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SCC upholds federal law affirming Indigenous self-governance in Indigenous child and family services

By **Cristin Schmitz**

Law360 Canada (February 9, 2024, 11:03 AM EST) -- The Supreme Court of Canada has 8-0 upheld a groundbreaking federal law which affirms the self-governance rights and jurisdiction of Indigenous governing bodies to provide child and family services to their communities, and which states that Indigenous child and family services laws prevail in Indigenous communities over any conflicting or inconsistent provincial laws.

In a far-reaching per curiam judgment Feb. 9 that was under reserve since December 2022, the top court held, in a reference from the government of Quebec, that the 2019 Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92) is within the federal government's exclusive s. 91(24) constitutional jurisdiction over "Indians, and lands reserved for the Indians": Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5.

The Supreme Court dismissed the appeal of Quebec's attorney general from a Quebec Court of Appeal judgment, 2022 QCCA 185, which upheld the constitutionality of the Act that came into force Jan. 1, 2020, except for ss.21 and 22(3), provisions which the court of appeal held were *ultra vires* the s. 91(24) federal power in that, respectively, those provisions altered the fundamental architecture of the Constitution and provided that Indigenous laws prevail over any conflicting or inconsistent provisions of provincial legislation with respect to Indigenous child welfare and family services.

The top court also allowed the federal government's appeal, ruling that the entire Act, including ss. 21 and 22(3), is a constitutionally valid exercise of the Parliament of Canada's s. 91(24) jurisdiction.

"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 court wrote.

"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*," the Supreme Court of Canada held.

"Parliament embarked on a process of legislative reconciliation by means of an innovative statute," the eight judges wrote (Brown J. did not participate in the judgment as he has retired).

"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," the court said. "In this way, Parliament not only immediately meets the commitment made by Canada to implement the United Nations Declaration on the Rights of Indigenous Peoples 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."

The top court ruled that s. 21, which it described as "simply an incorporation by reference provision, does not alter the architecture of the Constitution." It is "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," the judges explained. "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" under s. 91(24).

The top court held that "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," the court said. "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."

Section 21 of the Act states, in part, "A law, as amended from time to time, of an Indigenous group, community or people referred to in subsection 20(3) also has, during the period that the law is in force, the force of law as federal law."

Subsection 22 (1) states, "If there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services — other than any of sections 10 to 15 of this Act and the provisions of the Canadian Human Rights Act — that is in a federal Act or regulation, the provision that is in the law of the Indigenous group, community or people prevails to the extent of the conflict or inconsistency." Subsection 22(3) goes on to state, under the heading "Conflict — provincial laws", "For greater certainty, if there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services that is in a provincial Act or regulation, the provision that is in the law of the Indigenous group, community or people prevails to the extent of the conflict or inconsistency."

The landmark reference case on Indigenous self-governance attracted dozens of interveners, including several provincial attorneys general and many First Nations, Inuit and Metis groups, who filed more than 30 interventions with the court.

At a Feb. 9 news conference, leaders of the Assembly of First Nations Quebec-Labrador, representing 43 Chiefs of the First Nations in Quebec and Labrador, lauded the Supreme Court's 'historic' ruling as a 'victory for First Nations' right to self-government,' stating 'today our children are the clear winners of a decision designed to change the dynamic between First Nations and other levels of government.'

At an Ottawa press conference Feb. 9, leaders of the intervener Assembly of First Nations Quebec-Labrador (AFNQL), which represents 43 chiefs of the First Nations in Quebec and Labrador, hailed the Supreme Court's judgment as an "historic" victory "for First Nations' right to self-government" (the ruling also applies to Inuit and Metis governing bodies).

AFNQL chief, Ghislain Picard, said, “We have always been unwavering in our conviction that we, First Nations, must take over the welfare of our youth. We must keep in mind that our children are the core and vital component of this day.”

“The principles set out in the Act, including cultural continuity, substantive equality, and the best interests of the Indigenous child, are valid,” Picard said in a statement. “They represent minimum standards to be met across the country, and provincial governments and their structures must comply with them. As a result, we expect the Quebec authorities to implement the provisions of Bill C-92, so that genuine co-development and collaboration can begin.”

Derek Montour, president of the board of the First Nations of Quebec and Labrador Health and Social Services Commission, added, “This ruling reiterates the message we have been emphasizing for years — that First Nations are best placed to ensure the wellness of their own populations. After years of legal challenges and jurisdictional disputes, we can now focus fully on what matters to our nations: providing quality and equitable services to our families and ensuring a bright future for our children.”

The Quebec Native Women (QNW) organization, whose members comprise First Nations women in Quebec as well as Indigenous women living in urban areas, expressed “profound satisfaction” with the Supreme Court’s judgment.

“With its ruling, the Supreme Court supports Indigenous children and their parents in maintaining a safe and empowering home environment,” QNW’s president, Marjolaine Étienne, said in a statement. “This decision is of particular concern to Indigenous women, who more often than not head single-parent families and have to cope with many of the insidious consequences of systemic racism and discrimination, but who are also key players in the transmission of culture and language. With this decision, women, families and communities proudly regain their autonomy.”

QNW said it hopes the ruling “will put an end to the Quebec government’s opposition, and that it will undertake collaborative efforts with Indigenous communities and organizations to establish autonomous, accountable and effective [child welfare] systems.”

In a statement (English translation), the chiefs of the nine communities of the Innu Nation welcomed the judgment, which they said “affirms that the federal government can no longer argue, in any proceeding or discussion, that there is no Indigenous right to self-government with respect to child and family services.”

“Following this decision, we expect Quebec to respect the self-government of each of our communities and to promote the implementation and operationalization of our own child and family services laws,” they said, while highlighting also “the significant efforts of the various First Nations and Inuit stakeholders in this matter.”

“Together we are stronger!” the Innu Nation chiefs said of the co-operative efforts of Indigenous groups. “The Supreme Court has emphasized the objective of reconciliation in which the Act operates,” they said. “At the heart of this reconciliation process, the Act explicitly addresses the harms done to Indigenous children and their families, including the legacy of residential schools and the intergenerational trauma caused to Indigenous peoples by colonial policies and practices. Indeed, the court unequivocally recognizes that Aboriginal families are in the best position to know what is best for Aboriginal children.”

Gib van Ert of Olthuis van Ert LLP in Vancouver/Ottawa

Gib van Ert, with Olthuis van Ert LLP of Vancouver and Ottawa, counsel with Fraser Harland and Mary Ellen Turpel-Lafond for the intervener Union of British Columbia Indian Chiefs, First Nations Summit of British Columbia and British Columbia Assembly of First Nations, said the Supreme Court's decision "firmly situates [Bill] C-92 in a broader initiative to give domestic legal effect to the UN Declaration on the Rights of Indigenous Peoples. Courts in future will feel much more confident looking to the Declaration in cases touching Indigenous peoples' interests," he said. "The Declaration is now very clearly part of our public law. Lawyers, governments and courts have got to come up to speed on it.

van Ert said the court's emphasis on UNDRIP's art. 38 "requires Canada to take appropriate measures, including legislation, to achieve the Declaration's ends. That process has begun at the federal level and in B.C., but has not yet started in the other provinces."

"It has to start now," he told Law360 Canada. "All Canadian laws have to be reviewed, in consultation and co-operation with Indigenous peoples, to ensure their consistency with the Declaration."

van Ert noted that in para. 85 of its judgment, the top court emphasized that s. 5 of the federal UNDRIP Act requires the Government of Canada, in consultation and co-operation with Indigenous peoples, to take all measures necessary to ensure that the laws of Canada are consistent with the Declaration. "Bill C-92 is one such measure, but Parliament has passed other laws to implement UNDRIP and will have to pass more to ensure Canada is fully living up to UNDRIP's requirements," he advised."Provincial laws will need scrutiny and amendment too."

The judgment's recognition in para. 113 "of the Crown's targeting of Indigenous children, at the height of its imperialism, to destroy Indigenous cultures is powerful," van Ert added. "The Declaration requires Canada to provide redress for those wrongs and other wrongs Indigenous peoples have suffered. Part of living up to the Declaration will be redressing past and ongoing wrongs through restitution and compensation."

The Union of British Columbia Indian Chiefs (UBCIC) applauded the judgment, which it said "represents a giant leap forward in the implementation of Indigenous jurisdiction over children and families."

"This decision ends the colonial era of Canada and the provinces controlling Indigenous child welfare," UBCIC's president, grand chief Stewart Phillip, said in a statement. "Our inherent right to protect our children and to hold them within their families and communities is reaffirmed."

In its intervention, B.C.'s First Nations Leadership Council argued that the *UN Declaration on the Rights of Indigenous Peoples* affirms the Indigenous right to self-determination, and that the

Declaration represents binding international law. As a result, s. 35 of the Constitution should be interpreted broadly as including the right to self-determination.

"This decision reaffirms that Canada has an obligation to uphold international law and to act in ways that maintain the honour of the Crown," said regional chief of the B.C. Assembly of First Nations Terry Teegee. "Under those obligations, Canada must fully recognize our inherent Indigenous right to self-determination."

Robert Janes of JFK Law LLP in Toronto, who, with Naomi Moses, represented the intervener Grand Council of Treaty #3, called the judgment "a complete vindication of the legislation. The court has said the legislation is perfectly good. There's no constitutional issues with it. This is not Parliament trying to amend the Constitution. It's entirely within the rights of Parliament to try to recognize and affirm Indigenous self-government, and then to work with First Nations to try to implement that."

Robert Janes of JFK Law LLP Vancouver/Toronto

Janes noted a big problem over the years has been that governments often basically say, "'Until the court tells us to do something, we don't have to do it.'"

"And the message here is that the right path forward is not to leave it to the courts, but to actually start doing constructive positive things," Janes told Law360 Canada. "Just like with this legislation, Parliament got on with doing the right thing … and there's no reason this can't apply to other areas" outside child welfare.

Janes predicted the most immediate progress in Indigenous self-governance following the decision will come in the areas of child and family welfare services, language, education, health, and "we may even see some laws in the resource area, although … I think the federal government will move very cautiously there, because of course the provinces have a huge interest."

The message to provincial governments, Janes suggested, is that "they can't just say, 'Look, we have our system, live with it because you can't do anything.'" Instead, the message is "'Province, work with us [Indigenous peoples] to make a system that works. We would like agreement. We would like this to be a co-operative process. But look, if you decide to block the way, we have this federal law now that's going to make this law apply. You can't stand in the way, [or stop] us from working to protect our children and families.'"

Janes predicted the ruling will spur provincial governments to get involved in collaborative negotiations with Indigenous peoples about implementing Indigenous self-governance over family and child services, instead of an approach along the lines of "we'll do a contract for you to deliver

services, under our rules."

"I think the practical effect of this is going to be provinces are going to look at these negotiations that are going on, and say … 'We'd better get on the bus now and start having some input into these negotiations, and start having it work better for everyone.'"

In rejecting the attorney general of Quebec's position that the paramountcy provision in s. 22(3) of the Act alters the Constitution's architecture, the Supreme Court said that "the laws of Indigenous groups, communities or peoples that are incorporated by reference will have the force of law as federal law: laws incorporated into federal law apply as federal law ... Section 22(3) is simply a legislative restatement of the doctrine of federal paramountcy."

The top court concluded by stating that the Act, which was developed in co-operation with Indigenous peoples, "represents a significant step forward on the path to reconciliation. It forms part of the implementation of the UNDRIP by Parliament. It also responds to call to action No.4 made by the Truth and Reconciliation Commission, which calls upon the federal government to establish national standards and to affirm the role of Indigenous governments in the area of child and family services."

The Act "creates space for Indigenous groups, communities and peoples to exercise their jurisdiction to care for their children," the Supreme Court wrote. "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."

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," the court held. "This important legislative initiative falls squarely within Parliament's legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*."

News conference photo: handout Assembly of First Nations Quebec-Labrador

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