First Nations Child & Family Caring Society

February 2024

The Supreme Court of Canada Will Issue a Decision on Bill C-92 on February 9, 2024: What to Know

Introduction

The Supreme Court of Canada (SCC) has announced that it will issue its decision on the federal *An Act Respecting First Nations, Inuit, and Métis Children, Youth, and Families* (the Act) on February 9, 2024. The SCC's decision will provide important guidance about the constitutionality of the Act. In preparation for the decision, this information sheet provides a brief history of the case before the SCC and outlines, in broad terms, possible outcomes and implications.

The information contained in this information sheet is ***not legal advice***. Consult with your legal counsel to seek advice and guidance about your own needs and circumstances.

Background

Often referred to as Bill C-92, the Act came into force on January 1, 2020. It affirms that Indigenous peoples have jurisdiction in relation to child and family services through their inherent right to self-government and sets out minimum national standards for the provision of child and family services to Indigenous children.[1] Through the Act, Indigenous child and family services laws have the force of federal law. In the event of a conflict between Indigenous and provincial child and family service laws, Indigenous laws have priority.[2]

In December 2019, Quebec submitted a reference question to its Court of Appeal (the QCA) for an opinion on whether the Act exceeds Canada's constitutional authority.[3] While the QCA affirmed federal jurisdiction to establish national standards for Indigenous child and family services, it found sections 21 and 22(3) of the Act to be unconstitutional. These are the sections that stipulate Indigenous laws have the force of federal law and provide that they will prevail over conflicting provincial laws. The QCA found that these sections go beyond the authority granted to Parliament under the *Constitution Act, 1867*.[4] Quebec and Canada both appealed the QCA's decision, and the SCC heard the appeal in December 2022. Briefly put, before the SCC, Quebec in essence argued that the Act is wholly unconstitutional, while Canada argued that the Act is constitutionally valid in its entirety.

There are two main things to keep in mind about the SCC's decision: (1) the SCC's decision will be an advisory opinion on the constitutionality of the Act, not a judgment in which orders are made about the constitutionality of the Act; and (2) Parliament may respond to the SCC's decision on the constitutionality of the Act and amend the Act accordingly if the SCC advises that it is unconstitutional in whole or in part. In any event, the judgment would be seen as persuasive authority for any court considering a request to declare the *Act* or any provisions inoperable in whole or in part due to constitutional concerns.

The Caring Society's Position

The Caring Society was an intervenor on the appeal to the SCC, as it was before the QCA. The Caring Society's position is that, despite its shortcomings, the Act is constitutional. The Act needs to be significantly improved in certain respects, especially by setting out the funding responsibilities of different levels of government. However, it is a first effort at "legislative reconciliation".[5]

Possible SCC Decisions

In broad terms, there are three possible outcomes:

1. **Entirely unconstitutional:** The SCC could find the Act entirely unconstitutional (*ultra vires*).

[1] An Act Respecting First Nations, Inuit and Metis Children, Youth and Families, SC 2019, c 24, Preamble and s. 8 ("the Act").

[2] The Act, ss. 21 and 22(3).

[3] 2022 QCCA 185 at paras 6-7.

[4] 2022 QCCA 185 at para 571.

[5] The Supreme Court of Canada, *Factum of the Respondent First Nations Child & Family Caring Society of Canada* (9 September 2022) online.

2. **Partially unconstitutional:** For example, the SCC could uphold the QCA's decision and find that sections 21 and 22(3) are unconstitutional (*ultra vires*) while the rest of the Act is constitutional. National standards for providing child and family services would remain; however, the ability of Indigenous communities to exercise inherent jurisdiction over child and family services could be compromised. Indigenous laws might take a secondary role to provincial laws in the event of a conflict with provincial laws.

3. **Entirely constitutional:** The SCC may decide that the Act is entirely constitutional (*intra vires*). In this scenario, the SCC would confirm that Canada had the constitutional authority to enact the Act as drafted. The SCC would also overturn the QCA's finding that sections 21 and 22(3) are unconstitutional. Indigenous laws would have the force of federal law and would prevail over provincial laws to the extent of any conflict or inconsistency with provincial laws.

In any case, the SCC's decision itself will not make orders about the constitutionality of the Act but will instead provide important guidance about the constitutionality and operation of the Act going forward.

For Caring Society resources on Bill C-92 visit fnwitness.ca.

This document was prepared with the assistance of a Pro Bono Students Canada uOttawa (Common Law) law student volunteer. PBSC students are not lawyers, and they are not authorized to provide legal advice. This document contains general discussion of certain legal and related issues only.