

# The Right to Self-Government and Child and Family Well-Being: A Case Comment on *Cook et al. v. Canada*

by Scott Franks

**INDIGENOUS PEOPLES** have long advocated for the right to self-government related to their children and families. On May 11, 2026, the Misipawistik Cree Nation, Black River First Nation and Pimicikamak Cree Nation achieved a major success at the Manitoba Court of King's Bench for the recognition and affirmation of this right.

In *Cook et al v. Manitoba [Misipawistik]*, Chief Justice Joyal, for the Court, granted a declaration that the First Nations hold an Aboriginal right to self-government in the area of child welfare and child and family services under s. 35 of the *Constitution Act, 1982*. The Chief Justice found that this includes First Nations' right to raise their children in their culture and community, connected to their land and immersed in their languages and spiritual traditions.

The Chief Justice also granted a declaration that Canada and Manitoba's funding, regulation, and provision of child and family services unjustifiably infringed upon the rights of First Nations in Manitoba. The Chief Justice accepted the "rich" record of evidence of their right to self-government over children and families from over seventeen witnesses, nine expert witnesses — including Dr. Leanne Betasamosake Simpson and Elder Florence Paynter — and a substantial number of reports of inquiry and government publications. All of that evidence tells a story of how Manitoba and Canada's conduct resulted in the apprehension of children and their removal from their communities, land, spirituality, language, and culture.

All First Nations in Manitoba can rely on *Misipawistik* for their right to self-government. Chief Justice Joyal

explicitly confirmed that "there is a right of all Manitoba First Nations to self-government in the area of CFS" (at para 699). Additionally, this class action was certified as "opt-in," meaning that First Nations in Manitoba can opt in and be able to rely on the Court's declarations related to Manitoba and Canada's infringement of that right. Based on a notice plan filed with the Court, the Assembly of Manitoba Chiefs will provide information to First Nations in Manitoba.

In this case commentary, I explore the significance of the *Misipawistik* case for Indigenous peoples' exercise of their inherent right to self-government over Indigenous children and families. Although this case is directly relevant to First Nations in Manitoba, Indigenous peoples in other provinces, the territories, and Nunavut may find parts of the Chief Justice's reasons to be helpful.

## The Significance of the *Misipawistik* Case

*Misipawistik* confirms what First Nations in Manitoba have always known: they have an inherent right to self-government over their children and families, which was never surrendered by treaty or extinguished.

***Misipawistik* is significant because, for the first time in Manitoba, the Court has recognized aspects of this right under s. 35 of the *Constitution Act, 1982*.**

In the last twenty years, Indigenous peoples have brought actions to hold Canada and the provinces to account for the harms caused to individuals and communities.

The Indian residential schools litigation and class action, and the Indian Residential Schools Settlement Agreement, demonstrated that Canada could be sued for its conduct. The First Nations Child and Family Caring Society complaint at the Human Rights Tribunal proved that Canada's underfunding of First Nations child and family services was discriminatory. And in the *Moushoom* and *Trout* class actions, the plaintiffs sued Canada for underfunding the Child and Family Services Program and its narrow interpretation of Jordan's Principle.

*Misipawistik* relates to another aspect of all this litigation. Those cases focused on historical and ongoing harms caused to individuals by the government's policies and actions. In *Misipawistik*, the First Nations asked the Court to declare that those policies and actions also infringed upon their right to self-government under s.35 of the *Constitution Act, 1982*.

***Misipawistik* confirms that First Nations in Manitoba have a right to self-government over child and family services or child welfare. It also confirms that Canada and the Province's funding, regulation, and provision of child and family services is an unjustifiable infringement of that right.**

Now, Canada and Manitoba (all the provinces, really) should have the direction they need to ensure that their involvement in Indigenous child and family services is not discriminatory or negligent, and that it does not infringe Indigenous peoples' rights to self-government under the Constitution. Canada and Manitoba have started to take steps in the right direction by recognizing this right through legislation. Now, they have to live up to their commitments.

**First Nations in Manitoba have a Right to Self-Government over Child Welfare and Child and Family Services**

In *Misipawistik*, Canada argued that the First Nations needed to satisfy the test for proof of Aboriginal rights in *Van der Peet*. The Chief Justice rejected Canada's arguments and modified the test based on changes to the law since it was first developed in 1996. Rather than strictly apply the *Van der Peet* test, the Chief Justice

applied a modified version used by the Quebec Court of Appeal in its *Reference regarding an Act Respecting First Nations, Métis and Inuit Children, Youth and Families*. The modified test asks "whether the claimed right to self-government in a particular area goes to the cultural security and continuity — the cultural survival — of the Indigenous peoples claiming the right" (at para 677 in *Misipawistik*).

Under the ordinary *Van der Peet* test, Indigenous peoples must prove a practice, custom, or tradition was integral to their distinctive culture before contact (for First Nations and Inuit) or before effective governmental control (for Métis). As the Chief Justice himself noted, the *Van der Peet* test is "ill-fitting" for self-government rights because it relies on "outdated ideas about how cultures work," focuses on "discrete, particularized" practices such as hunting, fishing, and trapping, and freezes rights in the past (para. 657, 679). The Court found that "it would be [...] inefficient and inconsistent with the goal of reconciliation underlying s. 35 of the *Constitution Act, 1982*" to require the First Nations to prove their rights under a strict application of the *Van der Peet* test (para. 682).

The Chief Justice reasoned that it was necessary to depart from a strict application of the *Van der Peet* test because of the evolution of the jurisprudence and legislation related to the right to self-government (paras. 654-685). First, he noted that the Court in *Van der Peet* and *Delgamuukw* had always recognized that the *Van der Peet* test might require adaptation and modification as new rights were claimed (para. 470, 663-667). Second, over the past few decades, the case law has increasingly supported the possibility that s. 35 protects an Aboriginal right to self-government (paras 651, 668-674). Third, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) affirms rights to self-government related to children and families and informs the Court's interpretation of Indigenous peoples' constitutional rights (paras. 675-676 and 704). Fourth, Canada's federal *United Nations Declaration on the Rights of Indigenous Peoples Act* implements UNDRIP as a source of interpretation of Canadian law (para 430 and 681). And finally, and significantly, Canada and Manitoba have both recognized the inherent right to self-government over children and families through legislation (para. 693).

## **There is a clear takeaway from *Misipawistik*: Indigenous peoples' rights to self-government are vital to the cultural security and continuity, or cultural survival, of Indigenous peoples.**

Many other areas of self-governance are also vital to cultural security and continuity. *Misipawistik* is a well-reasoned starting point for future claims related to self-government in Manitoba — and throughout Canada.

### **Canada and Manitoba's Infringement on the Right to Self-Government**

Chief Justice Joyal found that Canada and Manitoba's regulation, funding, and provision of Indigenous child and family services unjustifiably infringed the First Nations' rights from January 1, 1992, to the present (2026).

In support of his finding, he accepted Dr. Simpson's evidence on the impact of child apprehensions on the community, and on a child's connection to land, culture, language and spirituality. The Chief Justice quoted Dr. Simpson at length (at para. 720):

When children are removed from their First Nations family, the community and nation has no mechanism to ensure their teachings and way of life is passed down to the next generation. They have no way of fulfilling their responsibilities to *mino-bimaadiziwin* and this has a negative impact on their own sense of belonging and their own identity since they are no longer a link in the chain, as expressed in the concept of *nindaanikoobijiganag*. Removing a child from their cultural land-based context is akin to cutting their umbilical cord and disconnecting them from their community, their knowledge systems, and the land from which all meaning flows. The survival of First Nations knowledge systems and languages is entirely dependent upon the next generation of First Nations people learning land-based practices from their Elders.

...

Land-based practices when a child or children are missing are therefore filled with grief and loss because there is nowhere else that this way of life and these practices can be learned. In many regions, land-based practices are threatened and endangered practices because of the impact of colonialism, the residential and day school era, and the child welfare system. Because

First Nations knowledge systems are land-based, spiritual, oral, and generated through communal practice, they cannot be learned at a desk in school or by reading books. They can only be learned by engaging in land-based practices over the course of one's lifetime. When children are removed from First Nations communities and families by Child and Family Services, they no longer have access to this knowledge, and it becomes impossible for them to uphold their responsibilities to their community.

In his reasons, the Chief Justice considered evidence on the cumulative effect of residential schools and federal and provincial policies on the harms caused to the First Nations' right to self-government, and the right to raise their children on the land, in their languages, cultures, and spiritualities (at para. 838). This is important, because in other cases, such as the residential schools litigation, the Court often separates these harms into distinct events, which often makes it difficult to litigate and remedy them. A cumulative approach recognizes how all of these events are related.

### **Indigenous Governments May Need to Consider Claiming Remedies for "Reconciliatory Justice" for Breaches of Aboriginal Rights**

*Misipawistik* provides some direction on what governments *should not do*, but it does not provide much clarity to what governments must do when they choose to be involved in regulating, funding, or providing Indigenous child and family services.

As others have noted, funding is one of the main challenges related to the exercise of the right to self-government for child and family services. Shortly after Canada enacted *An Act Respecting First Nations, Métis and Inuit Children, Youth and Families* (2019), the Yellowhead Institute published its report on the Act. Professors Naomi Metallic, Jeffery Hewitt, Hadley Friedland, Aimée Craft, and Sarah Morales identify five areas where the Act fell short. On funding, Canada received a failing grade. Almost seven years later, it is still unclear how funding and resources will be transferred to Indigenous governments who want to exercise their right to self-government in this area.

In *Misipawistik*, the Court was asked to determine whether Canada or Manitoba had breached any duties —

in common law, equity, or under the Charter — that were owed to the First Nations. Since duties specify a standard of conduct, any decision on these duties would have clarified Canada or Manitoba's obligations, including financial, to the First Nations involved.

Although the Chief Justice found that Canada and Manitoba had unjustifiably infringed upon the First Nations' right to self-government over child and family services, he dismissed the First Nations' claims that other duties had also been breached. Unlike s. 35, which acts as a *negative limit* on government, those other claims would have imposed a positive obligation or duty on the Crown. In turn, this would have impacted the Crown's legislative and executive discretion and, perhaps most importantly, its budgetary choices. Because, like it or not, Indigenous governments need resources and funding to provide child and family services in the First Nation communities.

One way to read the decision is that the Court was concerned about its impact on government discretion. Suppose the government owed the First Nations a duty of care and the *standard of that care* meant providing services in the child's home community. That would require the government to fund, in many cases, more extensive preventative services. Those "less expensive" — yet so-often used — short-term options, such as apprehending children and removing them from their community, would be off the table because they would fail to meet the standard of care.

So, how might *Misipawistik* be helpful to other First Nations? Consider that the Chief Justice accepted witness evidence and public reports about Canada and Manitoba's funding, regulation, and provision of services. This evidence clearly demonstrates gaps, challenges, and proposed best practices. It could, therefore, offer some guidance to inform future frameworks for moving forward.

## **Indigenous governments may also want to consider seeking remedies for "reconciliatory justice."**

In *Pekuakamiulnuatsh Takuhikan*, the Supreme Court of Canada ordered compensation because the Honour of the Crown was breached. I previously wrote about this for the Yellowhead Institute:

When the Honour of the Crown is breached, compensation may be required to advance what the majority calls 'reconciliatory justice.' The majority explains that the purpose of the Honour of the Crown is to 'facilitate the reconciliation of the Crown's interests and those of Indigenous peoples, including by promoting negotiation and the just settlement of Indigenous claims.' Where the Honour of the Crown is breached, compensation advances reconciliation by 'repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed.'

Although compensation is intended to remedy the harm caused to the First Nation, it may also be used by a First Nation to restore the community and prepare it for exercising the right to self-government. Compensation, however, is not a reliable source for sustaining Indigenous child and family services into the future.

### **What Comes Next?**

The Court's decision was the first of two stages in this litigation. The first stage addresses the certification of the plaintiffs' claims as a class action and presents a summary judgment on the sole certified claim under s.35. Now, the parties can negotiate and attempt to settle or proceed to the second stage. The Court's reasons are incredibly thorough, and so the parties have been given a lot of direction. If they can't come to a settlement, the Court will be asked to determine compensation for collective harms. Canada and Manitoba may be able to raise defences to limit their liability at the second stage.

Canada and Manitoba will likely argue that the claim for compensation is statute-barred. This occurs when a statute of limitations restricts compensation based on the number of years between the claim being filed and when it was first known to the plaintiff. It's unclear at this point whether Canada and Manitoba will be able to rely on statutory limitation periods to avoid paying compensation for their infringements. However, it might be argued that statutory limitation periods are unconstitutional and cannot be applied.

In addition, it is possible that compensation for "reconciliatory justice" is available. In *Pekuakamiulnuatsh Takuhikan*, a majority of the Supreme Court of Canada found that compensation

could be appropriate for breaches of the Honour of the Crown. It would seem inconsistent with the principles of reconciliatory justice for compensation to be barred by legislation enacted by a province or Canada. That is an odd sort of justice and reconciliation, where the party that causes the harm can determine whether it is liable.

Overall, the Chief Justice's reasons provide significant guidance and direction to the parties. At this point, the parties might discuss how Canada and Manitoba could support First Nations in Manitoba as they exercise their inherent right to self-government over Indigenous children and families. It is clear that whatever Canada and Manitoba do, they must ensure that the First Nations are supported in the right to raise their children on the land, in their own communities, and with their own culture, languages and spiritual traditions.

## CITATION

Franks, Scott. "The Right to Self-Government and Child and Family Well-Being: A Case Comment on *Cook et al. v. Canada*," *Yellowhead Institute*.

June 30 2026. <https://yellowheadinstitute.org/2026/case-comment-on-cook-et-al-v-canada-the-right-to-self-government-and-child-and-family-well-being>



