Cassels

SCC Upholds Indigenous Child Welfare Law

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On February 9, 2024, the Supreme Court of Canada (SCC) issued its decision on the Attorney Generals of Canada's (Canada) and Quebec's (Quebec) appeals of the Quebec Court of Appeal's (QCCA) reference opinion on the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families* (Act).[1] In its unanimous decision, the SCC found the Act to be constitutionally valid in its entirety and, in doing so, allowed Canada's appeal and dismissed Quebec's appeal.

Cassels acted as co-counsel for the Interveners: the Métis National Council, the Métis Nation British Columbia, the Métis Nation – Saskatchewan, the Métis Nation of Alberta, the Métis Nation of Ontario, and Les Femmes Michif Otipemisiwak. In its decision, the SCC affirmed and, in part, adopted these Interveners' submissions.

Background

On June 21, 2019, Parliament enacted the Act to address the country's need for comprehensive reform of child and family services, in light of the legacy of residential schools and the over-representation of Indigenous children in child and family services systems, and to advance the federal government's commitment to implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[2] The Act affirms Indigenous peoples' inherent right of self-government, which includes jurisdiction in relation to child and family services; establishes national standards for child and family services affecting Indigenous children; and implements aspects of UNDRIP in Canadian law.[3]

Since the Act came into force, Indigenous communities have started work on their own child welfare laws, and several Indigenous governing bodies have entered into coordination agreements with the federal and provincial governments.

Shortly after Parliament's enactment of the Act, Quebec filed a Notice of Reference to the QCCA requesting a reference opinion on the Act's constitutionality, namely whether Parliament's enactment of the Act was *ultra vires*.

The QCCA found the Act to be constitutionally valid except for its sections 21 and 22(3), which exceeded Parliament's legislative jurisdiction by unilaterally prioritizing Indigenous laws over provincial laws:[4]

- ***Section 21 of the Act*** incorporates, by reference, Indigenous laws regarding child and family

services and gives them the force of law as federal law.[5]

- ***Section 22(3) of the Act*** states, for greater certainty, that Indigenous laws regarding child and family services prevail over provincial laws to the extent of any conflict or inconsistency.[6]

The QCCA also confirmed Parliament's affirmation within the Act that Indigenous peoples have an inherent right of self-government that is protected under section 35 of the *Constitution Act, 1982* (Section 35), which right extends to child and family services.[7] Quebec appealed the QCCA's reference opinion, arguing that the Act should be held constitutionally invalid in its entirety because it impermissibly intrudes on certain areas of exclusive provincial jurisdiction and attempts to unilaterally amend the Constitution.[8] Canada also appealed, arguing that the entire Act constitutes a valid exercise of Parliament's legislative authority.[9]

The SCC's Decision

The SCC found the Act to be constitutionally valid in its entirety and, in doing so, allowed Canada's appeal and dismissed Quebec's appeal.

The Act's pith and substance 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 doing so, to advance the process of reconciliation with Indigenous peoples.[10] This pith and substance falls within Parliament's jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*.[11]

The SCC confirmed that neither section 21 nor section 22(3) of the Act alters the Constitution's architecture. Section 21 is simply an incorporation by reference provision, which reflects Parliament's authority to incorporate by reference those laws adopted by other entities pertaining to matters within its legislative jurisdiction. Section 22(3) is simply a legislative restatement of the doctrine of federal paramountcy, under which the provisions of valid federal law prevail over conflicting or inconsistent provisions of provincial law.[12]

Key Takeaway 1: The Act Codifies Parliament's Binding Affirmation that Section 35 Includes the Right of Self-Government in Relation to Child and Family Services

The SCC found that sections 7, 8(a), and 18(1) of the Act, read together, reflect Parliament's binding affirmation that Section 35 provides Indigenous peoples with an Aboriginal right of self-government in relation to child and family services:[13]

- ***Section 7 of the Act*** affirms that the Act is binding on the federal and provincial governments.[14]
- ***Section 8(a) of the Act*** affirms the inherent right of self-government, which includes jurisdiction in relation to child and family services.[15]
- ***Section 18(1) of the Act*** affirms that the inherent right of self-government recognized and affirmed by Section 35 includes jurisdiction in relation to child and family services.[16]

The SCC concluded that these provisions make it such that Parliament can no longer assert, in any proceedings or discussions, that there is no Aboriginal right of self-government in relation to child and family services, and such that the Crown must act in respect of these matters as though the honour of the Crown is engaged.[17]

Key Takeaway 2: The SCC Did Not Opine on the Scope of Section 35

The SCC did not opine on the scope of Section 35 (namely, whether the federal government is correct in understanding the scope of Section 35 as encompassing an Aboriginal right of self-government in relation to child and family services), as this question was not before the Court.[18] Instead, the SCC noted that it remains open to provincial governments to challenge Parliament's understanding of the scope of Section 35, as well as sections 7, 8(a), and 18(1) of the Act's applicability to the provinces, in court.[19]

Key Takeaway 3: The Act Reflects "Legislative Reconciliation"

The SCC recognized Parliament's enactment of the Act as a form of "legislative reconciliation" that respects, promotes, protects, and accommodates Indigenous peoples' inherent rights (in this case, the right of self-government in relation to child and family services) through frameworks and mechanisms contemplated therein. The Act proceeds on the premise that these inherent rights exist, rather than purporting to be the source of these inherent rights.[20]

The Act responds to a critical issue that lies at the heart of the reconciliation process: the well-being of Indigenous children, youth, and families. It allows the federal government to advance its commitment to implement UNDRIP and to respond to the Truth and Reconciliation Commission of Canada's and the National Inquiry into Missing and Murdered Indigenous Women and Girl's calls to action, which include reducing the number of Indigenous children in care and establishing national standards for Indigenous child apprehension and custody cases.[21]

The SCC further recognized the practical advantages of "legislative reconciliation," which includes avoiding the uncertainties of constitutional negotiations, the slowness of treaty settlements, and the inevitable conflicts associated with court settlements, and it encouraged the pursuit of reconciliation efforts outside of the courts, as "[t]rue reconciliation is rarely, if ever, achieved in courtrooms."[22]

Key Takeaway 4: The Act Advances the Federal Government's Commitments Around UNDRIP

The SCC recognized that the Act forms part of Parliament's broader legislative program to achieve reconciliation with Indigenous peoples, which legislative program is premised on UNDRIP and the federal government's commitment to implement UNDRIP.[23]

UNDRIP is an international document that is intended to reflect "the minimum standards" of Indigenous rights around the world, and it is intended to serve as a guide and a benchmark in the review of a country's Indigenous rights performance.[24] It contains provisions pertaining to child and family services, as well as a provision that calls on public governments to, in consultation and cooperation with Indigenous peoples, take the appropriate measures, including legislative measures, to achieve UNDRIP's standards.[25]

While UNDRIP is not, in and of itself, a legally binding document, the SCC called attention to Parliament's enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, which affirms UNDRIP as a "universal international human rights instrument with application in Canadian law" and commits Parliament to "take all measures necessary" to align its laws with UNDRIP.[26]

The SCC went on to identify the three types of legal norms that the Act engages: Indigenous peoples' legislative authority in relation to child and family services, Parliament's legislative authority in enacting the Act, and UNDRIP's standards.[27] It concluded that the metaphor of "braiding" these three types of legal norms into an interwoven framework is helpful in explaining how Parliament should implement UNDRIP; "state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope."[28] In this regard, the Act is a clear example of such "braiding" that advances the federal government's commitments around UNDRIP, as it represents a concrete legislative measure to implement the aspects of UNDRIP related to Indigenous children and families in Canadian law.[29]

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[1] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [Decision]; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [Act].

[2] Act, preamble.

[3] Act, s 8.

[4] Reference to the Court of Appeal of Quebec in relation with the *Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 at para 571 [QCCA Reference Opinion].

[5] Act, s 21.

[6] Act, s 22(3).

[7] QCCA Reference Opinion at para 494; *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35.

[8] Decision at para 36.

[9] Decision at para 36; *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(24).

[10] Decision at paras 41 & 135.

[11] Decision at para 135.

[12] Decision at paras 122 & 131.

[13] Decision at paras 56-59.

[14] Act, s 7.

[15] Act, s 8(a).

[16] Act, s 18(1).

[17] Decision at paras 63-66.

[18] Decision at para 111, 112 & 114.

[19] Decision at paras 60 & 118.

[20] Decision at para 17.

[21] Decision at para 5 & 21.

[22] Decision at paras 8 & 77, citing *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24.

[23] Decision at para 3.

[24] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, UN Doc A/Res/61/295 (2007), art 43 [UNDRIP].

[25] UNDRIP, arts 14, 17(2), 21(2), 22 & 38.

[26] Decision at para 4; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, ss 4(a) & 5.

[27] Decision at para 7.

[28] Decision at para 90.

[29] Decision at paras 3, 5 & 45.

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