AN OVERVIEW OF THE NEW

Federal Child Welfare Law

Formerly Bill C-92

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The Federal Child Welfare Law

- Full name: *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24
- Previously: Bill C-92
- Passed by Canada June 2019
- Came into force **January 1, 2020**
- Link: https://laws-lois.justice.gc.ca/eng/acts/F-11.73/FullText.html

Historical Context

- Residential schools
- Sixties Scoop
- Inter-generational trauma
- Insufficient support for prevention services
- Millenium scoop
- Huge over-representation of First Nations children in care (and to lesser extent, other Indigenous children)
- Landmark win (2016) in human rights complaint on the federal government's underfunding of child welfare services for First Nations

Immediate Context

- Truth and Reconciliation Commission on Indian Residential Schools, Call to Action #4 (2015): "We call upon the federal government to enact Aboriginal child welfare legislation that establishes national standards …"

- Canada holds a national "emergency meeting" on First Nations child welfare in January 2018: Then-Minister Jane Philpott unveils Canada's 6-point plan that includes "Supporting communities to draw down jurisdiction and explore the potential for co-developed federal child welfare legislation"

Process of making it

- Canada has never made child welfare legislation. Its lack of expertise and experience on this subject was apparent. There are also challenges given that the legislation cuts across all provinces (e.g. concepts and terms are not consistent). And, the actual development of the legislation felt very rushed.

- Canada said it was “co-developed” with Indigenous peoples, though many dispute that. It had the consent of national organizations (AFN, ITK, MNC) but not Indigenous nations.

Summary

What does it do?

How does it work?

C-92 Does 2 Things

1

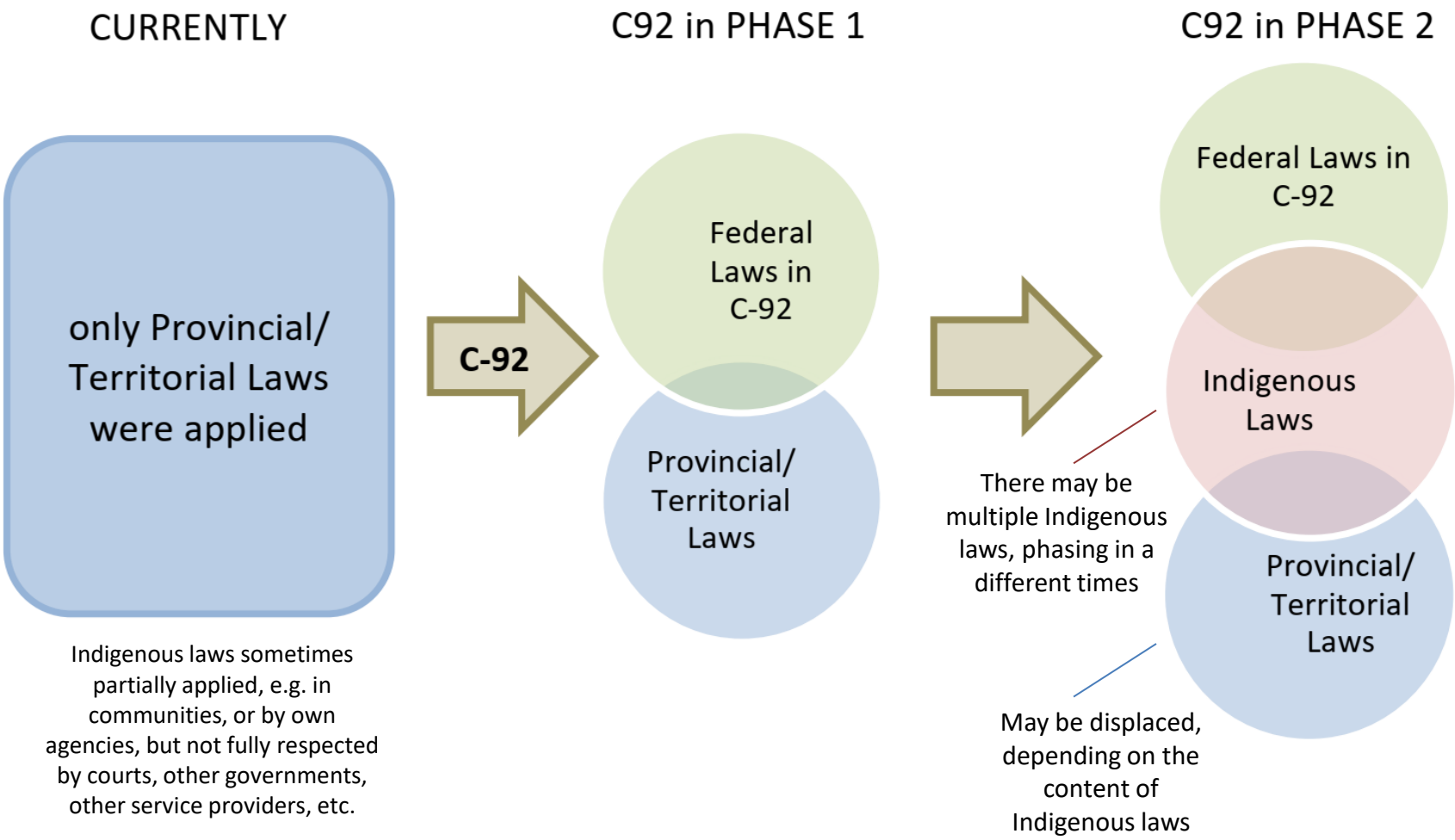
Sets out a small number of **federal rules** on Indigenous child welfare

- about 10 substantive laws
- content emphasizes prevention, etc.
- overlays on top of both provincial and Indigenous laws
- mandatory
- in force Jan 1, 2020

2

Recognizes inherent jurisdiction of Indigenous peoples in child and family services, and clears a **path** that can assist in the exercise of that jurisdiction

- Optional
- Can be exercised at any time (Jan 1st onward?)


CURRENTLY
only Provincial/ Territorial Laws were applied
Indigenous laws sometimes partially applied, e.g. in communities, or by own agencies, but not fully respected by courts, other governments, other service providers, etc.
C-92
C92 in PHASE 1
Federal Laws in C-92
Provincial/ Territorial Laws
C92 in PHASE 2
Federal Laws in C-92
Indigenous Laws
Provincial/ Territorial Laws
There may be multiple Indigenous laws, phasing in a different times
May be displaced, depending on the content of Indigenous laws

1. The Federal Rules ("Minimum Standards")

- There are about 10 sections of the federal law with substantive rules about child welfare: **sections 9-17** of Act.

- The way it works is pretty confusing. These federal rules **layer** on top of Provincial and Indigenous laws. Both or all three apply, unless there's a "conflict or inconsistency".

- All 10 will prevail over provincial law.
- 6 of them would prevail over an Indigenous law too: s. 22(1).

1. The Federal Rules ("Minimum Standards")

Some First Nations object in principle to the imposition of these rules over Indigenous laws. Though while some of the language is confusing, or constraining, most of the content is fairly mild and/or could be positive.

Starting Jan. 1st 2020, it will generally provide some benefits over provincial legislation. The degree of benefit depends on the province. It depends on what the provincial baseline is. In some cases, the benefits will not be dramatic, in others, the difference will be more noticeable.

Provincial/territorial laws will continue to provide the primary legal framework of child welfare. Cases will continue to be heard in provincial courts or wherever they usually go, and most processes will stay the same.

1. The Federal Rules ("Minimum Standards")

ss. 10-15 prevail over an Indig. law

- s. 9 – Principles (inform interpretation of the standards and of C-92 generally): (1) best interests; (2) cultural continuity; (3) substantive equality
- s. 10 – best interests of the child
- s. 11 – "effect of services" – some general points, mandatory language
- s. 12 – notice to Indigenous governments, parents, caregivers
- s. 13 – right to representations in court for Indigenous governments; right to party status in court for parents, caregivers
- s. 14 – priority to prevention before other services
- s. 15 – limiting use of socio-economic conditions as a driver for removals
- s. 15.1 – requires "reasonable efforts" to keep child at home before removal
- s. 16 – priority of placement, considering siblings, reassessment of family unity
- s. 17 – promoting emotional ties between child and family

The end of these slides has a summary of these 10 federal rules.
The analysis of their impact will differ by province/territory.

2. Jurisdiction – recognition

Affirmation

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

2. Jurisdiction – Pathway

There's a process to exercise it:

1. • Give notice to Canada and Province(s)
2. • Make "reasonable efforts" to negotiate a Coordination Agreement (including funding)
3. • Can come into force after a Coordination Agreement is made, **or** after 1 year, without an agreement, if "reasonable efforts" were made

The Indigenous law then has the same force as federal law

2. Jurisdiction – What law applies when

Once in force using the C-92 process:

- The Indigenous law "also has the force of federal law"
- The Indigenous law takes precedence over Provincial law
  - could displace all or some
  - both can apply, but in a conflict or inconsistency, the Indigenous Law prevails
- The Indigenous law takes precedence over *most* federal law, with exceptions (these are said to prevail over the Indigenous law):
  - ss. 10-15 of C-92: six of the federal rules
  - s. 23 of C-92: a general best interests override clause (problematic)
  - Human rights (Charter & Canadian Human Rights Act)

What law prevails if there's a "conflict or inconsistency" between laws?	
Charter of Rights and Freedoms	Other constitutional law including section 35 (section 35's role here is complex)
Federal Rules in C-92: ss. 10-15	Canadian Human Rights Act
Indigenous Law (if recognized in C-92)	
Federal Rules in C-92: ss. 16-17 and generally	Other federal laws (if any are relevant)
Provincial or Territorial Law	

$$

→ Fiscal arrangements under a Coordination Agreement must be "sustainable, needs-based and consistent with the principle of substantive equality" – s. 20(2)(c) brings in language similar to Canadian Human Rights Tribunal rulings (this was a positive update during review of the bill)

→ But funding outside of Coordination Agreements is not addressed. Funding for development of Indigenous laws, and for negotiation of Coordination Agreements is also not addressed in the Act.

Who makes Indigenous laws in C-92? "Indigenous governing bodies." Really it is up to Indigenous governments to decide. C-92 is silent and flexible on who this is.

- Could multiple systems of laws apply to the **same agency**? YES. Question will be child by child.
- Could multiple laws apply to the **same child**? KIND OF YES. C-92 federal laws will always apply, then Indigenous law if applicable, which could displace provincial law in whole or in part. If multiple Indigenous laws could be relevant, C-92 says to look for "stronger ties" to the child. This is an important area for drafters of Indigenous laws, and for inter-Indigenous coordination.

Sections 9 – 17
from C-92
the federal child welfare law,
i.e. the federal rules
(so-called “minimum standards”)

s. 9 - Principles

- Direction as to how the Act is to be interpreted
- Based on 3 principles –
  - best interests of the child;
  - cultural continuity;
  - substantive equality

- Does not prevail over Indigenous law

s. 10 – Best Interests

- 10(1) requires best interests be “a primary consideration” wherever a decision or action is taken; also best interests are “paramount consideration” in a “child apprehension”
- 10(2) “primary consideration” is to safety, security and wellbeing *as well as* ongoing relationships with family, community and connection to culture

s. 10 (con’td)

- 10(3) lists 8 best interest factors to consider
- 10(4) says best interests to be construed consistently with Indigenous law applicable, to the extent possible

- Section 10 prevails over Indigenous law (according to the Act)

s. 11 – Effect of Services

- Services provided *must*:
  - Take into account child's needs including physical, emotional and psychological safety, security and well-being
  - Take into account child's culture
  - Allow the child to know his/her family origins
  - Promote substantive equality between child and other children

s. 11 (cont'd)

- C-92 uses *mandatory language*
  - more powerful
  - could be more likely to have an impact

- s. 11 prevails over Indigenous law (according to the Act)

s. 12 - Notice

- Before taking "*any significant measure*" in relation to a child, service provider must notify child's parent, care provider and Indigenous governing body
- Personal information about the child, a member of the child's family or care provider is *not* to be included in the notice *other than* as necessary to explain the proposed measure or as required by the Indigenous governing body's Coordination Agreement.

S. 12 – Notice (cont'd)

- The "personal information" restriction is odd – but I would suggest *all* relevant information will be "necessary" to understand the proposed measure. Also, the restriction is limited to the initial notice, not ongoing disclosure. We were told the intent is to limit inadvertent disclosures received by the wrong person. In Ontario, for instance, full disclosure to First Nations is already required as they are parties to proceedings.

- C-92's notice provision is more general, so even if provincial/territorial legislation covers notice, C-92 might apply in some instances not yet covered

- s. 12 prevails over Indigenous law (according to the Act)

s. 13 – Representations and Party Status

- Child's parent and care provider have right to make representations and have party status
  - In many provinces/territories, these powerful procedural rights for "care providers" will be new (and will only apply to Indigenous children, which may be a bit awkward)
- Indigenous governing body has right to make representations (does not mention party status)
  - If a provincial/territorial law already provides Indigenous nations with party status, that should remain effective.

s. 13 – Representations and Party Status (cont'd)

- "care provider" is defined as "having primary responsibility for providing the day-to-day care"
  - Not clear how far this extends – I believe it would include a customary care provider and family. Is it meant to include foster parents who were not previously connected to the child?
  - Most provinces give participation rights to "parents" and to some people standing in place of parents *before* intervention but not those assigned a caregiver role after intervention (except in more limited situations, e.g. long-term placements)
- s. 13 prevails over Indigenous law

s. 14 – Priority to Prevention

- 14(1) Priority to be given to preventive care to support child's family where consistent with best interests of the child
- 14(2) Priority to be given to prenatal care which is likely to be in the best interests of the child after birth, to prevent apprehension at birth

s. 14 – Priority to Prevention (cont'd)

- Some provincial/territorial legislation may reference prevention, or say "no course of action less disruptive to the child" is available, etc.
- C-92 says prevention "*is to be given priority* over other services" → ***may be stronger***
- s. 14 prevails over Indigenous law (according to the Act)

s. 15 – Socio-Economic Conditions

- Child must not be apprehended solely on the basis of socio-economic conditions to the extent it is consistent with best interest's of the child – including poverty, lack of adequate housing or infrastructure, or parent's state of health
- To my knowledge, Canadian provincial/territorial legislation does not have comparable provisions. Though some American legislation does.
- This new rule supports the case for in-home support and addressing family / housing / caregiver conditions without apprehension
- s. 15 prevails over Indigenous law (according to the Act)

s. 15.1 – Reasonable Efforts

- Service provider *must demonstrate* that it has *made reasonable efforts* to have child continue with parent or other adult member of family before apprehending, unless immediate apprehension is consistent with best interests
  - Places a positive obligation on agencies to ***take action*** towards family integrity, ***and to show that***
- This "reasonable efforts" requirement will be new in most jurisdictions
- s. 15.1 does not prevail over Indigenous law

s. 16 – Placement Priorities

- Order for priority of placement to the extent consistent with best interests of child:
  - Parents
  - Family
  - Same Indigenous community/group/people
  - Others
- Placement with or near siblings must be considered (this may be an added benefit)
- Reassessment on an ongoing basis to see if child can be returned to parents or extended family

S. 16 – Placement Priorities (cont'd)

- Some provinces/territories already have a similar order of priorities, though there may be slight differences
- Some provinces/territories already have a system of status reviews for children & youth in care but some don't → they will have to start doing this new process at least for Indigenous kids
- s. 16 does not prevail over Indigenous law

s. 17 – Attachment and Emotional Ties

- If not placed with a family member, child's attachment and emotional ties to family members *are to be promoted* where consistent with best interests
  - Creates a positive obligation

s. 17 – Attachment and Emotional Ties (cont'd)

- Would need to be compared on rules on access in each province. In many cases, this provision may be somewhat stronger favouring access, and positive measures to support that relationship.
- Would include siblings, as well as parents, etc.
- s. 17 does not prevail over Indigenous law

First Nations' Responses to C-92

- Mixed; First Nations in some provinces quite supportive, others not
- Some are concerned with how this one-size-fits-all approach will impact local initiatives
- Some concerned with claim of "co-development" based on process that focused on national Indigenous organizations, not Nations

General Next Steps

- Important for all First Nations, agencies, provinces/territories, lawyers, judges, social workers and others involved in child welfare sector to learn about it and understand it
- First Nations & other Indigenous Governments may also want to consider their next steps in exercising their jurisdiction, whether using C-92 or otherwise
- Not clear if there will be federal regulations
- Transitional processes / tables still under consideration

Preparation for…

First Nations

- Ensure your employees and agencies involved in child welfare are familiar with the federal rules coming into effect Jan 1, and are ready to use them to help your families
- Consider your path forward in exercising your jurisdiction. There are many questions, such as…
  - What is the best group to go forward together in law-making and governance on this issue? Will our First Nation proceed alone or with others?
  - What is our process for law-making?
  - What internal and external technical supports can we assemble to help advise and inform our choices?
  - How will our community participate?
  - Do we need to work on uncovering traditional legal principles that have been buried?
  - Will our first law be a full-on comprehensive system overhaul? Or will we break off smaller pieces at a time?
  - Do we want to use C92 to assist with implementation?

Preparation for…

Agency Senior Management

Executive Directors

Directors of Service

Other senior management

- Get familiar with the 10 federal rules before Jan 1st
- Provide training to your team on the new rules, especially the areas where C-92 provides a different or higher standard
- Consider extending training opportunities to First Nation staff you work with
- Reach out to the First Nations and other Indigenous organizations you deal with most, to meet and open a dialogue – confirm their wishes for notice of "significant measures", ask to stay informed about their plans for jurisdiction, consider offering technical support in that journey
- Ask to receive a courtesy copy of any notice they serve to Province/Canada about exercise of their jurisdiction

Preparation for…

First Nation Agencies

In addition to the above for agencies generally, **you are a key technical support and institutional asset for your member First Nations.**

- Reach out – be part of their conversations about jurisdiction
- Offer technical support and involvement as they work on their laws
- Facilitate dialogue among your member First Nations – e.g.
  - Coordination in law-making: Are they thinking of proceeding within a larger group such as a PTO? Would it make sense to develop a legal system among members of the Agency? Is anyone thinking of proceeding solo?
  - How will the role of your Agency transform and transition?
  - What protocols will be needed to coordinate between laws, ensure smooth services for families living in different areas, and navigate mixed families?

Preparation for…

Agency Boards

- Be aware of the 2 things that C-92 does
- Help connect your Agency with your member First Nations, or for non-Indigenous agencies with the First Nations and other Indigenous organizations you deal with most, to meet and open a dialogue
- Consider what you find out – what does it mean for the long-term plans and roles of your Agency? How can your organization prepare for those transitions over time?

Preparation for…

Social Workers

- Be aware of the 2 things that C-92 does
- You will need training on the 10 federal rules that come into effect January 1st, especially the areas where C-92 provides a different or higher standard. For instance:
  - Be aware that the rules have stronger statements on *priority* to prevention, and that you will be required to *show reasonable efforts* were made to prevent removal.
  - In some provinces, the automatic right for First Nations / Indigenous government to participate in court proceedings will be new
  - C-92 requires notice to First Nations / Indigenous governments for any “significant measure” in relation to a child
  - In some provinces, requirement for ongoing reassessment of placements will be new

Preparation for…

Judges

- Be aware of the 2 things that C-92 does
- You will need to become familiar with the 10 federal rules that come into effect January 1st, especially the areas where C-92 provides a different or higher standard than your province/territory. These rules apply to all Indigenous children.
- Get more familiar with the Indigenous nations in your region and the concept of inherent jurisdiction. Be prepared to start seeing and applying Indigenous laws on child and family services as they come into effect. Some cases under Indigenous laws may come to your courtroom; others may shift to other forums for decision-making.

THANK YOU!

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