Public statement
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Supreme Court of Canada decisions underline the significance of the *UN Declaration on the Rights of Indigenous Peoples* in Canadian law

In two recent decisions, the Supreme Court of Canada has found that the *United Nations Declaration on the Rights of Indigenous Peoples* has significant implications for the interpretation and application of Canadian law and policy.

Although the *Declaration* was adopted by the UN General Assembly in 2007, and reaffirmed in numerous subsequent UN resolutions, the Supreme Court has been silent on the *Declaration* until this year.[1]

A growing number of lower court decisions have made use of the Declaration to help interpret domestic laws. However, these decisions have been inconsistent in the significance accorded to the *Declaration* and some judges have indicated that they are waiting for direction from the Supreme Court.

In two recent decisions, a February 9 reference decision concerning child and family services (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*[2]) and a March 28 ruling concerning elections in self-governing Indigenous nations (*Dickson v. Vuntut Gwitchin First Nation*[3]), the Supreme Court has now provided a clear and explicit indication that the legal implications of the *UN Declaration* should be taken very seriously.

These decisions could have far-reaching significance for how Canadian laws, including the Canadian Constitution and the *Charter of Rights and Freedoms*, are interpreted in the future and how new laws are drafted.

Of note:

- In the unanimous reference decision, the Court refers to the *UN Declaration* as being part of "the country's domestic positive law." In the Vuntut Gwitchin First Nation case, Justices Martin and O'Bonsawin, dissenting on other aspects of the case, refer to the *Declaration* as "binding on Canada."
- The Supreme Court is clear that the *Declaration* can and should be used in the interpretation of Canadian law, including the *Charter* and Constitution. In the Vuntut

[1] The Supreme Court had previously referenced the draft text of the Declaration in decision that pre-dated the finalization and adoption of the Declaration: *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33
[2] 2024 SCC 5.
[3] 2024 SCC 10.

Gwitchin First Nation case, Justices Martin and O'Bonsawin explicitly refer to the legal principle that Canadian law should be assumed to be intended to comply with Canada's international legal obligations and that domestic rights protection should be presumed "to provide at least as great a protection" as those instruments that Canada has committed to uphold.

- The commitments set out in the 2021 federal *UN Declaration Act* have significant legal weight. Quoting the Act, the unanimous reference decision states that "In keeping with the obligations imposed on it by the country's positive law, the Government of Canada 'must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.'"

The Coalition for the Human Rights of Indigenous Peoples has long maintained that the *Declaration* is much more than an "aspirational" document: that the rights affirmed in the *Declaration* have significant legal effect in Canada and that the interpretation and application of Canadian law must meet or exceed these minimum standards.

Canada's initial opposition to the *Declaration* led to the adoption of regressive and unsupportable interpretations of the *Declaration* that continue to be repeated in some parts of the civil service. The federal government needs to adopt clear and accurate guidance for implementation of the *Declaration* by all departments and agencies consistent with the direction now set by the Supreme Court.

Reference Decision on Child and Family Services

The reference decision concerns the 2019 *Act respecting First Nations, Inuit and Métis children, youth and families* ("the child and family services Act"). This federal law was co-developed with Indigenous Peoples to provide a framework for Indigenous governments and communities to assume direct control over child and family services, including passing their own child welfare laws. The child and family services Act also establishes national standards on child and family services to ensure Indigenous children and families' unique rights and interests are protected in the interim.

The Attorney General of Quebec had challenged the constitutionality of the Act. Joined by the Government of Alberta, Quebec argued that Parliament did not have constitutional authority to pass key elements of the Act, including recognizing laws passed by Indigenous governments, determining that these laws would have the same weight as federal laws, or enabling such laws to override provincial authority.

The Supreme Court unanimously and decisively rejected these arguments.

The Court noted that Indigenous child welfare is a matter involving federal, provincial and territorial governments and that concerted action is needed from each. At the same time, the Court found that the core elements of the Act – affirming the jurisdiction of Indigenous "groups, communities and peoples" in relation to child and family services, establishing national standards on the provision of child and family services for Indigenous children, and implementing aspects of the *UN Declaration* in Canadian law – are all within federal jurisdiction. The Court also found that key elements of this federal legislation, particularly the national standards, can be binding on provincial governments.

Some Indigenous Peoples' organizations were disappointed that the Court chose not to provide an opinion on whether it considered that Indigenous governments had the inherent right to control and manage child and family services. Parliament's affirmation in the Act that the inherent right of self-government includes jurisdiction in relation to child and family services, although a valid exercise of its legislative authority, cannot bind the courts. Ultimately, it is the courts that will have the last word on the scope of s. 35 of the *Constitution Act, 1982*, given its constitutional nature. This leaves open the potential for such a right to be formally recognized by the courts in a future case.

However, the Court did devote several paragraphs to the *UN Declaration*, including Parliament's explicitly stated intent to fully implement the *Declaration*. For the Court, the child and family services Act is part of a broader legislative program intended to achieve reconciliation with First Nations, the Inuit and the Métis. The *UN Declaration* is the framework serving as the foundation for such reconciliation.

The decision refers, in particular, to the "braiding" together of the laws of Indigenous Peoples, Canada's laws and the *UN Declaration*. This language marks a significant recognition of the importance of reconciling these different legal norms and the importance of the *UN Declaration* in the progressive development of Canadian law.

The Court notes that the child and family services Act refers explicitly to implementation of the *UN Declaration* in the first line of its preamble and in the description of the purposes of the Act. The decision states that as a concrete measure to implement the *UN Declaration*, the child and family services Act needs to be interpreted in light of the provisions of the *Declaration*.

The reference decision also explicitly confirms that the *Declaration* is now part of the legal landscape and positive law of Canada. Quoting the 2021 *United Nations Declaration on the*

Rights of Indigenous Peoples Act ("the UN Declaration implementation Act"), the Court states that, "In keeping with the obligations imposed on it by the country's positive law, the Government of Canada 'must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.''

Beyond the immediate issue of the authority of Indigenous Peoples to adopt child and family laws potentially contradicting those of the provinces or territories, the reference decision has far reaching consequences for the development of laws in other areas. This is particularly so given a growing number of provincial challenges to federal authority in areas such as climate change and impact assessments.

The reference decision should provide an incentive for the federal government to work closely with Indigenous Peoples in the development of future legislation, particularly in areas that have been challenged as overlapping with provincial jurisdiction, but which have distinct impact on the rights of Indigenous Peoples.

The Vuntut Gwitchin First Nation decision

The decision concerns residency qualifications for elected positions in the government of the Vuntut Gwitchin First Nation. Vuntut Gwitchin laws require that the Chief and all Councillors reside in their traditional territory. Ms. Dickson, a citizen of the Vuntut Gwitchin First Nation who was elected to the Council, but whose family required access to medical care not available in territory, challenged the residential requirement as a violation of her individual Charter right to equality.

The majority of the Court found that the residency requirement, as a means to ensure that leaders are connected to the traditional territory, is consistent with the objective of section 25 of the Charter. The purpose of section 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's Charter rights, such that giving effect to the individual Charter right would undermine the Indigenous difference protected or recognized by the collective right. In this case, the majority of the Court was satisfied that section 25 protects the residency requirement from abrogation or derogation by Ms. Dickson's individual Charter rights, which can be limited for the purpose of protecting the distinct rights of Indigenous Peoples. The majority concluded that the residency requirement was "inextricably tied" to the Nation's connection to its territory.

In a dissenting decision, Justices Martin and O'Bonsawin argued that the majority's interpretation of the operation and scope of section 25 was "too broad." They concluded that the existing residency requirement did not strike the appropriate balance between the right to democratic participation and the Nation's right to exercise self-government over their traditional territory.

In coming to this conclusion, the two dissenting Justices made extensive use of the *UN Declaration* as a source of guidance for interpreting Section 25, citing numerous articles related to reconciliation of individual and collective rights. The Justices state that "a holistic reading" of

the Declaration supports the view that individual and collective rights must both be protected and "one type of right cannot absolutely trump another."

While the dissenting opinion diverges from the majority in its interpretation and application of section 25, it is important to note that the statements about the legal significance of the *Declaration* set out by Justices Martin and O'Bonsawin are not disputed in the decision.

Justice Martin and O'Bonsawin notably characterize the *Declaration* as "binding" on Canada, noting Canada's 2016 statement of support for the *Declaration* and commitment to "implement it in accordance with the Canadian Constitution"; the references to implementation of the *Declaration* in the 2019 child and family services Act; and the 2021 implementation Act's affirmation that the Declaration is "a universal international human rights instrument with application in Canadian law."

Justices Martin and O'Bonsawin also note that "international human rights law can be a helpful source of information and direction when interpreting *Charter* provisions." They then state that an established principle of Canadian law, which presumes that laws passed by Parliament are intended to conform with Canada's international legal obligations, "directs that the *Charter* should be presumed to provide at least as great a protection as that which is afforded by similar provisions in international documents that Canada has ratified." The Justices state that the *Declaration* is "binding on Canada and therefore triggers the presumption of conformity."

While these positions are expressed in a dissenting opinion, there is a clear linkage to the reasoning behind the unanimous reference decision on the child and family services case. It is reasonable to expect that a similar understanding of the *Declaration* will help inform future Court decisions.

The Coalition for the Human Rights of Indigenous Peoples

This statement was endorsed by the following organizations and individuals:

Cheryl Knockwood; Ellen Gabriel, Kanehsatà:ke Land Defender; Hup-Wil-Lax-A, Kirby Muldoe, Grassroots Human Rights Defender; Joshua Nichols, Assistant Professor McGill University; Lea Nicholas Mackenzie; Naomi Metallic, Associate Professor, Dalhousie University; Professor Sheryl Lightfoot, University of British Columbia; International Chief Wilton Littlechild; British Columbia Treaty Commission; Canadian Friends Service Committee (Quakers); First Nations Summit; Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government; Kairos Canada