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# Determining the "Core of Indianness": A Feminist Political Economy of *NIL/TU,O v. BCGEU*

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**Abstract**

*In light of Bill C-92, which establishes a framework for Indigenous communities to exercise legislative authority over child and family service provision, this article addresses the contested regulation of employment and labour relations in Indigenous social service workplaces. It approaches this subject by looking back at NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, a case in which employees at a First Nations child and family services provider attempted to unionize. NIL/TU,O set in motion a legal battle over the jurisdiction of Indigenous labour relations that ultimately reached the Supreme Court of Canada (SCC) in 2010. The SCC determined that the labours of the workers at NIŁ TU,O Child and Family Services are a matter of provincial jurisdiction because they fall outside of the "core of Indianness," a contested legal concept used to determine exclusive federal legislative power over "Indians and Lands reserved for Indians." Using Indigenous feminisms and a feminist political economy approach, we argue that this decision rests on gendered appraisals, and indeed obfuscations, of social reproduction – that is to say, the labour involved in the daily and intergenerational care and reproduction of people. Bill C-92 necessitates revisiting the case history in NIL/TU,O because the regulation of labour relations are unaddressed in the new Act. We suggest that the uncertainty surrounding jurisdiction over Indigenous labour has the dual potential of, on the one hand, being used for exploitative or dispossessive purposes, or, on the other hand, taken up as an opening for greater self-determination by Indigenous peoples.*

## Introduction

The Trudeau Liberals' passage of Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families, 2019*, marks a recognition of the right of Indigenous peoples to control the provision of child and family services (Metallic et al. 2019). With


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this new legislation, the federal government has created a framework for Indigenous communities and service providers to govern the provision of child and family services on a case-by-case basis.[1] However, in drafting and implementing this new bill, the government has, unwittingly, waded into the contested terrain of the regulation of Indigenous employment and labour relations.

Although Bill C-92 does not expressly contemplate Indigenous employment and labour relations, the statutory recognition of Indigenous jurisdiction in relation to child and family services potentially puts the prevailing common law arising from the Supreme Court of Canada's (SCC) 2010 decision in *NIL/TU,O* into question. In that matter, NIŁ TU,O – a First Nations child and family services agency – argued that its First Nations character put it within the scope of s.91(24) of the *Constitution Act, 1867*, which gives the federal government exclusive jurisdiction over "Indians, and Lands reserved for the Indians," and that therefore its labour was a matter for federal regulation. The SCC disagreed, noting that the "essential nature of NIL/TU,O's operation is to provide child and family services, a matter within the provincial sphere" and that the Indigenous identity of the workers or its beneficiaries does "not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does."[2] As child and family welfare was a provincial undertaking, the SCC deemed the attendant labour as similarly provincial. But as a statute enacted under s.91(24) of the *Constitution Act, 1867*, Bill C-92 troubles these findings, as it affirms "the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services."[3] The corollary to this, as we argue herein, could similarly extend federal (or Indigenous) jurisdiction to the labour of child and family services. Because child and family services necessarily encompass the paid labour required to delivery these services, an Indigenous governing body that chooses to exercise its "inherent rights" as outlined in Bill C-92 could conceivably extend this governance power to labour relations.

Indigenous employment and labour relations within "Canada," in general, have been characterized by a persistent lack of certainty over jurisdiction. On the one hand, despite the Assembly of First Nations' insistence that Indigenous peoples should govern their own labour relations (Assembly of First Nations 1999), federal and provincial governments and their labour relations boards have been resistant to relinquishing this authority. Moreover, few Indigenous nations have proposed industrial relations frameworks or

1 The Act affirms the inherent right of Indigenous self-government, including jurisdiction in relation to child and family services. This Act outlines the jurisdictional coordination with provinces and the application of laws of Indigenous groups, communities, or peoples that have chosen to exercise their legislative authority in relation to child and family services (Government of Canada, *An Act respecting First Nations, Inuit and Métis children, youth and families, 2019* https://www.parl.ca/DocumentViewer/en/42-1/bill/C-92/royal-assent#ID0EEMAE).

2 *NIL/TU,O v. BCGEU* (2010) at para. 45.

3 *An Act respecting First Nations, Inuit and Métis children, youth and families, 2019.*

sought autonomy over these state functions.[4] On the other hand, though the provinces have primary jurisdiction over labour and employment, the federal government's legislative authority over "Indians, and Lands reserved for the Indians" through s. 91(24) of the *Constitution Act, 1867* has meant that *some* Indigenous labours and activities fall within the federal jurisdiction (Mazerolle 2016, 18). A frequent result of these uncertainties is a legal and jurisdictional limbo wherein Indigenous workers and/or employers/communities sometimes pursue federal (and in some cases provincial) jurisdiction over labour relations for political and/or strategic reasons. Thus, jurisdictional uncertainty can create structural vulnerability unique to Indigenous workers, as evidenced in cases where employers use jurisdiction to evade unionization.[5]

Bill C-92 does not explicitly address issues concerning employment and labour relations, nor does much of the commentary about the new Act (Metallic et al. 2019). However, the new law necessitates revisiting past jurisprudence concerning Indigenous labour relations, particularly the case history dealing with the application of a concept known as the "core of Indianness," which is used to "prove" exclusive federal jurisdiction over Indigenous peoples. Since the *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* SCC) decision in 2010, labour relations in Indigenous social service workplaces have been considered a matter of provincial jurisdiction, against the objections of the Indigenous nations involved in *NIL/TU,O.* The employer sought the federal "protection" offered by the "core of Indianness" in what it articulated as a step toward self-determination over both the provision of social services *and* labour relations. Through its passage of Bill C-92 and its broader legislative authority over Indigenous peoples, the federal government has seemingly reopened these questions concerning the jurisdiction over and the regulation of Indigenous labour relations.

This article re-evaluates the case of *NIL/TU,O* to address these issues by engaging Indigenous feminisms and a feminist political economy (FPE) framework, which centres the paid and unpaid work performed for the purpose of daily and intergenerational reproduction of people. Drawing on FPE, we aim to understand the tensions generated by the Canadian state's simultaneous regulation of wage labour and social reproduction and containment of "Indianness" through the ongoing processes of settler colonial dispossession. We use this case, wherein Indigenous workers at a child and family services provider attempted

4 Naiomi Metallic has argued, against the *NIL/TU,O* finding, that Indigenous peoples should, as a matter of self-determination, govern their own labour relations. However, this raises additional issues in instances where Indigenous employers and employees disagree over their preferred jurisdiction or labour relations regime. See Naiomi Metallic, 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" in Kent McNeil and Naiomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence* (Saskatchewan: Canadian Native Law Reporter, Indigenous Law Center).

5 As was the case in *Four B Manufacturing Ltd v. United Garment Workers of America* [1979] R.S.C.

to unionize, as a lens through which to examine the gendered nature of these tensions.[6] We analyse *NIL/TU,O* as it moved through the legal/court system from 2006 to 2010 and consider its implications for Bill-C-92 and beyond.[7] This case concerns employees who were seeking to organize and bargain collectively at NIŁ TU,O Child and Family Services Society (NIŁ TU,O CFSS),[8] a non-profit child welfare organization formed by several First Nations to serve Indigenous clients on Vancouver Island. On 23 March 2006, the British Columbia Government and Service Employees' Union (BCGEU) applied for union certification to the BC Labour Relations Board (BCLRB) to represent non-supervisory employees at NIŁ TU,O. The employer (NIŁ TU,O) contested this application on the basis that the agency's operations fall within exclusive federal jurisdiction and hence are governed by the *Canada Labour Code*, specifically its provisions on collective bargaining.[9] NIŁ TU,O contended that its activities (the provision of culturally specific Indigenous child and family welfare services) are within federal jurisdiction since they are part of the "core of Indianness." This "core of Indianness" – an essentializing settler colonial concept – has emerged in case law about the doctrine of interjurisdictional immunity around land rights, hunting, fishing and harvesting rights, as well as labour relations. A three-member panel of the BCLRB denied the employer's request for reconsideration, and held that NIŁ TU,O's labour relations, like those of other social service providers in British Columbia, are a matter of provincial jurisdiction. This denial set in motion a legal battle over the jurisdiction of the wage labour performed at NIŁ TU,O, which proceeded through the British Columbia Supreme Court (BCSC), the British Columbia Court of Appeal (BCCA), and, eventually, the SCC. The SCC affirmed the provincial regulation of NIŁ TU,O's labour relations, setting a legal precedent for determining the jurisdiction of labour relations in Indigenous social services and beyond.

According to our analysis, the labour of social reproduction, exemplified by the work involved in the provision of child and family services at issue in *NIL TU,O*, is excluded

6 When using "Indian" and "Indianness" throughout this article, we are referring specifically to the legal formulations of these designations, with recognition of their colonial legacy and historical violence. Unfortunately, within the case law on which this article is based, these are still the terms employed. The term "Indigenous" is used throughout to refer to status and non-status First Nations, Métis, and Inuit living in what is now Canada. See Vowel, Chelsea. 2016. *Indigenous Writes: A Guide to First Nation, Métis, and Inuit Issues in Canada* (Winnipeg: Portage & Main Press). However, this is also a totalizing term that often obscures important differences between Indigenous nations. In particular, this article does not address differences in labour practices between Indigenous nations.

7 *NIL/TU,O Child and Family Services Society v. BCGEU* (2007) BCSC 1080, Cullen J [*NIL/TU,O v. BCGEU* (2007)]; *NIL/TU,O Child and Family Services Society v. BCGEU* (2008) BCCA 333, Groberman J [*NIL/TU,O v. BCGEU* (2008)]; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* (2010) SCC 45, 696 [*NIL/TU,O Child & Fam Serv v. BCGEU* (2010)].

8 Throughout this article, we use NIŁ TU,O Child and Family Services Society's own spelling and punctuation when referring to the agency and the various courts' improper variation of the agency's name ("NIL/TU,O") when referring to specific decisions.

9 *Canada Labour Code*, RSC 1985, c L-2, ss 24, 25, 26, 27.

in the SCC judges' narrow interpretation of the "core of Indianness." As we show, the "core of Indianness" had previously been applied more broadly to delineate which Indigenous activities fell within exclusive federal jurisdiction, under section 91(24), of the *Constitution Act, 1867*. In other words, although labour that touches on the "core of Indianness" is deemed to be a matter of exclusive federal legislative authority, the courts have progressively narrowed the scope of this "core" over time. In the case of NIŁ TU,O, the "core of Indianness" emerges simultaneously and contradictorily (given the history of the *Indian Act*'s assimilatory intent) as a source of both identity protection and material protection. This is an example of the lack of Indigenous jurisdiction over labour relations shaping a dynamic wherein workers and employers utilize the "core of the Indianness" in strategic pursuit of federal jurisdiction. The ultimate exclusion of Indigenous social reproduction from "the core of Indianness" in *NIL/TU,O*, we argue, was driven in part by the SCC's interpretation of Indigenous modes of care as founded on "cultural" rather than material (i.e., labour) practices. In this way, the Indigenous approach to care and service provision undertaken by the employees of NIŁ TU,O was lauded as an example of Canadian multiculturalism but not recognized as integral to the social reproduction of distinctly Indigenous modes of life.

Our focus on the *NIL/TU,O* case is motivated by, first, the knowledge that child welfare, and its associated labours, is a contested site of de/colonizing struggle(s) in Canada and, second, the fact that the relationship between Indigenous labour relations and self-determination, as part of the complexities of settler colonial Canadian capitalism, has received little attention in Canadian political economy (Hall 2019). In light of Bill C-92, we argue that the jurisdictional landscape shaping Indigenous child welfare governance has shifted. With this Act, the federal government has recognized and affirmed the inherent right of Indigenous peoples over child and family services. However, the implications of this legislation are unclear, both because legal recognition necessitates formal agreements (or reasonable efforts toward these agreements) with provinces on an *ad hoc* basis and entails no firm funding commitments and because the new Act makes no mention of labour relations. While it is still early in the application of this Act, through a critical reading of *NIL/TU,O*, this article provides a background analysis of questions of jurisdiction and their relationship to the labour performed in the provision of Indigenous child and family welfare services.[10]

We begin by situating our analysis in a critique of the settler colonial regulation of Indigenous identity in Canada. Our analytic framework is informed by Indigenous feminisms and FPE scholarship that theorize social reproduction as a key site of de/colonizing struggle, as well as critiques of liberal multiculturalism as something that obscures the distinct nature of Indigenous labours and livelihoods. Through this exploration and utilizing this

10 See also Bezanson, Kate. 2018. "*Caring Society v Canada*: Neoliberalism, Social Reproduction, and Indigenous Child Welfare". *Journal of Law and Social Policy* 28: 152-173 for an analysis of *First Nations Child and Family Caring Society v Canada (Minister of Indian Affairs and Northern Development)* [2019] CHRT 39 [*First Nations Caring Society*] and a discussion of the role of funding in jurisdictional disputes over Indigenous child and family services.

framework, we reveal three phases in the gendered application of the "core of Indianness" during *NIL/TU,O*: First, the BCSC applies a broad definition of "the core of Indianness" that includes the labour of social reproduction; second, the BCCA narrows the definition considerably, so as to discount activities tied to social reproduction from "Indianness" and overturns the decision of the BCSC; third, the SCC confirms the BCCA's decision by holding the functional test as determinative and thereby cementing a narrow interpretation of "the core of Indianness." In the final section, we consider some of the issues raised by Bill C-92's seeming divergences from the SCC's decision in the *NIL/TU,O* case.

**An FPE Analysis of "the core of Indianness"**

We draw upon Indigenous feminisms (Green 2001; Anderson 2003; Starblanket 2017) to build a feminist political economy of the "core of Indianness" as it is interpreted in the series of cases related to NIŁ TU,O CFSS. We look through the lens of FPE to analyze how labour that is feminized through Western typologies and often performed by Indigenous women ended up being excluded from conceptions of "Indianness" and "tradition" as conceived by the settler colonial state. Our analysis is located in a critique of the past and present settler colonial processes that have forcibly asserted Canadian state power to define and regulate Indigenous identities, lives, and labour, or, as it is referred to in the jurisprudence/case law, "Indianness." So-called "Indianness" is limited by the contours of settler colonial political and economic development. "Indianness" has evolved, conceptually, as both a tool and articulation of longstanding and multi-scalar processes of dispossession, including settler colonial appropriations of Indigenous lands, resources, and labours and settler governance over Indigenous identities and impediments to Indigenous "modes of life" (Coulthard 2014, 4). At the same time, as Coburn (2019) argues, there is a two-sidedness to "Indianness": While "Indian" identity is regulated by the settler colonial state through the *Indian Act*, it is simultaneously and contradictorily (given the *Act*'s assimilatory intent) a source of both identity protection and material protection (i.e., of land and livelihoods), particularly for those with "Indian status."

We approach our analysis of the "core of Indianness" through the lens of this defining contradiction, aiming to problematize this notion, which is rooted in a narrow and static approach to what it means to be Indigenous and specifically what it means to be an Indigenous person engaged in labour (waged and/or unwaged). At the same time, we assert that whose and what labour is included in and excluded from the "core of Indianness" matters: The lack of Indigenous jurisdiction over labour relations means that Indigenous workers and employers end up strategically pursuing either federal or provincial jurisdiction. As well, jurisdictional uncertainty around Indigenous labour relations has meant that Indigenous workers either find it difficult to unionize or face long legal battles, which militates against forming or joining trade unions. More broadly, these debates around the "core of Indianness" are a prism through which to view the state reproduction of settler colonialism, the legal recognition of particular forms of "Indianness," and the obscuring of other forms. As Indigenous feminist theorists have demonstrated, settler colonialism has legislated new gender inequalities that have stripped Indigenous women of their leadership

roles, their band membership, and, under Canadian law, their Indigenous identity (Gehl 2000; Green 2001; Lawrence 2003; Starblanket 2017). We assess the "core of Indianness" through attention to these gendered and colonial continuities.

A narrow and static approach to "Indianness" reproduces ongoing dispossession in Canada, including processes that, at the service of the settler colonial state and economy, continue to strip Indigenous peoples of their identities, lands, relationships, and livelihoods (Coulthard 2014; Panagos 2016). A gendered analysis reveals how these processes of dispossession have denied and targeted Indigenous modes of social reproduction, such as through the surveillance and disciplining of Indigenous caring labours and the removal of Indigenous children from their care networks by state child services. Similarly, a gendered analysis of labour-focused case law shows how processes of social reproduction are conceptually separated from both processes of production (narrowly defined) and the traditional (often masculinized) forms of (largely) non-wage subsistence labour sometimes included in the "core of Indianness" (e.g. hunting and trapping). Depending on their political/legal/strategic position in relation to the settler colonial state and its legal apparatuses, some Indigenous nations, such as in the case of NIŁ TU,O, understand the "core" and federal jurisdiction in an expansive sense, while others have resisted the federal jurisdiction as a colonial imposition.[11]

On its face, the NIŁ TU,O case and much of the other case law related to "the core of Indianness" concerns debates about jurisdiction. The ultimate result in *NIL/TU,O*, which narrows what courts will consider matters related to "Indianness," is that the regulation of Indigenous caring labours is found to fall within provincial rather than federal jurisdiction. Notably, the legal process of ascertaining whether Indigenous labours are a matter of provincial or federal legislative authority reflects an underlying assumption of settler colonial jurisdiction over Indigenous peoples. Thus, in the legal volley between federal and provincial jurisdiction detailed below, settler colonial jurisdiction is assumed and a larger legal contestation – between Indigenous and settler colonial law and who defines and regulates Indigenous lives – is obscured, despite being pivotal. Indeed, although articulations of "Indianness" diverge in the judgments examined below, even in the most expansive interpretations (for example, at the BCSC [2007]), being "Indian" has little to do with the characteristics of peoples, histories, or lands but, rather, concerns the relationship between certain activities and federal rule over "Indians." That is to say, "Indianness" is defined not through a discussion of the peoples it identifies and their self-conception but, rather, through the federal powers it covers. As Pasternak (2014) writes, "micro-powers, enacted under federal and provincial jurisdictions, have carved out spatial patterns of land use and population control that defy easy mapping. This is because jurisdiction is not just an abstract or descriptive concept, but a practice that actively works to produce something"

11 For example, see *Manitoba Teachers' Society, on behalf of the Fort Alexander Teachers' Association (Local 65 of the Manitoba Teachers' Society) v. The Chief and/or Fort Alexander School Board of the Sagkeeng Education Authority* (1984) 1 FC 1109; *Saskatchewan Indian Gaming Authority Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al.* (2000) 2000 SKQB 176; *Mississaugas of Scugog Island v. CAW* (2006) ON SCDC 17944.

(p. 151). It is this "something" – that is, the labours and peoples that are understood to be within and outside of the "core of Indianness" – that we seek to expose and assess.

**Gendering the "Core of Indianness"**

Our analysis of the case law surrounding NIŁ TU,O CFSS identifies a pattern whereby certain types of labour are considered outside of the "core of Indianness." In one sense, the "core" has been read through a historically constructed tension wherein labour not particularly related to "Indianness," especially when it is paid labour, is not considered a matter of federal legislative authority. In *NIL/TU,O*, the labour of social reproduction – generally feminized as it is in Western capitalist political economies like Canada (where much of it is performed unpaid) – was also positioned outside, that is, not *at* the "'core' of Indianness." In this instance, the SCC did not find such labour essential to the reproduction of "Indianness" as it takes place through the colonial institution of Band governance. Instead, the Court conflated the feminized labour of social reproduction with a universalized approach to childcare, and celebrated this as a "culturally sensitive" orientation to care in line with Canadian liberal multiculturalism.

Although there has been variability in the breadth afforded to the "core of Indianness" as it relates to labour, positive formulations of "Indian" labour are limited. Further, "Indian" labour is typically defined via a static approach to Indigeneity wherein being Indigenous is proved through adherence to tradition unchanged through time (Panagos 2016; Dick 2009). As Anderson (2003) and Starblanket (2017) both argue, settler colonialism reproduces an unchanging, pre-contact version of Indigeneity wherein being Indigenous requires adhering to particular cultural criteria. Not only does this deny the generality of change in *any* community or mode of life, but it also obscures the particular changes wrought by settler colonialism itself. Thus, ironically, the adaptations and negotiations Indigenous communities are forced to undergo for the sake of survival – that is, in order to reproduce their societies through and against the many interventions of settler colonialism – make proving "Indianness" a near-impossible task. In the case of labour, the "core of Indianness" has been narrowed so as to frequently position it outside of wage labour and market exchange. Further, the settler colonial lens typically situates only land-based and masculinized labours, such as hunting and trapping, as being within the scope of Indigenous labours *qua* "Indianness." As scholars across disciplines show (Dombrowski et al. 2003; Usher, Duhaime, and Searles 2003; Irbacher-Fox 2009; Kuokkanen 2011; Hall 2015), many Indigenous societies have come to mix wage and non-wage labours in their productive, distributive, and consumptive activities as means of reproducing Indigenous modes of life in the contemporary Canadian political economy. For example, in the northern mixed economy, wages garnered through seasonal or shift work are used to pay for the materials required for land-based harvesting (Abele 2009; Harnum et al. 2014). The sharp division between wage labour and "Indian" labour denies these complex relations. Furthermore, when articulated as above, activities such as hunting are treated as those of individual "Indians," whereas, for the most part, land-based activities are undertaken cooperatively through the labours of multiple community members, including women.

This occlusion of activities undertaken collectively brings us to our central focus: the feminized labour of social reproduction. These labours, in particular, are obscured in the cases reviewed in this article through a narrow and static formulation of "Indian" labour. Starblanket (2017) calls attention to the gendered power relations inherent in the creation of "culture" in the context of settler colonial/Indigenous relations. In order to protect their rights in the courts, Indigenous communities have, she writes, identified a select set of knowledges and practices as "traditional." There is a danger, however, as Starblanket reflects more broadly that "strategic essentialism" and "gendered notions of cultural authenticity [may] determine whose experiences or interpretations of tradition count as significant and whose do not" (Starblanket 2017, 26).

Imported settler patriarchal assumptions about what counts as "labour" have operated alongside gender inequalities imported in parallel within communities to marginalize Indigenous women's roles in land-based, or subsistence, labours. Thus, to take the example of hunting, above – while harvesting (hunting, trapping, fishing, gathering) is usually a communal affair that includes the labours of both men and women, aspects of this labour often taken up by Indigenous women (which, in the case of hunting, often include the skinning and tanning of hides, drying and cooking of meats, and communal distribution) are excluded from a narrow masculinized interpretation of hunting that comprises only the activities involved in the actual killing of the animal (Irlbacher-Fox 2009).

Similarly, when it comes to the labour of social reproduction – in contract to FPE, which highlights the paid and unpaid work performed for the purpose of daily and intergenerational reproduction of people, community and ways of life (Vosko 2002) – courts have cast traditional modes of Indigenous "care" as frozen in time (Anderson 2003). Contradictorily, these modes of care have been defined outside of what it means to be "Indian." Indeed, as shown in the analysis of the BCCA and SCC decisions below, although the employees of NIŁ TU,O CFSS are engaged in Indigenous-led and culturally informed practices of the day-to-day care of Indigenous children and educative activities that reproduce Indigenous knowledge across generations and communities, the courts do not understand this care work, which in this instance takes the form of work for remuneration, to be "Indian" activity.

By contrast, as Anderson (2003) argues, contemporary Indigenous modes of care and reproduction are central to Indigenous identity and resistance. That is, the very act of reproducing Indigenous peoples and livelihoods is an act of survival and resistance in the face of the genocidal impulses of settler colonialism. However, the approach of the courts (the BCCA and SCC in this instance) in *NIL/TU,O* reframes the decolonizing labours of social reproduction as examples of multiculturalism, rather than as part of "the core of Indianness." By rendering these decolonizing labours of child and family welfare work in this way, the gendered omission of social reproduction from what counts as "labour" is articulated through the specifics of Canadian multiculturalism, wherein group difference is "civilized" by the "unity-driven space of multicultural nationalism" (Kernerman 2005, 11). The effect is an equation of all (i.e., multi) "cultures" in Canada, erasing the history of Indigenous dispossession, especially as this dispossession

(continuously) affects women in communities and households that are restructured toward production for profit (Hall 2015).

As Coulthard (2014) notes in parallel, an emphasis on liberal recognition has, in practice, obscured the distinct ontological and material ways of life and demands of Indigenous peoples in favour of a flattened and state-friendly approach to difference. The de-historicizing view of the relations between Indigenous people and the settler colonial state as "expressions of difference," Green (2000) suggests, strays into "the logic of equivalence, positing commensurability between all opposed minorities" (p. 13). The use to "multiculturalism," wherein the NIŁ TU,O CFSS is lauded for its cultural sensitivity on par with other cultural minorities but outside of "the core of Indianness," is ideologically supported by the general tendency to relegate Indigenous women's labours to the "cultural" realm, denying the distinct modes of life that they reproduce (Hall 2015).

In documenting and querying the legal decisions that follow, we pursue the following questions: What constitutes the "core of Indianness" and how is it gendered? Upon whose histories does the "core of Indianness" depend, and whose/what histories does it obscure/negate? What are the strategic uses and disuses of the "core of Indianness," and how do these articulate ongoing and gendered processes of dispossession? Before addressing these questions by interrogating the case of the NIŁ TU,O CFSS, we briefly outline the political context by describing the federal jurisdiction over Indigenous peoples and the state of Indigenous child welfare in Canada.

**Child Welfare and the Federal Jurisdiction**

There is a long history of settler colonial Canadian state relations with, and interventions into, the care and welfare of Indigenous children. While attempting to avoid flattening the complex and uneven history of these state interventions, we identify two dominant tendencies relevant to our inquiry: targeting Indigenous childcare (e.g. household and community-level nurturance, rearing in the form of socialization, passing on cultural traditions and practices, provisioning in the form of food and shelter, community education) as a key site of settler colonial encroachment on the one hand and, on the other, disavowing Indigenous forms of social reproduction.

The federal government's activist role in the education of Indigenous children is a long and painful one, dominated largely by politically sanctioned, church-run residential schools. The last residential school did not close until 1996, and, since then, state interventions into Indigenous social reproduction have continued. Indeed, the apprehension of Indigenous children by child services has become the "new residential school" (Blackstock 2016, 285). In Canada, there are more Indigenous children in foster care now than there ever were in residential schools (Christensen 2014). Nationally, First Nations, Inuit, and Métis Nation children make up 7.7 per cent of the population under fifteen but 52.2 per cent of the Canadian children in foster care in private homes (Government of Canada 2018). This extreme overrepresentation is the result of the racialized and gendered targeting of Indigenous women as "deficient" mothers (Thobani 2007, 126). The violent consequences of disrupting Indigenous relations of social reproduction, particularly childcare, are

recognized in the mandate of the NIŁ TU,O CFSS to provide Indigenous care for Indigenous children, as well as in the passage of Bill C-92 and the ostensible move to recognize the inherent jurisdiction over child and family services of Indigenous nations themselves.

Disavowal of Indigenous social reproduction is, on the other hand, both a general and a specific phenomenon. Generally, the settler state – in its policies, policing, and welfare provisioning at provincial and federal scales – has constructed Indigenous women as deficient in opposition to a white norm (Thobani 2007). Indigenous forms of care have been restricted by a static approach to "tradition" that denies, first, the ways in which Indigenous care relations have been shaped by settler colonialism (Anderson 2003) and, second, the myriad dynamic constellations and methods of care enacted in contemporary Indigenous communities (Starblanket 2017). More specifically, Indigenous forms of social reproduction have been disavowed through a state assumption and promotion of Western nuclear and feminized structures of care – that is to say, the assumption that childcare will take place in the context of a nuclear (and often male-breadwinner/female-caregiver) family. This assumption is far from benign; as Chelsea Vowel (2016) notes, the primary reason for the apprehension of Indigenous children is the finding of "neglect," which can include an assessment that a child is living in an overcrowded household. The finding of "neglect" is an individualized, punitive response to high levels of Indigenous poverty in Canada (MacDonald and Wilson 2013), divorced from the centuries of colonial dispossession and exploitation of Indigenous peoples and lands. However, "neglect" is also a racialized assessment that denies Indigenous household and kin structures. What is framed as "overcrowded" can often be an intergenerational household arrangement, with multiple kin living together, a rich and common practice in Indigenous communities, that helps to facilitate intergenerational relationships and learning. The state disavowal of Indigenous forms of education, such as intergenerational learning, is a gendered omission that links state approaches to social reproduction and traditional Indigenous labours. In many communities, Indigenous women hold particular responsibilities for carrying and sharing land-based, subsistence knowledge across generations (Nahanni 1992).[12]

Notably, the courts' arguments around the "Indianness" of the labour of employees of NIŁ TU,O CFSS and the content of its services do not turn solely, or even primarily, around notions of what it means to be Indigenous, but are driven by questions of the scope and parameters of federal jurisdiction over "Indians, and Lands reserved for the Indians." The BCSC ruling, for example, refers to *Tobique*,[13] which asserted that section 114 of the *Indian*

12 For example, Nahanni (1992) draws upon her experiences on the land with Dene families to demonstrate the tight links between subsistence and intergenerational education. Nahanni followed family members who work with their children on the land to teach them the skills they need to reproduce a subsistence orientation. Notably, in discussing Dene women's teaching role, she links their subsistence activities with their educative and caring responsibilities, responsibilities that FPE associates with social reproduction. She demonstrates that '"nurturing" and "providing" are customarily attached to Dene women's approaches to "learning" and "teaching." Conversely, as we shall see in the analyses that follow, feminized caring labours are divorced from that which is deemed "traditional."

13 *Tobique Band Council v. Sappier* (1988) 87 NRI (FCA).

*Act* provides for agreements with the provinces "for the education in accordance with this Act of Indian children." The *Tobique* decision continues: "The same technique of federal provincial agreements can of course be extended to social services for Indian children and families, provided funds are made available by Parliament…They deal with Indians qua Indians [and] They are related to 'Indianness.'"[14] Thus, because the welfare of Indigenous children is related to "Indianness," it is here understood as a matter of federal jurisdiction. Federal jurisdiction over Indigenous children and their welfare continues in, for example, federal funding for on-reserve schools, a model which has resulted in inequitable funding for Indigenous on-reserve education (Metallic et al. 2019). However, even in the BCSC's reference to *Tobique*, and certainly in the rulings that follow, this jurisdiction is in tension with the provincial jurisdiction over the *paid labour* of child and family services (as a matter of s. 92(13) "Property and Civil Rights"), even when performed by Indigenous organizations and employees. As activists and scholars have noted, lack of jurisdictional clarity can and does result in harm (Metallic, Friedland, and Morales 2019); in the case of jurisdictional uncertainty related to Indigenous child and family services, the Inquiry into Missing and Murdered Indigenous Women calls this "interjurisdictional neglect" (National Inquiry 2019; Friedland 2020). Again, the lack of certainty and continuity concerning Indigenous employment and labour relations sets the conditions for a political struggle over federal/provincial jurisdiction.

## *NIL/TU,O v. BCGEU a*nd "the Core of Indianness"

In the following sections, we turn to a chronology of the *NIL/TU,O* case (at the BCSC, BCCA, and SCC). As both the employer and union recognized, the issues addressed in the case go far deeper than jurisdiction over labour relations. This case raised questions about the federal government's responsibilities to Indigenous peoples and opened a debate about which First Nations' labours and activities fall within the scope of the "core of Indianness" and thus under section 91(24) of the *Constitution Act, 1867*. Although section 91(24) is understood to confer jurisdiction and not rights, as our analysis demonstrates, disentangling the two is exceedingly difficult because determination of federal jurisdiction necessarily involves evaluating which activities and labours count as "Indian." Because of the unique "special status" of Indigenous peoples federally in Canada, uncertainty around the regulation of Indigenous employment relations has raised far-reaching questions about how the legal apparatuses of the colonial state negotiate the relationships between Indigeneity, wage labour, and social reproduction.

### The BC Supreme Court's Broad Conception of "Indianness" (2007)

Following the employees' and BCGEU's successful attempt to obtain certification of a bargaining unit at NIŁ TU,O CFSS at the BCLRB, the employer (NIŁ TU,O) made an application for judicial review, requesting that the certification be set aside on the basis that the organization falls within the federal jurisdiction and that, hence, its labour relations are governed by the *Canada Labour Code*, making the Canadian Industrial Relations Board

14 Quoted in *NIL/TU,O v. BCGEU* (2007) at para 54.

(CIRB) the appropriate site for certification. The basis of its argument was that NIŁ TU,O provides child and family services to First Nations people in a specifically Indigenous manner. Through a tripartite delegation agreement between the federal and British Columbia governments and the organization itself, the provision of child and family welfare would be delegated to NIŁ TU,O in recognition of the failure of both levels of government to provide adequate and culturally appropriate services. Even though child and family welfare is constitutionally within provincial jurisdiction and the government of BC administers the *Child, Family and Community Service Act*,[15] powers were delegated to NIŁ TU,O to act "for the benefit of Indian persons under 19" in providing child and family services to First Nations community members, assuming "Canada would reimburse the cost of child protection services for certain eligible children."[16] Because of federal involvement in this delegation and what NIŁ TU,O understood to be the scope of federal responsibility to Indigenous peoples under section 91(24) of the *Constitution Act, 1867*, the employer believed that the regulation of its labour relations should fall within federal jurisdiction.

NIŁ TU,O pursued this application on several grounds. Foremost were the facts that all of the children it served are "of First Nations and are Indians within the meaning of the Indian Act," that 86 to 90 per cent of its services are provided "on reserve lands," and that the organization provides services culturally necessary for survival.[17] To this end, NIŁ TU,O's chief programming includes services of a uniquely Aboriginal nature, such as school programs centring on First Nations culture, a residential camp focused on rebuilding traditions, a youth justice initiative, school support for First Nations children having difficulties fitting into non-First Nations schools and societies, and cross-cultural education. Furthermore, BC's Ministry of Child and Family Services becomes involved in NIŁ TU,O's files only when child protection issues come into play – that is, only in rare cases (i.e. in "reportable circumstances in which child apprehension could occur").[18] Additionally, as the employer emphasized, the federal government funds fully 75 per cent of its services, given its responsibility for "Indians and lands reserved for the Indians" and its commitments under the tripartite agreement.

Rather than to avoid unionization – as it assumed the union would be certified by the CIRB under the *Canada Labour Code* – NIŁ TU,O pressed these claims to oppose the narrowing of the "core of Indianness" that had arguably taken place at the BCLRB (Wente 2011). In the original decision of the BCLRB, adjudicators found that NIŁ TU,O fell within the provincial jurisdiction based on the approach adopted in a pivotal case known as *Four B Manufacturing Ltd. v. United Garment Workers of America*, involving a private sector firm manufacturing leather uppers for the Bata Shoe company on an Indian

15 RSBC 1996, c 46.

16 *NIL/TU,O v. BCGEU* (2007) at para 3.

17 *Ibid* at paras 5, 6.

18 *Ibid* at paras 6,10.

Reserve in Ontario.[19] In *Four B*, the majority found in favour of the union and argued that the entity fell within provincial jurisdiction. The Vice-Chair, writing for the BCLRB, drew from *Four B* the following two-part test to determine jurisdiction over Indigenous labour relations: The first step involves querying "the primary focus of the *normal and habitual activities* of the operation in question (in) respect to the status of Indians referred to in the jurisprudence as 'Indianness'"; the second step then concerns the question of whether the relevant "provincial law impairs the status or capacity" of Indians.[20] In addressing these questions, and drawing in particular on what the BCLRB deemed an analogous case (namely, *Native Child and Family Services of Toronto*),[21] the Vice-Chair found that, while NIŁ TU,O is clearly an "Indian" organization, "'Indian' content without some kind of connection to the exercise of federal legislative power doesn't necessarily attract federal jurisdiction over labour relations." She continued, "there is nothing in the *Indian Act* related to child welfare or cultural organizations."[22] In making this judgement, the Vice-Chair suggested that the primary focus of NIŁ TU,O is child welfare, which is clearly a provincial responsibility under the *Constitution Act, 1867*. Accordingly, employees of the organization appropriately report to the province, and only the province can intervene in the most extreme situations (of apprehension). The role of the federal government, in contrast, is limited to providing funding. The Vice-Chair at the BCLRB stated that "the association of First Nations *with one another and others* for labour relations purposes does not affect 'Indian' status."[23] In taking this interpretive turn, the Vice-Chair accepted the argument developed subsequently that some laws (such as traffic laws) are of general application whereas other laws, such as those falling under wildlife regulation, are intimately related to "Indianness" and that labour relations laws fall within the former grouping.

The BCSC took these renderings into account in making its decision, but it also cast attention to the federal-level cases of *Qu'appelle*, *Sagkeeng*, *Shubenacadie*, *Tobique,* and *Westbank* upon which NIŁ TU,O and the BCGEU rested their arguments.[24] In both *Qu'appelle* and *Tobique* (respectively, a school providing education and residential care to Indigenous children and a child welfare agency of the Tobique Indian Band), adjudicators found educational and/or child welfare organizations providing services to Indigenous

19 (1980) 1 RCS 1031, Laskin CJ [*Four B*].

20 *NIL/TU,O v BCGEU* (2007) at para 13.

21 *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* (2010) 2 RCS (SCC) 46.

22 Quoted in *NIL/TU,O v. BCGEU* (2007) at para 15.

23 *Ibid* [emphasis added].

24 *Qu'appelle Indian Residential School Council v. Canada* (1988) 2 FC 226, 14 (FTR) 31 [*Qu,appellee*]; *Sagkeeng Alcohol Rehabilitation Centre Inc v. Abraham* (1995) 1 CNLR 184 (FCTD) [*Sagkeeng*]; *Shubenacadie Indian Band v. Canada (Canadian Human Rights Commission)* (2000) 187 DLR (4th) 741 (FCA) [*Shubenacadie*]; *Tobique Band Council v. Sappier* (1988) 87 NRI (FCA) [*Tobique*]; *Westbank First Nation v. British Columbia (Labour Relations Board)* (1997) 39 CLRBR (2d) BCSC, Tysoe J [*Westbank*].

children and families (i.e. "Indians qua Indians")[25] to be within federal jurisdiction, regardless of agreements and subsidiary agreements. This too was the case in *Sagkeeng*, an alcohol rehabilitation centre located on an Indian Reserve "providing health care services designed and operated to meet the needs of its Indian beneficiaries."[26] Interestingly, in *Shubenacadie*, where the question was whether social assistance should be provided to "non-Indians" living on reserves, the Federal Court of Appeal also rendered that the federal "government's general responsibility to Indians as a result of s. 91(24)…" required it to be responsive to their families and communities such that it should provide social assistance to "non-Indians" living on reserves.[27] Consistently, although the decision led to a rendering that the entity in question was provincial, in the case of *Westbank*, the court found that, even though a care facility (Pine Acres) was located on an Indian reserve, the fact that it was "a for-profit enterprise intended to serve the South Okanagan [population] generally" made it provincial jurisdiction.[28]

Drawing together such decisions, and finding that the functional test adopted from *Four B* was not well-applied – criticizing, in particular, the notion of inter-jurisdictional immunity – the BCSC ultimately found in NIŁ TU,O's favour. It rendered that the organization's purpose – cultural and social reproduction through the support of Indigenous children and families – is "closely connected to the [Indigenous] rights 'at stake'" and confirmed its "Indianness."[29] In this decision, although it surveyed previous cases confounding its relatively broad definitional approach, the BCSC thus applied a definition of the "core of Indianness" encompassing the paid labour of social reproduction, epitomized by the work involved in the provision of child and family welfare services.

**The BC Court of Appeal and Narrowing of the "Core of Indianness" (2008)**

Although the BC Supreme Court decision and NIŁ TU,O's reasoning concerning its federal regulation drew on case history that characterized the "core of Indianness" as encompassing a broader range of services and labours, the BCGEU's next appeal to the BC Court of Appeal also had legal precedent on which to draw. In sectors outside of Indigenous enterprises, the courts have quite clearly elaborated the criteria for determining federal jurisdiction over labour relations and employment standards (for example, in *Canadian Western Bank v. Alberta* in 2007).[30] Put simply, only the employment relations of those sectors and enterprises where federal legislative power is implicated are within the jurisdiction of Parliament (most commonly, where interprovincial or international travel, shipping or finance are concerned,

25 *NIL/TU,O v BCGEU* (2007) at para 55.

26 *Ibid* at para 57.

27 *Ibid* at para 61.

28 *Ibid* at para 68.

29 *Ibid* at para 79.

30 2 SCR (3) SCC 22.

or other areas of "national interest," such as uranium mining). The difficulty with the regulation of Indigenous labour, as many courts and litigants have noted, is that the question revolves around jurisdiction over *people*, not "businesses or industries, or undertakings."[31] The central question consequently involves delineating exactly what is encompassed by the "core of Indianness" and the federal jurisdiction over "Indians and lands reserved for the Indians" under section 91(24) of the *Constitution Act*, *1867*.

The Justices at the BC Court of Appeal disagreed with the reasoning set out in the BCSC decision, and maintained that the practical activities of NIŁ TU,O (i.e. child and family welfare services) did not mean that its labour relations touch the "core of Indianness." Instead, the BCCA claimed that, although the activities of the agency – including both the identity of the people it hires and the services it provides – are concerned with the maintenance and promotion of Indigenous identity, the regulation of labour relations at the provincial level does not impair this aspect of the operation. In the course of reviewing the case history relied upon by Justice Cullen at the BCSC (where Indigenous services were found to be federal because of their "Indianness"), Justice Groberman (on behalf of the BCCA) questioned whether the content of NIŁ TU,O's activities by extension meant its labour relations were a matter of federal jurisdiction. He noted that previous judges had found the federal Parliament's ability to legislate on matters of Indigenous social welfare, health, and education sufficient to extend federal jurisdiction into the labour relations of these workplaces. In disagreeing with this approach, the BCCA decision maintained that, even if federal power is involved in creating or funding the provision of services specifically for Indigenous peoples, this does not necessarily mean that the labour relations within these workplaces are also a matter of federal jurisdiction. By making this exclusion, the BCCA moved to discount the labours of Indigenous social reproduction from within the legal definition of "Indianness."[32] Although the BCCA acknowledged that the federal government may well have legislative authority over certain aspects of Indigenous child welfare and family services, it argued that this did not by extension mean that the labour relations of Indigenous social services touched "the core of Indianness" and were therefore matters of federal regulation.

However, the BC Court of Appeal nevertheless considered the most relevant issue to be establishing that child and family services were *generically* a matter of provincial legislative authority (i.e. that Indigenous child and family welfare did not differ from child and family welfare services provided to others within Canada).[33] Justice Cullen in his BCSC decision had found the First Nations content and practice of the agency relevant for determining federal jurisdiction. By contrast, the BCCA Justices reasoned that, because child and family services are (generally) a provincial matter, the formal content through which these services are delivered should not bear on their jurisdiction. In drawing their conclusion, the Justices wrote, "Social services must, in order to be effective, be geared to the target clientele. Neither

31 Respondent's Factum, *NIL/TU,O Child & Fam Serv v BCGEU* (2010) at para 52.

32 *NIL/TU,O v. BCGEU* (2008) at para 56.

33 *Ibid* at para 61.

the importance of a service to an individual, the fact that a First Nation derives a benefit from a service, nor the fact that the service is provided in a manner conforming to cultural norms mean that the service goes to 'the core of Indianness.'"[34]

However, the union, in its Factum to the Supreme Court of Canada (as well as the SCC itself, as discussed below), also recognized this reasoning as only partial. The jurisprudence was already clear that, if federal paramountcy is established, management and labour relations necessarily follow. An exemplary case involving employees at the nuclear facilities (federal) of Ontario Hydro (otherwise provincial) had determined that where federal legislative authority prevails, jurisdiction over labour relations cannot be separated.[35] By entertaining the notion that the content of the culturally specific provision of child and family welfare services might be a federal matter, the BCCA left open further litigation on exactly *how* federal a service needs to be before paramountcy – and thus federal jurisdiction over labour relations – is established. The BCCA had thus opened a pathway through which to narrow the "core of Indianness" by arguing that the content of child and family welfare services should not bear on jurisdictional power over them, but it would be up to the Supreme Court of Canada to clarify just how narrow the definition of the "core of Indianness" would be, which labours and activities it would encompass, and how the formal test for determining "Indian" labours or enterprises would operate.

## The Supreme Court of Canada and the Gendered Narrowing of "the Core of Indianness" (2010)

In 2010, the Supreme Court of Canada upheld the ruling of the BC Court of Appeal, maintaining that NIŁ TU,O is indeed a provincial undertaking. The Court favoured the union's claim that child and family welfare services agencies, and thus their labour relations, are provincially regulated, whether or not these services "are designed and delivered by First Nations people to First Nations people to ensure preservation of First Nations identity."[36] Importantly, the SCC extended the first part of the two-step legal test previously used in jurisprudence to determine the status of a "federal undertaking" in relation to jurisdiction over labour relations in First Nations private industrial enterprises (as in *Four B*) to public First Nations agencies delivering child and family welfare services. With this extension, the majority precluded consideration of the legal meaning of "Indianness" – effectively making the second step of the functional test concerning how provincial legislation might "impair" the "core of Indianness" irrelevant. The functional test became a means to avoid considering the "Indianness" of Indigenous service providers, as the Court's decision indirectly promotes a narrow reading of the scope of federal jurisdiction under section 91(24). By doing so, the Court practically excluded Indigenous child and family welfare services previously interpreted to be a matter of federal legislative authority under section 91(24)

34 *Ibid*.

35 *Ontario Hydro v Ontario (Labour Relations Board)* (1993) 3 SCR 327).

36 Appellant's Factum, *NIL/TU,O Child & Fam Serv v BCGEU* (2010) at para 7.

in relation to "Indians and lands reserved for the Indians." By way of applying the same "functional test" previously used for private industrial enterprises to NIŁ TU,O, in this case the SCC excluded the Indigenous labour of social reproduction from being considered as inherent to the cultural reproduction of Indigenous peoples and, by extension, from their special status within Canada's settler-colonial system of federalism. In this way, the SCC decision set a major precedent for the legal understanding of Indigenous labour in Canadian constitutional law – precluding the option of strategically classifying Indigenous child and family services within the "core."

The SCC was divided regarding the purpose of the functional test but nonetheless arrived at the same decision, finding provincial jurisdiction over the labour relations of NIŁ TU,O.[37] Justice Abella, writing for the majority, found that section 91(24) need not change the approach that the SCC takes in determining the jurisdiction of an entity's labour relations.[38] In strictly applying the functional test as the first step in a two-step process to determine jurisdictional authority over an enterprise's labour relations, she maintained that the nature, operations, and habitual activities of NIŁ TU,O comprise the provision of child and family services, and that it is accordingly regulated exclusively by the province. Abella foreclosed the question of "the core of Indianness" by stating that "since the question of whether an entity's activities or operations lie at the 'core' of a federal undertaking or head of power is not part of the functional test, and since the functional test is conclusive, an inquiry into the 'core of Indianness' is not required."[39] The minority claimed that the proper approach "is simply to ask, as the cases consistently have, whether the Indian operation at issue, viewed functionally in terms of its normal and habitual activities, falls within the core of s. 91(24)."[40] In answering this question, however, they arrived at the same conclusion as the majority: Child and family welfare services, the minority affirmed, are not an "aspect of Indianness" that "warrants federal exclusivity," as child and family welfare is not "necessary incident[s] of Indian status."[41]

In designating child and family welfare services as activities not integrally related to what makes "Indians and lands reserved for the Indians" a federal responsibility, the majority

37 The disagreement between the majority and minority revolved around how inter-jurisdictional immunity was to be interpreted in cases involving First Nations and, consequently, how the functional test for determining an "Indian" enterprise should be applied. The logic of inter-jurisdictional immunity was historically developed as a way to protect federal undertakings from provincial legislation and was later applied to Indigenous peoples "to shield Aboriginal peoples and their lands from provincial legislation of general application affecting certain aspects of their special status" (quoted from *Canadian Western Bank* in Respondent's Factum, *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at para 48). However, the SCC's decision in *NIL/TU,O* limited this "special status" of Indigenous peoples, as enumerated in section 91(24).

38 *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at para 20.

39 *Ibid* at p. 698.

40 *Ibid* at p. 699.

41 *Ibid* at paras 69, 71.

decision employed the equalizing multiculturalism argument, levelling the special status of Indigenous people with other cultural groups in Canada (Kernerman 2005). Furthermore, by asserting that First Nations are members of the broader Canadian population and are thus subject to provincial laws of general application like any other group, the SCC called for embracing provincial delivery of culturally specific social services as part of promoting a model of flexible and co-operative federalism in Canada.

In this case, the SCC's argument hinged on what NIŁ TU,O called an "outdated and regressive approach to interpretation of the Constitution," as it denied the fact that "Indian status and membership in a First Nation are rooted in and inextricably linked to the culture, tradition and language of that First Nation and the ability of all members of that First Nation to exercise aboriginal rights entrenched in the Constitution."[42] Erasing the special legal and constitutional status of First Nations and, thus, hollowing out the historical responsibility of the federal government, the SCC admitted that its use of the narrow scope of the core of section 91(24) "is as it should be…[because it] recognizes that Indians are members of the broader population and, therefore, in their day-to-day activities, they are subject to provincial laws of general application."[43] As such, the SCC followed the union's position as set out in the Respondent's Factum by characterizing NIŁ TU,O's provision of child and family services as entirely similar to other provincially regulated social welfare services.[44] The Court found:

> the fact that NIL/TU,O employs Indians and works for the welfare of Indian children in a culturally sensitive way that seeks to enhance Aboriginal identity and preserve Aboriginal values does not alter that essential function. Moreover, NIL/TU,O's ordinary and habitual activities do not touch on issues of Indian status or rights. As such, the child welfare services cannot be considered federal activities.[45]

The decision ultimately rejected the Appellant's reasoning, that "to equate the way in which NIL/TU,O delivers its services to efforts to promote multiculturalism and the need for cultural sensitivity more generally (as the Appeal does at paragraph 65) is to ignore the relationship between s. 91(24) of the *Constitution Act*, 1867 and s. 35 of the *Constitution Act*, 1982."[46] It is also to ignore, NIŁ TU,O argued, "the fact that aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures

42 Appellant's Factum, *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at paras 80, 73.

43 *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at para 73.

44 Respondent's Factum, *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at para 20. The union's factum continued: "In response to paragraph 24 of the Appellant's factum, the Aboriginal Practice Standards were promulgated by the director under the CFCS Act, in consultation with First Nation groups. Generally, the Standards are of a nature applicable to the provision of services to *any* children" (Respondent's Factum, para 20).

45 *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at p. 699.

46 Appellant's Factum, *NIL/TU,O Child & Fam Serv v BCGEU* (2010) at para 83.

as they had done for centuries, when the Europeans arrived in North America…"[47] This, the Appellant continued, "is what distinguishes aboriginal peoples from all other minority groups in Canada and explains why aboriginal rights have a special legal and constitutional status."[48] By invoking liberal multiculturalism, the Supreme Court of Canada portrayed Indigeneity as a problem of cultural diversity, obfuscating the particular history of settler-colonial violence and dismissing the paid work of Indigenous social reproduction as a step toward self-determination (Green 2001).[49] Furthermore, by treating s. 91(24) as though it conferred federal jurisdiction without consequent responsibilities, the SCC dismissed NIŁ TU,O's normative reasoning that federal responsibility was equally a matter of Indigenous rights to exercise control over child and family services and their labour relations.

In asserting that NIŁ TU,O's provision of services to Indigenous children is essentially no different from the provision of services to *any* children in Canada and is thus a provincial matter, the SCC celebrated the provincial delivery of culturally specific social services as part of promoting a model of flexible, co-operative, and multicultural federalism.[50] Although the Court insisted that its decision does not mean "an abdication of regulatory responsibility by the federal government,"[51] it nonetheless underlined the fact that the federal government "actively endorsed" provincial oversight of the delivery of child welfare services to Aboriginal children in the province.[52] Justice Abella stressed, "the very fact that the delivery of child welfare services is delegated to First Nations agencies marks, significantly and positively, public recognition of the particular needs of Aboriginal children and families. It seems to me that this is a development to be encouraged in the provincial sphere, not obstructed."[53] This promotion of constitutional decentralization, couched in terms of liberal recognition, ironically *mis*recognized that "First Nations social service agencies have their genesis in the failure of generic programs offered by the

47 *Ibid*.

48 *Ibid* at paras 81, 83.

49 *Ibid* at para 7. Green, *supra* note 29.

50 *Ibid* at para 44. The SCC decision stated further that "today's constitutional landscape is painted with the brush of co-operative federalism…NIL/TU,O's operational features are painted with the same co-operative brush…in a detailed and integrated operational matrix comprised of NIL/TU,O's Constitution and by-laws, a tripartite delegation agreement, an intergovernmental memorandum of understanding, a set of Aboriginal practice standards, a federal funding directive and provincial legislation, all of which govern the provision of child welfare services by NIL/TU,O in a manner that respects and protects the Collective First Nations' traditional values." *Ibid* at paras 44, 42, 43.

51 Abella continued, "I see this neither as an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial one. It is, instead, an example of flexible and co-operative federalism at work and at its best." *Ibid* at para 44).

52 *Ibid*.

53 *Ibid* at para 41.

provinces as applied to First Nations children and families."[54]

In this vein, the *NIL/TU,O* SCC decision reflects a broader reconfiguration of the form of state regulation that has been a central feature of neoliberalism in Canada. Through massive cuts in federal social transfers to the provinces for welfare, social services, and education (as well as constitutional decentralization), the Canadian state has further devolved and devalued the work of social reproduction (Brodie 1995; Cossman and Fudge 2002).[55] By finding provincial jurisdiction over the labour relations of NIŁ TU,O CFSS by extending the application of a strict "functional test," the SCC decision mitigated the historical and material significance of section 91(24). The Supreme Court of Canada, through a decision concerning the jurisdiction of Indigenous labour relations, set a constitutional precedent by effectively excluding Indigenous child and family welfare services and labours from the federal responsibility for "Indians and lands reserved for the Indians." In doing so, it also foreclosed further attempts by Indigenous nations to strategically "use" the "core of Indianness" as a path to greater autonomy and self-determination over labour relations in Indigenous-run public and social services.

**In Lieu of a Conclusion: Going Forward?**

The *NIL/TU,O* case affirmed provincial jurisdiction over labour relations in Indigenous child and family services – rendering moot the legal reasoning adopted in the broader set of cases used previously to characterize the "core of Indianness" as encompassing matters related to the social reproduction of Indigenous peoples as distinct societies. Indigenous activists and their allies have, however, made political and legal interventions that continue to reconfigure jurisdiction over child welfare. Building on the momentum of the Truth and Reconciliation Commission (TRC; Truth and Reconciliation Council of Canada 2012) as well as the *First Nations Child and Family Caring Society* case, Bill C-92 provides space to "empower Indigenous peoples to reclaim jurisdiction in this area, and ensure the rights of children are affirmed" (Metallic et al. 2019, 4). With a partial recognition of the egregious harms that all levels of government have enacted against Indigenous peoples through the settler colonial practices of dispossession and systemic underfunding of Indigenous child and family services, the federal government has used its legislative power to recognize an Indigenous right to control these services, albeit without a clear commitment regarding access to resources. However, much about this new legislation remains unclear and inadequate, particularly as it relates to issues concerning the labours of social reproduction discussed in this article.

54 Appellant's Factum, *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) at para 77.

55 As Cossman and Fudge (2002) write, "Constitutional decentralization has gone hand-in-hand with a devolution in responsibility for social welfare from elected governments to private institutions and charities. *But decentralization is more complex and contradictory than the federal government simply ceding its authority and responsibility in the face of global pressures. It is also part of the ongoing process of negotiation and litigation between the federal and provincial governments and First Nation's peoples over social welfare and economic authority*" (20, emphasis added).

Additionally, while making no mention of section 91(24) or the previous legal battle over "the core of Indianness," the 2019 Act formalizes a framework for including provincial governments in the relationship between the federal government and Indigenous peoples in the realm of child and family services. In this way, it seems that the federal government has erected obstacles from the outset (Metallic et al. 2019). Recall that it was precisely the delegation agreement between NIŁ TU,O CFSS, the BC Government, and the federal government that the SCC partially drew on to argue that NIŁ TU,O was a provincial undertaking, providing services under the auspices of provincial child welfare legislation (an exercise of multicultural "co-operative federalism"). In referencing tripartite delegation agreements, Abella dismissed the federal government's unique responsibility in cases of Indigenous child and family welfare services and thereby dismissed the argument for "substantive equality" in favour of multiculturalism.[56] This historical approach by the SCC leads us to ask: How are we to interpret the limits of federal jurisdiction over Indigenous labours and activities, the NIŁ TU,O CFSS delegation agreement, and the latter's place within the SCC's decision in *NIL/TU,O* in light of the new Act (Metallic et al. 2019, 16)?[57]

In particular, what is the legal relationship between the judicial precedent set in *NIL/TU,O* and the new Act? The *NIL/TU,O* decision and the 2019 Act could be found to be at odds, insofar as the Act grants Indigenous governing bodies autonomy over child and family services but does not explicitly extend this operational power to labour relations in these workplaces. Could the labour involved in child and family services provision not also come under the jurisdiction of Indigenous peoples? The SCC's use of the narrow reading of the "core of Indianness" via its strict use of the functional test (as established in *Four B)* formally rendered the wage labour of Indigenous child and family services as a matter of provincial jurisdiction. Consequently, the *NIL/TU,O* decision effectively closed the door on any further attempts by Indigenous nations or service providers to pursue control over labour relations via federal jurisdiction and the "core of Indianness." NIŁ TU,O understood the SCC's reasoning as an attack on self-determination. With Bill C-92, however, this door seems to have opened again.

The new federal Act, therefore, simultaneously represents a federal commitment to recognize Indigenous authority over child and family services *and* a lack of forethought concerning the labour relations involved in the provision of these services. Thus, in line with the argument made herein, the new Act's augmented use of the "best interests of the child" – which includes Indigenous cultural continuity inseparable from substantive

56 Abella stated that "NIL/TU,O's operational features are painted with […] co-operative brush…in a detailed and integrated operational matrix comprised of NIL/TU,O's Constitution and by-laws, a tripartite delegation agreement, an intergovernmental memorandum of understanding, a set of Aboriginal practice standards, a federal funding directive and provincial legislation, all of which govern the provision of child welfare services by NIL/TU,O in a manner that respects and protects the Collective First Nations' traditional values." *NIL/TU,O Child & Fam Serv v. BCGEU* (2010) paras 44, 42, 43.

57 Metallic et al. (2019), for example, conclude that, "at best, this could be interpreted as an acknowledgment of concurrent (or shared) jurisdiction, a matter on which Bill C-92 should be more clear" (16).

equality – and its silence on labour relations appears, ironically, to position child welfare as being separate from work. This omission thus seems to exclude Indigenous labours central to the reproduction of Indigeneity from the legal concept of the "best interests of the child," as well as from this particular understanding of self-governance and autonomy over service provision.

As we have suggested, the political volley over the jurisdiction of Indigenous labour relations stems fundamentally from a lack of consideration for Indigenous workers' rights and how these articulate with questions of self-determination. Bill C-92 opens these questions anew and should encourage scholars to think seriously about the long-term project of establishing an Indigenous right to govern not only service provision but also labour relations in Indigenous-run workplaces. How to balance the political goals of Indigenous self-determination while safeguarding the rights of Indigenous workers to free association and collective bargaining are complex but timely problems. The case history involving the "core of Indianness" and its relationship to the labours of Indigenous social reproduction demonstrate how problematic the struggle has been up to now. The 2019 passage Bill C-92 provides an opportunity to, once again, debate the regulation of Indigenous labours as part of a commitment to self-determination and self-governance.

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