

Major takeaways of the decision *Reference to the Court of appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*

By Nicholas Dodd

*On February 10, 2022, the Quebec Court of Appeal released its judgment regarding the constitutionality of An Act respecting First Nations, Inuit and Métis children, youth and families. In finding the Act mostly constitutional, the Court emphatically confirmed that s. 35 of the Constitution Act, 1982 protects Indigenous peoples' right to self-government. No appeal court in Canada has ever taken this step, and the Court's judgment will have far-ranging consequences for the rights of Indigenous peoples. Jameela Jeeroburkhan and Nicholas Dodd of Dionne Schulze assisted an intervening party in preparing its written submissions and Nicholas has prepared a short summary of the major takeaways from the decision to help you understand more.*

On February 10, 2022, the Quebec Court of Appeal released its judgment in *Reference to the Court of appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*. The judgment deals with the constitutionality of the federal law (also known as Bill C-92) that set national standards for the delivery of youth protection and similar services to Indigenous youth in Canada and that provided Indigenous groups with a vehicle through which they may exercise their inherent right to self-government with respect to child and family services.

The Quebec Court of Appeal found the *Act* constitutional, with the exception of two provisions dealing with the relationship of Indigenous laws regarding child and family services and federal and provincial laws. In rendering its judgment, the Court of Appeal found that:

- Indigenous peoples have a subsisting right to self-government and this right is protected under s. 35 of the *Constitution Act, 1982*. Contrary to what Canadian governments have at times argued, the self-government right has never been extinguished, and this despite the Crown's constant interference in, and attempts to destroy, the social fabric of Indigenous peoples.
- This right is a generic right that is held by all s. 35 peoples, regardless of their specific practices with respect to children and families.
- Because the right of each Indigenous people to exercise jurisdiction over child and family services is already protected by the Constitution, their laws on this issue will take precedence over inconsistent federal and provincial laws. Federal and provincial laws may only interfere with the exercise of Indigenous jurisdiction where the Crown can prove that such interference is justified according to the test previously established by the Supreme Court in *Sparrow*. For the Court of Appeal, the bar for demonstrating justified interference is very high.

This judgment appears to be a historic step in the direction of meaningful self-government for Indigenous peoples. While the judgement is far from perfect (for example, it appears to urge

provinces to be more proactive in determining the nature and extent of Aboriginal rights, and it leaves undisturbed the basic presumption that Crown sovereignty in North America is justified) it has nonetheless greatly strengthened the hand of Indigenous groups looking to assert their inherent rights, particularly with respect to youth protection.

While it remains possible that one of the governments involved will appeal the judgement to the Supreme Court of Canada, we believe that, as of right now, Indigenous groups have a window of opportunity to exercise their rights in a more fulsome way than before. Moreover, this judgment strengthens the bargaining position of Indigenous groups vis-à-vis the federal and provincial governments, which may allow them to conclude coordination agreements that provide them with the financial resources required to exercise real autonomy with respect to child and family services.

We at Dionne Schulze look forward to helping Indigenous groups seize this opportunity to more fully exercise their inherent rights.