Bill 15, *An Act to amend the Youth Protection Act and other legislative provisions*

For a Law Worthy of Our Children

JOINT BRIEF PRESENTED BY

THE AFNQL AND THE FNQLHSSC

FEBRUARY 2022

FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION

Assembly of First Nations Quebec-Labrador

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Coordination

Leila Ben Messaoud, Legal Advisor – FNQLHSSC

Writing

Leila Ben Messaoud, Legal Advisor – FNQLHSSC
Wyatt Dumont, Child and Family Services Analyst-Advisor – FNQLHSSC

Collaboration

Mira Levasseur-Moreau, Political and Legal Advisor – AFNQL
Marie-Jeanne Disant, Surveillance Plan Development Agent – FNQLHSSC
Marjolaine Siouï, Executive Director – FNQLHSSC
Médérik Sioui, Communications Advisor – FNQLHSSC
Richard Gray, Social Services Manager – FNQLHSSC
Valérie Vennes, Social Services Sector Team Leader– FNQLHSSC

Translation
OpenText

Graphics and layout

Mireille Gagnon, Graphics Technician – FNQLHSSC
Nancy Gros-Louis, Secretary – FNQLHSSC

Photos: FNQLHSSC, Manon Dumas and Marc Tremblay

Note to readers
Please note that the masculine gender is used as a generic for the sole purpose of brevity.

First Nations of Quebec and Labrador Health and Social Services Commission
250 Place Chef-Michel-Laveau, Suite 102, Wendake, Quebec G0A 4V0
info@cssspnql.com

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Preamble

In August 2019, the Government of Canada, the Government of Quebec, and the Assembly of First Nations Quebec-Labrador (AFNQL) signed a tripartite memorandum of understanding under the Quebec First Nations health and social services governance process. This tripartite memorandum of understanding serves as a political commitment. By their signatures, the parties attest to their willingness to pursue discussions and continue to collaborate in the development of a new health and social services governance model.[1] It also confirms the commitment of all the parties to overcome the challenges that arise from jurisdictional disputes.

Indeed, in December 2019, this same provincial government, by reference to the Quebec Court of Appeal, contested *An Act respecting First Nations, Inuit and Métis children, youth and families* (Federal Act) on the grounds that it exceeds the jurisdiction of the Parliament of Canada.

However, First Nations have never ceded their rights, and even less so the right to decide on their children's future, education, and wellness.[2] The current systems were imposed on them, and an obsolete system unfortunately has too many consequences. Moreover, in June 2015, the AFNQL adopted the *Declaration of the Rights of First Nations Children*, which affirms the inherent right of First Nations to self-determination, recalling the disastrous consequences of colonial laws and policies on our families and children, and declares the rights of our children. In 2021, to mark the fifth anniversary of its signing, a book inspired by this declaration and entitled *My Rights and Me* was launched.

On the other hand, on November 17, 2020, the AFNQL and the Government of Quebec agreed to set up a joint political table (AFNQL-Quebec Political Table). The Political Table's objective is to develop and maintain a mutually respectful and productive political relationship, government to government, between the First Nations and Quebec. This is supported by technical tables whose mandate is to implement and follow up on the commitments arising from the meetings of the AFNQL-Quebec Political Table. In matters of health and social services, it was agreed to address two themes: access to services and youth protection.

It is also in a spirit of cooperation that the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) actively participated in the work of the Standing Committee on the Application of the *Youth Protection Act* (YPA) and the Working Group on the Provisions of the YPA Specific to First Nations and Inuit Children and Families. It must be recognized that there is a limit to the current system for First Nations, especially when we exercise our right to self-determination.

It is important to remember that our collaboration with the Government of Quebec is carried out as a First Nations government, in a relationship of equality, without ever renouncing our fields of jurisdiction. We will continue to exercise our right to self-determination and self-government: the *Loi de la protection sociale atikamekw d'Opitciwan (LPSAO) [Atikamekw of Opitciwan Social Protection Act]* is a very good example of this.

[1] The objectives of the memorandum of understanding are to "consolidate and clarify a tripartite partnership of collaboration and coordination, participate in the development of a health and social services governance model and work together so that issues related to jurisdiction are analyzed according to the roles and responsibilities of each party and to ensure that solutions are developed."

[2] *Constitution Act, 1982*, Schedule B of the *Canada Act 1982*, 1982, c. 11 (U.K.), s. 35.

Introduction

On December 1, 2021, the Minister for Health and Social Services, Lionel Carmant, tabled Bill 15 in the National Assembly, entitled *An Act to amend the Youth Protection Act and other legislative provisions* (the Bill). Further to the tabling of this bill, the Committee on Health and Social Services invited the AFNQL and the FNQLHSSC to participate in the public hearings as part of the special consultations on the Bill.

This joint brief presents an overview of our organizations and outlines some of the particularities that characterize the context in which First Nations operate. It also proposes a number of legislative improvements that are the result of many efforts made by First Nations to the Government of Quebec.

1. Description of the Organizations

Created in 1985, the AFNQL is the meeting place for the Chiefs of 43 communities of ten First Nations in Quebec and Labrador. It deals with many issues, such as the defence of First Nations titles and Aboriginal and treaty rights, federal and provincial government policies and legislation that affect their customs and way of life, funding levels, government decisions and relations, economic development, and all social, economic, and cultural issues and, in general, all matters relating to self-government, international relations, and domestic relations with government.

The FNQLHSSC is a non-profit association created through a resolution of the AFNQL Chiefs in 1994. It is responsible for supporting the efforts of First Nations in Quebec to plan and offer culturally appropriate and preventive health and social services programs, among other things. Its mission is to accompany Quebec First Nations in achieving their health, wellness, culture and self-determination goals. Its main fields of intervention are related to governance, early childhood, health, social services, social development, research and information resources.

2. Current Context for First Nations Child and Family Services

In Quebec, for most communities, the First Nations child and family services (FNCFS) agencies take on certain youth protection responsibilities[3] and offer first-line prevention services. A total of fifteen FNCFS agencies provide youth protection services to 21 communities under provincial delegation and funding agreements with Indigenous Services Canada (ISC) and three provincial institutions (Integrated Health and Social Services Centres [CISSSs]), [4] which provide youth protection services to four communities. A total of 27 First Nations communities provide first-line prevention services to their population under funding agreements with ISC. The federal FNCFS Program enables communities to obtain funding when they sign delegation agreements with the province.[5]

[3] See Appendix FNQLHSSC (2022). *Table of Types of Youth Protection Agreements Delegating Responsibilities to First Nations Communities in Quebec*.

[4] Namely CISSS-AT (Timiskaming First Nation and Kebaowek), CISSS de l'Outaouais (Barriere Lake) and CISSS des Laurentides (Kanesatake).

[5] In January 2016, the Canadian Human Rights Tribunal (CHRT) recognized that the federal government maintained discriminatory practices related to inequitable and insufficient funding to First Nations child and family services (FNCFS), while failing to implement Jordan's Principle, which ensures that First Nations children have equal access to government services as other children. It ordered Canada to reform its funding method and reimburse the actual costs of certain FNCFS expenditures. Since February 1, 2018, a new model for the FNCFS Program has been in force. Jordan's Principle is a rule of law arising from the CHRT orders, which must be applied by the Quebec government.

As several studies have shown, Indigenous children are overrepresented in the youth protection system, at all stages of intervention.[6] According to the trajectory analysis,[7] the overrepresentation of Indigenous children begins at the stage of receiving and processing reports, where we can note a rate that is 4.4 times greater than for non-Indigenous children. The further along we get in the intervention process, the greater this disparity becomes between Indigenous and non-Indigenous children. This disparity stands out even more when we look at the placement of Indigenous children in an alternative environment (7.9 times greater) and at recurrence (9.4 times greater). As for the rate of maintenance of protection services for Indigenous children,[8] it is 6.6 times greater.[9] Moreover, this disparity between Indigenous and non-Indigenous children exposes a system that gives little consideration to the realities of Indigenous communities.

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

On December 18, 2019, the Government of Quebec decided to challenge the *Act respecting First Nations, Inuit and Métis children, youth and families*, on the grounds that it exceeds the jurisdiction of the Parliament of Canada. This Federal Act affirms First Nations and Inuit jurisdiction over child and family services. Moreover, the Federal Act lays down principles that apply to youth protection nationally. These principles, which are found in sections 9 to 17, must now be applied from now on by all youth protection interveners in Quebec (FNCFS and CISSS or Integrated University Health and Social Services agencies [CIUSSS] agencies) as well as by the courts. The YPA should incorporate these principles as they constitute a minimum standard.

Section 20 of the Federal Act[10] provides for options to facilitate the enactment and implementation of laws by a First Nation. It provides that First Nations may send a notice of intent to exercise lawmaking jurisdiction over child and family services and/or a request to enter into a coordination agreement with the federal and provincial governments.

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[6] On this subject, see: FALLON, B., LEFEBVRE, R., TROCMÉ, N., RICHARD, K., HÉLIE, S., MONTGOMERY, H. M. ET AL. (2021). *Denouncing the continued overrepresentation of First Nations children in Canadian child welfare: Findings from the First Nations/Canadian Incidence Study of Reported Child Abuse and Neglect-2019. Ontario: Assembly of First Nations*.

[7] FNQLHSSC, *Trajectories of First Nations youth subject to the Youth Protection Act – Component 3: Analysis of mainstream youth protection agencies administrative data*, Wendake, 2016.

[8] This indicator is used to count children whose youth protection file was kept open for delivery of services under the judicial or voluntary protection measures initiated after the first corroboration of abuse within 36 months of the first substantiated report.

[9] See Appendix FNQLHSSC (2016). *Trajectories of First Nations youth subject to the Youth Protection Act – Component 3: Analysis of mainstream youth protection agencies administrative data.*

[10] **Notice**

20 (1) If an Indigenous group, community or people intends to exercise its legislative authority in relation to child and family services, an Indigenous governing body acting on behalf of that Indigenous group, community or people may give notice of that intention to the Minister and the government of each province in which the Indigenous group, community or people is located.

Coordination agreement

(2) The Indigenous governing body may also request that the Minister and the government of each of those provinces enter into a coordination agreement with the Indigenous governing body in relation to the exercise of the legislative authority, respecting, among other things,

(a) the provision of emergency services to ensure the safety, security and well-being of Indigenous children;

(b) support measures to enable Indigenous children to exercise their rights effectively;

(c) fiscal arrangements, relating to the provision of child and family services by the Indigenous governing body, that are sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people to exercise the legislative authority effectively; and

(d) any other coordination measure related to the effective exercise of the legislative authority.

A coordination agreement defines how the federal and provincial governments support the implementation of Indigenous laws.[11] Such an agreement would avoid many pitfalls by establishing joint mechanisms for the purpose of allocating the necessary support to First Nations children in the provision of emergency services and funding and for the effective exercise of their rights. Section 20 (3) of the Federal Act provides that twelve months after the date of the request to enter into a coordination agreement, the legislation the First Nation will have adopted will have force of law as federal law.[12] The First Nation's law will then take precedence over the contrary provisions of a provincial law, such as the YPA.

In Quebec, 16 communities have sent in their notice of intent to exercise their inherent jurisdiction over child and family services and 22 communities have requested to enter into a coordination agreement with the federal and provincial governments.[13]

Since the Federal Act took effect, the Government of Quebec has refrained from actively participating in the implementation of the Federal Act. For example, the community of Opitciwan, whose law took effect on January 17, 2022, has repeatedly invited the Quebec government to the coordination agreement tables. The Government of Quebec attended only once, as an observer. The law of the community of Opitciwan[14] provides for the care of all children, regardless of their place of residence. This government does not cooperate with the community of Opitciwan and keeps the files of children living outside the community, despite the community's requests. The Quebec government is playing politics on the backs of First Nations children. Despite the reference to the Court of Appeal, the Government of Quebec must respect the rule of law, a concept it has long evoked with respect to First Nations when they attempt to exercise their inherent rights. Now that the situation is reversed, Quebec must act accordingly and respect it.

For several decades, First Nations have been calling for the recognition of First Nations jurisdiction in youth protection matters. Many reports recommend that the federal, provincial, and territorial governments recognize First Nations jurisdiction over child and family services.[15] In May 2021, the Special Commission on the Rights of the Child and Youth Protection (Laurent Commission) issued its report. An entire chapter of this report is dedicated to Indigenous children. Although the AFNQL and the FNQLHSSC welcome the addition of a preamble in the YPA,[16] we feel that the Government of Quebec has missed a golden opportunity to recognize and respect the jurisdiction of First Nations and Inuit in matters of youth protection in the preamble. However, this was one of the recommendations of the Laurent Report, namely to support the right to self-determination and self-government in matters of youth protection. This is especially true since several studies "establish a correlation between progress in self-government and improvements in the socioeconomic conditions of Indigenous populations. For example, a study showing the correlation between improved health outcomes and self-determination in First Nations communities reveals that the lowest suicide rates are found in communities

[11] ASSEMBLY OF FIRST NATIONS (AFN), *Options for a First Nation to enact and enforce its laws*.
[12] Unless there is an extension of the work on the coordination agreement by the Indigenous governing body.
[13] This number takes into account the fifteen Inuit communities.
[14] *Loi de la protection sociale Atikamekw d'Opitciwan* [Atikamekw of Opitciwan Social Protection Act], November 2021.
[15] On this subject, see: FNQLHSSC (January 1998). Telling it like it is – *Consultation on the Contents and Application of the Youth Protection and Young Offenders Acts in Communities of the First Nations* – Report and recommendations, Wendake, *Truth and Reconciliation Commission of Canada: Calls to Action, Winnipeg,* 2012, 13 p. (TRC), GOUVERNEMENT OF QUEBEC. *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Final report,* 2019, 488 p. (Viens Commission), *RECLAIMING POWER AND PLACE*: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS *(Vol. A and B),* 2019 (MMIWG) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).
[16] Section 1 of Bill 15.

where *cultural continuity*, defined as a higher degree of sustained control over the cultural and political processes of the community, is more prominent."[17,18]

4. Definition of Parents

As defined by the YPA, the parents are "the father and the mother of a child or, where applicable, any other person acting as the person having parental authority."[19] However, section 2 of the Bill amends the definition of parents to "the father and the mother who have not been deprived of parental authority and any other tutor." This amendment raises questions on the part of First Nations. We find this amendment difficult to understand since, for First Nations, it is not uncommon for extended family members to have parental authority. They are considered as care providers, that is, a person who has the primary responsibility for providing daily care to a child, other than a parent—mother or father—of that child, in accordance with the customs or traditions of the community of which the child is a part.[20] Since they assume the responsibilities for the child and have a meaningful relationship with the child, they are the most important people in the child's life. These persons must be heard in the tribunal, without having to apply to intervene or be granted the status of party, as provided in section 81 of the YPA. It is inconsistent that the Bill creates an entire chapter on special provisions for Indigenous people while, on the other hand, reducing the scope of the definition of parents. Thus, we recommend that the definition of parent in section 1) of the YPA not be changed.

5. National Director of Youth Protection

5.1 Assistant Commissioner and team dedicated exclusively to issues regarding Indigenous children

In March 2021, Catherine Lemay was appointed National Director of Youth Protection, as recommended by the Laurent Commission Report. This same report provided for the creation of a Commissioner for Children's Welfare and Rights and an Assistant Commissioner responsible for overseeing the rights and needs of Indigenous children. The position of Assistant Commissioner has been requested by the First Nations since 2016. We insist on the urgency of action, which is why we recommend the implementation, in partnership with First Nations and Inuit, of the recommendation in the Laurent Commission Report to establish an Assistant Commissioner position and a team dedicated exclusively on issues regarding Indigenous children with the Commissioner for Children's Welfare and Rights.

5.2 Directors Forum

We recognize that the Bill establishes a Forum des directeurs (Directors Forum), consisting of the National Director of Youth Protection and each of the Directors of Youth Protection.[21] Section 30.6 of the Bill sets out the objectives of the Directors Forum, namely "to develop and harmonize clinical practices in youth protection, to ensure that policy directions and clinical practice standards are implemented and complied with in all the regions of Quebec, and to take up any issue submitted to them by the National Director of Youth Protection."

As for the communities, only the Conseil de la Nation Atikamekw (CNA) and the communities or nations that have signed an agreement with Quebec may sit on the Directors Forum.[22] As the goal of the Forum will be to develop and harmonize clinical practices in youth protection that will impact Indigenous children and

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[17] FNQLHSSC, *First Nations in Quebec Health and Social Services Governance Project. Better Governance, Greater Wellbeing*, Wendake, 2015, p. 12 and FNQLHSSC, *The Benefits of Health and Wellness Governance by and for First Nations*, Wendake, 2019, pp. 4–5.

[18] Articles 3 and 4 of the UNDRIP.

[19] See the decision *Protection de la jeunesse — 135022,* 2013 QCCQ 16045.

[20] The term "de facto parents" is also used in this context.

[21] Section 30.5 of Bill 15.

[22] Section 30.5 of Bill 15.

interveners working for the FNCFS agencies, we recommend that individuals from other communities be appointed.

6. Judicial Intervention

6.1 Participation of a community representative in the judicial process

Section 131.15 does not contain any substantial changes to the current section of the YPA, section 81.1. The first paragraph of this section provides that a person responsible for the youth protection services of an Indigenous community or, in the absence of such a person, the person who assumes a role in matters of child and family services within an Indigenous community may testify or submit observations before the tribunal at the hearing of any application concerning an Indigenous child belonging to that community. The director, under paragraph 3 of section 131.15, must, as soon as possible, inform the person responsible for the youth protection services of an Indigenous community or, in the absence of such a person, the person who assumes a role in matters of child and family services within an Indigenous community or the designated representative of the Indigenous community, of the date, time and place of the hearing of any application concerning an Indigenous child belonging to that community, of the subject of such an application and of the person's right to participate in the hearing. However, ever since section 81.1 took effect, the enforcement of this obligation has always been difficult. The Director of Youth Protection (DYP) does not always inform the communities of a child's hearing, and some communities have received information from a child in another community. We recommend inserting in section 131.15 that the tribunal ensure that the director has met his or her obligation to inform a representative of the child's community of the child's hearing.

Also, section 81.1 should not apply to communities, such as Opitciwan, that exercise their inherent rights in matters of child and family services, as stated in the Federal Act. As mentioned, the law of the community of Opitciwan provides for the care of all children, regardless of their place of residence. Thus, the law of the community applies to children living in and out of the community. To ensure a better transition from the YPA to the law of the community, this type of issue may be addressed under coordination agreements.

7. Confidentiality and Exchange of Information

7.1 Access to information held by bodies and professionals for the DYPs

Section 21 of the Bill amends sections 35.4 and 36 of the YPA to allow the director or any person who acts under sections 32 or 33 "to require an institution, body or professional to disclose to him information concerning the child, either of the child's parents or another person involved in a report if any of the following conditions is met."[23] Moreover, a director or any person who acts under sections 32 or 33 may, "if the person considers it necessary to ensure the protection of a child with regard to whom that person has accepted a report, enter, at any reasonable time or at any time during an emergency, a facility maintained by an institution or premises kept

[23] Namely:
(a) such information reveals or confirms the existence of a situation related to the grounds alleged by the director to the effect that the security or development of the child is in danger, the knowledge of which could justify, as applicable,
(1) accepting the report for evaluation,
(2) deciding whether the security or development of the child is in danger or remains so, or
(3) deciding as to the directing of the child, or
(b) such information makes it possible to confirm or deny the existence of a situation that, if proven, would justify reviewing the child's situation, where events that have occurred since the decision made regarding whether the security or development of the child is in danger, and of which the person has become aware, constitute grounds to believe that the situation exists.

by a **body** or in which a professional practises their profession to examine on-site the record of the child and make copies of it."

In practice, for First Nations bodies, the health centre's interveners, in response to requests from the institutions' interveners, transmitted only information relevant to the performance of their work.[24] The health centres were collaborating with the institutions. However, under section 36 of the current Act, only a director or a person acting under section 32 may enter an **institution** to examine the record kept on the child and make copies of it. Section 21 of the Bill extends this authority to a body or a professional. Health centres are considered to be bodies in the eyes of the law.

We are concerned that this amendment to the Bill will have adverse effects on First Nations. In fact, First Nations may feel distrustful of the health care system. Many Indigenous women who are pregnant fear that they will be reported to Youth Protection when they consult health care professionals during their pregnancy. In our opinion, the impact on First Nations of such an amendment regarding professionals is too great not to be considered. This is an invasion of privacy. The context for First Nations is entirely unique.[25] Moreover, obtaining the consent of parents and child aged 14 and over is, in our opinion, the only way to maintain the bond of trust between them and professionals. Families need to feel that they can reach out for help without feeling "threatened." We recommend that First Nations bodies be exempted from the application of section 21 of the Bill.

7.2 Extension of the DYP's investigative powers to all stages of intervention

The extension of the DYP's investigative powers to all stages of intervention is too broad. In our opinion, it is essential to encourage parental involvement and obtain their consent. This will allow the parents better adherence to the intervention plan. We request that investigative powers not be extended to all stages of intervention set out in section 21 of the Bill.

8. Provisions Regarding Indigenous Children and Families

8.1 Maximum Periods of Placement

In 2006, an amendment to the YPA[26] initiated, among other things, the maximum periods of placement in an alternative environment. A time limit is prescribed within which the decision whether or not to return the child to their family environment must be made. After this period, if the child's safety and development are still compromised and their return to the family environment is not possible, the court must make a decision to impose on the child a stable and permanent living environment.

Since 2007, the AFNQL and the FNQLHSSC have raised the possible consequences of the introduction of maximum periods of foster care in alternative environments and strongly denounced this provision insofar as these maximum periods were likely to result in the placement of First Nations children outside their communities and the "breaking of ties between the child and his family, which [could] represent a disastrous social, cultural, and linguistic break."[27] 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[28] and, on the other, find

[24] Also see the *Act respecting Access to documents held by public bodies and the protection of Personal information*, CQLR, c. A-2.1.
[25] On this subject, you can consult the discussion document presented by the AFNQL and submitted at the Coroner's public inquiry into the death of Joyce Echaquan.
[26] S.Q. 2006, c. 34.
[27] AFNQL AND FNQLHSSC (2006) Brief of the AFNQL and the FNQLHSSC: *Highlights and recommendations*. Submitted to the National Assembly of Québec as a supplement to the brief tabled for Bill 125, p. 5. (Brief of the AFNQL and the FNQLHSSC for Bill 125).
[28] *Ibid.*

enough foster families in the community to avert the placement of children in non-Indigenous families in cases where the alternative life plan becomes necessary.[29] Thus, the youth protection system served as the main gateway to social services for children and families living in the communities, since prevention services only being introduced in 2009. Unfortunately, the data confirms the concerns raised: more and more First Nations children are placed outside their family environments; financial, material and human resources continue to be insufficient; and First Nations families are not necessarily receiving all the services they need.

Despite these concerns, the Government of Quebec has gone ahead with the addition of this provision to the YPA. Years later, the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Quebec: Listening, reconciliation and progress (hereinafter "Viens Commission") recommended in 2019 what the AFNQL and the FNQLHSSC had already recommended in 2007, that there be an exemption for First Nations regarding the maximum periods of foster care. At the Laurent Commission, we reiterated the importance of exempting First Nations children from these periods. In fact, the Laurent Commission report recommends implementing the calls to action of the Viens Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG).

Although continuity of care and stable ties for a child are essential and constitute the objectives underlying the maximum periods of foster care, the need to avoid cultural disruption for First Nations children is very clear and also constitutes a fundamental element to consider in the analysis of their interests.[30] Despite the importance of preserving cultural identity and the duration of the healing process for parents or guardians who have experienced multiple traumas that may prove to be longer (while some services are not easily accessible), all of these elements should be considered to explain the First Nations exemption from the maximum periods provided for in the YPA, as recommended in call to action 108 of the Viens Commission report.[31] It was the attachment theory that led the legislator to add the maximum periods of foster care in the YPA.[32] The principle of attachment theory is that a child, to experience normal social and emotional development, needs to develop an attachment relationship with at least one person who cares for that child consistently and continuously.[33]

Moreover, as expressed by Mr. Sébastien Grammond, judge at the Federal Court, the attachment theory is not appropriate in an Indigenous environment,[34] in that:

> "Attachment theory has not necessarily been tested with Indigenous children. It was, I believe, primarily developed in the United States and the question should be asked whether it truly applies in a society where the extended family plays such an important role. Is it really harmful to the child [...] at a certain point in its childhood to move from its parents' home to the home of its uncle or aunt, or its grandmother's home? Sometimes, all these individuals are living under the same roof, due to the housing crisis. In a society where the extended family has a great deal of influence, one might question the validity of attachment theory."[35]

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[29] 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 n° 125.

[30] AFNQL AND FNQLHSSC (2016) *Culture: The Key to First Nations Wellness*. 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) to the National Assembly of Québec as part of the consultations on Bill 99, *An Act to amend the Youth Protection Act and other provisions*, p. 14.

[31] *Ibid.*

[32] VIENS COMMISSION, p. 436.

[33] LE PARISIEN, *Théorie de l'attachement*, online: http://dictionnaire.sensagent.leparisien.fr/Théorie%20de%20l'attachement/fr-fr/ (consulted on 2022-01-25).

[34] VIENS COMMISSION, p. 436.

[35] *Ibid.*

As one study on the impacts of the YPA indicates, “half of parents don’t realize they have a certain amount of time to make changes in their lives. The deadlines seem unrealistic to them in terms of being able to make the changes necessary for the return of the children. The parents feel that they are committed to the change but perceive that the Director of Youth Protection and the judges do not recognize the progress made.”[36] Especially since for Indigenous parents who have experienced trauma, the healing process can be longer. It is about recognizing and applying the principle of substantive equality, a principle recognized under Bill C-92. As Mr. Grammond mentioned during the Viens Commission: “It is not enough to treat all individuals equally; we also have to ask whether applying a single rule has discriminatory effects.”

We question section 131.12 of Bill 15 because it does not go as far as Call to Action 108 of the Viens Commission. Section 131.12 of the Bill provides that “the total period for which an Indigenous child may be entrusted to an alternative living environment is not limited by sections 53.0.1 and 91.1 if a family council has been formed.” What happens when a family council is not formed due to emergencies or time constraints? We understand the need to incorporate the establishment of a family council in the YPA. However, holding a family council must not be a condition for exemption from the maximum placement periods. Furthermore, the tribunal has never exempted an Indigenous child from the maximum placement periods on the grounds that it was in the child’s interests under section 91.1 para. 4 of the YPA,[37] which argues for a full exemption of Indigenous children from these periods. This is why we recommend exempting all First Nations children.

8.2 Reasonable Efforts

In section 131.5 of the Bill, we find an order of priority that must be respected, considering the interests of the child, when an Indigenous child must be entrusted to an alternative living environment. This order of priority is more complete than the one found in section 4 of the YPA. However, the second paragraph of section 131.5 is problematic because it does not go as far as the communities would have wanted. Section 131.5 reads as follows:

> “131.5. When an Indigenous child must, under this Act, be entrusted to an alternative living environment, the living environment chosen must be the one that, considering the interest of that child, is suitable for him in the following order of priority:
>
> (a) the child’s extended family;
> (b) members of his community;
> (c) members of a different community of the same nation as the child’s nation;
> (d) members of a nation other than the child’s nation; or
> (e) any other environment.
>
> **The director must enter in the child’s record the reasons justifying the decision made under the first paragraph.”**

The Viens Commission showed that prioritization during placement with a significant person is not always respected for Indigenous children. Indeed, “members of extended families heard by the Commission explained that they were either never consulted or not considered when they stated their intentions of caring for a child.”[38] However, several judgments have reiterated the DYP’s responsibility to employ all reasonable means to find a foster family in the community:

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[36] Drapeau, S., et al. *Supra*, note 46, p. 41.
[37] The other exemptions concern the child’s return to his family environment in the short term or for serious reasons.
[38] VIENS COMMISSION, p. 460.

> "[14] Although this task may prove difficult due to the lack of resources and the sometimes problematic cooperation of parents, the Direction de la protection de la jeunesse must make every effort to find a foster family in the child's community when the child is Indigenous. Without being an obligation of result, the DYP's responsibility in this regard is very high, **and <u>all reasonable means</u> must be used**. This is a continuing obligation. Just because a spot check has been done does not mean that the applicant's legal obligations have been fulfilled. If the passage of time results in finding a suitable Indigenous foster family, the Direction de la protection de la jeunesse will have to reassess what is in the best interest of the child and respectful of the child's rights."[39] [Our emphasis - TRANSLATION]

Other judgments note that efforts to find Indigenous foster families are not always made at the beginning of the placement. In this regard, in Protection de la jeunesse—175726 judgment,[40] despite several court orders, no steps were taken to find an Indigenous foster family. Subsequently, in November 2016, the judge ordered that the child be placed with an Indigenous foster family in the community for a twelve-month period, and failing that, entrusting the child to his maternal grandmother for a twelve-month period. The DYP appealed this decision. By the time the case was heard in 2017, it was too late. The Indigenous child had developed significant ties with the non-Indigenous foster family. This is an issue the Viens Commission had noted, namely that many First Nations members have the impression that "the ties between children and their foster families are favoured to the detriment of family ties."[41]

We recommend replacing the second paragraph of section 131.5 with "The Director is required to demonstrate that every reasonable effort has been made to place the child with members of his extended family, members of his community, or another community or nation of the child." The term "reasons" used in the second paragraph of section 131.5 is not as inclusive and broad as the term "reasonable efforts." In addition, evidence of reasonable efforts must be included in the psychosocial report submitted to the tribunal. Similarly, interveners must demonstrate reasonable efforts to have the child continue to reside with the parents.[42]

The order of priority set out in this section is a step forward but must be read in conjunction with the general criteria to become a foster family determined by the Minister. These criteria should be made more flexible since many families fail to comply with the requested criteria, including those relating to indoor and outdoor arrangements, bedrooms and the health and safety of the environment,[43] "which can result in children being placed off-reserve. These children are thus at risk of losing their ties to their family, their community, their language and their culture."[44] In fact, most of these criteria do not take into account the realities that communities face. There are possible exemptions, but these are not well known by the interveners in the environments concerned.

In addition, certain criteria such as the criterion on the criminal record in connection with the function are very subjective and do not target only the applicant, but also the people who reside in their environment.[45] Only a criminal record which could affect the skills required and the conduct necessary to perform the resource

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[39] Protection de la jeunesse, 2016 QCCQ 10941, par. 14.
[40] Protection de la jeunesse — 175726, 2017 QCCQ 10171.
[41] VIENS COMMISSION, p. 456.
[42] See section 15 of the Federal Act.
[43] AFNQL AND FNQLHSSC (2020) *The system is "broken": concrete actions are needed to end systemic discrimination*, Joint brief presented by the Assembly of First Nations Quebec-Labrador (AFNQL) and the First Nations of Quebec and Labrador Health and Social Services Commission (FNQLHSSC) to the Special Commission on the Rights of the Child and Youth Protection, p. 9. (Brief tabled to the Laurent Commission)
[44] FNQLHSSC (2017). *Final Report Consultation Process for the Reform of the First Nations Child and Family Services (FNCFS) Program*, p. 55.
[45] Brief submitted to the Laurent Commission, p. 9.

function should be considered.[46] Considering that this wording leaves it completely to the interveners to decide what has an impact on aptitude and conduct, its application is very uneven.[47] Some may decide that a particular history has an impact on the resource's ability to perform the function, while this same history for another family or in another region may not have an impact.[48] Should we deprive ourselves of a potential Indigenous foster family, knowing that there is a severe shortage in the communities, on the grounds that a person has been charged with an offence against property or against persons, for example, that dates back several years? [49]

8.3 First-line Prevention Services

Since 2009, first-line prevention services have been available in most communities.[50] Section 131.1 of the Bill stipulates that "the priority intervention of providers offering health services and social services to the community to prevent the situation of an Indigenous child from being taken in charge by the director." This section reflects the needs of communities, namely that first-line preventive services are given priority over youth protection services.[51] The priority of preventive care is also a principle under the Federal Act. The communities want to focus on first-line prevention services as a first step to implement upstream solutions and avoid reporting, in accordance with the practices favoured by the First Nations. In the current context, Indigenous children are overrepresented, at every stage of the youth protection intervention process. This overrepresentation "has been connected to risk factors like overcrowding, poverty, violence, and addiction in the family and living environment. It is largely due to the unfavourable socio-economic conditions inherited from the colonial system which underfunds public and residential infrastructure as well as public services in the community, thus marginalizing the populations who reside there."[52]

In section 131.6 of the Bill, we read:

> "131.6. For the purposes of section 38.2, any decision concerning a report for a situation of neglect or a serious risk of neglect in respect of an Indigenous child must take into consideration, in particular, the following factors:
>
> (a) the measures taken by the parents to meet the child's fundamental needs and the cooperation offered to the providers offering health services and social services to the community, and
>
> (b) the service providers' ability to support the parents in the exercise of their responsibilities and to help meet those needs."

While the Bill contains a reference to first-line prevention services, it does not go as far as the Federal Act and some youth protection legislation in Canada.[53] The term "the service providers' ability" in paragraph (b) is problematic because it would allow the use of first-line prevention services to be circumvented. It would therefore be up to the interveners to decide whether first-line prevention services have the "ability" to support the parents in carrying out their responsibilities, which is subjective. Our concern is that interveners will routinely dismiss the use of first-line prevention services because, in their view, there is no service that meets the needs of parents. However, first-line prevention services are in the best position to know if they can meet the parents'

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[46] GOUVERNEMENT DU QUÉBEC. *Document de soutien au Cadre de référence sur les ressources intermédiaires et de type familial quant à la vérification et au maintien de la conformité de certains critères généraux déterminés par le ministre*, 2016, p. 10.
[47] Brief submitted to the Laurent Commission, p. 9.
[48] *Ibid.*
[49] With the exception, of course, of certain offences (sexual assault, aggravated assault, etc.). The person's impulsiveness, the context of the event and the person's overall progress will have to be assessed. This is done case by case.
[50] The service offering for first-line prevention services is broader and includes support services.
[51] See section 14 of the Federal Act.
[52] FNQLHSSC, *Sworn Declaration of Marjolaine Siouï filed under the Reference on the Federal Act*.
[53] This finding is also reflected in the Laurent Commission Report.

needs. They should be the ones to make such a decision. Furthermore, first-line services offered in communities are varied.

Secondly, we argue that in cases of neglect, serious risk of neglect, or psychological abuse, we must move toward prevention. A study has shown that out of all the compromising situations in youth protection, in 85% of the cases there was no evidence that the immediate safety of the children was threatened.[54] Only 15% of cases required urgent intervention. Of the 85% of cases, most involved neglect and psychological abuse, situations in which there was no evidence of imminent harm, but where the literature shows convincingly that chronic exposure leads to several long-term negative effects on the development and welfare of the children, largely stemming from socioeconomic conditions.[55] This is why first-line prevention services, which can act upstream, must be prioritized. In Quebec, in 2020–2021, 58% of the reports accepted were for compromising situations of neglect and 15% of the reports accepted were for psychological abuse of non-treaty First Nations children residing in the communities (in 2020–2021, for all children in Quebec, 44% of the reports accepted were for compromising situations of neglect, and 19% were for psychological abuse).[56,57] The rate of reports accepted for neglect per 1000 youth is 3.8 times higher for First Nations residing in the communities than for the general Quebec population (see Appendix, Figure 4).

We recommend, in the second paragraph of section 131.7, adding the prioritization of first-line prevention services in cases of neglect, serious risk of neglect, and psychological abuse.

8.4 Language

It is essential that, from a clinical and legal perspective, children and parents can understand and communicate with the interveners. We recommend that a section on the importance of DYP interventions being conducted in a language understood by Indigenous children and families be included in the chapter Provisions Specific to Indigenous People. Documents and procedures provided to children and families must also be translated, whether into English or an Indigenous language.

8.5 *Act respecting the Ministère du Conseil exécutif* (M-30)

The M-30[58] process applies to the agreements stipulated in section 131. 20[59] et seq. of the Bill, considering section 3.12 of the *Act respecting the Ministère du Conseil exécutif*, which stipulates:

> "**3.12.** No public agency may, without the prior written authorization of the Minister, enter into any agreement with another government in Canada or one of its departments or government agencies, or with a federal public agency.
>
> The minister responsible for or the minister who subsidizes the public agency shall give an advisory opinion on the draft agreement to the Minister before the decision on the application for authorization is made.
>
> The Minister may attach such conditions as he or she determines to the authorization. The Minister may, in particular, fix as a condition that the financing obtained under the agreement referred to in the first paragraph will not be subsequently taken into consideration to determine whether or not the agency is subject to this section.

[54] TROCMÉ, N., KYTE, A., SINHA, V. & FALLON, B. (2014). Urgent Protection versus Chronic Need: Clarifying the Dual Mandate of Child Welfare Services across Canada, Social Sciences, 2014, 3(3), p. 483–498. (Urgent Protection versus Chronic Need).
[55] *Ibid.*
[56] All children in Quebec includes the population of all youth aged 0 to 17 years (including First Nations and Inuit living in out of communities).
[57] The data comes from AS 480 A and G and will soon be published on the FNQLHSSC's PRISM portal.
[58] CQLR, chapter M-30.
[59] More precisely, sections 131.23, 131.25 and 131.26 of Bill 15.

Any contravention of the provisions of the first paragraph or any failure to comply with the conditions referred to in the third paragraph entails the nullity of the agreement.

The Minister, concurrently with the minister responsible for or the minister who subsidizes the public agency, shall see to the negotiation of the agreement."

Thus, the communities are considered, within the meaning of M-30, to be federal public agencies. This process only adds to the administrative burden of entering into an agreement, because the written authorization of the Minister must be obtained before entering into an agreement with the community. Moreover, when there are amendments to the agreements, it is necessary to go through the M-30 process again. We recommend that agreements between communities or groups of communities and institutions be excluded from the application of the *Act respecting the Ministère du Conseil exécutif* by order. We also recommend working on the order as soon as possible so that it can be adopted at the same time as Bill 15. In the past, although Bill 113 *(An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information)*, which recognized the legal effects of Aboriginal customary tutorship and adoption, has received assent and taken effect, the draft regulation respecting financial assistance to facilitate tutorship and Aboriginal customary tutorship to a child and the draft regulation respecting financial assistance to facilitate the adoption and Aboriginal customary adoption of a child were published later in the Gazette officielle du Québec. To date, neither regulation has been adopted yet, which means that customary adoption and tutorship may be considered as a life project by the Director, but they cannot be implemented until the regulations are adopted. This is why we recommend working on the order as soon as possible to exclude agreements between communities or groupings of communities and institutions from the application of the M-30 process so that it can be adopted at the same time as this Bill.

Conclusion

Several sections of the *United Nations Declaration on the Rights of Indigenous Peoples* affirm the rights of our children, our families and our peoples to their cultures, languages, values, ceremonies, territories and governance. Although Bill 15 amends the YPA and proposes the insertion of an entire chapter on the provisions specific to Indigenous people, the Bill still does not take into account the principles of the Federal Act and several calls to action of the Viens Commission, the calls to justice of the MMIWG, and the recommendations of the Laurent Commission. However, these are essential reference documents for the work on the YPA.

As mentioned, several First Nations have filed notice of intent and/or applications to enter into a coordination agreement. The communities are in the best position to make decisions for their children and their families. For example, the law adopted by the community of Opitciwan has been in effect since January 17, 2022. Other communities will certainly follow suit in the near future.

We invite the Government of Quebec to collaborate with and support First Nations in the exercise of their rights and in their efforts toward full autonomy by agreeing to negotiate coordination agreements aimed at defining measures to support the application of laws adopted by First Nations. This is in the interest of children and future generations.

We request that you consider the recommendations proposed in this brief to better meet the needs of the communities that would decide to maintain governance under the YPA system. These recommendations are aimed at eliminating the overrepresentation of Indigenous children in youth protection and making youth protection interventions culturally safe.

Recommendations

***An Act respecting First Nations, Inuit and Métis children, youth and families*:**

1. We request that the Government of Quebec amend the YPA to include the principles of *An Act respecting First Nations, Inuit and Métis children, youth and families* after it took effect on January 1, 2020, and facilitate the application of the laws of the communities regarding child and family services.
2. We request that the Government of Quebec negotiate coordination agreements in good faith with the Indigenous governing bodies and the federal government, while respecting the jurisdictions of the three levels of government and providing for the establishment of a system where first-line prevention and youth protection services will respect the needs and realities of First Nations children and families.
3. The AFNQL calls on the Government of Quebec to enter into an agreement with the Indigenous governing bodies and the federal government on the collection, analysis, retention, use and disclosure of information concerning child and family services provided to First Nations children.
4. We call on the Government of Quebec to make the necessary administrative and legislative changes to allow First Nations governments or the organizations they designate to always have easy access to data relating to their populations, particularly in matters of health and social services.

Youth Protection Act:

5. We request that First Nations and Inuit jurisdiction over youth protection be recognized and respected in the preamble.
6. We request that the definition of parents in section 1 of the YPA not be changed.
7. We request the rapid implementation, in partnership with First Nations and Inuit, of the Laurent Commission report's recommendation for the establishment of an Assistant Commissioner position and team dedicated exclusively to issues regarding Indigenous children, along with the Commissioner for Children's Welfare and Rights.
8. We request that First Nations individuals representing the diversity of the communities be appointed to the Directors Forum.
9. We ask that section 81.1 of the YPA include a requirement that the tribunal ensure that the director has met his or her obligation to inform a representative of the child's community of the child's hearing.
10. We request that First Nations bodies be exempted from the application of section 21 of the Bill.
11. We request that investigative powers not be extended to all stages of intervention set out in section 21 of the Bill.
12. We request that all Indigenous children be exempted from the application of the maximum placement periods.
13. We recommend replacing the second paragraph of section 131.5 with "The Director is required to demonstrate that every reasonable effort has been made to place the child with members of his extended family, members of his community, or another community or nation of the child." Moreover, we request this information be recorded in the psychosocial report.
14. We request that the general criteria set out by the Minister for becoming a foster family for the First Nations be amended.
15. We request that "psychological abuse" as one of the compromising situations be added in the first paragraph of section 131.6, and that paragraph (b) of this section be removed.
16. We request that section 131.7 be amended to provide for prioritization of first-line prevention services in situations of neglect, serious risk of neglect, and psychological abuse.
17. We recommend that a section on the importance of DYP interventions being conducted in a language understood by Indigenous children and families be included in the chapter Provisions Specific to

Indigenous People. Documents and procedures provided to children and families must also be translated, whether into English or an Indigenous language.

18. We request that agreements between communities or groups of communities and institutions be excluded from the *Act respecting the Ministère du Conseil exécutif.*

Appendices

Table of Types of Youth Protection Agreements Delegating Responsibilities to First Nations Communities in Quebec

Nation	Community	Centre jeunesse (Youth Centre) with which the community or ISC has an agreement[1]	Responsibilities delegated under section 32 of the YPA	Responsibilities delegated under section 32 of the YPA
Abenaki	Odanak/Wôlinak(Grand Conseil de la Nation Waban-Aki)	Centre jeunesse de la Mauricie et du Centre-du-Québec		x[2]
Algonquin	Kitigan Zibi	Centre jeunesse de l'Outaouais	x	x
	Lac-Simon, Kitcisakik, Pikogan and Long Point	Centre jeunesse de l'Abitibi-Témiscamingue (CJAT)	x	x
	Barriere Lake	Centre jeunesse de l'Outaouais		
	Timiskaming First Nation and Kebaowek	Centre jeunesse de l'Abitibi-Témiscamingue (CJAT)		
Atikamekw	Manawan (Conseil de la Nation Atikamekw)	Centre jeunesse de Lanaudière	x[3]	x[3]
	Opitciwan[4]	Centre jeunesse de la Mauricie et du Centre-du-Québec		
	Wemotaci (Conseil de la Nation Atikamekw)	Centre jeunesse de la Mauricie et du Centre-du-Québec	x[3]	x[3]
Huron-Wendat	Wendake	Centre jeunesse de Québec – Institut universitaire		x[5]
Innu	Pessamit	Centre de protection et de réadaptation de la Côte-Nord (CPRCN)		x
	Mashteuiatsh	Centre jeunesse de Saguenay–Lac-Saint-Jean	x	x
	Uashat mak Mani-Utenam	CPRCN		x
	Matimekush–Lac-John	CPRCN		x
	Nutashkuan	CPRCN		x
	Pakua Shipu, Unamen Shipu and Ekuanitshit (Mamit Innuat)	CPRCN		x
	Essipit	CPRCN		x[6]
Mi'gmaq	Listuguj	Centre jeunesse Gaspésie-Les Îles	x	x
	Gesgapegiag	Centre jeunesse Gaspésie-Les Îles	x	x
Mohawk	Akwesasne	CISSS de la Montérégie-Ouest	x	x
	Kahnawake	Centre jeunesse de la Montérégie	x	x
	Kanesatake	Centre jeunesse des Laurentides		
Naskapi	Kawawachikamach	There is no agreement with a youth centre for this community, which is under treaty. This community is served by Centre de protection et de réadaptation de la Côte-Nord (hereinafter CPRCN) and the services are funded by Quebec. The responsibilities defined in sections 32 and 33 of the YPA are exercised by the DYP and the authorized employees of the CPRCN.		

1 The coloured boxes indicate the bipartite agreements between the communities and the youth centres, while the white boxes indicate the agreements between the youth centres and ISC. The appellation CISSS or CIUSSS was not used because the agreements in force were signed prior to the merger of the institutions of the provincial network.

2 Although the agreement allows for the exercise of responsibilities under section 33 of the YPA, the Grand Conseil de la Nation Waban-Aki currently has no staff working in youth protection.

3 The CNA has entered into an implemented agreement relating to the special youth protection program under section 37.5 of the YPA.

4 In November 2021, the Opitciwan community adopted the *Loi de la protection sociale atikamekw d'Opitciwan* (LPSAO) [Atikamekw of Opitciwan Social Protection Act] in accordance with the *Act respecting First Nations, Inuit and Métis children, youth and families*. The LPSAO took effect on January 17, 2022.

5 Although the agreement allows for the exercise of responsibilities under section 33 of the YPA, the Conseil de la Nation huronne-wendat currently has no staff working in youth protection.

6 Although the agreement allows for the exercise of responsibilities under section 33 of the YPA, the Conseil de la Première Nation des Innus Essipit currently has no staff working in youth protection.

Figure 1- Average rates per 1000 children by indicator (2002–2010)

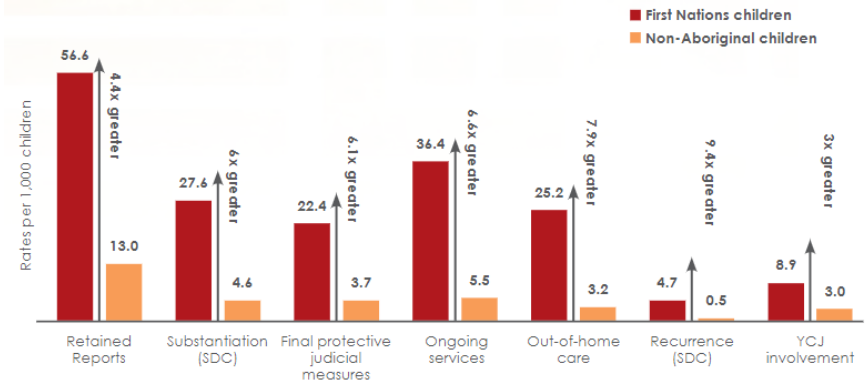


Figure 2- Breakdown of reasons for reports accepted for First Nations youth (0–17 years) in the communities – AS 480 A from 2011 to 2021

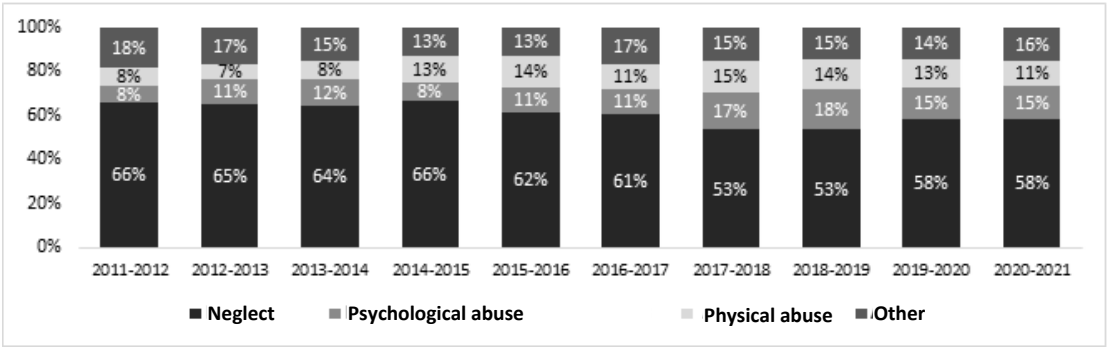


Figure 3- Breakdown of reasons for reports accepted for all Quebec youth (0–17 years) - AS 480 G from 2011 to 2021

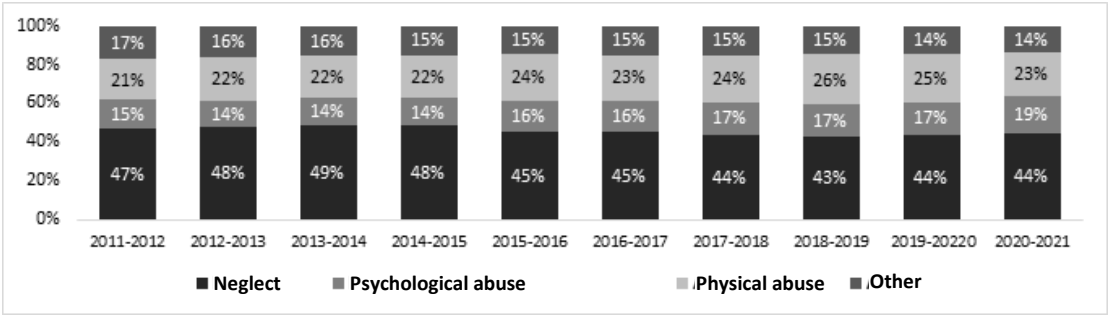
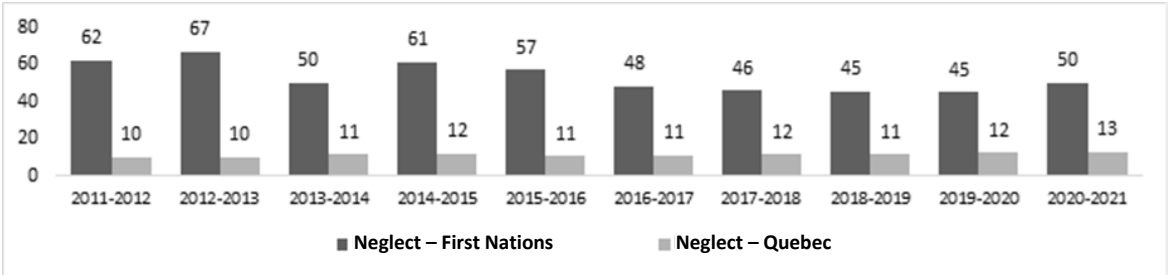
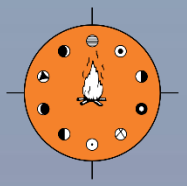


Figure 4- Rate of reports accepted for neglect per 1000 for First Nations youth and all Quebec youth (0–17 years) – AS 480 A and AS 480 G from 2011 to 2021



FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION



Assembly of First Nations Quebec-Labrador