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An Act respecting First Nations, Inuit, and Métis Children, Youth and Families Does Bill C-92 Make the Grade?

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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 Thursday, February 28, 2019, the federal government introduced Bill C-92, An Act respecting First Nations, Métis and Inuit children, youth and families for first reading.

After many years of well documented discrimination against Indigenous children, there is much hope in this legislative process to reverse this trend, empower Indigenous peoples to reclaim jurisdiction in this area, and ensure the rights of children are affirmed. To realize those hopes, we have drafted this analysis with the aim to improve the current legislation as it moves through committee and the Senate.

But first, we begin with the context:

- ▶ It has been **4 years** since the **Truth and Reconciliation Commission** (TRC) stated that "Canada's child-welfare system has simply continued the assimilation that the residential school system started," and issued five **Calls to Action** aimed to fix this broken system.
- ▶ It has been over **3 years** since the Canadian Human Rights Tribunal's landmark ruling in the *First Nation Caring Society case*, finding that Canada has been knowingly discriminating against First Nations children by underfunding the First Nations Child and Family Services (FNCFS) Program and affirmed that First Nations children and their families are entitled to funding and services based on substantive equality. This means governments must "consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances" (para. 465). Since this ruling, Canada has been held in non-compliance with the Tribunal's decision seven times.
- ▶ It has been over **1 year** since the Liberals committed to a **six-point plan**, including fully implementing the First Nation Caring Society decision, developing data and reporting strategies and co-developing federal legislation that would "to support communities to draw

down jurisdiction in the area of child and family services."

- ▶ And prior to all of the above, Cindy Blackstock and the First Nations Caring Society had been repeatedly blowing the whistle on the dysfunctional and discriminatory FNCFS Program in national studies published **in 2000 and in 2005**, as well as recommending changes.

Considering this history, Indigenous leaders and communities, as well as broader members of the Canadian public, may be uncertain about how to react to Bill C-92. To help in this regard, we have identified five key areas we believe the legislation should address in order to make meaningful change in the lives of Indigenous children and families.

Below, we analyze whether the bill delivers in these areas, and assign grades (A to F) based on how the bill performs in each. At a glance, we score the bill as follows:



Our goal is to provide a useful framework to help Aboriginal leaders and community members understand what's included—and what's not—this bill and what that means. We recognize that there are and will continue to be differing perspectives on this legislation from within the Indigenous community around priorities. It may be the case that others draw different conclusions about whether the legislation should earn a "pass". But our hope is that this analysis helps people reach informed conclusions.



GRADE

1. NATIONAL STANDARDS

Why is this Important?

THERE ARE THREE TIMES the number of Indigenous children in government care today than at the height of residential schools (see *First Nations Caring Society decision* at para. 161). There is ample empirical research that demonstrate the grim and often tragic outcomes for the vast majority of Indigenous children raised in government care or non-Indigenous adoptive homes (see, for example, Okei et al., Sinclair and *Brown v. Canada* (2017), at paras. 3-9).

National standards are important because the federal government has allowed provincial child welfare laws and policies to apply to Indigenous children, on and off reserve, and these differ substantially from province to province.

In response to similarly high Indigenous child removal rates in the United States, the *Indian Child Welfare Act [ICWA]* was passed in 1978, and while not uniformly interpreted or implemented, it is widely acknowledged as the “gold standard” for Indigenous child welfare world-wide. It has significantly reduced over-representation of Indigenous children in care and it has long been argued that similar legislation is needed in Canada.

As previously mentioned, the first five TRC Calls to Action also address the continuing and extreme over-representation of Indigenous children in provincial child welfare systems across Canada.

Why we give the bill a “C” on National Standards:

Our comments on these national standards reflect our understanding that they are created to fill a gap in provincial and federal laws, but it is important to note Indigenous laws have always prioritized and protected Indigenous children’s immediate and life-long best interests, including their safety, security and well-being. The best interests of an Indigenous child is inextricable from the best interests of that child’s family, community and nation. Children are at the heart of Indigenous societies.

The National Standards section of the Bill C-92 has four sections:

1. Purpose and Principles;
2. Best interests of the Indigenous child;
3. Provision of Child and Family Services and
4. Placement of an Indigenous child.

SECTIONS 1 AND 2:

PURPOSE AND PRINCIPLES AND BEST INTERESTS OF THE INDIGENOUS CHILD

The Bill begins with a statement that it must be interpreted and administered according to the principles of the best interests of the child [BIOC], the principle of cultural continuity, and the principle of substantive equality. While it sets out multiple factors, including cultural, linguistic, religious and spiritual upbringing, and relationships between the child and their parent, providers, families and Indigenous, group community or people, those are secondary to the “child’s physical, emotional and psychological safety, security and well-being.”

The Bill largely imports the definition of BIOC in Bill C-78, which was an amendment to the Divorce Act, including provisions dealing with family violence, the nature and strength of an Indigenous child’s relationships with family members beyond parents, the importance of ongoing relationships with their community, their cultural heritage, and plans for the child’s care (which can be rooted in their community’s “customs and traditions”). The additional principle of cultural continuity, new to Canadian jurisprudence, stresses the relationship between an Indigenous child’s wellbeing and their connection to their culture and community. The principle of substantive equality is a positive nod toward the findings in the First Nations Caring Society case. However, the factors listed under it are vague and the lack of mandatory language regarding funding and Jordan’s Principle, is of concern.

SECTION 3: PROVISION OF CHILD AND FAMILY SERVICES

The Bill states that Child and Family services must be provided in a way that takes into account an Indigenous child's basic physical and emotional needs, their culture, ensures they know family origins, and promotes their substantive equality. It also makes it mandatory for decision-makers to give notice to an Indigenous child's parents, caregivers, and Indigenous governing body of their apprehension and ensures they all have standing (can make representations) in court proceedings. This is a significant improvement from most provincial statutes, that often do not provide notice or allow standing. If they do, it is narrowly circumscribe notice and standing requirements are offered to only Indian bands, leaving Métis, Inuit and non-status children's families and communities out of these protections.

Still, while the Bill does recognize standing, it fails to address the issue of funding necessary for these parties to give adequate representations.

The Bill also states that priority should be given to preventative services, including prenatal care to prevent apprehensions at birth. Further, it confirms that an Indigenous child must not be apprehended solely on the basis of socio-economic factors or the health of their parent or caregiver. It is important to note; however, that there is no funding provided for any of these legislative commitments, no compliance mechanisms are provided for, and all of these provisions are "subject to the best interests of the child."

SECTION 4: PLACEMENT OF AN INDIGENOUS CHILD

Like ICWA, the bill establishes a clear placement priority for Indigenous children. Placements with parents, then extended family, then members of the same group, community or nation, then other Indigenous adults, prior to other placements, must be considered. Placements with siblings or sibling-like relatives are to be prioritized. Where an Indigenous child is not placed with parents or extended family, there is to be a re-assessment, on an ongoing basis of the appropriateness of such a placement and the child's emotional ties and attachments with family are to be promoted. Like the notice and standing provisions, placement priority, ongoing re-assessments, and promotion of relationships are a significant improvement on most provincial statutes.

While at face value, these sections seem positive, if lacking in funding commitments and enforcement mechanisms, the status quo can easily be maintained despite them.

What's Missing?

First and foremost, all provincial statutes have mandatory timelines (ranging from six months to two years) for the amount of time a child can be in care prior to becoming a permanent government ward. Since statutes have removed all judicial discretion, a child's relationships with their biological parents and extended family are legally and permanently severed after a certain amount of time in care, regardless of whether this is in the BIOC. Nothing in these National Standards address this situation, other than the re-assessment provision, which lacks proportionate mandatory language. While the act refers to children's right to know their family origins, nothing requires ongoing legal relationships, or even access to their family of origin.

Second, the way BIOC has been interpreted and applied to cases involving Indigenous children suggests that without strong mandatory language to address judicial bias and clearly overtake binding precedent, the Bill will continue to maintain the status quo.

In the 1983 Supreme Court of Canada case of *Racine v Woods*, Justice Wilson stated the importance of culture, "fades with time" compared with bonding with foster or prospective adoptive parents. This remains the law. It remains the law despite the fact that the attachment theory used as the basis for the decision in *Racine v Woods*, has evolved in the intervening 36 years and researchers have since recognized that gendered stereotypes and cultural biases over-emphasized the importance of a single caregiver relationship. This is also despite the 2017 finding in *Brown v Canada* (the "sixties scoop" case) that there was "uncontroverted expert evidence" from across Canada that "great harm was done" by placing Indigenous children in non-Indigenous foster and adoptive homes.

The case law across all provinces in Canada continues to routinely interpret "stability" and "security" for Indigenous children so it is virtually impossible to find a case where it was determined to be in the BIOC for an Indigenous child to return to

More than “good faith” is required to ensure Indigenous children’s relationships with their families, communities, cultures and territories are prioritized, nurtured and maintained.

their Indigenous family or community once they have been placed in a non-Indigenous home for any length of time. These cases have come under scrutiny, **Ardith Walkem** has outlined the numerous biases influencing these decisions, among others.

The *Indian Child Welfare Act (ICWA)* has clear provisions to address biases that maintain the status quo, such as the “active efforts” principle, where there must be evidence of active (not just reasonable) efforts to maintain the family unit prior to an out of home placement. The *Divorce Act* has a “maximum contact” principle which has been enormously influential in child custody decisions, such that maximizing parenting time with both spouses is now the norm, rather than the exception. Without something similar in place in the Indigenous child context, where Indigenous groups have not taken over full jurisdiction, the dominant and biased interpretation of BIOC will almost certainly continue to prevail over the other factors that recognize the unique situation of Indigenous children.

Finally, without accountability measures and funding commitments, it will be business as usual for the vast majority of provincial child and family services departments and agencies. More than “good faith” is required to ensure Indigenous children’s relationships with their families, communities, cultures and territories are prioritized, nurtured and maintained.

For example, more could include:

- ▶ a requirement of written documentation of active efforts to find placements according to the priority set out,
- ▶ affidavit evidence from the Indigenous group that there is no available placement, and/or
- ▶ a presumption that an access order with some family or community member and a long term funding commitment for regular travel back to the community is included as a term of any permanency order.

These additions could push against the continuation of the status quo, but they do not appear in the legislation.

While this is discussed further in the funding section below, it bears repeating that culturally appropriate service delivery, prevention, maintaining community and cultural connections, re-assessments, and notice and standing, all require directed funding to have any efficacy. Further, no provincial statute currently allows for apprehension due to poverty or for the express purpose of assimilation.

Many social workers and judges lament the limited choices they see before them and are troubled by the fact that the conditions that lead them to decide if apprehension is in the BIOC are intimately linked to poverty and intergenerational trauma (from the residential schools and the sixties scoop).

Of course, these decisions sometimes unintentionally continue the large scale removal and assimilation of Indigenous children. They just don’t see any other choice available, and this legislation, unfortunately does not enhance the alternative choices. It does not provide any funding commitments or even the discretion to employ or order funding for ameliorative measures prior to apprehension or permanency decisions.

IN SUMMARY, there are positive steps in the National Standards, but they lack provisions to address the weight of the status quo in the interpretation and application of BIOC, and are missing key accountability measures and funding commitments. As a result, without some key revisions, they may end up echoing hollow promises rather than creating real change for Indigenous children, families and communities.



GRADE

2. FUNDING

Why is this Important?

BILL C-92 AND INDIGENOUS CHILD WELFARE would likely not be on the Canadian government's radar if it were not for the *First Nations Caring Society case*. That case found that Canada has been discriminating against First Nations children by knowingly underfunding child welfare services for over a decade, and that such underfunding has "resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves" including "impacts [that] perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system" (paras. 458-459). In other words, the current First Nation child welfare system was found to mirror the effects of the Indian Residential School System, including disconnection from family and community, and loss of cultural, language, self-worth, etc.

The Tribunal also recognized a clear link between child welfare and the need for improvements in other essential services on reserve in order to improve the overall wellbeing of First Nations children and their families (para. 374).

We believe it is obvious that improvements in housing, social assistance, health and other services need to happen at the same time as reform in child welfare in order for there to be meaningful change in the lives of Indigenous children and their families.

It was also recognized long ago in the *1996 Report on the Royal Commission on Aboriginal Peoples*, that if Indigenous groups are to be successful exercising self-government, they require funding for capacity building

and development and implementation of their laws (Vol. 2, pp. 296-321).

Finally, article 4 of *UN Declaration on the Rights of Indigenous peoples*, states that, along with the right to self-determination and self-government over their internal and local affairs, Indigenous peoples have the right to the "ways and means for financing their autonomous functions."

Why we give the Bill an 'F' on this:

Despite Canada's commitment to fully implement the First Nation Caring Society decision in its six-point plan and several commitments to implement UNDRIP, there is no commitment in Bill C-92 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.).

The preamble of the bill includes an acknowledgment by Canada of "the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with substantive equality...".

An acknowledgment is not a commitment to do any particular thing.

Sébastien Grammond's *2017 paper*, a suggested blueprint for the legislation, emphasized that the law should contain binding commitments regarding the proper funding of Indigenous child welfare and enumerated various areas resources are required. To be clear, these are not recommendations for legislated dollar figures, but instead for commitments for government to provide funding of a certain quality. An example of such a commitment can be found in ss. 3 and 5 of the *Canada Health Act*. These provisions would allow an Indigenous group to seek enforcement of such a commitment in court—an avenue that is currently not available.

Funding is only otherwise mentioned in the bill as a possible agenda item for the "coordination agreements" (s. 20(2)(c)). The conclusion of such "coordination agreements" with both the federal and provincial governments is a precondition of an Indigenous law receiving full effect (see ss. 20-21).

While Canada is presenting Indigenous jurisdiction as the main selling feature of this Bill, without adequate funding, this will simply be jurisdiction to legislate over our own poverty.

In other words, Bill C-92 leaves funding to be negotiated between Indigenous groups and Canada, and, for the first time, the participation of the provinces is also required.

What's Missing?

The inclusion of the provinces in this legislation lacks clarity and, without clear roles and responsibilities, this is problematic.

First, in our view, nothing in the Constitution requires Canada to involve the provinces, or allows the federal government to directly bind provincial governments. Second, save for cost-sharing agreement with Ontario (90% federal; 10% provincial), the Federal government alone has funded First Nations child and family services on reserve since the 1960s. On the other hand, off-reserve, Métis, non-status and Inuit children and families are included in provincial budgets without any distinction from non-Indigenous children and families.

As described by Naomi Metallic, for decades, the provinces have actively resisted federal attempts to delegate delivery of essential services over First Nations unless they received full reimbursement. Given this active resistance, it is unreasonable to imagine provinces suddenly having a change of heart following the passage of Bill C-92.

We fully expect that Indigenous groups seeking jurisdiction under Bill C-92 will experience significant challenges in negotiating adequate funding agreements with the provinces and federal government. The very stark inequality of bargaining

power between Indigenous groups and other governments, which Bill C-92 does nothing to address, virtually ensures this.

By excluding any clarity or binding commitments on funding, and leaving funding to tripartite negotiations (previously bilateral agreements), Bill C-92 will likely perpetuate, if not worsen, the longstanding game of jurisdictional hot-potato the federal government and provinces have played over First Nations services for decades.

In fact, it was jurisdictional squabbling over funding services for Indigenous children, culminating in the death of Jordan Anderson, which led an all-parties resolution of the House of Commons to recognize **Jordan's Principle**. Jordan's Principle was supposed to set aside the jurisdictional in-fighting in favour of ensuring services to Indigenous children. Yet the trilateral negotiation requirement fails to address this, and in all likelihood, will perpetuate the underfunding Indigenous child welfare and related services, thereby continuing to mirror the effects of the Residential School era. While Canada is presenting Indigenous jurisdiction as the main selling feature of this Bill, without adequate funding, this will simply be jurisdiction to legislate over our own poverty. For these reasons, Bill C-92 gets an "F" on funding.



GRADE

D

3. ACCOUNTABILITY

Why is this Important?

ARTICLE 21 OF THE UN Declaration on the Rights of Indigenous Peoples recognizes as a right that Indigenous peoples receive basic, essential services and related government obligations to “take effective measures and, where appropriate, special measures to ensure continuing improvement of [Indigenous peoples’] economic and social conditions.” The sad reality in Canada, however, is that neither federal or the provincial governments have ever wanted or been prepared accept primary responsibility for ensuring Indigenous people receive adequate, basic services (an overview [here](#), with specific reference in part one.)

Despite its s.91 (24) constitutional jurisdiction over “Indians”, and the Supreme Court of Canada finding that all Indigenous people (Indian, both “status” and **non-status, Métis and Inuit**) are covered by that jurisdiction, Canada has claimed its only funds essential services to First Nations peoples on reserve, and only as a matter of public policy. This discretionary approach has been in practice since the 1950s.

Repeatedly, Canada has maintained it has no constitutional or legal obligation to do provide adequate essential services to First Nations on reserve or other Indigenous peoples located elsewhere.

For the first time, the *First Nation Caring Society decision* confirmed otherwise. The Tribunal found that Canada plays a primary role in child welfare services on reserve pursuant to its s. 91 (24) constitutional jurisdiction and ultimately has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families (paras. 40, 66, 71-76).

As matter of human rights, Canada is required to ensure that First Nations receive funding and services based on substantively equality that consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances (para. 465).

Although these obligations have now been confirmed in law, if they were to be spelled out in legislation, it would alleviate any future confusion and debate regarding Canada's responsibilities and commitments.

Given Canada's long-resistance, it reasonable to expect that future governments will come down with a case of jurisdictional and financial amnesia regarding the First Nation Caring Society case (arguably the current government already has, since Bill C-92 avoids it all together).

At the very least, setting out clear binding obligations on Canada in legislation provides a clearer path to enforcement in the courts (instead of the parties to the *First Nations Caring Society case* having to bring contempt or further non-compliance rulings against Canada).

Ideally, in addition to spelling out Canada's obligations to Indigenous peoples, the law would provide an effective mechanism for compliance and dispute resolution, since there will inevitably be disputes in interpretation of and implementation of the legislation.

It is normal to see dispute resolution or appeal bodies created in complex legislation involving social benefits. This recognizes the reality of power imbalances between states and citizens, and how difficult it can be for citizens to take the government to court over a dispute. Such bodies can also be crafted to improve upon shortcomings in the mainstream justice system, including the significant costs of legal representation, over-reliance on procedural arguments causing delay in deciding the case on its merits, and judges who lack cultural and substantive competency in this complex area. By addressing these access to justice problems, a dispute resolution process would level the playing-field.

Unfortunately, there is a massive power imbalance not only between Indigenous individuals and governments, but also between Indigenous governments and federal and provincial governments.

**...we feel that true
accountability here demands
an independent decision-
making body with the
ability to make binding
decisions against
Canada set out directly in the
legislation.**

One would expect a government committed to true reform in the Indigenous-Canada relationship to want to embrace the necessity of accepting and spelling out its accountability to Indigenous children and families, and living up to accountability through accessible forms of dispute resolution.

Why We Give the Bill a 'D' on this:

Bill C-92 leaves a lot of to be desired on accountability.

On the positive side, the preamble includes commitments by Canada to working in partnership, achieving reconciliation, and “engaging with Indigenous peoples ... to support a comprehensive reform of child and family services.” Beyond this, the bill lacks clarity (and therefore enforceability) in terms of Canada’s obligations.

There are some general principles in the bill that could be interpreted as placing limits on government conduct. Section 9(2)(d) suggests that children and family services should not be provided in a way that contributes to assimilation. Section 11(d) suggests that child and family services should be provided in a manner that promotes substantive equality between the child and other children. It is not clear, however, whether these principles apply only to those providing services (either Indigenous groups or the provinces), or to Canada’s provisions of funding to Indigenous groups. Since there is no commitment to funding in the legislation, one might assume the principles apply primarily to services providers.

It is also not clear from the Bill who interprets, what the principles and processes guiding that interpretation are, and how it will be enforced.

Leaving this to the mainstream courts will not address the power imbalance that currently exist. Both the [Grammond article](#) and the [draft child welfare law](#) (prepared by Gowlings and Carrier Sekani Family Services (CSFS) in consultation with First Nations leadership and experts) called for more.

Both envisioned an independent Caring Society Authority or Institute whose duties would include support to communities in developing and implementing their laws, but also monitoring the implementation of Canada’s obligations. Grammond suggested there could also be an independent Commissioner to whom the Authority could make complaints and who would have powers to compel witnesses to testify, order production of documents and make binding decisions against Canada. The Gowlings/Carrier Sekani law proposed something similar, except that complaints would be heard by Canadian Human Rights Tribunal.

What’s Missing:

Bill C-92 hints at the possible development of a dispute resolution process under the broad regulations power at s. 32. We see this at s. 20(5), where it is suggested that a dispute resolution mechanism could be created to deal with situations where Indigenous groups experience challenges in entering collaboration agreements with Canada and the provinces.

BUT THERE ARE CAUTIONS HERE. First, Canada has a track record of failing to develop promised regulations (for example, Canada has never passed regulations for clean drinking water under the *Safe Drinking Water for First Nations Act*, SC 2013, c 21, or for ‘recall regulations’ under the *First Nations Elections Act*, SC 2014, c 5). Second, it is unclear from the language used whether Canada envisions a process that results in *binding* decisions (the texts state “a dispute resolution mechanism provided for by the regulations... may be used to *promote* entering into a coordination agreement”). Given the power imbalance and history of underfunding services, we feel that true accountability here demands an independent decision-making body with the ability to make binding decisions against Canada set out directly in the legislation.



GRADE

4. JURISDICTION

Why is this Important?

JURISDICTION IN RELATION TO CHILD WELFARE is essentially about who has the authority to decide on child welfare matters, within a particular boundary (territorial jurisdiction), or over certain people (personal jurisdiction). There are two major issues regarding Bill C-92 jurisdiction's provisions regarding Indigenous Child and Family Services:

- 1. It is our firm understanding that Indigenous peoples have held and practiced inherent jurisdiction over law-making and the delivery of care for the wellbeing of Indigenous children for thousands of years.** However, this inherent jurisdiction has not been recognized or respected in Canada, either by the federal or provincial governments as part of a mutually respectful nation-to-nation relationship, nor by courts, as an Aboriginal or Treaty right under s. 35 of the Constitution Act.
- 2. Indigenous children's wellbeing has suffered due to jurisdictional disputes between federal and provincial governments.** Canada's *Constitution Act 1867* assigns jurisdiction for health (including child welfare) to the provinces while simultaneously providing the federal government with authority under section 91 (24) to decide all matters relating to "Indians and lands related to Indians". Meaning that if a First Nation child lives on a reserve (which may be located in any province), it is federal child welfare laws, policies, programs and funding models that apply to the First Nation child, not that of the provinces.

This tends to leave First Nation families in a jurisdictional quagmire, as before the introduction of this Bill, there was no federal legislation dealing with Indigenous child welfare.

Jurisdiction issues are not only legal and political. They are also practical and have overwhelmingly negative effects on the lives of First Nation children's mental and physical health.

Take for example another key facet of the Caring Society complaint that sought to hold Canada accountable to **Jordan's Principle**. Jordan River Anderson was a member of Norway House First Nation in Manitoba and spent two years in hospital where he died, while the provincial and federal governments argued over who should cover his at home care costs. Canada sought to renounce its responsibilities by claiming the province had jurisdiction.

But as noted earlier, an all-parties resolution of the House of Commons in 2007 recognized Jordan's Principle. This is a child-first principle that essentially states where a public service is available to all other children, and there is a jurisdictional dispute between governments, it is the responsibility of the government department of first instance to pay for the service and seek reimbursement after the child has received the service. The Caring Society decision revealed Canada continues to under-deliver on Jordan's Principle, even after the January 2016 ruling of the Tribunal, by minimizing state jurisdiction when it comes to accountability and maximizing jurisdiction when it comes to control.

Canada's discrimination and failure to uphold Jordan's Principle is ongoing. In September 2017, **the CBC reported** Canada spent over \$110,000 in legal fees fighting \$6000 in orthodontic treatment for a First Nation child, while the youth involved had to take pain medication for over two years while the federal government refuted responsibility. These contractions of jurisdiction cost everyone, with First Nation children bearing the brunt on the front lines and too often while in pain.

As Canada and provinces argue over jurisdiction and spending, they have also continually denied Indigenous peoples' own jurisdiction. This has created a practical gap. While those with power attempt to minimize their responsibilities, those closest to and most invested in Indigenous children's wellbeing are denied the power

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to act on their responsibilities. The day to day reality is that many Indigenous children's essential needs are not being met. In our view, recognizing jurisdiction over Indigenous children properly rests in Indigenous peoples themselves is the most principled and logical way to address this practical gap.

Why We Give the Bill a 'D' on this:

IN A HISTORIC FIRST FOR CANADA, the Bill purports to recognize Indigenous peoples' inherent jurisdiction. For example, section 8(a) of the Bill affirms "the rights and jurisdiction of Indigenous peoples in relation to child and family services". This positively worded language is also noted in the Bill's introduction and summary. Similarly, section 18(1) states that the "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." Section 18(2) affirms that this right includes the right to "provide for dispute resolution mechanisms."

As there are no section 35 cases that recognize an inherent right of self-government for Indigenous Peoples or that have recognized an Aboriginal or Treaty right over child and family services law-making, this is a significant step forward.

This is not, however, a recognition of jurisdiction that removes all federal or provincial oversight, power or intervention. By recognizing jurisdiction over child and family services as a section 35 right, the federal government immediately re-asserts its power to unilaterally infringe or limit that right, a power upheld by court cases such as *Sparrow*. The legislation sets *legal* limits in terms of Indigenous laws being subject to *Charter* and *Canadian Human Rights Act* and the BIOC. It also sets practical limits in terms of the virtual necessity of negotiating coordination agreements with the federal and provincial governments, and in the glaring absence of any provisions for funding. At best, this could be interpreted as an acknowledgment of **concurrent** (or shared) jurisdiction, a matter on which Bill C-92 should be more clear.

Section 18(3) requires that the "Canadian Charter of Rights and Freedoms applies to an Indigenous governing body in the exercise of jurisdiction in relation to child and family services on behalf of an Indigenous group, community or people." Reading sections 18(1) and (3) together then, an Indigenous governing body may make a decision on child welfare so long as it complies with the Charter. This

is a common term in negotiated self-government or modern treaty agreements. The Bill is also clear that Indigenous laws will be subject to the Canadian Human Rights Act [CHRA].

There is an irony in a federal government compelling Indigenous governing bodies to be subject to the Charter while still actively discriminating against First Nation children, contrary to the substantive equality guarantees in the Charter and the CHRA.

Further, section 23 states Indigenous laws only authoritative if they can be applied in a way that "is not contrary to the best interests of the child." As previously stated, Indigenous laws have upheld the best interests of Indigenous children for thousands of years. The concern about this limit is how the BIOC doctrine has been interpreted and applied by courts, non-Indigenous governments and decisions makers to apprehend Indigenous children and separate them from their families, communities and territories for the past 50 plus years.

We are concerned a legislated limit invoking only the broad discretion of BIOC creates an unacceptable level of uncertainty and opens an almost limitless path for federal and provincial government to assert authority and over-ride Indigenous jurisdiction under BIOC auspices.

The unidirectional nature of this section is also a concern for true concurrent jurisdiction. Over time this also carries the potential impact of subjugating Indigenous laws. There is no correlated provision stating that federal and provincial laws can only be applied to Indigenous children if they are not contrary to the BIOC.

Sections 20 and 21 function as paramountcy provisions. They recognize the legislative authority of Indigenous governing bodies and state Indigenous legislation will have the force of federal law in relation to child and family services. Indigenous laws that are *Charter* compliant will be enforceable as federal law and take precedence over any conflicting provincial or federal laws, aside from the CHRA. This is a potentially positive legal step in the formal and enforceable recognition of Indigenous laws in Canada. However, Sections 20 and 21 also state that Indigenous legislation is only treated as having the force of federal law if the Indigenous group enters a "coordination agreement" with both governments or has "made reasonable efforts to do so during the period one year" (s. 20(3)). This qualification conceivably undermines the nation-to-nation relationship in that it compels

federal approval of Indigenous groups through the negotiation of coordination agreements.

Coordination agreements require the Indigenous governing bodies to come to agreement with both the federal government and province on matters relating to collaboration, including funding, emergency services to children, and support measures, but is also left open-ended to include “any other coordination measures for effective exercise of jurisdiction” (s. 20(2)). There is ample room here for the federal government or the provinces to insist that other issues be addressed within these agreements.

Some Indigenous peoples may question if this requirement is simply another way of reinforcing current views of Indigenous governing bodies as agents or delegates of the federal government, rather than a true recognition of concurrent jurisdiction.

Others may see this as a necessary aspect of re-establishing government to government relationships. Either way, Bill C-92 is proposed law and law should be clear. It is also unclear how different the negotiation and implementation of tripartite coordination agreements will be from current agreements for delegated authority, and no indication of anything that will oblige or incentivize federal or provincial governments to approach these differently.

Another issue that lacks clarity is whether Bill C-92 only acknowledges Indigenous groups’ territorial jurisdiction (on-reserve or specific land bases only) or personal jurisdiction (over all its citizens) for child and family services. This is an important issue because families are mobile, over half of First Nations individuals live **off-reserve**; some Indigenous groups (like the Metis Nation) may not have a land base; while others (like Inuit) may have many children and families living far from its land base.

The most obvious and glaring practical limit on jurisdiction is the complete lack of funding commitments, as discussed in our earlier analysis on funding.

What’s Missing:

THIS BILL DOES NOTHING TO LIFT INDIGENOUS CHILDREN out of the jurisdictional quagmire and may in fact deepen it. It also needs to address the glaring limits and absences that threaten to gut any meaningful exercise or enforcement of Indigenous jurisdiction in this essential area. Bill C-92 should:

- ▶ **Recognize jurisdiction** as a right to self-determination under UNDRIP rather than a s. 35 right, which would make it less easy for federal or provincial government to unilaterally infringe upon the rights of Indigenous children and would potentially offer greater incentive to negotiate robust coordination agreements.
- ▶ **Set a clear path out of** the existing jurisdictional squabbling between the provincial and federal governments rather than 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 - leading to increased impasses.
- ▶ **Revise paramountcy rules** so they are clear enough for, and accessible to community members, so that can understand in time sensitive or emergency circumstances.
- ▶ **Compel coordination** between federal and provincial governments regarding incentives to cooperate and adequately fund Indigenous governing bodies to implement Jordan’s Principle at the frontlines where it matters most. With a history of both the federal and provincial governments claiming authority but denying responsibility, there is a shocking lack of clarity on known discriminatory conduct and jurisdictional issues in child welfare as it relates to Indigenous peoples.
- ▶ **Contain clear conflict of laws** principles and processes that give real weight to Indigenous law-making authority and jurisdiction.
- ▶ **Address the long-standing issue** of services to First Nations children who are residing off-reserve, as well as non-status, Metis and Inuit children. Failing to clarify if the inherent Indigenous jurisdiction over child and family services is recognized to be both territorial and personal in nature may risk leaving many Indigenous children subject to provincial children services by default, with no access to the benefit of their own laws.

- ▶ **Provide clarity and direction** on how the BIOC standard will be defined regarding the applicability of laws. At minimum this should clarify a standard for best interests of the Indigenous child - determined by Indigenous legal and community standards - and dictate the application of federal and provincial laws to Indigenous children.
- ▶ **Clearly and openly resolve** the lack of funding for Indigenous law-making, administration and enforcement as well as funding for the of preventative child and family health. Without funding commitments, Bill C-92 may merely allow Indigenous groups the power to administer their own poverty, rather than strengthen their families and nations.



GRADE

5. DATA COLLECTION & REPORTING

Why is this Important?

DATA COLLECTION CAN PLAY AN IMPORTANT ROLE

in holding governments accountable, allowing for measurements and assessment of government commitments. Effective data collection can also point to improvements that can be made in implementation of legislation.

It was noted in the *First Nation Caring Society* decision that Canada has a track record of not measuring whether the essential services it provides to First Nations is comparable to services to similar provincial services, despite that being the government's stated objective in its policies. The Auditor General of Canada has also called on Canada, on several occasions, to collect this data. Canada's failure to do so has allowed underfunding of child and family services to go on largely unnoticed for over a decade (though it was of course felt in communities).

This presents a strong argument that obligations to collect data should be set out in legislation (and therefore be enforceable).

In this regard, TRC Call to Action #2 called upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Indigenous children (First Nations, Inuit, and Métis) who are in care, compared with non-Indigenous children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.

The **Gowlings/CSFS draft** recommended that the independent Caring Society Institute be charged collecting and managing all data and maintaining all records necessary for administering and publishing annual reports (ss. 17, 29(i), 31). peoples themselves is the most principled and logical way to address this practical gap.

Why We Give the Bill a 'D' on this:

There is no binding obligation on Canada, or any other body, to collect and publish of the kinds of data identified by the TRC in Bill C-92. Instead, the responsible federal Minister acting under the bill has a discretionary power to collect and disclose information (s. 27). This may include collection and disclosure to "support improvement of CFS services" (s. 28(b)), but this is not mandated.

What is Missing:

Canada's record on the collection and publishing data on child welfare and other essential service delivery suggests that, if given the choice to do this, it won't.

Therefore, Bill C-92 failure to mandate collection and publication of data along the lines of TRC Call to Action #2 is another missed opportunity to ensure greater accountability and transparency.

Although we recognize that there could be some privacy issues involved in the collection and disclosure of such data, generally, the type of information that would be published for public accountability purposes (like the Census) would be anonymized and displayed in aggregated. Thus, we fail to see how such privacy concerns should act as a barrier to collection and publication of such important information.

CONCLUSION

The time for change to Indigenous child welfare policy in Canada is long overdue.

Earlier in this analysis, we noted the variety of recommendations for action, including from the Truth and Reconciliation Commission's Calls, the Human Rights Tribunal rulings, the Liberals own six-point plan, and the tireless efforts of those like Cindy Blackstock and the First Nations Caring Society. We also have a mountain of academic and policy research on the way forward. Codifying these recommendations in law is an important strategy to ensure Canadian and Indigenous community obligations are clearly defined. But we need to get the law right.

After reviewing C-92, An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, we have identified five key areas that require significant attention.

As law professors, and to communicate the degree to which these areas of the Bill require improvement, we have offered a grade for each. Hopefully this serves as an accessible and useful framing of the scope of the remaining challenges. The National Standards elements of the law does have some utility, but with a C grade, there is much room for improvement. On Funding, we simply cannot give a pass to an area that is so lacking, especially considering all other areas rely upon funding. Finally, Accountability, Jurisdiction and Data Collection and Reporting all earned a D grade. We see some potential here, but much work to do as well.

In this concluding section we summarize our proposals for amendments, that if acted upon in the final weeks of this parliamentary session, can strengthen the legislation and ensure, finally, that Indigenous children, youth and families receive the services that they are owed.

RECOMMENDATIONS

1. NATIONAL STANDARDS

- **Ensure that standards** exist in law so that Indigenous children do not automatically become government wards without significant efforts are made to maintain familial and community care.
- **Require ongoing legal relationships**, or at the least, access to children's family of origin.
- **Include strong, mandatory language** around BIOC to address judicial bias and overtake any binding precedents in this area.
- **Include "active efforts" or "maximum contact"** clauses in relation to Indigenous child welfare with First Nations have not taken over full jurisdiction.
- **A requirement of written documentation** of active efforts to find placements according to the priority set out or affidavit evidence from the Indigenous group that there is no available placement. And/or a presumption that an access order with some family or community member and a long term funding commitment for regular travel back to the community is included as a term of any permanency order.

2. FUNDING

- **Attach clear federal funding commitments** for First Nations pursuing child welfare jurisdiction.
- **Ensure funding reflects** the principle of substantive equality and which also meets the needs and circumstances of children on reserve
- **Ensure off-reserve, Métis, non-status and Inuit children and families** are included in budgets, distinct from non-Indigenous children and families.
- **Compel coordination** between federal and provincial governments regarding incentives to cooperate and adequately fund Indigenous governing bodies to implement Jordan's Principle.
- **Provide clarity** around the inclusion of the provincial funding obligations.

3. ACCOUNTABILITY

- **Establish a dispute resolution mechanism** to deal with situations where Indigenous groups experience challenges in entering collaboration agreements with Canada and the provinces, in the cases they are required.
- **Create an independent body** to hear disputes and make binding decisions on all parties.

4. JURISDICTION

- **Recognize jurisdiction** as a right to self-determination under UNDRIP rather than a s. 35 right.
- **Set a clear path** out of the existing jurisdictional squabbling between the provincial and federal governments.
- **Revise paramountcy rules** so they are clear enough for, and accessible to community members, so that can understand in time sensitive or emergency circumstances.
- **Contain clear conflict of laws principles** and processes that give real weight to Indigenous law-making authority and jurisdiction.
- **Address the long-standing issue** of services to First Nations children who are residing off-reserve, as well as non-status, Métis and Inuit children.
- **Provide clarity and direction** on how the BIOC standard will be defined regarding the applicability of laws. At minimum this should clarify a standard for best interests of the Indigenous child—determined by Indigenous legal and community standards—and dictate the application of federal and provincial laws to Indigenous children.
- **Clearly and openly resolve** the lack of funding for Indigenous law-making, administration and enforcement as well as funding for preventative child and family health.

5. DATA COLLECTION AND REPORTING

- **Mandate collection and publication** of data along the lines of TRC Call to Action #2
- **Address privacy issues** by anonymized and displaying data in aggregate. .

**...Our proposals for amendments...
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legislation and ensure, finally, that
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