First Nations Child &
Family Caring Society

January 2025

Loving Our Children: Finding What Works for First Nations Families

Canada Research Chair in First Nations Child and Family Services Implementation 2023-2030

Information Sheet #6

Supreme Court of Canada's Reference[1] re *An Act respecting First Nations, Inuit and Métis children, youth and families*: What Indigenous Peoples and Governments Need to Know

Thomas Bissett

Overview

Until recently, the power to make general child and family services laws rested exclusively with the provinces, while the Parliament of Canada made child and family services laws for "status Indians" under the *Indian Act*. This changed with *An Act respecting First Nations, Inuit and Métis children, youth and families* ("the Act," also known as Bill C-92), which was passed in 2019 and came into force on January 1, 2020. It establishes national standards and a framework through which First Nations, Métis and Inuit communities ("Indigenous groups") can make their own child and family services laws, which many Indigenous groups have since done or started the process to gain this authority.

Shortly after Parliament passed the Act, the Quebec government launched a constitutional challenge to its validity. In 2022, the Quebec Court of Appeal found the Act to be mostly valid and on 9 February 2024, the Supreme Court of Canada declared it constitutional in its entirety. By upholding the Act, the Supreme Court's opinion supports Indigenous self-governance over child and family services.

In 2016, the Canadian Human Rights Tribunal ordered Canada to cease its discriminatory practices and to reform the First Nations Child and Family Services (FNCFS) program. Indigenous Services Canada will fund "prevention/least disruptive measures" at the rate of $2,500 (adjusted for inflation) per person living on reserve and in the Yukon until the FNCFS program reform is completed. Concerns have been raised about the adequacy and implementation of this per capita funding approach.

This information sheet is **one in a series**[2] developed in collaboration with the McGill University's Faculty of Law to provide basic legal information relevant to self-government and the provision of child welfare services. This is not legal advice. Legal counsel should be consulted for guidance on your situation.

What Does the Act Do?

An Act respecting First Nations, Inuit and Métis children, youth and families recognizes Indigenous groups' authority to enact and enforce their own child and family services laws. An Indigenous governing body can make laws on behalf of its

group, community or people, so long as (i) those laws comply with minimum standards outlined in the Act[3] and (ii) the governing body has entered into a coordination agreement with the federal and provincial governments or has made reasonable efforts to do so for one year.[4]

According to the Court, the Act's overarching purpose is to protect "the well-being of Indigenous children, youth and families."[5] This it seeks to do by promoting the delivery of "culturally appropriate child and family services."[6] More broadly, the Act seeks to advance the process of reconciliation with Indigenous peoples.[7]

The Supreme Court also identified three elements of the Act's purpose:

- Affirming Indigenous groups' inherent right of self-government over child and family services,[8]
- Establishing national standards that guarantee services to all Indigenous children,[9]
- Implementing aspects of the *United Nations Declaration on the Rights of Indigenous Peoples*.[10]

What is the Scope of Indigenous Groups' Authority Under the Act?

The Act addresses Indigenous self-government in relation to child and family services. It does not address Indigenous self-governance over other matters. In other words, Indigenous groups cannot rely on the authority granted under the Act to make laws about issues unconnected to the provision and regulation of child and family services.

The scope of Indigenous groups' law-making authority must be understood in relation to the purpose and context of the Act: to enable those groups to protect Indigenous children, youth and families and promote their well-being and to further reconciliation. Under the Act, Indigenous groups can seek to fulfill this purpose by providing child and family services, including youth protection, foster care, prevention services, community support, adoption and individual or family counselling. Moreover, they may do so in ways that are responsive to the cultural needs of their community and to the realities of colonialism.

Arguably, the goal of reconciliation means that Indigenous groups' authority over child and family services should be understood broadly. In some cases, establishing child and family services laws appropriate for Indigenous communities may require doing things other or differently than the current systems. Indigenous groups might decide to create child and family services laws that are substantially different. That reconciliation is one of the core purposes of the Act suggests there is room for this expansion. So does its acknowledgement of how existing child welfare systems have failed Indigenous groups.

Significantly, the power to make laws in relation to Indigenous child and family services includes the possibility of affecting other areas on certain conditions. Such effects will be permissible so long as the law is primarily about Indigenous child and family services. For example, Indigenous child and family services laws might validly have secondary effects on matters over which Parliament or the provinces retain exclusive authority, such as child custody or privacy.

Moreover, in adopting a law that primarily concerns child welfare, Indigenous communities might make rules about other matters that they could not validly make in isolation, such as rules about privacy or the sharing of information. Such rules are permissible so long as they are necessary to the child and family services law of which they are a part.

What if Indigenous Laws Conflict with Federal Laws?

Section 22(1) of the Act clearly states that Indigenous child and family services laws are paramount over all federal laws, other than the *Canadian Human Rights Act* and the Act itself. This means that the Indigenous law will prevail to the extent of any conflict or inconsistency with any other federal law.

What if Provincial Laws Conflict with Indigenous Laws?

Both the Act and the Reference opinion assert that Indigenous laws properly enacted under the Act will have the force of federal law. This is significant because valid federal law occupies a privileged

position relative to valid provincial law when conflicts arise, as they sometimes do in a federation. The solution worked out by courts is that provincial laws must yield to federal laws to the extent of any conflict. The valid provincial law will not produce its effects so long as the valid federal law that conflicts with it remains in force. Indigenous laws having the force of federal laws means that they, too, will trump provincial laws to the extent of any conflict.

A valid provincial law might conflict with valid federal law or a valid Indigenous child and family services law in one of two ways. First, a provincial law might directly contradict an Indigenous law. For example, it might require a person to do something prohibited by the Indigenous law, or it might forbid an action required by that law.

Second, a provincial law might conflict with an Indigenous law indirectly. It might get in the way of carrying out the Indigenous law, "frustrating its purpose." For example, it might be possible to follow the explicit requirements of an Indigenous law and a provincial law, but obeying the provincial law would fundamentally undermine the spirit of the Indigenous law. In such cases, too, the provincial law would give way to the Indigenous law having the force of federal law. Such a "frustration of purpose" is foreseeable in relation to matters where provincial and Indigenous approaches contrast starkly, such as privacy laws and the instinct to remove children from their homes as a response to risk.

Key Points and Takeaways

- The Act allows Indigenous groups to draw down the authority to make their own child and family services laws. Such laws must meet specified minimum standards.
- Indigenous laws may affect matters beyond child and family services, so long as the most important characteristics concern child and family services. In fact, those laws can even contain rules about matters outside of child and family services if they are a necessary part of the law. When drafting such rules, it is important to demonstrate the connection between such rules and the law as a whole. A preamble or other language may help demonstrate this connection.
- Indigenous laws will prevail over provincial laws that directly conflict with or frustrate the purpose of the Indigenous child and family services law. Indigenous groups should explicitly state the overarching purpose of each law they enact. This will help underscore possible areas of conflict with provincial laws.

If you would like to share information about a First Nations child and family support initiative in your community, the Loving Our Children project researchers would like to hear from you. **LOCwhatworks@gmail.com**

Endnotes

1 *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5 ("the Reference").
2 https://cwrp.ca/indigenous-child-welfare
3 *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 at ss 10-17. ("the Act").
4 Ibid at ss 20(2)-(3), 21(1).
5 See the Reference *supra* note 1 at para 41.
6 Ibid.
7 Ibid.
8 Ibid at paras 43, 50. See also the Act *supra* note 2 at s 8(a).
9 Ibid at paras 44, 51. See also the Act *supra* note 2 at s 8(b).
10 Ibid at para 45, 52; see also the Act *supra* note 2 at s 8(c).