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Is the *Act respecting First Nations, Inuit and Métis children, youth and families* Constitutional?

By: Robert Hamilton

Case Commented On: *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 (CanLII) [quotations from the unofficial English translation]

Legislation Commented On: *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24

The *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, [the *Act*] received royal assent on June 21, 2019, and came into force on January 1, 2020. The *Act* was developed over two years and through wide-ranging consultations. It is designed to gradually transfer control of child and family services to Indigenous nations and, through this, to ensure that fewer Indigenous children are removed from their families and communities. The intention is to mitigate the effects of the assimilationist policies that have been incredibly harmful to Indigenous children, families, and communities. The *Act* seeks to accomplish this by establishing national standards for the provision of child and family services and by providing a mechanism through which Indigenous laws – that is, the laws of Indigenous nations themselves – can take priority over inconsistent federal and provincial laws and govern the delivery of child and family services to Indigenous peoples (*Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 (CanLII), paras 4-5 [*Reference*]). Although it has faced thoughtful and considered criticism, it is clear the *Act* seeks to substantially change how child and family services are provided and to transition the governance and regulation of those services to Indigenous peoples.

In addition to the critiques of the *Act*, there are also questions concerning its legality. On December 20, 2019, the Government of Quebec filed a Notice of Reference to the Court of Appeal of that province, asking the Court to assess the constitutionality of the *Act.* The Reference Question asked: "Is the *Act respecting First Nations, Inuit and Métis children, youth and families ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?" (*Reference*, para 7) On February 10, 2022, the Quebec Court of Appeal found the *Act* unconstitutional in part. The federal government and the province of Quebec both appealed the decision to the Supreme Court of Canada. Leave to appeal is not required on a reference question initiated by Governor and Council, so the appeal will be heard. Oral arguments will likely be heard in the winter.

The Supreme Court's decision will have significant implications. Three areas are particularly notable. First, the immediate effects concern the validity of the federal legislation and practical impacts on the provision of child and family services to Indigenous peoples. The provision of such

services has historically been a complex and contentious area of overlapping federal and provincial jurisdiction and service delivery. The *Act* changes this, especially through the development of national standards and its provisions for the exercise of Indigenous jurisdiction. The Supreme Court's decision will be immediately relevant to Indigenous peoples across the country, including the many who have already begun to develop laws based on the new regime, as well as the federal and provincial governments engaged in service delivery and negotiations with Indigenous parties regarding the transitions envisioned under the *Act.*

Second, the decision will impact the development of future legislation. Under the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP ACT*], the federal government has established a process for ensuring that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 [*UNDRIP*]). The child and family services *Act* is a model of how the federal government may seek to make Canada's laws consistent with the *UNDRIP* by recognizing Indigenous jurisdiction and establishing processes for Indigenous peoples to assume governance powers (valid questions about the *Act's* consistency with the *UNDRIP* notwithstanding). The Supreme Court's decision in the present case will provide guidance on complex issues of Indigenous self-government, federalism, and the division of powers that will arise under this model of implementation.

Finally, the QCCA's conclusion that self-government is a "generic" Aboriginal right under s 35(1) of the *Constitution Act, 1982* and recognition of a right to self-government over child and family services (*Reference*, paras 468-85) may have significant doctrinal implications. While there is some support for the Court's reasoning and conclusions in previous case law, the holding also poses a direct challenge to the leading SCC decision on self-government, *R v Pamajewon*, [1996] 2 SCR 821, 1996 CanLII 161). Endorsement from the Supreme Court may require re-consideration of longstanding doctrine and could introduce a new era of Aboriginal rights jurisprudence.

This post summarizes the key conclusions of the QCCA on the reference question and outlines likely issues on appeal. It also serves as an introduction to a series of subsequent ABlawg posts from practitioners and academics engaging specific aspects of the decision in more detail. Given the wide-ranging importance of the decision for governments and Indigenous peoples across Canada, a detailed series of posts is merited.

The *Act*

The *Act* attempts to instigate a shift in governance practices by recognizing Indigenous jurisdiction and providing a mechanism for that jurisdiction to supersede federal and provincial law. In the words of the QCCA, the *Act* favours "a bottom-up approach, [and] provides Aboriginal peoples with the flexibility and functional independence to choose their own solutions. In responding to the pressing need for reconciliation, the *Act* is designed to address the excessive delays of the piecemeal agreement negotiating process" (*Reference*, para 27). It tries to accomplish this in two ways: 1) the establishment of national standards for the provision of child and family services to Indigenous peoples and 2) the transfer of control over the governance and regulation of such services to Indigenous peoples in recognition of the Aboriginal right of self-government (*Reference*, para 25).

National standards are established in Part 1 (*Act*, ss 1-17) and are discussed under three headings: best interests of the child, provision of services, and child placement (*Reference*, para 29). As the QCCA noted, "[t]hese standards place the best interests of Aboriginal children at the heart of decisions made in their regard and recognize the importance for these children of maintaining ongoing relationships with their families and with the communities to which they belong, while preserving their connections to their culture" (*Reference*, para 4). I will note here that the official English translation I have cited departs from the wording of the *Act* in consistently using "Aboriginal" instead of "Indigenous." I have maintained this where quoting directly from the decision but otherwise use "Indigenous" unless referring to s 35 "Aboriginal rights."

Part 2 (*Act*, ss 18-26) establishes a process for the recognition of the child and family services laws of Indigenous nations and communities. In recognition of the right of self-government, the *Act* provides a mechanism through which Indigenous laws can have "the same force of law as federal laws and prevail over any conflicting or inconsistent provision of a federal or provincial law respecting child and family services" (*Reference*, paras 32). The *Act* is explicit that the right of self-government includes the right to legislate in relation to child and family services (s 18 reads: "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority").

The *Act* establishes two options for "Indigenous governing bodies" (the term used in this and other recent federal legislation – see e.g. *Impact Assessment* Act, SC 2019, c 28, s 1, s 2; *Indigenous Languages Act*, SC 2019, c 23) seeking to exercise jurisdiction: they can inform federal and provincial governments that they intend to exercise their rights of self-government and legislate in relation to child and family services, or they can request the negotiation of a coordination agreement under which such laws will be developed (*Act*, ss 20(1) & (2)). *If* an Indigenous governing body pursues this latter option, ss 21 and 22 of the *Act* then apply. Under those sections, Indigenous "laws pertaining to child and family services have the same force of law as federal laws and prevail over any conflicting or inconsistent provision of a federal or provincial law respecting child and family services" (*Reference*, para 32).

The combined effects of Parts 1 & 2 of the *Act* are the establishment of national standards concerning the delivery of child and family services to Indigenous peoples and the development of a process for Indigenous peoples to take control of the regulation and provision of these services through negotiation with other levels of government. Important questions remain about whether this structure will effectively recognize Indigenous authority, whether the national standards are stringent enough, who will be recognized as an "Indigenous governing body", and where funding for jurisdictional transitions will come from. The *Act's* national standards and recognition of Indigenous jurisdiction also raise important constitutional questions.

The Constitutional Challenge

The Attorney-General of Quebec challenged the constitutionality of the *Act* on two grounds. First, the national standards in Part 1 "are invalid because they have the effect of dictating the manner

in which provinces are to provide services to Aboriginal children and families" (*Reference*, para 8). That is, s 91(24) does not allow the federal government to determine how the provinces can legislate in an area of provincial jurisdiction: provinces hold jurisdiction over child welfare, and the *Act* "dictates how such services are to be provided to Aboriginal persons" (*Reference*, para 36). In this, the *Act* "exceeds the federal powers under s. 91(24) and jeopardizes the architecture of the Constitution" (*Reference*, para 36).

Second, the *Act*'s recognition of the right of self-government impermissibly amended the constitution (*Reference,* para 36). Quebec argued that recognition of an inherent right of self-government protected by s 35 is not within Parliament's authority. That is, "by affirming the existence of the inherent right of Aboriginal self-government, Part II of the Act usurps the role of the courts and unilaterally creates a third level of government in Canada. This can only be achieved through a constitutional amendment or by means of treaties protected by s. 35" (*Reference*, para 36).

In response, the Attorney-General for Canada argued that the *Act* is valid under ss 91(24) and 35 (*Reference*, para 9). In respect of the division of powers question under s 91(24), Canada argued that the pith and substance of the *Act* is the protection of Indigenous children, families, and culture through reducing the number of Indigenous children in child welfare systems, a matter that falls within federal authority under s 91(24). The exercise of this authority does not, the AG argued, interfere with provincial authority in any way (*Reference*, paras 9, 37).

The Decision of the Court of Appeal

The Court of Appeal held that the *Act* is unconstitutional in part. The national standards do not violate the division of powers: Part 1 of the *Act* is constitutionally compliant. The Court concluded, however, that the process established under Part 2 for making Indigenous laws paramount over inconsistent federal and provincial legislation is unconstitutional. I address the reasoning of the court briefly here. Subsequent posts will analyze these issues in greater detail.

On the establishment of national standards, the QCCA rejected Quebec's argument that the *Act* "dictates how provinces must provide child and family services in an Aboriginal context" (*Reference*, para 44). Rather, the pith and substance of the *Act* "is to ensure the well-being of Aboriginal children, by fostering culturally appropriate services to reduce their overrepresentation in provincial child welfare systems" (*Reference*, para 44). The Court also rejected Quebec's further argument that the effects of the *Act* impair the "province's authority over its public service", holding that the impact on the work of the provincial public service is merely incidental (*Reference*, para 45).

On the question of whether it is constitutionally permissible for the federal government to recognize Indigenous laws as paramount over provincial law, the court sided with the AG of Quebec. The reasoning, however, is important, as the Court rejected many aspects of Quebec's argument for reasons that will likely feature prominently in arguments at the Supreme Court. Quebec had based its argument on this issue in part on the contention that "Aboriginal governance can result only from delegations of legislative powers, agreements between governments and Aboriginal peoples, or a constitutional amendment" (*Reference*, para 47). Section 35 does not,

Quebec argued, recognize an Aboriginal right of self-government. The QCCA rejected this argument, notably holding that there is a generic right of self-government under s 35 which includes the right of self-government in relation to child and family services (*Reference*, paras 57-60).

The Court did, however, agree that the provisions purporting to make Indigenous laws paramount over federal and provincial laws are unconstitutional. The Court reasoned:

> When an Aboriginal governing body attempts to enter into a coordination agreement with a government and, in accordance with the Act, enacts legislation in relation to child and family services, s. 21 of the Act specifies that the legislation has "the force of law as federal law". The aim of this provision is to render the doctrine of federal paramountcy applicable to Aboriginal legislation. In this regard, the provision alters the fundamental architecture of the Constitution and is *ultra vires*. The doctrine of federal paramountcy, which is used to resolve irreconcilable conflicts between federal and provincial laws under certain conditions, pertains only to federal laws validly enacted under s. 91 of the *Constitution Act, 1867*. The legislative texts in question here, however, are not enactments of the federal government, but rather enactments of Aboriginal governing bodies exercising the s. 35 Aboriginal right of self-government of their peoples. (*Reference*, para 64)

To summarize, the Court held that the national standards established in the *Act* are within federal jurisdiction. The pith and substance of the *Act* concerns a subject matter of federal jurisdiction, and the national standards of a general nature and have only incidental effects on the exercise of provincial jurisdiction. The provisions of the *Act* making Indigenous laws paramount over inconsistent federal and provincial law, however, are *ultra vires.* This is not, however, because Indigenous peoples do not have the right to legislate in relation to child and family services, but because it is beyond the jurisdiction of Parliament to make those laws paramount over provincial laws.

The Appeal to the Supreme Court

The decision of the QCCA dealt with a number of issues that will be raised on appeal, including whether the federal government can establish national standards for the provision of services presumptively under provincial jurisdiction to Indigenous peoples, whether s 35 recognizes a generic right of self-government and a right of self-government in relation to child and family services, whether Parliament can validly enact a scheme that makes Indigenous laws paramount over inconsistent federal and provincial legislation, whether the *Pamajewon* decision should be modified or overruled, and the effect of *UNDRIP* on domestic law.

The stakes are significant. The *Act* clearly represents a model for moving away from the *Indian Act*, RSC 1985, c I-5, and recognizing Indigenous law and jurisdiction in legislation that strives to be consistent with *UNDRIP*. The Supreme Court's decision will provide guidance not only on the provision of child and family services to Indigenous peoples, but the scope of federal authority to shift jurisdiction to Indigenous peoples in legislation consistent with *UNDRIP*. This decision may determine whether the federal government's *UNDRIP ACT* represents the beginning of a new era

in which Indigenous peoples take on meaningful jurisdiction and agency in Canada's constitutional order or whether the existing rules of that order will constrain what change can be achieved. This appeal asks the Supreme Court to consider not only *whether* a right of self-government exists, but how the jurisdiction reflected in such a right fits into the existing constitutional order.

This post may be cited as: Robert Hamilton, "Is the *Act respecting First Nations, Inuit and Métis children, youth and families* Constitutional?" (April 28, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/04/Blog_RH_Reference_Child_Family_Services.pdf