S.C.C. File No. 40602

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)**

B E T W E E N :

**COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE**

Appellant

- and -

**DIRECTRICE DE LA PROTECTION DE LA JEUNESSE DU CISSS DE LA MONTÉRÉGIE-EST**

Respondent

-and-

**A**
**B**
**X**
**ATTORNEY GENERAL OF QUEBEC**
**CANADIAN CIVIL LIBERTIES ASSOCIATION**
**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Interveners

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# FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

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**MCCARTHY TÉTRAULT LLP**
1000 De La Gauchetière Street West, Suite MZ400
Montréal QC, H3B 0A2

**Karine Joizil** (kjoizil@mccarthy.ca)
**Simon Bouthillier** (sbouthillier@mccarthy.ca)
Tel: (514) 397-4129
Fax: (514) 875-6246

**Counsel for the Intervener,**
**Canadian Civil Liberties Association**

**ORIGINAL TO:** **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

**COPIES TO:**

**COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE**
360, rue Saint-Jacques
2e étage
Montréal, Quebec
H2Y 1P5

**Me Catherine Gauvreau**
**Me Lysiane Clément-Major**
**Me Manon Montpetit**
**Me Christine Campbell**
Tel: (514) 873-5146
Fax: (514) 873-6032
catherine.gauvreau@cdpdj.qc.ca

**Counsel for the Appellant,**
**Commission des droits de la personne et des droits de la jeunesse**

**NOËL & ASSOCIÉS**
2e étage
225, montée Paiement
Gatineau, Québec
J8P 6M7

**Me Pierre Landry**
Tel : 819 771-7393
Fax : 819 771-5397
p.landry@noelassocies.com

**Ottawa Agent for the Appellant,**
**Commission des droits de la personne et des droits de la jeunesse**

**ÉTUDE LÉGALE DU CISSS DE LA MONTÉRÉGIE-EST**
Suite 3500
800, rue du Square-Victoria
Montréal, Québec
H4Z 1E9

**Me Julie Langlois**
**Me Mélanie Poulin**
**Me Audrey Boctor**
**Me Vanessa Ntaganda**
Tel: (438) 820-8927
Fax: (450) 651-8644
julie.langlois.cisssme16@ssss.gouv.qc.ca

**Counsel for the Respondent,**
**Directrice de la protection de la jeunesse du CISSS de la Montérégie-Est**

**JURISTES POWER**
50, rue O'Connor, bureau 1313
Ottawa, Ontario
K1P 6L2

**Me Maxine Vincelette**
Tel: (613) 702-5573
Fax: (613) 702-5573
mvincelette@juristespower.ca

**Ottawa Agent for the Respondent,**
**Directrice de la protection de la jeunesse du CISSS de la Montérégie-Est**

**PRINGLE & ASSOCIATES**
502-2905 place Louis R. Renaud
Laval, Quebec
H7V 0A3

**Me Stéphane Pouliot**
Tel: (450) 668-8008 #111
Fax: (450) 686-1112
spouliot@pringleassocies.com

**Counsel for the Intervener,**
**A**

**PRINGLE & ASSOCIATES**
502-2905 place Louis R. Renaud
Laval, Quebec
H7V 0A3

**Me Stéphane Pouliot**
Tel: (450) 668-8008 #111
Fax: (450) 686-1112
spouliot@pringleassocies.com

**Counsel for the Intervener,**
**B**

**CENTRE COMMUNAUTAIRE**
**JURIDIQUE DE LA RIVE-SUD**
1732, boul. Marie-Victorin
Longueuil, Quebec
J4G 1A5

**Me Charlotte Vanier Perras**
**Me Myriam Couillard**
Tel: (450) 928-7666 #244
Fax: (450) 928-7671
cvperras@ccjrs.com

**Counsel for the Intervener,**
**X**

**BERNARD, ROY & ASSOCIÉS**
Bureau 8.00
1, rue Notre-Dame Est
Montréal
H2Y 1B6

**Me Éric Cantin**
**Me Mario Normandin**
Tel: (514) 393-2336 # 51616
Fax: (514) 873-7074
eric.cantin@justice.gouv.qc.ca

**Counsel for the Intervener,**
**Attorney General of Quebec**

**LAROCHELLE LAW**
4133 Fourth Avenue
Suite 201
Whitehorse, Yukon Territory
Y1A 1H8

**Me Vincent Larochelle**
Tel: (867) 456-2325
vincent@larochellelaw.ca

**Counsel for the Intervener,**
**British Columbia Civil Liberties Association**

**NOËL & ASSOCIÉS**
2e étage
225, montée Paiement
Gatineau, Québec
J8P 6M7

**Me Pierre Landry**
Tel : 819 771-7393
Fax : 819 771-5397
p.landry@noelassocies.com

**Ottawa Agent for the Intervener,**
**Attorney General of Quebec**

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## PART I — OVERVIEW

1. It has long been recognized that legislatures can empower courts to grant systemic remedies.[1] This well-established principle is not at stake in this appeal. It is also uncontested that the Youth Division of the Court of Quebec is empowered to grant remedies that entail the expenditures of public funds and remedies that impact children other than the child that appears before it, at least incidentally.[2] This appeal is about whether the Youth Division of the Court of Quebec must decline to remedy the rights violations of children in difficulty on the basis that its jurisdiction is limited to the situation of the child who appears before it.

2. The Canadian Civil Liberties Association (the "**CCLA**") intervenes in this appeal to make two submissions.

3. *First*, the separation of powers does not require that Canadian courts grant undue deference to the government when it has been found to have violated the rights of vulnerable and marginalized members of society. The separation of powers warrants that the judiciary show proper deference to the legitimate sphere of activity of the executive branch, but also to the legislature. Therefore, when the legislature adopts a legislative scheme that mandates the judiciary to keep the executive branch in check and to ensure that laws are properly executed, the judiciary has the responsibility to grant effective and meaningful remedies that attain the law's objectives, regardless of whether these remedies are systemic in nature or involve allotting resources.

4. *Second*, statutory provisions aimed at protecting vulnerable persons should be interpreted in light of the *parens patriae* doctrine. After the legislature effectively removed jurisdiction over youth protection cases from the hands of the Superior Court to grant it to the Youth Division, the legislature conferred on the Youth Division a jurisdiction similar to the *parens patriae* jurisdiction that was previously exercised by the Superior Court in such matters. The *parens patriae* doctrine empowers courts to do everything that is necessary for the protection of the person for whose benefit it is exercised. The jurisdiction is broad in scope, provided that it is exercised in accordance with its underlying principle and the fundamental human rights provided for by the *Canadian*

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[1] *CN* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 ; *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 SCR 84 ; *Moore* v. *British Columbia (Education)*, 2012 SCC 61 [***Moore***].

[2] *Protection de la jeunesse — 226231*, 2022 QCCA 1653 [***Court of Appeal's decision***] ; *Protection de la jeunesse – 123979*, 2012 QCCA 1483.

*Charter of Rights and Freedoms*. Pursuant to the *parens patriae* jurisdiction, a court is empowered to render judgment in the best interest of children even with regard to children who are not parties to the proceedings.

5. *Third*, s. 91 *in fine* only applies in very narrow circumstances and interpreting it to permit the Youth Division to grant systemic remedies would not open up the floodgates to a plethora of claims for systemic remedies under the YPA. Even when s. 91 *in fine* applies, the record will not always warrant a remedy of systemic nature.

## PART II —ARGUMENT

### A. Canadian courts need not grant undue deference to the government when it has been found to have violated the rights of vulnerable and marginalized members of society.

6. The majority of the Court of Appeal overturned the orders granted by the first instance judge at the Youth Division on the basis i) that they contravened the separation of powers; and ii) that they required the expenditure of public funds. While the CCLA does not take position with regards to the validity of the orders granted by the first instance judge, the CCLA respectfully submits that the majority of the Court of Appeal's reliance on these two principles was unwarranted.

#### *i) The "separation of powers" supports – not undermines - an interpretation of s. 91 in fine of the YPA pursuant to which the Youth Division may grant systemic remedies.*

7. In enacting the *Youth Protection Act* ("**YPA**"), the legislature has chosen to create a legislative scheme by which it has delegated to the executive branch - mainly directors of youth protection ("**DPJ**") - the task of implementing its policies regarding youth protection. Such delegation is consistent with "the hierarchical relationship between the executive and the legislature [in Canadian law], whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form."[3]

8. In order to protect children whose security or development is or may be considered to be in danger, the legislature provides the DPJ with extraordinary powers. The decision to remove children from their family and place them in state care brings profound, life-altering consequences for children and families. Such intervention can only be justified in the best interest of children and

[3] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para. 139.

in accordance with the principles of fundamental justice.[4] Children and their families are legitimately entitled to expect that the rights of children under state care will be protected and that the DPJ will act in conformity with legislation and abide by the law.

9. Due to the very intrusive nature of the state's interventions in the life of children and their families, Canadian child protection statutes give courts the authority to supervise the exercise of an agency's power.[5] Legislatures entrust courts with an important oversight role.[6] As this Court recently reminded us, "the checks and balances established in child welfare legislation [must be] front of mind for all decision makers" tasked with reviewing a child protection agency's conduct.[7] In Quebec, the legislature has mandated a specialized judiciary body, the Youth Division of the Court of Quebec, to keep the executive branch in check and to ensure that the YPA is properly executed.

10. Under the YPA, when the DPJ has failed to abide by its legislative duty, s. 91 *in fine* comes into play. The DPJ can be at fault in several ways. First, it can be responsible for its failures to comply with court orders, to provide services or to act in the best interest of children. In fact, research shows that the rights violations that give rise to remedies under s. 91 *in fine* are generally *the direct result of actions or omissions* by the DPJ.[8] Second, the DPJ can be responsible for its failure to ensure that measures ordered by tribunals are carried out by others.[9] Finally, the DPJ can be responsible for having failed to protect the rights of the children under its charge.[10] In other words, s. 91 *in fine* is a "last resort" mechanism that is exercised when harm has already been done due to the DPJ's failure to execute its legislative duties.[11] Thus, the Respondent's suggestion that the Youth Division granting a remedy under s. 91 *in fine* has a duty of reserve with regard to the

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[4] *Winnipeg Child and Family Services* v. *K.L.W.*, 2000 SCC 48 [***K.L.W.***], para. 15 ; *B.J.T.* v. *J.D.*, 2022 SCC 24 [***B.J.T.***], para. 65.

[5] *B.J.T.*, para. 65.

[6] *K.L.W.*, 2000 SCC 48, para. 76.

[7] *B.J.T.*, para. 67.

[8] Valérie P. Costanzo & Mona Paré, « Les réponses judiciaires au non-respect des droits de l'enfant dans l'intervention sociale : utilité ou futilité du recours en lésion de droits ? », (2023) 33(2) *Nouvelles pratiques sociales* 135, at 153 [***Contanzo & Paré***].

[9] s. 92 al. 2 of the YPA.

[10] ss. 46, 62 of the YPA.

[11] Contanzo & Paré, at 156.

operations of the DPJ[12] flows from a misunderstanding of the purpose of s. 91 *in fine* and its role within the legislative scheme. A proper interpretation of s. 91 requires that, once it is proven that the rights of a child have been wronged, the Youth Division may grant remedies that would prevent similar violations of other children's rights that are proven or reasonably apprehended.

11. The executive branch's failure to comply with its legal duties leads to very serious consequences. Situations that give rise to a remedy under s. 91 *in fine* include the violations of fundamental human rights provided for under the *Canadian Charter* and the *Quebec Charter*.[13] Even when the s. 91 *in fine* remedy results instead from a violation of rights provided for in the YPA, it must be remembered that the provisions of the YPA reflect the human rights guaranteed by the *Canadian Charter* and the *Quebec Charter*.[14] As Pr. Laurence Ricard notes, « *[l]a notion de lésion de droits est une application spécifique, dans le droit de la jeunesse, du pouvoir de réparation des tribunaux en matière de violation des droits fondamentaux.* »[15] The legislature's intent in enacting the YPA and s. 91 *in fine* must be interpreted in light of that context.[16]

12. Courts already have the power to ensure the executive branch complies with legislation under administrative judicial review. A public authority's failure to abide by a duty assigned to it by statute calls into action the supervising function of the courts. Courts engaging in judicial review in such circumstances usually assess the public authority's on a reasonableness basis, which calls for deference towards the public authority. However, legislative intent remains the "polar star" of judicial review and where the legislature has indicated that a different standard of review applies, such legislative indication prevails.[17] Therefore, when the legislature directs a court to oversee the

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[12] Respondent's Factum, paras 97-105.

[13] Sophie Papillon, « Le jugement en matière de lésion de droits de la Chambre de la jeunesse : où en sommes-nous ? », (2015) 56(2) *Les Cahiers de droit* 151, at 157 ; Mona Paré, « L'accès des enfants à la justice et leur droit de participation devant les tribunaux: quelques réflexions », (2014) 44 *R.G.D.* 81, at 90.

[14] Contanzo & Paré, at 152.

[15] Laurence Ricard, « Un regard sur la notion de lésion de droits en matière de protection de la jeunesse », (2021) 62(2) *Les Cahiers de Droit* 605, at 614 [***Ricard***].

[16] *R.* v. *974649 Ontario Inc.*, 2001 SCC 81, para. 18 ; *British Columbia Development Corp.* v. *Friedmann*, [1984] 2 S.C.R. 447, at 458 ; *Toronto Area Transit Operating Authority* v. *Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, para. 21 ; *Interpretation Act*, CQLR, c. I-16, s. 41.

[17] *C.U.P.E.* v. *Ontario (Minister of Labour)*, 2003 SCC 29, para. 149 ; *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65 [***Vavilov***], para. 33.

executive branch and to "correct" a situation following a failure by the DPJ and those responsible under it as it does under s. 91 *in fine*, such indication must be given effect.[18]

13. Granting systemic remedies does not require the Youth Division to usurp the role of the executive branch of government. It must be noted that operational decisions made by the DPJ are not "core policy" government decisions. In the context of a negligence case, this Court has held that these types of decisions are not immune to judicial review *precisely because they do not raise concerns regarding the separation of powers*.[19]

14. In fact, the exercise in which the Youth Division must engage is a purely legal one. Section 91 *in fine* is triggered where "the *rights* of a child in difficulty have been wronged," an assessment which is the exclusive prerogative of the judiciary. Once the Youth Division has determined that s. 91 *in fine* applies, it must craft a corresponding remedy. Such exercise also falls squarely under the expertise of the judiciary. These legal determinations warrant proper deference towards the determination made by the Youth Division, a specialized judicial body. Confirming that the Youth Division can grant systemic remedies would not require the Youth Division to engage in a political process to "improve" the wellbeing of children; the Youth Division's mandate under s. 91 *in fine* is to remedy rights violations.

15. In addition to granting supervisory powers to the judiciary, the legislature has mandated a specialized organization, the Commission, with the task of overseeing the executive branch by "tak[ing] the *legal* means it considers necessary to remedy any situation where the rights of a child have been wronged by bodies, institutions or persons"[20]. The Commission stands as an independent organization that is distinct from the rest of the executive branch; it reports directly to the legislature, its members are appointed by the legislature and its staff cannot be removed by the government, unless the Commission specifically recommends it.[21] Given that the Commission is nonetheless part of the executive branch, its involvement in proceedings under s. 91 in *fine* does not raise concerns regarding the separation of powers.

16. The legislature's choice to delegate this crucial task to the Commission is an important

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[18] *Vavilov*, paras. 34-35.

[19] *Nelson (City)* v. *Marchi*, 2021 SCC 41.

[20] ss. 23(c), 74.1 al. 2 of the YPA.

[21] *Charter of Human Rights and Freedoms*, CQLR, c. C-12 [***Quebec Charter***], ss. 73, 58, 62.

indication that the legislature intended to allow the Youth Division to grant systemic remedies that take into account the rights violations suffered by children beyond the ones who appear before it. Indeed, the legislature has conferred on the Commission the necessary qualities to be granted public interest standing, which determines if individuals or organizations may seek a remedy for the benefit of non-parties to the proceedings.[22] The legislature has expressly mandated the Commission to supervise the administration of the scheme by the DPJ, meaning that it has *genuine interest* in ensuring that the rights of children are protected. Moreover, the involvement of the Commission is a *reasonable and effective means* to remedy the rights violation of children beyond the situation of the child before the Youth Division. The Commission is a specialized organization with a significant expertise in youth protection.[23] It also has the expertise to propose efficient and meaningful systemic remedies and the legislature has charged it with the task of elaborating affirmative action programs.[24]

17. The separation of powers is a flexible concept in Canada that often gives way to parliamentary sovereignty. This Court has recently confirmed that the legislatures have a significant power to delegate, even when such delegation diverges from the traditional understanding of the separation of powers.[25] It is established that the legislature may confer certain judicial functions on bodies that are not courts and that it may confer other legal functions on the courts.[26] Therefore, when the legislature adopts a legislative scheme that mandates the judiciary to keep the executive branch in check and to ensure that laws are properly executed, the judiciary has the responsibility to grant effective and meaningful remedies that attain the law's objectives, regardless of whether these remedies are systemic in nature or involve allotting resources.

18. In conclusion, the separation of powers should be reconciled with the need to ensure meaningful remedies remain available for the violations of the fundamental rights of children, in accordance with this Court's holding that "tradition and history cannot be barriers to what reasoned

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[22] *British Columbia (Attorney General)* v. *Council of Canadians with Disabilities*, 2022 SCC 27.

[23] s. 58.1 of the *Quebec Charter*.

[24] ss. 86, 88, 89 of the *Quebec Charter*. Section 86 provides that the purpose of these programs is to "remedy [*corriger*] the situation of persons belonging to groups discriminated against", which is similar to the language used at s. 91 *in fine* of the YPA.

[25] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[26] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 15.

and compelling notions of appropriate and just remedies demand".[27] The protection of children's life and security is a "basic tenet of our legal system,"[28] and it should not be eclipsed by abstract and ill-defined concepts.

**ii)** ***The Youth Division is entitled to grant remedies requiring the expenditures of public funds.***

19. The considerations underlying the inherent judicial discretion in *Criminal lawyers* - where a legal aid tariff set by the Attorney General of Ontario already provided for a lower rate of compensation for an *amicus curiae* than the one set by the court - were substantially different from the ones underlying judicial intervention expressly authorized by legislation under s. 91 *in fine*. Moreover, whereas in *Criminal lawyers*, the orders "direct[ed] the Attorney General to pay specific monies out of public funds", orders allowing for systemic remedies such as the ones granted by the first instance judge only have ancillary financial consequences;[29] the government is required to comply with the orders but to do so it can allocate its resources as it deems appropriate.

20. The comments by the majority of the Court of Appeal suggest that there is a presumption pursuant to which statutes must be interpreted in a way that does not allow for appropriation of funds. However, there is no such presumption, and appropriation of funds can be implied or inferred. To quote Pr. Rankin, "[l]ike any other statute, appropriations are subject to the ordinary principles of statutory interpretation, as guided by Parliament's purpose in enacting them."[30]

21. Even if there was such a presumption against government expenses, it would be rebutted by the very wording of s. 91 of the *YPA*, which expressly indicates that the Court may grant orders that require expenditure of public funds, such as orders allowing for "a person working for an institution or body provide aid, counselling or assistance to the child and the child's family"[31] or for a child " [to] receive specific health care and health services."[32]

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[27] *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 59.

[28] *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 [***B. (R.)***], at 374 (La Forest J.).

[29] *Ontario* v. *Criminal Lawyers' Association of Ontario*, 2013 SCC 43, para. 59.

[30] Micah B. Rankin, « The improbable rise and fall of Auckland Harbour Board v the King », (2019) 97-1 *Canadian Bar Review* 43, at 66-67.

[31] s. 91(f) of the YPA.

[32] s. 91 (j) of the YPA.

22. Contrary to what the Respondent contends, s. 8 of the YPA is not an impediment to systemic remedies. While s. 8 of the YPA provides that children are entitled to receive "health services and social services that are appropriate… taking into account… [the] human, material and financial resources [of the institution providing those services]", such considerations are only relevant to determine the "health services and social services" to which a child is entitled. Once the judiciary has determined that a child's right to these services has been infringed, the legislature has not placed any restrictions on the remedies that the Youth Division may grant to correct the situation.[33] Moreover, where other rights than the child's rights to "health services and social services" have been wronged, s. 8 YPA is not applicable.

23. Finally, this Court recently ruled that "the fair and rational allocation of limited public funds" is not a pressing and substantial objective that can justify an infringement of rights and freedoms.[34] While that comment was part of an analysis under s. 1 of the *Canadian Charter*, it must be remembered that both the *Canadian Charter* and the *Quebec Charter* play an important role under the YPA, particularly under s. 91 *in fine*.[35]

### B. Section 91 *in fine* reflects the legislature's choice to grant to the Youth Division the *parens patriae* jurisdiction.

24. The *parens patriae* doctrine is an important doctrine in Canadian law. It has been relied on by the Supreme Court in several cases dealing with the rights of vulnerable people, including children.[36] As this Court has long recognized, children are a "highly vulnerable" group.[37] This is particularly true when s. 91 *in fine* is triggered, i.e. where the DPJ has failed to abide by its legislative duty.[38] Under some circumstances, courts may even be required to inquire into the

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[33] s. 92 (2) of the YPA provides that : ''Every institution and every educational body is required to take *all available means* to provide the services required to carry out the measures ordered." (emphasis added).

[34] *Conseil scolaire francophone de la Colombie-Britannique* v. *British Columbia*, 2020 SCC 13, para. 153.

[35] See above, para. 11.

[36] *Beson* v. *Director of Child Welfare (NFLD.)*, [1982] 2 SCR 716 [***Beson***] ; *King* v. *Low*, [1985] 1 SCR 87 [***King***] ; *B.J.T.*, paras 63-65.

[37] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, 2004 SCC 4, para. 56 ; *R.* v. *D.B.*, 2008 SCC 25, para. 48 ; *A.C.* v. *Manitoba (Director of Child and Family Services)*, 2009 SCC 30, para. 104.

[38] See above para. 10; Ricard, at 619.

actions of a child protection agency, on account of its essential oversight role in child welfare matters and its *parens patriae* jurisdiction.[39]

25. Once understood as a broad authority of the Crown of the property and person of children and individuals lacking legal capacity, it is now construed as a doctrine that extends the jurisdiction of the courts to make orders in the best interests of children.[40] The *parens patriae* jurisdiction of the courts "elevates the concept of the welfare of the child to the paramount position."[41]

26. Ater the legislature effectively removed jurisdiction over youth protection cases from the hands of the Superior Court to grant it to the Youth Division, the legislature conferred on the Youth Division a jurisdiction similar to the *parens patriae* jurisdiction that was previously exercised by the Superior Court in such matters. When the *parens patriae* jurisdiction is expressed through legislative provisions, like s. 91 *in fine*, those legislative provisions should be interpreted in light of that doctrine.[42]

27. Jurisdiction under both the *parens patriae* and s. 91 *in fine* of the YPA provide courts with extraordinary powers to intervene on behalf of children. The *parens patriae* jurisdiction empowers courts "to do what is necessary for the protection of the person for whose benefit it is exercised" [43] as long as it is exercised in accordance with its underlying principle and the fundamental human rights provided for by the *Canadian Charter of Rights and Freedoms*. Likewise, the YPA expressly renders inapplicable to judicial interventions the provision of the *Code of Civil Procedure* which provides that "[t]he courts cannot adjudicate beyond what is sought by the parties".[44] Moreover, both the *parens patriae* jurisdiction and s. 91 *in fine* can be raised by judges of their own motion.[45]

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[39] *B.J.T.*, para. 63.

[40] *Reference re Broome* v. *Prince Edward Island*, 2010 SCC 11, paras 49-50.

[41] *King*, para. 20.

[42] *B. (R.),* at p. 374-375 ; *R.* v. *C.P.*, 2021 SCC 19, paras 69, 76 (Abella, Karakatsanis and Martin JJ). By analogy, the power to grant safeguard orders that the legislature conferred upon the Court of Quebec under s. 49 of the *Code of Civil Procedure*, CQLR, c. C-25.01 [***CCP***], was interpreted in light of the Superior Court's historical power to grant injunctive reliefs.

[43] *E. (Mrs.)* v. *Eve*, [1986] 2 SCR 388 [***Eve***], para. 77.

[44] s. 85 of the YPA and art. 10 al. 2 of the CCP.

[45] Ricard, at 617; Lucie Lemonde et Julie Desrosiers, « Le droit à un recours effectif lors de la violation des droits fondamentaux des mineurs privés de liberté », (2002) 62 *R. du B.* 205, at 218-219.

28. More specifically, the *parens patriae* doctrine supports the contention that the Youth Division is empowered to grant systemic remedies. This Court has repeatedly resorted to the *parens patriae* doctrine to render judgment in the best interest of children *even when the children were not parties to the proceedings*.[46] In addition, once s. 91 *in fine* is triggered, the *parens patriae* doctrine enables the Youth Division to not only act in situations where an injury has occurred, but also where an injury is apprehended, specifically to prevent harm to vulnerable children.[47] Finally, courts have an obligation to intervene under their *parens patriae* jurisdiction to fill a statutory gap that jeopardizes the best interest of a child.[48]

### C. Interpreting s. 91 *in fine* as allowing the Youth Division to grant systemic remedies would not open up the floodgates for claims for systemic remedies under the YPA.

29. It must be remembered that s. 91 *in fine* applies in narrow circumstances: (1) where children in difficulty are concerned; (2) where the rights of these children are in jeopardy; and (3) where bodies, institutions or persons are responsible for these infringements.

30. Even where s. 91 *in fine* applies, it does not necessarily follow that a remedy of a systemic nature will be granted. Justice Schrager J.A., dissenting in the Court of Appeal, stated that the Youth Division may grant systemic remedies "*si la preuve révélait un problème systémique dans l'organisme affectant tous les établissements*"[49]. In accordance with the principles already established by this Court, the Youth Division will have to ensure that the evidence supports the remedy, and that the remedy sought is not redundant, nor remote.[50]

## PART III — SUBMISSIONS CONCERNING COSTS

31. The CCLA asks that no costs be awarded for or against it.

## PART IV — ORDER SOUGHT

32. The CCLA takes no position on the outcome of the appeal.

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[46] *B.J.T.*; *King*.
[47] *Eve*, para. 75.
[48] *Beson*, at 724.
[49] *Court of Appeal's decision*, paras. 38-39.
[50] *Moore*, paras. 55-70.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29th day of February, 2024.

McCarthy Tétrault S.E.N.C.R.L., s.r.l.

**Karine Joizil and Simon Bouthillier**
McCarthy Tétrault LLP

## PART V — TABLE OF AUTHORITIES

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