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Legislative Reconciliation and Indigenous Rights of Self-Government: Reference re An Act respecting First Nations, Inuit and Métis children, youth and families

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Case Commented on: *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#) (“SCC Reference”).

The Supreme Court recently delivered its judgement on the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) (“the Act”). This post summarizes this long-awaited decision. Colleagues and I will provide more detailed analysis of the Court’s rationale and the implications of the decision in subsequent posts.

In short, the decision was a significant victory for the federal government and Indigenous peoples. The SCC upheld not only legislation recognizing and giving effect to Indigenous self-government in respect of child and family services, but a model of federal implementation of the [United Nations Declaration on the Rights of Indigenous Peoples](#) (“UNDRIP”) that could see Indigenous nations assume jurisdiction in many important areas.

The Court upheld the authority of the federal government to establish national standards, binding on the provinces, for the provisions of services to Indigenous peoples and held that the federal government can referentially incorporate Indigenous laws, giving them the force of federal law and thereby making them paramount over inconsistent provincial law. It also held that Parliament can, by affirming the existence of a right under s 35 of the [Constitution Act, 1982](#), bind itself and Crown in right of the federal government to act on the basis of that affirmation. Whether, or to what extent, the affirmations are binding on the Crown in right of the provinces will be considered in a separate post.

In reaching the conclusions that it did, the Court affirmed the constitutionality of an ambitious approach to reconciliation and UNDRIP implementation whereby the federal government can give legal effect to Indigenous rights of self-government and give effect to Indigenous laws and jurisdiction. It confirmed that the federal government has the authority under s 91(24) of the *Constitution Act 1867* to implement statutory regimes to enhance Indigenous self-determination, including where this occurs in fields currently occupied by provincial law.

Notably, however, the case said very little about the scope and content of s 35. The question of the inherent right of self-government, and the appropriate legal test to prove such a right, were left for another day. The reasons for decision – issued unanimously by “The Court” – are grounded in principles of federalism rather than Aboriginal rights. This is not to downplay the importance of the decision, but the many people who wondered if the Court would finally move beyond the

problematic test for self-government articulated in *R v Pamajewon*, [1996 CanLII 161 \(SCC\)](#), [1996] 2 SCR 821 and develop a more generative framework for s 35 will have to continue to wait.

Context

The *Act respecting First Nations, Inuit and Métis children, youth and families* is an important part of the federal government's approach to reconciliation with Indigenous peoples. The Act affirms that Indigenous peoples have an inherent right of self-government in relation to the provision and regulation of child and family services under s 35 of the *Constitution Act, 1982*. Further, it develops a process for giving effect to that right by recognizing Indigenous jurisdiction in the area and giving legal force to Indigenous laws, even where they conflict with provincial law. As such, the *Act* is part of the current federal government's approach to implementing the UNDRIP. As the Supreme Court wrote:

In keeping with its commitments relating to the UNDRIP, Parliament decided to enact innovative legislation that establishes national standards and provides Indigenous peoples with effective control over their children's welfare. (*SCC Reference* at para 19)

The Act does this in two ways. First, it establishes national standards for the delivery of child and family services to Indigenous peoples, standards which bind all service deliverers. Second, it provides a process for recognizing and giving effect to Indigenous jurisdiction over the delivery of child and family services on their nations and for giving effect to Indigenous laws. This framework is established under the Act explicitly in order to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services” and to “contribute to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*” (Act at s 8).

Where Indigenous nations or governing bodies seek to exercise jurisdiction under the scheme devised by the Act, they can follow one of two processes. First, in light of the affirmation of the inherent right of self-government in the Act, 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, creating their own law on that basis. Second, nations can choose to enter into a coordination agreement with the federal and relevant provincial governments. Should they pursue this option, ss 21 and 22 of the Act 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” (*Renvoi à la Cour d'appel du Québec relative à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, [2022 QCCA 185 \(CanLII\)](#) at para 32, “QCCA Reference”).

The government of Quebec considered that the Act raised important constitutional questions and instigated a reference decision to ascertain the constitutionality of the Act. Quebec referred the following constitutional question to the Quebec Court of Appeal (“QCCA”): “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? (Order in council 1288-2019, (2020) 152 G.O. II, 154, at p. 155)” (*SCC Reference* at para 1).

There were two primary grounds on which Quebec argued invalidity.

First, Quebec argued that the national standards established in the Act “are invalid because they have the effect of dictating the manner in which provinces are to provide services to Aboriginal children and families” (*QCCA Reference* at para 8). That is to say, it is beyond federal jurisdiction to determine how the provinces can carry out activities within provincial jurisdiction (*QCCA Reference* at para 36). This overreach, Quebec argued, “jeopardizes the architecture of the Constitution” (*QCCA Reference* at para 36).

Second, Quebec argued that legislative recognition of an inherent right of self-government protected by s 35 is beyond Parliament’s authority and that “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” (*QCCA Reference* at para 36).

The QCCA found most of the Act to be constitutional. I summarized the decision [here](#). While the QCCA upheld the authority of the federal government to establish national standards, it deemed ss 21 and 22(3) of the Act unconstitutional. These sections, which establish the framework whereby Indigenous laws may be referentially incorporated as federal law and thereby made paramount over inconsistent provincial law, were found to “impermissibly alter Canada’s constitutional architecture” (*SCC Reference* at para 30). This was a significant loss for the federal government. While establishing national standards is one key pillar of the Act, giving effect to Indigenous jurisdiction by giving the force of federal law to Indigenous laws was a central part of the federal government’s novel approach to implementing the UNDRIP through “legislative reconciliation.”

The QCCA, however, did not stop there. The Court also held that s 35 recognizes an inherent right of self-government in relation to the provision and regulation of child and family services. This right, the QCCA held, is “generic” in nature, meaning that it is held by all Indigenous peoples and need not be proven through the highly restrictive *Pamajewon* test (no claim for a right of self-government has ever been successful under *Pamajewon* – see commentary on this aspect of the QCCA decision from Kent McNeil [here](#)). Thus, while the QCCA significantly undermined the ability of the federal government to give effect to Indigenous laws through federal statutes, it significantly expanded the constitutional protection of Indigenous child and family services laws against both federal and provincial incursion.

The QCCA decision was a reference decision, meaning that it was advisory in nature and did not have the effect of invalidating the legislation that it deemed unconstitutional. Governments have tended to treat reference decisions with deference, however, and the practical effects of the QCCA decision, were it to have been upheld, are therefore of note. Had the SCC upheld the decision in full, Indigenous child and family services laws would be constitutionally protected as expressions of an inherent right of self-government under s 35 of the *Constitution Act, 1982*. That would have been significant. A federal or provincial government that deemed an Indigenous law inadequate and wished to impose their own law would have needed to be able to justify that infringement.

They would have been required to show that they had a valid legislative objective in infringing the Indigenous law and that the infringement itself was minimally impairing and proportional (*Tsilhqot'in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#) at para 77-79). This is a high bar and, especially given the significance of control over child and family services, infringement would likely have been difficult to justify in most cases.

But Indigenous laws would not have had statutory protection. Because the QCCA held that the federal government did not have the jurisdiction to incorporate Indigenous laws as federal law, thereby giving them the force of law and making them paramount over inconsistent provincial law, the provisions of the Act purporting to do so were deemed unconstitutional. Indigenous laws were protected by s 35, that is, but not by the conventional division of powers. Provincial laws would, in theory, continue to apply until such time as they were challenged as infringing the right of self-government or until a negotiated jurisdictional arrangement was found.

The stakes of the SCC decision for Indigenous nations, children, and families, therefore, were clear.

The Supreme Court's Decision

Both Canada and Quebec appealed the decision of the QCCA to the Supreme Court of Canada. As before the QCCA, Quebec argued that “the entire Act is ultra vires Parliament because it impermissibly intrudes on certain areas of exclusive provincial jurisdiction, especially the province’s power to direct its own agencies, and because the Act represents an attempt to unilaterally amend the Constitution” (*SCC Reference* at para 36). Canada argued that the Act is within federal jurisdiction under s 91(24) of the *Constitution Act, 1867* and that “the incorporation by reference and paramountcy provisions are not problematic because incorporation by reference is a long-accepted legislative technique and the paramountcy provision merely states for greater certainty what constitutional law already provides” (at para 36).

The Supreme Court found the Act constitutional in its entirety: the Act falls within federal jurisdiction over “Indians, and Lands reserved for the Indians” under s 91(24) of the *Constitution Act, 1867*. Thus, the Court upheld federal jurisdiction to impose national standards on service providers, including provinces. It held that Parliament can affirm its understanding of s 35 rights in ordinary statutes, thereby binding the Crown to act as through the right had been recognized, and it held that Parliament has the authority to referentially incorporate the laws of another body (including Indigenous governments) so long as those laws fall under federal jurisdiction. So incorporated, these laws have the effect of federal law and are paramount over inconsistent provincial law.

Before getting into the Court’s reasoning, there are two things worth noting about the context setting the Court did.

First, like the QCCA, the Court took considerable time discussing the context of the Act, including the damaging history of colonialism that the Act seeks to address, the development of the Act, and the Act’s role with the federal government’s approach to reconciliation (*SCC Reference* at paras 10-12). In doing so, it drew on the Truth and Reconciliation Commission’s [Calls to Action](#) (at para

13), highlighted the importance of the UNDRIP and the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#) (“*UNDRIP Act*”)(at paras 14-15), and noted the connection between the UNDRIP and the Act (at para 19). While the dispositive legal reasoning in the decision focused quite narrowly on established doctrines of federalism, the Court made clear that it understood the importance of the Act as part of a federal project aimed at reconciliation with Indigenous peoples and implementation of the UNDRIP and as reflective of the desires and advocacy of many Indigenous nations.

Second, the Court adopted the metaphor of braiding to explain the relationship between Canadian, Indigenous, and international law. The Court held that the Act, the processes it established, and the broader project of which it is a part, are central to this process of braiding. It wrote:

The metaphor of “braiding” together these three types of norms has been helpfully proposed to explain how the Declaration should be implemented in Canada, so as to “work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope” (*SCC Reference* at para 7, citations omitted).

The Court thus set the context of the Act by recognizing legal pluralism and recognizing that the UNDRIP requires that state law be harmonized with, informed by, and otherwise considered in relation to both international law and the laws of distinct Indigenous nations: “The three elements of the purpose set out in s. 8 [of the Act] reflect Parliament’s openness to using three different types of legal norms that will be interwoven in this framework for reconciliation” (at para 7).

More detail will be provided on these aspects of the decision in subsequent posts.

As a last prelude before I review the Court’s reasoning, a few words need to be said about the Court’s use of the UNDRIP. First, the Court relied on the UNDRIP in providing context for the enactment of the Act, highlighting the implementation of the Declaration as one of the Act’s central purposes and that the Act is part of a broader legislative agenda aimed at implementing the Declaration in Canadian law. The Court also held that the UNDRIP has been recognized by Parliament as “a universal international human rights instrument with application in Canadian law” (at para 15). This much is uncontroversial – this is done explicitly in the federal *UNDRIP Act*.

The Court went further, however, and held that “the Declaration has been incorporated into the country’s positive law” by the *UNDRIP Act* (at paras 4 and 15). Thus, the UNDRIP and the *UNDRIP Act* were both relied on by the Court in explaining the exercise of federal authority under the Act. What is not clear is what legal effect was given to these instruments. It appears that the federal government could have imposed national standards, affirmed the right of self-government, and incorporated Indigenous laws as federal law without the UNDRIP or *UNDRIP Act*. None of those depend for their legal validity on the UNDRIP or *UNDRIP Act*. While the engagement with the Declaration was significant, and well beyond what the Supreme Court has done to date, it left many questions about the application of these instruments unanswered. A subsequent post will address these issues in more detail.

With that by way of lead in, the Court moved to the dispositive legal analysis. The central issue was whether the Act falls within federal jurisdiction under s 91(24). Assessing the validity of legislation for division of powers purposes required the Court to determine the pith and substance, or essential character, of the Act (*SCC Reference* at para 37). In doing so, the Court looked at the Act as a whole rather than dividing it into parts as the QCCA had (*SCC Reference* at para 38).

There are several steps to determining the pith and substance of legislation. First the purpose and effects of the law must be considered (*SCC Reference* at para 39). Determining the purpose involves considering both intrinsic and extrinsic evidence (at para 39). Determining effects requires consideration of both the legal and practical effects.

The Court held that the pith and substance of the Act is “protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advanc[ing] the process of reconciliation with Indigenous peoples” (at para 41).

From the intrinsic evidence, the Court derived 3 purposes, all of which are also stated in the Act itself: to “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services”; to set out national standards for the provision of child and family services to Indigenous peoples; and to “contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (at paras 43-45).

The Court then turned to extrinsic evidence, noting that the Parliamentary debates on the Act and statements of the Parliamentary Secretary to the Minister of Indigenous Services indicate that the purpose of the Act is to promote “the well-being of Indigenous children, youth and families” (at para 49) and to establish national standards, consistent with the TRC Calls to Action, that ensure that “all services for first nation, Inuit and Métis children are provided in a manner that takes into account the individual child’s needs, including the need to be raised with a strong connection to the child’s family, culture, language and community” (at para 51, citing *House of Commons Debates*, May 3, 2019, at 27324).

The extrinsic evidence also showed that the federal government intended to implement parts of the UNDRIP through the Act and that this implementation is “closely linked to both the affirmation of Indigenous peoples’ right of self-government and the establishment of national standards for the provision of child and family services in relation to Indigenous children” (at para 52).

Taken together, the intrinsic and extrinsic evidence illustrated that the purpose of the Act was to recognize and affirm an Indigenous right of self-government in relation to child and family services, establish national standards for the provision of such services to Indigenous peoples, and implement the UNDRIP. This informed the purpose branch of the pith and substance analysis.

The Court then considered the effects of the Act, both legal and practical. In assessing the legal effects of the Act, the Court grouped the provisions of the Act into three categories: “(1) provisions affirming the right of self-government; (2) provisions establishing national standards; and (3) provisions setting out concrete implementation measures” (at para 55). The legal effects analysis addresses several of the central legal issues of the decision.

The provisions affirming the right of self-government are found in ss 8 and 18 of the Act and are stated in s 7 as binding on the Crown. The Court held that these affirmations have “substantive legal effects” (at para 56). The principle of parliamentary sovereignty grounds the legal effect of these affirmations. It follows from the principle of parliamentary sovereignty, “that Parliament may bind the Crown through legislation” (at para 57). Parliament can limit government authority, bind government actors and the Crown and “shape how public powers are exercised” (at para 57).

As a result, s 7 of the Act, which “expressly makes the Act binding on the Crown in right of Canada or of a province” (at para 58), combines with ss 8(a) and 18 to compel the Crown to act as though s 35(1) recognizes an Indigenous right of self-government in relation to the provision and regulation of child and family services. By enacting a binding affirmation, Parliament has bound the federal government to the position it has affirmed as a matter of statutory positive law (at para 59). While it is clear that the national standards (ss7-19) and incorporation provisions (ss.21-23) bind provinces, whether, or to what extent, the affirmation in s.18 is binding on the Crown in right of the provinces is a question the decision leaves open (at para 118). This is a complex issue, and I will unpack it in a separate post.

There is an important qualification to note here. Some commentary immediately following the decision suggested that the Supreme Court affirmed an inherent right of self-government. It did not do so. First, the Court explicitly declined to consider whether s.35 recognizes a right of self-government. Second, responding to arguments from Quebec that the Act violated the separation of powers by purporting to determine the scope and content of s 35 rights, the Court was clear: “Parliament cannot bind the courts — in their capacity as guardians of the Constitution — or the provinces as regards the definitive interpretation to be given to s. 35” (at para 60). The Act did not do what Quebec contended – confirm that s.35 includes a right of self-government in relation to child and family services - because the Act could not do that.

What Parliament could do, significantly, is lay out its understanding of s 35 and direct itself and the Crown to *act as though* a right has been recognized: “By setting out its understanding of the scope of this constitutional provision in s. 18(1) of the Act, Parliament undertakes to act as though Indigenous peoples enjoy an inherent right of self-government in relation to child and family services” (at para 60, emphasis added).

This may seem like a pedantic point, but its impact is significant. As discussed below, the Court explicitly declined to determine whether s 35 includes a right of self-government. As a result, several doctrinal questions, such as the proper test for establishing a right of self-government and the relationship between s 35 and the doctrine of interjurisdictional immunity, remain outstanding. Perhaps most significantly, this would appear to leave the courts no role in supervising Crown actions that might impact the right. Recall that following the QCCA decision, Indigenous laws had constitutional protection (i.e. a government would have to satisfy the test for justifying an infringement of Aboriginal rights outlined in *R v Sparrow*, [1990 CanLII 104 \(SCC\)](#), [1990] 1 SCR 1075 before acting in a manner that undermined those laws). Following the SCC decision, this no longer appears to be the case.

This does not mean that an Indigenous nation would be without recourse in this situation. The Supreme Court indicated that the honour of the Crown applies to the undertaking Parliament has

made through the affirmation of Indigenous self-government. Further, the “content of the resulting obligations” will be determined “as if this affirmation was enshrined in the Constitution” (*SCC Reference* at para 65). As a result, if Parliament (or the federal Crown) fails to “act as though Indigenous peoples enjoy an inherent right of self-government in relation to child and family services”, Indigenous peoples impacted by this failure may have a cause of action based on the honour of the Crown (at para 63). The Crown also must act diligently to implement the right, an obligation that follows from the obligation to act as though the right had been proved (at para 66).

Importantly, however, the government’s affirmation and undertaking in relation to Indigenous self-government can be challenged: “The fact remains, of course, that all actors in the system, including the provinces, can go to court to challenge Parliament’s understanding of the scope of the rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*” (at para 60). It is not clear what the effect of a successful challenge would be. The principle of parliamentary sovereignty suggests Parliament could continue to bind itself regardless of such a determination. But its ability to bind the other actors, to the extent that such authority exists now, may be undermined.

The legal effect of the provisions establishing national standards is more straightforward. The Court found that their effect is to “establish a normative framework for the provision of culturally appropriate child and family services that applies across the country” (at para 67). This “normative framework” is “binding on federal and provincial providers of such services, as well as on Indigenous providers in certain cases” (at para 67).

The legal effect of the provisions setting out concrete implementation measures (ss 21-23 of the Act) is also straightforward. When an Indigenous governing body enters into a coordination agreement with the federal and relevant provincial government pursuant to the process outlined in the Act, the Indigenous law made under that agreement has the “force of law as federal law” and prevails over provincial law and most federal law (at para 72).

Having determined the legal effects, the Court then moved to assess the practical effects of the legislation. It highlighted the avoidance of the time and expense associated with litigation and the negotiation of comprehensive modern treaties (at para 76), changing the culture of state institutions through the pedagogical function of the law (at paras 80-81), the establishment of national standards to ensure that the child and family services provided to Indigenous children while Indigenous nations craft their own laws are culturally appropriate for them and are in their best interests (at para 83), and advancing reconciliation, particularly through implementation of the UNDRIP (at paras 85-89).

Based on this assessment of the purpose and effects of the Act, the Supreme Court identified the pith and substance of the Act:

the purpose of the Act is to protect the well-being of Indigenous children, youth and families in three interwoven ways: affirming Indigenous communities’ jurisdiction in relation to child and family services; establishing national standards applicable across Canada; and implementing aspects of the UNDRIP in Canadian law [...] the essential matter addressed by the Act involves protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family

services and, in so doing, advancing the process of reconciliation with Indigenous peoples. The affirmation of Indigenous legislative authority, the national standards and the concrete measures to implement aspects of the UNDRIP are all integral parts of this unified whole (at paras 91-92).

With this determination of the pith and substance in mind, the Court held at the classification stage that “[t]he Act falls squarely within s. 91(24) of the *Constitution Act, 1867*” (at para 93). That is, “binding the federal government to the affirmation set out in s. 18(1), establishing national standards and facilitating the implementation of the laws of Indigenous groups, communities or peoples are all measures that are within Parliament’s powers under s. 91(24)” (at para 93). Notably, the Court held that this fell under the first head of power, “Indians”, which it labelled as “Indigeneity, that is, Indigenous peoples as Indigenous peoples” (at para 94). This re-formulation of the language of s 91(24) is potentially significant, particularly the emphasis on Indigenous *peoples*. This was enough to affirm the constitutionality of the Act.

The Court then addressed some further arguments that were made by Quebec.

Quebec argued that the pith and substance of the Act, particularly ss 1-17, concern how provincial jurisdiction over youth protection is to be exercised in relation to Indigenous children and, consequently, ought to be classified under provincial jurisdiction (at para 96). The Court rejected this submission, holding that “Parliament can bind the Crown in right of the provinces [in areas of federal jurisdiction]” (at para 97). In particular and consistent with recent references in the environmental law arena (see [here](#) and [here](#)), the double aspect doctrine allows for “the *concurrent application* of both federal and provincial legislation” (at para 98). Both federal and provincial laws can operate in relation to the same subject matter, and the federal law (or Indigenous laws that it enables) will prevail where they are irreconcilable. The Act’s impact on the delivery of provincial services has only incidental effects on provincial jurisdiction and is not beyond the scope of federal power.

Quebec also argued that the provisions affirming the right of self-government are unconstitutional as they attempt to amend the constitution (by determining the scope and content of s 35) through regular legislation (at para 104). The Court dismissed this argument, following its reasoning with respect to the legal effect of the Act in holding that “Parliament is not unilaterally amending s. 35 of the *Constitution Act, 1982*. Rather, it is stating in the Act, through affirmations that are binding on the Crown (s. 7), its position on the content of this constitutional provision” (at para 107).

In response to Quebec’s argument that the incorporation provisions in s 21 of the Act alter the architecture of the constitution, the Court held that “given that this Court has not yet addressed the question of whether the right described in s. 18(1) has been proved, neither s. 21 nor s. 22(3) of the Act alters the architecture of the Constitution” (at para 120). This is notable, as it suggests that a judicial determination that s 35 *does not* include a right of self-government in respect of child and family service may impact the constitutionality of ss 21 or 23, as they might then be considered as “alter[ing] the architecture of the Constitution.” Given the reasons for upholding those sections, it is not clear why that would be the case: neither were dependent on a right of self-government being recognized. As it stands, the Court upheld s 21 as “simply an incorporation by reference provision” (at para 122). That is, while there was much argument made before the Court about the

authority of the federal government to referentially incorporate Indigenous law, the Court dealt with the matter quickly and straightforwardly, adopting a line of reasoning anticipated by Kerry Wilkins [here](#).

Finally, the paramountcy provision in s 22(3) of the Act does not alter the architecture of the constitution, as contended by Quebec and the QCCA (see Naiomi Metallic’s post on this aspect of the QCCA’s decision [here](#)), because it “is simply a legislative restatement of the doctrine of federal paramountcy” (*SCC Reference* at para 132).

To sum up, the Court held the Act in its entirety constitutional. It did so primarily on the basis of conventional rules of federalism. The pith and substance of the Act is the protection and well-being of Indigenous children and families and the cultural continuity and survival of Indigenous peoples. This, the Court held, fits squarely into federal jurisdiction under s 91(24).” The federal government may referentially incorporate Indigenous laws so long as they fall within an area of federal jurisdiction. The sections of the Act affirming the right of self-government under s 35 are constitutional. They do not amend s 35 or the constitution. Rather, they state Parliament’s understanding of s 35 and direct Parliament and the Crown to act as though s 35 includes a right of self-government in respect of child and family services.

This is a significant victory for Indigenous peoples. It upholds a novel use of federal power to support Indigenous self-government and jurisdiction in an area of central importance to Indigenous nations: control over the delivery and regulation of child and family services. If this framework works as anticipated, it should see Indigenous nations assume control over child and family services, with the results of fewer Indigenous children being removed from their families and communities and care being provided to families in a more culturally appropriate manner.

Yet, the decision also left much to be determined. The decision to defer a determination on the question of self-government as a s 35 Aboriginal right means that the protection of the authority under the Act is more tenuous than it might otherwise be. Bruce McIvor has outlined some troubling implications of this approach, and of the rationale supporting federal authority in this case, [here](#). While the practical effects of the decision remain to be seen, the Court itself seems to anticipate this will lead to future litigation on the question of self-government (*SCC Reference* at para 114).

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