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Indigenous Jurisdiction and Bill C-92 at the Supreme Court of Canada

By: Kate Gunn

Case Commented On: *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 (CanLII) (unofficial English translation)

Persistent uncertainty regarding the extent to which governments in Canada are prepared to recognize and give effect to Indigenous Peoples' inherent laws and jurisdiction remains a serious barrier to decolonization and reconciliation. In December 2022, the Supreme Court of Canada will consider this issue directly in the Bill C-92 Quebec Reference case. The Court will determine the constitutionality of federal legislation which affirms Indigenous Peoples' right to regulate child and family services based on their inherent law-making authority. The decision will also have broader implications for the development of Aboriginal rights jurisprudence, including for Indigenous Peoples' ability to make decisions based on their inherent laws.

This post considers the implications of the Bill C-92 Reference as it pertains to the recognition of Indigenous Peoples' inherent law-making authority and the Court's approach to the determination of Aboriginal rights within the meaning of section 35 of the *Constitution Act, 1982.* For further background and analysis on other important aspects of the Bill C-92 Reference, see previous posts from Naiomi Metallic, Paul Joffe, Kerry Wilkins, Kent McNeil and Robert Hamilton.

Bill C-92

The historic and ongoing impacts of colonization, including the legacy of Indian Residential Schools and the Sixties Scoop, on the wellbeing of Indigenous children and families cannot be overstated. Indigenous children remain disproportionately represented in foster care, and Indigenous Peoples continue to face discrimination in accessing appropriate funding supports for child and family services. For this reason that the Truth and Reconciliation Commission of Canada lists the welfare of Indigenous children first among its 94 Calls to Action.

In 2019, the Government of Canada, in collaboration with Indigenous organizations, took an important step towards addressing this issue through the introduction of Bill C-92, *An Act respecting First Nations, Inuit and Metis Children, youth and families.* The Act, which came into force in 2021, is aimed at addressing the overrepresentation of Indigenous children in child and family services systems. It affirms that Indigenous Peoples' inherent right to self-government, as recognized and protected under section 35 of the *Constitution Act, 1982,* includes jurisdiction over the regulation of child welfare matters and provides a framework for Indigenous Peoples to

exercise that jurisdiction, including through negotiated arrangements with federal and provincial governments and the incorporation of Indigenous laws into federal legislation.

As Indigenous scholars and experts have noted, the final version of the Act still contains limitations which, if unaddressed, risk perpetuating ongoing discriminatory practices within the child welfare system. At the same time, however, the Act has been recognized as a positive, unprecedented step forward towards addressing the impacts of a system founded on the systematic destruction of Indigenous families, children, and lands.

Quebec's Constitutional Challenge

Quebec filed a reference case (a case in which a federal or provincial government asks a court to issue an opinion on a legal issue) at the Quebec Court of Appeal in 2021 challenging the constitutionality of the Act. Quebec argued the federal government does not have authority to enact legislation dictating how provincial governments deliver child and family services, and that Canada cannot unilaterally determine the scope of constitutional protections under section 35 of the *Constitution Act, 1982*. A number of Indigenous organizations, including the Assembly of First Nations and the Assembly of First Nations Quebec-Labrador, participated as intervenors and argued that Indigenous Peoples have always held a right to self-government based on their inherent laws.

The Quebec Court of Appeal issued its decision in February 2022. The Court of Appeal affirmed that First Nations have a right to exercise jurisdiction regarding child and family services which is protected under section 35, and that the right extends to all Indigenous Peoples because the exercise of such jurisdiction is "intimately tied to their cultural continuity and survival" (at para 59). The Court further rejected Quebec's argument that it was not open to Canada to legislate on rights which have not yet been determined by the courts, and held instead that "[n]othing in the Constitution precludes Parliament from adopting legislation on the basis of the rights set out in it, prior to a court ruling on the matter" (at para 442).

In the result, the Court upheld the majority of the Act, but struck out provisions which provided that Indigenous laws enacted within the framework contemplated under the legislation would prevail in the event of a conflict with a provincial law. Both Quebec and Canada have appealed aspects of the Quebec Court of Appeal's decision to the Supreme Court of Canada.

Bill C-92 at the Supreme Court

If upheld, the Court of Appeal's decision to strike out provisions in the Act which provide that Indigenous laws will prevail over provincial laws in the case of a conflict could have serious, negative implications for Indigenous Peoples' ability to exercise their inherent laws in respect of children and families. However, as discussed below, the Court of Appeal's decision also includes a number of findings which, if affirmed by the Supreme Court, could have tangible positive impacts for Indigenous Peoples and governments.

1. Parliament has Authority to Recognize and Protect Section 35 Rights Prior to Such Rights Being Determined by the Courts.

The Quebec Court of Appeal affirmed that it is open to Parliament to recognize the existence of Aboriginal rights under section 35 through legislation or political action, regardless of whether those rights have been determined by the courts. The Court went on to note that the honour of the Crown imposes a proactive duty on governments to "delineate the Aboriginal rights recognized by s. 35 of the *Constitution Act, 1982* so as to give effect to the promise to recognize these rights, which is the *raison d'être* of this constitutional provision" (at para 444). As the Court noted, this duty is critical because "refusing to delineate these rights can result in the *de facto* denial of their very existence or, at the very least, make them ineffective or inoperative" (at para 444).

These principles are not novel – Canadian courts have long recognized that Aboriginal rights are protected, rather than created, by the *Constitution Act, 1982*, and that the honour of the Crown requires governments to take measures to recognize and give effect to those rights (*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC) at paras 29-30 and *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, 1973 CanLII 4 (SCC) at 328, 383). However, as Quebec's arguments before the Court of Appeal demonstrate, governments still rely, implicitly and explicitly, on the position that Aboriginal rights must be recognized by Canadian courts in order to attract the full measure of constitutional protections contemplated under section 35.

The appeal provides an opportunity for the Supreme Court to clarify that section 35 rights can be recognized and protected absent a court proceeding, and that governments must take concrete steps to determine and protect those rights. This affirmation could play an important role in disincentivizing governments from relying on positions based on the denial of section 35 rights, and in turn, reduce the need for costly and protracted litigation to determine the nature and scope of those rights.

2. Aboriginal Rights can Exist on a Generic, Non-Specific Basis.

Since 1996, the Supreme Court's landmark decision in *R v Van der Peet* has guided the courts' approach to defining Aboriginal rights. In *Van der Peet*, the Court held that Aboriginal rights must be identified in light of the purpose of section 35 of the *Constitution Act, 1982*, being the reconciliation of the pre-existence of Indigenous Peoples with the assertion of Crown sovereignty (at para 31). The Court went on to hold that for an activity to attract constitutional protection under section 35, it must be "an element of a practice, custom or tradition integral to the distinctive culture" of the Indigenous group prior to the arrival of Europeans (at paras 44-47).

The Bill C-92 Reference has the potential to broaden the application of the *Van der Peet* test, and in turn, expand the scope of the practices and activities which fall within the scope of section 35. At the Quebec Court of Appeal, the Court held that the ability to exercise decision-making authority over child and family services is an intrinsic aspect of Indigenous Peoples' culture and identity, even though it may not be based on the unique cultural practices of any one Indigenous group (at para 486). Rather than deny or limit the existence of the right, the Court held that the factors in *Van der Peet* should be adapted in relation to the right to make decisions on issues relating to child welfare. The Court went on to affirm that Indigenous Peoples hold a "generic"

right to regulate child and family services, regardless of the specific practices of individual Indigenous groups prior to colonization (at paras 489, 494).

At the upcoming appeal, the Supreme Court will again be asked to affirm that Indigenous Peoples have a "generic" right to exercise their inherent jurisdiction in respect of child and family services, which is protected under section 35. Such confirmation could signal a shift in Canadian Aboriginal rights jurisprudence away from the rigid application of the *Van der Peet* factors towards a more flexible approach to rights determination based on the underlying purpose of section 35.

3. Treaties Do Not Automatically Negate the Existence of Indigenous Decision-Making Authority.

Across the country, Indigenous treaty parties have consistently and repeatedly expressed that they did not surrender their inherent decision-making authority on entering into treaty with the Crown, and that they continue to hold and exercise jurisdiction over their lands and people today. At the same time, federal and provincial governments in Canada have largely proceeded on the basis that the Indigenous treaty parties surrendered their right to make decisions under their own laws, along with other rights not enumerated in the written English text of the treaty document.

The Act and the Quebec Court of Appeal decision recognize that all Indigenous Peoples hold a generic, constitutionally protected right to exercise their inherent laws in relation to child and family services. Both the legislation and the decision provide little guidance on the issue of how this right will be exercised by Indigenous Peoples who are parties to Crown-Indigenous treaties. When read as a whole, however, it is clear that the right affirmed under the Act and Court of Appeal decision extends to all Indigenous Peoples, regardless of whether or not they are party to a treaty.

Contrary to the standard approach to treaty interpretation adopted by Canadian governments, the Court of Appeal decision implicitly affirms that Indigenous groups who are parties to Crown-Indigenous treaties can and do hold rights based on their own law-making authority which were not surrendered on entering into treaty and which continue to exist today. If endorsed by the Supreme Court, the Act and the Court of Appeal decision could provide support for the Indigenous treaty parties' understanding of the treaty relationship, including the position that the Indigenous treaty parties continue to hold and exercise jurisdiction over their children and families based on their own inherent laws.

Conclusion

The Bill C-92 Reference is one of several appeals now before the Supreme Court which engage directly with the relationship between Indigenous Peoples' inherent laws and the jurisdictional authority of federal and provincial governments. The decision will clarify whether and how the Court will recognize and protect Indigenous Peoples' ability to regulate child and family services based on their own laws and cultures and, in turn, support Indigenous communities in healing from the devastating impacts of colonial policies advanced and supported by Canadian institutions.

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