Supreme Court declares Indigenous child and family services law constitutional

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What you need to know

On Feb. 9, the Supreme Court of Canada released its highly anticipated decision on the constitutionality of *An Act respecting First Nations, Inuit and Metis children, youth and families*, S.C. 2019, c. 24 (the Federal Act).[1] The Court unanimously upheld the validity of the Federal Act and with it reinforced the authority of Indigenous Governing Bodies to enact and enforce their own child and family services laws pursuant to the Federal Act.

This landmark ruling represents a critical development in Indigenous self-governance and signals an important step in the acknowledgement and recognition of Indigenous laws within the Canadian federal structure. Since the Federal Act was proclaimed in 2020, over 50 Indigenous communities have undertaken to draft laws, prepare for and assert jurisdiction, and enter into coordination and funding arrangements with provinces and Canada. This decision removes a considerable degree of legal uncertainty regarding the legal status of laws enacted pursuant to the Federal Act and reaffirms that such laws are paramount to provincial laws.

While this decision paves the way for recognition and enforcement to Indigenous child and family services laws, it is important to note that the Court did not pronounce on the issue of inherent right of self governance under Section 35 of the *Constitution Act, 1982*. Leaving this question "for another day", the Court confined its reasoning to whether the Federal Act – which effectively bootstraps Indigenous laws to federal constitutional authority – was within Parliament's jurisdiction.

Background

The Federal Act came into force on Jan. 1, 2020 and represented a landmark piece of legislation reflecting Parliament's attempt to implement Canada's obligations under the *United Nations Convention on the Rights of the Child*, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and the *Truth and Reconciliation* Commission's Calls to Action.

Prior to the Federal Act, the provinces were primarily responsible for the administration of child, youth and family services matters, including those regarding Indigenous peoples. This arrangement faced significant criticism over the decades because of persistent overrepresentation of Indigenous children in care, coupled with a failure to incorporate Indigenous decision making and culturally appropriate care.[2]

The Federal Act created a framework for Indigenous groups to develop their own legislative approach for their children and families and move beyond "delegated" arrangements with provincial authorities.

The Federal Act affirms the inherent right of self-government of Indigenous groups and gives federal backing to laws of Indigenous groups exercising legislative authority related to child and family services. The Federal Act also sets out principles, or "minimum standards," for the provision of child and family services in relation to Indigenous children, whether those services are delivered pursuant to provincial laws or Indigenous laws. These principles emphasize the best interests of the child, cultural continuity, and substantive equity.

Since its enactment, over a dozen Indigenous governing bodies have enacted legislation under the Federal Act. Over 50 Indigenous governing bodies have provided notice of their intent to exercise their legislative authority over child, youth and family services and more than 30 have requested a coordination agreement with the federal and provincial governments.

The Québec Court of Appeal ’s decision

Shortly after the Federal Act was in force, Québec launched a constitutional reference case arguing that the Federal Act was an unconstitutional intrusion into provincial jurisdiction. One of Québec’s main arguments was that the Federal Act presupposes an Aboriginal right to self-governance and that Parliament was attempting to unilaterally define the scope of such a right through the Federal Act itself.

In 2022, the Court of Appeal of Québec found that the majority of the Federal Act was a valid exercise of the federal government’s power under section 91(24) of the *Constitution Act, 1867* to legislate with respect to Indigenous peoples.[3] The Court did, however, find that section 21 of the Federal Act (which gives a law enacted under the Federal Act the same force of law as federal law) and section 22(3) (which gives a law enacted under the Federal Act paramountcy over conflicting provincial legislation) of the Federal Act were unconstitutional. This created significant uncertainty for Indigenous governments in the process of enacting child and family services legislation.

The Supreme Court ’s decision

The two key issues before the Court were: (1) whether Parliament possessed the constitutional authority to enact the Federal Act; and (2) whether the Federal Act impermissibly attempts to alter the constitutional architecture of Canada.

Constitutional validity of the Federal Act

The characterization of the Federal Act is the first step in determining whether it was within Parliament's jurisdiction. This is determined by looking at the purpose and effects of the law.

The Court found that the Federal Act's dominant purpose concerns "the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child, youth and family services and, in so doing, advances the process of reconciliation with Indigenous peoples".[4]

In considering the law's effects, the Court found that, taken as a whole, the Federal Act aimed to "create a uniform national scheme for protecting the well-being of Indigenous children, youth and families".[5] It also found that on a practical level, the Federal Act may reasonably be expected to reduce the overrepresentation of indigenous children in child, youth and family services settings and help protect the well-being of Indigenous children, youth and families. The Federal Act may therefore be a practical means of advancing reconciliation with Indigenous peoples.

Having characterized the purpose and effects of the Federal Act, the Court held that it fell within Parliament's jurisdiction under Section 91(24) of the *Constitution Act, 1867.* This section gives Parliament exclusive jurisdiction to make laws in relation to two subject matters: "Indians" and "Lands reserved for the Indians". The scope of this jurisdiction over "Indians" is broad and the Court concluded that the Federal Act "falls squarely within s. 91(24) of the *Constitution Act, 1867*."

Amending the Constitution

Québec argued that the Federal Act was unconstitutional, as Parliament cannot unilaterally, through legislation, establish the existence of an Indigenous right under Section 35 of the *Constitution Act, 1982*, determine its scope, or define its content. The Court dismissed this argument and held that by enacting the Federal Act, Parliament did not unilaterally amend the Constitution, but rather stated, through affirmations that are binding on the Crown, its position on the content of Section 35.

In support of its position, Québec also argued that the clauses giving Indigenous legislation the same force of law as a federal law (s. 21) and paramountcy over provincial legislation (s. 22(3)) were unconstitutional. The Supreme Court found that neither of these provisions altered the architecture of the Constitution. Section 21 validly incorporated by reference the laws, as amended from time to time, of Indigenous groups, communities or peoples in relation to child, youth and family services, which have the force of law as federal law. As for s. 22(3), the Court held that it was a restatement of the doctrine of federal paramountcy, following which provisions of a valid federal law prevail over conflicting provisions of a provincial law.

Implications and key takeaways

This landmark ruling represents a critical development in Indigenous self-governance and signals and important step in the acknowledgement and recognition of Indigenous laws within the Canadian federal structure. This decision removes a considerable degree of legal uncertainty regarding the constitutionality of laws enacted pursuant to the Federal Act. Importantly, it reaffirms two key sections of the Federal Act providing

that Indigenous laws have the force and effect of federal law and that such laws are paramount to provincial laws in the event of a conflict.

It is important to note that the Court did not directly pronounce on the scope or content of inherent right of self-governance under Section 35 of the *Constitution Act, 1982*. Instead, the Court reasoned that the Federal Act's statement that the "inherent rights of self-government … includes jurisdictions in relation to child and family services" was an affirmation by Parliament intended to bind the Crown" as if Section 35 included that right of self-determination. The Court held that this type of legislative process was a practical way to advance reconciliation with Indigenous communities while leaving "for another day" the issue of Section 35 rights.

For Indigenous communities currently in the process of drafting laws and entering into coordination agreements, some uncertainty remains, including in relation to the scope of an Indigenous governing body's jurisdiction, the qualification and definition to be given to an entity pursuant to the Federal Act, and the outcomes of conflicts between provincial and Indigenous laws. The Court noted that such uncertainties will need to be resolved in future court proceedings arising on a case-by-case basis.

BLG's lawyers work extensively in Indigenous law and government relations, including support for Indigenous communities looking to develop their own legislation regarding child, youth and family services. Reach out to any of the key contacts below if you have further questions regarding the Federal Act and this important decision.

[1] Reference re An Act respecting First Nations, Inuit and Métis children, youth and *families*, 2024 SCC 5 (*Decision*) at para 64.

[2] According to 2021 Census data, 58% of children in foster care under 14 are Indigenous, but account for only 7.7% of the child population.

3 Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185. Section 91(24) of the *Constitution Act, 1987* states that the federal government may pass laws with respect to "Indians and Lands reserved for Indians". This means that the federal government–and not the provinces–has the authority to pass laws that are "in pith and substance" about First Nations, Inuit, and Métis peoples and their lands.

[4] *Decision*, para 41. The Court found that Parliament's purpose in enacting the Federal Act was to: (1) affirm Indigenous peoples' inherent right to self government, which includes jurisdiction in relation to child, youth and family services; (2) "set out national standards for the provision of child and family services in the Indigenous context in order to ensure respect for the dignity of Indigenous children"; and (3) implement aspects of the UNDRIP in Canadian law

[5] *Decision*, para 55.

By

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