

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: June 26, 2023
TO: Chiefs of Ontario Early Learning and Child Care Gathering
FROM: Jessie Stirling
RE: Bill C-35, *An Act respecting early learning and child care in Canada* (Canada Early Learning and Child Care Act)
FILE NO: 75441

This briefing note on Bill C-35 – the new federal legislation aimed at strengthening Canada's early learning and child-care (“ELCC”) system – was prepared for presentation to the attendees of the Chiefs of Ontario Early Learning and Child Care Gathering on June 26, 2023 in Toronto, Ontario.

Background

Bill C-35, *An Act respecting early learning and child care in Canada* (or the Canada Early Learning and Child Care Act)¹ was announced December 8, 2022 by the Ministry of Families, Children and Social Development. The stated goal of Bill C-35 is to build an affordable, inclusive, and high-quality Canada-wide ELCC system that remains in place long into the future. Bill C-35 is currently at Third Reading in the House of Commons, which will be followed by a review by the Senate.

The Liberals had promised to introduce this legislation by the end of 2022 in the Liberal-NDP confidence-and-supply agreement² that would see the NDP support the minority government on key votes in the House of Commons to avoid triggering an election before 2025. The pledge was to ensure that the child-care agreements "have long-term protected funding" and delivers "high quality, affordable" options for families.

Canada made an investment of over \$27 billion over five years as part of Budget 2021 to build a Canada-wide ELCC system. Combined with other investments (including in Indigenous ELCC and previous investments since 2015), as of fiscal year 2025-26 (April 1, 2025 to March 31, 2026), a minimum of \$9.2 billion will be provided every year – permanently. This investment allows governments to work together to achieve an average parent fee of \$10-a-day by March 2026 for all licensed child care spaces.

¹ Bill C-35, *An Act respecting early learning and child care in Canada*, online:

<https://www.parl.ca/DocumentViewer/en/44-1/bill/C-35/second-reading>.

² *Delivering for Canadians Now, A Supply and Confidence Agreement*, online:

https://xfer.ndp.ca/2022/Documents/2022-03-23_Delivering_for_Canadians_Now_EN.pdf

Overview of Act

If passed, Bill C-35 would:

1. **Set out Canada's vision for a Canada-wide ELCC system and its commitment to ongoing collaboration with the provinces and Indigenous peoples to support them in their efforts to establish and maintain such a system.** Canada's vision is for Canadian families to have enduring access to affordable, inclusive, and high-quality early learning and child care.
2. **Establish a permanent, legislated commitment on Canada's behalf to maintain federal funding for provinces and Indigenous peoples for ELCC programs and services, including ELCC programs and services for Indigenous peoples.** Provinces and Indigenous organizations and governing bodies are anticipated to benefit from the greater predictability and assurance of a federal commitment to ELCC.
3. **Establish the National Advisory Council on Early Learning and Child Care, which would provide third-party expert advice to Canada and serve as a forum for engagement on issues and challenges facing the ELCC sector.**
4. **Enhance accountability by requiring that the federal government report to the public annually on federal investments and on the progress being made towards an ELCC system.** Bill C-35 would not impose any conditions or requirements upon provincial and territorial governments, or Indigenous peoples. Reporting requirements on provinces and Indigenous peoples would continue to be collaboratively negotiated and articulated within the bilateral agreements with provinces and within funding agreements with Indigenous partners.

Analyzing Bill C-35

Bill C-35 was reviewed by the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (the "Standing Committee"). More than 60 individuals and organizations made submissions to the Standing Committee during this review period, including Chiefs of Ontario (COO).

On May 4, the Standing Committee presented its report on Bill C-35 to the House of Commons. This report included several amendments to the legislation informed by the briefs and witness testimony received by the Committee during its review.

Below is a summary of COO's recommendations to the Standing Committee. Amendments adopted by the Standing Committee that relate to COO's recommendations are highlighted.

COO Submission to Standing Committee

In its submission,³ COO suggested several ways to improve Bill C-35 from the unique perspective of Ontario First Nations:

- **First Nations-specific definition of “high quality”** – COO submitted that the quality of ELCC programs and services delivered to First Nations children and families must be evaluated differently, and that a First Nations-specific definition of “high quality” is needed. ELCC services for First Nations children and families must meet their unique, be culturally appropriate, be culturally relevant (traditional languages, values, and customs), and be grounded in First Nation worldviews.

Section 7(1) requires that ELCC programs and services meet the standards set by provincial governments or Indigenous governing bodies, be reflective of evidence-based best practices in service provision, and respond to the varying needs of children and families. Bill C-35 refers to the need for culturally appropriate ELCC programs and services for Indigenous families and acknowledges that Indigenous children are best supported by culturally appropriate ELCC services, but does not discuss what culturally appropriate means.

- **Respect for First Nation jurisdiction and self-determination in ELCC** – According to the Backgrounder prepared by Canada, Bill C-35 would “fully respect provincial and territorial jurisdiction, and Indigenous rights, including the right to self-determination, while recognizing that the federal government has a role to play in setting guiding federal principles and in providing financial support. The proposed Act would not impose any conditions or requirements upon provincial and territorial governments, or Indigenous peoples.”⁴ However, and as COO drew attention to in its submission, Bill C-35 does not acknowledge First Nations’ inherent rights and jurisdiction over matters related to their children.
- **Federal commitment to increase funding for First Nation ELCC systems** – First Nations communities, families, and children have suffered from inadequate, inconsistent, and unpredictable funding for ELCC. This has caused a disproportionate negative impact on First Nations people and has undermined the ability of First Nations to provide their own ELCC services.

Bill C-35 commits Canada to collaborating with the provinces and Indigenous peoples on ELCC in order to support them in providing ELCC programs and services; and providing

³ Chiefs of Ontario, *Submission to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities Regarding Bill C-35, An Act respecting early learning and child care in Canada* (April 14, 2023), online: <https://www.ourcommons.ca/Content/Committee/441/HUMA/Brief/BR12356859/br-external/ChiefsOfOntario-e.pdf>

⁴ Canada, *Backgrounder on Bill C-35*, online: <https://www.canada.ca/en/employment-social-development/news/2022/12/backgrounder.html>

long-term funding for ELCC programs and services, including ELCC programs and services for Indigenous peoples. With respect to funding, Bill C-35 states that “[t]he funding must be provided primarily through agreements with the provincial governments, Indigenous governing bodies and other Indigenous entities that represent the interests of an Indigenous group and its members” (section 8).

Note that Bill C-35 does not commit Canada to provide needs-based and substantively equal funding to support First Nations to deliver ELCC programs and services. The reliance on agreements to fund ELCC services for First Nations also leads to uncertainty about levels of fundings that make planning and engagement difficult, in addition to putting disadvantaged First Nations in potentially imbalanced negotiations.

To support First Nations to realize the aspirations identified in Bill C-35 and in the Indigenous ELCC Framework (the “Framework”), COO called on Canada to make a statutory funding commitment in the legislation for First Nations ELCC.

COO also voiced its concern that the work completed through the Framework will be lost if the Framework is not embedded in Bill C-35. Canada has stated publicly that, if passed, Bill C-35 would complement (not replace) the Framework; and Canada commits in the preamble of Bill C-35 to continuing to implement the Framework and to achieving the goals set out in it. However, COO is made suspicious of these commitments by Canada’s decision to not enshrine the Framework in Bill C-35.

- **Meaningful consultation with First Nations on federal ELCC legislation** – COO stated in its submission that it had not been consulted on Bill C-35 and had had zero input into the proposed legislation. COO and others called on Canada to meaningfully consult with First Nations rights holders on Bill C-35 to ensure that these perspectives are captured in Bill C-35 and taken into account in the implementation of Bill C-35.

Section 14(b) was amended to require the National Advisory Council to “consult broadly with *individuals and organizations that have an interest in early learning and child care*, including parents, the early childhood education workforce, child care providers, advocates and policy and research specialists, on matters relating to the Canada-wide early learning and child care system” [*emphasis added*].

- **First Nation representation on the National Advisory Council on Early Learning and Child Care** – COO called for a minimum of two spots to be reserved for First Nations individuals.

Section 11(1) was amended. Now, the Governor in Council will appoint members to the National Advisory on recommendation of the Minister, “having regard to the importance of having members who are representative of the diversity of Canadian society, *including Indigenous peoples ...*” [*emphasis added*].

- **Free, prior, and informed consent of First Nations** – One of the stated purposes of Bill C-35 is to “contribute to the implementation of the *United Nations Declaration on the*

Rights of Indigenous Peoples.” As such, COO submitted that Canada must uphold commitments to obtaining the free, prior, and informed consent of First Nations, as affirmed in UNDRIP and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, before making Bill C-35 law.

An acknowledgement of Canada’s commitment to upholding the right of Indigenous peoples to be consulted in order to obtain their free, prior, and informed consent for legislation pertaining to Indigenous children was added to the Preamble. In addition, section 6(e) was amended to state that First Nations, Inuit, and Metis children and families are best supported by ELCC programs and services that are “culturally appropriate, that are led by Indigenous peoples and *that respect the right of Indigenous peoples to free, prior and informed consent in matters relating to children*” [emphasis added].