First Nations Child & Family Caring Society of Canada

July 20, 2021

LOOKING FOR CLARITY IN CANADA'S FUNDING POSITIONS ON C-92
Part I – The Caring Society's Position

Purpose:

Currently, there are over 100 First Nations child family service agencies are funded under Indigenous Services Canada (ISC)'s First Nations Child and Family Service Program (FNCFSP). The federal government also requires the agencies to operate under provincial laws. There are over 100 First Nations child and family service agencies across the country. Canada's C-92 (***An Act respecting First Nations, Inuit and Métis children, youth and families***) seeks to affirm First Nations jurisdiction in child and family services. ISC has said it will not fund these new entities under the FNCFSP, and it is not clear what Canada is proposing in the alternative or how the funding arrangements will be enforced if the funding levels or structures prove inadequate. Canada is refusing to expand the FNCFSP terms and conditions to include First Nations jurisdiction and is signaling that the government may not honour the Canadian Human Rights Tribunal orders in funding agreements for agencies operating under First Nations jurisdiction. FNCFSP is subject to binding legal orders by the Canadian Human Rights Tribunal (CHRT or Tribunal), requiring Canada to provide substantively equal funding that responds to children's needs and the distinct circumstances of the communities they live in. Arrangements negotiated outside of the FNCFSP have no such backing, which is concerning given Canada's track record of underfunding public services. It is also unclear how excluding First Nations jurisdiction from the FNCFSP will impact existing agencies if the Nation(s) they serve choose to assume jurisdiction under C-92. This paper is intended to provide a guide to ensuring Nations receive relevant information from Canada before entering into a coordination agreement to ensure "free prior and informed consent."

Paragraph 413(2) of) CHRT order on funding for First Nations child welfare (2018 CHRT 4) states that the CHRT order applies until such time that "Canada reaches an agreement that is Nation specific even if the Nation is not providing its own child welfare services and the agreement is more advantageous to the Indigenous Nation than the orders in this ruling." The Caring Society takes the position that the CHRT orders are a baseline to funding First Nations jurisdiction; however, we are keenly aware that it has often taken litigation to enforce legal principles v. Canada and that such litigation can be costly and arduous. The *First Nations Child and Family Caring Society et al. v. Attorney General of Canada* case has been ongoing for over 14 years. First Nations must ensure that funding agreements with Canada are rock solid before entering into jurisdiction, given Canada's long history of under-funding and divesting itself of accountability in First Nations child and family services.

This paper is not exhaustive, does not represent legal advice and reflects the Caring Society's knowledge as of the date of publication.

Caring Society Position:

The First Nations Child and Family Caring Society (Caring Society) supports First Nations self-determination in child welfare. Self-determination means First Nations should be ensured substantively equal funding regardless of the service delivery model or the nature of the jurisdiction. As Canada provides inequitable funding across most First Nations public services, it is vital that Canada end its discriminatory conduct in the areas that drive child welfare maltreatment concerns such as poverty, poor housing, addictions, mental health and domestic violence services. Canada's failure to address the funding gaps in areas that drive the maltreatment poses a significant risk to First Nations jurisdiction and to First Nations children regardless of jurisdictional model.

Canada must respect this self-determination by providing:

- accurate, clear and transparent information to ensure "free, prior and informed consent";
- funding that improves on the CHRT orders and fully enables First Nations children and families to receive full benefits from evidence-informed and culturally-based services;
- funding that is evidence informed and based on wellbeing indicators;
- Canada must give First Nations providing child and family services under any form of jurisdiction the option of receiving funding per the CHRT orders;
- Canada must remedy its discriminatory program funding for First Nations children's services by adopting and fully implementing the Spirit Bear Plan;
- Canada's obligation per any funding agreements must be binding and enforceable;
- Consistent with Jordan's Principle, Canada must provide funding for on and off reserve service delivery regardless of the province/territory's willingness to do so;
- Canada must fully implement Jordan's Principle per the CHRT definition and approach regardless of the jurisdictional model per C-92; and
- Canada must support a range of jurisdictional models including but not limited to provincially delegated agencies, partial jurisdiction, full jurisdiction via C-92 or via Section 35 or another self-government pathway.

The Caring Society supports options that go beyond the dichotomous options of maintaining provincial delegation or assuming full jurisdiction. This means that First Nations ought to be supported financially by Canada to explore partial-jurisdiction models and to transition to full jurisdiction at their own pace. The *Act*'s 12-month provision for the enactment of laws is very unrealistic, particularly for communities that have not done direct service delivery before. The agency experience is that it typically takes a minimum of 5 years to do the developmental work necessary to begin offering services and a further 10 years of operations for funding levels to become predictable.

Our concern is that Canada has not been transparent, thereby frustrating the "free prior and informed consent" enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Indeed, Canada has taken measures to shield itself from the CHRT orders by: 1) not expanding the

current FNCFSP terms and conditions to include First Nations jurisdiction; 2) failing to disclose its positions on the CHRT orders vis-à-vis C-92 to First Nations and the public; 3) publishing a flawed technical guide that fails to clearly disclose Canada's positions on funding; 4) writing C-92 in a manner that shielded Canada from a clear fiduciary obligation; and 5) failing to take adequate measures to ensure a smooth transition for those assuming jurisdiction under C-92 or adequate supports to actualize measures such as the C-92 national standards and notice provisions for all First Nations.

Data on First Nations Child Wellbeing:

1. The Canadian Incidence Study (CIS) on Reported Child Abuse and Neglect (2019) shows that:
    a. First Nations children are 4.2 times more likely than non-Indigenous kids to be investigated for child maltreatment, 11.4 times more likely to be placed in kinship care and 12.4 times more likely to be placed in child welfare care;
    b. neglect is the primary category of child maltreatment driving the over-representation;
    c. the key drivers of the over-representation are caregiver poverty, poor housing, substance misuse, domestic violence and mental health concerns;
    d. First Nations children are also more likely to have positive toxicology at birth, FASD, intellectual and developmental delays, and mental health concerns;
    e. 72% of the families investigated for child maltreatment live off reserve; and
    f. ISC data trends show the number of children in maltreatment investigations on reserve is slowly going down thanks to the work of agencies and communities.

The Institute for Fiscal Studies and Democracy (IFSD) study (2020)1on equitable funding for First Nations child welfare includes wellbeing indicators that were developed with input from First Nations, First Nations agencies and experts. Driving funding towards outcomes for children is critical in the development of an effective needs-based funding approach. Canada is currently not using evidence-based indicators for any of its funding approaches.

Inequalities in federally funded public services on reserve:

The Auditor General of Canada and Parliamentary Budget Officer have repeatedly pointed to broad sweeping and deep inequalities in public services on reserve. In response, First Nations adopted the Spirit Bear Plan to cost out all inequalities and prepare and implement a comprehensive plan to address these shortfalls. Canada has refused to adopt or implement it and has not proposed any other mechanism to eliminate all the public service inequalities. These inequalities feed into the drivers of the over-representation noted in the CIS.

1 https://fncaringsociety.com/sites/default/files/2020-09-09_final_report_funding_first_nations_child_and_family_services1.pdf

UNDRIP:

Non-discrimination and free, prior, and informed consent are cornerstone principles of UNDRIP. Canada has said it adopts UNDRIP without qualification and is currently considering legislation to enact it into domestic law.