provisions encroach on First Nations' Aboriginal and treaty rights vis-à-vis customary adoption.

To conclude, by means of these legislative changes, the brief emphasizes the importance of First Nations families receiving the services they need in a timely manner. On this score, the Government of Québec has the opportunity and the duty, in the context of this bill and going forward, to implement Jordan's principle in its entirety for all jurisdictional conflicts, including intragovernmental conflicts, and to ensure that the First Nations have access to quality services at least equal to those which Quebecers enjoy, by collaborating with the federal government and by allocating the human, material, and financial resources necessary for providing an effective continuum of services.

Introduction

On 3 June 2016, Lucie Charlebois, Minister for Rehabilitation, Youth Protection, Public Health and Healthy Living, tabled Bill 99, *An Act to Amend the Youth Protection Act and other Provisions* (hereinafter, "Bill 99") in the National Assembly. The Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) were invited to participate in the special consultations on Bill 99.

The framework in which youth protection services are provided in First Nations communities is complex and a review is in order. In the majority of First Nations communities, First Nations child and family services agencies (FNCFSA) are responsible for some aspects of the management and delivery of youth protection services through agreements signed with their regions' centre jeunesse prior to the passage of the *Act to Modify the Organization and Governance of the Health and Social Services Network, in Particular by Abolishing the Regional Agencies* (AOGHSSN).[1] The FNCFSA provide youth protection services pursuant to the *Youth Protection Act* (YPA) and are delegated responsibility for the assessment of child protection reports and the follow-up conducted with regard to the application of measures[2] as stipulated in their agreements. Services not provided by a FNCFSA in the community, either because it has not been delegated the responsibility to do so or because such a delegation is not currently possible under the YPA, are provided by the centre jeunesse. The same applies to communities lacking a FNCFSA. It is important to note that despite the provisions of the YPA allowing for the creation of a special youth protection program, no community has as yet signed an agreement under YPA section 37.5, although some have been involved in the process leading to such an agreement for several years. In all cases, the services are funded by INAC in accordance with its guidelines and the *National Social Programs Manual*,[3] and the funds are disbursed to the community or communities, to a third-party service provider, or to the Centre intégré de santé et de services sociaux (CISSS),[4] depending on the agreement in effect.

A set of common concerns have been expressed across this diverse range of administrative and funding arrangements for youth protection services: the importance of the First Nations' culture and the preservation of their ancestral customs and traditions, as well as the communities' desire to be involved at the outset and throughout the delivery of youth protection services. These are aspects that are addressed by Bill 99. In this regard, it is important to emphasize the collaboration between Quebec's Ministère de la Santé et des Services sociaux (MSSS) and the First Nations and Inuit organizations on the development and drafting of Bill 99. The involvement, since March 2015, of the FNQLHSSC and various First Nations partners in the work leading up to the tabling of Bill 99 has given them an opportunity to propose legislative changes in keeping with the priorities of the population whose interests they represent.

The AFNQL and the FNQLHSSC accordingly submit this brief with the aim of declaring their overall support for the amendments proposed by this bill and of encouraging the government to pursue its collaboration with the First Nations organizations so as to give the best possible consideration to the interests of the First Nations.

1 SQ 2015, c. 1.
2 *Youth Protection Act*, CQLR, c P–34.1, s 32–3.
3 Aboriginal Affairs and Northern Development Canada, *National Social Programs Manual:* https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-HB/STAGING/texte-text/hb_sp_npm_mnp_1335464147597_eng.pdf.
4 Formerly to the centre jeunesse.

Description of the organizations

ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR

The AFNQL was created in May 1985 and is the site of periodic meetings of the chiefs of 43 First Nations communities of Quebec and Labrador. The AFNQL holds four Chiefs' Assemblies each year, at which it receives its various political mandates.

MISSION AND OBJECTIVES

- Affirmation and respect of the rights of the First Nations
- Recognition of First Nations governments
- Increased financial autonomy for First Nations governments
- Development and training of the public administration of the First Nations
- Coordination of the First Nations decision-making mechanism
- Representation of positions and interests in the public space (e.g., forums)
- Definition of strategies to advance common positions
- Ensuring recognition of First Nations cultures and languages.

FIRST NATIONS OF QUÉBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION

The FNQLHSSC is a non-profit organization that is responsible for supporting the efforts of the First Nations of Quebec to plan and deliver culturally appropriate and preventive health and social services programs, among other things.

MISSION

The mission of the FNQLHSSC is to promote the physical, mental, emotional and spiritual well-being of First Nations and Inuit people, families and communities, which includes improving access to comprehensive and culturally-adapted health and social services programs designed by First Nations organizations that are recognized and sanctioned by local authorities, at the same time respecting their respective cultures and local autonomy. The FNQLHSSC also assists interested communities in setting up, developing, and promoting comprehensive health and social services and programs that are adapted and designed by First Nations organizations

1. CULTURE, A SOURCE OF PROTECTION FOR FIRST NATIONS CHILDREN

> *Culture, like language, is spirit-centered. Culture expresses language and the worldview it contains. Culture is manifested in the unique ways of living and being in the world. While culture is not static or homogeneous across First Nations in Canada, there are common fundamental principles. Identity, relationships, purpose, and meaning are all anchored by culture's unique way of seeing, relating, being, and thinking.*[5]

The importance of First Nations culture has special resonance in the area of youth protection, particularly due to the cultural dispossession that resulted from policies of assimilation, the most-well known being the Indian residential schools. Colonial policies and legislation greatly contributed to the destruction of First Nations cultures, identity, and spirituality, all the more so in being based on Western values. The majority of child protection systems declare themselves to be culturally neutral, but this neutrality is always established from the perspective and norms of the dominant culture, without necessarily taking account of Aboriginal values.[6] The Indian residential school system has been studied by the Royal Commission on Aboriginal Peoples (1991–1996) and the Truth and Reconciliation Commission of Canada (TRC, 2008–2015), both of which gathered numerous personal accounts. According to the TRC, more than 150,000 Aboriginal children were placed in residential schools, a process that has been described as "cultural genocide."[7] The implementation and the forced imposition of provincial child protection services (under colonial policies) only exacerbated the socioeconomic problems and perpetuated the loss of identity.[8] Indeed, several studies have emphasized the overrepresentation of Aboriginal children at all stages of the youth protection intervention process.[9] The most recent work on this matter indicates that this overrepresentation begins at the assessment stage, where the rate per 1,000 children is 4.4 times higher for First Nations children than for non-Aboriginal children. This disparity increases with each stage of the process, reaching a peak at the placement stage (7.9 times higher) and the recurrence stage (9.4 times higher).[10]

A joint brief on Bill 125 submitted 16 December 2005[11] by the AFNQL and the FNQLHSSC stated that:

> One of the basic postulates distinguishing the modes of intervention preferred by the members of the First Nations from those used by the directors of youth protection … is that the first consider the family as an integrated entity whose balance must be restored by investing in each of its members, while the second base their interventions on children needing the protection of the state and their legal parents.[12]

In addition, researchers have shown the extent to which language and culture, in an intrinsically linked manner, help maintain and improve health, at the same time attenuating risk factors among the First Nations.[13] The holistic healing approach and the involvement of the extended family and the community are deeply rooted in First Nations cultures; this gives the family or the community some of the information as well as the support needed to help people resolve the difficulties they face. For the First Nations, "the notion of the child's interest encompasses the interest of the family, the community and the Nation and seeks in particular the protection of identity, culture, traditional activities and language."[14] Furthermore, on 10 June 2015, the AFNQL adopted the *Declaration of the Rights of First Nations Children*, which affirms that "the First Nations care for, cherish and love children in a balanced and holistic way which is deeply rooted in Indigenous traditions" and, in particular, proclaims the right of children to learn about their history, culture, Indigenous language, spiritual traditions and philosophy.[15] In this context, and given the importance of culture in the First Nations healing process, the consideration of the cultural identity of a First Nation child in the determination of his best interest, the preservation of his bonds with his community, and the involvement and mobilization of the community around the child constitute aspects inherent to the protection of First Nations children.

5 Health Canada, in partnership with the Assembly of First Nations: *First Nations Mental Wellness Continuum Framework*, Québec, 2015, p. 22.
6 Blackstock, C., "The Occasional Evil of Angels: Learning from the Experiences of Aboriginal Peoples and Social Work," *First Peoples Child and Family Review* 4(1): pp. 28–37 (2009).
7 Truth and Reconciliation Commission of Canada, *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), online at http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf.
8 Bennett, M., and C. Blackstock, *A Literature Review and Annotated Bibliography Focusing on Aspects of Aboriginal Child Welfare in Canada* (Ottawa: First Nations of Child and Family Caring Society of Canada, 2002).
9 Breton, A., S. Dufour, and C. Lavergne, "Les enfants autochtones en protection de la jeunesse au Québec: leur réalité comparée à celle des autres enfants," Criminologie 45(2): 157–85 (2012); Sinha, V., N. Trocmé, B. Fallon, B. MacLaurin, E. Fast, S. Thomas Prokop, et al., *Kiskisik Awasisak, Remember the Children: Understanding the Overrepresentation of First Nations Children in the Child Welfare System* (Ontario: Assembly of First Nations, 2011).
10 FNQLHSSC, 2016, Analyse des trajectoires des jeunes des Premières Nations assujettis à la Loi sur la protection de la jeunesse. Volet 3: Analyse de données de gestion des établissements offrant des services de protection de la jeunesse [in press].
11 Bill 125, *An Act to Amend the Youth Protection Act and other Legislative Provisions*, 1st sess., 37th leg., Québec, 2005.
12 AFNQL and FNQLHSSC (2005), *Mémoire sur le projet de loi n°125, Loi modifiant la Loi sur la protection de la jeunesse et d'autres dispositions législatives*, p. 6.
13 Melvor, O., A. Napoleon, and K.M. Dickie, "Language and Culture as Protective Factors for At-Risk Communities," Journal of Aboriginal Health 5(1): pp. 6–25 (2009).
14 *Report of the Working Group on Customary Adoption in Aboriginal Communities* (2012), online at http://www.justice.gouv.qc.ca/english/publications/rapports/pdf/rapp_adop_autoch_juin2012-a.pdf, p. 30.
15 AFNQL, *Declaration of the Rights of First Nations Children*, 10 June 2015, preamble and s 4.

The Truth and Reconciliation Commission (TRC), created following the Indian Residential School Settlement Agreement, makes a similar point in conjunction with its clear recommendations concerning culturally appropriate interventions for First Nations children and families It specifically called on the provincial, territorial, federal, and Aboriginal governments to "keep Aboriginal families together … and to keep children in culturally appropriate environments, regardless of where they reside" (1ii). The TRC also recommends that concrete measures be taken to ensure that all the social workers and decision makers working in child protection take account of the history and impacts of the residential schools when making decisions (1iii; 1v), and that they be educated about the potential for Aboriginal communities and families to provide more appropriate solutions for family healing (1iv).[16] It is essential for practitioners working in social services or the legal system to have access to training so that they can actualize and implement these calls to action. In addition, it appears essential that employees of provincial bodies work in close collaboration with First Nations practitioners and organizations, who know the language and culture of the child and his family, in order to benefit from their competencies at all stages of the youth protection intervention process.

In parallel, the general principles of the YPA acknowledge that the characteristics of First Nations and Inuit communities must be taken into consideration. An analysis of the jurisprudence shows that a number of judges seem to comprehend these realities, yet few judgments explicitly address the importance of preserving the cultural identity of the First Nations and Inuit.[17] In addition, while community involvement must be encouraged, this provision has been too seldom applied in practice, particularly due to the rules of confidentiality that have so far been in effect. A community for which there is no FNCFSA to deliver youth protection services is generally not consulted by the centre jeunesse caseworker, unless there is an agreement to this effect[18] or the parents or the child request consultation, assuming they are aware of this possibility. If an FNCFSA is limited in its actions to monitoring the application of measures, it receives the child's file only after completion of the assessment and the choice of measures (orientation). Finally, in cases where an FNCFSA assesses child protection reports and monitors the application of measures, it is not consulted when immediate protection measures are necessary at the stage of receipt and processing of the child protection report. In all these situations, a child can be removed from the family environment without the body responsible for child and family services in the community being notified, making it more difficult to mobilize key individuals around the family and to offer services to all persons affected by the situation so as to restore family unity.

The amendments to sections 3, 4, and 72.6 of the YPA and the new section 72.6.1 can help make youth protection services more culturally appropriate for First Nations and respond to some of the concerns they have raised. All these amendments are closely related, since the involvement of the child's community in the youth protection process helps ensure that the methods which are chosen do in fact preserve the child's ties to his culture.[19] These amendments are specifically supported by the members of the Regional Roundtable on First Nations Child and Family Services (the "Regional Roundtable"),[20] which, in the context of a prioritization process carried out in May 2015, placed emphasis on the themes of consideration of cultural identity in the determination of the child's best interest, placement of children in an environment able to preserve their cultural identity, and participation of the First Nations in the planning and delivery of youth protection services. With regard to the interest of the child and its close relationship with the preservation of cultural identity for the First Nations, beyond the amendments to the YPA,[21] these considerations should be reflected in the Civil Code of Québec[22] so as to provide for legislative coherence and to avoid divergent interpretations of the best interests of First Nations children.

Other discussions held at the Regional Roundtable have helped to structure the wording of the new section 72.6.1 YPA around the needs of the First Nations. In particular, as to time of disclosure, the members of the Regional Roundtable have indicated that, at a minimum, in order to do their work of mobilization and support properly, they must be notified when a child has to be removed from his family environment. It is important here that the DYP give enough lead time before removal of the child for priority to be placed on finding an environment in the community. As to the consent of the persons concerned, the members of the Regional Roundtable found that the preservation of the child's cultural identity, an integral part of his best interest, should take precedence over consent to disclosure. In light of the preceding comments on the importance of language and culture for the First Nations, this departure from the general rule of confidentiality is pertinent and fully justified. However, with a view to preserving the relationship between the parents and a child aged 14 or over, it is necessary to notify them of this disclosure and its purpose.

16 TRC, *supra* note 7, pp. 347–8.
17 Brief submitted to the Cabinet (2016), *Loi modifiant la Loi sur la protection de la jeunesse et d'autres dispositions: Partie accessible au public*, p. 4.
18 An example is the intervention model "My family, my community," an ecosystemic approach implemented in three regions of Quebec, whose purpose includes "mobilizing the community and making it a partner in the protection of the children who live in it, drawing on innovative strategies that take advantage of its resources": http://www.avenirdenfants.org/media/349116/FicheACJQ_2.pdf.
19 Libesman, T., *Child Welfare Approaches for Indigenous Communities: International Perspectives* (Melbourne: National Child Protection Clearinghouse, Australian Institute of Family Studies, Research Brief no. 20, 2004).
20 The Regional Roundtable members representing the communities are the directors of social services of each community or group of communities or, in their absence, the health and social services directors.
21 Bill 99, new sections 3–4 YPA.
22 A. 33 C.c.Q.

Moreover, Justice Normand Bonin, in a decision of the Court of Québec, Youth Division, makes some interesting connections between the high rate of imprisonment among the First Nations and Inuit and the high rate of placement of First Nations and Inuit children.[23] He writes that in criminal cases, the Supreme Court asks judges to take account of historical and systemic factors specific to the First Nations and Inuit before handing down a prison sentence, so as to lessen the overrepresentation of the First Nations and Inuit in the correctional system.[24] Analogously, in youth protection, the enactment of legislative provisions specific to the First Nations and Inuit and favoring community involvement and the preservation of cultural identity would serve to attenuate their overrepresentation at all stages of the process. Nevertheless, the legislative considerations applied in criminal cases have not had any effect on the overrepresentation of the First Nations and Inuit in the criminal justice system, and inconsistencies and major gaps subsist in both the application of these considerations and the delivery of services.[25] It will thus be indispensable to do everything possible to ensure that the YPA, once amended, is applied in its entirety by all relevant professionals in the social services and legal systems.

Therefore, since "protection of family relations, care for children, identity, culture and language lie at the heart of the rights of self-determination and self-government of our Nations,"[26] the AFNQL and the FNQLHSSC recommend the following:

Recommendation 1: That sections 3, 4, 72.6, and 72.6.1 be enacted as proposed, that section 33 of the CCQ be amended to reflect the changes made to section 3 of the YPA, and that recommendations 1ii, iii, iv, and v of the Truth and Reconciliation Commission of Canada be effectively implemented in the Quebec health and social services system.

23 *X (Dans la situation de)*, [2002] R.D.F. 759.
24 *R v Gladue*, [1999] 1 SCR 688.
25 Ontario Federation of Indian Friendship Centres (2012), *Gladue Rights. A Call for Recommitment and Accountability*, online at http://ofifc.org/sites/default/files/docs/2012-05-18%20Position%20Paper%20-%20Gladue%20-%20Sent%20to%20MAA%20-%20MAG%20-%20FCs.pdf.
26 AFNQL, *Declaration*, *supra* note 15, preamble. These rights are recognized in the *Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples*, and in the principles adopted by the Cabinet in 1983 to specify the basis of government action with respect to Aboriginal people.

2. BILL 99 AND THE FIRST NATIONS: ADVANCES AND ISSUES

2.1 Nation-to-nation cooperation

Apart from consideration of the distinct cultural identity of the First Nations, Bill 99 contains several advances. As mentioned in the introduction, for the preparation and drafting of Bill 99, the MSSS and the First Nations and Inuit organizations have engaged in a constant and mutually rewarding dialogue since March 2015. This kind of cooperation from the outset, as we have frequently requested, has had positive effects on the First Nations' reaction to the bill, and it is hoped that this will help lay the groundwork for a durable nation-to-nation relationship between the Government of Québec and the First Nations.

2.2 Legislative and linguistic harmonization and clarification

Numerous amendments introduced by Bill 99 are designed to clarify and harmonize Quebec legislation further to the passage of new laws, particularly the *Code of Civil Procedure*,[27] the AOGHSSN, and the *Act respecting the Representation of Family-type Resources and Certain Intermediate Resources and the Negotiation Process for Their Group Agreements*.[28] The AFNQL and the FNQLHSSC support linguistic and legislative harmonization as well as the Government of Québec's intention to modernize the judicial process. In addition, it is worth emphasizing a number of aspects.

The expanded opportunity to use technological methods[29] in the judicial context is a measure that will favour access to the courts, particularly for First Nations living in remote communities. Among other things, it will facilitate the testimony and participation of children and parents and obviate unreasonable travel. In addition, the new rules relating to the emancipation of a minor by the Court of Québec will allow for a more fluid passage of youth through the legal system and could make emancipation a more viable option for youth involved in a youth protection process while undergoing the transition to adulthood. As well, the inclusion of forms of sexual exploitation[30] will facilitate child protection reporting in such situations and help ensure consideration of the realities experienced by numerous First Nations and Inuit adolescents, who are at higher risk of being victimized by exploitation, abuse, and trafficking.

Other amendments supported by the AFNQL and the FNQLHSSC aim to bring the YPA into better alignment with practice; an example is the introduction of the short-term intervention[32] codifying the practice of the terminal intervention. The increase in the allowable extension of a provisional agreement or for provisional measures that have been ordered, which resolves problems with the application of periods that are often exceeded for clinical reasons,[33] also favours the use of consensus-based approaches – which are preferred by the First Nations – and facilitates the active participation of the parents, the child, the extended family and the community in decision making.

27 *Code of Civil Procedure*, CQLR, c C–25.01.
28 *Act respecting the Representation of Family-type Resources and Certain Intermediate Resources and the Negotiation Process for Their Group Agreements*, CQLR, c R–24.0.2.
29 Bill 99, new section 74.0.1 YPA.
30 *Ibid.*, new section 38(d).
31 Kingsley, C., & M. Mark, *Sacred Lives: Canadian Aboriginal Children and Youth Speak out about Sexual Exploitation* (Vancouver: Human Resources Development Canada, 2001); Farley, M., & J. Lynne, "Prostitution of Indigenous Women: Sex Inequality and the Colonization of Canada's First Nations Women," Fourth World Journal 6(1): pp. 1–29 (2005).
32 Bill 99, new sections 51.1–51.7 YPA.
33 *Ibid.*, new sections 47.1 and 79 YPA.

Bill 99 also introduces the concepts of alternative living environment and kinship foster families. This will help to harmonize the rights and obligations of children, parents, the DYP and the court in the situation of a child entrusted to a person other than his parents. It will also clarify the legal situation of children entrusted to significant persons who become kinship foster families. For greater certainty, an interpretive provision is added to section 1 YPA concerning foster families administered by an Aboriginal community pursuant to the new section 37.6 YPA. But this provision only covers situations in which a child may be entrusted to a foster family under the YPA. In all cases, it is important to note that regular and kinship foster families administered by a FNCFSA do not meet the definitions contained in the *Act Respecting Health Services and Social Services* (ARHSSS),[34] since they are subject to assessment not by an institution of the Quebec health and social services system but by the FNCFSA. Thus, kinship foster families administered by a FNCFSA cannot be included in a comprehensive definition of the term "foster family" flowing from the ARHSSS. Furthermore, within the framework of an agreement pursuant to section 37.5 YPA, a FNCFSA "could take on the responsibilities of recruiting, assessing, and overseeing the activities of its foster families."[35] References to kinship foster families and to section 37.5 YPA should therefore be included in this interpretive provision so that all the different scenarios are covered.

Recommendation 2: That the last paragraph of section 1 of the YPA as amended by Bill 99 be amended to read as follows, for greater clarity and certainty: "In addition, in this Act, whenever it is provided that a child may be entrusted to a foster family or a kinship foster family … has entered into an agreement under section 37.6 in relation to such activities or with whom an agreement under section 37.5 including such activities has been concluded. These persons are then considered to be foster families or kinship foster families for the purposes of this Act."

In addition, further to the question of harmonization and linguistic clarification, the AFNQL and the FNQLHSSC wish to draw the Government of Québec's attention to the use of the term "Aboriginal" in the YPA. For the First Nations, this is a generic term with little resonance that is commonly used by the government as an umbrella designation for the First Nations, Inuit, and Métis. In order to represent the diversity of the nations of Québec, it is recommended to employ the term "First Nations and Inuit."

Recommendation 3: That the term "Aboriginal" be replaced by the term "First Nations and Inuit" in the YPA.

Along the same lines, the AFNQL and the FNQLHSSC have observed that the definitions of "body," "educational body," and "childcare establishment"[36] do not take account of First Nations bodies, yet these bodies deliver services of the same nature as the bodies and institutions of the Quebec system. The First Nations bodies include FNCFSA, health centres, community childcare services, band schools, rehabilitation centres[37] and treatment centres.[38] Acknowledgment of the existence of First Nations bodies in the YPA is essential if Bill 99 is to be made fully effective. For example, the amendment of section 72.6 YPA allowing for disclosure of personal information to a body brought in to collaborate with the DYP loses its essence if First Nations bodies are not covered by the section 1 definition. In addition, if the new section 62.1 YPA is to be efficient, the prescribed stays with a body must be able to take place in an appropriate cultural environment for the First Nation child.

34 *Ibid.*, new section 312 ARHSSS.
35 Clément, S., *Guidelines for Establishing a Special Youth Protection Program for Native People* (Québec: MSSS, 2016), at 17.
36 YPA, *supra* note 2, s 1(d)(d.1)(d.2).
37 E.g., Centre de réadaptation Mishta-An-Auass.
38 E.g., Walgwan Centre.

As regards educational bodies, the current YPA definition does not cover primary and secondary schools situated in a community. The same is true, with some exceptions, for childcare establishments in a community. Given the recent signing, on 19 March 2015, of the Entente relativement à la délégation de l'exercice de certains pouvoirs en matière de services de garde éducatifs à l'enfance et autres sujets, several First Nations communities now have childcare establishments coming within the meaning of the *Educational Childcare Act.* However, other childcare establishments offer the same type of services, yet are not covered by the *Educational Childcare Act*; they are funded through the federal government's First Nations and Inuit Child Care Initiative. A definition including the First Nations would, among other things, make it possible to make legal reference to such establishments in any protection measures that may be agreed upon or ordered.[39]

Since many of these bodies, organizations or services have no legal existence of their own under Quebec and federal law (although there are exceptions) and come under the aegis of a First Nation band council or a tribal council, the wording of the definition must be sufficiently broad to encompass the different modes which are in place for the organization and delivery of services in First Nations communities and which can be difficult to categorize according to Quebec's criteria. For these reasons, the following text is proposed:

"First Nation or Inuit body": *Any body constituted by the local government of a First Nations community or an Inuit village or by a group of communities so represented, any administrative structure reporting to such authorities, any body constituted under provincial or federal law and situated in a community, any body constituted under an agreement with a provincial or federal government that advocates on behalf of children or promotes their interests and the improvement of their living conditions, any educational body of a First Nations community or an Inuit village, and any childcare establishment of a First Nations community or an Inuit village.*

"First Nations educational body": *Any body constituted by the local government of a First Nations community or by a group of communities so represented and providing primary-, secondary-, or college-level education.*

"First Nations or Inuit childcare establishment": *Any body constituted by the local government of a First Nations community or an Inuit village or by a group of communities so represented that offers educational childcare services.*

Recommendation 4: That definitions of First Nation or Inuit body, First Nation or Inuit childcare establishment, and First Nation educational body be added to the YPA.

39 YPA, *supra* note 2, s 54(l) and 91(l).

2.3 Foster families

As mentioned in the introduction, several First Nations communities have implemented FNCFSA with a view to regaining control and autonomy over the delivery of services for First Nations children and families. Moreover, governance in the area of health and social services has been a central concern of the First Nations for decades. During discussions and conversations with members of the Regional Roundtable since 2012, preservation of autonomy as regards the administration of foster families and kinship foster families has frequently been raised as a priority aspect to consider. The AFNQL and the FNQLHSSC are of the view that the introduction of section 37.6 of the YPA provides a clear legal basis for the delegation of responsibilities to the FNCFSA as regards the administration of foster families and serves to maintain the autonomy they have acquired. Although Bill 99 does take account of bipartite agreements already signed as transitional provisions, it applies "only for the elements provided for" in section 37.6.[40] However, according to the information obtained by the FNQLHSSC in 2015–2016, there are significant disparities in the current processes surrounding the administration of foster families, thereby indicating discrepancies with the signed agreements. Since the entry into force of the AOGHSSN, some CISSS have arrogated to themselves responsibilities formerly resting with the health and social services agencies, considering themselves accountable for the recognition of foster families even though this stage has disappeared from the assessment process. Since the majority of the bipartite agreements currently in effect were signed before 2010, this confusion in terms of responsibilities raises issues for the First Nations. Furthermore, several FNCFSA have tacit agreements with the institutions of the Quebec system and take charge of all stages in the administration of foster families with complete autonomy, even though the signed bipartite agreement details a process giving certain responsibilities to the provincial institution. The transitional provision should therefore validate the existing de facto situations and avoid the unnecessary involvement of provincial institutions where they have delegated responsibilities concerning the administration of foster families to the FNCFSA, whether tacitly or in writing.

Recommendation 5: That the existing de facto situations and tacit agreements concerning the administration of Aboriginal foster families and Aboriginal kinship foster families be validated by the transitional provision.

The AFNQL and the FNQLHSSC are also favourable to the amendments concerning the designation of a foster family or kinship foster family by the court. This will promote continuity and stability for children who, having been placed without designation of a family by the court, could be moved from one family to another at the DYP's discretion without the court having to intervene. To allow better consideration of the needs and interests of First Nations children, a designation made by the court could, where clinically and culturally appropriate, comprise several persons who can take care of the child, as is done traditionally. Indeed, it is not uncommon for a First Nations child to live with different families (e.g., grandparents, uncles, aunts, cousins) depending on his age and temperament and what he wants to learn. In this way, the whole community becomes responsible for the child's well-being.

40 Bill 99, new section 85 YPA.

2.4 Effectiveness of section 37.5 of the Youth Protection Act

As noted in the introduction, no agreement under YPA section 37.5, which allows for the creation of a special youth protection program, has yet been signed, even though this section of the YPA was introduced in 2001. Of course, interim agreements or partial transfers of responsibility are possible, but it seems that this has been insufficient to convince communities to get involved in a cumbersome administrative process. In addition to the assessment of child protection reports, the delegation of responsibilities contemplated in section 32, such as orientation, review and the decision to terminate an intervention, could make agreements under YPA section 37.5 more manageable by establishing intermediate levels for the transfer of responsibilities adapted to the wishes and capacities of the different First Nations communities. Such an amendment would have positive effects at the clinical level, since the adaptation and training of community practitioners could take place gradually. In financial terms, the increase in the cost to the FNCFSA would be progressive and more predictable. The length of the negotiations leading to the signing of an agreement under section 37.5 would be considerably shortened, since major responsibilities would already have been transferred and the exercise of these responsibilities would have become routine.

Moreover, after an exhaustive analysis of various models for the transfer of responsibility for youth protection services by First Nations in Canada, the United States, New Zealand and Australia, Libesman concluded in 2004 that a collaborative partnership between governments and First Nations organizations predicated on the delegation of powers and the recognition of the First Nations' self-determination and rights is fundamental. Such a collaboration is indeed indispensable to the development of culture-based youth protection services[41] and must also be reflected in legislative changes such as the one proposed by the AFNQL and the FNQLHSSC below. Ultimately, greater involvement of the communities in the delivery of services at stages prior to the signing of a 37.5 agreement is a priority of the First Nations, as indicated by the members of the Regional Roundtable during the prioritization process mentioned earlier.[42]

Recommendation 6: That section 32 be amended to allow an FNCFSA to take charge of the orientation and review of a child's situation as well as the termination of the intervention, in addition to assessment, by making the following additions:

(…)

Authorization granted to a person mentioned in subparagraphs (a) and (b) who is not a member of the director's staff is valid only for the purposes of the assessment and not for the purpose of deciding whether the child's security or development is in danger. The director may withdraw the authorization at any time.

An authorization relating to a person mentioned in paragraph c who is not a member of the director's staff is valid only for the purposes of subparagraphs (b), (c), (d), and (e) of the first paragraph. The director may withdraw the authorization at any time.

(…)

41 Libesman, T., *supra* note 19.
42 See the section "Culture, a source of protection for First Nations children" in this brief.

2.5 Delivery of quality services, human and financial resources, and access to services favouring the child's cultural identity

The provincial institutions have the responsibility to offer First Nations' members the same services – whether first-line or specialized second- or third-line services – to which all Quebecers are entitled. Québec also acknowledges that it has a responsibility vis-à-vis the continuity and complementarity of the services provided with First Nations communities. Despite these provisions, the communities have commented on factors limiting access to the services of the Quebec health and social services system and report that these services often lack cultural sensitivity. In addition, the political context and the geographical environment of the First Nations, combined with linguistic obstacles and jurisdictional ambiguities, militate against equitable access to services and accentuate the health gap between the First Nations and the Quebec population as a whole.[43] Thus, any amendment to the YPA, particularly involving an increase in the length of the provisional measures prescribed by section 79, should not be applied with a view to making up for a lack of clinical resources in the Quebec system to serve the First Nations clientele or to compensate for court backlogs; extending these measures should be due solely to clinical considerations.

To provide access to more specialized services not provided by organizations working in the communities, the institutions in the Quebec system play an essential support role in favouring the signing of complementary service agreements with the provincial system. The CISSS also have an essential role to play in the process whereby the First Nations partially or fully take over the provision of youth protection services, by encouraging their autonomy and supporting them at each step of the process. This means allocating the human, material and financial resources needed to build a well-functioning collaborative partnership and a more effective services continuum. To cite the conclusion of the study *L'évaluation des impacts de la Loi sur la protection de la jeunesse: Qu'en est-il huit ans plus tard?*:

> [W]ith the introduction of maximum periods of foster care placement, the YPA has accentuated the need for rapid and intensive intervention with parents. Parents' remarks on this issue show that significant work remains to be done to maintain this service intensity once a child is placed. And it cannot be said too often: such improvements will not be possible unless backed by political will, in particular the allocation of the resources necessary for the delivery of rapid and intensive services.[44]

In youth protection for First Nations communities, this means that the provincial government must, among other things, favour access to computer applications for file management (Programme Intégration Jeunesse or PIJ) and support the sharing of knowledge and expertise with practitioners in First Nations communities, in particular by giving them access to training programs designed for practitioners in the Quebec system.

Moreover, we must reemphasize here the importance of applying Jordan's principle, which encourages both levels of government to always prioritize the child's interest in situations of jurisdictional conflict relating to services directed at First Nations children, regardless of their place of residence. These disputes over who has "legislative, constitutional, fiscal, and moral responsibility for First Nations people (children) have had an impact on the availability of services and programs for First Nations children."[45] The full implementation of Jordan's principle, with its full scope and all of its implications, is moreover among the recommendations of the TRC as well as the recent Canadian Human Rights Tribunal decision.[46] The full import of this principle, which is closely tied to access to services, becomes evident when an analysis is made of those amendments to the YPA that relate to the preservation of the cultural identity of a child member of an Aboriginal community (sections 3 and 4 YPA). This means that when a First Nations child is entrusted to an alternative living environment, this environment must take every step to preserve the child's ties to his original cultural identity, among other things, by taking concrete measures that are meaningful and authentic for him. These measures must be unwavering, not limited to a single special event, and access to them must not be undermined by an intra- or intergovernmental conflict. Along these lines, the First Nations communities, working through collaborative partnerships with the provincial institutions and the federal government, must in the first place facilitate the child's participation in activities favouring the preservation of his cultural identity and in his best interest, and then turn to a consideration of aspects relating to financial responsibility.

43 FNQLHSSC, *First Nations in Quebec Health and Social Services Governance Project: Abstract of Health and Social Services Issues* (2015), online at http://www.cssspnql.com/docs/default-source/centre-de-documentation/css_1509_gouvern_abr%C3%A9g%C3%A9-_an_web.pdf?sfvrsn=2.

44 Drapeau, S., et al., *L'évaluation des impacts de la Loi sur la protection de la jeunesse: Qu'en est-il huit ans plus tard?*, Final report submitted to the MSSS, Direction des jeunes et des familles (Québec: Centre de recherche sur l'adaptation des jeunes et des familles à risque, 2015), pp. 42–43.

45 First Nations Child and Family Caring Society of Canada, *Wen:De: We Are Coming to the Light of Day* (Ottawa, 2005), p. 88.

46 TRC, supra note 7; *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 10.

Lastly, on 8 July 2016, Lucie Charlebois, the minister in charge of this file, reiterated in a letter to Ghislain Picard the commitment of the MSSS to take part in work on Jordan's principle and to work jointly with all partners, including the First Nations, to facilitate inter-ministerial and intergovernmental coordination so as to offer children all the required services. The AFNQL and the FNQLHSSC welcome the interest and commitment of the MSSS in this regard.

Recommendation 7:
That Quebec implement Jordan's principle immediately and in its entirety for all jurisdictional conflicts, including intragovernmental conflicts, and that it ensure that the First Nations have access to quality services at least equal to those which Quebecers enjoy, by collaborating with the federal government and by allocating the human, material, and financial resources necessary to provide for an effective continuum of services.

2.6 Maximum periods of foster care

The FNQLHSSC and the AFNQL were particularly concerned about the possible consequences of instituting maximum periods of placement in alternative foster care environments and have strongly denounced this provision, in that such limits were likely to lead to First Nations children being placed outside their communities and to "a breaking of ties between the child and his family, which [could] represent a disastrous social, cultural, and linguistic break."[47] In 2007, this risk was deemed even greater since the First Nations lacked sufficient financial and human resources, on one hand, to implement adequate preventive social services to support families in difficulty in responding to children's needs within the prescribed periods[48] and, on the other, find enough foster families in the community to avert the placement of children in non-Aboriginal families in cases where the alternative life plan becomes necessary.[49] It must also be emphasized that the youth protection system served as the main gateway into social services for children and families living in the communities, since preventive services did not appear there until quite recently (the teams have all been established in the last seven years). This may greatly influence access to services and the intensity of care in taking over services where the parents, who may have suffered multiple wounds and the multigenerational impacts of historical trauma, need the support and assistance of several professionals over a long period. It is clear that to favour the maintenance of the child in his family environment or his return to that environment, the "intensity of services is essential from the outset and throughout the intervention in terms of both the nature of the services and the modalities and rhythm with which they are provided."[50]

Following the entry into force of the legislative amendments in 2007, the AFNQL had sent several letters to Mr. Couillard requesting an immediate suspension of the application of permanent life plans for First Nations children. On 10 June 2008, the Quebec Chiefs met and instructed the AFNQL to take all measures necessary to prevent the application of Bill 125. The AFNQL in particular considered the maximum foster care periods a "looming crisis resembling the proportions of the residential schools era."[51] The resolution passed by the Chiefs further stipulates that the exceptions to the period prescribed in the act are "difficult to apply to the First Nations" due to the lack of services and resources.[52] Data gathered since 2007 uphold the concerns that were raised: increasing numbers of First Nations children are being placed outside their family environment,[53] financial, material, and human resources continue to be insufficient,[54] and First Nations families are not necessarily receiving all the services they need. From an organizational standpoint, the rapidity, intensity, and accessibility of the services entails a major time commitment and involvement of parents and communities in the development of life plans. In this context, the full import of the addition of section 72.6.1 becomes clear: it bolsters the collaboration and partnership between the communities and the provincial system, while allowing practitioners in the communities to be informed of the situation and to ensure that the child does not lose contact with his roots.

47 AFNQL and FNQLHSSC (2006), *Mémoire de l'APNQL et de la CSSSPNQL: Faits saillants et recommandations. Soumis à l'Assemblée nationale du Québec comme complément au mémoire déposé pour le projet de loi n° 125*, p. 5.
48 Ibid.
49 Commission des droits de la personne et des droits de la jeunesse (2005), *Mémoire à la Commission des Affaires sociales de l'Assemblée nationale – projet de loi 125*.
50 Lalande, D., and J. Lortie, *Cadre de référence: un projet de vie, des racines pour la vie* (Québec: Association des centres jeunesse du Québec, 2009), at 18.
51 Letter from the AFNQL to Jean Charest, 18 June 2008.
52 AFNQL Secretariat, Resolution no. 04/2008.
53 FNQLHSSC, *supra* note 10.
54 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, supra note 48.

Although continuity of care and stability of ties are essential for a child and constitute the objectives underlying the maximum period of foster care, the need to keep First Nations children from losing their cultural bearings is quite clear and also constitutes a fundamental factor to be considered in the analysis of their interest. Indeed, one judgment on appeal stated that "the Act does not prescribe any kind of automatic response that forces the court to blindly make a measure permanent with the approach of the prescribed deadline. The role of the court remains entire. It cannot be limited to simply certifying the passage of time without regard for the interest of the child."[55] The importance of preserving cultural identity, the fact that the healing process for parents or guardians who have suffered multiple traumas may be lengthy and the fact that certain services are not easily accessible are all factors that should be considered when exceptions to the maximum periods prescribed by the Act can or must be invoked.

Lastly, when the FNQLHSSC holds information sessions for parents and extended family members, many of them do not understand the implications of the maximum foster care periods and are unfamiliar with the exceptions provided by the Act. This observation holds true throughout the province, as indicated by a study on the impacts of the YPA:

> Half of all parents do not understand that they have a deadline by which to make changes in their lives. They view the deadlines as unrealistic given the changes they have to make so that their children can come home. The parents see themselves as being committed to the change but perceive that the DYP and the judges do not acknowledge the progress accomplished.[56]

Recommendation 8: That exceptions to the maximum periods of foster care placement be interpreted by taking into consideration the historical circumstances and the intergenerational trauma affecting the First Nations, on the one hand, and the fact that quality services are often less accessible for the First Nations, on the other.

2.7 Financial contribution to placement

In order to alleviate the disparities in the application of the financial contribution to placement (FCP) noted by the Ombudsman,[57] among others, Bill 99 proposes that all parents with children in foster care under the YPA pay the FCP, except those whose children are placed with a hospital centre, a local community service centre, a body, or a significant person lacking the status of a kinship foster family.[58] It is important to reiterate here that under the Quebec system, a parent who pays the FCP continues to receive provincial allowances for the child, including the child assistance payment, but these allowances are cut off if the FCP is not paid. In First Nations communities, the situation is variable, to say the least. In some regions, the FCP is billed to parents while in others, it is not. In regions where the FCP is billed to some parents and is in fact paid, the child assistance payments are in some cases deducted without the FNCFSA knowing where the money has gone. The First Nations, the MSSS, Revenu Québec, and INAC must jointly analyze these situations, first to clarify the situation of First Nations families regarding the FCP and secondly to clarify the guidelines for billing the FNCFSA by the institutions of the Quebec system which, in some cases, will deduct the FCP from amounts due for payment by the FNCFSA, but without itemizing the amounts paid by the families in the community. Furthermore, the First Nations and INAC have waited almost two years for the creation of a committee on the costs set for services provided to the First Nations by the Quebec system. This committee, which is to study the disparities in the billing of services among regions and communities, would be the ideal forum in which to analyze the challenges posed by the application of the FCP in First Nations communities and their ramifications.

Recommendation 9: That a committee on the costs set for the services provided to First Nations communities, made up of MSSS, Revenu Québec, INAC and First Nations representatives, be created to deliberate, among other matters, on the existing disparities in the application of the FCP in First Nations communities, and that the ensuing recommendations be reviewed by the AFNQL's Taxation Roundtable.

55 Protection de la jeunesse – 10174, 2010 QCCA 1912.
56 Drapeau, S. et al., *supra* note 46, p. 41.
57 McLaughlin, J., M. Rioux, and M-A Dowd, eds., Rapport du Protecteur du citoyen: La contribution financière au placement d'enfants mineurs (Québec: Protecteur du citoyen, 2013).
58 Bill 99, new section 65 YPA.

2.8 Trans-border customary adoption

The AFNQL and the FNQLHSSC have questions regarding the scope and impact that the amendments relating to adoption[59] will have vis-à-vis customary adoption. At the conclusion of the work of the Working Group on Customary Adoption in Aboriginal Communities and for the purposes of its report,[60] the First Nations and Inuit and Quebec parties agreed on a process of recognition of the effects of customary adoptions of children domiciled outside of Québec in Canada without the need for intervention by the court, the Ministère de la Justice or the DYP. The collective recommendations on this issue were reflected in Bill 81 and Bill 47.[61] However, it was also agreed that further joint deliberation was necessary on the question of other customary adoptions with trans-border implications.[62] Of course, the question of customary adoption outside Québec of First Nations children domiciled in Québec was not specifically mentioned. But in this context seen in its entirety, the provisions of Bill 99 at issue here cannot be adopted without detailed discussions and, as necessary, amendments to ensure that they do not infringe any rights relating to customary adoptions with trans-border implications.

Recommendation 10: That a working group made up of First Nations and Inuit, Ministère de la Justice and MSSS representatives study new sections 71.3.1, 71.3.2, 71.3.3, and 74.1 para. 2.1 prior to their adoption to ensure that they do not infringe any rights relating to customary adoptions with trans-border implications.

Conclusion

In conclusion, the AFNQL and the FNQLHSSC support Bill 99 insofar as it will allow for the preservation of the cultural identity of all First Nations and Inuit children and greater participation by communities in the delivery of services. Of course, the amendments must be implemented with respect for the autonomy, the right of self-determination, and the Aboriginal and treaty rights of the First Nations and Inuit. Finally, all the necessary human, material and financial resources will have to be deployed to guarantee the delivery of quality services to the First Nations and Inuit.

59 *Ibid.*, new sections 71.3.1, 71.3.2, 71.3.3, and 74.1(2.1) YPA.
60 *Supra* note 14.
61 Bill 81, *An Act to Amend the Civil Code and Other Legislative Provisions As Regards Adoption and Parental Authority*, 2nd sess., 39th leg., Québec, 2012; Bill 47, *An Act to Amend the Civil Code and Other Legislative Provisions As Regards Adoption, Parental Authority and Disclosure of Information*, 1st sess., 40th leg., Québec, 2013.
62 *Supra* note 14, p. 159 : «2.11, that the Government of Québec pursue its deliberations with the First Nations and Inuit in order to find potential solutions to facilitate recognition of the effects of the customary adoption of Aboriginal children domiciled outside of Québec and Canada by adopters domiciled in Québec, all in conformity with Aboriginal customs."

Assembly of First Nations
Quebec-Labrador

FIRST NATIONS OF QUEBEC
AND LABRADOR HEALTH
AND SOCIAL SERVICES
COMMISSION