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Extending Paramountcy to Indigenous Child Welfare Laws Does Not Offend our Constitutional Architecture or Jordan’s Principle

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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)

While a strong decision on many fronts, as noted by [Kent McNeil](#), I, too, have been troubled by the Quebec Court of Appeal’s (QCCA or Court) invalidation of ss 21 and 22(3) of *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24 \(Act\)](#) in *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*). My greatest concern is that if the QCCA’s decision on ss 21 and 22(3) is upheld, this will serve to perpetuate one of the key problems that lead to the crisis in Indigenous child welfare in the first place—jurisdictional wrangling by the federal and provincial governments and consequential delays and denials—with the effect of stymying the urgent change needed to curb the overrepresentation of Indigenous children in provincial child welfare systems.

I agree with [Kerry Wilkins](#) that nothing about the *Act* offends the doctrinal rules on incorporation by reference. The Court’s striking of these provisions also seems to run afoul of the Supreme Court of Canada’s (SCC) recent ruling in *Toronto (City) v Ontario (Attorney General)*, [2021 SCC 34 \(CanLII\)](#) that unwritten principles and architecture cannot be used as a bases for invalidating legislation. Here, however, I would like to scrutinize the merits of the QCCA’s reasoning on ss 21 and 22(3). I believe its finding that these provisions run afoul of our constitutional architecture (1) ignores the protective purpose behind s 91(24) of the [Constitution Act, 1867](#), (2) overreaches on the implications of the SCC decisions in *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#) and *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48 \(CanLII\)](#), and (3) misconstrues how Jordan’s Principle informs this case.

Unpacking the QCCA’s Reasoning on ss 21 and 22(3)

Section 21 of the *Act* extends the status of federal laws to Indigenous laws that comply with the notice and collaboration agreements requirements of the *Act*, resulting in these laws having paramountcy over provincial laws. Section 22(3) makes this point explicit. While finding that the *Act* fell squarely within Canada’s s 91(24) jurisdiction over “Indians and lands reserved for Indians,” and that Canada’s recognition of the inherent right to self-government was constitutional, the QCCA found ss 21 and 22(3) to be a step too far.

The Court held that paramountcy should be reserved for situations of conflicts between provincial laws and federal laws enacted as ‘true’ federal laws (not Indigenous peoples’ laws getting the benefit of paramountcy). Rather, conflicts between Indigenous peoples’ laws and either federal or provincial laws ought to be mediated through s 35 of the [Constitution Act, 1982](#) alone, specifically the framework developed by the SCC in *R v Sparrow*, [1990] 1 SCR 1075, [1990 CanLII 104 \(SCC\)](#), that enables a government to justifiably infringe s 35 rights. *Sparrow* contemplated justified infringement by the federal government, but in *Tsilhqot’in*, the SCC clarified that its test applies to provinces and was not precluded by reason of the doctrine of interjurisdictional immunity (IJI). In *Grassy Narrows*, the SCC further emphasized that provinces are bound by the Honour of the Crown and fiduciary duties and that IJI did not prevent provinces from justifiably infringing treaty rights.

From these cases, the QCCA concluded that our constitutional architecture recognizes equal powers of the federal and provincial governments to unilaterally infringe Aboriginal rights (including the right to self-government) subject to the *Sparrow* test. Therefore, Parliament could not use its s 91(24) legislative powers to unilaterally preclude provinces from arguing a justified infringement by giving Indigenous laws paramountcy. The QCCA further emphasized that both levels of government need to be involved in coordinating and reconciling their laws with Indigenous laws, citing harms of past jurisdictional wrangling and the need to now respect Jordan’s Principle.

Missing the Protective Purpose Behind s 91(24)

The QCCA’s reasoning on ss 21 and 22(3) needs to be contrasted with its reasoning on the *Act*’s recognition of self-government. Far from finding this to be a unilateral constitutional amendment or in violation of Canada’s constitutional architecture, the QCCA found that self-government had in fact become part of our constitutional architecture. In reaching this conclusion, the QCCA looked to the historical relationship between Indigenous peoples and representatives of the British Crown established through early treaties and the Royal Proclamation of 1763, which has been interpreted by the US Supreme Court, several Canadian lower courts, and numerous Aboriginal law scholars as recognizing the continued existence of Indigenous self-government at common law. It also took note of several more recent government actions, developments in Aboriginal law, as well as the [UN Declaration on the Rights of Indigenous Peoples](#), to bolster this conclusion.

Basing the origin of Canada’s recognition of the inherent right to self-government in the Royal Proclamation and early treaties and finding this to be part of our constitutional architecture, signals a very important—and overdue—step forward for us as a nation. Embracing this part of our constitutional history permits Canada to distance itself from a false, colonial narrative that has long dominated in our constitutional law. This narrative assumes that European nations gained title and sovereignty over the territory that is now Canada simply by ‘discovering’ it, and that following Confederation, the federal and provincial governments were the only legitimate orders of government based solely on the division of powers provisions in the *Constitution Act, 1867*. John Borrows has argued, “If Canadian law flows from this view, it revolves around a loathsome core. Discrimination, coercion, and inequality lie at the roots of Canada’s legal system under this view.” (“Canada’s Colonial Constitution,” in *The Right Relationship: [Reimagining the Implementation of](#)*

[*Historical Treaties*](#), John Borrows and Michael Coyle, eds, (Toronto: University of Toronto Press, 2017) at 18.)

The only problem with the QCCA’s embrace of this narrative is that it is incomplete. British recognition of Indigenous jurisdiction and law is only half the story. In addition to, and along with, such recognition, the British Crown committed to protecting Indigenous rights from incursion by settlers and the colonies. This is made clear from the text of the Royal Proclamation itself, as well as other sources. At Confederation, this turned into a commitment by the federal government to protect Indigenous lands and interests from encroachments from local populations and their governments (a.k.a. the provinces). This was the driving force behind s 91(24) of the *Constitution Act, 1867*. As noted by Peter Hogg, “[t]he idea was that the more distant level of government—the federal government—would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians..., and generally to protect the Indians against the interests of local majorities.” (*Constitutional Law of Canada* (Canada: Carswell, 2021) (loose-leaf, 5th ed), §28:1).

The QCCA did not consider this protective purpose within s 91(24). In fact, it appears to have exclusively relied on the purpose of 91(24) discussed in *Daniels v Canada (Indian Affairs and Northern Development)*, [2016 SCC 12 \(CanLII\)](#), as being about westward expansion and assimilation. But *Daniels* did not say this was the only purpose of s 91(24), and, indeed, this contradicts the SCC’s further statement in *Daniels* that “reconciliation with *all* of Canada’s Aboriginal peoples is Parliament’s goal” (at para 37). A protective purpose for s 91(24), as opposed to an assimilationist purpose couched in a colonial narrative, is more consistent with reconciliation.

Thus, Parliament is empowered under s 91(24) to protect the interests of Indigenous peoples from potentially harmful action (or inaction) by the provinces (which is foreseeable here, as I develop further below). This ought to include extending federal paramountcy protection to Indigenous laws.

Overreaching on *Tsilhqot’in* and *Grassy Narrows*

The QCCA was wrong to interpret *Tsilhqot’in* and *Grassy Narrows* as removing paramountcy from the federal toolbox when it comes to legislating in relation to Aboriginal rights. While these decisions did eliminate the doctrine of IJI in relation to Aboriginal rights (which has been highly criticized by several scholars, including Borrows, *supra*), their effect on paramountcy is far less clear.

Neither case involved federal legislation or arguments on federal paramountcy. However, in its discussion on IJI, there is a passage at para 152 in *Tsilhqot’in* where the SCC says that the *Sparrow* framework is a “complete and rational way of confining provincial legislation affecting Aboriginal title” and also distinguishes Aboriginal rights disputes from IJI as well as paramountcy disputes as being “not at base one of conflict between the federal and provincial levels of government,” which the QCCA cited in support of its reasoning (at para 546).

However, in two earlier passages in the same section, the SCC clearly suggests that paramountcy would be available to Parliament in future cases, including the following:

First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament’s power over “Indians”, the latter would trump the former. No such inconsistency is alleged in this case. (at para 130, emphasis added; see also para 128)

To my knowledge, no scholarly commentaries on *Tsilhqot’in* or *Grassy Narrows* have interpreted the cases as taking paramountcy out of play, and some have explicitly acknowledged its continuing role in the federal toolbox (see, e.g., Borrows, *supra*, at 30). Furthermore, when one reads s 91(24) as including a protective function for Aboriginal rights, this can clearly raise issues of conflict between the federal and provincial governments because the protection of Aboriginal rights becomes Parliament’s business. Moreover, the removal of interjurisdictional immunity from the federal toolbox to pursue protection of Aboriginal rights makes preservation of the paramountcy mechanism all the more important.

The QCCA’s reasoning suggests that using federal paramountcy to protect Aboriginal rights is aberrant. However, this overlooks the fact that the opening phrase of s 88 of the *Indian Act*, [RSC 1985, c I-5](#), “Subject to the terms of any treaty...” has been providing paramountcy protection to treaty rights for over 70 years. In *R v Côté*, [1996] 3 SCR 139, [1996 CanLII 170 \(SCC\)](#), the SCC recognized that s 88 “accord[s] federal statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy” (at para 86). Antonio Lamer CJ acknowledged that the effect of s 88 was to give treaty rights “broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*” (at para 87).

Section 88 has been used on multiple occasions to find the terms of treaties paramount over provincial laws, including in *R v Simon*, [1985] 2 SCR 387, [1985 CanLII 11 \(SCC\)](#), *R v Sioui*, [1990] 1 SCR 1025, [1990 CanLII 103 \(SCC\)](#), and *R v Morris*, [2006 SCC 59 \(CanLII\)](#). Section 88’s ongoing status in protecting treaty rights following *Tsilhqot’in* and *Grassy Narrows* is not clear. Neither case explicitly addressed the provision. *Tsilhqot’in* said that *Morris* should no longer be followed “[t]o the extent that [it] stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights” (at para 150), but that tells us nothing about the paramountcy protection in s 88. The point here is that we have long-standing precedent of federal paramountcy being used to protect Treaty rights. The SCC has never said this provision violates our constitutional architecture.

Misconstruing Jordan’s Principle

The QCCA suggested that a provincial role equal to the federal government, in terms of justified infringement, will avoid the jurisdictional wrangling of the past, and aligns with Jordan’s Principle, stating:

Too often, Aboriginal children have been the victims of squabbles between the two levels of government, which have taken turns refusing to intervene to ensure their safety and well-being on the pretext that they do not have the jurisdiction or financial responsibility to do so. The disastrous results of the approach based on the federal government's exclusive and plenary jurisdiction over Aboriginal peoples and the disengagement of the provinces show that this approach is simply not suited to nor consistent with the structure of government established by the Constitution as it stands today in light of s. 35 of the *Constitution Act, 1982*. Jordan's Principle ... confirms that a rigid interpretation of provincial and federal jurisdictions is largely outdated... (at para 558, emphasis added)

This passage shows the Court identifying the jurisdictional wrangling problem but misunderstanding the cause. Consequently, it misdiagnoses the cure. The problem has not been federal "plenary jurisdiction" excluding a provincial role, leading to provincial "disengagement." Nor has there been a "rigid interpretation" of provincial jurisdiction in the circumstances.

On the contrary, through the introduction of s 88 in 1951, incorporating by reference provincial laws of general application to Indians as federal laws, Canada made clear that it wanted the provinces to take over in areas of essential services, especially in child welfare. In the *Dick v La Reine*, [1985] 2 SCR 309, [1985 CanLII 80 \(SCC\)](#), the SCC went further and stated that most laws of general application apply of their own force to Indians (and s 88's incorporation by reference was reserved for when provincial law affected the 'core of Indianness'). *Kitkatla Band v British Columbia*, [2002 SCC 31 \(CanLII\)](#), expanded this concurrence by recognizing a significant field in which provinces can specifically legislate in relation to "Indians." *Tsilhqo'tin* and *Grassy Narrow* enlarged provincial jurisdiction further by discarding IJI through taking Aboriginal rights out of the 'core of Indianness.'

Despite having concurrent jurisdiction in an ever-widening field, going back to the 1950s, the provinces have had little interest in assuming responsibility and mostly refused this. In child welfare, provinces were willing to extend some aspects of child protection to First Nations, but only with full reimbursement of their costs. However, the services provided were patchwork and resulted in massive overrepresentation of Indigenous children in care from the 1960s onward. The federal government intervened in the 1990s to fund more culturally appropriate child welfare services to First Nations, but this service was chronically underfunded and only served to exacerbate the problems of overrepresentation. (For more information, see [my article](#) on this history.)

Provinces haven't been prevented or 'disengaged' from taking action on account of rigid interpretations of the federal jurisdiction over "Indians." The door has been wide open for the provinces to step up and do more for over 70 years. Few have because of costs and political will. Rather than broad concurrence being a solution to the problem of jurisdictional wrangling as the QCCA assumes it is, it's been a leading cause of the problem. Extensive concurrence in jurisdiction has led the federal and provincial governments to largely defer to the other *in lieu* of taking meaningful action to protect the rights of Indigenous children, families, and communities.

What has been desperately lacking in this area are clear jurisdictional lines. In *Daniels*, the SCC emphasized the importance of drawing clear jurisdictional lines, especially where federal and

provincial wrangling over responsibility to Indigenous peoples results in a “jurisdictional wasteland” (at para 14):

Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution. (at para 12)

The *Act* draws clear jurisdictional lines in important ways: (1) by the federal government exercising its jurisdiction to protect Indigenous interests by dictating minimum standards in child welfare across the country; and (2) protecting the operation of Indigenous laws from the inevitable delay and denials that will arise if provinces can stall or prevent them by claiming they are justifiably infringing such laws. Indigenous children and families desperately need such lines to be drawn. In this regard, I have emphasized [elsewhere](#), how self-government over child welfare is key to addressing the Indigenous child welfare crisis in this country.

The QCCA put much stock in the fact that Indigenous laws would be paramount under s 35 by default, and that any justified infringement by the provinces would be difficult to prove. While this may well be true in law, with respect, this grossly underestimates how power and resource imbalances between Indigenous communities and provinces will play out on the ground. Where a province refuses to recognize and respect an Indigenous law, in whole or in part, and seeks to impose its own regime on Indigenous children and families over the community’s objections, the community will be forced to go to the courts, if it can afford to (and most cannot), likely having to seek both interlocutory injunctive relief, as well as bringing a s 35 unjustified infringement claim, which even if litigated solely on the infringement and justification elements will require substantial evidence, time, and resources to prove. It would likely be a matter of years before the matter is resolved.

It is overly optimistic to assume that all the provinces and their child welfare agencies will engage in a close study of their obligations under s 35, voluntarily come to the table to negotiate and cooperate, and not adopt unsupported and unreasonable positions. This has not transpired in the last 70 years despite s 88 and numerous SCC decisions empowering provinces to protect Indigenous interests. That provincial governments’ other interests might take precedence over their regard for Indigenous rights was foreseen in 1867: s 91(24) is specifically intended to allow Parliament to address such situations.

Jordan’s Principle recognizes that extensive concurrent jurisdiction, and consequently jurisdictional wrangling, are a reality in Canada. However, it does not endorse absolute equality in power between federal and provincial government vis-à-vis Indigenous people, especially where this could cause harm to Indigenous communities. This misunderstands the principle.

The principle is named in honour of Jordan River Anderson, a Cree boy born with multiple disabilities who died without ever being able to live in his First Nation community with his family because Canada and Manitoba squabbled for two years over who would be responsible for paying for his care once he was discharged from hospital. Jordan’s Principle recognizes that First Nations children should have access to substantively equal public services and not experience delays or

denials based on jurisdictional wrangling. Where there is a dispute between governments on who has to pay for a service to an Indigenous child, it has translated into a rule that requires that the first government contacted to provide the service and seek reimbursement from the other level of government, if needed, after the child has received the service. Jordan's Principle has been endorsed by Parliament and several provinces (though not Quebec), as well as recognized as a human right and legal principle by the Canadian Human Rights Tribunal and the courts.

As a human right and legal principle, Jordan's Principle is more than just a rule that 'the government of first contact pays first.' Rather, considering the history of jurisdictional wrangling and its impacts, particularly in the story of Jordan River Anderson, it can be unpacked to:

- (1) Require decision-makers in Canada (governments and courts) to understand our country's history of jurisdictional wrangling and its impacts on Indigenous peoples;
- (2) Discourage government actions that cause delays or denials in services or rights of Indigenous peoples;
- (3) Encourage solutions to potential jurisdictional disputes that lessen/mitigate harms to Indigenous groups (e.g., government of first contact rule);
- (4) Encourage government actions that facilitates the exercise of Aboriginal rights; and
- (5) Discourage interpretation of laws that could result in jurisdictional disputes and delays and denials of services or right of Indigenous peoples.

On this unpacking, there is no question ss 21 and 22(3) of the *Act* align with Jordan's Principle. Canada is acting with the purpose of creating an option that protects Indigenous communities from having to fight with the provinces over recognition of their laws. Indigenous communities are free to simply assert their own law, as Indigenous law, under s 20, now. However ss 21 and 22(3) give the opportunity to have the law recognized as having the force of federal law, to prevent the types of uncertainty, delays or denials that will arise if provinces are given the opportunity to disregard or challenge Indigenous law. This obviously serves to facilitate the exercise of Aboriginal rights. The fact that so many Indigenous governing bodies have [chosen to negotiate at coordination tables](#) in order to access the relative certainty of ss 21 and 22(3) indicates the protective function of these provisions. The QCCA's interpretation of Jordan's Principle is problematic because it favours a solution (absolute concurrency) that will only further jurisdictional wrangling instead of deterring it. This will perpetuate the very uncertainty in service delivery for Indigenous children and families that Jordan's Principle aims to eliminate.

Conclusion

Broad concurrent jurisdiction in relation to Indigenous peoples is and has been a reality in Canada for some time and has been the source of significant harm to Indigenous children, families, and communities. We probably cannot turn the clock back entirely as some scholars have argued for (see Borrows, *supra* at 37). Also, there can be benefits to concurrence where provinces take their obligations seriously. Provinces can play a substantial role in promoting the well-being of Indigenous communities, including by contributing to a secure financial basis for the exercise of meaningful self-government by Indigenous groups, as well as coordinating its interactions with both the federal and Indigenous governments.

Contrary to what the QCCA suggested, the scheme developed within the *Act* is not insensitive to the interests of the provinces and the role they play in regulating child welfare in general. The Act is premised on recognition of overlapping jurisdiction over Indigenous child welfare and anticipates that the concerns of provinces can be addressed through the negotiation of coordination agreements, and, if not, through a dispute resolution mechanism. While not forcing the provinces to negotiate, the *Act* provides an important nudge to get them to the negotiation table due to the fact that Indigenous laws will be a reality—particularly due to the effects of ss 21 and 22(3)—and the coordination agreement negotiation process is their opportunity to have their concerns dealt with. In this way, provinces are part of the process but cannot delay or halt the coming into force of Indigenous laws through their intransigence. This solution balances provincial concerns with Canada’s recognition and protection of Indigenous laws, which is, in turn, consistent with our constitutional architecture’s recognition of self-government and Canada’s responsibility to protect Indigenous interests and rights from harm by the provinces.

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