



Congress of Aboriginal Peoples' Submission to the Standing Senate Committee on Aboriginal Peoples

Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families

The Congress of Aboriginal Peoples (CAP) is one of five National Indigenous Organizations (NIOs) recognized by the Government of Canada. Founded in 1971 as the Native Council of Canada (NCC), the organization was originally established to represent the rights, interests and needs of Métis and non-status Indians. Reorganized and renamed in 1993, CAP has extended its constituency to include all off-reserve status and non-status Indians, Métis and Southern Inuit Indigenous Peoples, and serves as the national voice for its 10 provincial and territorial affiliate organizations.

CAP has been involved in advocacy and initiatives for the well-being of Indigenous children and families throughout the organization's history, calling for adequate child and family services for CAP's constituency. At the national level, this has included the development of national studies, participation in working groups, and policy input to government. In addition, some of CAP's provincial and territorial affiliates (PTOs) run child and family focussed programming to meet the specific needs of their members.

Indigenous child welfare apprehensions are part of a continuing colonial policy, including residential schools and the 60s scoop, that seeks to separate Indigenous families, undermine Indigenous peoples and communities, and advance assimilation by negating Indigenous peoples sense of place, belonging, and home.¹ These policies have deeply and irrevocably affected CAP's constituency. CAP calls for federal and provincial program and policy that is focused on supporting and strengthening families regardless of residency and status and meets the unique needs of the growing urban, non-status and Métis populations living off-reserve.

The Statistics

- Statistics Canada data from 2016 shows that over 70% of Indigenous peoples live off-reserve.²
- The 2006 Aboriginal Children's survey shows that nearly half (49%) of off-reserve First Nations children under the age of 6 were in low income families, compared to 18% of non-Aboriginal children. For off-reserve children living in large cities, 57% were in low-income families.³
- There is a lack of up-to-date data that properly reflects the off-reserve and non-status demographics for Indigenous children and families.

¹ Christensen, Julia, "Our home, our way of life': spiritual homelessness and the sociocultural dimensions of Indigenous homelessness in the Northwest Territories (NWT), Canada", 2013, *Social & Cultural Geography*, 14 (7): 804-828.

² Statistics Canada, "Aboriginal peoples in Canada: Key results from the 2016 Census", (Published in The Daily. Catalogue No 11-001-X, 2017). Retrieved from: <<https://www150.statcan.gc.ca/n1/dailyquotidien/171025/dq171025a-eng.htm>>.

³ Statistics Canada, "First Nations Children living off reserve", Aboriginal Children's survey, 2006. (Fact Sheet No.1. Catalogue No 89-634-x, 2017).

- There is also insufficient data on the number of Indigenous children in care in Canada. This is not coincidental. Some provinces refuse to provide or track data and where provinces that do collect data, overrepresentation is clear. In Manitoba, 90% of children in care are Indigenous, amounting to 10,552 children.^{4,5} In Saskatchewan, there are 5,930 Indigenous children in care.⁶ In British Columbia, one in five Indigenous children are involved in child welfare services in their lifetime.⁷

Bill C-92

On February 28, 2019, the Minister of Indigenous Services, Seamus O'Regan introduced *Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families*⁸ outlining a federal vision for Indigenous child welfare across the country. The following summary represents CAP's positions on the legislation:

1. Co-development Process

Bill C-92 was co-developed with only three National Indigenous Organizations: the Assembly of First Nations, Métis National Council (MNC) and Inuit Tapiriit Kanatami.⁹ CAP's exclusion from this co-development process is a critical oversight because the legislation appears to seek to address the needs of peoples who are constituents of CAP: off-reserve First Nations, Métis, and Inuit.

Since CAP's exclusion from the 2018 Emergency Meeting on Indigenous Child and Family Services hosted by the federal government, we have repeatedly requested to be involved in the development of child welfare legislation and programming with Indigenous Services Canada. Prior to the January 2018 meeting, between 2016-17 CAP actively participated on the Federal, Provincial, Territorial and Indigenous Forum (FPTIF) Working Group on the "Underlying Principles in Addressing Children in Care". This participation indicates CAP is considered an essential organization for determining policy and programming for Indigenous children. The process aimed to identify solutions to the over-

⁴ Manitoba, "Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth Report of the Legislative Review Committee", 2018. Retrieved from:

https://www.gov.mb.ca/fs/child_welfare_reform/pubs/final_report.pdf

⁵ Healthy Child Manitoba, "Child and Youth Report", 2017. Retrieved from:

https://www.gov.mb.ca/healthychild/publications/hcm_2017report.pdf

⁶ Canadian Child Welfare Research Portal, "Saskatchewan's Child Welfare System", 2014. Retrieved from:

http://cwrp.ca/sites/default/files/publications/en/SK_final_infosheet.pdf

⁷ Aboriginal Children in Care Working Group, "Aboriginal Children in Care: Report to Canada's Premiers", 2015.

Retrieved from:

<https://fncaringsociety.com/sites/default/files/Aboriginal%20Children%20in%20Care%20Report%20%28July%202015%29.pdf>

⁸ *Bill C-92: An Act respecting First Nations, Inuit and Métis children, youth and families (2019)*. First Reading Feb 28, 2019, 42nd Parliament, 1st Session. Retrieved from:

<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10344307>

⁹ Government of Canada, with First Nations, Inuit and Métis Nation leaders, announce co-developed legislation will be introduced on Indigenous child and family services in early 2019. Indigenous Services Canada, Nov 30, 2018.

Retrieved from: <https://www.newswire.ca/news-releases/government-of-canada-with-first-nations-inuit-and-metis-nation-leaders-announce-co-developed-legislation-will-be-introduced-on-indigenous-child-and-family-services-in-early-2019-701636712.html>

representation of Indigenous children in child welfare systems across Canada, and fully address the gaps in the programs and services of Indigenous children and youth in care, including off-reserve children.

The federal government has not heard from CAP as the national representative for off-reserve peoples on Bill C-92. In our view the government have not taken into consideration the unique needs of off-reserve and non-status Indigenous families and critical gaps remain. As a result, the legislation and associated programming will not go far enough to reduce the chronic overrepresentation of Indigenous children in care and may further marginalize some children and families.

CAP advocates for the federal government to undertake an inclusive consultation process on the design of the child and family services legislation that will impact all Indigenous children and families.

2. Preamble

In the preamble of the legislation it affirms the need “to enact legislation for the benefit of Indigenous children, including First Nations, Inuit and *Métis Nation* children” [emphasis added].¹⁰

Clarification is needed on the purpose of the federal government’s use of the term “Métis Nation”. CAP is concerned that this a reference to only persons who are registered members of the MNC as descendants of the Red River Métis in the western provinces. As 2016 Statistics Canada data shows, many Métis peoples live across Canada with 20.5% of the total Métis population in Ontario, 11.8% in Quebec, and 7.2% in the Atlantic provinces¹¹.

CAP demands that the federal government create inclusive legislation that addresses the needs of all Métis peoples of Canada, including those residing in the eastern provinces, some of whom are members of CAP’s provincial and territorial affiliate organizations.

3. Definitions

In Bill C-92 under Section 1 Interpretation several definitions are included:

Indigenous, when used in respect of a person, also describes a First Nations person, an Inuk or a Métis person.

In 2016 the Supreme Court of Canada unanimously affirmed in *Daniels v Canada* that Métis and non-status Indians are Indians under section 91(24) of the Constitution Act, 1982.¹² The government must acknowledge their responsibility to legislate for and fiduciary duty to Métis and non-status peoples as affirmed in the Daniels decision. **CAP submits that persons who are “non-status Indians” be explicitly included in this definition so as to benefit from responses to their specific needs as Indigenous persons of Canada.**

Indigenous governing body means a council, government or other entity that is 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.

¹⁰ Bill C-92, page 2 at para 15.

¹¹ Aboriginal peoples in Canada: Key results from the 2016 Census, Statistics Canada, Oct 25, 2017. Retrieved from: <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>

¹² Daniels v. Canada (Indian Affairs and Northern Development, 2016 SCC 12 [Daniels SCC]

Clarification is needed on the government's definition of an Indigenous governing body. CAP and its PTOs are recognized by government as Indigenous representative organizations and representatives for Section 35 rights-holders, yet were excluded from the co-development process.¹³ It is unclear whether these organizations would be eligible to engage in the provision of child and family services under the legislation and be given meaningful opportunity to collaborate in the policy development that would be undertaken if the legislation passes.

Further, clarification is also needed on the distinct roles of an Indigenous governing body and that of service providers, to ensure independent service provision to families in need.

Indigenous peoples has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the Constitution Act, 1982.

CAP believes that the government must adhere to the definition of Aboriginal peoples as defined in the Constitution in its development of legislation, program and policy for "Indigenous peoples". Section 35 of the Constitution Act, 1982 provides, "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit, and Métis peoples of Canada".¹⁴ The definition therein extends to CAP's constituency. **CAP submits that the government must uphold the honour of the Crown and cease in developing legislation that will impact our peoples without adequate and meaningful consultation.**

4. Principles - Best interests of child

Sections 9 (1) and 10 refer to the concept of the "best interests of the child", which has been a leading concept in child welfare for some time. However, the genealogical foundations of this concept are deeply rooted in the colonial child welfare system. **CAP submits that legislation should provide for Indigenous laws to determine the definition and limits of this concept.** As culturally defined by a nation or community, this concept must also allow consideration of the needs of the community as a collective entity beholden with the responsibility of ensuring continuity of their culture.

5. Provision of Child and Family Services – Socio-economic conditions

Section 15 on Socio-economic conditions lacks recognition of the broader colonial policies and limits the consideration of additional structural biases and impacts that should be determined by Indigenous peoples because of their own experiences of colonialism, such as the over representation of adult parents in prisons. It also absolves all Canadian governments of responsibility for both the design and persistence of these conditions through structural discrimination and chronic under-funding. This section should include a requirement for federal action and proactively address the precarity that Indigenous children face.

¹³ CAP notes that in the Canada and the Congress of Aboriginal Peoples Political Accord signed on December 5, 2018 with the federal government it explicitly recognizes that "the Congress is a national representative organization whose PTO memberships can and do include some rights-holding Indigenous peoples". Canada and the Congress of Aboriginal Peoples Political Accord, 5 Dec 2018, Retrieved from: <http://www.abo-peoples.org/wp-content/uploads/2019/02/Political-Accord-ENG.pdf>

¹⁴ See Report of the Royal Commission on Aboriginal People: Perspectives and Realities, vol 4 (Ottawa: Supply and Services Canada, 1996) at 244 (Harry W. Daniels, who was instrumental as president of the Native Council of Canada, in negotiating the inclusion of section 35(2) in the Constitution Act, 1982, contends that it was intended to cover all Métis people and non-status Indians, regardless of where they lived in Canada).

For example, in addition to the existing text, this section may include content to the effect of: “the child must not be apprehended solely on the basis or consequences of colonial and structural discrimination and intergenerational harm which are defined by the Indigenous community and which are the responsibility of the federal government to redress. The federal government must make every effort to address the consequences of harmful colonial policies that are impacting the community, Nation, family, or child before apprehension is considered.” **CAP submits that the underlying structural context of the socio-economic conditions experienced by Indigenous families must be acknowledged in this section and proactive actions be undertaken to redress inequities.**

CAP notes that off-reserve and non-status Indigenous peoples are amongst the most socially and economically disadvantaged groups in Canadian society,¹⁵ an unfortunate reality deeply rooted in colonialism and its impacts. At the Federal Court of Appeal in *Daniels v. Canada*, Justice Phelan left the Federal Court’s findings of fact undisturbed and acknowledged that the consequences “produced a large population of collaterally damaged people...” as a result of being “deprived of programs, services and intangible benefits recognized by all governments as needed.”¹⁶ As part of document disclosure in the *Daniels* trial, a 1972 confidential memo to Cabinet showed that Canada was well aware that Métis and non-status Indians are “far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are they are the most disadvantaged of all Canadian citizens.”¹⁷

6. Substantive Equality

Section 3 (a-e) aims to ensure substantive equality between Indigenous and non-Indigenous children and includes clauses addressing the child’s rights and freedom from discrimination. This section does not go far enough to the roots of inequities experienced by our constituents.

In CAP’s view this concept of substantive equality must extend to adequate resourcing, and resourcing that is inclusive. Substantively equal resourcing must address Métis and non-status Indian inequalities and needs aggravated because of this neglect – this is especially urgent where those impacted by such inequalities and neglect are children. This includes a meaningful and diligent implementation of the *Daniels* decision, ending the structured exclusion of CAP’s constituency that has divided families and communities.

The federal history of limiting programs to status or on-reserve Indians have reinforced existing divisions and disadvantage. Non-status and Métis families who may be accessing off-reserve and urban child and family services continue to be marginalized and can face discrimination in accessing these services. In addition, barriers to attendance and access to prevention services must be considered. All First Nation children should be able to access services as needed, free from adverse discrimination. **CAP thus advocates for full resourcing, and a reorientation of child family services around families in CAP’s constituency, refocusing on community-based programs for new parents and families at risk.**

¹⁵ See *Daniels v Canada* (Minister of Indian Affairs and Northern Development), 2014 FCA 101 at para 70, 371 DLR (4th) 725 [Daniels FCA].

¹⁶ *Daniels FCA* at para 70.

¹⁷ *Harry Daniels. Gabriel Daniels, Leah Gardner, Terry Joudrey and the Congress of Aboriginal Peoples v Canada* (The Minister of Indian Affairs and Northern Development and the Attorney General of Canada), at para 84, 2013 FC 6, at para 84.

7. Placement of Indigenous Child

The inclusion of Section 16.1. (e) allowing the placement of Indigenous children "with any other adult" should be qualified. This inclusion is concerning as it does not stipulate any requirements regarding continuity of connection with their community, culture, or necessitate cultural-sensitivity requirements for the placement of Indigenous children with non-Indigenous adults. Though it may be implied that First Nations, Métis, and Inuit child and family service providers will make every effort to ensure a culturally safe space for Indigenous children, this provision should be clearly stated.

8. Jurisdiction — Child and Family Services

Section 18 (1) the Bill establishes the potential for Indigenous governing bodies to have an opportunity to work with provinces to take over jurisdiction. It is not clear what the implications are for non-status, off-reserve peoples and Métis with origins across Canada. For example, for a Métis child living in the Ottawa area, what are the implications if the child and their family are not registered members of the MNC and belong to an urban Indigenous community? Will they be afforded adequate, appropriate, and culturally-responsive child and family services? It is also unclear whether jurisdictional challenges will be created between provincial/territorial service providers and Indigenous governing bodies for "non-affiliated" families and how they will be addressed. Clear procedural requirements for the referral of off-reserve, non-status First Nations, Métis, and Inuit children and families to appropriate Indigenous child welfare agencies should be outlined in this legislation.

Children and families living off-reserve may be disadvantaged in accessing services available from their Nation. Legislation should require provincial, territorial, and federal services that come into contact with children and families in need to inform the appropriate Indigenous child and family services. The onus of this process should lie with the service provider, not the family or child. **CAP recommends that full consultation with these affected communities is required to meet the specific needs of all Indigenous children and youth regardless of residence, status or political affiliation.**

9. Agreements — Information

Section 28 (a) refers to agreements with provinces and Indigenous governing bodies regarding the collection, retention, use and disclosure of information respecting the child and family services and to "ensure that Indigenous children are identified as Indigenous".

This is an area that requires further input and full consultation with off-reserve and non-status communities, because of the ongoing lack of recognition of these peoples by provincial and federal governments, and some Indigenous bodies. The lack of identification must not further marginalize those who are non-status, Métis or living in urban and rural settings across Canada.

All child welfare agencies should be required to collect data on Indigenous children, youth and families (regardless of status or residence) that are involved with or referred to their agencies.¹⁸ As the intent of

¹⁸ There is a critical lack of data on the number of Indigenous children in care in Canada. Federal documents often refer to the findings of the 2011 National Household Survey. This study reports only 11,700 First Nation children in foster care under the age of 14 nationally (of which 1,800 are non-status and 7,400 live off-reserve) and 1,800 Métis children under 14 living in foster care. Sources indicate this data is unreliable in the context of some province's data that well exceed these estimates. Statistics Canada, "Living arrangements of Aboriginal children

information gathering in this section is intended to be support the improvement of services, CAP also stresses the need for the improvement of services for our constituency that would be grounded in accurate data collection.

10. Funding

The bill fails to make the federal government legally required to fund Indigenous child and family services to an adequate level. There are also no clear obligations for federal program or dedicated funding to meet current gaps for off-reserve, non-status and Métis populations. **CAP recommends that a number of funding concerns must be directly addressed within the legislation** such as:

- Funding for Indigenous organizations to develop child welfare legislation, expertise, and resources. This should also include funding for Indigenous organizations to work with and learn from existing First Nations, Métis, and Inuit service providers;
- Funding for kinship care arrangements, including comprehensive support beyond monthly allowances;
- Funding for off-reserve resources for First Nations, Métis, and Inuit child and family service providers who are in the process of developing resources within their community; and,
- Funding for First Nations, Métis, and Inuit child and family service providers to provide continuous care and services to children and families who relocate and to maintain continuity of care through supported arrangements with other child and family service providers.

Conclusion

Bill C-92 continues the cycle of the federal government creating legislation that will affect our peoples, without their voices, and constrains Indigenous child and family services within a colonial system. This brief submission outlines perspectives relevant to off-reserve, Métis and non-status Indigenous peoples that are often marginalized with substandard funding and excluded from services. It is our submission that a full consultation must be undertaken by the federal government on this legislation to meaningfully address the overrepresentation of Indigenous children in care, and a solution must be crafted that ends the structured exclusion of CAP's constituency from much-needed child and family services.

aged 14 and under", (Published in Insights on Canadian Society, April 13, 2016). Retrieved from: <https://www150.statcan.gc.ca/n1/pub/75-006-x/2016001/article/14547-eng.htm>.