Overview of C-92 for Chiefs and Leaders

Mary Ellen Turpel-Lafond (Aki-Kwe) *

WHAT IS BILL C-92 AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES?

An Act respecting First Nations, Inuit and Métis children, youth and families received Royal Assent on June 21, 2019, and became Canadian law. The legislation comes into effect on January 1, 2020.

This legislation recognizes and affirms the inherent right of self-government held by First Nations in relation to child and family services and confirms that such rights are existing inherent Aboriginal and treaty rights in section 35 of the *Constitution Act*, 1982.

This legislation will apply to First Nations children, youth and families, and means that the application of provincial child welfare laws, policies and practices to First Nations will change as of January 1, 2020, subject to how and when First Nations assert jurisdiction over child welfare.

Preparing for the change will require work on two tracks:

1. **Re-establishing First Nations laws and practices for total First Nations control over child welfare decisions, with the option of entering into coordination agreements with the provincial and federal government.**
2. **Work within current child welfare system with the children, youth and families currently in the system, who can greatly benefit from the new tools that come with the legislation to keep families together, including supporting kinship placement and reconsidering existing cases.**

BILL C-92: NEW TOOLS AND RIGHTS RECOGNITION

- Affirms the United Nations Declaration on the Rights of Indigenous Peoples and supports the Truth and Reconciliation Commission's Calls to Action regarding Child Welfare.
- Creates a clear legislative framework that supports First Nations to develop their own child and family welfare laws, including a mechanism for those laws to be recognized as paramount to those of the provincial and federal governments.
- Affirms self-determination and inherent rights of First Nations, and better aligns with First Nations history, laws and approaches to child and family well-being.
- Sets out minimum standards and rights for Indigenous children and families interacting with child welfare services. These minimum standards can be improved upon as First Nations enact their own child and family welfare laws in accordance with their own laws and traditions.
- Sets out new tools including stronger principles for the Best Interests of the Child such as:
    - » Affirmation of the right of children to be raised in their families, with their language, culture and identity supported.
    - » Right to receive services in their communities, to preserve the child's culture, connections and belonging.
    - » Right of the child to be connected to their family and community.
    - » Account for intergenerational impacts of residential schools and affirm right of families to not be blamed for trauma and struggles they may experience when parenting.

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» Mandate prenatal support to avoid apprehensions at birth, and place onus on the system to take a holistic approach to the prenatal, birth, and early years.

- Prioritizes placement for children who must be placed in care with immediate family, extended family, a family from the child's First Nation, or a First Nations family from another First Nation, with placement with a non-First Nations family as a last resort.
- Emphasizes not removing a child due to poverty, housing, lack of health supports for parents, and instead shifts focus to supporting families through preventative measures.

The affirmation of inherent rights and jurisdiction means that First Nations must drive this process and act according to the self-determined choices of the rights and title holders who are members of the First Nation. This Act did not establish these rights, but it does affirm the right of First Nations to make laws, policies and decisions about their children and families, according to their own traditions, practices, customs and values.

WHO DOES THIS ACT APPLY TO?

The Act applies to all First Nations, regardless of *Indian Act* status and/or residency. This means:

- First Nations have the authority and jurisdiction to determine their own governance structure in relation to child and family services, defined in the Act as an "Indigenous Governing Body," which can designate who acts on behalf of the children and families they represent (e.g. Band Council, Tribal Council, Treaty Government).
- In the development and enactment of First Nations laws, First Nations can define concepts, such as membership and kinship, according to their own laws and practices.
- A child does not have to live on-reserve for the Act or First Nations child and family services laws to apply. In the development of First Nations laws and negotiation of coordination agreements, First Nations can assert jurisdiction over their children, regardless of where they live.

WHAT IS THE PROCESS FOR PASSING FIRST NATIONS LAWS AND HOW DOES IT WORK?

First Nations can choose if they want to enact their own laws, when and how they do so, and how involved the federal and provincial governments shall be in decisions regarding their children and families.

Section 18(1) of the Act states:

> *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.*

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There are two ways that a First Nation can proceed in enacting and implementing their own laws:

Option 1:

S. 18: First Nations Governing Body enacts law → **S. 20(1): Notify Canada of intent to pass law** → **Law is passed, and Canada posts in a federally-maintaned registry as notice to all**

This option will make a First Nation's law effective but will not automatically give that law recognition and support to override provincial child welfare law and may remain in dispute by provincial and federal authorities. If a First Nations law is developed and enacted in full view of section 35 rights, as affirmed by the Act, there is a strong case to be made for First Nations' laws to supersede provincial and federal laws on child welfare.

Option 2:

S. 18

First Nation Governing Body enacts law

→

S. 20(1)

Notify Canada of intent to pass law

→

S. 20(2)

Request "Coordination Agreement" with federal and/or provincial governments

- **Coordination agreements can be used to set out how emergency issues, fiscal arrangements, jurisdiction, location, and any other items are handled, to best support First Nations children and families.**
- **Coordination agreements will set out how the federal and provincial governments will support the implementation of First Nations laws.**
- **All governments must make *reasonable efforts* to coordinate with First Nations.**

←

S. 20(3) & S. 21

After 12 months (or sooner if an agreement is made), the law of the First Nation comes into force and has the same effect and protection of federal law.

- **A coordination agreement *does not* have to be in place, if reasonable efforts to negotiate one have been made.**

←

S. 20(6)

First Nations can request an extension to continue work on a coordination agreement if they choose; federal or provincial governments, however, cannot request an extension.

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S. 22

If there is a conflict between the law of the First Nation and federal or provincial laws, the law of the First Nation prevails, as long as it complies with the Charter of Rights and the Canadian Human Rights Act.

→

S. 23

The law of the First Nation applies to a child of that First Nation, unless it is contrary to the best interests of that child.

- **Coordination agreements can articulate how the system will work based on a First Nation's agreement and consent. If an agreement is not reached after 12 months, and reasonable efforts have been made, First Nations laws come into *full force and effect*.**

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WHEN DO C-92 AND FIRST NATIONS LAWS COME INTO EFFECT?

The Act comes into effect on January 1, 2020. Starting January 1, 2020, a First Nations governing body can notify Canada that a law has been enacted, and/or of their request to negotiate a coordination agreement. First Nations laws will come into effect when they are passed.

IS THERE MORE TO BE DONE?

With all laws, there are changes that will be required as the law applies, and issues arise. In the case of the Act, a major challenge is funding; the funding principles in the preamble and section 20 of the Act are weaker than what were proposed by First Nations Chiefs and many others. Ongoing efforts to push for strong fiscal support, policy and law changes will continue and should be coordinated and strategic.

IF FIRST NATIONS HAVE CASES IN THE SYSTEM, WHAT CAN THEY DO?

1. Continue to advocate for the children and families directly with their authority as Chiefs.
2. Take the Act to social workers, lawyers and courts and point to it as basis for a major shift and indicate the expectation for families to remain together with support.
3. Point out the provisions of the Act that gives a First Nations governing body standing as a **PARTY** in the case or the right to make **REPRESENTATIONS** in court on cases involving their children and families. Encourage grandparents, parents and relations to attend and stand up for their children and families.

NOTICE AND FIRST NATIONS' RIGHTS TO BE KEPT INFORMED

The Act strengthens the obligation to keep First Nations and families informed about decisions related to their children and families. Section 12(1) of the Act articulates that the parent, care provider/guardian, First Nation and governing body of a First Nations child must be informed of decisions regarding the child before any significant actions are taken.

STANDING AS A PARTY IN A CHILD WELFARE MATTER

Section 13(a) and (b) of the Act expands who can be a full party in a child welfare matter relating to a First Nations child. The Chief of the First Nation where the child concerned is from is permitted to participate under provincial law; the Act expands participation to include parents and care providers (a person who cares for the child day-to-day, in accordance with the First Nation's practices, including a grandparent, aunt, etc.) as parties and their right to make representations, and also includes the First Nations governing body's right to make representations. Section 9 of the Act protects against discrimination, including confirming that families must have the right to have their views considered without discrimination in the case of their child or children.

Standing as a “party” means the right to be a full part of the entire process, to be heard throughout and speak directly to the court. Making “representations” means having the right to speak in court about the child and their circumstances, to advocate for the rights of children and families to stay together, and to address concerns with the handling of the child’s case or process.

Transition provisions of the Act, including section 33, provide some discretion, but must emphasize the best interests of the child is for the parents, family, kinship and community to be involved to keep families together and ensure they receive services they require in their families and communities.

ASKING FOR REASSESSMENT OF CASES DECIDED BEFORE C-92

The Act allows for ongoing reconsideration of if a placement of a child is appropriate. A child or children may have been placed under the provincial system in foster care and may need to be reconsidered under the Act. The key provision provides consideration for family unity in section 16 (3), which calls for reassessment of placements of children in care, and to (re)consider the appropriateness of placing a child with a parent or member of the child’s family.