First Nations Child & Family Caring Society

March 2024

Supreme Court of Canada Decision on *An Act Respecting First Nations, Métis and Inuit Children Youth and Families* (C-92)

On February 9, 2024, the Supreme Court of Canada (SCC) unanimously affirmed that the federal *An Act Respecting First Nations, Métis and Inuit Children Youth and Families* (the Act) is constitutionally valid as a whole. The decision is a strong endorsement of the purpose of the Act, namely: affirming through legislation the inherent right of Indigenous self-government, including jurisdiction in relation to child and family services; establishing national standards for providing child and family services to Indigenous children; and contributing to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in Canadian law.[1] The SCC decision also highlights Jordan's Principle, affirming that disputes between governments may not interfere with the right of Indigenous children to access the same services as other children in Canada.[2]

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.

Key Takeaways and Implications

The SCC's decision provides important guidance about the constitutionality of the Act. Some key things to keep in mind include:

The whole Act is constitutional:

The SCC found that the Act as a whole is constitutional and overturned the Quebec Court of Appeal's 2022 decision that sections 21 and 22(3) of the Act were unconstitutional. These sections say that Indigenous laws have the force of federal law and will prevail over conflicting provincial laws. The decision also affirms Parliament's authority to establish minimum national standards for child and family services, use legislation to affirm Indigenous peoples' inherent right of self-government, and facilitate Indigenous groups', communities', or peoples' implementation of their own laws.[3]

Inherent right of self-government and the honour of the Crown:

The SCC found that, by passing the Act, Parliament recognized that Indigenous people's inherent right of self-government in relation to child and family services has constitutional status.[4] Now, the Crown is bound to this.[5] Per the SCC, "the federal government can now no longer assert, in any proceedings or discussions, that there is no Indigenous right of self-government in relation to child and family services".[6] This means that governments will have obligations even if another government's mandate ends: they are honour-bound.

UNDRIP as a presumption:

The SCC recognized that Parliament incorporated UNDRIP into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("UNDRIP Act"). In part, the Court said that the UNDRIP Act requires Canada, in consultation and cooperation with Indigenous peoples, to take "all measures necessary to ensure that the laws of Canada are consistent with the Declaration".[7] This is a strong endorsement of how UNDRIP provides a framework for reconciliation, requires Canada to take measures to ensure Canadian law is consistent with UNDRIP, and requires Canada to take concrete measures to address injustices facing Indigenous youth and children.[8]

[1] 2024 SCC 5 at para 7.
[2] 2024 SCC 5 at para 99.
[3] 2024 SCC 5 at para 93.
[4] 2024 SCC 5 at para 115.
[5] 2024 SCC 5 at para 64.
[6] 2024 SCC 5 at para 62.
[7] 2024 SCC 5 at paras 4 and 85.
[8] 2024 SCC 5 at para 4.

Transition to self-government may take time and Indigenous peoples have the right to set the pace:

The SCC recognized that Indigenous groups, communities, or peoples may not wish to exercise jurisdiction in relation to child and family services immediately. The full realization of Indigenous jurisdiction as recognized in the Act "will take some time".[9] Communities have the right to go at their own speed, take the appropriate steps, and do the necessary capacity building before exercising their inherent right to self-government in relation to child and family services. In the interim, the national standards will operate to ensure that the child and family services are culturally appropriate and in the best interests of Indigenous children.[10]

Benefits of "legislative reconciliation":

The SCC recognized that Parliament engaged in a process of "legislative reconciliation" in making the Act law. The Court pointed out that there are certain practical advantages of proceeding through legislation rather than through the courts and constitutional litigation.[11] Relying on the Caring Society's factum, the SCC wrote that avoiding years of litigation also avoids a scenario in which Indigenous children and families "continue to suffer as the status quo continues". The Court also relied on Carrier Sekani Family Services Society's factum to indicate that avoiding litigation "allows Indigenous groups and the Crown to use their time and resources to focus on the actual substance of the issue: caring for children".[12] Legislative initiatives can "proceed more quickly, with less expense and with a wider scope."[13]

Culture change and broader public impact:

The SCC suggests that the Act could lead to a culture change in Canada and have educational value. The Court said that the Act's affirmation of the inherent right to self-government could be seen as a step to shift the culture underlying the actions of the federal and provincial governments. In time, this may help cultivate new attitudes or approaches that will further promote a culture of respect and reconciliation in Canada.[14]

Notwithstanding clause cannot be used:

Provincial and territorial governments ***cannot*** use the notwithstanding clause to override the federal Act for two main reasons. First, the notwithstanding clause is part of the *Charter* and can only override certain *Charter*-protected rights for a limited period of time in certain cases. It does not apply to Aboriginal rights under s. 35(1) of the constitution, which is outside the Charter. Second, provincial and territorial governments cannot use the notwithstanding clause to override constitutional federal legislation: they could only ever use it to protect their own *Charter*-infringing legislation. In short: the notwithstanding clause can ***never*** be used to override s. 35(1) Aboriginal rights.

Limitations

Funding remains an issue:

The Caring Society has raised concerns since the Act was passed about significant gaps in the Act, particularly the absence of a funding structure. An evidence-informed funding structure is necessary to ensure that Canada's discrimination with respect to the First Nations Child & Family Services Program is not replicated in C-92 agreements. While the SCC's ruling is an important step forward for First Nations children, youth, and families, it does not address this vital topic. Addressing the issue of funding is crucial to ensure that communities have "the resources to breathe life into [their] own laws".[15] The unanimous decision may, however, provide a framework for resolving the uncertainties that remain in this incomplete framework.

Legislation can be repealed:

The SCC's decision only advises on the constitutionality of the Act and it does not address whether s. 35(1) of the constitution itself protects the inherent right to self-government.[16] The SCC's decision says that the Crown must honour the inherent right to self-government in child and family services "as long as this affirmation is part of the law in force".[17] As with other pieces of legislation, the Act as a whole or provisions within it could be

[9] 2024 SCC 5 at para 83.

[10] 2024 SCC 5 at para 83. See webinar hosted by Dr. Pamela Palmater and featuring Dr. Cindy Blackstock, Mary Teegee, and Naiomi Metallic from 26:27 to 27:10.

[11] 2024 SCC 5 at para 77.

[12] 2024 SCC 5 at para 77.

[13] 2024 SCC 5 at para 78.

[14] 2024 SCC 5 at para 81.

[15] See webinar hosted by Dr. Pamela Palmater and featuring Dr. Cindy Blackstock, Mary Teegee, and Naiomi Metallic from 22:50 to 23:24.

[16] 2024 SCC 5 at para 115.

[17] 2024 SCC 5 at para 66.

repealed by a future Parliament. However, any attempt at repeal is unlikely, given public opposition and the probability of court challenges. The issue of whether the inherent right to self-government is protected by s. 35(1) of the constitution may receive further analysis in upcoming cases before the SCC.

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. 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.

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.[18] 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.[19] 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.

On February 9, 2024, the SCC found that the Act "as a whole is constitutionally valid."[20] The SCC's decision is an advisory opinion on the constitutionality of the Act, not a judgment in which orders are made. However, any other court in Canada asked to rule on or consider questions about of the Act will turn to the SCC's decision for guidance.

Resources

Caring Society resources on the C-92: fnwitness.ca

SCC upholds Indigenous Child & Family Legislation: Warrior Life Podcast hosted by Dr. Pamela Palmater and featuring Dr. Cindy Blackstock, Mary Teegee, and Naiomi Metallic on February 24, 2024: www.youtube.com/watch?v=GGKSD0uEL10

Wahkohtowin Law and Governance Lodge Resource Library: www.ualberta.ca/wahkohtowin/library-areas.html

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.

[18] 2022 QCCA 185 at paras 6-7.

[19] 2022 QCCA 185 at para 571.

[20] 2024 SCC 5 at para 2.