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Memorandum

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TO: First Nations Leadership Council of British Columbia

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DATE March 25, 2019

RE **Opinion on Federal Bill C-92 – *An Act Respecting First Nations, Inuit and Metis children, youth and families***

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Introduction

Thank you for your request for an assessment and evaluation of Bill C-92, *An Act Respecting First Nations, Inuit and Metis children, youth and families* in the context of British Columbia. I am pleased to provide you with the following opinion and invite your feedback. I welcome further instructions should you require more detailed examination of any item explored below. As well, given the Bill remains before Parliament, this opinion may change if the Bill is amended. Similarly, if the Bill comes into force and regulations are developed, an opinion on the regulations will be warranted.

I note that the preparation of the opinion included a review and consideration of other opinions prepared on Bill C-92 provided at the National or regional level thus far.[1]

Summary of Opinion

This opinion concludes that Bill C-92 represents an advance for First Nations inherent rights and self-government in relation to the area of children and families in comparison to the legal *status quo* in British Columbia and Canada. The Bill provides a clear mandate for reconciliation-based discussion or negotiation tables and other processes where children and families' authority and jurisdiction is under active discussion, development or at the implementation stage.

A discussion of the baseline operation of the current BC law, policy and process is considered in relation to the suite of provincial legislation for children and families. Although Bill C-92 appears complex upon reading, it provides immediate tools and a framework to evaluate whether the Bill is a step forward, and if so, in what specific areas and to what extent does the Bill align with the long-advocated positions of First Nations in BC for comprehensive reform of children and families law and policy.[2]

My comparison and contrast of the Bill with existing policy, case law and practice in effect in BC includes an assessment of the challenges of piecemeal assertion of rights by First Nations children and families versus a system-wide shift to recognition of inherent rights and stronger individual protections for children and families in the child welfare system today. Specific recent and notable cases are also

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[1] Opinions have been shared with the AFN Legislative Working Group by First Nations from various regions, and some opinions or "scorecards" have been published by public policy institutes. See, for example, the joint opinion by 5 Canadian legal academics prepared for the Yellowhead Institute, http://yellowheadinstitute.org/bill-c-92-analysis/.

Appendix B includes a schedule of opinions that were reviewed which were received by the Assembly of First Nations, Legislative Working Group on Children and Families. Moreover, the presence of a variety of views, discussion and debate is welcome and important in this area as the impact at the national level, as well reflect the distinct issues for each province or territory, and the diversity and distinctions of First Nations peoples and rights.

[2] The positions of First Nations leadership, including special reports and overviews of meetings have been reviewed in the preparation of this opinion. This includes *INDIGENOUS RESILIENCE, CONNECTEDNESS AND REUNIFICATION – FROM ROOT CAUSES TO ROOT SOLUTIONS A Report on Indigenous Child Welfare in British Columbia Final Report of Special Advisor Grand Chief Ed John (November 2016).* *http://fns.bc.ca/wp-content/uploads/2017/01/Special-Advisor-Indigenous-Child-Welfare-Report-2016-Summary-of-Recommendations.pdf*

discussed in relation to the challenges faced by First Nations seeking better protection of rights and recognition of the requirement of involvement of families, communities and Nations in all aspects of child and family services.

Bill C-92 is characterized as "rights recognition" legislation and offers a pathway to change over time through review of the Bill's effects by the House of Commons every five years following Royal Assent. The Bill does not mention the *Indian Act* and effectively replaces section 88 of the *Indian Act* for those First Nations that assert jurisdiction and authority, which in contrast to current requirements of process and evidence requires no further proof under the Bill.

Four sets of questions that have been raised regarding the Bill are evaluated based on instructions from First Nations Leadership Council (FNLC). These include the impact of the Bill's affirmation of jurisdiction and inherent rights, the proposal of new processes, the recognition of First Nations governments as "governments" with inherent and independent authority, and capacity. Further, the principles and protections for First Nations children, families, caregivers, communities and Nations within child and family laws and systems (apart from the exercise of jurisdiction and First Nations law-making) is assessed.

Gaps in the Bill are identified, particularly in the areas where the Bill falls short of the asserted policy positions advanced during the process of engagement on Bill C-92. Six key areas for improvement are identified and given a priority ranking to promote further discussion and support the adoption of positions and development of responses to Bill C-92.

Strategic considerations regarding improvements to Bill C-92 are highlighted for consideration by BC Chiefs and Leaders in formulating their positions and approaches and reconsidering mandates for next steps. In particular, emphasis is placed on the short time frame for review and passage of Bill C-92, and the possibility that the Bill will not survive the current session of Parliament if wholesale changes are suggested, as recent experience demonstrates that very minor changes can be entertained, but may not be approved at Committee stage (e.g. the experience with Committee review of *Bill C-262* on UN Declaration implementation).

Background for Bill C-92

Bill C-92 was developed over a 13-month timeframe between January 2018 and February 2019 following a National Emergency Meeting on Children and Families convened by the Government of Canada, and specifically by former-Cabinet-Member Jane Philpott. The recommendation for legislation on child welfare was among the first five Calls to Action of the Truth and Reconciliation Commission focussed on addressing the "legacy" of residential schools and failed policies of Canadian governments.

Indigenous Services Canada ("ISC") reports that officials held in excess of 70 sessions with First Nations and regions on the policy positions of Indigenous peoples and received approximately 50 written submissions regarding child welfare reform following the National Emergency Meeting in January 2018, at which time the lead Minister referred to child welfare issues as a "humanitarian crisis". ISC further reports it has collaborated with Indigenous peoples on the development of Bill C-92 more extensively than any other legislative proposal in the history of the Department of Aboriginal and Northern Affairs. Canada released a "consultation" bill for comment, circulating the consultation draft to approximately 50 individuals and organizations. Feedback provided at that stage resulted in additional changes to the

final Bill tabled in the House of Commons. Although, ISC accepts that it did not "co-draft" the legislation with First Nations representatives, it is their firm view that development of Bill C-92 was the most fulsome and collaborate in memory.[3]

Bill C-92 received its first reading on February 28, 2019. It proceeded to second reading on March 19, 2019. It then advanced to the Standing Senate Committee on Aboriginal Peoples for study, with the process likely to get underway in April 2019. By directing the matter to the Senate Committee at an early stage, it is believed that examination of the Bill will receive an expedited process. Given that the end of the current Session is scheduled for National Aboriginal Day (June 21, 2019), the time pressure to complete the legislative process is significant and must be considered in weighing the need for action on the items reviewed in this opinion. After June 2019, the House of Commons will rise and will not return until late in the Fall, after the October 2019 general election.

It is also important to note that in BC there are 7 "tables" or Memoranda of Understanding that have been entered. These are both bilateral and trilateral and have a focus on jurisdiction in relation to children and families. These include:

- Secwépemc Nation, Memorandum of Understanding signed July 2018
- First Nations Health Council Memorandum of Understanding signed February 2017
- Lake Babine Memorandum of Understanding signed November 2018
- Wet'su'wet'en Memorandum of Understanding October 2018
- Carrier Sekani Tribal Council Letter of Understanding signed in January 2019
- Cowichan Tribes (with Hul'quimi'num Treaty Group) Letter of Understanding signed January 2019
- Northern Secwépemc te Qelmucw (NStQ) Agreement-in-Principle July 2018

The tables are relevant because Bill C-92 will provide immediate mandates for the tables to transition from considering jurisdiction to a more end stage discussion of supporting the implementation of First Nations jurisdiction. The tables are relevant to the topic of Bill C-92 because the terms that create the tables generally identify jurisdiction but Canada has not made a clear and consistent commitment to inherent jurisdiction and authority with a commitment of supporting law-making. Furthermore, there may not be a need for other First Nations to enter into such Agreements if Bill C-92 is passed as there will be nothing to "negotiate" only matters to coordinate as jurisdiction will be affirmed for all First Nations governing bodies in BC.

Bill C-92: Relevant British Columbia Legal and Policy Context

Assessing Bill C-92 for BC First Nations requires consideration of the current legislative context governing First Nations child welfare in the Province.

Under the current legal situation, provincial laws are applied to First Nations peoples as "laws of general application" incorporated through section 88 of the *Indian Act*, or through provisions of treaties and agreements by virtue of "equivalency" clauses requiring First Nations law-making to be equivalent to the

[3] I note that in the House of Commons, Minister O'Regan, Marco Mendicino (Parliamentary Secretary to the Minister of Infrastructure and Communities), and Dan Vidal (Liberal member for St. Boniface) all commented that the legislation was "co-developed" with First Nations. Co-developed and co-drafted are not the same process and the actual task of drafting remained with the Department of Justice and Attorney General.

provincial standards. In short, the provincial laws become applicable to First Nations as if they were federal laws. This legal situation has been the source of significant conflict, as such arrangements (with few exceptions) were imposed without the consent or agreement of First Nations and without due recognition of First Nations governments or their authority. The constraints of the status quo are significant and have been well documented. The only example of a child welfare law receiving recognition under the *Indian Act* relates to the Splatsin First Nation law submitted in 1980 and inadvertently not disallowed by the Minister within the 40-day period, thus receiving status of a by-law on child welfare under the *Indian Act*.

In the *Family and Child Service Act (BC)*, *Re 1990* 4 C.N.L.R. 14, the Provincial Court held that BC provincial child welfare legislation applies to Aboriginal children in the care of residents on a reserve, and the right to determine where children are in need of protection, and the power to implement remedies, are not Aboriginal rights protected by section 35 of the *Constitution Act, 1982*. This decision was followed in a number of other decisions in British Columbia finding that apart from some "customs" in relation to adoption or placement of children, which must be proven on a standard of evidence in each and every specific proceeding, provincial laws establish the applicable legal standards. These legal standards apply to First Nations children, families and communities, despite the fact that consent to such laws and policies was never sought or obtained.[4] This is the essence of the colonial nature of the current system—reinforced in thousands of circumstances where children remain in provincial child welfare systems every year in British Columbia—under the "direction" of the Provincial Director of Child Welfare.

Specific circumstances in other Provinces or Territories may be different in some respects, but the basic practice of provincial laws being "referentially incorporated" into federal law by section 88 of the *Indian Act* is consistent.

BC does not at this time have any legislation that is based on "recognition of rights", nor has it affirmed the rights of First Nations to inherent jurisdiction in relation to law-making authority for children and families. The federal *Indian Act* and the provisions of Modern Treaties and legislation implementing the Treaties give some First Nations laws the force federal laws in certain respects through delegation of power from the Federal government (the *Indian Act* by-law system) or by incorporation in enabling statutes ratifying or implementing the Treaties.

From the national, legal viewpoint, the recognition of the inherent right of self-government has been difficult to affirm in a blanketing fashion. One important yardstick against which to measure the Bill is the legal status quo on self-government. Bill C-92 rejects the approach taken in the decision in *R. v. Pamajewon* (1996), in which the Supreme Court of Canada held that "in so far as they can be made under s. 35(1) [of the Constitution Act, 1982], claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard"(meaning those asserting such rights bear the burden to prove they exist, continue and have not been extinguished). Bill C-92 affirms the existence of the inherent right of self-government and requires no further proof other than the asserting by a First Nations governing body that the capacity to represent First Nations rights holders lies in section 35 of the *Constitution Act*. Not having to prove

[4] This decision was affirmed in an Ontario decision in which the Court was presented with an argument that the Children's Aid Society in that Province had no authority to make rules for First Nations and no jurisdiction, as First Nations are sovereign and not within the authority of child welfare systems. That argument was rejected in the Court as inaccurate under Canadian law: *Children's Aid Society of Ottawa v. C.(A),* 2016 ONCA 512.

rights smooths the path forward in that regard, shifting the legal ground by affirming a position that First Nations have advanced consistently on the source and nature of First Nations governmental powers, rights and capacity. That aspect of self-government assertion will be easier, and disputes on recognition are going to be put to rest unless there are transitional items such as competing claims among representative governing bodies. Such matters of representation can be resolved according to the UN Declaration and principles of self-determination, although disputes of this nature could well be subject to judicial review in Canadian courts by Canadian judges who may not have the degree of expertise required to evaluate such matters.

Frontline Child Welfare Practice Considerations

For those in BC who work within a litigation context, it is well known that the degree of evidence required to establish an Aboriginal right, including expert fact-gathering, poses a significant barrier and cost to First Nations clients. Cost and timeliness are often prohibitive for clients asserting a First Nations rights position, and such cases may not surmount the challenging body of caselaw in this area. Especially given the hundreds of cases involving First Nations children and families processed each year, the cost to engage and assert rights is formidable.

As a matter of practice in BC courts, evidence and legal advocacy required to obtain recognition under Section 35 of even the most basic Aboriginal right requires scaling a high legal barrier, even despite the collective effort of an engaged practising Bar in BC. The onus to bring forward compelling evidence proving the existence of rights on a balance of probabilities is on the same First Nations party that must prove such rights are historically-based, continuous and unextinguished. As a matter of practice, these burdens, the severe limitations of legal aid and access to justice for First Nations parents and families, and the many other constraints of the current Canadian legal system (court rules, etc.) permit inequities to persist. The very limited state of litigation on the inherent rights of First Nations to jurisdiction over their children and families is attributable to these legal barriers, extreme costs, and the lengthy and contested processes required to obtain even declaratory relief in BC Courts.

More broadly, the legal recognition and protection of First Nations rights in BC, both collective and individual, is not highly-progressive at this time—though there have been substantial victories in hard-fought and highly-disputed Aboriginal title cases in recent year, most of which occurred at the apex of the legal system (the Supreme Court of Canada)—meaning that a long, treacherous and winding path lies ahead of those who seek justice. While there are active political discussions regarding UN Declaration legislation at the provincial level, which may be of great assistance in reversing the denial of rights foundation of the laws and policies in a progressive fashion, the law at this point is extremely limiting and constrains the extent to which First Nations are successful in growing or supporting beneficial child welfare methods and raising or addressing their rights in BC courts.

New government policy statements on recognition of rights, the adoption of guiding principles for Government on rights-recognition and Crown obligations, and the discussion of topics at negotiation or recognition of rights tables on new approaches to rights and title, including children and families matters, are positive steps. The fundamental legal principles and system remain in a different place, very much rooted in the colonial pillars of the *Indian Act,* particularly section 88.

Many child welfare proceedings and determinations restate these limitations. For example, an important case that advocated for return of a First Nations newborn to her parent was argued in 2018. That case, citable as *Director v. L.D.S. and C.C.C. 2018 BCPC 61 (LDS)*, involved highly skilled and

dedicated legal counsel with expertise on inherent Aboriginal and treaty rights, who were seeking to address the legal barriers that led to the family breakdown. This case involved a vigorous legal argument before two levels of Courts in BC. In similar cases, appeals to higher courts and challenges to the conduct of MCFD and child welfare officials before Courts require sustained and complex proceedings and legal challenges and may be dismissed without any basis for appeal. In this case, however, arguments appealing to the historic and inherent "parental" jurisdiction of superior courts to overturn the decisions of lower courts formed the basis of a successful appeal to have the child returned to her mother. Still, this case was not decided on the recognition of the rights of First Nations children to be raised with their families and communities and cannot be enjoyed as a right of individuals in BC or as a member of a collective "peoples" with rights of self-determination.

Chiefs may be familiar with this matter as it involved a First Nations mother who opposed removal of her infant and sought an order returning the child to her care, with or without conditions, including the participation of an unnamed party known to the mother and the supervision of both the Director and a qualified professional designated by the Huu-Ay-Aht First Nations (HFN) or Usma Naa-chah-nulth Family and Child Services (USMA). Usma is a Delegated Aboriginal Agency (DAA) and has authority to provide and oversee child protection services.

The Director sought an order that the infant remain in the interim custody of the paternal grandmother (non-Indigenous) pending a protection hearing. The child's physician advised against mother-infant separation and noted it was unrealistic to seek for the mother to move in full-time with the paternal grandmother due to a deteriorating relationship between the two. The court ordered the infant be temporarily returned to her mother and the unnamed party with conditions including home inspection, appointment attendance, and program participation. The court directed MCFD to meet with Usma representatives to plan for the child's return. The mother, working with Usma and the Chief, was able to appeal this decision and have the child returned based on the special, inherent "*parens patriaie*" jurisdiction of the court– a principle outlining the common law parent-like authority of a court to intervene and decide a matter.

The Province further appealed the decision on the basis that it was improper and should not establish an avenue of appeal open to First Nations parents or communities. Fortunately, after the matter was set down for appeal, a negotiated resolution was reached. The case caused deep concern about further setbacks in the ability of families and communities to prevent family breakdown in the legal system except through extraordinary measures. The arguments were intense at each step of the proceedings, and thus costly, though the case was discontinued through the role of the leadership of the HFN in political collaboration at the practice and leadership level.

HFN leadership, working with their child and family director and the child's family, were able to reach a negotiated solution in this case because of the high-profile media coverage the case received and the awareness raised by advocates identifying the removal of infants and newborns as systemically-destructive for First Nations families. By negotiating a specific protocol, the HFN have attempted to resolve this dispute through an innovative approach. However, the legal status of the protocol is still in question. It is likely not enforceable and the Director of Child Welfare retains all discretion to act for children in BC under the *Child, Family and Community Service Act* (CFCSA). This means that a new Director could decide to break with the protocol in the future.

Bill C-92 would address a number of the specific concerns raised in cases like *LDS* and provide new tools and mechanisms to remove matters from the mainstream system and reinforce the authority of First Nations for decisions, principles and cultural continuity of its children and families.

Analysis of Four Key Issues

I have organized this opinion into four key areas. These areas are based on the issues identified by the FNLC, as well as other matters raised in briefings and correspondence regarding the Bill.

1. **Jurisdiction:** What is the legal significance of *Bill* C-92 in relation to the inherent right of self-government, the Indigenous right of self-determination recognized in the UN Declaration, and the recognition of First Nations governments in British Columbia? More specifically, how do the jurisdiction and governance provisions of Bill C-92 compare to the status quo? What changes are to be expected in mandates at negotiating tables or bilateral/trilateral processes with the legislative affirmation of jurisdiction space for First Nations laws, development of policies and practices, and enforcement of laws and procedures for First Nations dispute resolution in British Columbia?
2. **Practical Impacts:** What are the various procedures, principles or collective and individual rights that are referenced in *Bill C-92*? What are the practical impacts of these rights in relation to First Nations children, youth, parents, families and caregivers engaged with the child welfare system today if Bill C-92 receives Royal Assent in its current form?
3. **Shortcomings:** Where does *Bill C- 92* fall short of the policy positions previously adopted by Chiefs in British Columbia?
4. **Potential Improvements:** Where are improvements to Bill C-92 necessary and which areas are matters of priority?

1. Jurisdiction

Bill C-92 is a significant shift from the legal status quo in BC regarding First Nations jurisdiction.

The Bill includes several provisions that affirm the inherent Aboriginal and treaty rights of First Nations, including self-determination and the inherent right of self-government in relation to children and families. These rights are further framed in the preamble to the Bill with reference to several significant interpretative and legal sources, including the UN Declaration, the *United Nations Convention on the Rights of the Child*, the *International Convention on the Elimination of All forms of Racial Discrimination*, the imperative of promoting reconciliation approaches, the *TRC* Calls to Action and the objective of promoting major reform of child welfare in Canada.

The Bill further sets out a "distinctions-based" approach which means that the differences between Indigenous peoples in relation to their rights, cultures, and customs and the Treaties of First Nations peoples must guide the interpretation, approach and understanding of the provisions of the Bill.

Bill C-92 is best categorized as "recognition of rights" legislation. It confirms pre-existing rights, affirming such rights while not claiming to recognize them anew, within a process to support the

implementation of those rights, coupled with key principles, processes and purposes to guide the process. The legislation is higher level human rights legislation and has several more complex aspects that need to be separated out and assessed. In addition to the jurisdiction and law-making affirmations in the legislation, there are operational principles that will be relevant to decision-making about specific cases but were added to ensure that the critical problems in child welfare were immediately tackled. These principles such as the priority on prevention and placement of children, are designed to recalibrate the child welfare system without requiring First Nations laws be passed on the first day after Royal Assent to supplant existing provincial or federal laws.

Two infographics have been developed to provide a visual guide to the provisions of Bill C-92, and these might be helpful to review to frame a larger perspective on the various parts of the Bill and how they may interact with each other and impact the current system in BC. These infographics are attached as Appendix A and might be useful to view alongside this opinion.

Bill C-92 advances substantive legal recognition of the human rights of First Nations peoples by affirming collective rights (such as self-determination and the inherent right of self-government) and by recognizing and affirming critical rights of individual children and youth, and the rights of their families and caregivers. The Bill makes no explicit reference to the *Indian Act,* which was a key policy objective advanced by First Nations leadership because any attempt to rehabilitate the *Indian Act* has been resoundingly rejected and because the absence of reference to the *Indian Act* is a commendable achievement in light of the long reach of section 88 of the *Indian Act* in the colonial system. Lawyers and others who are highly accustomed to working within the *Indian Act* system, and who may have "normalized" it as accepted legislative practice or as a necessary aspect of working with First Nations administration, may find the wording of the Bill to be awkward. Any such awkward wording is a direct result of the explicit objective to not refer to the *Indian Act*, but instead affirm the inherent rights of First Nations for a recognition-based approach.

Bill C-92 provides support for the inherent right of self-government and self-determination in one important way that deserves particular note for BC. The definition of "governing body" in the Bill is "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*." The affirmation of a Nation-to-Nation approach in the Bill, and the confirmation of UNDRIP and related provisions, strengthens this position. The Preamble to the Bill gives the context for the provisions that follow. In it, Canada is "committed" to the following principles:

- Working in cooperation and partnership to support the dignity and well-being of children, youth, families and communities and to recognize and build upon the achievements and accomplishments to date
- Achieve reconciliation with First Nations through renewed nation-to-nation relationships based on recognition of rights, respect, cooperation, partnership, and
- Engage with First Nations and provincial governments to support a comprehensive reform of child and family services.

Bill C-92 does not refer to the Indian Act in any section, or provision. It recognizes that First Nations governing bodies must be selected by First Nations peoples. This is not *Indian Act* band councils by default, as is the case in many contexts including provincial child and family services law. The Governing Bodies are the representative governing bodies selected by First Nations rights and title holders. A band

council will be considered a governing body, only if that is the choice of the relevant First Nation's citizens at that point in time. Like self-determination and the process of dealing with the colonization caused by the *Indian Act* imposition, the Nation-building approaches may involves steps and take time. This is a dynamic process and transitions are well underway for most First Nations in BC.

The "nation-building" and Nation-to-Nation approach of Bill C-92 is reflected in the definition of Governing Bodies and is further affirmed in the provisions of the Bill that recognize that such Governing Bodies can enter into agreements with federal and provincial governments. This may be valuable to support legislative reform work in BC on UNDRIP legislation and other topics where the legal status of First Nations Governing bodies continues to be approached such that they are not recognized as Governments. Bill C-92 changes that paradigm without referencing in any way the *Indian Act*.

Such recognition might seem obvious and legally insignificant. However, it is of utmost importance in the assessment of the Bill's real impacts. Under the *Indian Act*, band councils are not considered real "governments" or entities with legal capacity or freestanding rights and powers. All powers of band councils are delegated or derived from the Federal Minister under the *Indian Act* as a matter of law.

The purpose of the *Indian Act* was to erase First Nations government systems. Hence as a matter of legal capacity—First Nations create corporate structures or non-profit societies as legal entities to enter into or conclude agreements for their capacity to have legal effect. This is because the legal capacity and authority of Council is derived from the Minister of Indigenous Services or designated Minister under the *Indian Act.* This has distorted many issues and caused a variety of difficulties for First Nations rights and title holders who have been deprived of representational capacity by federal laws that eroded or denied the inherent exercise jurisdiction and the need for appropriate Nation-to-Nation relationships with other Governments.

This colonial vestige has distorted legal and political recognition for First Nations inherent rights since the 1840s. Such difficulties continued after Section 35 was included in the repatriated Constitution due to political divisions, narrow approaches to interpretation, and the absence of recognition of rights as a default approach. In Bill C-92, First Nations governing bodies selected according to the self-determined choices of First Nations rights holders will see their governments recognized as having legal capacity to enter into agreements and to be "governments" with rights and jurisdiction that are "inherent" and not derived from federal or provincial Canadian governments. This means only First Nations governments draw their jurisdiction from their inherent rights, which are affirmed in the Bill for clarification purposes, and are not "inferior" to other governments.

(a) *Coordination Agreements*

Bill C-92 takes a further step in terms of First Nations jurisdiction by providing the option for a First Nation, as a distinct and recognized government, to request a "coordination" agreement with the Federal and Provincial Government (section 20). Such coordination agreements are not meant to create rights or recognize rights—jurisdiction and rights are already affirmed in the Bill and sourced outside the Bill in the inherent and pre-existing rights and Treaties of First Nations peoples and their own systems of laws—but coordination agreements create a process to support First Nations authority, fiscal relations and a uniform safety system for children and youth, especially in emergencies when any government engaging with a child may need to bring the child to a place of safety while delimiting their respective authorities and roles. Section 20 of the Bill takes one further step: it creates a 12-month transition

process which allows First Nations to trigger the request for Coordination Agreements and gives the other governments 12 months to come to the table to discuss matters and reach an agreement on items of mutual concern.

However, if no such participation is forthcoming by the Province, or should such a process to discuss coordination of jurisdiction proceed too slowly because of denial of rights or other such obstacles, the laws of First Nations will take precedence over provincial and federal laws after the 12-month period has passed. All governments are expected to make "reasonable efforts" to conclude coordination agreements and there is an option for dispute resolution to address items that may be protracted. The reasonable efforts standard is new and is not a high standard—but applies to all Governments, meaning there is a standard expectation for cooperation in concluding agreements on important matters that is required for child welfare jurisdiction to be operational. Funding and fiscal issues will be vital; more will be said of that topic later in this opinion.

First Nations governments can pass laws and enforce those laws without involvement with any other government and without any coordination agreement being triggered or concluded. However, for clear paramountcy of First Nations laws to be recognized, the transition process of a one-year period to coordinate and address critical issues with other governments can be triggered unilaterally by the First Nations government.

The introduction of timeframes for transition, pathways for dispute resolution, and other practical intergovernmental recognition and coordination functions, places the First Nations governments in a new setting that has not been recognized in any other federal legislation to date.

In relation to jurisdiction and law-making of First Nations, the Bill recognizes the entire bundle of powers attached to such jurisdiction and exercisable by a First Nations government. This includes authority to pass laws, enforce laws, and implement dispute resolution processes for those laws. Such dispute resolution powers are distinct from the dispute resolution in section 20 for intergovernmental disputes during coordination agreement discussions.

To achieve a fundamental shift in First Nations governance and inherent rights, the laws passed by First Nations governing bodies are afforded full "protection" of federal laws, superior to all other federal laws, with the exception of certain provisions of the *Human Rights Act* and the *Canadian Charter of Rights and Freedoms* (which, as part of the *Constitution Act, 1982*, cannot be excluded without a constitutional amendment—but which has an interpretive provision (section 25) for Aboriginal peoples). First Nations laws are inherent self-governing instruments, but they are also of the full force and effect as federal laws, with priority over Canadian federal laws under Bill C-92. The *Indian Act*, though unreferenced, is set aside by the Bill in those cases where First Nations occupy a legal or regulatory field and chose to end the application of Canada's colonial, administrative *Indian Act* regime.

The Bill should be understood as a pathway to change—with First Nations in the lead and deciding for themselves how to navigate. This is "pathway" legislation because it sets out key principles and identifies processes for ongoing improvement with a provision triggering a fulsome review every five years. Such a review, with First Nations involvement, will be required to be tabled in the House of Commons for consideration, study and debate.

Bill C-92 is broad and general. Therefore details regarding the operational aspects of child welfare systems development, information sharing, organization of services and employee qualifications and

indemnity, are all second-level items that will need to be resolved through regulations to the Act, or as matters of internal determination by First Nations governing bodies.

For Bill C-92 to be effective, it will require further articulation and development of specific items in regulations and associated policy and operational processes to ensure the opportunity for reform can be fully realized and implemented. The effectiveness of these changes may be impacted by lagging progress on some related items, some of which are identified in this opinion.

(b) *Rights Recognition Framework*

The Government of Canada's work on Bill C-92 proceeded alongside other initiatives on a Rights Recognition Framework (RRF) in 2018. It was contemplated that the RRF process would also lead to legislation that could reset the pathway for self-determination and for recognition of the inherent right of self-government. This process was slowed down, stalled, or ended (depending on the viewpoint of the officials involved in this process). Bill C-92 should have been part of a "suite" of legislation that would have set out several critical matters for rebuilding First Nations governments based on inherent rights, self-determination and within the context of implementing the UN Declaration as a progressive tool for reconciliation in Canada.

That projected course did not materialize as promised, and is an ongoing matter of discussion and debate. Nevertheless, the child welfare legislation did emerge and is the first rights recognition legislation from that process. There is no question it would have benefitted from some more critical nation-building elements that would serve to support transitions out of the *Indian Act* into new nation-to nation arrangements. There are implications for Bill C-92 as the first legislation out of the starting gates to affirm inherent rights and self-determination. Acute levels of distrust, disappointment and dismay with the RRF process may well colour the reception of Bill C-92. However, Bill C-92 should be given independent consideration in a wider context because so many children and families will be immediately impacted by its passage.

Child welfare and systemic discrimination requires significant immediate action and not all First Nations governments are ready to occupy the jurisdictional field, even if they have an inherent right to do so. However, of all places in Canada, BC First Nations have a higher degree of readiness to take these steps. Specific First Nations have legislation in place—some have even had by-laws in place since the 1980s.

The "law-making" concept is not simply a mirroring of a provincial statute or legislation. First Nations legal approaches to children and families can mean protecting existing practices and beliefs, ways of life, cultural systems, family and clan or house systems, and other elements of First Nations society that have been repressed or denied formal legal recognition in the colonial system. Should Bill C-92 receive Royal Assent, the definition of "law" itself will change —because First Nations laws may not be as written and prescribed in the same sense. Practices may be identified with clear Indigenous custodians or decision-makers for children and entirely new approaches to child welfare itself. For example, the strong preference to remove the offending adult harming a child rather than removing the child is already stated as a preferred First Nations practice but was prevented from operating until First Nations laws gained precedence over other child welfare laws and approaches. Much room for development of new approaches to laws, policies, enforcement and dispute resolution (including Tribal Courts) will evolve from Bill C-92 over time if the current political conditions to support such developments hold or develop.

2. Practical Impacts

Bill C-92 sets out a number of key principles and procedural or substantive rights for the protection of First Nations children, youth, families (including caregivers) and First Nations governments.

The Bill is complex in this regard and those not as familiar with child welfare may read the Bill and find it confusing, with mixed messages or perhaps even poorly structured. There is no question Bill C-92 could use reorganization for clarity, further editorial polish and clarification in places, and perhaps it will receive that refinement during the study period in the Senate Committee. The complexity arises because of the uncertainty around shifting from the status quo, reorienting familiar concepts in new directions, and practicably weighing and balancing various factors and considerations that may be material to specific cases in the future.

The elements of the Bill that are included as principles reflect the immediate need to reset the child welfare system and the immediate shifts necessary to ensure that the dual purposes of the legislation can be supported across all systems. There are at least six major adjustments in principle, substantive or procedural rights and practice that the Bill will introduce or refine in some fashion. These are, among others, the following:

a. Priority for prevention approaches (section 14) including explicit requirements for prevention and support in prenatal and post-natal contexts to avoid birth alerts and removals at birth.
b. Provisions on "substantive equality" aimed to address a range of issues for which First Nations and their representatives have advocated under the important rubric of "Jordan's Principle."[6] Note the expression "Jordan's Principle" was not used in the Bill due to statutory drafting guidelines that generally do not allow references to specific names. This was not the suggestion of First Nations as it was strongly encouraged that such a reference be included, even if it breaks with the conventions of statutory drafting.
c. Best Interests of the Child provisions (particularly section 10) that give a new definition to the factors of significance in determining the best interests of the child, including cultural continuity and family unity, while not prescribing precisely the weight to be given to these factors, thereby leaving significant room and flexibility for First Nations laws to supplement and breathe deeper meaning into these concepts.
d. Priority for placement of children with family and community and a requirement for ongoing reassessment if return to family can be achieved.
e. Principles for service delivery to First Nations children, youth, families and communities.
f. Process rights to be informed, participate as a party or make representations in child welfare proceedings are expanded beyond provincial law to include caregivers, family, community and Governing Bodies.

[6] Note that the Bill does not refer to Jordan's Principle specifically, but section 9 and other references use the phrase "substantive equality." This provision includes references to avoiding gaps in services for children and youth and other critical factors. The absence of acknowledgement of Jordan's Principle in the preamble or body of the bill is a point of contention and does not align with the policy positions advanced by First Nations for this to be included in the Bill.

Such aspects of the Bill offer new tools and opportunities to address First Nations child welfare concerns by reframing some established child welfare concepts or doctrines—such as the Best Interests of the Child (BIC). This concept has been often used to remove children, notwithstanding that it is part of the international human rights standards for children, merely because the concept has been applied in a discriminatory way by Canadian authorities toward First Nations children, families and communities.

For those who work directly in these systems and interact with provincial statutes, procedures, rules and processes, the provisions of Bill C-92 create obvious new spaces for discussion, for new sources of law to inform practices that exclude First Nations culture and family as meaningful considerations or have become too routinized, and for the recognition of First Nations rights with clarity where current provincial laws are silent.

A range of key provisions in the first half of Bill C-92 reframe child welfare concepts or introduce new principles and rights—in addition to those sections of the Bill that focus on the jurisdiction and self-government provisions which in and of themselves can serve to modify some of these provisions through First Nations law making. I highlight in Appendix C some of the most significant words or concepts that will shift the framework for child welfare practice and serve as a potential focal point for change or expansion of the tools available to First Nations in relation to promoting identity, cultural continuity, attachment to family and community, and family unity.

Some of these provisions are "process" rights—like the right of parents, caregivers and communities to be notified "before any significant measure" is taken by child welfare authorities regarding a child. The right for parents and caregivers to be automatically added as a party to a proceeding is a shift that expands who can be involved in child welfare (especially when caregivers or family members such as grandparents have expressed that they have felt excluded for some time in these systems and have been excluded due to privacy considerations or because their roles in First Nations family systems are not acknowledged). Other provisions are rights to request that any cases involving First Nations children be reassessed on an ongoing basis to identify viable family placements for children. These are also significant process rights that are not restricted to a particular stage of proceeding and could therefore be beneficial in rolling-back matters that may otherwise be considered "settled" by the provincial system.

Other concepts in Bill C-92 introduce considerations and priorities that discretionary decision-makers must account for when providing child and family services to an Indigenous child. For example, Bill C-92 requires comprehensive consideration of poverty and socio-economic difficulties facing First Nations families, which are not valid grounds upon which to apprehend a child. That requirement reads:

> **15** ***Socio-economic conditions***
> *In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.*

Many such considerations have previously rested exclusively with Provincial Directors of Child Welfare under provincial laws. Now, there are stronger terms respecting the principles of cultural continuity directed at keeping children connected to their family, culture, language, customs, traditions, laws and

territories. One such provision in Bill C-92 that requires a priority for Indigenous family, group, and community members when identifying placement options for a child in care reads as follows:

> **16(1)** ***Placement of Indigenous child – Priority***
> *The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:*
>
> **(a)** *with one of the child's parents;*
>
> **(b)** *with another adult member of the child's family;*
>
> **(c)** *with an adult who belongs to the same Indigenous group, community or people as the child;*
>
> **(d)** *with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or*
>
> **(e)** *with any other adult.*
>
> [underlining added]

Recognizing the territorial nature of identity, culture and Nationhood is also a significant departure from the current range of legal factors. For example, the importance to the child of an ongoing relationship with the Indigenous group, community or people to which the child belongs must be considered as part of an Indigenous child's best interests in order to preserve the child's cultural identity and connections to the language and territory of that Indigenous group, community or people. Supporting comprehensive consideration of these factors are additional clauses that require decision-makers to consider all factors related to the circumstances of the child including child's cultural, linguistic, religious and spiritual upbringing and heritage to ensure that any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs.

Bill C-92 also provides a shift in notification requirements when significant measures are being taken on children and youth files. This is an expansion beyond current provincial requirements in BC. Now, notification of significant measures must be given to caregivers, family, community and governing bodies involved with children. The class of persons who can be parties to the proceedings has expanded to others connected to the child. The waypoints during which such notifications will be required under Bill C-92 are left open. Clearly then, additional work will be required in BC to develop clear expectations with MCFD regarding such matters in order to make notification much more substantial and meaningful. Whether this creates "meaningful" notification so that families and communities do not lose track of children, and can actively become involved in all aspects of planning for children, will require active promotion of these concepts as well as training and acceptance by provincial systems through re-education and re-alignment of provincial practices. Each of these items are meaningful but one can quickly pinpoint a pressing need for focussed training, compliance and accountability given the difference between the status quo and these principles, tools and processes.

New procedural rights give parents and caregivers the right to make representations or become a party to child welfare proceedings. When caregivers are extended family such as grandparents, this recognition is important. The lack of such recognition has been a source of ongoing complaint by family

members with important standing in First Nations family systems about their rights to know and participate. The rights of families to know what is happening to a child, including where and when decisions will be made, and to participate in child welfare processes strengthens the natural advocates for children in child welfare. It makes routine in legal proceedings a degree of involvement that has been common outside the legal system but uncommon within.

The scheme of *Bill C-92* is complex because child welfare systems have certain core working concepts that have been the subject of extensive review and evaluation and have been repeatedly determined to promote systemic discrimination against First Nations peoples, causing a breakdown of family unit and cultural continuity for First Nations children, families and peoples. The interrelationship of these principles and process rights will be determined in actual cases and will no doubt be subject to disagreement in the early stages of implementation of the Bill, should it receive Royal Assent. However, the tools that are contained in these provisions reflect priorities and positions asserted by First Nations through child welfare reviews and positions for many years. For example, one of the core principles of the bill is substantive equality as reflected in the following concepts:

> **9(3)** ***Principle — substantive equality***
>
> **(c)** a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;
>
> **(d)** the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and
>
> **(e)** in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

It is easy to posit scenarios where one principle will collide with another principle, requiring decision-makers to determine how to proceed. This is an ordinary part of decision-making. Actual practice is highly influenced by the culture and competency of those making the assessments. To address this reality, a shift is being undertaken to place decision-making more firmly in First Nations hands and out of provincial child welfare systems. This alone should bring more clarity and focus to the priorities and value judgments required to maintain family connection and unity.

Bill C-92 attempts to reframe provisions like those routinely assessed in provincial statutes for the determination of what is in the Best Interests of the Child. The child's best interest must be understood and approached in light of their family, First Nations culture and identity, and with participation of their family and community. For those who are not routinely working in child welfare at the front line in BC, there are at least three distinct provisions on BIC in BC statutes (child welfare, adoptions and family law)—each is different and none have the scope of considerations included in Bill C-92. In fact, the Bill would arguably supersede these definitions on the first day and require officials, courts and others applying a BIC test for First Nations citizens using the provisions of Bill C-92. Without a doubt, this will be met with resistance, debate and discussion even if for the purposes of seeking clarification regarding

First Nations customs and practices that officials will have no knowledge of. Hence, implementation and planned transition for the Bill is of critical importance in a province like BC.

Transitioning from the current law to Bill C-92 (if given Royal Assent in current form) will require significant effort to establish pathways for change. It is crucial that momentum continues in the right direction, toward meaningful and effective engagement with those currently operating these systems. Such momentum will help to ensure uniform adoption of the Province's new legal requirements, despite any strategic challenges that may arise.

Some provinces and territories have expressed concern that they do not understand the Bill and how it will "work" with their existing systems. They are seeking clarification and further work to be educated and informed on what the Bill will mean for these systems, in the beginning, and over time. Without a doubt, the shifts brought by Bill C-92 will be the source of significant discussion and require new kinds of relationships between provincial child welfare systems and First Nations systems, leaders and families.

Child welfare systems in Canada are uneven and there is not exactly a "national" or seamless child safety system. Directors of Child Welfare meet informally or use non-binding protocols to interact. However, they have never had to work with First Nations based on concepts such as those articulated in Bill C-92. The Bill will result in changes at a national and local level, driving some conformity across Canada on how child welfare concepts are applied, including presenting opportunities for further articulation of national standards through regulations and other processes that First Nations might want to propose following the passage of the Bill.

In many places, one will meet significant resistance to the concepts and principles in Bill C-92, and resistance to First Nations law, policy and practice in relation to engagement with First Nations, not to mention power-sharing with First Nations, or complete deferral of decisions to First Nations systems. Even where there is a commitment to sharing information or giving community greater input in decision making in Canada, that is controlled by a public official (the Director of Child Welfare) who is a lead public official delegated and designated to make decisions under child welfare legislation and policy. This "command and control" model is highly entrenched and considered essential for child-focussed decisions free from influence by others. In practice, these systems have disproportionately impacted First Nations families and communities in myriad and devastating ways. The structure of these systems is built into the architecture of child welfare and very resistant to change. The task to adjust these systems will be formidable and Bill C-92 does suggest a number of immediate major changes in this regard. Therefore it can be expected that the changes presented by Bill C-92 will be resisted and challenged in specific cases and situations.

One of the higher principles restated in Bill C-92 comes from Article 8 of the UN Declaration. In Section 9(2)(c), the language of the UN Declaration is repeated in the principle that "child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people." This provision would present multiple opportunities to mount new arguments to address cases where First Nations children have faced removal from their families or communities and where assimilation and destruction of culture can be argued as a systemic matter of concern that is relevant to and should be considered in individual cases. There is significant value in such broad concepts. While the UN Declaration could be argued itself, and should be, the explicit adoption of this wording and the priority given to it underscores

the need for systemic and individual attention in the application of Bill C-92 and the project of child welfare reform in Canada.

3. Shortcomings

While the discussion of the shifts and tools in Bill C-92 has been outlined above, practice and experience reinforce the need to flag the importance of early training, capacity development, and information and knowledge exchange to shift entrenched practices in new directions. These major social-serving systems are very challenging to change and often have suboptimal organizational cultures that are rewarded or reinforced through training, practice and shared beliefs for generations. Bill C-92 will cause significant concern when decisions on children move from the ambit of provincial government officials and over to First Nations governments or service agencies applying First Nations laws, policies and practices. Delegated Aboriginal Agencies have navigated these issues for many years, and the relationships have not been easy or equal.

Shifting these systems requires resources and supports beyond any particular legislative push in a new direction, or tools that can be used—in fact the 1990s CFCSA amendments in BC were not fully implemented because the culture of social work practice was very slow to come to the position of recognizing the importance of engagement and collaboration with Aboriginal communities. Indeed, some suggest that this shift has not happened more than 20 years after those basic concepts were passed into provincial law. Many experienced analysts point to the absence of adequate resources to support those shifts out of the starting gates as a major shortcoming in legislative reform.

Leading advocate Dr. Cindy Blackstock recently suggested in her early assessment of Bill C-92 that the legislative proposals in Bill C-92 may result in merely a "paper tiger" unless adequate resources and supports are put in place to ensure First Nations governments and First Nations children and youth are properly supported during the transitions the Bill will bring. Dr. Blackstock has provided determined leadership on exposing and addressing funding shortcomings in the current formulas the provide support to Delegated Aboriginal Agencies mandated under the provincial systems. Dr. Blackstock, as Director of the Caring for First Nations Society, along with the Assembly of First Nations, spent a decade seeking adjudication of a human rights complaint that was decided in favour of First Nations by the Canadian Human Rights Tribunal in 2016, with a finding of discrimination against First Nations children and families receiving services from Delegated Agencies that were not funded at the level required in comparison to other children and family services.[7]

While that tribunal decision was focussed on funding to delegated aboriginal agencies operating under provincial systems, the principles of anti-discrimination applied to the body of material placed before the tribunal (including ongoing financial information regarding children's services) is highly relevant to the assessment of Bill C-92. The tribunal process led to a process for ISC and Canada's to explore better ways to promote accountability surrounding funding and expenditures on First Nations children and families—and the creation of a National Action Committee (NAC). Further work on a plan entitled "Spirit Bear Plan" has been proposed by the Caring Society as important to sustain that effort and complete a more comprehensive fiscal review, assessment and replacement of current policies with

[7] See timelines, documents and further details of the Human Rights complaint, decision and subsequent compliance orders (as recent as 2019) at https://fncaringsociety.com/i-am-witness-tribunal-timeline-and-documents?page=2.

more accountable, collaborative and transparent processes. There is no question that building on the expertise and information considered during the human rights tribunal process must continue in some forum or mechanism on an ongoing basis.

If it receives Royal Assent, Bill C-92 will become the statute under which ISC will be making Treasury Board funding submissions within their budgeting processes on an ongoing basis. The Bill will anchor the statutory funding submissions and impact the manner in which resources are allocated to carry out the actions falling within Bill C-92. **However, it must be emphasized that there is no funding formula in the Bill**, apart from the acknowledgement by Canada of the call for funding in the preamble, which now reads:

> *And whereas the Government of Canada acknowledges the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities;*

The policy positions of FNLC include support for the Caring Society/AFN human rights complaint, and repeated calls for funding for child welfare services, jurisdiction-based approaches, and Jordan's Principle. While Budget 2019 included a lift for Jordan's Principle, much of the budgeting for children and families is allocated without the degree of clarity required to be needs-based, or provide for the capacity and support work required to build and fund the First Nations systems that are required. The absence of a funding principle in the body of the Bill (in addition to the preamble) is the matter that requires the highest priority attention in review of the Bill.

All First Nations who engaged in the development of the legislation asserted that funding was a priority. Canada rejected this proposition and did not add a funding provision to the body of the Bill. The language of the preamble, if restructured as a principle and migrated to the body of the Bill, could be a significant improvement more consistent with First Nations policy submissions.

First Nations have also identified funding concerns surrounding fiscal supports for capacity, operations, capital and services provided under First Nations authority. Without a specific commitment to a funding principle or guidance on a formula (even if such was developed later in regulations), there are concerns that the jurisdiction will be difficult to occupy and implement across such complex and entrenched systems.

First Nations across Canada will be focussing some of their submissions on expanding the language of the Bill in section 20(2) to be a more positive and affirmative commitment to supporting the exercise of jurisdiction and the development of systems, services, capital expenses, and other categories of expenditure. Canada, due to the Tribunal orders, now covers "actuals" for Delegated Aboriginal Agencies, but has restricted those fiscal decisions to Delegated Agencies applying provincial child welfare laws to First Nations peoples. Transitions here will be very critical, and the advocacy of First Nations leaders will no doubt emerge strongly on the issue of fiscal arrangements.

Three other critical gaps in the legislation are also of significance for implementation of the tools and concepts in Bill C-92.

First, First Nations advocated consistently, including in BC, for the creation of an independent Office such as a National Children's Commissioner for First Nations children and youth, or a series of equivalent

provincial First Nations offices linked to a single effective point of leadership at the federal level to advance implementation and reforms required in relation to the Bill, to promote the participation and voice of children and youth in these matters as they are so widely impacted, and to maintain pressure on governments to implement the Bill and resolve operational or transitional issues in a purpose driven way. Other priorities and functions include independent monitoring and reporting periodically on outcomes, progress and issues for attention by governments between the five-year review periods to keep the issues for First Nations children and families visible to law-makers and the public, as well as promoting international human rights compliance and accurate international reporting on Canada's record for First Nations peoples.

The proposal for the creation of these independent Commissioners at the national or provincial/territorial levels was not supported by Canada in Bill C-92. Canadian officials indicated they could support initiatives outside the legislation, but did not receive approvals from central agencies of Government to include such a body or bodies in the text of Bill C-92.

BC Chiefs have identified the need for a BC support body that could be dedicated to First Nations children and families in BC and ensure that the work continues to advance the resolution of cases, systemic change, and address specific needs in BC surrounding First Nations jurisdiction and authority in relation to provincial laws and policies.

Second, there is a gap in Bill C-92 due to the absence of provisions identifying a mechanism to establish a supportive agency, such as a national child welfare agency, or series of provincial organizations, akin to the National Indian Child Welfare Agency (NICWA) in the USA. NICWA operates as a high-functioning technical-and-capacity-supporting institution to address practice issues such as the need to develop national standards and funding guidelines and co-develop comprehensive regulations as needed (i.e., insurance, notification, participation rights, etc.), while promoting the clearinghouse and knowledge exchange of best practices. NICWA is a clearinghouse and training agency emphasizing professional development, and inter-tribal cooperation in reuniting families, promoting cultural continuity and ensuring a coordinated and prominent effort is made to achieve the aims of fundamental reform supporting family unity. One of the prominent Tribal Chiefs and child welfare leaders in BC, Deb Foxcroft, has served on the Board of NICWA and has brought the Board to meet with FNLC and representatives in BC. Strategically, BC has strong ties to NICWA and has looked to their output for jurisdictional reviews and knowledge exchange.

BC First Nations strongly advocated for this agency to be supported and included in Bill C-92, and the absence of such a provision is a gap that will require discussion. While Canada indicates it can support the development of such a concept and work toward supporting it more explicitly in legislation over time, it is questionable how rapid advancements will be without such an agency supporting capacity and providing the bridge for practitioners experienced in the current system to assist with the transformation of those systems in light of the exercise of jurisdiction and authority by First Nations governments.

Officials have indicated that they are open to discussing the three items identified above through agreements and arrangements outside of the text of Bill C-92—such as through political accords with BC Chiefs, or other arrangements. The consensus of First Nations technical opinion is that these areas require refinement in the current Bill and improvement will be part of the advocacy for amendments to the Bill during the Committee stage. Of course, all options will need to be considered and evaluated at each stage.

Again, there will be good reasons to consider a BC specific agency that can support the work of First Nations in BC given that the BC region is in many respects ahead of other regions in Canada. Many of the tables where jurisdiction has been under active discussion are in BC, and many First nations have child welfare laws and policies ready to go or have sought implementation of these for years. The stage of development in BC is more advanced in many ways than elsewhere in Canada. Therefore, there may be need to discuss the immediate creation of a BC institution to support the First Nations on a regional basis.

Third, while Bill C-92 has strengths and innovations and advances recognition of rights in important ways, the Bill also has a gap in relation to a parallel bill advancing on Indigenous languages: Bill C-91. The purposes section of Bill C-91 includes reference to advancing the objectives of the UN Declaration. For some reason, parallel proposals were not included in Bill C-92. This was highlighted for Canada at the consultation stage, but not remedied.

Given the central place of the UN Declaration as a progressive instrument that speaks to the minimum standards for the survival and dignity of the Indigenous peoples, further reference to UN Declaration should be added to Bill C-92. The UN Declaration provisions on children and families, self-determination, the special role of women, elders, children and youth, and other key Articles are foundational to meaningful human rights improvements in children and family services. Adding reference to the UN Declaration to the purposes of Bill C-92 will be a matter of discussion, but the absence of such a reference in the current Bill does not align well with positions taken by BC First Nations, or language accepted in other Bills also under consideration.

4. Potential Improvements

Based on the analysis of shortcomings, the following six improvements are proposed:

1. **Funding principle(s)** should be added to the body of the Bill in a funding principle section, and referenced in section 20 through specific connection of funding to the work of First Nations Governments. As a discussion item, Section 20 (2) (c) could benefit from additional language regarding "fiscal arrangements to provide funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long term positive outcomes for Indigenous children, families and communities and support the capacity and exercise of jurisdiction by Indigenous governing bodies…."[8]
2. ***The UN Declaration*** should be referenced in the purposes section of Bill C-92 to include advancing the UN Declaration, in the same manner as was done in *Bill C-91* on Indigenous languages.
3. **Jordan's Principle** should be given explicit reference, ensuring that this useful legal tool is not isolated from Bill C-92, and is instead an active consideration in child welfare matters.
4. **Best interests of the child** section(s) could be amended to more specifically clarify that First Nations governing bodies may pass laws that detail more specific First Nations policies and

[8] A table of agreements between Canada and the Provinces and First Nations that involve discussion of child and family services is attached as Appendix C.

practices including factors for the best interests of children and how to resolve issues involving the best interests of children according to the distinct practices of the specific First Nations people. This improvement would confirm what is not implied in the Bill but could be disputed later. In particular, affirm that First Nations laws bring the inherent sources of First Nations practices and culture to the consideration of the best interests of the child.

5. **The First Nations Children's Commissioner** and Independent Office to Support the Rights of Children and the Rights of First Nations Peoples should be included in a section on "mechanisms".
6. **An independent Child Welfare Agency** in the same category of the highly-respected and highly-valuable NICWA may well be required to support capacity, transitions, practice matters; develop, review and propose standards and ongoing improvements to practice areas; evaluate and assess outcomes, and address data- and information-sharing matters. This could also be included in a section on "mechanisms."

In the matter of the last two items (priorities #5 & 6, above), any meaningful amendments must clarify that First Nations leadership should be responsible for developing the framework for these institutions. The work connected with these new mechanisms or institutions is not likely to be effective in keeping with the purposes of the Bill if it is assigned to a non-governmental agency or other entity that is not connected to the priorities of First Nations governments. Such connections should provide for clear accountabilities in reporting back to First Nations on workplans and assessments undertaken, and should further provide for First Nations selection of the candidates for leadership positions in such institutions.

Conclusion

Bill C-92 is the first legislation to affirm a realignment of federal, provincial and territorial jurisdiction to make space for inherent First Nations jurisdiction in child and family services. The Bill affirms inherent Aboriginal and Treaty rights in Section 35 of the *Constitution Act, 1982*, including self-government, and gives protection for laws passed by First Nations governments to have the full force of federal law, trumping the *Indian Act* and other legislation, except for the *Human Rights Act*, and the *Canadian Charter of Rights and Freedoms*.

Bill C-92 opens a pathway to First Nations legislative, administrative and judicial space and control for activities in relation to their children and families which might build over time through ongoing refinement of the principles in the legislation through regulations including provisions for further review of the Bill every five years with reporting to the House of Commons on the effectiveness of the Bill and on necessary improvements identified at each juncture.

Bill C-92 creates or reinforces a range of "tools" or "national principles" that can effect change in provincial child welfare systems in BC and across Canada. The tools and principles include procedural and substantive rights for individuals, families, communities and First Nations and will result in a wide range of impacts and adjustments to child welfare, and more sustained relationships with children, communities and families.

Like the UN Declaration, human rights legislation and conventions are designed to give a progressive and evolving framework for addressing areas where individual and collective rights and freedoms need more explicit balancing and protection.

In conclusion, Bill C-92 will require improvements in the six areas identified in order to more closely align with the policy positions of First Nations of BC. Whether improvements can be achieved at this stage, or can be deferred to further processes (such as political accords or later legislative reviews of the Bill in 2024) is uncertain at this time. It is recommended that suggested improvements be brought forward—with a discrete number of changes given the time restrictions. Chiefs of BC can be supported to prepare letters if not formal briefs to the Committee, to the Prime Minister of Canada, and to the Minister of Indigenous Services to both outline areas for improvement and advocate for ongoing progress in child welfare reform.

Chiefs of BC might also consider recommending further internal technical work on the preparation of a draft transition plan for BC to ensure that full advantage of the legislation will be available to all First Nations governments and citizens. Such a draft plan could be brought back for review and be directed at ensuring all First Nations governments in BC can benefit from the changes Bill C-92 will bring and can access resources and supports to ensure their children and families are appropriately served, supported and connected to their families, communities, Nations, cultures, languages and territories.

Thank you again for asking for my opinion on Bill C-92. I look forward to the opportunity to revisit this opinion and provide updated views on the final Bill as matters progress.

Mary Ellen Turpel-Lafond

Appendix A:

Infographics on Jurisdiction and Inherent Rights and on National Rules, Principles or New Rights in Bill C-92

Overview of National Principles in Bill C-92

First Nations Children, Youth, Families and Peoples

What are key principles/rights? (To be added to by first nation laws)

First Nations Child, Youth and Community

Prevention

Prenatal Prevention (S.14(2))
Prevention Priority (S.14(1))

Substantive Equality (S.9(3))

1. Right of family and community to be involved in decisions that affect them/their children,
2. Rights of disabled children and youth,
3. Right of child and youth to have views heard and considered,
4. No gaps in services,
5. Regional factors considered, like remote or Northern.

Section 10 (1) **Best Interests of the Child** has a First Nation lens, including priority on **cultural continuity** - not assimilation or destruction of culture and identity (based on UNDRIP, Article 8).

Best Interests Factors S. 10 (3)

a. child's cultural, linguistic, religious, spiritual upbringing and heritage,

b. child's needs, given their age and stage of development,

c. nature and strength of the child's relationship with parent, care provider and any member of their family,

d. relationship with their First Nation peoples, language and territory,

e. child's views and preferences,

f. plans for the child in accordance with the customs and traditions of their First Nations peoples,

g. family violence and its impact on the child,

h. any civil or criminal proceeding, order, condition, or order of safety (including under a S.17 attachment and ties of child to family and each member of family to be promoted, and First Nation law).

Current Cases S.13

- Right to notice of any measure.
- Right to be a party to any case (parent and caregiver).
- Right to make representation for First Nations governments in any case.

Services: No Removal of Children for Poverty or Health Reasons (S.11)

All services provided to child and family must consider their:

- Needs, physical, emotional, psychological, safety, security and wellbeing,
- Culture,
- Right to know family and origins,
- Substantive equality,
- Must promote attachment to family and emotional ties to First Nations (S.17).
- No discrimination against First Nations governments and views of First Nation peoples

Priority For Placement: Family Unity And Primary Placement of Child (S.16)

1. With parent,
2. With family,
3. With First Nation community or origin,
4. With another Frist Nation,
5. With or close to siblings.

Reconsider Plan for Child and Family Unity

- Preamble recognizes reuniting children with family and community,
- Ongoing reassessment on return to family.

Overview of Inherent Rights and Jurisdiction

First Nations Child, Youth and Family Legislation

(BILL C-92)

Affirming UNDRIP, TRC and Self-determination of First Nations peoples.

Affirm and implement inherent right to self-government and in S.35, Treaty Rights, distinctions approach.

First Nations Government Jurisdiction =

- Law making on children & families
- Enforcement of laws
- Dispute resolution over those laws (S.18)

Must respect Best Interest of Child and First Nations approaches (S.23)

First Nations
Governments, Tribal Councils Bands

1. First Nations can pass law and proceed without Federal or Provincial Coordination (S.18)

OR

2. **Notify Canada**
Pass Law

May request a S.20 **coordination agreement**

- emergency issues
- fiscal arrangements
- how kids can exercise rights in all systems
- other items

Request Coordination Agreement with Federal and Provincial Government

All governments make reasonable efforts to conclude way to coordinate for child's safety. Duty on provinces to come to **Table** and act reasonably.

After 12 Months/or earlier with Coordination Agreement

First Nation Laws have Force as Inherent Self-government and Full Protection as Federal Law (S. 20(7))

First Nations laws prevail over Federal and Provincial Law if wanted by First Nation (must comply with the *Charter of Rights*, and *Canadian Human Rights Act*.

Extend Time for Agreement S. 20(6)

If First Nations chooses after 12 months because need time, based on First Nations choice.

Detailed Regulations can be passed on any matters if First Nations have had Meaningful Collaboration in Development (S. 32/34).

Dispute Resolution

If want to settle the issue with the Federal or Provincial Government over Agreement Stage (S. 20 (5)).

Canada will post the law and agreement on a public site so all have can have access (S. 25).

PATHWAY: 5-year reviews and reports to the House of Commons with First Nations Involvement

Appendix B:
Opinions and Letters on Bill C-92 Reviewed to Date, AFN LWG Records as of March 25, 2019

Submissions Bill C-92					
Author	**Submitted by**	**Region/Organization**	**Document Type**	**Date**	**Submission Title**
Richard Gray	richard.Gray@cssspnql.com	Quebec	Letter	11-Mar-19	PMO Letter Bill C-92
GC Joel Abram/Ruby Miller	jabram@aiai.on.ca	Ontario - COO		11-Mar-19	Recommendations Bill C-92
GC Ed John	edjohn@fns.bc.ca	BC-NAC Chair	Email	05-Mar-19	Preliminary Reflections on Bill C-92
Dr. Cindy Blackstock	cblackst@fncaringsociety.com	Caring Society	Briefing Sheet	12-Mar-19	Preliminary Briefing Sheet, Bill C-92 *An Act respecting First Nations, Metis and Inuit children, youth and families*
Naomi Metallic	phyllis.hudson@ecfs.ca	NB/PEI	Memorandum of law	04-Mar-19	Legal opinion on Bill C-92
John Olthuis	Jolthuis@oktlaw.com	Innu Nation	Email	12-Mar-19	Proposal for the Innu Nation for amendments to C-92
Daryn Leas	kadamek@afn.ca	Yukon	Memorandum of law	12-Mar-19	Memorandum on Bill C-92 (Self-Government)
Mary Teegee	mary@csfs.org	BC-NAC Rep	Letter; Revised Draft of Bill	13-Mar-19	Blackline; Proposed Revisions for Bill C-92
Bobbie Cameron/David Pratt	david.pratt@fsin.com	Saskatchewan-FSIN	Letter	09-Mar-19	Letter Child Welfare Bill C-92
Child Welfare League of Canada	rachel.gouin@cwlc.ca	Child Welfare League of Canada	Press Release	08-Mar-19	The Child Welfare League of Canada and the Canadian Association of Social Workers Welcome New Direction on Indigenous Child Welfare Legislation

Appendix C

In this Appendix, pertinent language of Bill C-92 is highlighted.

Principle — best interests of child

9 (1) *This Act is to be interpreted and administered in accordance with the principle of the best interests of the child.*

Principle — cultural continuity

(2) *This Act is to be interpreted and administered in accordance with the principle of cultural continuity as reflected in the following concepts:*

(a) *cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;*

(b) *the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;*

(c) *a child's well-being is often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;*

(d) *child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and*

(e) *the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.*

Principle — substantive equality

(3) *This Act is to be interpreted and administered in accordance with the principle of substantive equality as reflected in the following concepts:*

(a) *the rights and distinct needs of a child with a disability are to be considered in order to promote the child's participation, to the same extent as other children, in the activities of his or her family or the Indigenous group, community or people to which he or she belongs;*

(b) *a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;*

(c) *a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;*

(d) *the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and*

(e) *in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.*

10 (1) *The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.*

Primary consideration

(2) *When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being.*

Factors to be considered

(3) *To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including*

(a) *the child's cultural, linguistic, religious and spiritual upbringing and heritage;*

(b) *the child's needs, given the child's age and stage of development, such as the child's need for stability;*

(c) *the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;*

(d) *the importance to the child of an ongoing relationship with the Indigenous group, community or people to which the child belongs in order to preserve the child's cultural identity and connections to the language and territory of that Indigenous group, community or people;*

(e) *the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;*

(f) *any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;*

(g) *any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and*

(h) *any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.*

Provision of child and family services

Effect of services

11 *Child and family services provided in relation to an Indigenous child are to be provided in a manner that*

(a) *takes into account the child's needs, including with respect to his or her physical, emotional and psychological safety, security and well-being;*

(b) *takes into account the child's culture;*

(c) *allows the child to know his or her family origins; and*

(d) *promotes substantive equality between the child and other children.*

Notice

12 (1) *In the context of providing child and family services in relation to an Indigenous child, to the extent that doing so is consistent with the best interests of the child, before taking any*

significant measure in relation to the child, the service provider must provide notice of the measure to the child's parent and the care provider, as well as to the Indigenous governing body that acts on behalf of the Indigenous group, community or people to which the child belongs and that has informed the service provider that they are acting on behalf of that Indigenous group, community or people.

Personal information

(2) *The service provider must ensure that the notice provided to an Indigenous governing body under subsection (1) does not contain personal information about the child, a member of the child's family or the care provider.*

Representations and party status

13 *In the context of a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child,*

(a) *the child's parent and the care provider have the right to make representations and to have party status; and*

(b) *the Indigenous governing body acting on behalf of the Indigenous group, community or people to which the child belongs has the right to make representations.*

Priority to preventive care

14 (1) *In the context of providing child and family services in relation to an Indigenous child, to the extent that providing a service that promotes preventive care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.*

Prenatal care

(2) *To the extent that providing a prenatal service that promotes preventive care is consistent with what will likely be in the best interests of an Indigenous child after he or she is born, the provision of that service is to be given priority over other services in order to prevent the apprehension of the child at the time of the child's birth.*

Socio-economic conditions

15 *In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.*

Placement of Indigenous child

Priority

16 (1) *The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:*

(a) *with one of the child's parents;*

(b) *with another adult member of the child's family;*

(c) *with an adult who belongs to the same Indigenous group, community or people as the child;*

(d) *with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or*

(e) *with any other adult.*

Placement with or near other children

(2) *When the order of priority set out in subsection (1) is being applied, the possibility of placing the child with or near children who have the same parent as the child, or who are otherwise members of the child's family, must be considered in the determination of whether a placement would be consistent with the best interests of the child.*

Family unity

(3) *In the context of providing child and family services in relation to an Indigenous child, there must be a reassessment, conducted on an ongoing basis, of whether it would be appropriate to place the child with*

(a) *a person referred to in paragraph (1)(a), if the child does not reside with such a person; or*

(b) *a person referred to in paragraph (1)(b), if the child does not reside with such a person and unless the child resides with a person referred to in paragraph (1)(a).*

Attachment and emotional ties

17 *In the context of providing child and family services in relation to an Indigenous child, if the child is not placed with a member of his or her family in accordance with paragraph 16(1)(a) or (b), to the extent that doing so is consistent with the best interests of the child, the child's attachment and emotional ties to each such member of his or her family are to be promoted.*

Appendix D:

Table of Agreements between Canada/Provinces and First Nations that Involve Discussion of Child and Family Services

Overview of Agreements, MOUs, Discussions related to Child and Family Services – Updated March 20, 2019

Signed MOUs and Other Agreements*			
Indigenous Group/ Organization	**Region**	**Federal / Provincial Parties**	**Status**
Secwépemc Nation	BC	ISC CIRNAC BC	Memorandum of Understanding signed July 23, 2018 (BC Government Minister Conroy and CIRNA Minister Bennett, 2018). Signed by Minister Philpott October 17, 2018.
First Nations Health Council	BC	CIRNAC	Memorandum of Understanding signed February 14, 2017
Lake Babine	BC	CIRNAC BC	Memorandum of Understanding signed November 2018 – CFS is identified as topic for discussion
Wet'su'wet'en	BC	ISC CIRNAC BC	Memorandum of Understanding signed October 11, 2018
Métis Nation British Columbia	BC	ISC	Memorandum of Understanding signed December 13, 2018
Carrier Sekani Tribal Council	BC	CIRNAC	Letter of Understanding signed in January 2019 – children & families is identified as a topic for discussion
Cowichan Tribes (part of Hul'quimi'num Treaty Group)	BC	ISC CIRNAC	Letter of Understanding signed January 25, 2019
Northern Secwépemc te Qelmucw (NStQ)	BC	CIRNAC BC	BC treaty process Agreement-in-Principle signed July 22, 2018 - CFS is identified as topic for discussion
Siksika First Nation	AB	ISC	Protocol Agreement regarding preliminary CFS discussions signed December 19, 2019
Métis Nation of Alberta	AB	ISC	Memorandum of Understanding on developing a CFS Accord signed December 13, 2018

Overview of Agreements, MOUs, Discussions related to Child and Family Services – Updated March 20, 2019

Alexander First Nation	AB	ISC	Protocol Agreement regarding preliminary CFS discussions signed December 19, 2019
Federation of Sovereign Indigenous Nations	SK	ISC	Letter of Accord signed July 24, 2017
Saskatoon Tribal Council	SK	ISC	Letter of Understanding signed September 11, 2018
Métis Nation of Saskatchewan	SK	ISC	Memorandum of Understanding on developing a CFS Accord signed December 13, 2018
Fisher River Cree Nation	MB	CIRNAC	Memorandum of Understanding signed in December 2018 – CFS is identified as topic for discussion
Assembly of Manitoba Chiefs	MB	ISC CIRNAC	Memorandum of Understanding signed December 7, 2017
Manitoba Métis Federation	MB	ISC	Memorandum of Understanding on developing a CFS Accord signed December 13, 2018
Chiefs of Ontario	ON	ISC ON	Joint commitment signed on April 12, 2018
Métis Nation of Ontario	ON	ISC	Memorandum of Understanding on developing a CFS Accord signed December 13, 2018

*These agreements are non-legally binding and without prejudice