Concerns & Recommendations on Bill C-92,

An Act respecting First Nations, Inuit and Métis children, youth and families

From the Chiefs of Ontario to the
Senate Standing Committee on Aboriginal Peoples

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Introduction

Bill C-92 does two things:

1. it sets out a path for the exercise of Indigenous jurisdiction in child and family services (generally, ss. 18-26 of the Bill); and
2. it sets federal rules for Indigenous children that supplement and sometimes override both provincial and Indigenous child welfare laws (generally, ss. 9-17; see also ss. 4, 22, 23 to understand how those rules interact with other laws).

It does not, however, provide a statutory base for funding or otherwise regulate federal funding of First Nations child welfare, despite the dismal record of federal funding in this area.

Chiefs of Ontario has significant concerns with the bill in its current form.

- The promise of jurisdiction will be left unrealized if funding is not addressed, and if this bill's practical and legal limits on the exercise of that jurisdiction are not addressed.
- In addition, some of the overriding federal rules would actually make things significantly worse for First Nations in child welfare matters in Ontario unless these provisions are removed or amended. In particular, s. 12(2) stands out as a clause that would definitely **decrease** First Nation's rights in Ontario and harm First Nations children in Ontario.

We hope to see substantial improvements to this bill before it passes.

The issues set out here have become quite clear as significant concerns. Note that First Nations within Ontario may have further feedback.

About Chiefs of Ontario

Chiefs of Ontario is an advocacy forum and secretariat for collective decision-making and action for the 133 First Nations located within Ontario. We uphold self-determination efforts of the Anishinaabek, Mushkegowuk, Onkwehonwe, and Lenape Peoples in protecting and exercising their inherent and Treaty rights. Our activities are mandated through and guided by:

- Resolutions passed by the Chiefs in Assembly;
- The Political Confederacy, made up of the Grand Chiefs of Political Territorial Organizations (PTOs) and Independent First Nations; and
- The elected Regional Chief for the Chiefs of Ontario.

Our main objective is to facilitate the discussion, planning, implementation and evaluation of all local, regional and national matters affecting the First Nations people of Ontario.

Summary of Recommendations on C-92 from Chiefs of Ontario

Process Concern	Comment
This legislation was not co-developed.	Claims that Bill C-92 was "co-developed" are inaccurate. Chiefs of Ontario participated in the Legislative Working Group that Canada convened for this legislation, but: (1) it provided us with very limited and rushed opportunities for input; (2) our input was largely ignored; and (3) the rights-holders, our member First Nations, only had earlier "engagement" sessions and no opportunity to participate at the legislation stage at all. This is not co-development.
Substantive Concerns	**Recommended Amendments**
1. A binding funding clause must be included, linked to the legal standard of substantive equality.	A funding clause must be put into the law. See our suggested text on p. 8. Annex B and Annex C provide additional references to take into account.
2. Section 12(2) would take away our existing rights to information about our children, gutting the Band Representative program in Ontario and our existing participation rights.	At the very least, to protect First Nations' existing rights in Ontario and in the other provinces that already support information sharing, s. 12(2) must be prefaced with "Unless permitted under provincial or Indigenous law, …". Or, the better solution would be to remove section 12(2). That would benefit the most First Nations across Canada, and be the most logical. No First Nations will be able to help their kids without case-specific information.
3. Section 13 provides us with lesser participation rights than we have now, and it is unclear whether it would restrict those rights.	Section 13(b) must be clarified to ensure the existing participation rights of Indigenous governing bodies are not decreased, by adding at the end of (b): "and for greater certainty, the Indigenous governing body also has any greater rights of party status, consultation, and other forms of participation that may apply under a provincial or Indigenous law".

4. Section 23 invites open-ended, unfair, and completely unpredictable intrusions on our jurisdiction	Section 23 needs to be removed.
5. The imposition of federal rules across the board, so called "minimum standards", is problematic	Section 22 – Indigenous Laws: - Section 22(1) should take out the reference to sections 10-15 of the Act, so that cookie-cutter terms hastily written in Ottawa are not imposed on First Nations laws for years to come. Infringing on First Nations jurisdiction will not help First Nations children. Additionally, the federal government lacks experience on the content of child welfare laws and should not play around with it. Section 4 – Provincial Laws: - We would like to have an opt-out option, allowing a First Nation to remain with provincial law alone if they choose to. Adding C-92 on top of provincial law will be confusing, and some First Nations may conclude the benefit is not worth the cost. - Alternatively, it would be responsible to delay imposition of the national standards for at least a year to allow for preparation. - At the very least, s. 4 should be clarified. The words "conflict or inconsistency" leave a lot of uncertainty and will be hard to operationalize. Service providers and courts need clear direction on what laws to apply when they act quickly for vulnerable children and youth. These terms should at least be clearly defined with a clear basis in constitutional law. Section 32 – Regulations: - Any regulations further to C-92 should require the consent of First Nations, not just consultation.

6. Problematic imposition of a Best Interests test in s. 10	Section 10 should be removed. Or, at the very least, subsections (2) and (3) should be removed such that it requires that best interests be applied, while leaving the detailed definition of factors to the full and proper consideration by Indigenous lawmakers.
7. Alternative to giving Indigenous laws force "as federal law"	Amend s. 21(1) to say instead: "An Indigenous law referred to in s. 20(2) shall be interpreted and applied as having as much force of law as a federal law."
8. The use of ADR in achieving Coordination Agreements is unduly restricted	Preconditions to accessing dispute resolution in s. 20(5) should be removed, i.e. no requirement that all parties have made "reasonable efforts".
9. Should allow for option of a bilateral Coordination Agreement in Ontario	It would be useful if section 20 clarified that a Coordination Agreement can be reached with either the federal government or the province, but it does not necessarily have to be reached with both parties.
10. Unclear enforcement systems	A provision should be added saying: "(1) Unless another forum is specified in an Indigenous law, any proceedings under this Act shall proceed in the same courts in a province which normally hear child protection proceedings in that province, and matters involving the application of this Act may be heard in such courts. (2) Nothing in this Act confers any jurisdiction for child and family services proceedings to be heard in the Federal Court."
11. Problematic definitions of "Indigenous" child, "Indigenous peoples", "Indigenous group, community or people", and "Indigenous governing body"	All references to an Indigenous "group" or "community" should be removed throughout Bill C-92. Non-rights-holding groups cannot and should not exercise jurisdiction. The term "Indigenous peoples", referring to s. 35 rights-holders, is sufficient and is defined to capture the full breadth of rights-holding First Nations, Inuit and Métis. The definition of "Indigenous" (for individuals, e.g. children) should capture members of s. 35 rights-holding peoples. Going beyond that is inappropriate and would lead to too much confusion, uncertainty and unworkability in a system that needs clarity on what laws apply to which children.

12. Definition of "care provider" in s. 1 and related rights in ss. 10(3)(c), 12, 13, 15, 24	The term "care provider" should be re-drafted more carefully with consideration of provincial standards, and at a minimum, should specifically exclude paid foster parents without family or community ties to the child.
13. Unclear definition of "child and family services"	The definition of "child and family services", in the examples after the word "including", needs to add "adoption services", "reunification services" and "post-majority transition services" to reflect the spectrum of life-stages at which a child and family service system operates.
14. Section 3 on existing agreements is over-broad	Section 3 needs more careful re-drafting for accuracy and specificity, and must explicitly exclude funding agreements.
15. The Principles in section 9 raise more questions than answers	The principles in s. 9(3) on substantive equality should define substantive equality with reference to the legal test for substantive equality, i.e. the factors set out in the Caring Society case. The principles in s. 9(2) on cultural continuity should be linked to best interests and should also reflect a connection to land and territory.

Detailed Comments

The Process Did Not Reflect Co-Development

Before addressing our recommendations on the content of the bill itself, we first have an important concern with the process. The federal government is claiming that Bill C-92 was "co-developed". We disagree. Bill C-92 was not co-developed in any legitimate sense of the word.

The initial stage was "engagement sessions" held with various First Nations representatives in summer and fall 2018. This was a weak or at least routine form of consultation. General input was gathered but Canada made all the final decisions.

The drafting stage, from December 2018-February 2019, was exclusive, rushed and secretive. Chiefs of Ontario participated in the Legislative Working Group that Canada convened at that time, but we were excluded from any actual drafting. Our representatives had the opportunity to review and comment on one draft, in an extremely short time-frame in January. When we saw the bill introduced on February 28th, we saw that our comments had mostly been ignored.

If any of our First Nation members claimed to have "co-developed" a document with Canada in this way, surely the Government of Canada would beg to differ.

Words like "co-development" suggest **equal partnership** and **consent**. Before using that kind of language, or supporting its use, there should be agreement on the process and its outcome.

Substantive Concerns & Proposed Amendments

1. **A binding funding clause must be included, linked to the legal standard of substantive equality**

The long record of discretionary federal funding has been a complete failure. First Nations have had to spend years, and considerable funds, litigating this issue at the Canadian Human Rights Tribunal, which confirmed that funding has been deeply discriminatory. We cannot walk away at this point without clear terms that will ensure predictable, adequate funding to the standard of substantive equality. This applies both inside and outside any exercise of jurisdiction.

Here is our suggestion of the funding clause Bill C-92 needs. It is simple and absolutely essential:

(1) The Minister shall ensure that child and family services for Indigenous children are adequately funded to meet the standard of substantive equality.

(2) For the purposes of subsection (1), "shall ensure" means that the Minister shall ensure adequate funding to meet the standard of substantive equality is provided by the federal government, or by a provincial or territorial government, or by a combination of them. [1]

(3) For the purposes of subsection (1), "the standard of substantive equality" is defined by reference to the jurisprudence on s. 5 of the *Canadian Human Rights Act* and s. 15 of the *Canadian Charter of Rights and Freedoms*, and is inclusive of the level of funding and the terms governing such funding, and includes but is not limited to:[2]

a) Meeting actual needs, including but not limited to meeting the diverse needs of various regions and communities including remoteness costs, and meeting the diverse needs of children;
b) Ensuring services are of comparable quality to services to other children;
c) Not perpetuating historical disadvantage;
d) Addressing the intergenerational trauma caused by residential schools;
e) Providing services that are culturally appropriate;
f) Narrowing the gaps in outcomes between Indigenous children and others; and
g) Breaking the cycle of outside control imposed on Indigenous peoples.

(4) A dispute alleging a breach of this section may be brought by an Indigenous governing body, or a litigation guardian of an Indigenous child, or a recipient of funding pursuant to this section, to the binding arbitration process set out in the regulations.

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[1] This will accommodate two things:

- Across Canada, Indigenous children living off reserve are generally receiving child and family services funded by their provincial government.
- In Ontario, the *1965 Agreement* supports a system in which the federal government pays the province, and child and family services are provided by the province at provincial funding rates.

This would allow those systems to continue, and would not force the federal government to widen its scope of funding to draw in new groups of Indigenous children vis a vis the provinces.

What is new is that it would require the federal government to take an oversight role with Indigenous children, to ensure that the funding meets the substantive equality test for those children. This role is consistent with Canada's powers under s. 91(24), its responsibility in funding First Nations child and family services, and the responsibility it is taking on in governing Indigenous child and family services through this legislation.

[2] This list of factors is directly from the *Caring Society* case, 2016 CHRT 2.

The Auditor General of Canada has found that funding of our child and family services must be founded in legislation in order to be predictable and adequate: see Annex A for excerpt. Otherwise, we are leaving this critical funding for our kids up to each budget and each election, and that has failed us each time.

Even the Harper Conservatives had a basic funding clause in the proposed *First Nations Control of Education Act*, for all its flaws. This government should be able to do at least as well as that precedent as a bare minimum: see Annex B for excerpt.

The Preamble's reference to an "ongoing call" for funding, and the reference to fiscal arrangements being negotiated within Coordination Agreements, are completely inadequate. Frankly, referring to an "ongoing call" for funding is insulting.

These indirect references do not require Canada to provide any funding whatsoever, nor ensure that provinces do so. They do not require that the amount of funding supports services at a standard of substantive equality: the legal test confirmed at the Canadian Human Rights Tribunal. They do not provide any mechanism that will help avoid disputes about funding and resolve them expeditiously.

Provinces regulate their funding of major programs by law (e.g. Ontario's *Child, Youth and Family Services Act* ["*CYFSA*"], or *Education Act*). The federal government regulates the funding of its major non-First Nations programs by law (e.g. CPP, EI, etc.). But somehow First Nations families are expected to make do with the scraps leftover on the table at budget time, without any legislative guarantees. As noted above, the Auditor General has criticized this approach.

It will be difficult if not impossible to put jurisdiction into practice without overall provisions on federal funding that apply whether or not jurisdiction is being exercised. If adequate funding is up for negotiation each time a First Nation pursues its jurisdiction, we are essentially asking each First Nation to re-fight the *Caring Society* case at the negotiating table. That is unnecessary and unfair. And we are giving Canada – and in our case Ontario too – an easy veto.

To see real change, we have to stop the era of completely discretionary, policy-based funding. Fair funding for our kids should be a starting point, not just a hope and a dream.

COO's Position:

- *A funding clause must be put into the law. See our suggested text on p. 8. Annex B and Annex C provide additional references to take into account.*

2. Section 12(2) would take away our existing rights to information about our children, gutting the Band Representative program in Ontario

Section 12(2) of C-92 says:

> Personal information
> (2) The service provider **must ensure** that the notice provided to an Indigenous governing body under subsection (1) **does not** contain personal information about the child, a member of the child's family or the care provider. [emphasis added]

Ontario's *Child, Youth and Family Services Act,* SO 2017 c 14, Sched 1 provides First Nations in Ontario with notice, consultation and participation rights well beyond what Bill C-92 would do through ss. 11-12. First Nations in Ontario have had, for decades, the right to receive notice at many points, the right to be consulted, and the right to participate as a full party in proceedings. Our representatives receive full case information.

We receive full information in initial notices because this information is essential for quick response by our Band Representatives program. We have been handling this information responsibly for decades. Indeed, Ontario has recently confirmed and expanded these rights in its new 2017 legislation. Ontario already has detailed regulations on personal information that already deal with disclosure to First Nations and that ensure that we receive clear information from the start.

It's important to understand that getting this information is critical to our Band Representative program – which the CHRT has ordered Canada to fund and support. And it's important to understand that the Band Representative program is critical to the well-being and best interests of First Nations children and youth.

We had to fight Canada in the *Caring Society* case to have our band representatives be funded again. Now that they are finally funded, Bill C-92 is threatening to take their rights away.

Ontario's greater notice, consultation and participation rights for First Nations will *generally* continue despite C-92 unless there is a "conflict or inconsistency" as per s. 4 of the Bill. But section 12(2) is a clear conflict with our existing rights in Ontario's *CYFSA* because of its mandatory language. It **prohibits** a service provider from providing us with information about our own children. It will therefore prevail over the provincial law, and will **decrease** First Nations' notice rights, restricting First Nations ability to help their own children.

Personal information is not defined in C-92, but in other federal laws it includes names and other identifying details. Without information, our Band Representatives could not do anything.

This clause is absolutely ridiculous. It would undo years of hard-earned progress we have made in Ontario, not to mention our overdue victory at the Canadian Human Rights Tribunal.

We cannot let C-92 take us backwards.

COO's Position:

- *At the very least, to protect First Nations' existing rights in Ontario and in the other provinces that support information sharing, s. 12(2) must be prefaced with "Unless permitted under provincial or Indigenous law, …".*

- *Or, our preference would be to see section 12(2) removed. That would benefit most First Nations across Canada, and be the most logical. No First Nations will be able to help their kids without case-specific information.*

3. Section 13 should be clarified to ensure it does not restrict our rights as parties in proceedings

Section 13 also needs to be clarified to ensure it does not decrease our rights.

- First Nations are automatically parties to child welfare proceedings in Ontario law, but s. 13 of C-92 only provides us with the ability to make "representations", not to be a party.

- First Nations have the right to be consulted at various points in child welfare proceedings in Ontario, but s. 13 does not address consultation at all (nor do other parts of the Bill).

Our preliminary interpretation is that our greater rights under Ontario law in these respects would *probably* still apply as there is *probably* no "conflict or inconsistency" between the Ontario law and s. 13 of C-92, as per s. 4. But the meaning of an "inconsistency" is not clear. Could a court find that s. 13 deals entirely with the matter of First Nations' participation and Ontario's provisions are inconsistent? This interpretation raises risks we cannot afford to take.

- *Section 13(b) must be clarified to ensure the existing participation rights of Indigenous governing bodies are not decreased, by adding at the end of (b): "and for greater certainty, the Indigenous governing body also has any greater rights of party status, consultation, and other forms of participation that may apply under a provincial or Indigenous law".*

4. Section 23 invites open-ended, completely unpredictable intrusions on our jurisdiction

Section 23 of the bill reads:

> s. 23 A provision respecting child and family services that is in a law of an Indigenous group, community or people **applies** in relation to an Indigenous child **except** if the application of the provision would be contrary to the best interests of the child. [emphasis added]

Section 23 is an overly vague intrusion on Indigenous laws that will lead to endless uncertainty about what law even applies. It invites parents, agencies and anyone else to challenge Indigenous laws on an open-ended basis if they don't like how it applies to them in a given case.

No provincial law is subject to this kind of exception. To compromise Indigenous laws in this way is unfair, and totally counterproductive. It will inevitably lead us back to the application of provincial laws instead.

It promotes endless uncertainty. Imagine yourself in the position of a service provider. You have identified a child as Indigenous. You then need to apply both the provincial law and Bill C-92. You look to see if an Indigenous law applies too, and you find that it does. After sorting out what laws apply, you finally proceed – only to find that the Indigenous law may not apply after all, because someone else asserts that the law is not in the child's best interests.

That kind of uncertainty is not a useful way to promote the actual best interests of children. It is harmful, unpredictable, and fuels disputes and litigation.

It also entirely undermines Indigenous jurisdiction. After all the work to have our laws recognized in Bill C-92, after finally and painstakingly making our own laws, after finally (in most if not all cases) negotiating a Coordination Agreement – after all that, we would find our laws picked apart, section by section, whenever a judge or service provider has a different opinion about the legislative choices we have made.

And it is totally unnecessary to protect children. Both Indigenous and provincial laws are already required to apply best interests in their decision-making and actions with children through s. 10. So children's best interests are already protected. Section 23, however, would allow the concepts of best interests to be used as swords to undermine **only** Indigenous laws unpredictably, piece by piece, providing a tool for those service providers, parents or judges who do not want to follow Indigenous laws.

We need to give Indigenous laws a chance to succeed, without being second guessed at every turn. And we need to give Indigenous children a chance to have their cases heard without fueling endless litigation about what laws apply to them.

COO's Position: *Section 23 needs to be removed.*

5. The imposition of federal rules across the board, so called "minimum standards", is problematic

The imposition of sections 10-15 over and above Indigenous laws, as per section 22(1), is another intrusion on our jurisdiction. These six sections, plus more federal rules i.e. the principles in s. 9 and ss. 16-17, will also apply over and above provincial laws as per s. 4.

The heading in s. 4 uses the phrase "minimum standards". Section 8(b) uses the phrase "principles applicable on a national level". These sound nice, and are probably well intentioned.

But well-intentioned rules crafted in Ottawa do not have a good track record in their actual impact on First Nations children and families.

These rules are a one-size fits all solution written hastily by federal bureaucrats and lawyers, who have little to no experience in child welfare, let alone with our communities. They do not fit the diverse needs and choices of our communities, who may make different legislative choices. We deserve the respect to be trusted to make our own rules.

The layering of federal rules on top of provincial and Indigenous laws is unnecessary and will create a high degree of confusion and uncertainty with very little if any benefit for children.

For instance, in Ontario, we just completed several years of review and update with Ontario's legislation. We would now have to re-assess the legal picture all over again. The full implication of how differing definitions overlap, or do not, or conflict, or do not, will create risks for our children. Delays, legal challenges and confusion would be rampant, not to mention extensive training costs.

This is the opposite of what we have been calling for throughout this process: that we must minimize the chances that children get caught in the middle of jurisdictional tangles. This is a recipe for endless jurisdictional debates. (Great for some lawyers, maybe, but not for kids.)

In addition, s. 32 allows the federal Cabinet to make regulations on "any matter relating to the application of this Act or respecting the provision of child and family services in relation to Indigenous children". Further details on these national standards might be imposed through regulation. With this open-ended regulation power, C-92 opens the door to endless federal involvement in both provincial and Indigenous child welfare laws. We do not see that as beneficial.

Dealing with Ontario's interference with our jurisdiction is bad enough; adding another Crown government's interference into the picture does not help things.

COO's Position:

- *Section 22 – Indigenous Laws:*
    - *Section 22(1) should take out the reference to sections 10-15 of the Act, so that cookie-cutter terms hastily written in Ottawa are not imposed on First Nations laws for years to come. Infringing on First Nations jurisdiction will not help First Nations children. Additionally, the federal government lacks experience on the content of child welfare laws and should not play around with it.*

- *Section 4 – Provincial Laws:*
    - *We would like to have an opt-out option, allowing a First Nation to remain with provincial law alone if they choose to. Adding C-92 on top of provincial law will be confusing, and some First Nations may conclude the benefit is not worth the cost.*

    - *Alternatively, it would be responsible to delay imposition of the national standards for at least a year to allow for preparation.*

    - *At the very least, s. 4 should be clarified. The words "conflict or inconsistency" leave a lot of uncertainty; they should be clearly defined with a clear basis in constitutional law.*

- *Section 32 – Regulations:*
    - *Any regulations further to the national standards should require the consent of First Nations, not just consultation.*

6. Problematic imposition of a Best Interests test in s. 10

In theory, everyone can agree that decisions about children should be made in their best interest. In practice, few agree about **what** that best interest is.

The definition and application of "best interests" tests has become a core ground of dispute in First Nations' efforts to avoid unintentional harms to our children from outsiders who think they know what's best for our children.

We have not yet recovered from the legacy of residential schools, and the legacy of the Sixties Scoop. The ongoing Millennium Scoop remains deeply influenced by these legacies.

Other people often have strong ideas about what is in the best interests of our children. And they are usually wrong.

These well-intentioned but misguided impositions have caused and continue to cause vast harms to the children affected, harms that impact their whole lives as adults, plus their communities.

As described above, we are concerned with the imposition of overriding federal rules generally. But the imposition of a particular best interests test by the federal government, imposed on First Nations children alone stands out and needs further comment.

It shows a failure by Canada to understand what it did wrong in residential schools, and in the Sixties Scoop. Imposing outside ideas about the best interests of our children is, fundamentally, *not in the best interests of our children*.

What will truly be in our children's best interests is to let First Nations, finally, speak to our own knowledge of our own communities and determine how our children can be best served. There is not a one-size-fits-all solution to the best interests test.

COO's Position:

- *Section 10 should be removed. Or, at the very least, subsections (2) and (3) should be removed such that it requires that best interests be applied, while leaving the detailed definition of factors to the full and proper consideration by Indigenous lawmakers.*

7. Better alternative to giving Indigenous laws force "as federal law"

Once an Indigenous law has been passed by its nation, and has become effective either after a Coordination Agreement or after the 12-month option, s. 21 says it "also has, during the period that the law is in force, the force of law as federal law".

The language of "also has" is helpful – it seems to acknowledge that the Indigenous law already has its own force as an inherent Indigenous law, not as delegated law.

However, turning Indigenous laws into federal laws does not accord with true Indigenous jurisdiction. It perpetuates the racist myth that Indigenous laws cannot stand on their own feet and have no inherent power.

And it is unnecessary. The provisions on conflicts of laws already in Bill C-92 help address practical concerns by telling courts how to treat an Indigenous law, because they specify how the Indigenous law interacts with other provincial and federal laws. Further direction on the force of Indigenous laws may not be needed.

If there remain legal and practical concerns about how courts should treat our laws, we recommend different text to accomplish that objective.

COO's Position:

- *Amend s. 21(1) to say instead: "An Indigenous law referred to in s. 20(2) shall be interpreted and applied as having as much force of law as a federal law."*

8. The use of ADR in achieving Coordination Agreements is unduly restricted

The headline that Bill C-92 recognizes our jurisdiction sounds nice. The reality is that it all depends on how easy or how hard it is to negotiate Coordination Agreements. Few Indigenous laws will be able to be implemented without funding.

One solution is ensuring that a baseline of adequate, non-discriminatory funding does not have to be re-negotiated every time. See #1 above on the essential need for a funding clause.

But other issues can bog down negotiations too. It is helpful that s. 20(5) anticipates the need for "dispute resolution mechanism"[s], to be developed in the regulations.

It is odd, though that it requires, as a precondition for accessing ADR, that all three parties to the negotiations have already made "reasonable efforts". This seems counterintuitive, since the failure of one or more parties to make reasonable efforts is exactly what may drive the need for dispute resolution.

COO's Position:

- *Preconditions to accessing dispute resolution in s. 20(5) should be removed, i.e. no requirement that all parties have made "reasonable efforts"*

9. Should allow for option of a bilateral Coordination Agreement in Ontario

Bill C-92 seems to assume that a Coordination Agreement will be trilateral, although this is not quite clear.[3] But it is not obvious why the federal government would need to be a party to such negotiations in Ontario, where, at least currently, Ontario controls funding for most child and family services further to the 1965 Agreement, and Ontario also controls the laws and mechanics of the mainstream child welfare system.

[3] See C-92 at s. 20(1) and s. 20(2).

Recently, the federal government has taken on a few direct funding streams in Ontario pursuant to Canadian Human Rights Tribunal orders, e.g. paying directly for band representatives, some prevention, mental health, and Jordan's Principle cases. But Ontario might take on payment for those items further to the 1965 Agreement, especially if the 1965 Agreement is updated.[4] The Tribunal has called for the 1965 Agreement to be updated, and this is being reviewed at present through the Ontario Special Study.

If the federal government is not involved directly in any funding, or other roles, it is not clear why it would need to be involved in a Coordination Agreement. Simplifying negotiations would help move them forward.

COO's Position:

- *It would be useful if section 20 clarified that a Coordination Agreement can be reached with either the federal government or the province, but it does not necessarily have to be reached with both parties.*

10. Unclear enforcement systems

Child protection cases often involve court proceedings. In Ontario they go through the Provincial Court system.

With Bill C-92, child protection agencies and other "service providers" will be making decisions under two or three laws – a mixture of *CYFSA* and C-92, and possibly an Indigenous law as well.

An Indigenous law might provide for mechanisms of enforcement, but it might not. No default method of enforcement is set out in Bill C-92 for decisions in which Bill C-92 applies.

Without further clarification, there is a risk that C-92 means that some cases could be brought in Federal Court (or, at least, that some people would try this route). For instance, decisions made under an Indigenous law could be treated as subject to judicial review in Federal Court, since a First Nation with band status under the *Indian Act* is treated by legal precedent as a "federal board, commission or other tribunal" within the meaning of s. 18 of the *Federal Courts Act* (a conclusion we disagree with, but have no control over). A First Nations child welfare agency might be similarly treated. The Federal Court system is not designed for child protection cases and is completely ill-suited for them.

[4] Arguably, it may not even need to be updated for these funding streams to be re-routed through Ontario, since they are mostly services within *CYFSA* though not exclusively.

In addition, there is some risk that even decisions made without an Indigenous law, i.e. under a mixture of *CYFSA* and Bill C-92, could end up in Federal Court due to the confusion surrounding the implications of a federal law being inserted into the child protection system. Or, decisions could end up in Ontario's Superior Court (the provincial court of inherent jurisdiction), as well as in the Ontario Court of Justice, where child protection proceedings are currently heard.

Bill C-92 should provide more clarity on enforcement to avoid derailing and delaying proceedings involving vulnerable children.

COO's Position:

- *A provision should be added saying: "(1) Unless another forum is specified in an Indigenous law, any proceedings under this Act shall proceed in the same courts in a province which normally hear child protection proceedings in that province, and matters involving the application of this Act may be heard in such courts. (2) Nothing in this Act confers any jurisdiction for child and family services proceedings to be heard in the Federal Court."*

11. Problematic definitions of "Indigenous" child, "Indigenous peoples", "Indigenous group, community or people", and "Indigenous governing body"

Bill C-92 includes the exercise of jurisdiction. Jurisdiction is a fundamental right of rights-holding Nations, i.e. peoples with the right to self-determination and self-government.

It has nothing to do with other kinds of "groups" and "communities", which are undefined here, and which could include any number of non-rights-holders, such as friendship centres, clubs and associations, diverse collections of Indigenous individuals living in the same urban area, etc.

The definitions in section 1 includes the term "Indigenous peoples" which it defines by reference to "aboriginal peoples" under s. 35 of the *Constitution Act, 1982*. That is a reasonable way to refer to rights-holding nations.

However the term "Indigenous peoples" is never really used in Bill C-92 – it is only used as part of a larger, much broader phrase: "Indigenous groups, communities or peoples". This vague, over-broad term is deeply problematic and needs to be removed throughout.

Oddly, the term "Indigenous governing body" is defined as the entity authorized to act on behalf of "an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*". By definition within C-92 itself, not to mention within the Constitution, only "peoples" hold section 35 rights. So why add in "groups" and

"communities"? The reference to other "groups" and "communities" is confusing, and suggests incorrectly that other "groups and communities" might in fact hold section 35 rights and exercise some kind of jurisdiction, contrary to the definition of "peoples".

Similarly, the definition of "Indigenous" is confusing and over-broad, saying that "Indigenous" "also describes" a First Nations person, an Inuk or a Métis person. This suggests the word "Indigenous" goes beyond First Nation, Inuit and Métis – to whom? The inclusion of First Nations, Inuit and Métis with s. 35 rights is broad enough, and already goes well beyond the typical federal role that focused on status *Indian Act* Indians on reserve.

This vagueness creates confusion for service providers and families about what laws apply to whom. There should be certainty about what laws apply to which child. The legislation needs clear, sensible definitions.

COO Position:

- *All references to an Indigenous "group" or "community" should be removed throughout Bill C-92. Non-rights-holding groups cannot and should not exercise jurisdiction. The term "Indigenous peoples", referring to s. 35 rights-holders, is sufficient and is already defined to capture the full breadth of rights-holding First Nations, Inuit and Métis.*

- *The definition of "Indigenous" (for individuals, e.g. children) should capture members of s. 35 rights-holding peoples. Going beyond that is inappropriate and would lead to too much confusion, uncertainty and unworkability in a system that needs clear direction on what laws apply to which children.*

12. Definition of "care provider" in s. 1 and related rights in ss. 10(3)(c), 12, 13, 15, 24

Bill C-92 includes the term "care provider", very broadly defined in s. 1. It then gives "care providers" a host of rights, including the right to notice, to participate as of right in proceedings (which even First Nations do not have under this Bill), to have their relationship with the child considered as part of the best interests test, to have their socio-economic circumstances considered, and to give their preferences on which Indigenous law applies to a child.

There will be unintended consequences of having so broad a term – especially if it does not clearly exclude foster parents assigned by the child protection system.

Ontario's *CYFSA* gives participation rights to "parents", which is defined in s. 74(1) for child protection and s. 180(1) for adoption. It includes a variety of people standing in the place of a

parent, including a person who demonstrated a settled intention to treat the child as part of their family during the 12 months *before* intervention. It specifically excludes foster parents.

CYFSA does not generally provide foster parents with rights to participate in proceedings, except in very limited circumstances, e.g. if a child in their long-term care is removed from the foster parent's care, the foster parent is able to challenge that.

In giving new rights to "care providers", C-92 would give foster parents rights to participate in proceedings for Indigenous children, rights that they would not have under CYFSA for non-Indigenous children. We concerned about that inequality, and its unintended consequences would not help our kids.

COO's Position:

- *The term "care provider" should be re-drafted more carefully with consideration of provincial standards, and at a minimum, should specifically exclude paid foster parents without family or community ties to the child.*

13. Unclear definition of "child and family services"

The definition of "child and family services" in s. 1 is unclear, and could be interpreted too narrowly.

Does it include adoption services? It should, in order to address the breadth of services in child welfare. But adoption is not listed in the examples after the word "including" in the definition. In Ontario, adoption is part of the *CYFSA* and all adoptions must be approved through a children's aid society or other licensed adoption agency. Reviewing potential adoptions for safety and best interests purposes is an important public service to children and families. Indigenous customary laws have dealt with adoption since time immemorial, and First Nations agencies in Ontario are already experienced in the issues involved in adoptions in a modern context. Modern Indigenous laws can and should govern adoption practices and this sector is an important part of child and family services. The current definition risks being under-inclusive.

Do "child and family services" include reunification services and post-majority transition services? We think it should. But these would probably not be included in the existing examples of "child protection services" or "prevention services" or "early intervention services". When a child, youth or young adult exits the child welfare system, at any age, they usually need significant supports to reintegrate effectively within their community and to transition to a positive adulthood. First Nations have worked for years to try to ensure supports are available

for vulnerable young people in this situation, and have recently made some gains with Ontario increasing its supports under *CYFSA* up to age 25. Bill C-92 needs to show understanding that reunification and post-majority transition services are an essential part of a child welfare system. It is no coincidence that the homeless population and prison population are full of youth and adults who were dumped out of the child welfare system without sufficient support. We can't have a system that sets kids up to fail, by intervening in their lives and then leaving them without resources.

COO's Position:

- *The definition of "child and family services", in the examples after the word "including", needs to add "adoption services", "reunification services" and "post-majority transition services" to reflect the spectrum of life-stages at which a child and family service system operates.*

14. Section 3 on existing agreements is over-broad

Section 3 says that "an agreement" between an Indigenous group, community or people and Canada or a province "that contains provisions respecting child and family services" will prevail over the Act in the case of a conflict.

While it gives examples of major agreements – "including a treaty or a self-government agreement" – the basic term "an agreement" on its face refers to <u>any</u> agreement. This is extremely broad. Most First Nations have funding agreements that deal in some way with child and family services (e.g. prevention). Would child welfare agencies be considered a First Nations' "group" under the expansive definitions? They certainly have numerous funding and other agreements on their services.

Surely the intention is not to make such a wide variety of day-to-day operational agreements prevail over this law. It would only add to the confusion about what laws apply.

COO's Position:

- *Section 3 needs more careful re-drafting for accuracy and specificity, and must explicitly exclude funding agreements*.

15. The Principles in section 9 raise more questions than answers

While substantive equality is a worthy principle, its definition in s. 9(3) is bizarre, and shows little connection to the definition of substantive equality in the *Caring Society* case, the leading case dealing with Indigenous child and family services. For a reflection of how substantive equality is defined in *Caring Society*, see the funding clause we have proposed in Annex A.

To talk about substantive equality without referring to funding for services is to miss the whole point of the story that led to this legislation in the first place. It is a strange and glaring omission. In addition, some of the examples here, such as those involving the right to be heard, touch on important issues but are not about substantive equality.

In addition, the principles on cultural continuity in s. 9(2) should be linked to best interests, and they are missing the issue of connecting a child to their Nation's land and physical territory.

COO's Position:

- *The principles in s. 9(3) on substantive equality should define substantive equality with reference to the legal test for substantive equality, i.e. the factors set out in the* Caring Society *case.*

- *The principles in s. 9(2) on cultural continuity should be linked to best interests and should also reflect a connection to land and territory.*

Concluding Comments

This legislation is too important to give up on. It needs amendments, but its aims are good. We hope the Committee looks hard at this bill to do the work needed to get it into shape.

We hope Bill C-92 is amended as indicate above, and goes forward in a better way that will actually help our efforts to support our children.

Annex A: Auditor General of Canada on the need for funding provisions in legislation

2011 June Status Report of the Auditor General of Canada, Chapter 4 – Programs for First Nations on Reserves (excerpts, underline emphasis added)

…

Lack of a legislative base. Provincial legislation provides a basis of clarity for services delivered by provinces. A legislative base for programs specifies respective roles and responsibilities, eligibility, and other program elements. It constitutes an unambiguous commitment by government to deliver those services. The result is that accountability and funding are better defined.

The federal government has often developed programs to support First Nations communities without establishing a legislative or regulatory framework for them. Therefore, for First Nations members living on reserves, there is no legislation supporting programs in important areas such as education, health, and drinking water. Instead, the federal government has developed programs and services for First Nations on the basis of policy. As a result, the services delivered under these programs are not always well defined and there is confusion about federal responsibility for funding them adequately.

…

Lack of an appropriate funding mechanism. … The use of contribution agreements to fund services for First Nations communities has also led to uncertainty about funding levels. Statutory programs such as land claim agreements must be fully funded, but this is not the case for services provided through contribution agreements. Accordingly, it is not certain whether funding levels provided to First Nations in one year will be available the following year. This situation creates a level of uncertainty for First Nations and makes long-term planning difficult. In contrast, legislation may commit the federal government to provide statutory funding to meet defined levels of service. A legislative base including statutory funding could remove the uncertainty that results when funding for services depends on the availability of resources.

…

In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations.

Annex B: Funding clause in the proposed First Nations Control of First Nations Education Act [5]

(Bill C-33, 2013-14, excerpt at ss. 43-45, underline emphasis added)

…

FUNDING

Amounts payable to responsible authorities

43. (1) The Minister must pay to a responsible authority, in respect of each school year and at the time and in the manner prescribed by regulation, the amounts determined in accordance with the methods of calculation established in the regulations for providing access to elementary or secondary education in accordance with this Act.

Methods of calculation — quality of services

(2) The methods of calculation must allow for the provision under sections 32 and 33 of services to each First Nation school and to persons referred to in section 7 attending such a school that are of a quality reasonably comparable to that of similar services generally offered in a similarly sized public school that is regulated under provincial legislation and is located in an analogous region.

Definition of "analogous region"

(3) For the purposes of subsection (2), "analogous region" means a region that is in the same province as the First Nation school in question and whose geographic and demographic characteristics are similar to those of the region in which that school is located.

First Nation language and culture

(4) The amounts payable under subsection (1) must include an amount to support the study of a First Nation language or culture as part of an education program.

Management of property

(5) The amounts payable under subsection (1) must also include an amount to enable a responsible authority to manage the property of any school that it administers.

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[5] *An Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for related funding and to make related amendments to the Indian Act and consequential amendments to other Acts*, 2nd Session, 41st Parliament, 62-63 Elizabeth II, 2013-2014, House of Commons of Canada, Bill C-33.

Agreements regarding funding

44. (1) The Minister may enter into an agreement regarding funding, including with the government of a province or an entity administering a school that is regulated under provincial legislation, if, after seeking the advice of the Joint Council, the Minister is of the opinion that the agreement is necessary for carrying out the purposes of this Act.

Amounts payable under agreements

(2) The Minister must pay to the government of the province or the entity with which he or she has entered into such an agreement the amounts specified in or determined under the agreement.

Amounts payable — agreement under section 23 or 24

(3) The Minister must pay to a responsible authority that has entered into a tuition agreement under section 23 or to the council of a First Nation that has entered into an agreement under section 24 the amounts specified in or determined under the agreement.

Maximum amount

45. (1) The aggregate amount that may be paid by the Minister under this Act in any fiscal year must not exceed the amount that is specified by order of the Governor in Council for that fiscal year. The order is made on the recommendation of the Minister with the concurrence of the Minister of Finance.

Payments out of the Consolidated Revenue Fund

(2) Any amount payable by the Minister under this Act, except under section 19, may be paid out of the Consolidated Revenue Fund.