A Roadmap to C-92, the Federal Child Welfare Law

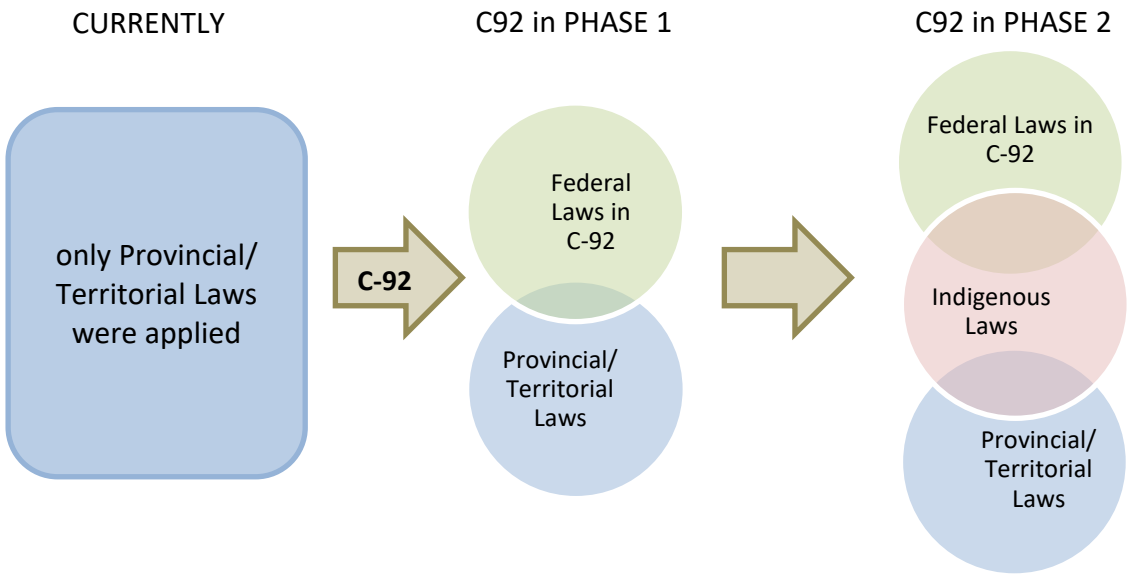
Last week, Parliament passed Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*. What does it mean? Why are some First Nations concerned, and some supportive? And what opportunities could it bring?

It Means 3 Layers of Laws Can Apply to Indigenous Child Welfare Matters

For decades, provinces and territories have had child welfare legislation that has been applied to everyone, including Indigenous peoples. Now, with C-92, the federal government has created its own child welfare law that applies to Indigenous peoples across the country.

Meanwhile, First Nations and other Indigenous peoples have never given up their inherent jurisdiction in child welfare. C-92 recognizes that jurisdiction, and creates pathways that could facilitate the implementation of Indigenous child welfare laws – though not without some limitations (more on that below).

So conceptually, when it comes to child and family services for Indigenous families, the big change is that we are moving from a situation in which only provincial/territorial laws have typically been applied, to one in which 3 layers of laws need to be considered – and the relationships between them.



C-92 Works in Two Phases

How do these 3 layers interact? To answer that, we have to look at how C-92 works, which happens in two phases. These phases depend on what First Nations and other Indigenous peoples do with C-92. So the timing will be specific to each Indigenous nation.

PHASE 1: FEDERAL LAWS LAYER OVER PROVINCIAL/TERRITORIAL LAWS

As soon as C-92 comes into force (the federal Cabinet will decide that date, not yet announced), it will have an impact by adding the federal laws it contains over top of provincial or territorial laws.

Sections 10-17 of C-92 has substantive content about child and family services (in addition, the "principles" in s. 9 may have some influence too). This content touches on things like: priorities when placing a child, emphasizing prevention when possible, what to consider when assessing the best interests of a child, and notice and participation in legal proceedings. I call these sections the "Federal Rules". (The feds like to call them "minimum standards", but I think that term can be misleading.)

These Federal Rules will apply *in addition to* the existing provincial or territorial laws. Most of the time, both laws will apply, and the Federal Rules will just act as a supplement. For instance, they might frame a slightly different direction or add some new requirements. There are only a few Federal Rules, and the provincial/territorial laws remain much more comprehensive.

But if there is a "conflict or inconsistency" between the Federal Rules and the provincial/territorial ones, the Federal Rules will prevail (see s. 4).

Funding in Phase 1: Nothing in the Act addresses federal funding for Indigenous child and family services during this initial phase. The various orders made by the Canadian Human Rights Tribunal on that matter (such as these, for example) remain in place for now. But it is not clear how long-term funding reform will be addressed. Many First Nations and agencies were disappointed that C-92 did not provide a consistent statutory funding guarantee for these essential services, after so many years of underfunding and litigation.

PHASE 2: INDIGENOUS LAWS

Crucially, C-92 also has a pathway that First Nations and other Indigenous peoples can use to exercise their own jurisdiction in child and family services. This phase is optional. It will be up to Indigenous governments to decide whether to use it, when, and what their laws will say.

C-92 says that the inherent rights of First Nations, Inuit and Métis affirmed in s. 35 of the *Constitution Act, 1982* includes "jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority" (s. 18).

To use C-92, an Indigenous government gives notice to the provincial and federal governments that it intends to exercise its jurisdiction, and makes "reasonable efforts" to reach a Coordination Agreement with them. Once the Coordination Agreement is made, or after one year, then its law will have the same force as a federal law (see s. 20(3) and s. 21). This is a potentially powerful tool.

Funding in Phase 2: It could be possible for an Indigenous government to pass targeted laws that do not require changes in funding, and therefore do not depend on the successful conclusion of a Coordination Agreement. It would depend on the content of the law.

An Indigenous government that needs funding changes for its law will likely need to reach a Coordination Agreement. Section 20(2)(c) was helpfully amended during the Parliamentary process to say that fiscal arrangements under Coordination Agreements must be "sustainable, needs-based and consistent with the principle of substantive equality". This draws in the standard set out by the Canadian Human Rights Tribunal in the *Caring Society* case.

Some Indigenous governments remain concerned that it will remain up to federal and provincial governments to actually conclude Coordination Agreements with them. Potentially, this could hold things up. It remains to be seen how easy or hard those negotiations will be, or how long they will take. No resources for negotiations, or to support Indigenous law-making, have yet been announced.

Relationships between laws in Phase 2: All 3 layers – Indigenous, provincial/territorial, and federal – could apply together. If there's no "conflict or inconsistency", all three will apply.

If there is a "conflict or inconsistency", C-92 sets out rules about which law prevails (s. 22):

- It says that Indigenous laws prevail over provincial/territorial laws.
- It says that Indigenous laws prevail over federal laws, *other than* sections 10-15 of C-92 itself, and the *Canadian Human Rights Act*. And it says the *Charter* applies (s. 19). Since there aren't any federal laws on child welfare other than in C-92, this really means the Federal Rules prevail.

<table>
<tr><th colspan="3">What law prevails if there's a "conflict or inconsistency" between laws?</th></tr>
<tr><td>Federal Rules in C-92: ss. 10-15</td><td>Canadian Human Rights Act</td><td>Charter of Rights and Freedoms</td></tr>
<tr><td colspan="3">Indigenous Law (if recognized in C-92)</td></tr>
<tr><td colspan="2">Federal Rules in C-92: ss. 16-17 and generally</td><td>Other federal laws (if any are relevant)</td></tr>
<tr><td colspan="3">Provincial or Territorial Law</td></tr>
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Section 23 is especially troubling, as it says an Indigenous law will not apply if not in the child's best interests, opening up a vague uncertainty about what laws may apply according to the preferences of social workers and judges. The same caveat is not applied to provincial laws.

The ability to overtake provincial and territorial law has many Indigenous governments eager to use C-92. And yet, the imposition of the Federal Rules about child and family services over and above Indigenous laws is a cause for concern. The federal government had no experience making child welfare laws before C-92. Many First Nations objected to the content, which is often confusing, vague and occasionally even worse for First Nations than some provincial laws.

There are also strong objections on principle: the federal government is both recognizing Indigenous jurisdiction and restricting it in the same breath. And while the federal government claimed to have "co-developed" the law, the reality was just a consultation process and the consent of Indigenous governments was not sought or obtained.

C-92 is complex legislation, but it remains to be seen how it will be used and what effects it will have in addressing the crisis in First Nations child and family services.

If your Indigenous government or organization is looking for more information on C-92, you can contact OKT's Judith Rae (jrae@oktlaw.com, 416-981-9407).