# Affirming and recognizing Indigenous jurisdiction over child and family services: An Act respecting First N...

*Indigenous Services Canada*

An Act respecting First Nations, Inuit and Métis children, youth and families: Context

## *An Act respecting First Nations, Inuit and Métis children, youth and families*: Context

The over-representation of First Nations, Inuit and Métis children in the child and family services system has been described as a humanitarian crisis; according to Census 2016 data, Indigenous children make up 7.7% of all children between the ages of 0 and 14 but account for 52.2% of children in foster care in private homes. The current approach to Indigenous child and family services too often sees Indigenous children separated from their families and communities, due to poverty, inter-generational trauma and culturally biased child welfare practices that result in apprehension.

Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families* (the Act), affirms the rights of First Nations, Inuit and Métis in relation to child and family services, and establishes national principles to help guide the provision of child and family services in relation to Indigenous children.

The Act is consistent with the Government of Canada's ratification of the *United Nations Convention on the Rights of the Child* and commitments to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*, the Truth and Reconciliation Commission of Canada's *Calls to Action*, including Call to Action #4 which calls "upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases."

The *Act* is the culmination of extensive engagements, which began with the January 2018 Emergency Meeting on Indigenous Child and Family Services involving Indigenous partners, provincial and territorial representatives, youth (including youth with lived experience), experts and advocates. Further to this meeting, the federal government committed to **six points of action** to address the over-representation of Indigenous children and youth in care in Canada. One of the points of action was a commitment to work with our partners to support communities to exercise jurisdiction in the area of child and family services, including exploring co-developed federal legislation.

Throughout the summer and fall of 2018, Indigenous Services Canada engaged with national, regional, and community organizations, with representatives from First Nations, Inuit and Métis, as well as Treaty Nations, self-governing First Nations, Provinces and Territories, experts and those with lived experience. Over 65 **engagement sessions** were held with nearly 2,000 participants. In October 2018, the Government of Canada participated in a Reference Group consisting of delegates from the Assembly of First Nations, Inuit Tapiriit Kanatami and the Métis National Council. The Reference Group proposed legislative options grounded on what was heard

through the engagement process.

Additional engagements took place with Indigenous, provincial and territorial partners in January 2019 to gather feedback on the content of the draft Bill.

# Purpose and guiding principles

The purpose of this Act is to:

- affirm the rights of First Nations, Inuit and Métis to exercise jurisdiction over child and family services;
- establish national principles such as best interests of the child, cultural continuity and substantive equality to guide the provision of child and family services in relation to Indigenous children; and
- contribute to the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.

The Act provides an opportunity for Indigenous peoples to choose their own solutions for their children and families.

# Best interests of an Indigenous child

This Act establishes that, when determining the best interests of an Indigenous child, primary consideration is given to the child's physical, emotional and psychological safety, security and well-being. The Act puts Indigenous children first so that they can stay with their families and communities and grow up immersed in their cultures.

The *Act* outlines the following factors that would have to be considered when determining the best interests of an Indigenous child:

- the child's physical, emotional and psychological safety, security and well-being;
- the importance of preserving the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- the attachment and emotional ties between the child and significant persons in the child's life;
- the child's views and preferences;
- the child's needs and level of development;
- any plans for the child's care;
- any family violence and its impact on the child; and
- any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

The *Act* was amended to clarify that the best interests of the child is to be interpreted, to the extent it is possible to do so, in a manner that is compatible with a provision of an Indigenous law.

# Priority given to preventative care

The Act emphasizes the need for the system to shift from apprehension to prevention, with

priority given to services that promote preventive care to support families. It gives priority to services like prenatal care and support to parents. The Act also clearly indicates that no Indigenous child should be apprehended solely on the basis or as a result of his or her socio-economic conditions, including poverty, lack of housing or related infrastructure, or state of health of the child's parent or care provider.

## Keeping Indigenous children and families together

The Act seeks to preserve a child's connection to his or her family, community and culture. As such, it provides the following order of placement of an Indigenous child when apprehension is in the best interest of that child:

- one of the child's parents;
- another adult member of the child's family;
- an adult who belongs to the same Indigenous group, community or people;
- an adult who belongs to an Indigenous community or people other than the one to which the child belongs; and
- any other adult.

This *Act* stresses that Indigenous siblings should be kept together provided it is in their best interest. To achieve this objective, unless immediate apprehension is consistent with the best interests of the child, before apprehending a child who resides with one of the child's parents or another adult member of the child's family, the service provider must demonstrate that reasonable efforts were made to have the child continue to reside with that person.

The *Act* also ensures that Indigenous children in care keep strong emotional ties with their family and stay connected to their communities and culture. For example, the *Act* establishes an ongoing obligation to re-assess the possibility for an Indigenous foster child to reside with one of the parents or an adult member of his or her family. It also provides that when an Indigenous child is not placed with a member of his or her family, his or her attachment and emotional ties to his or her family are to be promoted.

## Jurisdiction of Indigenous groups, communities and people

Currently, Indigenous families are bound by rules and systems that are generally not reflective of their cultures and identities. The goal of the *Act* is to change that by affirming the right to self-government of Indigenous peoples to freely determine their laws, policies and practices in relation to Indigenous child and family services.

Central to the Act is the process through which Indigenous groups or communities could exercise their jurisdiction over child and family services. The process is not a "one size fits all" approach. The *Act* is designed for Indigenous peoples to exercise partial or full jurisdiction over child and family services at their own pace. Depending on the path chosen, the exercise of their jurisdiction could result in their laws prevailing over federal laws and laws of provinces and territories.

Regardless of the approach taken, a tripartite coordinating agreement with Canada and the government of each province in which the Indigenous group is located will not be required for the Indigenous law to prevail over federal and provincial laws. An Indigenous group may:

- Give notice of their intent to exercise their jurisdiction to the Government of Canada and the government of each province in which the Indigenous group, community or people are

located.
    - Having submitted a notice of their intent, the Indigenous group would exercise their jurisdiction. However, it would not prevail over federal and provincial laws.
- Make a request to the Government of Canada and the government of each province in which the Indigenous group, community or people are located to enter into a tripartite coordination agreement to exercise their jurisdiction on child and family services, and have their law prevail over federal, provincial and territorial laws.
    - Within 12 months following the request, if a tripartite coordination agreement is reached, or no agreement is reached but reasonable efforts were made to reach an agreement, the laws of the Indigenous group and community would have force of law as federal law and would prevail over federal and provincial laws.

To facilitate the conclusion of a coordination agreement, at any given time, the Act allows the parties to benefit from a dispute resolution mechanism to be established by regulations co-developed with Indigenous peoples.

As a result, the Act is flexible enough to accommodate the needs of all groups and communities and provides the space for them to adopt their own distinctions-based child and family services models.

The Act applies to child and family services provided to Indigenous children and families by any agency, whether directly by Provinces and Territories, or by First Nations, Inuit and Métis delegated agencies.

# Next steps

To ensure a smooth transition and implementation of the Act, the Government of Canada is exploring the creation of transition governance structures with distinctions based underpinnings. Members could include representatives from First Nations, Inuit, Métis, self-governing and Treaty Nations; provincial and territorial representatives; child advocates; and others with relevant experience and knowledge to provide advice and recommendations. Such transition governance structures could also assess gaps and recommend mechanisms to guide future funding methodologies.

Where needs arise, the *Act* includes regulation-making authority. Any regulations would be developed in partnership with the relevant Indigenous governing bodies, thus ensuring they reflect the distinctive needs and diversity of Indigenous peoples.

The Government of Canada believes that the reform set out in the *Act* will begin to close the gap between Indigenous and non-Indigenous children in Canada and will meaningfully address disparities in the child and family services system. This initiative is an important step toward comprehensive reform and we remain committed to pursuing nation-to-nation, government-to-government, and Inuit-Crown relationships based on the recognition of rights, cooperation and partnership with Indigenous people in Canada.