SUPREME COURT OF CANADA

CITATION: Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5

APPEALS HEARD: December 7 and 8, 2022
JUDGMENT RENDERED: February 9, 2024
DOCKET: 40061

BETWEEN:

Attorney General of Quebec
Appellant

and

Attorney General of Canada, Assembly of First Nations Quebec-Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, Makivik Corporation, Assembly of First Nations, Aseniwuche Winewak Nation of Canada and First Nations Child & Family Caring Society of Canada
Respondents

AND BETWEEN:

Attorney General of Canada
Appellant

and

Attorney General of Quebec
Respondent

- and -

Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of the Northwest Territories, First Nations Child & Family Caring Society of Canada, Aseniwuche Winewak Nation of Canada, Assembly of First Nations, Makivik Corporation, Assembly of First Nations Quebec-Labrador, First Nations of Quebec and Labrador Health and Social Services Commission, Grand Council of Treaty #3, Innu Takuaikan Uashat mak Mani-utenam, Federation of Sovereign Indigenous Nations, Peguis Child and Family Services, Native Women's Association of Canada, Council of Yukon First Nations, Indigenous Bar Association in Canada, Chiefs of Ontario, Inuvialuit Regional Corporation, Inuit Tapiriit Kanatami, Nunatsiavut Government, Nunavut Tunngavik Incorporated, NunanuKavut Community Council, Lands Advisory Board, Métis National Council, Métis Nation — Saskatchewan, Métis Nation of Alberta, Métis Nation British Columbia, Métis Nation of Ontario, Les Femmes Michif Otipemisiwak, Listuguj Mi'gmaq Government, Congress of Aboriginal Peoples, First Nations Family Advocate Office, Assembly of Manitoba Chiefs, First Nations of the Maa-Nulth Treaty Society, Tribal Chiefs Ventures Inc., Union of British Columbia Indian Chiefs, First Nations Summit of British Columbia, British Columbia Assembly of First Nations, David Asper Centre for Constitutional Rights, Regroupement Petapan, Canadian Constitution Foundation, Carrier Sekani Family Services Society, Cheslatta Carrier Nation, Nadleh Whuten, Saik'uz First Nation, Stellat'en First Nation, Council of Atikamekw of Opitciwan, Vancouver Aboriginal Child and Family Services Society and Nishnawbe Aski Nation
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 137)

* Brown J. did not participate in the final disposition of the judgment.

IN THE MATTER OF a Reference to the Court of Appeal for Quebec concerning the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24

Attorney General of Quebec *Appellant*

v.

Attorney General of Canada,
Assembly of First Nations Quebec-Labrador,
First Nations of Quebec and Labrador Health and Social Services Commission,
Makivik Corporation, Assembly of First Nations,
Aseniwuche Winewak Nation of Canada and
First Nations Child & Family Caring Society of Canada *Respondents*

- and -

Attorney General of Canada *Appellant*

v.

Attorney General of Quebec *Respondent*

and

Attorney General of Manitoba,
Attorney General of British Columbia,

Attorney General of Alberta,
Attorney General of the Northwest Territories,
First Nations Child & Family Caring Society of Canada,
Aseniwuche Winewak Nation of Canada,
Assembly of First Nations, Makivik Corporation,
Assembly of First Nations Quebec-Labrador,
First Nations of Quebec and Labrador Health
and Social Services Commission,
Grand Council of Treaty #3,
Innu Takuaikan Uashat mak Mani-utenam,
Federation of Sovereign Indigenous Nations,
Peguis Child and Family Services,
Native Women's Association of Canada,
Council of Yukon First Nations,
Indigenous Bar Association in Canada,
Chiefs of Ontario, Inuvialuit Regional Corporation,
Inuit Tapiriit Kanatami, Nunatsiavut Government,
Nunavut Tunngavik Incorporated,
NunanuKavut Community Council,
Lands Advisory Board, Métis National Council,
Métis Nation — Saskatchewan, Métis Nation of Alberta,
Métis Nation British Columbia, Métis Nation of Ontario,
Les Femmes Michif Otipemisiwak, Listuguj Mi'gmaq Government,
Congress of Aboriginal Peoples,
First Nations Family Advocate Office, Assembly of Manitoba Chiefs,
First Nations of the Maa-Nulth Treaty Society,
Tribal Chiefs Ventures Inc.,
Union of British Columbia Indian Chiefs,
First Nations Summit of British Columbia,
British Columbia Assembly of First Nations,
David Asper Centre for Constitutional Rights,
Regroupement Petapan, Canadian Constitution Foundation,
Carrier Sekani Family Services Society,
Cheslatta Carrier Nation, Nadleh Whuten,
Saik'uz First Nation, Stellat'en First Nation,
Council of Atikamekw of Opitciwan,
Vancouver Aboriginal Child and Family Services Society and
Nishnawbe Aski Nation *Interveners*

Indexed as: Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*

2024 SCC 5

File No.: 40061.

2022: December 7, 8; 2024: February 9.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Aboriginal peoples — Child and family services — Parliament enacting statute establishing national standards to protect Indigenous children and affirming Indigenous peoples' inherent right of self-government in relation to child and family services — Whether statute is ultra vires Parliament's jurisdiction under Constitution of Canada — Constitution Act, 1867, s. 91(24) — Act respecting First Nations, Inuit and Métis children, youth and families, S.C. 2019, c. 24.

In keeping with its commitments relating to the *United Nations Declaration on the Rights of Indigenous Peoples* ("Declaration"), which has been incorporated into Canada's domestic positive law, and in response to the calls to action made by the Truth and Reconciliation Commission of Canada, Parliament enacted the *Act respecting First Nations, Inuit and Métis children, youth and families* ("Act"). The Act establishes national standards and provides Indigenous peoples with effective

* Brown J. did not participate in the final disposition of the judgment.

control over their children's welfare. In ss. 9 to 17, it sets out national standards and principles, which establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. In ss. 8(a) and 18(1), it affirms that the inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act, 1982* includes legislative authority in relation to Indigenous child and family services. As well, the Act establishes a framework within which Indigenous groups, communities or peoples may exercise the jurisdiction affirmed in ss. 8(a) and 18(1) of the Act. It also specifies how its provisions and the jurisdiction it affirms will interact with other laws. Section 21 incorporates by reference the laws made by Indigenous groups, communities or peoples and gives them the force of law as federal law, and s. 22(3) states for greater certainty that the laws of Indigenous groups, communities or peoples prevail over provincial laws to the extent of any conflict or inconsistency.

Following the Act's enactment, the Attorney General of Quebec referred the question of its constitutional validity to the Quebec Court of Appeal, asking whether the Act is *ultra vires* Parliament's jurisdiction under the Constitution of Canada. The Court of Appeal held that the Act is constitutionally valid except for ss. 21 and 22(3), provisions that give the laws of Indigenous groups, communities or peoples priority over provincial laws. In its view, these provisions exceed Parliament's jurisdiction because they impermissibly alter Canada's constitutional architecture. The Attorney General of Quebec and the Attorney General of Canada appeal from the opinion given by the Court of Appeal.

Held: The appeal of the Attorney General of Quebec should be dismissed, and the appeal of the Attorney General of Canada should be allowed.

The Act as a whole is constitutionally valid. 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 Act falls squarely within Parliament's legislative jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

Parliament embarked on a process of legislative reconciliation by means of an innovative statute. Under this statute, Indigenous governing bodies and the Government of Canada will work together to remedy the harms of the past and create a solid foundation for a renewed nation-to-nation relationship in the area of child and family services, binding the Crown in its dealings with the country's Indigenous peoples. In this way, Parliament not only immediately meets the commitment made by Canada to implement the Declaration and respond to the call to action of the Truth and Reconciliation Commission of Canada, but also avoids the uncertainties of constitutional negotiations, the slowness of treaty settlements and the inevitable conflicts associated with court settlements.

There are two stages in determining the constitutional validity of a law. At the first stage of the analysis, which involves characterizing the law, a court identifies the purpose and effects of the law in order to determine its main thrust or dominant

characteristic. In looking at the purpose of the law, the court considers both intrinsic evidence, such as the law's preamble, provisions and title, and extrinsic evidence, such as parliamentary debates. In looking at effects, the court must be concerned with legal effects, which flow directly from the provisions of the law itself, and practical effects, which are the side effects flowing from the law's application. Next, at the second stage of the analysis, the court classifies the law by reference to the heads of power listed in ss. 91 and 92 of the *Constitution Act, 1867*.

Given that the question referred to the Court of Appeal in this case did not relate to any specific provision of the Act, it is the Act in its entirety that must be first characterized and then classified. To begin with, the pith and substance of the Act flows from an examination of its aims and effects. The pith and substance of the Act, taken in its entirety, is to protect the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, to advance the process of reconciliation with Indigenous peoples.

First, the intrinsic evidence taken as a whole suggests that the Act's overarching purpose 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 Declaration in Canadian law. Second, the purpose identified from the intrinsic evidence is confirmed by the extrinsic evidence. Excerpts from the debates point to the seriousness of the problem of overrepresentation

of Indigenous children in child and family services systems. They also clarify how the Act's fundamental purpose is closely linked to the three aims identified from the intrinsic evidence. Affirming the legislative authority of Indigenous groups, communities and peoples and adopting national standards were viewed as an integral part of implementing aspects of the Declaration. Similarly, the affirmation of legislative authority was also seen to sit comfortably alongside the national standards articulated by Parliament, because Indigenous communities had been participants in formulating the standards and were expected to be participants in implementing them thereafter. The three elements are aims that are mutually reinforcing to protect the well-being of Indigenous children, youth and families.

The legal effect of the Act is to establish a uniform scheme for protecting the well-being of Indigenous children, youth and families through the affirmation of Indigenous legislative authority, through national standards and through concrete implementation measures. Practically speaking, the Act may reasonably be expected to protect the well-being of Indigenous children, youth and families and to advance reconciliation with Indigenous peoples. It is reasonable to expect that Indigenous children and families will receive services that are more appropriate to their cultural realities, which will reduce the overrepresentation of Indigenous children in child and family services settings. It is also reasonable to think that the Act will help avoid the waste of time and resources involved in prolonged litigation or negotiations over whether and, if so, to what extent a particular Indigenous group, community or people

has jurisdiction in relation to child and family services. The effects of the three interrelated categories of provisions are along the same lines.

The provisions affirming the right of self-government have substantive legal effects because of the relationship that exists between legislation and government. The logical corollary of parliamentary sovereignty is that Parliament and the legislatures may bind the Crown through legislation. In conjunction with s. 7 of the Act, which expressly makes the Act binding on the Crown in right of Canada or of a province, Parliament's binding affirmation about the scope of s. 35 of the *Constitution Act, 1982* binds the federal government to the position it has affirmed as a matter of statutory positive law. Parliament undertakes to act as though Indigenous peoples enjoy an inherent right of self-government in relation to child and family services and ensures that the Crown also undertakes to act in accordance with its position by expressly binding the Crown through s. 7. Insofar as the affirmation in s. 18(1) of the Act is found in a law that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867*, Parliament's affirmation and the Crown's corollary undertaking have effect. The combined operation of ss. 7, 8(a) and 18(1) of the Act could also have other legal effects by requiring the Crown to act as though the principle of the honour of the Crown is engaged. With regard to practical effects, the affirmation performs the pedagogical or educational function of the law. It may in part be viewed as a step toward changing or adjusting the culture underlying the actions of the federal and provincial governments and may help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples in Canada.

The provisions setting out national standards establish a normative framework for the provision of culturally appropriate child and family services that applies across the country. Some of these principles guide the courts' interpretation of the Act and the administration of the Act by governments. This normative framework is binding on federal and provincial providers of such services, as well as on Indigenous providers in certain cases. Pending the full realization of Indigenous jurisdiction as recognized, many of the national standards laid down may, on a practical level, operate to ensure that the child and family services provided in relation to Indigenous children are culturally appropriate for them and are in their best interests. It may reasonably be expected that the standards that are preventive will lessen the historical propensity of child welfare systems to apprehend Indigenous children and thus that they will help such children remain, where possible, in the environment they are from. As for the standards that come into play after a decision has been made to place a child, they are likely capable of reducing the disproportionate mass placement of Indigenous children outside their families and their communities. Addressing overrepresentation protects the well-being of Indigenous children, youth and families.

The provisions setting out concrete implementation measures facilitate the adoption by Indigenous groups, communities or peoples of legislative measures in relation to child and family services. An anticipated practical effect of the Act is to make Canadian law more consistent with the Declaration. The Act also puts in place mechanisms to facilitate and encourage, from a forward-looking perspective, the negotiation of agreements between the Crown and Indigenous communities. It may also

be anticipated that the Act's provisions will advance reconciliation with Indigenous peoples and accelerate certain aspects of this process of reconciliation. It may be expected that Canada will move closer to the goal of establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples.

With regard to the second stage of the analysis, which involves classifying the Act, Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* is a sound basis for its enactment. 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). The Act does not alter Canada's constitutional architecture.

First of all, the incidental effects of the national standards on the provinces' exercise of their powers, including on the work of their public servants, have no impact on the Act's constitutional validity. The national standards are within federal jurisdiction and can accordingly be binding on the provincial governments. The double aspect doctrine allows for the concurrent application of both federal and provincial legislation in relation to the same fact situation.

Moreover, nothing prevents Parliament from affirming that Indigenous peoples' inherent right of self-government recognized and affirmed by s. 35 of the *Constitution Act, 1982* includes legislative authority in relation to child and family services. In doing so, 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, its position on the content of this constitutional provision, which the division of powers and the separation of powers do not prevent it from doing. The correctness of its position does not have to be determined to answer the reference question, and the classification of the affirmation under one of the heads of power in the *Constitution Act, 1867* must, in the context of this question, be determined by the classification of the Act as a whole.

It is also constitutionally open to Parliament to use anticipatory incorporation by reference of provisions adopted by other entities as a legislative drafting technique if Parliament has the legislative jurisdiction required to enact the law it seeks to referentially incorporate. Here, through s. 21, Parliament has validly incorporated by reference the laws, as amended from time to time, of Indigenous groups, communities or peoples in relation to child and family services. Parliament has independent legislative authority to enact such laws pursuant to its jurisdiction over Indians and lands reserved for the Indians under s. 91(24) of the *Constitution Act, 1867*. Therefore, s. 21 of the Act, which is simply an incorporation by reference provision, does not alter the architecture of the Constitution either.

Lastly, it is equally open to Parliament to affirm that the laws of Indigenous groups, communities or peoples will prevail over other laws in the event of a conflict. Section 22(3) of the Act is simply a legislative restatement of the doctrine of federal paramountcy, under which the provisions of a valid federal law prevail over conflicting

or inconsistent provisions of a provincial law. Although paramountcy is a judicial doctrine whose scope and application are matters for the courts rather than Parliament or the legislatures, this does not prevent Parliament from declaring its understanding of federal paramountcy. It is ultimately for the courts to adjudicate any alleged conflict between federal law and provincial law and to make any necessary declaration of paramountcy. Therefore, the s. 22(3) paramountcy provision does not alter the architecture of the Constitution.

Cases Cited

Referred to: *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Badger*, [1996] 1 S.C.R. 771; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14,