

From: "Gros-Louis2, Isa (AADNC/AANDC)" <isa.gros-louis2@canada.ca>
Date: January 29, 2021 at 2:23:06 PM EST
To: Cindy Blackstock <cblackst@fncaringsociety.com>
Cc: "Gideon, Valerie (AADNC/AANDC)" <valerie.gideon@canada.ca>, Stephanie Wellman <SWellman@afn.ca>, Martin Orr <MOrr@afn.ca>, Sarah Fredericks <sfredericks@fncaringsociety.com>, "Quintal, Isabelle (AADNC/AANDC)" <isabelle.quintal@canada.ca>, "Gros-Louis2, Isa (AADNC/AANDC)" <isa.gros-louis2@canada.ca>
Subject: RE: Technical document on C-92

Good afternoon Dr Blackstock,
I apologize for the delay in getting back to you. Here are my responses to your questions:

1. Given Canada's commitment to a distinctions-based approach, is there a First Nations version of this document?

The purpose of this technical information package was to provide a general guide to support the implementation of the Act. Much like the Act itself, the information provided applies to First Nations, Inuit, and Métis. First Nations-specific information was included when pertinent, such as in the discussion of the designation of Indigenous governing bodies.

As you know, the implementation of the Act will be done in a distinctions-based manner. We will be happy to work with you to address any First Nations-specific questions that are not covered in the technical information package.

2. Has Canada done a thematic review of the existing child welfare legislation in order to support its claims about the Act improving upon provincial/territorial statutes and if so, is this available?

The purpose of the Act is to contribute to reform of the child and family services for Indigenous children, with the ultimate goal of reducing the number of Indigenous children in care. Canada has never made a claim concerning whether the Act improves upon provincial and territorial statutes and has not undertaken a thematic review that would support such a position. It can be stated, however, that the Act establishes minimum standards to be applied across the country when child and family services are rendered in relation to Indigenous children, standards which prevail over conflicting or inconsistent provincial or territorial legislative provisions. Of note, the technical information package does specify that nothing precludes

Indigenous groups, communities, or peoples, as well as provincial and territorial governments, from offering greater protection through their child and family services legislation. Canada remains committed to discussing with partners any specific issues that arise related to the provisions of the Act.

- 3. I appreciate the references to the Charter and the CHRA and the requirements that First Nations ought to ensure programs are non-discriminatory. The missing piece is whether Canada acknowledges its responsibility to provide adequate resources and funding per the CHRT orders to ensure this is achievable. Can you please let me know what Canada's position is with respect to the CHRT orders and the durability of Canada's obligations therein for FN drawing down their own legislation?**

Canada acknowledges that discussions on funding are an essential part of discussions with First Nations planning to exercise their jurisdiction. However, since the Act falls outside of the scope of the CHRT orders, the CHRT orders will not apply to a First Nation that has assumed jurisdiction. Coordination agreement tables will discuss fiscal arrangements relating to the provision of child and family services by the Indigenous governing body, that are sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people to exercise the legislative authority effectively.

- 4. The document says that the Act acknowledges CFS is a Section 35 right so I am not sure why a self-government discussion re: CFS or Jordan's Principle would be restricted to the Act. The Charter has supremacy over the Act so can you help me understand Canada's position on this?**

The Act provides a path for Indigenous governments and communities to exercise jurisdiction over child and family services. However, other paths remain available for the exercise of jurisdiction such as self-government agreements.

Under the mandate established by the Act, coordination agreements can only discuss the legislative authority over child and family services. Broader discussions on self-government are a mandate of the Department of Crown-Indigenous Relations and Northern Affairs.

- 5. The document uses the word "chose" often but choice implies the ability to choose. Canada's lack of funding for pre-planning (prior to sending notices of intent or coordination agreements) and failure to fund agencies to provide technical support for First Nations coupled with broad sweeping inequalities in public services on reserve place First Nations in an untenable situation whereby they cannot make a free, prior and informed choice to draw down authority. If Canada is going to hold onto the phrase of "choose" then do you not agree that it is obligated to take measures to eliminate all discriminatory service provision per the Spirit Bear plan and to provide First Nations governments with financial and expert support (including funding agencies to assist where requested)?**

The Act is meant as a framework that First Nations can use to exercise their jurisdiction over child and family services. We remain committed to providing capacity-building funding to help First Nations prepare for coordination agreement discussions and ultimately exercise jurisdiction over child and family services. As you know, over 542 million was granted to support the implementation of the Act, including capacity building.

Canada is committed to an effective implementation of the Act. We will discuss with First Nations what their needs are, and how best they may be met, to ensure that implementation takes place as smoothly as possible. We will also continue to take the Spirit Bear plan into consideration during the ongoing implementation of the Act.

6. **Can you please provide a glossary of terms for the technical document?**

As the Act is being implemented and as Indigenous groups begin exercising their jurisdiction over child and family services, we expect that there will be more clarity regarding the meaning of terms or expressions undefined by the Act. We are not in a position, at this time, to unilaterally provide such definitions.

Isa

From: Cindy Blackstock <cblackst@fncaringsociety.com>
Sent: Wednesday, January 27, 2021 9:27 AM
To: Gros-Louis2, Isa (AADNC/AANDC) <isa.gros-louis2@canada.ca>
Cc: Gideon, Valerie (AADNC/AANDC) <valerie.gideon@canada.ca>; Stephanie Wellman <swellman@afn.ca>; Martin Orr <morr@afn.ca>; Sarah Fredericks <sfredericks@fncaringsociety.com>
Subject: Re: Technical document on C-92

Good morning Isa,

I am mindful that your deadline for feedback on the technical guide is on January 29, 2021. Can you please respond to the items below so I can furnish you with my comments in a timely fashion?

One of my thematic comments is that a technical document ought to be factual versus putting forward Canada's opinions. For example, I view Canada's inclusion of its perspective that the legislation was co-developed with partners as a matter of opinion versus as a fact. It detracts from the document and ought to be excluded.

Looking forward to a response and wishing you a good day,

Cindy

From: Cindy Blackstock
Sent: January 22, 2021 6:44 AM
To: Gros-Louis2, Isa (AADNC/AANDC) <isa.gros-louis2@canada.ca>
Cc: Gideon, Valerie (SAC/ISC) <valerie.gideon@canada.ca>; Stephanie Wellman <swellman@afn.ca>; Martin Orr <morr@afn.ca>
Subject: Technical document on C-92

Good morning Isa,

I hope this message finds you well. Thank you for the opportunity to review the technical document on C-92. I am amidst reviewing it and to ensure my comments are the most useful, I have a few questions:

- 1) Given Canada's commitment to a distinctions-based approach, is there a First Nations version of this document?
- 2) Has Canada done a thematic review of the existing child welfare legislation in order to support its claims about the Act improving upon provincial/territorial statutes and if so, is this available?
- 3) I appreciate the references to the Charter and the CHRA and the requirements that First Nations ought to ensure programs are non-discriminatory. The missing piece is whether Canada acknowledges its responsibility to provide adequate resources and funding per the CHRT orders to ensure this is achievable. Can you please let me know what Canada's position is with respect to the CHRT orders and the durability of Canada's obligations therein for FN drawing down their own legislation?
- 4) The document says that the Act acknowledges CFS is a Section 35 right so I am not sure why a self-government discussion re: CFS or Jordan's Principle would be restricted to the Act. The Charter has supremacy over the Act so can you help me understand Canada's position on this?
- 5) The document uses the word "chose" often but choice implies the ability to choose. Canada's lack of funding for pre-planning (prior to sending notices of intent or coordination agreements) and failure to fund agencies to provide technical support for First Nations coupled with broad sweeping inequalities in public services on reserve place First Nations in an untenable situation whereby they cannot make a free, prior and informed choice to draw down authority. If Canada is going to hold onto the phrase of "choose" then do you not agree that it is obligated to take measures to eliminate all discriminatory service provision per the Spirit Bear plan and to provide First Nations governments with financial and expert support (including funding agencies to assist where requested)?

Also- can you please provide a glossary of terms for the technical document?

I have copied Stephanie and Martin on this email as they may also find this information useful.

Thank you very much,

Cindy

**Responses to undertaking of Nathalie Nepton during the January 8, 2020
cross-examination in the matter before the Canadian Human Rights Tribunal**

Undertakings Based on Questions from the Caring Society

Undertaking #1: Provide a regional breakdown for FY 16-17 through to 19-20 of the number of First Nations not served by a delegated agency.

Region	2016-17	2017-18	2018-19	2019-20	2020-21
AB	9	9	9	11	11
ATL*	4	4	4	4	4
BC	84	83	84	83	83
ON	16	16	15	15	15
SK	10	9	10	11	11
YK	14	14	14	14	14
TOTAL	137	135	136	138	138

* In the Atlantic Region, there are two in New Brunswick and two in Newfoundland and Labrador.

- In Quebec, all First Nations are served by a service provider that have access to the CHRT actual claims process.
- In Manitoba, all First Nations are served by a delegated agency.

Undertaking #2: Provide the number of First Nations not served by a delegated agency that received CWJI funding for each fiscal year since the start of CWJI.

Based on a preliminary analysis of the available data, as of January 26, 2020, ISC's records indicate that the following number of First Nations not served by a delegated agency have received CWJI funding:

- 107 First Nations in 2018-19
- 111 First Nations in 2019-20
- 124 First Nations in 2020-21

Undertaking #3: Provide a copy of the Saskatchewan Prevention Protocol.

The Prevention Protocol was developed at the request of the Government of Saskatchewan. It is tripartite and includes the First Nation, the province and ISC. Attached is a draft protocol for a First Nation that will be entering into this protocol.



Draft SK Prevention
Protocol.docx

Responses to undertaking of Nathalie Nepton during the January 8, 2020 cross-examination in the matter before the Canadian Human Rights Tribunal

Undertaking #4: Confirm which First Nations that have provided Notice under C-92 are not currently served by a delegated agency.

The following First Nations have provided Notice under C-92 which are not currently served by a delegated agency:

- Mushuau Innu First Nation
- Sheshatshiu Innu First Nation
- Mikisew Cree Nation
- Muskeg Lake Cree Nation
- Sts'ailes First Nation
- Cowessess First Nation

Undertaking #5: Confirm whether First Nations agencies operating under a First Nations law developed in accordance with C-92 will be eligible for funding under the FNCFS Program. Provide information on what the Act provides for funding.

ISC cannot presume which service delivery model an Indigenous Governing Body may choose to adopt when exercising jurisdiction under the Act. The role of agencies will be decided by the communities.

Should an Indigenous Governing Body exercising jurisdiction under the Act choose to adopt a model which includes continuing to have protection services delivered by an agency, funding for activities eligible under the FNCFS program would be available.

Indigenous Governing Bodies exercising jurisdiction under the Act, that choose to adopt an Indigenous-led child and family services model that does not include agencies, will discuss and establish their funding needs at the coordination agreement table. Under this scenario, funding for agencies under the FNCFS Program would not be available to the Indigenous Governing Body.

Other variations of service delivery models may also be adopted by an Indigenous Governing Body, which may choose to maintain some links to the existing child and family services system in either the short or longer term. In such a case, funding requirements and eligibility of activities under the FNCFS program would be discussed at the coordination agreement table.

Responses to undertaking of Nathalie Nepton during the January 8, 2020 cross-examination in the matter before the Canadian Human Rights Tribunal

Undertaking #6: Provide any analysis, if any, that demonstrate that “Canada is at the forefront of prevention funding as most provincial and territorial jurisdictions have not yet revised legislation to account for a significant shift towards prevention”, as stated at paragraph 55 of Nathalie’s affidavit.

The statement is based on a review of provincial and territorial child and family services legislation, which is included at Exhibit NN-2 of Nathalie Nepton’s affidavit. From this review we concluded that very few jurisdictions have revised their legislation to account for the shift in emphasis toward prevention work. ISC assumes from this that there is a lack of provincial/territorial investment in prevention. Furthermore, ISC is unaware of instances where provincial/territorial governments may be investing in this area through other departmental initiatives rather than through their respective child and family services legislation.

Undertakings in Response to Questions from the Assembly of First Nations

Undertaking #7: Clarify whether for First Nations that choose to exercise their right under the Act, there will be a funding stream for them to provide services to their communities. (similar to undertaking #5)

There is no funding stream for the long-term operationalization of an Indigenous governing body’s law once they begin exercising jurisdiction. Each community will directly receive funding unique to their service delivery model as established in the coordination agreement. The needs and service delivery models will vary in each community, and we cannot fully anticipate at this time what funding will be required to support the operationalization of Indigenous laws.

Undertakings in Response to Questions from the Innu Nation

Undertaking #8: Provide an explanation of how ISC arrived at the 82 figure at paragraph 27 of Nathalie’s affidavit regarding the number of children in care from Natuashish and Sheshatshiu, and why there is a discrepancy between this number and the 162 number reported in Germaine Benuen’s affidavit. In addition, explain why the 82 figure is different from the 235 figure reported in Nathalie Nepton’s exhibit #2.

ISC would need a better understanding of the methodology used to arrive at the 162 figure to accurately answer the question.

The number reported in the affidavit is based on ISC’s available child maintenance data for 2018-2019, which is the number of on-reserve registered children in care who have been associated with the two Innu bands.

ISC’S Information Management System indicated that there were 82 registered on-reserve children with a band number from the Mushuau Innu First Nation or the Sheshatshiu Innu First Nation who were in care as of March 31, 2019.

Responses to undertaking of Nathalie Nepton during the January 8, 2020 cross-examination in the matter before the Canadian Human Rights Tribunal

The Information Management System includes information on children in care, based on eligible placement expenses for a First Nation child on reserve or ordinarily a resident on reserve. The system groups registered children according to their band, however it does not record the band associated to children who are not registered. Therefore, it is possible that this number may be higher. This may account for the difference in the numbers reported in Nathalie Nepton's affidavit and in the affidavit of Germaine Benuen.

The count is also based on a point in time as of March 31, 2019. If other numbers are taken from a period of time, as opposed to a fixed point, that could also account for the variation.

Finally, the 235 figure reported at exhibit 2 of the affidavit is based on a different point in time and includes different groups of children.

The number provided in Exhibit NN-2 is based on data as of March 31, 2018, and includes all on reserve registered and non-registered First Nations children in care in Newfoundland and Labrador.

The number provided at paragraph 27 in Nathalie Nepton's affidavit is based on data as of March 31, 2019, and only includes registered on-reserve First Nations children from the Mushuau Innu First Nation and the Sheshatshiu Innu First Nation.

Undertaking #9: Clarify whether the \$19.1 million figure referenced at paragraph 27 of Nathalie's affidavit included an amount for \$1.8 million that related to a previous year.

Canada's public accounts indicate that funding to the province of Newfoundland and Labrador increased from \$10.8 million in 2015-2016 to \$19.1 million in 2018-2019. My understanding is that of the \$19.1 million provided to the province in 2018-2019, \$1.8 million was an expense incurred by the province in 2016-2017, but only invoiced to and paid by Canada during the 2018-2019 fiscal year. As such, for financial reporting purposes, a total of \$19.1 million was paid to the province of Newfoundland and Labrador by Canada in 2018-2019.

The payment of invoices in a new fiscal year for previous year's expenses is a common occurrence in the context of Canada's funding agreements with provinces and territories, as it often takes more time for the provinces to finalize their compliance.

Undertaking #10: Clarify which jurisdictions include band representatives in their legislation and how ISC funds them.

"Band Representative Services" is a term which is used in child and family services legislation for some jurisdictions, but not all. To assist in making comparisons between jurisdictions, the following is a description of the funding ISC currently provides to service providers in various provinces. These providers may be engaging in activities similar to band representative service in Ontario which are the subject of the CHRT order.

ISC is currently providing funding to support Indigenous or band representatives for First Nations communities in Ontario and three Atlantic provinces, being Newfoundland and Labrador, Nova Scotia and Prince Edward Island. Funding has been provided through either the February 1, 2018 CHRT actuals process, regular operations budget allocations, or through

Responses to undertaking of Nathalie Nepton during the January 8, 2020 cross-examination in the matter before the Canadian Human Rights Tribunal

additional funding sought through a proposal based mechanism. The details by province are as follows:

- In Ontario, funding for band representative services is provided through the reimbursement of actual expenditures, in accordance with the February 1, 2018 CHRT orders.
- In Nova Scotia, the provincial allocation of CWJI funding under the FNCFS program has been prioritized by Chiefs to fund a band representative project that includes funding for one band representative for each of the 13 communities.
- In Newfoundland and Labrador, the Innu Roundtable Secretariat has been receiving funding for band representatives through Jordan's Principle for the two Innu communities in Labrador. In addition, the Miawpukek First Nation has recently identified its Director of Child and Family Services as an Indigenous representative under the provincial legislation. The Director's salary is an eligible expenditure under the FNCFS annual operation budget allocation. No additional funding has been requested to date.
- In Prince Edward Island, the Mi'kmaq Confederacy of PEI's (now named Epekwitk Assembly of Councils Inc.) Director of Child and Family Services was the band representative for the two Mi'kmaq communities. The Director's salary is an eligible expenditure under the FNCFS annual operations budget allocation. Recently, the Chiefs designated one staff member within their band administration to exercise a band representative function.

The CWJI funding stream provides flexibility to First Nations in determining where to allocate resources, including towards "band representative" type activities. Funding for band representative services will be considered in ISC's ongoing discussions with First Nations to advance long term reform of the FNCFS Program.

Undertaking #11: Confirm how funding flows from ISC to Miakpukek First Nation for protection services and whether there is any delegation to ensure the flow of funding, and if so to confirm the specifics of the delegation.

While the provincial legislation in Newfoundland and Labrador provides for delegation since June 2019, as of yet there are no regulations in place to implement the delegation provision. As a result, ISC has a comprehensive funding agreement with the Miakpukek First Nation for the delivery of child and family services within its community, which includes both protection and prevention activities because Miakpukek also has a service agreement in place with the province for the delivery of protection services on-reserve.

Under the funding agreement with ISC, Miakpukek's protection care expenditures are reimbursed on actuals based on maintenance costs reported. Miawpukek also receives an annual allocation for operations and prevention, and as it is considered a small agency, it has access to reimbursement on actuals as per the CHRT orders.

**Responses to undertaking of Nathalie Nepton during the January 8, 2020
cross-examination in the matter before the Canadian Human Rights Tribunal**

Undertaking #12: Confirm how funding flows from ISC to MCPEI for protection services and whether there is any delegation to ensure the flow of funding, and if so to confirm the specifics of the delegation.

There is no delegation provision in PEI's legislation. ISC has a comprehensive funding agreement with MCPEI (now named Epekwitk Assembly of Councils Inc.) for the delivery of child and family services in the two Mi'kmaw communities, which includes both protection and prevention activities because MCPEI has a service agreement with the province for the delivery of protection services for children ordinarily living on-reserve.

Under the funding agreement with ISC, MCPEI's protection care expenditures are reimbursed on actuals based on maintenance costs reported. MCPEI also receives an annual allocation for operations and prevention. As it is considered a small agency, it has access to reimbursement on actuals as per the CHRT orders.

Undertaking #13: Provide the basis on which ISC reimburses the province of Newfoundland and Labrador for maintenance (e.g. is it based on an actual cost for reimbursement).

Under the bilateral agreement between ISC and Newfoundland and Labrador's Ministry of Children, Seniors and Social Development, protection care expenditures are reimbursed on actuals based on maintenance expenses, which are reported quarterly.

An operations (administration) budget is negotiated annually as part of the annual funding agreement, based on budget projections and substantiation submitted by the province.