"A New Legislative Structure for Reconciliation"

An Act respecting First Nations, Inuit and Métis children, youth and families
A Case Summary on the Supreme Court of Canada's Reference Decision

This is a summary of the Reference Decision of the Supreme Court of Canada ("the Court") on *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "Act" previously known as "Bill C-92"). It has been prepared for the Métis National Council ("MNC") by Jason Madden, Alexandria Winterburn, Alissa Saieva-Finnie, and Matthew Patterson of Aird & Berlis LLP. This summary is not legal advice.

The MNC jointly intervened in the Reference Decision with the Métis Nation of Ontario, Métis Nation—Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, and Les Femmes Michif Otipemisiwak to ensure the Métis Nation's perspective was before the Court. Jason Madden, Alexander DeParde, and Emily Lahaie were legal counsel for these Métis interveners.

Key Takeaways in the Reference Decision

1. **The Act Is Constitutional and Falls Squarely Within Parliament's Jurisdiction (Although It Has Effects on Provinces):** At its core, the Act advances reconciliation by protecting the well-being of Indigenous children through culturally appropriate child and family services. This falls within Parliament's exclusive legislative authority for "Indians" (i.e., all Indigenous people) under s. 91(24) of the *Constitution Act, 1867*. While the Act has incidental effects on provincial jurisdiction for child and family services, both Parliament and provincial legislatures can pass laws in this same area based on the double aspect doctrine.

2. **The Crown (Federal and Provincial) Is Bound to Respect the Affirmations in the Act and the National Standards:** The combination of ss. 7, 8(a) and 18(1) of the Act bind the Crown (federal and provincial) to acting in a manner that is consistent with the affirmations in the Act (i.e., Indigenous peoples have an inherent right to self-government, including jurisdiction over child and family services). While the affirmations in the Act do not create or prove a specific s. 35 right under the *Constitution Act, 1982*, they commit Crown actors to a course of conduct consistent with the affirmations in the Act and engage the honour of the Crown.

3. **Parliament Can Interpret Section 35 Without Amending the Constitution:** The affirmations in the Act set out Parliament's view on specific s. 35 rights. These legislative 'affirmations' bind the Crown's future conduct (i.e., it can no longer deny the existence of this s. 35 right). However, this does not create or prove a s. 35 right and the courts continue to be responsible for the authoritative interpretation of Canada's Constitution, including s. 35.

4. **Indigenous Laws Can Be Incorporated as "Federal Law" and Have Priority Over Provincial Laws Where There Is Inconsistency:** Sections 21 and 22 of the Act incorporate Indigenous laws recognized under the processes in the Act as "federal laws." Through the doctrine of paramountcy, these laws—incorporated as "federal laws"—have priority over provincial laws to the extent that there are inconsistencies between them.
5. **The Court Avoids the "Elephant In The Room" with Respect to Indigenous Self-Government Rights:** As the Reference Decision was about the constitutionality of legislation as a whole, the Court did not need to determine whether Parliament's view on the s. 35 right of self-government was correct or whether the inherent right to self-government exists. The Court confirmed it "has not yet addressed the question" and doubled down on its existing case law for how to establish s. 35 rights, including self-government. However, it noted the "affirmation [in the Act] will undoubtedly also be a factor to consider when the courts are called upon to formally rule on the scope of s. 35."
6. **The Act "Weaves" Together Indigenous, Canadian and International Law:** Throughout the Reference Decision, the Court relies on the metaphor of "braiding" together Indigenous law (i.e., laws adopted by Indigenous governing bodies), Canadian law (i.e., through the national standards and how Indigenous law under the Act will interface with other laws), and international law (i.e., it implements aspects of the United Nations Declaration on the Rights of Indigenous Peoples ["UNDRIP"] in Canadian law). While the Court did not address the source of Indigenous laws (i.e., whether they are based on inherent rights), the metaphor supports the position advanced by many intervenors that the Canadian legal system is multi-juridical and Indigenous laws must be recognized as a part of that system.
7. **The Importance of UNDRIP in Canadian Law:** While the Act was passed before the adoption of the federal UNDRIP implementation legislation, the Court recognized that UNDRIP "has now been incorporated into the country's positive law." The Court also extensively considered UNDRIP in the Reference Decision and relied on the declaration to support and inform the interpretation of the Act. This bodes well for future judicial consideration of UNDRIP to inform s. 35's interpretation and implementation.

Background and Context for the Act

In 2019, Parliament passed the Act after significant engagement with First Nations, Inuit and Métis representatives about how to address the "staggering" statistics of Indigenous children in child welfare systems. (para. 11)

The Act was also informed by recommendations with respect to Indigenous child and family services from the Royal Commission on Aboriginal Peoples ("RCAP"), the Truth and Reconciliation Commission ("TRC") Final Report, as well as UNDRIP, which Canada committed to support and implement "without qualification" at the United Nations in 2016. (paras. 10-14)

Evidence before the Court included the 2016 Census that showed Indigenous children under 15 were 7.7% of the total Canadian population, but represented 52.2% of all children in foster care in private homes. This overrepresentation was described as a "humanitarian crisis" during debates about the Act. (paras. 11 & 48)

Understanding the Act

The Act is a part of the federal government's efforts to advance reconciliation with First Nations, Inuit, and Métis communities through proactive legislative recognition of Indigenous rights (as opposed to first having to prove the right affirmed in the legislation through litigation or having to negotiate on a community-by-community, right-by-right basis). The Court recognized the Act as an "innovative" and "new legislative structure for reconciliation." (para. 20)

The Act's Binding Effect, Purpose, National Standards & Affirmation

The Act starts with definitions (s. 1), a non-derogation clause (s. 2) and sections setting out how conflicts with other agreements, treaties or legislation are to be resolved (ss. 3-5).

Section 7 sets out that it is "binding on [the Crown] in right of Canada or of a province."

Section 8 of the Act sets out that its three-fold purpose is to:

a) affirm the inherent right of self-government, which includes jurisdiction [i.e., law-making power] in relation to child and family services;

b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and

c) contribute to the implementation of the [UNDRIP].

Sections 9 to 17 of the Act set out high-level national standards and principles for the delivery of Indigenous child and family services that are binding on the Crown and Indigenous governing bodies who choose to use the Act.

Section 18(1) of the Act affirms that "[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 and Indigenous Law

Sections 21 and 22 provide "Indigenous governing bodies" under the Act (i.e., bodies that are authorized by an Indigenous community that holds a s. 35 right) with legislative options for taking over control of their children's wellbeing. The Act does this by establishing a framework through which Indigenous groups can exercise their law-making authority over child and family services by passing their own laws, giving notice, and then requesting that the federal and relevant provincial or territorial government enter into a "coordination agreement" with them.

Once a coordination agreement has been reached (or reasonable efforts to do so have been made over a 1-year period), the Indigenous group's law related to child and family services is deemed by the Act to have the force of "federal law".

Based on s. 20(1), an Indigenous group may also choose to simply give notice of their law related to child and family services and not make a request to enter into a coordination agreement. In these situations, an Indigenous law will not have the force of federal law.

Quebec's Legal Challenge of the Act

The Reference Question

Reference cases involve governments asking courts to answer specific legal questions. While a reference decision is not legally binding on the parties, no government in Canada has ignored a reference decision, particularly one issued by the highest court in the country.

Following passage of the Act, Quebec asked the Quebec Court of Appeal this question: "Is the Act … *ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?"

"*Ultra vires*" is a legal term that means beyond one's legal power or authority. In a nutshell, Quebec argued the Act was beyond Parliament's authority because it encroached on Quebec's exclusive provincial jurisdiction for child and family services.

Understanding Canada's Constitution in the Context of the Reference Question

When Canada was first established as a country, the *Constitution Act, 1867* set out what matters are within the "exclusive Legislative Authority" of Parliament (and by extension the federal government) in s. 91 (e.g., matters that are mostly national in scope such as navigation, currency, banking, criminal law, etc.).

Section 91(24) of the *Constitution Act, 1867* assigns Parliament "exclusive Legislative Authority" for "Indians, and Lands reserved for the Indians." In *Daniels v Canada*, the Court held the term "Indians" in s. 91(24) means all Indigenous peoples, including First Nations, Inuit and Métis. Canada argued the Act was constitutionally valid based on its legislative authority in s. 91(24).

Section 92 of the *Constitution Act, 1867* sets out the legislative authority of provincial legislatures, which includes matters that are more local in nature and scope. Child and family services has been found to fall within exclusive provincial jurisdiction based on ss. 92(13) and (16). Quebec argued the Act was constitutionally invalid because it was really about controlling its legislative authority over child and family services under s. 92.

The issue of reconciling ss. 91 and 92 with inherent Indigenous jurisdiction and law has long been the "elephant in the room" in interpreting Canada's Constitution. Instead of addressing this issue, the Court held it was only answering the narrow question of whether the Act was a valid exercise of Parliament's legislative authority under s. 91(24), It held that "it is unnecessary to determine the limits of s. 35(1)" in this reference. (para. 112)

The Court's Answer to the Reference Question

The Two Stage Legal Test

In order for a court to determine the overall constitutional validity of a law, there are two stages:

- ***First***, a court must "**characterize**" the legislation (i.e., determine its "pith and substance" or its true nature by reviewing the legislation's purpose and practical effects); and,
- ***Second***, a court must "**classify**" the legislation (i.e., determine which legislative head of power in the *Constitution Act, 1867* the law falls under based on the law's characterization).

Step One: "Characterizing" the Act

As a part of "characterizing" an act, a court looks to the words in the legislation itself (intrinsic evidence) and external evidence related to the Act's passage. A court also looks to the legal and practical effects of the legislation to determine its "pith and substance" (i.e., to characterize it).

As part of determining the Act's "true purpose", the Court identified three categories of provisions: (1) provisions affirming the right of self-government; (2) provisions establishing national standards; and (3) provisions setting out concrete implementation measures. The Court used this framework to assess the evidence as well as the Act's practical effect. (para. 55)

Of particular note, the Court found that the affirmations in the Act have "substantive legal effects" and binds the Crown (federal and provincial). This "shap[es] how public powers are exercised" by both federal and provincial government actors going forward (i.e., Canada can no longer deny this affirmed rights exists in negotiations or proceedings) and engages the honour of the Crown. The Court noted that through the Act's affirmations, "Parliament is attempting to persuade other institutions to adopt the position it has now embraced." (paras. 57 & 81).

The Court also recognized that another "anticipated practical effect of the Act is to make Canadian law more consistent with UNDRIP." (paras. 81 & 86).

After reviewing the Act through the above-noted three categories, the Court concluded that—together—these provisions "create a uniform national scheme for protecting the well-being of Indigenous children, youth and families" and it ultimately 'characterized' the Act as follows:

> [it] protects the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advances the process of reconciliation with Indigenous peoples. (para. 41)

Step Two: "Classifying" the Act

Based on the above-noted 'characterization,' the Act was then 'classified' as falling within the scope of s. 91(24). The provisions within the Act "are all measures that are within Parliament's powers under s. 91(24)," which "is broad in scope and relates first and foremost to what is called 'Indianness' or Indigeneity, that is, Indigenous peoples as Indigenous peoples." (paras. 93-94)

This 'classification' was a full answer to whether the Act was constitutionally valid, but the Court went on to address some of Quebec's other objections with respect to the Act:

- The Act's national standards do not interfere with the work of the provincial public service under provincial laws. While Parliament can bind the Crown in right of the provinces in areas of federal jurisdiction, the standards are general enough that "provincial public servants retain significant discretion in making decision concerning Indigenous children." (para. 100)
- The Act's affirmations do not (and cannot) alter Canada's Constitution. Parliament has set out its "position on the scope of s. 35," which it is entitled to do in order to protect and promote rights in relation to an area of federal jurisdiction. (para. 107)
- The Act's incorporation by reference of Indigenous laws related to child and family services as "federal law" is valid and engages the legal doctrine of paramountcy. (para. 132)

Conclusion

Based on the above, the Act—as "a new legislative structure for reconciliation"—is valid and can continue to be relied upon and implemented. (para. 20)

As the Court wrote, "[t]he Act creates space for Indigenous groups, communities and peoples to exercise their jurisdiction to care for their children. The recognition of this jurisdiction invites Indigenous communities to work with the Crown to weave together Indigenous, national and international laws in order to protect the well-being of Indigenous children, youth and families." (para. 134)

Time will tell if this laudable goal is ultimately achieved through the Act's implementation, but the technique used in this legislation provides a potential framework for expansion into other matters and the Court unquestionably endorses the approach used in the Act as another legal tool in the reconciliation basket.

"Even though the Act is expected to accelerate certain aspects of the process of reconciliation, it is still important to recognize that reconciliation is a long-term project. It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist." (para. 90)

About Us

Aird & Berlis LLP's Indigenous Practice Group includes First Nations, Métis, and non-Indigenous lawyers with extensive experience in Aboriginal law as well as supporting Indigenous peoples in advancing their own jurisdiction, law, and legal orders (i.e., Indigenous law). For more information about our firm or this summary, please feel free to contact:

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