Bill C-92: Recognizing Indigenous authority over child and family services

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On June 21, 2019, the Government of Canada passed Bill C-92: *An Act respecting First Nations, Inuit and Metis children, youth and families* (Bill C-92 or the Act). The Actofficially came into force on January 1, 2020. Bill C-92 is an historic piece of legislation which represents a critical step in recognizing Indigenous jurisdiction over the provision of child and family services.

Below we provide an overview of Bill C-92, summarize the processes required to establish a child and family welfare services law under the Act, and discuss practical implications Indigenous governing bodies may wish to consider.

Bill C-92: Background and objectives

Bill C-92 demonstrates how the federal government is attempting to implement Canada's obligations under the United Nations Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission.

The Act affirms the inherent right of self-government of Indigenous groups and gives federal backing to laws of Indigenous groups exercising legislative authority related to child and family services. The Act also sets out principles, or "minimum standards," for the provision of child and family services in relation to Indigenous children, whether those services are delivered pursuant to provincial laws or Indigenous laws. These principles emphasize the best interests of the child, cultural continuity, and substantive equity (section 9).

The Act presents an opportunity for Indigenous groups to pass their own laws and move beyond "delegated" or "devolved" arrangements with provincial authorities that define the current approach to child and family services for many Indigenous groups. The path to exercising that jurisdiction is fairly straightforward, but with many challenges and considerations.

Process for establishing an Indigenous child and family services law

Three key steps are required for Indigenous groups seeking to exercise jurisdiction:

1. Provide notice of intention to exercise legislative authority, pursuant to subsection 20(1).
2. Issue a request, pursuant to subsection 20(2), that Canada and the relevant provincial government enter into a coordination agreement that addresses:
    1. The provision of emergency services;
    2. Measures to enable Indigenous children to exercise their rights effectively;
    3. Fiscal arrangements relating to the provision of child and family services by the Indigenous group; and
    4. Other matters related to the effective exercise of legislative authority.
3. Draft and enact the law pursuant to subsection 18(1).

Practical considerations

1. Funding. While the *Act* embraces the need for sustainable funding for administering the Indigenous law, it does not clarify who will provide that funding. The federal government is currently offering capacity funding to Indigenous groups interested in exercising jurisdiction under C-92. While this initial capacity funding is welcome, the more significant funding issue is who will fund ongoing administration costs once the law is implemented. At present, the provincial and federal governments share responsibility for the cost of delivering child and family services to Indigenous groups. The question of who funds and delivers the services is largely influenced by whether families are located on- or off-reserve, and whether the Indigenous group participates in a delegated arrangement with the relevant provincial authority.

Negotiating a coordination agreement presents an opportunity (or a risk, depending on perspective), for federal and provincial governments to revisit their relative financial obligations. It is also important to remember that provincial governments are not compelled to participate in negotiations of a coordination agreement. At present, there is no binding dispute resolution process in place if negotiations do not succeed.

2. Relationship of laws. In drafting their own laws, Indigenous groups will have the opportunity to depart significantly from the approach found in existing provincial laws to key issues such as apprehensions and how to support children in care. Where there is a conflict between Indigenous and provincial laws for child and family services, section 22 of the Act provides that Indigenous laws are paramount to provincial laws, but subsection 21(3) qualifies that this only occurs if the Indigenous group has entered into a coordination agreement, or made "reasonable efforts" to do so for at least one year.

Negotiating coordination agreements provides an opportunity for provinces and Indigenous groups to confirm how their respective jurisdictions and administrations will interact with each other. This could be captured in the coordination agreement itself, as well as in the parties' respective laws, policies, and procedures.

Indigenous groups may also want to consider mechanisms to coordinate jurisdictions with other Indigenous groups where, for example, families include members from different Indigenous groups, each of whom have enacted their own laws.

3. Liability. Persons and organizations exercising authority under provincial laws relating to child and family services generally have the benefit of various types of protections from liability, whether through statute, insurance, employment and service agreements, training, or policies and procedures. In exercising authority under their own laws, Indigenous groups will need to consider how to establish their own approach to managing risks.

Indigenous groups may want to consider how the opportunities and risks associated with exercising jurisdiction under the Act contrasts with the status quo, including delegated arrangements. For those who do proceed with developing their own law, the process of passing a law and negotiating a coordination agreement may also take much longer than one year.

The Government of Canada seems to have acknowledged the scale and scope of work required by announcing $542 million for a capacity-building fund to assist Indigenous governing bodies with developing legislation and delivery models, participate in coordination agreement tables, engage their communities, and consult outside experts.

Takeaways

Bill C-92 provides an important pathway for Indigenous groups to exercise their inherent rights. The decision to do so requires careful consideration of significant political, legal, administrative, financial and cultural issues.

BLG's dedicated lawyers work extensively in Indigenous law and government relations. Reach out to any of the key contacts below if you have further questions regarding Bill C-92.

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