

What's at the "Core of Indianness"? Bill-C92, Labour and Indigenous Social Services

by Adam D.K. King, Veldon Coburn, Leah F. Vosko,
Olena Lyubchenko, Rebecca J. Hall, Andrea M. Noack
and Tyler Chartrand

THE TRUDEAU GOVERNMENT'S June 2019 passage of **Bill C-92**, *An Act respecting First Nations, Inuit and Métis children, youth and families*, marked a major victory for Indigenous child welfare advocates in many respects. With the passage of this *Act*, the federal government has ostensibly removed Indigenous child and family services from the provincial jurisdiction and made a formal commitment to the rights of First Nations to control such services' development and delivery. At the least, this is the aspirational objective.

Although on its face the passage of Bill C-92 appears to be a monumental political achievement, the legal specificities of this change to child and family services is likely to be complex, due in part to the settler-colonial history and the structures of Canadian federalism. The legislation describes jurisdiction over Indigenous child and family services as an exercise of Indigenous self-government rights under section 35 of the *Constitution Act*, 1982.

Though it does not explicitly say so, for the purpose of delegating control of these services to Indigenous peoples, Bill C-92 appears to bring Indigenous child and family services back within federal jurisdiction as a result of the federal jurisdiction over "Indians and lands reserved for the Indians" asserted under section 91(24) of Canada's Constitution Act, 1867.

Because the relationship between sections 35 and 91(24) are muddled in Bill C-92, the full implications of enacting this new legislation remain unclear.

In order for First Nations governments and other Indigenous service providers to assume control of child and family services, they must enter into formal agreements with the provinces on an *ad hoc* basis. The federal government intends to play a role in facilitating these agreements, although how, in what ways, and to what extent, remain open questions. Indeed, some provinces have signalled opposition to the arrangement.

As well, the new legislation does not entail firm funding commitments from the federal government, which, as a previous Yellowhead **report** details, could prove to be a serious impediment to the autonomy of Indigenous child and family services.

Perhaps most striking of all, however, Bill C-92 makes no mention of how the labour relations of child and family services are to be regulated going forward. In this way, the new *Act* – apparently without consideration – has waded into a longstanding dispute over the jurisdiction of Indigenous labour regulation.

NIL/TU,O V BCGEU: WHO REGULATES INDIGENOUS LABOUR?

In 2010, the Supreme Court of Canada issued a landmark determination relating to the jurisdiction of Indigenous labour relations in *NIL/TU,O v BCGEU*. This case concerned employees who were seeking to organize a union at NIL TU,O Child and Family Services Society (CFSS), a non-profit child welfare organization formed by several First Nations to serve Indigenous clients on Vancouver Island.

The British Columbia Government and Service Employees' Union applied for union certification to the BC (provincial) Labour Relations Board (BCLRB) to represent non-supervisory employees at NIL TU,O. The employer (NIL TU,O) contested this application because it believed the agency's activities – the provision of culturally-distinct Indigenous child and family welfare services – fell within federal, and not provincial, jurisdiction and hence were governed by the *Canada Labour Code*.

A three-member panel of the BCLRB denied NIL TU,O's request for reconsideration, and held that NIL TU,O's labour relations, like those of other social service providers in British Columbia, are a matter of provincial jurisdiction.

This denial set in motion a legal battle over the jurisdiction of the wage labour performed in Indigenous child and family service organizations, which proceeded through the British Columbia Supreme Court, the British Columbia Court of Appeal, and, eventually, the Supreme Court of Canada.

The SCC ultimately affirmed the provincial regulation of NIL TU,O's labour relations – setting a major legal precedent for determining the jurisdiction of labour relations in Indigenous social services.

THE "CORE OF INDIANNESS" AND LABOUR RELATIONS

The Supreme Court of Canada reasoned that the labours involved in providing child and family welfare services at an Indigenous social service agency were not a matter of federal jurisdiction because these labours fall outside of the "core of Indianness."

This so-called "core of Indianness" is a contested concept referring to federal jurisdiction over "Indians and lands reserved for the Indians" under section 91(24) of Canada's *Constitution Act*, 1867. Since the late 1970s, the "core" has emerged in case law around land rights, hunting, fishing and harvesting rights, and labour relations to determine what counts as Indigenous activity and labour and, following from that definition, what falls within (or outside) federal jurisdiction.

In drawing on this ever-narrowing conceptualization of Indigenous activities and labours, the SCC decided that Indigenous social service agencies and their labour relations are a matter of provincial (and not federal) jurisdiction.

The First Nations employer, NIL TU,O Child and Family Services Society, had argued that, because of the Indigenous nature of their enterprise, they were operating within the ambit of federal jurisdiction. Moreover, NIL TU,O explicitly argued before the Court that it understood federal jurisdiction over their service delivery to be a step on the path to self-determination.

Although the employees of NIL/TU,O were engaged in Indigenous-led and culturally-informed practices of day-to-day care of Indigenous children and educative activities that reproduce Indigenous knowledge across generations and communities, the Supreme Court nevertheless ruled that this work was not “Indian” activity.

Rather, because social services (and their labour relations) are generally a provincial matter, so too, the Court decided, are Indigenous child and family services.

THE IMPACT OF C-92?

With NIL/TU,O, the Supreme Court affirmed the provincial jurisdiction of Indigenous child and family services and their labour relations by denying that culturally-distinct service delivery has any bearing on jurisdiction. However, the passage of Bill C-92 opens these questions anew.

With a partial recognition of the egregious harms that all levels of government have enacted against Indigenous peoples through settler-colonial dispossession and systemic underfunding of Indigenous services, the federal government has used its legislative power to ostensibly recognize an Indigenous right to exercise jurisdiction over child and family services.

However, this intent of the new Act – to bring Indigenous child and family services back within the federal jurisdiction for the purpose of delegating control over service design and provision to Indigenous peoples – seems to put Bill C-92 and NIL/TU,O directly at odds with one another. Whereas the Supreme Court held that Indigenous social service labours fall within provincial jurisdiction, Bill C-92 brings social service labours back within federal jurisdiction (if only for the purposes of legislating and delegating) without explicitly recognizing that it is doing so.

The “core of Indianness” and its application by the courts to the labours of Indigenous social services seem to be, once again, open for contestation. As a result, workers in Indigenous social service agencies are effectively left in legal limbo when it comes to their labour rights.