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The Supreme Court of Canada's Child Welfare Ruling: Short and Long-Term Implications

Yellowhead Institute

by Scott Franks

IN 2019, Canada enacted *An Act Respecting First Nations, Métis, and Inuit Children Youth and Family.* The Act recognized and affirmed Indigenous peoples' inherent right to self-government over child and family services, established national standards related to the best interests of Indigenous children, and protected Indigenous jurisdiction over children from provincial intrusion. In short, the Act responded to Indigenous peoples' calls for support in their care of their children and families, and for Canada to begin to fix over a century of harm caused to Indigenous peoples by the removal and disappearance of Indigenous children from their communities.

The Act was referred to the Quebec Court of Appeal. A reference is when a party is asking the Court for guidance on legislation. In this case, Quebec argued that the Act was unconstitutional because it interfered with its powers and that Aboriginal rights to self-government cannot be unilaterally affirmed by legislation. Rather, Quebec argued that the right to self government must either be proven in Court or negotiated with the provinces and Canada. Canada responded to the reference, since it was Canada's legislation.

Because of the nature of a reference, all of the other provinces and Indigenous communities and organizations were interveners. Interveners get less time and space to make submissions. In addition, because the reference came from Quebec, the Court of Appeal's decision was in French and Canada and Quebec's submissions were also in French (Canada gave a translation, Quebec did not). In a reference about Indigenous self-government, the structure of the reference prioritizes the concerns and interests of Quebec and Canada.

On February 9, 2024, **the Supreme Court of Canada found that the Act was constitutional.**

They affirmed that the exercise of self-government is permissive, meaning that it will be up to Indigenous peoples to choose whether and when to exercise their powers. However, those national standards related to the best interests of the Indigenous child will apply, meaning there are some limitations on the exercise of self-government.

Still, Canada and the provinces will likely be required to comply with Indigenous peoples' exercise of their jurisdiction related to Indigenous children and family services, subject to the Charter of Rights and Freedoms.

The Court has also provided important guidance on the coordination of Indigenous child and family services between Indigenous governing entities, and the provincial and federal governments.

What does Child Welfare mean for Self-Government?
The practical effect of the Court's decision is positive. Since 2019, several communities have transitioned their

Indigenous child and family services from provincial jurisdiction. This means that they are providing services through their inherent right to self-government, rather than as a provincial agency. Several communities have also entered into coordination agreements with the provinces and Canada to secure financial support for Indigenous child and family services, among other things. The Court's decision ensures that this work can continue.

In the short-term, how will Indigenous jurisdiction over child and family services be funded?. The Act states that funding can be part of a coordination agreement, but does not require nor set out a standard for funding. As a result, funding will likely be negotiated by communities with the provincial and federal governments through coordination agreements. The discretionary and voluntary nature of these negotiations might mean that communities could be unable to secure sufficient funding for their services. For more information on potential challenges with the Act, see the Yellowhead Report on **"The Promises and Pitfalls of C-92."**

Long-term, Indigenous peoples may find the Court's decision lacking, and at worst, a barrier for exercising self-government in other contexts. The Court's reasons are narrowly focused on Parliament's jurisdiction over "Indians and lands reserved for them". The Court **declined to answer** whether the Constitution Act, 1982 includes an Aboriginal right to self-government and what that right includes. The judges' questions at the hearing suggest that they did not have enough information to decide this point and were concerned about the implications of defining self-government.

The Court describes the Act as a form of "legislative reconciliation". Legislative reconciliation, as **theorized by Naoimi Metallic**, is a form of reconciliation that recognizes Indigenous peoples' inherent jurisdiction without needing them to prove their rights in court or negotiate an agreement with government. This form of legislation can be an efficient way for a government to legally bind itself to its recognition of Indigenous jurisdiction, without having to work out the precise details through litigation or an agreement. Legislative reconciliation is not a delegation of provincial or federal powers to an Indigenous community. Rather, it is a form of recognition of the inherent right to self government; the activity of recognition becomes a limit on the state's conduct, requiring it to respect Indigenous jurisdiction (subject to any limitations that the state places on its recognition of Indigenous jurisdiction). The Act's recognition of the inherent right to self-government for children and families is limited by the national standards as well as the Charter of Rights and Freedoms.

Because the Court largely avoided answering whether the right to self-government is an Aboriginal right under s. 35 of the Constitution Act, 1982, it has left the door open for other governments to argue that such a right does not exist.

As long as **R. v. Van der Peet** and **R. v. Pamajewon** remain the law, the potential for the Indigenous right to self-government to be legally recognized outside of "legislative reconciliation" may be limited. In those cases, the Court constructed a test for Aboriginal rights that is difficult to apply to the right to self-government. A recent case at the Quebec Superior Court, **White and Montour,** however, suggests that it is time for the Court to overturn Van der Peet and Pamajewon in light of Canada's domestic incorporation of the United Nations Declaration on the Rights of Indigenous Peoples.

Possible Futures for Federalism, the Charter & UNDRIP

The Court seems to be nudging the provinces and Canada in the direction of UNDRIP, though it is unclear how committed the Court is to that vision. Because the decision focuses on Parliament's legislative jurisdiction over "Indians and lands reserved for them", the judgement seems to support the Crown's assertion of sovereignty over Indigenous peoples and their territories. This is a point argued by Bruce McIvor in his recent **blog**. At the same time, the Court clearly states that UNDRIP has been incorporated into the Country's domestic positive law".

The Court also refers to the Honour of the Crown to suggest Canada, in creating the Act, **has bound itself to recognize Indigenous jurisdiction**, at least over children and families. The Court also describes the Act as **educational**, as putting forward a vision for reconciliation that Canada hopes other governments may follow. Whether there is enough in the Court's reasons to finally move out of the shadow of the Crown's assertion of sovereignty is unclear. I've written **before** that the Court's jurisprudence

may end up limiting the imagination and political will of the Canadian and provincial governments. Overall, the Court's reasons seem to be hyper-focused on issues of federalism; this seems to cement, rather than unsettle, the Crown's sovereignty.

Another issue relates to whether the Charter applies to the exercise of self-government under s. 35**. Section 25 of the Charter** says that the Charter shall not apply in a manner that "abrogates or derogates" from the rights of the "Aboriginal peoples of Canada." The Act specifically **says** that the Charter will apply to the exercise of the inherent right to self-government under s. 35. However, the Court did not consider whether s. 25 of the Charter prohibits this outcome. A companion case, **Dickson v. Vuntut** Gwichin, which is currently on appeal to the Supreme Court of Canada, raises this issue directly. We will need to see what the Court says.

If s. 25 shields Aboriginal rights from the Charter, then the Act's application of the Charter to the exercise of self-government will likely be unconstitutional.

Finally, one of the interesting moves that the Court makes is an apparent attempt at rehabilitating s. 91(24)'s racist past. In its reasons, **the Court refers to the core of s. 91(24) as related to "Indianness" or "Indigeneity".** By referring to "Indigeneity", the Court may be gesturing towards Indigenous peoplehood. This would align the Court's interpretation of s. 91(24) with UNDRIP. This passing discussion is important to our understanding of Indigeneity within a liberal framework based on self-identification or within the context of peoplehood and political collectives.

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