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CURRENTS/QUESTIONS D'ACTUALITÉ

Beyond the Constitutional Architecture: *An Act respecting First Nations, Inuit and Métis children, youth and families* at the Supreme Court of Canada

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Abstract
In December 2022, the Supreme Court of Canada heard arguments in a reference case about the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families* (the Act). At issue is whether the Act infringes on provincial jurisdiction and changes the constitutional architecture by giving First Nations law governing child welfare the force of federal law. In this short Currents article, we argue that the Supreme Court's consideration of the Act marks a critical juncture in the ongoing relationship between Canadian and Indigenous law. Through an examination of the arguments made before the Supreme Court, we assert that it is essential that the Court move beyond its historical commitments to protecting the Constitution and umpiring jurisdictional disputes and toward a recognition of the failures of the constitutional framework to account for an expansive understanding of inherent rights and inherent jurisdiction, including child welfare.

Résumé
En décembre 2022, la Cour suprême du Canada a entendu les arguments dans une affaire de renvoi concernant la constitutionnalité de la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis (la Loi). L'appel visait à établir si la Loi empiète sur les compétences provinciales et modifie l'architecture constitutionnelle en conférant aux lois des Premières Nations régissant la protection de l'enfance « force d'une loi fédérale ». Dans ce court article des Courants, nous soutenons que l'examen de la Loi par la Cour suprême marque un tournant décisif dans les relations entre le Canada et le droit autochtone. En examinant les arguments présentés devant la Cour suprême, nous affirmons qu'il est essentiel que la Cour aille au-delà de ses engagements historiques en matière de protection de la constitution et d'arbitrage des conflits de compétence, pour reconnaître l'incapacité du cadre constitutionnel existant à tenir compte d'une compréhension élargie des droits inhérents et de la compétence inhérente, y compris en matière de protection de l'enfance.

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Introduction

On December 7 and 8, 2022, the Supreme Court of Canada heard an appeal on the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families* (the Act). The Act—which both affirms Indigenous communities' inherent jurisdiction over child welfare and creates relevant national standards—had previously been challenged at the Quebec Court of Appeal (QCCA). A simple explanation of this case might position it as a jurisdictional tug-of-war, examining whether the Court recognizes Indigenous child welfare as a matter of federal jurisdiction over Indigenous affairs or provincial jurisdiction over social services. The case is not simple, however, and although it has not received much attention in political science to date, it raises important questions about the role of the Supreme Court as a potential institution of reconciliation, the possibility of broad recognition of Indigenous rights, and the exercise of inherent jurisdiction.[1] Together with *Dickson v. Vuntut Gwitchin First Nation* (heard in February 2023), this case is part of the Court's current consideration of how Indigenous law and Canadian law work together.

In this brief article, we argue that the *Reference on An Act respecting First Nations, Inuit and Métis children, youth and families* at the Supreme Court marks a critical juncture in defining the role of the Supreme Court in reconciliation. By providing an overview of the Act's trajectory and key arguments in the Court, we argue that if the Supreme Court acts within the tradition of colonial Canadian institutions—if it upholds the "constitutional architecture," as has often occurred in reference cases (Lawlor, 2018; Macfarlane, 2021)—then it is not likely that Indigenous law will be recognized as having paramountcy (that is, the same force as federal law). Yet this case offers a chance for the Supreme Court to affirm that Indigenous jurisdiction over child welfare—as the Act intended—should be paramount, and further, that inherent rights must be recognized on their own terms.

An Act respecting First Nations, Inuit and Métis children, youth and families

An Act respecting First Nations, Inuit and Métis children, youth and families is a response to the Calls to Action of the Truth and Reconciliation Commission (2015) that notably seek to reduce the number of Indigenous children in state care. The Act also addresses the finding in *Caring Society v. Canada* (2016: 463) that the long-standing system of child welfare on reserves discriminates against First Nations children and that significant reform is needed. Following a preamble that acknowledges the ongoing legacy of Indian Residential Schools and commits to implementing the United Nations Declaration on the Rights of Indigenous Peoples (2007), the Act is divided into two parts. Part 1 (ss.1–17) provides national standards that must be applied in provincial interventions involving any Indigenous child. Part 2 (ss.18–31) sets up a mechanism by which Indigenous Governing

Bodies can exercise jurisdiction over child welfare, including identifying and developing Indigenous laws and entering into co-ordination agreements with governments to facilitate the transition of child welfare back to communities. This part of the Act is particularly important in the context of the Supreme Court case because it contains provisions which assert that Indigenous laws related to child welfare developed under the Act have paramountcy (s.21) and, further, that "if there is a conflict or inconsistency between" laws developed or identified by Indigenous people under the Act and provincial law, Indigenous law prevails (s.22(3)).[2]

The Act received Royal Assent in June 2019, and before it could come into force in January 2020, the Government of Quebec announced it would be asking the QCCA to rule on its constitutionality (Shingler and Deer, 2019). At the hearings, the Government of Quebec argued that insofar as provinces are responsible for child welfare under s.91(24) of the *Constitution Act, 1867*, the federal government cannot determine how relevant services are delivered. Further, the Government of Quebec suggested that by mobilizing the constitutional protections of inherent Indigenous rights in legislation, rather than through the courts, the Act made a change to the constitutional architecture akin to a unilateral constitutional amendment. The Government of Canada countered that the pith and substance of the Act are to address the well-being of *Indigenous* children, which falls under s.91(24) of the *Constitution Act, 1867*, and that the right to self-government, including child welfare, is part of broader Indigenous rights under s.35 of the *Constitution Act, 1982*. Interveners, including the Assembly of First Nations and the Assembly of First Nations Quebec-Labrador, argued also that no change to the constitutional architecture need occur for inherent rights to be recognized, as the inherent right to self-government has always existed and has simply not been recognized by colonial governments. The decision rendered by the QCCA in February 2022 found that the Act was intra vires with the exceptions of sections 21 and 22(3).

At the Supreme Court of Canada

In December 2022, the Supreme Court of Canada heard the appeal and reserved judgment. Given the history of the Act and the substance of the hearings, there are three likely outcomes. The first is that the Supreme Court will find the entirety of the Act ultra vires. The Government of Quebec argued, as they did at the QCCA, that the recognition of inherent jurisdiction over child welfare infringes on provincial jurisdiction over the same and, further, that the attempt to mobilize s.35 rights via legislation is both a unilateral change to the constitutional architecture and an illegitimate way of recognizing self-government. A decision that the Act is entirely unconstitutional would mean that the Supreme Court recognizes exclusive provincial jurisdiction over the well-being of Indigenous children, affirming the Court's role in reference cases as the "guardian of the constitution" and "umpires of federalism" (Lawlor, 2018).

The second potential outcome is that the Supreme Court will uphold the decision of QCCA, leaving most of the Act intact but finding sections 21 and 22(3) ultra vires. Doing so would affirm the recognition—as established in *R. v. Van der Peet*

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(1996)—that activities that have a "practice, custom, or tradition integral to distinctive culture" of Indigenous peoples are protected under s.35, including, in this case, child welfare. The justices inquired several times throughout the hearings about whether the Act would hold without these impugned provisions, ostensibly to discern whether the Act could function without the explicit articulation of paramountcy. Still, upholding a constitutionally protected right to self-government that includes child and family well-being—even without the paramountcy provisions—would be, in itself, a significant development (Canada, 2022).

There is an alternative approach to this second outcome, as the Court could uphold the decision of the QCCA but not apply the narrow confines of the *Van der Peet* test. Rather, as counsel for the Makivik Corporation argued, the Court could recognize that the scope of inherent rights are much broader than *Van der Peet* suggests as, following *R. v. Pamajewon* (1996), Indigenous peoples have historically exercised—as peoples—"the full spectrum of their powers" (Supreme Court of Canada, 2022). There is an opportunity here for the Court to flip the presumption that there needs to be parameters set regarding what self-government rights can and cannot include or what might be litigated in the narrow understanding established in *Sparrow* (1990). Instead, the Court could presume that inherent rights are broad in scope and that the burden of proof falls to governments to assert when inherent rights *do not* apply

The third potential outcome is that the Supreme Court could decide that the Act is intra vires in its entirety. Following the arguments of the Government of Canada, the pith and substance of the Act is Indigenous child welfare, which fits squarely within s.91(24) of the *Constitution Act, 1867*. The Act also affirms constitutional rights under s.35 of the *Constitution Act, 1982*, and enables future recognition of other inherent rights in legislation. The Act is not only constitutional on these grounds but also in keeping with Canada's obligations under the United Nations Declaration on the Rights of Indigenous People and other international human rights agreements (United Nations, 2007). As counsel for the Federation of Sovereign Indigenous Nations argued, the ability of an Indigenous community to raise its children is not only integral to the identity of that community but also the inherent right from which all others flow.

Beyond the Constitutional Architecture

The question before the Supreme Court is whether the Act is unconstitutional and, further, whether the Act's provisions affirming paramountcy for Indigenous child welfare laws unilaterally change the constitutional architecture. This case, this framing, requires the Court to examine the deeply flawed foundations of Canada's existing constitutional architecture and to consider whether Indigenous law can coexist with it. But it is clear that there is no path forward for reconciliation if the constitutional challenge of the Act is understood merely as a dispute between two levels of colonial government.

The three potential outcomes outlined above will lead to profoundly different futures for Indigenous children and communities, as well as the role of the Supreme Court in addressing the ongoing legacies of colonialism. If the Act is found to be entirely ultra vires, responsibility for child welfare will revert to the

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provinces: another jurisdictional tug-of-war won. This outcome would, however, undermine the decades of foundational work leading to the Act, the ongoing work of Indigenous Governing Bodies to commence or enter into co-ordination agreements, and the collaborations of Nations, Indigenous Governing Bodies, provincial governments, and stakeholders who are successfully transferring the care of Indigenous children back into their communities. The Act was created in the first place to respond to the failures of the child welfare system to address the needs of Indigenous children; to find the Act ultra vires would be a recommitment to that failing system.

If the Act is found to be intra vires with the exception of the impugned provisions—affirming the QCCA's decision—the national standards regulating provincial interventions involving Indigenous children will remain, but the possibility for Indigenous communities to exercise inherent jurisdiction over child welfare will be more tenuous than ever. The upholding of the *Van der Peet* test will affirm inherent rights, albeit within a framework that binds them to "the precise moment of contact," ensuring that inherent rights are woven together with the Court's understanding of colonial history (Borrows, 2017: 128). In this scenario, if conflict arises between Indigenous Governing Bodies' legislation and any other law, the Indigenous Governing Bodies' legislation will be secondary to provincial law, at once maintaining a jurisdictional hierarchy (in which Indigenous law cannot be paramount) and potentially disincentivizing Indigenous Governing Bodies from asserting jurisdiction over child welfare altogether.

If the Act is found intra vires in its entirety, the extensive, critical work toward its enactment will continue, both in recognizing the minimum standards for provincial interactions with Indigenous children and in supporting First Nations and Indigenous Governing Bodies to identify and implement their own laws. If the Act is a part of broader attempts to engage in reconciliation, the laws that emerge from its framework cannot merely be subordinate to provincial laws, as a third and lesser order of government. Paramountcy matters, and although the implementation of the Act is slow going and hard fought, it is the result of decades of negotiation between key stakeholders and a site of hope for a stable future in which the inherent rights of Indigenous peoples to raise their families and govern their communities is affirmed and respected. Recognizing the whole Act as intra vires, with reasoning that supports the broad recognition of the inherent rights of Indigenous peoples under s.35 can fundamentally shift the legislative framework from questioning whether affirmation of these inherent rights is possible to *how* such rights can be affirmed in practice.

The inherent and inalienable right of Indigenous peoples to address child welfare endures regardless of the Supreme Court's decision. It has always existed and will exist regardless of the outcomes of this case. The Supreme Court must consider in its deliberations not only the ongoing legacies of colonialism and continued intergenerational trauma but the responsibility of Canada's highest court of law in shifting power back to those from whom it was stolen, whose children continue to be taken away from their communities. It cannot do so in ways bound to a colonial constitution, the foundations of which never considered the rights of Indigenous people.

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Notes

1 While there has been limited attention to Bill C-92 in political science, there have been a number of commentaries from legal scholars, including an in-depth series on the University of Calgary Faculty of Law *ABlawg*. See links to all posts in Gunn, 2022.

2 The Act is by no means perfect, and its most significant failing is a lack of funding commitments built into the legislation (Blackstock, 2019; Metallic et al., 2019). Throughout the legislative process, Indigenous groups spoke out about the lack of associated funding that could enable communities to exercise inherent jurisdiction. To this end, the Act is, to quote Mi'kmaq lawyer, professor and activist Pam Palmater, "like saying, 'we give you the power to all operate your own hospitals, but we're not giving you any money, so no money for buildings or staff or education or hiring or infrastructure or medicine' " (2019: n.p.).

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