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With a Little Help from the Feds: Incorporation by Reference and Bill C-92

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Case Commented On: *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (CanLII) (unofficial English translation) (*Reference*)

According to section 18 of *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (*Act* or the *Act*), "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority" and "the authority to provide for dispute resolution mechanisms." As it turns out, the Quebec Court of Appeal tells us in the recent *Reference* about the Act's validity (now under appeal to the Supreme Court of Canada; you can read Robert Hamilton's summary of the decision here), there is indeed such a right, but not because Parliament says so (*Reference*, at paras 451-453, 514).

According to the Court, section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, 1982 c 11 (UK) (*Constitution Act, 1982*) is concerned with "ensuring the continued existence of these particular aboriginal societies" (*Reference*, at para 474, quoting with approval *R v Sappier; R v Gray*, 2006 SCC 54, at para 26); raising Indigenous children in a manner consistent with their communities' own traditions, laws, and values is essential to the preservation of those communities' cultural identity (*Reference*, at paras 476-485). All Indigenous peoples, therefore, have Aboriginal rights of self-government in respect of child and family services, regardless of what other subject matter jurisdiction their inherent rights of self-government may or may not contain (paras 58-59, 469-470, 493-494, 514). Kent McNeil has discussed these conclusions here.

From this, and as the Court recognized, it follows that section 35 confers on this tailored self-government right the same protection available to any other Aboriginal right. As long as a given child welfare law is a valid exercise of an Indigenous collective's right of self-government, the law has *constitutional* protection from federal or provincial laws that interfere or conflict with it, unless the interference can be justified. Such protection is substantial (*Reference*, at paras 60, 495-505, especially para 501); Indigenous collectives may well elect to rely on it exclusively. But the *Act* affords such laws additional *statutory* protection when Indigenous governing bodies satisfy certain procedural requirements before enacting them. According to the Court of Appeal, that part of the Act is unconstitutional. For the reasons set out below, I disagree.

Pursuant to section 19 of the *Act*, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (*Charter*), applies to Indigenous governing bodies in their exercise of jurisdiction over child and family services in their collectives. According to the Court of Appeal,

there is nothing precluding Parliament from enacting such a provision, because the *Charter* already applies, as such, to the exercise of inherent Indigenous jurisdiction (*Reference*, at paras 63, 523-528, especially paras 527-528). I disagree in part with this, as well. I'll deal with these two issues in turn.

Indigenous Laws as Federal Laws

Under the *Act*, the governing bodies of Indigenous collectives have the option of notifying the Minister of Indigenous Services and the governments of the provinces they inhabit of their intention to enact child welfare laws (at ss 1 "Minister," 20(1)) and of seeking "coordination agreements" with the Minister and the governments of those provinces in respect of the exercise of their legislative authority (at s 20(2)). If, but only if, such collectives then defer enactment of their own child welfare laws until they have either concluded, or spent at least a year making reasonable efforts to conclude, such agreements (at s 20(3)), those laws acquire "the force of federal law" (at s 21(1)) and with it paramountcy over all provincial, and most other federal statutory provisions – all but the *Canadian Human Rights Act* and ss 10-15 of the *Act* itself – that conflict with them (at ss 21(2)-(3), 22). Such laws do not cease on that account to have effect as Indigenous laws. Incorporation by reference of another jurisdiction's valid laws does not preclude them from continuing to apply, if otherwise applicable, of their own force (*R v Francis*, 1988 CanLII 31 (SCC), [1988] 2 SCR 1025, at 1031). They are, therefore, available for enforcement either as federal law or as Indigenous law, in each case with the relevant constitutional consequences.

To the Court of Appeal, this statutory arrangement purports to alter, unilaterally, the fundamental architecture of the Canadian Constitution (*Reference*, at paras 64-65, 533-534, 553, 570). Federal legislation, the Court concedes, does indeed prevail, in case of irreconcilable conflict, over provincial legislation (para 536), but that priority extends only to *federal* legislation, not to Indigenous legislation enacted pursuant to section 35 of the *Constitution Act, 1982* (paras 64, 537, 540). Section 35 is the *exclusive* source of constitutional protection for existing Aboriginal and treaty rights; they derive no further protection or priority from the division of powers (paras 66, 545-548, citing with approval *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 150, 152; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, at para 37). Provincial involvement, the Court adds, is crucial to realization of section 35's underlying objectives, especially in areas principally under provincial legislative authority (*Reference*, at para 552). It is true that Parliament may adopt for federal purposes the laws of other jurisdictions; Parliament's objective here, however, was not to do that but instead just to confer on certain Indigenous child welfare laws the added benefit of federal paramountcy (para 538). That, in the view of the Court of Appeal, is constitutionally impermissible (paras 64-65, 541, 570).

But … no, it isn't. Let's review some basics. Valid federal legislation prevails, in case of genuine conflict, over valid and applicable provincial legislation. Section 91¶24 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK), gives Parliament legislative authority over "Indians, and Lands reserved for the Indians": indeed, over "all Aboriginal peoples" (*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at paras 19, 25, 46). No one, including counsel for Quebec, disputes that Parliament may make laws about Indigenous child and family services (*Reference*, at para 330). Once we've established that a given federal law is really about Indigenous

child and family services, Parliament's motive for enacting it makes no difference for division of powers purposes. Parliament, therefore, could, if it chose, provide each Indigenous collective in Canada with its own specific federal child and family services law. It could, in fact, enact as individual federal statutes exact duplicates of any and every child welfare law that qualifying Indigenous collectives made from time to time in the valid exercise of their self-government rights. Each such duplicate federal law would, as such, prevail outright over any conflicting provincial child welfare legislation. Nothing in this paragraph is controversial.

That, of course, is not what Parliament has done. The result, however, is exactly the same, achieved more efficiently in the *Act* by means of an approved constitutional shortcut *and* in a way that ensures opportunities for provincial involvement. Instead of replicating in separate counterpart federal statutes every individual child and family services law that any qualifying Indigenous community validly enacts, the *Act* incorporates all such laws from time to time by reference *into* federal law. (Prospective incorporation of this sort is known to be constitutionally permissible: *Ontario (AG) v Scott*, 1955 CanLII 16 (SCC), [1956] SCR 137; *Coughlin v Ontario Highway Transport Board*, 1968 CanLII 2 (SCC), [1968] SCR 569; *Dick v The Queen*, 1985 CanLII 80 (SCC), [1985] 2 SCR 309, at 328 (*Dick*)). But only the laws of qualifying Indigenous collectives: those that have deferred enactment until after they had concluded, or sought reasonably for twelve months to conclude, coordination agreements (*Act*, at s 20(3)). Provinces are necessary parties to such agreements (*Act*, at s 20(2)), and therefore, necessarily, to any good faith negotiations about them.

It is, I suppose, arguable that Parliament chose the wrong form of words in section 21(1) of the *Act* to achieve incorporation by reference. If so, that's a problem easily fixed by clearer phrasing (e.g., phrasing deeming all qualifying Indigenous laws to be Acts of Parliament). The point is that the Constitution gives Parliament all the power it needs to give the force of federal law to the provisions in Indigenous child welfare laws validly enacted pursuant to inherent rights of self-government and, having done so, to determine their priority as against other, coordinate federal legislation (*Dick* at 327-328). The manner in which Parliament chooses to achieve that result should, therefore, be of little, if any, constitutional consequence, as long as the statutory language makes the federal intention sufficiently clear. Parliament may, of course, at any time change its mind and discontinue doing so. Should that happen, those laws would remain in force as valid Indigenous laws, still with the full protection of section 35 of the *Constitution Act, 1982* but without the added heft of federal law.

In the meantime, Indigenous collectives' child and family services laws will operate somewhat differently when enforced as federal law than when enforced as Indigenous law. Considered as federal law, they will supersede any conflicting provincial, and most conflicting federal, legislation; considered as Indigenous law, they will be vulnerable to justified federal or provincial interference. This much is clear from the discussion so far. But the *Charter*'s relationship to such laws may differ as well, depending on whether they're invoked as federal or as Indigenous law. This deserves elaboration.

What About the *Charter*?

When operating as federal law, Indigenous child welfare laws will, of course, be subject to the *Charter*. The *Charter* applies straightforwardly to federal legislation and to those in government that act pursuant to it (*Charter*, at s 32(1)(a)). But what about the times when such laws operate just as Indigenous laws, validly enacted pursuant to inherent self-government rights? (This might be a matter of simple preference, or because a particular Indigenous collective enacted its child and family services law without completing the procedural requirements the *Act* imposes (at ss 20(1)-(4)) for incorporation into federal law.) Does the *Charter* apply then, too?

According to section 19 of the *Act*, the *Charter* applies *as statute law* to Indigenous governing bodies "in the exercise of jurisdiction in relation to child and family services on behalf of an Indigenous group, community or people." There is every reason to suppose that section 19 – another example of incorporation by reference – is a valid exercise of federal legislative authority over Indigenous child welfare, irrespective of whether the *Charter* applies of its own force to inherent self-government rights. Section 19 itself, however, will require justification if the *Charter*'s application to such jurisdiction depends on it and if, pursuant to it, *Charter* provisions infringe Aboriginal rights of self-government. If the *Charter*, as such, already applies to self-government rights and their exercise, on the other hand, section 19, and with it any such justification inquiry, become unnecessary.

The Court of Appeal seems satisfied that the *Charter*, as such, does govern the use of inherent Indigenous jurisdiction over child welfare. Supreme Court precedent, it maintains, confirms the *Charter*'s application to entities properly characterized as "government," regardless of whether section 32 of the *Charter* mentions them (*Reference*, at paras 525-526, quoting with approval *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, at para 48 (La Forest J); *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, at paras 41-44; and *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, at paras 13-16). Indigenous governing bodies too are engaged in governmental activity within Canada when exercising inherent self-government rights; they too, therefore, the Court concludes, are subject already to the *Charter* (*Reference*, at para 527, citing with approval *Taypotat v Taypotat*, 2013 FCA 192, at paras 38-39).

Perhaps, but surely not for that reason alone. There's an important difference between the kinds of entities discussed in those Supreme Court judgments and Indigenous governing bodies exercising inherent self-government rights. Without exception, the entities under consideration in those judgments were creatures of legislation or of section 32 governments, and were engaged in governmental functions duly assigned to them. Indigenous governing bodies using inherent rights of self-government – as the Court of Appeal itself acknowledges explicitly (*Reference*, at para 539; see also paras 524, 527) – are not. If the Court of Appeal's conclusion is correct nonetheless, it follows that the *Charter* applies to *any* entity taking part in governmental activity within Canada, even when the governmental authority it is exercising exists altogether independent of any federal or provincial executive or legislative authority.

That conclusion will surprise the staffs of the several foreign embassies in Ottawa, the several additional consulates sprinkled elsewhere throughout the country, and the foreign military bases

located here; they too engage in governmental activity within Canada. It will also require reconciliation with the Supreme Court decisions that have held the *Charter* inapplicable to governmental activity that does not somehow implicate any federal or provincial legislation or government (see, e.g., *R v Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562, at para 12; *Schreiber v Canada (AG)*, 1998 CanLII 828 (SCC), [1998] 1 SCR 841, at para 27). Conduct undertaken pursuant to inherent self-government rights fits comfortably within this excluded category. Anchored, like other Aboriginal rights, in features characteristic of Indigenous life from before Europeans arrived (*R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507, at para 61) or assumed effective control (*R v Powley*, 2003 SCC 43, at para 37), self-government rights need not rely for their exercise on any provincial or federal facilitation. The Supreme Court has rejected invitations "in the name of fairness" to extend the *Charter*'s application to conduct to which it otherwise would not apply (*R v Terry*, 1996 CanLII 199 (SCC), [1996] 2 SCR 207, at para 23).

If the *Charter* is to apply as such to Indigenous child welfare laws when not enforced as federal law, therefore, it will have to be for reasons better than those the Court of Appeal has provided in the *Reference*. Otherwise, the *Charter*'s application to such laws will depend, after all, on section 19 of the *Act*. Section 19, in turn, will be at risk if *Charter* enforcement proves to infringe unjustifiably the implementation of such laws or, more generally, the exercise of the inherent self-government rights from which they derive. Such an inquiry, regardless of its results, would be instructive.

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