Preliminary Briefing Sheet

Bill C-92

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

March 9, 2019

Background

For decades, First Nations have called for the recognition of First Nations jurisdiction in child welfare coupled with adequate needs-based funding. These recommendations are echoed in a plethora of reports including, but not limited to, the Royal Commission on Aboriginal Peoples (1996), the Joint National Policy Review (2000), and the Wen:de Reports (2005). The Truth and Reconciliation Commission of Canada (2015) listed the full and proper implementation of Jordan's Principle and child welfare reform, including the setting of national standards and data collection mechanisms, as its top Call to Action. Bill C-92 is Canada's response to these calls, however, it presents an "Indigenous" rather than a First Nations specific legislative approach.

In 2007 the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) filed a human rights complaint under the *Canadian Human Rights Act* against Canada alleging its funding for First Nations child welfare and failure to properly implement Jordan's Principle was discriminatory. Before the Canadian Human Rights Tribunal issued its decision in 2016 substantiating the complaint, Canada brought eight failed motions to get the case dismissed and was found to have breached the law on three occasions. Since 2016, the Canadian Human Rights Tribunal (CHRT) has issued multiple non-compliance orders against Canada and more are possible as hearings continue. While there have been increases in funding for First Nations child and family services and Jordan's Principle over the past two years, these advances are directly tied to the CHRT orders.

Important to this legislation, Canada has refused to adopt the 'Spirit Bear Plan to end all inequalities in public services for First Nations children, youth and families' and has no proposal of its own to end inequalities. This means that there are no assurances that the issues that drive the over-representation of First Nations children in child welfare care will abate (i.e. poverty, poor housing, substance abuse related to inter-generational trauma and domestic violence).

Limitations

This briefing sheet provides a summary of the key elements of Bill C-92 and identifies important considerations for those in leadership, child and family service experts and legislators. There was very little time to prepare this document and thus, it should be regarded as a preliminary draft until further analysis is possible. The sheet begins by listing key themes requiring consideration before reviewing Bill C-92 by section. We are grateful to the legal experts who contributed to this document but this does not represent legal advice.

Bill C-92: Thematic Considerations

Jurisdiction: Section 18 reads "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority to administer and enforce laws made under that legislative authority." Section 18 (2) notes that this authority includes authority to provide for dispute resolution mechanisms.

While encouraging, these sections must be read together with Sections 4, 10, 19, 23 and 32 that all include provisions that could infringe on First Nations jurisdiction. For more precision:

Section 4: Minimum standards. The general nature of the principles in the Bill means First Nations laws could be challenged for non-compliance with the principles. It is important to understand that while best interest of the child, cultural continuity and substantive equality are all listed as "principles" in the act; substantive equality and cultural continuity are diminished by the primacy afforded by "best interests" of the child afforded in Section 10.

Section 10: Best Interests of the Indigenous Child. Gives primacy to "the best interests of the child" without adequately considering how the jurisprudence on best interest that is framed by western experience.

Section 19: Charter. Applies the Charter of Rights and Freedoms to First Nations jurisdiction.

Section 23: Exceptions. Allows for the infringement or limitation of First Nations laws "if the application of the provision [of Indigenous law] would be contrary to the best interests of the child." The section is absent on who makes the determination and how.

Section 23: Federal Law Provides that sections 10-15 will prevail over First Nations laws that do not comply with the principles in those sections.

Section 32: Regulations Gives the federal Cabinet broad authority over the application of Bill C-92 and "respecting the provision of child and family services in relation to Indigenous children." Given the general nature of the principles in Bill C-92, the federal Cabinet may use regulation-making power to limit First Nations jurisdiction. The requirement that First Nations governing bodies can be "afforded a meaningful opportunity to collaborate" is vague. It is also unclear who will determine whether a meaningful opportunity to collaborate has been provided or not.

Interpretation and enforcement:

Overarching questions about the Bill are: who interprets the Bill, what are the principles and processes guiding that interpretation, and how is it enforced?

Absent affirmation of, and funding for, First Nations legal systems and courts, it appears mainstream courts will interpret the Act. This will effectively mean that terms like best interests will be determined be mainstream courts.

The vague nature of the Bill heightens the need for clarity on these points particularly given the lack of funding and the inclusions of sections that could truncate First Nations jurisdiction.

Funding: Funding is essential to the realization of First Nations jurisdiction and there is nothing in Bill C-92 that binds the federal government to provide needs-based and substantively equal funding that would support First Nations jurisdiction in this Bill. The only mention of funding in Bill C-92 is in the non-binding preamble and as a possible agenda item for the "coordination agreements" (Section 20 (2) (c)).

There is currently no policy or agreement to provide funding for First Nations jurisdiction in child welfare. To the contrary, the Terms and Conditions for federal funding for on-reserve child and family services specifically references provincial delegation or designation as a condition for providing services beyond prevention. Coordination agreements propose a negotiation of "fiscal arrangements" within the 1-year time frame yet the parties at the Canadian Human Rights Tribunal have spent 12 years trying to achieve equitable funding for First Nations child and family services and the litigation is ongoing. This Bill provides little protection for the hard-won gains at the CHRT nor does it include Jordan's Principle, which is currently benefiting tens of thousands of First Nations children.

Sections 32 (1) and 34 (1) only require Canada to provide a "meaningful opportunity to collaborate" on regulations. This is a very low threshold and it is not clear how First Nations could successfully challenge not being given a "meaningful opportunity to collaborate" on key issues like funding should it, or items giving more precision to the "coordination agreements," be included in the regulations.

It is unclear if the Bill anticipates provincial/territorial funding for off reserve citizens and if so what could bind the provinces/territories to funding that portion.

Framing: Overall, the Bill focuses on the reduction of over-representation of First Nations children in care within an incomplete frame of western child welfare concepts. In addition to focusing on incomplete standards, Bill C-92 fails to provide and guarantees regarding funding to ensure the standards adopted are met. This could restrict more holistic First Nations laws that reflect a non-segmented approach to child wellbeing that includes education, recreation and play, and basics like water, housing, sanitation and food, and is situated within the context of community and in broader contexts of time and space (i.e.: the 7 generations concept). There is also no reference to the land as a sacred underpinning of child's best interests or cultural continuity. While the section 15 (socio-economic conditions) may be an attempt to recognize the importance of these factors, unless funding is provided to address the inequities then this section will have little impact.

Complementary laws: Current child and family service laws act in relationship with other laws governing children such as public trustee acts, coroner's acts, child and youth advocate acts. Bill C-92 does not explicitly provide the support for First Nations to exercise jurisdiction in these related areas.

Lack of developmental or remedial measures: Section 20 says that if a collaboration agreement is not reached after one year the First Nations law takes effect. There are no safeguards to ensure the foundations for effective child and family service jurisdiction such as community consultation, First Nations laws, governance, programs, staffing, dispute and evaluation mechanisms are in place before the one year time period expires or in the absence of an agreement, when the First Nations law is enacted. The bill is bereft of the funding and supports many First Nations will require in order to develop and implement a solid foundation for success.

Another issue is that the bill anticipates a 100% success rate in the transition to First Nations jurisdiction. While many will be successful, the absence of key elements such as regional and national technical support/data collection and developmental/operational funding will likely impede the goal of universal success. Bill C-92 provides no safeguards to ensure continuity of service should a First Nation experience difficulty in child and family service design/provision in whole or in part. The Bill should incorporate regional and national First Nations technical bodies that could assist First Nations with child and family service capacity building and provide peer support in the event a First Nation experiences some difficulties in service delivery.

Bill C-92: Section by Section Review

Preamble (non-binding)

Includes references to UNDRIP, UNCRC and ICRD and acknowledges an "ongoing call for funding" as well as important recognitions of Indigenous women and girls, LGBTQ2S+ persons and the effects of inter-generational trauma. The international human rights treaties and UNDRIP are not mentioned in the binding section of the Bill and the only reference to funding is in the context of "coordination agreements."

While gender diversity is acknowledged in the preamble, the text in the binding sections continues to use him/her or his/her language that is not inclusive.

Definitions

This is a key section for the interpretation of the Act. There are no definitions for: child, parent(s), types of maltreatment that could trigger non-voluntary CFS involvement, post-majority care or other key elements like cultural continuity and substantive equality.

Sections of the Bill

Section 4: Minimum Standards

Reads "[F]or greater certainty, nothing in this Act affects the application of a provision of a provincial Act or regulation to the extent that the provision does not conflict with, or is not consistent with, the provisions of this Act."

It is not clear how conflicts or inconsistencies with provinces on what is, or is not, consistent with Bill C-92 or First Nations or Indigenous legislation will be resolved.

Section 7

Specifies that the legislation is binding on the federal and provincial Crown but does not reference territories.

Section 8 (b)

Reads “set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children.”

There is no clarity in the Bill as to what court will interpret these principles and determine if Indigenous legislation is compliant with them. This likely means that any conflicts between First Nations laws and provincial/territorial and federal laws will be resolved in Canadian courts.

Section 9 Principles

This section enumerates the principles of the Bill: best interests of the child, cultural continuity and substantive equality.

Section 9 (1) Best Interests of Child. The criteria for “best interests of the child,” are general and open to interpretation. This is important given the primacy the Bill provides for best interests, particularly in relation to jurisdiction (see section 23 below).

Section 9 (2) Cultural Continuity

There is no reference to the sacred relationship Indigenous children have with the land and territories of their ancestors.

Section 9 (2) (c) reads “a child’s well-being is promoted when...” This section could be strengthened by saying the “child’s best interests are promoted when…”

Section 9 (2) (d) Reads “child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or the destruction of the culture of the Indigenous group, community or peoples;” This section is written in the negative versus affirmative tense and thus, it imposes no positive obligations on the State or anyone else to ensure this is upheld.

Section 9 (2) (e) Reads “the characteristics and challenges of the region in which a child, a family or Indigenous group, community or people is located are to be considered.” There is no weighting of the cultural and community factors meaning it is unclear how they would be applied on the ground or in the context of the trumping by “best interests of the child.” This section is also the only one that appears to hint at First Nations children living off reserve in urban centers. The Act does not properly consider how these children will be addressed.

Overall, the cultural continuity principles outlined in s. 9(3) are diminished by the primacy of “best interests of the child” per Section 10 (1).

Section 9 (3) Substantive Equality

9 (3) (a) is specific to a “child with a disability” and it is not clear why children of other diversities that invoke some disadvantage were not included (i.e.: children with long term illnesses, mental health issues, LGBTQ2S+ children, girls, etc.) While this is addressed in part 9 (3) (b) it is not clear why children with disabilities were not enumerated in this section instead.

The problematic nature of limiting definitions so narrowly was also seen in Canada’s discriminatory approach to Jordan’s Principle which was also limited to children with disabilities.

Section 9 (3) (e) reads “in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a

gap in the child and family services that are provided in relation to Indigenous children." This appears to be a reference to Jordan's Principle but narrows the CHRT and Federal Court rulings on Jordan's Principle in that the Federal Court made clear that jurisdictional disputes are not required to trigger Jordan's Principle and the CHRT adopted the Federal Court's position and added that Jordan's Principle is not limited to "gaps" in services. Instead, the CHRT ruled that Jordan's Principle must address the child's needs, best interests, substantive equality considerations (including historic disadvantage) and the child's culture and context.

Overall, the substantive equality principles outlined in s. 9(3) are diminished by the primacy of "best interests of the child" per Section 10 (1).

Section 10 (1) Best Interest of the Indigenous Child

reads "[T]he best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child, and in the case of decisions or actions related to child apprehension, the best interest of the child must be the paramount consideration."

"Apprehension" is a dated word and should be replaced by the word "removal" or the phrase "placed in alternative care."

Section 10 (2) Primary Consideration

This section gives primacy to best interests of the child and later in the Bill (Section 23), it is made clear that Indigenous laws can be overcome by a determination that something is not in the best interests of the child. Moreover, provincial/territorial acts require a child's safety to be at risk to trigger non-voluntary interventions, however, this section provides no such threshold suggesting that a host of reasons framed as best interest could trigger involuntary child and family services intervention. This possibility is amplified by the lack of maltreatment definitions in the Bill.

The "must" give primacy to best interests also diminishes the importance of the other principles, namely "substantive equality" and "cultural continuity."

Section 10 (3) Factors to be considered

While this section includes important considerations for First Nations children such as culture, language and relationship to family, and sets out the placement preferences for children in care, the only direction in the act is to "consider" of the factors. It is unclear what weight 10 (3) a-h will be given in light of 10 (2).

Sections 12 Notice and 13 Representations and party status

It is unclear what standing an Indigenous representative group will have in a dispute. What is the mechanism for giving such groups full standing if the family or caregiver or other interested party disputes a decision? It is also not clear what the relationship is between the "Indigenous governing body" set out in Section 13 to the "Indigenous groups, communities and peoples" in Section 20.

Section 14 (1) Priority to preventative care

This section will be most profoundly impacted by funding agreements reached per the sections on "coordination agreements or the "regulations." There are already provisions in every provincial/territorial child welfare law that give primacy to prevention. The problem has been with the unavailability of those services or the lack of culturally appropriate services. Despite the CHRT finding Canada underfunds prevention in First Nations child and family services

and the related orders to Canada to ensure prevention services are provided, this Bill is silent on the principles, mechanisms and dispute resolution processes to be used to ensure adequate funding.

The title of this section should be changed to Priority to Preventative Services to more closely tie to the CHRT orders.

Section 14 (2) Prenatal Care

This section is poorly worded and it is not clear what it is aiming to achieve, particularly as there is no positive duty on the federal government to ensure adequate funding for child and maternal health and infant development.

Section 14 (3) Socio-economic conditions

This section appears to acknowledge the structural drivers of child maltreatment without imposing any positive obligation on the Canadian state to redress the inequalities that deepen those drivers, namely poverty, poor housing, addictions related to multi-generational trauma and domestic violence. The absence of this commitment will fetter more holistic visions of child wellbeing in First Nations laws. It is particularly concerning given Canada's refusal to adopt and properly implement the Spirit Bear Plan to redress all inequalities in First Nations services and reform the federal government's relationship with First Nations and their children.

Similar to the preventative services section, no provincial/territorial child welfare law allows for removal based on "poverty." Instead it is an under-current to neglect. In the United States, 21 States and the District of Columbia include provisions that impose positive duties on the state to ameliorate poverty as a factor in the determination of a child being at risk. While the efficacy of these provisions is contingent on the level of funding provided to actualize them, such provisions at least acknowledge that the need for positive measures be taken to address poverty.

Section 16: Placement of Indigenous children

It is not clear how Indigenous children placed with non-Indigenous family members will receive the supports necessary to promote cultural continuity. It is also not clear what supports will be provided to family members to care for children with special needs.

*There is also no provision in the Bill for post-majority care or reunification of children already in care.

Section 17: Attachment and Emotional Ties

Reads "[I]n the context of providing child and family services in relation to an Indigenous child, if the child is not placed with a member of his or her family in accordance with paragraph 16 91)(a) or (b), to the extent that doing so is consistent with the best interest of the child, the child's attachment and emotional ties to each such member of his or her family are to be promoted."

This is a highly qualified section that makes it difficult to know how attachment and emotional ties would get any particular recognition. For example, what if the child is placed in accordance with Sections 16 1 (a) and (b) but the parent or family with whom the child is placed is non-Indigenous?

Section 18 (1): Affirmation

Reads "[t]he inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that

legislative authority."

This section should be read in tandem with Sections 4, 10, 19, 22(1), 23 and 32 which all include provisions that could limit or infringe on First Nations jurisdiction. Furthermore, a lack of funding will disable the development and provision of First Nations laws and the administration of disputes provided for in Section 18.

For a further explanation of how Section 18 could be constrained or limited please refer to the Thematic Considerations section of this briefing sheet.

Sections 20-21 Coordination agreement and Force of Law

The provision provides for "coordination agreements" that could provide for funding but there is nothing to redress imbalances of power, nothing that requires consultation and negotiation, no guarantees that federal and provincial/territorial governments will conduct such "negotiations" in good faith for the agreements to be concluded within one year. While the section provides that should a coordination agreement not be reached, the First Nations law is enacted, the law could practically be rendered mute due to the lack of a funding agreement.

Sections 22 and 23 Conflict – federal and provincial laws. While on first reading it may appear that First Nations laws are given supremacy so long as they conform to the *Canadian Human Rights Act* and the *Constitution Act*, Section 23 enables First Nations laws to be infringed if there is a determination that a provision is not in the best interests of the child. Again, this is key particularly given that the Act is not particularly clear on what body will interpret the Act and best interests in particular.

While safety of children should be safeguarded, the First Nations draft offers improved wording in that regard.

Section 23 further provides that sections 10-15 of Bill C-92 will prevail over First Nations laws that do not comply with the principles in those sections.

Section 32 (1): Regulations Reads "[i]f affected Indigenous governing bodies were afforded a meaningful opportunity to collaborate in the policy development leading to the making of the regulations, the Governor in Council, may make regulations providing for any matter relating to the application of this Act or respecting the provision of child and family services in relation to Indigenous children." There is no definition as to what "meaningful opportunity to collaborate" is, nor is there any jurisprudence to guide such an interpretation. What seems clear from this section is that it is the federal government's determination of "meaningful opportunity to collaborate" that will stand as it will be very difficult for First Nations to challenge such nebulous wording in court. It also seems clear that First Nations will not draft the regulations despite the significant ramifications said regulations could have on their jurisdiction and ability to enact that jurisdiction.