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The Promise and Pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families

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The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families

JULY 4, 2019

Yellowhead Institute generates critical policy perspectives in support of First Nation jurisdiction. The Institute is a First Nation-led research centre based in the Faculty of Arts at Ryerson University in Toronto, Ontario. Privileging First Nation philosophy and rooted in community networks, Yellowhead is focused on policies related to land and governance. The Institute offers critical and accessible resources for communities in their pursuit of self-determination. It also aims to foster education and dialogue on First Nation governance across fields of study, between the University and the wider community, and among Indigenous peoples and Canadians.



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INTRODUCTION

On June 21, 2019, Bill C-92 *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families* became law. The Bill is a huge and unprecedented step forward in Canada. It is the first time the federal government has exercised its jurisdiction to legislate in the area of Indigenous child welfare.

The purposes of the Bill is to recognize Indigenous People's jurisdiction over child and family services, as part of an inherent and Aboriginal right to self-governance; to establish national standards in this area, in response to the TRC's Call to Action #4; and to contribute to the implementation of UNDRIP.

For generations, Indigenous leaders across Canada have been asserting and advocating for recognition that Indigenous peoples have the inherent right to care for Indigenous children.

As the late great Cree leader Harold Cardinal states in his 1963 book, "The Unjust Society":

"As a matter of fundamental principles, Canadians should recognize and accept the fact that First Nations and First Nation Families possess and are entitled to possess the primary and sole authority to decide what is in the best interest of their children. The principle should be reflected in legally enforceable fundamental rights and protections for First Nation children - rights and protections binding upon all levels of government, including First Nation governments. The principle, should, at its core, recognize First Nation children possess the God-given birthright to grown up as First Nation persons, to be raised in their own languages and their own cultures and their own traditions. If Aboriginal and Treaty rights do not mean at least these things, what do they mean?"¹

There have been untold and countless sorrows, losses and tragedies rooted in Canada and the provinces denying or ignoring Indigenous peoples' jurisdiction, to the detriment of generations of Indigenous children, youth, families and communities. Non-Indigenous

courts, provinces and agencies have recently started to recognize these harms as harms.² It is inarguable that these harms continue, with more Indigenous children living out of family care than there were at the height of residential schools.³

The ground-breaking recognition and fundamental shift Bill C-92 represents is necessary, and long overdue. The question remains, as it passes into law, is it sufficient?

In March 2019, we published *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: Does Bill C-92 Make the Grade?*, raising a number of serious concerns with the proposed bill. Following this, two of us (Professor Metallic and Dr. Friedland), gave evidence before both the House of Commons and the Senate Standing Committees on Aboriginal Peoples in early May. The testimony resulted in some amendments to Bill C-92 that were ultimately passed by the House of Commons. We continued to have concerns that these changes did not go far enough and wrote the Senate to suggest further amendments. The Senate did propose further amendments; however, the majority of these were rejected in the House of Commons' final vote on the bill.

While the Senate did not insist on their amendments, we imagine they were forced to ask that familiar question: is this Bill not better than the status quo ?

As Cindy Blackstock put it: "Bill C-92 offers Indigenous children a colonial Faustian bargain: Accept the flawed bill in its current state or get nothing."⁴

¹ Harold Cardinal, *The Unjust Society* (BC: Douglas and McIntyre, 1963/1999).

² See, for example, *Brown v Canada* (Attorney General), 2017 ONSC 251. Manitoba was the first province to issue an official apology for the harms of the Sixties Scoop in 2015 (para. 8). Other provinces and organizations have started to acknowledge and apologize for the harm caused by these practices. See, for example, Alberta's historic apology to Sixties Scoop survivors, issued in May, 2018 by Premier Rachel Notley: <https://www.alberta.ca/release.cfm?xID=5602290F38FE0-B9A4-A910-A0FA25640F0A9EDB> and the Ontario Association of Children Aid Societies apology: "Ontario Children's Aid Societies apologize for harm done to Indigenous Peoples" CBC News, October, 6, 2017, online: <https://www.cbc.ca/news/canada/thunder-bay/sixties-scoop-cas-apology-1.4343325> [Ontario Sixties Scoop Apology].

³ *First Nations Child and Family Caring Society of Canada et. Al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2, para. 464 [Caring Society].

⁴ See Cindy Blackstock, June 6th, 2019: <https://www.theglobeandmail.com/opinion/article-will-canada-continue-to-fail-indigenous-girls/>

So where does this leave Indigenous peoples?

In this article, we identify both the improvements in Bill C-92 since our last report as well as key problems that remain in the five following areas:

- 1) National Standards
- 2) Jurisdiction
- 3) Funding
- 4) Accountability
- 5) Data Collection

We also suggest strategies to assist Indigenous communities in trying to work with the new law.

1. NATIONAL STANDARDS & BEST INTEREST OF THE CHILD

The National Standards set a floor, not a ceiling, and if implemented may make a difference in the lives of some Indigenous children and families currently involved in provincial child welfare systems.

As written, good hearted and good minded decision makers could make a positive change to the status quo for many Indigenous children. However, it is also entirely possible to maintain the status quo in almost all circumstances, especially for those children currently in the system.

We were pleased that amendments were added to recognize the importance of a child's ongoing relationships, community and connections to culture as a primary consideration in the best interests of the child [BIOC].

This significantly strengthens the National Standards. That being said, the legislation would be stronger if these relationships are understood in law to be an essential aspect of an Indigenous child's emotional and psychological safety, security and wellbeing, as we and many others have stressed. While we believe decision-makers have ample grounds under the National Standards to interpret the Act accordingly without specific wording, the common judicial misinterpretation that a child's need for community and culture be balanced *against* their best interests may continue.

Another positive amendment was a "consistency" clause, which states that BIOC should be interpreted in a manner consistent with Indigenous law whenever possible.

If this is interpreted logically as deference to Indigenous people's inherent jurisdiction, then decision-makers should be seeking out and respecting Indigenous community's own legal principles.

The House of Commons did accept a Senate amendment to add in a "reasonable efforts" clause that requires workers to make reasonable efforts to maintain the child within the home of family or extended family home prior to apprehension. As we stated in the Yellowhead Report and in our House and Senate submissions, we remain concerned that there is not a stronger "active efforts" principle clause in the legislation, as there is in the Indian Child Welfare Act in the US. The concern is that the broad discretion of individual case workers still allows them, if they choose, to make minimal to no effort toward prevention prior to taking an Indigenous child into care. At the least, this amended clause is a step forward toward requiring more emphasis on early intervention and prevention.

The National Standards section contains crucial clauses requiring notice and standing for an Indigenous child's family, including extended family, and governing body, in significant decisions regarding the child's placement. This is positive because not every province currently requires this, and some have been underinclusive of Indigenous family members and types of communities (i.e. bands but not Metis or non-status).

They also include placement priorities with family members and within a child's own community and culture, as well as recognition of the importance of cultivating and maintaining an Indigenous child's attachment and emotional ties to family even when not placed with family members.

Given these somewhat or very positive changes to the law, a major concern to us and many others was that this Act does not address the fact that once an Indigenous child is taken into government care, the statutory limits for time in care in all provincial legislation (and the still binding 1983 Supreme Court case of *Racine v Woods*) will force judges to continue permanently separating Indigenous children from their families, communities and cultures, regardless of the other provisions in the Act. This is rarely, if ever, actually in Indigenous children's best long term interests.

To address this, we had suggested adding an "impermissible reasoning" clause, where time out of family care, in itself, could not be reason enough to end a child's legal relationship to their family and extended family.

While the Senate committee recommended this amendment to the House of Commons, it was not accepted in the final version of the Act.

Finally, we want to acknowledge the ache, efforts and advocacy of Indigenous youth currently in government care, who face the lonely, precarious and often dangerous "aging out" of care, with all their family relationships legally severed long ago.

Youth advocates spoke eloquently of the need to have National Standards that require the provision of government support past the age of majority, so their physical, emotional and psychological safety and security does not suddenly become irrelevant considerations to decision makers based on an arbitrary age.

This point in time varies drastically across Canada, from age 16 in some provinces, to age 24 in others. Amendments to address this were put forward, and ultimately not accepted. It is these youth who have suffered the most under current laws, and will benefit the least from this new law. We believe they deserve better.

Finally, we want to acknowledge the ache, efforts and advocacy of Indigenous youth currently in government care, who face the lonely, precarious and often dangerous "aging out" of care... they deserve better.

2. JURISDICTION

In the Yellowhead Report, we mentioned two concerns regarding jurisdiction. First, the lack of recognition of the inherent jurisdiction of Indigenous peoples, and second, the ongoing jurisdictional quagmire between federal and provincial governments.

In regard to the first jurisdictional issue, the reference to the implementation of the United Nations *Declaration on the Rights of Indigenous Peoples* is a positive improvement. However, section 4, the minimum standards clause explicitly states that nothing in this Act affects the application of a provision of a provincial Act or regulation to the extent that the provincial provision is not in conflict with, or inconsistent with, the provisions of this Act. This seems to suggest a concurrent law model, a model where federal, provincial and Indigenous laws could potentially all apply at the same time to a given situation.

As we stated in our previous publication, this concurrent law model has the potential to further complicate existing jurisdictional squabbling and add to the complexity for individual social workers and judges having to figure out who is responsible and what standards and procedures apply in any given situation.

Furthermore, the “consistency clause” (section 10(4)) which stresses the importance of interpreting the concept of best interests of the child (BIOC) in a manner consistent with Indigenous laws remains weak, as it adds “when possible”. The legislation creates the possibility that interpretations of BIOC by Canadian courts will lead to Indigenous law-making jurisdiction constantly being challenged and overturned. Especially given the fact that the number of Indigenous judges remains finite within the Canadian legal system, and very few judges have the training or expertise to interpret Indigenous laws according to specific Indigenous legal traditions.

In regard to the second jurisdictional issue, while

federal officials stated publicly that Indigenous laws will be paramount over federal and provincial laws, it is important to note that is only if an Indigenous group, community or people enters into a coordination agreement, or makes reasonable efforts to do so for at least a year.

If an Indigenous group, community or people chooses to exercise its inherent jurisdiction over child and family services through a rights assertion model, i.e. by drafting, ratifying and giving notice to the Minister and appropriate provincial government(s), then according to Bill C-92 (section 20(1)), their laws will not prevail over federal or provincial laws. Furthermore, although paramountcy is recognized, the legislation limits Indigenous authority by stating that Indigenous paramountcy does not include sections 10 to 15, the sections dealing with BIOC. This has the potential effect gutting Indigenous laws to make a difference in the lives of the Indigenous community members in which they apply, as most child and family welfare decisions are determined on the basis of the BIOC doctrine.

An issue raised by many Indigenous groups is jurisdiction over the large number of Indigenous children in urban areas who are First Nations but live off reserve, or non-status, Metis or Inuit. While federal officials publicly stated that Indigenous laws may apply to children and families living on and off reserve, and even out of province, this was not reflected in the wording of the Bill. As a result, there may be confusion from provincial ministries as to the scope of their jurisdiction and it may lead to situations where provincial laws remain paramount in practice. In addition, it remains unclear for Indigenous groups, communities or people who wish to enter into coordination agreements if they have to seek input from all provinces in which their community members reside, or simply the province(s) in which their Indigenous governing body is located.

Finally, and as outlined further below, while the inclusion of the principle of substantive equality is important for adequate funding, the vagueness regarding who is accountable for fiscal arrangements in coordination agreements is unfortunate.

It will continue to leave Indigenous children in the

jurisdictional quagmire between federal and provincial governments. This could have been remedied simply by the addition of “Jordan’s Principle” applying to any funding disputes. Furthermore, Bill C-92 is clear that if a coordination agreement is not reached, then despite the fact that Indigenous laws may prevail after the mandatory 12 month period, there is no guaranteed funding to aid in the implementation of those laws or legal institutions within the affected Indigenous community.

3. FUNDING

Our concern with the first version of the Bill was a lack of commitment for Canada to fund child and family services to Indigenous peoples aside from a brief acknowledgment in the preamble.

Otherwise, the C-92 only mentioned funding as a matter to be negotiated by Indigenous groups with both the provinces and federal government under collaboration agreements when a group seeks to become self-governing in child welfare.

In the Yellowhead Report and our submissions to the House and Senate, we insisted that leaving Indigenous groups to the whims of both the provinces and Canada at the negotiation table on funding was problematic.

In this regard, we highlighted the long history of interjurisdictional squabbling between Canada and the provinces over funding Indigenous child welfare, Canada’s known underfunding of such services (substantiated in the Caring Society case), and the obvious power imbalance between Indigenous peoples and Canada and the provinces.

In the Yellowhead Report, we identified that it was important for Bill C-92 to specifically commit Canada to adequately fund:

1. Existing First Nation child and welfare according to the standard of substantive equality required by the Tribunal in Caring Society;

2. Future exercise of self-government by Indigenous group over child welfare services;
3. Capacity building for the development and implementation of Indigenous child welfare laws; or
4. Related essential service areas that impact of child welfare (housing, social assistance, health, etc.).

While the House of Commons attempted to address some of our concerns by helpfully adding specificity (that negotiations for fiscal arrangements would be those for sustainable, needs-based funding consistent with substantive equality), unfortunately, the changes didn’t go far enough.

First, the legislation still does not address funding for existing child welfare services, especially where an Indigenous group may decide not to become self-governing (at least, through Canada’s processes) for a period of time.

Canada has borne responsibility for funding child welfare services to First Nations on reserve since the 1960s and the Canadian Human Rights Tribunal in the Caring Society case affirmed that this was pursuant to Canada s. 91 (24) jurisdiction under the Constitution Act, 1867.

Remarkably, in recent discussions and in testimony before the Tribunal (May and June 2019), staff of Indigenous Services Canada suggested that they have not contemplated or budgeted for continued funding of existing child welfare services after the passage of Bill C-92.

Second, and related, without clear responsibilities to fund services written into the Bill, Indigenous groups will continue to be subject to the interjurisdictional squabbling between the federal and provincial governments that has plagued Indigenous child welfare services for nearly 70 years.

If history is any indication of what to anticipate, we fully expect that this will result in most negotiations over funding breaking down with the federal and provincial governments disagreeing on who is primarily responsible for funding such essential services.

This is simply no longer acceptable. As noted by the Commission on Missing and Murdered Indigenous Women and Girls (Vol. 1, p. 567):

"Canada has failed, partially through a lack of interjurisdictional cooperation, to ensure that Indigenous Peoples have access to adequate resources and the support necessary to have their human dignity, life, liberty, and security protected...Interjurisdictional neglect represents a breach of relationship and responsibility, as well as of a constitutionally protected Section 7 Charter right to life, liberty, and security of the person...These deficits, then, are about much more than the organization of services, or the specifics of their delivery: they are about the foundational right to life, liberty, and security of every Indigenous woman, girl, and 2SLGBTQQIA person."

Because of this, at the very least, Bill C-92 needed to emphasize Canada's primary responsibility to fund Indigenous child welfare services. Even if Canada disagrees with this and feels that provinces have a fiscal responsibility as well, applying Jordan's Principle here, we would urge that such debates should be left for Canada and the provinces to negotiate among themselves *after* adequate funding has been provided to Indigenous groups.

4 & 5.

ACCOUNTABILITY & DATA COLLECTION

In the Yellowhead Report and submissions to both the House and Senate we emphasized the need for the creation of an independent dispute resolution mechanism in the Bill as well as mandatory data collection (consistent with **Truth and Reconciliation Call to Action #2).**

While the Senate's pre-study report made both of these recommendations as well, no such amendments were adopted into the legislation and two critical tools to ensure communities have the resources they require to enable child welfare jurisdiction will not be available.

It is important to turn now to supporting communities prepare for the legislation, including providing information on the implementation process, ensuring adequate funding is obtained, and establishing the institutions to develop child welfare laws and practices.

AN IMPERFECT CHILD WELFARE LAW

While there had been disappointing and demoralizing aspects of this process, and we maintain, like Cindy Blackstock, that Indigenous children, youth, families and communities deserve better, there is still hope and room for positive change.

It is important to turn now to supporting communities prepare for the legislation, including providing information on the implementation process, ensuring adequate funding is obtained, and establishing the institutions to develop child welfare laws and practices.

21 IMPLEMENTATION STRATEGIES:

NATIONAL STANDARDS

1. **Define what Best Interests of the Child** means for your own Indigenous community as soon as possible. Write it down, make it public and distribute it to Children Services Managers and Workers as soon as possible.
2. **Ensure workers and advocates know** the new National Standards, your BIOC standards, and advocate for them to be applied in every case.
3. **Consider strategic and coordinated** advocacy with other Indigenous groups. In particular, how the BIOC and “reasonable efforts” of this Act are actually interpreted and applied will make a huge difference for Indigenous children.
4. **Even if you don’t have a full** piece of legislation and a coordination agreement, the National Standards require notice, consultation and provide standing. Develop your own laws to fill the gaps. This will build toward jurisdiction as well.

Like most progress on Indigenous issues in Canada, the work will be undertaken in communities.

Listed below are a set of 21 strategies communities can pursue in each of the areas discussed here: 1) National Standards, 2) Jurisdiction, 3) Funding, and 4) Accountability.

These are by no means an exhaustive list but building on the positive elements of the legislation, proactive communities can also overcome some of the legislation’s limitations as well. By engaging within the community (and perhaps across communities) and then with provincial and federal counterparts, it is still possible to ensure Indigenous visions of child welfare jurisdiction are realized.

For example, consider clauses like:

- Active efforts, not just reasonable efforts, to keep a child in family care,
 - Maximum contact with siblings, extended family, community and territory, as a principle for all children out of family care,
 - Impermissible reasoning, where time out of parental care alone cannot be grounds for permanently ending the child’s legal relationships
5. **Internally, develop a list of people** in or related to the community who are able and willing to act as safe houses in emergencies or take in children temporarily or permanently. Also develop a list of people who might not be able to provide full time care, but may be able to provide respite, regular or special visits, and facilitate familial and cultural connections for children out of family care.
 6. **Keep advocating** for children’s and families needs as a whole, as well as for the needs of youth in care or aging out of care today.

JURISDICTION

7. **This is your inherent jurisdiction**, not jurisdiction granted or delegated to you.

8. **Start sooner rather than later.**
9. **Define own BIOC**, definitions and terms and start drafting (see National Standards above).
10. **Consider what are the most important** aspects of child welfare to your community, or most significant differences from provincial statutes or practices, and start writing these down.
11. **Nothing in the Act states** jurisdiction must be all or nothing. Consider your options and what your community's capacity and goals are.

For example:

- Some communities have large populations and pre-existing agreements and or/ have delegated agencies, and may want to develop, administer and enforce all aspects of child and family services, as well create or expand dispute resolution processes.
 - Some communities may have small populations, or not want to take on all aspects of administering and delivering children services. You may want to develop laws and coordination agreements that outline, for instance, standards for your children's care. Like other governments, you may choose to delegate certain aspects of administration and service delivery while retaining oversight or final decision making power.
 - Some communities with shared values and goals may choose to work together on all or some aspects of law development, administration, service delivery, enforcement and dispute resolution.
12. **If you want your jurisdiction to extend** to children off-reserve and even out of province, write this in clearly, and consider how you want this to work in practice, so you can explain this to provincial ministries and provide them guidance.
 13. **Work together and share resources.** There are some existing examples of Indigenous child welfare laws and groups that are currently working on creating their own laws.

There is a need for gathering together and sharing of laws and best practices (e.g. Wahkohtowin Lodge is working on website now).

14. **Use existing / upcoming gatherings** to discuss

strategies around development of laws and what issues, questions and pressure points need to be addressed in your community.

15. **If you are a First Nation, consider** whether **Indian Act bylaws on child welfare** (like Splitsin First Nation) are a viable alternative for your First Nation, or would be useful as an interim measure for establishing key laws (like your BIOC) while developing more fulsome legislation and negotiating coordination agreements.

FUNDING

16. **The federal government has an obligation** to continue to fund existing child welfare services - failure to do so is a human rights violation according to Caring Society.
17. **The federal government is also responsible** for funding the exercise of self-government in child welfare under s. 91(24) and also UNDRIP (article 4).
18. **For funding for future self-government**, Bill C-92 requires negotiation with Canada and the provinces. The broad definition given to Jordan's Principle by the Canadian Human Rights Tribunal applies to such negotiation. This means Canada should be the payor of first contact and, if Canada thinks provinces should also pay, this is up to the federal government and provinces to resolve between themselves after funding has been provided. This can be asserted and reasserted if necessary to your government counterparts.
19. **Indigenous groups should insist on funding** for capacity building in addition to service delivery.

ACCOUNTABILITY

20. **Bill C-92 gives Canada the power** to create dispute resolution mechanism by regulation to deal with funding and other disputes. Canada should be pressured to start developing this now and in partnership with Indigenous groups.
21. **This should be a dispute resolution body** that is independent and arms-length from the federal government with the power to make binding decisions. Advocate to participate in its creation.

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