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LEGISLATIVE SUMMARY

BILL C-92:
AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-92
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-92: AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES

1 BACKGROUND

1.1 LEGISLATIVE STAGES

Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families,[1] was introduced in the House of Commons on 28 February 2019 by the Honourable Seamus O'Regan, then Minister of Indigenous Services.

In April and May 2019, the Standing Senate Committee on Aboriginal Peoples held meetings on the subject matter of the bill. The Senate committee presented its report to the Senate on 13 May 2019.[2]

The bill was referred to the House of Commons Standing Committee on Indigenous and Northern Affairs (the House of Commons Committee) on 3 May 2019, and that committee's report on the bill was presented to the House on 30 May 2019.[3] The report (which contained amendments) was concurred in on 3 June 2019. The bill was passed by the House of Commons that same day.

Bill C-92 received first reading in the Senate on 4 June 2019 and was referred to the Standing Senate Committee on Aboriginal Peoples on 10 June 2019. That committee's report on the bill (which contained amendments) was concurred in the same day that it was presented to the Senate (13 June 2019).[4] The amended bill was passed by the Senate the next day and a message was sent to the House of Commons.

The House of Commons considered the Senate amendments and sent a message back to the Senate on 19 June 2019, agreeing with some of the amendments, amending one of the amendments and disagreeing with others. The Senate agreed to the amended amendment and did not insist on the amendments it had made with which the House of Commons disagreed.[5] The bill received Royal Assent on 21 June 2019.

1.2 OVERVIEW: INDIGENOUS CHILDREN AND THE GOVERNMENT OF CANADA

As indicated by its title, Bill C-92 establishes a legislative framework for the provision of First Nations, Inuit and Métis child and family services across Canada. At issue is the high number of Indigenous children in care in provincial and territorial child welfare systems. The number of Indigenous children in foster care is disproportionate to their share of the population. While Indigenous children aged 15 and under make up about 7.7% of all children in Canada, 52.2% of children in foster care in private homes[6] are Indigenous, representing more than 14,000 children growing up away from their families.[7]

Not only are Indigenous children involved in the child welfare system separated from their families, they may also be disconnected from their language and culture. Recently, an Ontario court ruling in the matter of the "Sixties Scoop Children" affirmed that the loss of Indigenous language, culture and identity caused "great harm" within the context of provincial child welfare systems and held that Canada had a duty of care to take steps to prevent Indigenous children from losing their identities.[8]

For decades, the Government of Canada enforced various policies that led to Indigenous children being apprehended and separated from their families. For example, Indigenous children were removed, often forcibly, from their families and cultures during the Indian residential schools era, from the late 1800s until the last school closed in 1996. From the 1960s to the 1980s, Indigenous children were adopted into or fostered by non-Indigenous families during what has become known as the "Sixties Scoop," in many cases without the consent of their families.[9] In acknowledgement of the harm caused, the Government of Canada settled two lawsuits brought forward by Indigenous people in recent years, one for its part in Indian residential schools and the other for the "Sixties Scoop."[10] Both settlements included compensation for harms experienced, including being disconnected from one's Indigenous identity, language and culture. Métis people were not included in either settlement.

Significant inquiries have connected the legacies of Indian residential schools and adoption or fostering by non-Indigenous families to the disruption of social structures like the family unit.[11] Evidence suggests this has resulted in generations who have experienced trauma that is passed on collectively to future generations.[12]

Past policies of the Government of Canada are linked to the contemporary "educational, income, and health disparities"[13] experienced by Indigenous peoples today. Research suggests that culture and cultural safety build resilience and should be a part of efforts to close the gaps in health inequities experienced by Indigenous peoples.[14] Given the great diversity of First Nations, Inuit and Métis, distinction-based approaches to service delivery are seen as important to ensure services are culturally appropriate to First Nations, Inuit and Métis realities.

Bill C-92 recognizes the diversity of Indigenous peoples in Canada in its preamble, but the differing circumstances and needs of First Nations, Inuit and Métis children are not otherwise reflected in the proposed child and family services framework.

1.3 FEDERAL AND PROVINCIAL/TERRITORIAL LEGISLATIVE FRAMEWORK

Currently, there is no federal legislative framework for the provision of Indigenous child and family services. Section 91(24) of the *Constitution Act, 1867*[15] grants the federal government jurisdiction over "Indians, and lands reserved for Indians" while section 88 of the *Indian Act*[16] applies to First Nations people, making them subject to provincial laws of general application. Under the Constitution, health and child welfare

fall under the jurisdiction of the provinces. The interaction between these two provisions has meant that the provinces assume jurisdiction in certain areas where federal legislation is absent, notably for First Nations child and family services on reserve. In the current context, the absence of federal legislation means that provincial and territorial governments determine the level of services provided and the independence exercised by Indigenous child welfare agencies.[17]

The current jurisdictional framework leads to ambiguity over who is responsible for services for First Nations on reserve and may delay or impede access to services. Jurisdictional disputes between different orders of government over who is financially responsible for a public service have had significant effects on the well-being of Indigenous children.

For example, Parliament adopted a motion in 2007, entitled Jordan's Principle, named after a First Nations child, Jordan River Anderson, who passed away in a hospital far from his home in Norway House Cree Nation while the federal and Manitoba governments disagreed over who would assume the costs of at-home care.[18] The motion stated that the government of first contact pays for the service and instructs governments to resolve which order of government is responsible for costs after the child has received the service.[19]

1.4 INDIGENOUS CHILD AND FAMILY SERVICES

The Department of Indigenous Services Canada (the department), under its First Nations Child and Family Services program,[20] funds First Nations and their child welfare agencies to deliver services on reserve. These agencies must comply with standards, terms and conditions set out in provincial/territorial legislation as a condition of federal funding.[21] In Nunavut and the Northwest Territories, child and family services are delivered by the territorial government and are funded via transfer payments from the federal government.[22] The Government of Nunavut delivers services to Inuit in the territory; apart from this, there are no Inuit-specific agencies delivering a full spectrum of child and family services.[23] In some provinces, the Métis have established child and family service agencies.

Across Canada, about 100 First Nations child and family services agencies provide services to children on and sometimes off reserve.[24] In areas without an Indigenous child and family service agency present, services for Indigenous people living off reserve are funded and delivered by the respective province or territory.

Provincial/territorial legislation with respect to child and family services includes varying provisions specific to Indigenous children and their families. For example, Ontario's *Child, Youth and Family Services Act, 2017*[25] acknowledges the importance of First Nations, Inuit and Métis peoples delivering their own child and family services, thus preserving the child's cultural identity and maintaining connections to Indigenous families – including extended families – and communities. British Columbia's *Child,*

Family and Community Service Act,[26] sets out that Indigenous people should be involved in the planning and delivery of services to families and children, and that the child's Indigenous cultural identity should be preserved as a consideration to determine the best interests of the child, among other provisions.

Child welfare advocates and professionals alike have called for measures to decrease the number of Indigenous children in care by providing Indigenous families with the necessities to raise healthy children and prevent apprehension altogether. This is because research has shown that poverty, unstable housing and substance misuse were among the factors considered by social workers when deciding to apprehend Indigenous children from their families.[27] What this means is some children stay in care for longer periods of time due conditions beyond the parent's control like poverty and poor housing.[28]

Provincial and territorial statutes tend to acknowledge that children should only be removed from their family as a last resort, where no other options are possible.[29] Thus, greater emphasis is typically placed on preventative services, which can take several forms, including education about healthy families and measures to prevent child maltreatment; secondary services to prevent a crisis from occurring; and tertiary services targeted at families when risks to children are identified.[30] Such preventative measures to keep families together can be supported by complementary measures in the areas of prenatal care, access to health services, youth and specialized services, parenting supports and emergency services, among others.

Advocates have identified two measures that are key to reforming Indigenous child and family services: funding equity and Indigenous jurisdiction over child and family services. These are discussed in the following section.

1.4.1 Indigenous Child and Family Services Funding

In 2016, the Canadian Human Rights Tribunal (CHRT) found that the Government of Canada's underfunding of child welfare services on reserve and in Yukon was discriminatory on the basis of race and ethnic origin.[31] The CHRT ordered the federal government to reform First Nations child and family services and to address funding inequities. At issue, among various matters, were the design and application of the department's funding formulas for First Nations child and family services, the failure to adjust funding levels over the years, the failure to coordinate child and family services programming with other federal and provincial/territorial programs, and the narrow definition and inadequate implementation of Jordan's Principle.[32] Since its 2016 ruling, the CHRT has issued additional compliance orders to the Government of Canada. The latest, released 6 September 2019, awards financial compensation to "each First Nation child removed from its home, family and Community"[33] from 2006 until certain conditions are met. The CHRT also awarded compensation to parents and grandparents who "had their child unnecessarily apprehended and placed in care outside of their homes."[34]

The Government of Canada has known of the overrepresentation and underfunding of Indigenous children in care for some time, and numerous reports have provided recommendations to remedy these deficiencies.[35] Nearly two decades ago, research findings questioned the suitability of the federal funding methodology with respect to First Nations child and family services agencies.[36] By 2008, the Office of the Auditor General of Canada (OAG) found that First Nations children and their families required the same access to services that other children receive, in addition to services that are culturally appropriate.[37]

At the time of the 2008 audit, the OAG observed that the federal funding formula did not take into consideration the requirement that First Nations agencies must deliver services in accordance with provincial legislation and standards.[38] The CHRT echoed this concern in its 2016 ruling.[39] The OAG also found that as budgets were fixed and the cost of child and family services programs increased, the then-department of Indian and Northern Affairs Canada, now Indigenous Services Canada, reallocated funding from other programs like housing, a factor taken into account when removing Indigenous children from their families.[40]

Not only did the CHRT find the Government of Canada's funding was discriminatory, it found that the funding formula in use by Canada incentivizes taking children into care. As the department provides inadequate funding for preventative services, children are apprehended "as a first resort rather than a last resort."[41] Canada's design, management and control of First Nations child and family services has led to "adverse impacts for many First Nations children and families living on reserves."[42]

In 2007, the Government of Canada began to reform the First Nations Child and Family Services program to place a greater emphasis on prevention. In 2016, however, the CHRT found that the department incorporated some of the same limitations of the previous funding formula into the revised formula.[43] A decade after it initiated these reforms, funding for prevention accounted for 12% of the budget overall.[44] A 2018 report observed that the revised funding formula still "tend[s] to require that children enter into care in order to unlock funding."[45]

Given the importance of adequate funding and the centrality of this issue in CHRT rulings, some stakeholders have expressed disappointment that Bill C-92 does not include funding provisions.[46]

1.4.2 Indigenous Jurisdiction

Indigenous peoples strongly assert that they have never surrendered their right to care for their children.[47] Both the Royal Commission on Aboriginal Peoples (1996) and the Truth and Reconciliation Commission of Canada (TRC) (2015) called on the Government of Canada to undertake reforms to the child and family service system that would lead to Indigenous institutions delivering their own health and social services.[48]

Despite these recommendations, Indigenous governments exercise complete control in only a few instances.

Some First Nations and Inuit governments included provisions in modern treaties to enact Indigenous laws or to devolve child and family services. For example, the *Labrador Inuit Land Claims Agreement* sets out that the Nunatsiavut Government can make laws related to the custody, guardianship or access to an Inuk child.[49] The Council of Yukon First Nations' *Umbrella Final Agreement* provides for the devolution to First Nations of programs and services related to family and child welfare, including custom adoption.[50] Another example is found in British Columbia, where in 1980, the Splatsin First Nation (then the Spallumcheen Indian Band) enacted a by-law and subsequently entered into an agreement with Canada acknowledging the First Nation's jurisdiction over child welfare services.[51] The First Nation thus delivers its services in accordance with the band by-law rather than provincial legislation.[52]

Nevertheless, most service delivery by Indigenous child and family services agencies occurs under the delegation model, where the province delegates authority to the Indigenous agency by entering into an agreement. Delegation means that First Nations child welfare agencies are granted the authority by the province to carry out specific duties as identified in the agreement, which can include child protection, family support and guardianship services. The First Nations agency must comply with the provincial standards in place as a condition for the receipt of federal funds.

For example, British Columbia has a model where First Nations agencies assume greater responsibilities for the delivery of child and family services over time. The First Nations agency may first be authorized to provide case management, supports for families or voluntary care agreements for children. Eventually, the agency may assume responsibility for providing guardianship of children, before moving on to providing full child protection services, such as investigating and receiving reports of child abuse and neglect, making decisions if a child requires protection, or obtaining court orders, among other responsibilities.[53]

Some jurisdictions have developed a shared, or integrated, model, where the system is governed jointly between the Indigenous community and the provincial government. For example, Manitoba developed an integrated model in conjunction with Indigenous organizations for child and family services, with four authorities serving their respective regions and populations: a General Authority, a Métis Authority, a First Nations of Northern Manitoba Authority and a First Nations of Southern Manitoba Authority. The four authorities provide services anywhere in the province, both on and off reserve.[54]

1.5 RECENT FEDERAL INITIATIVES

In January 2018, the then-Minister of Indigenous Services, the Honourable Jane Philpott, called an emergency meeting with Indigenous leaders and provincial and territorial representatives to look at ways to respond to the "humanitarian crisis" of Indigenous children in care. From this meeting, six measures were identified to address the overrepresentation of Indigenous children and youth in care and to reform the Indigenous child and family services system:

- implementing all orders of the CHRT, including moving to a flexible funding model;
- shifting programs to focus on prevention of child apprehension and early intervention;
- supporting communities to exercise jurisdiction over child and family services, and exploring potential for "co-developed" federal child and family services legislation;
- accelerating the work of federal, provincial and technical tables;[55]
- supporting Inuit and Métis Nation leadership to advance culturally appropriate reform; and
- developing strategies for data collection and reporting with Indigenous and provincial/territorial partners.[56]

In response to the CHRT compliance order of February 2018,[57] the Government of Canada began to cover "the actual costs of prevention, intake and assessment, legal fees, building repairs, child service purchase and small agency costs" retroactive to 26 January 2016.[58]

Child and family services remains a matter under discussion in bilateral talks held between the Government of Canada and the Assembly of First Nations, the Inuit Tapiriit Kanatami and the Métis National Council, respectively.

Additionally, the CHRT instructed the federal government to fully implement Jordan's Principle as a matter of equal access to public services for First Nations children on and off reserve. The Government of Canada has since launched Jordan's Principle: A Child First Initiative. Under this envelope, funding is available for health, social, educational and specialized services for First Nations children living on and off reserve.

The federal government has also announced a new initiative, an Inuit-specific Child First Initiative.[59] Inuit Tapiriit Kanatami notes that the initiative will remove barriers to services many Inuit children face, and that the federal government will work

with Inuit partners across Inuit Nunangat,[60] provinces and territories to develop Inuit-specific approaches to address the needs of Inuit children.[61]

Indigenous Services Canada's backgrounder on Bill C-92 notes that the Government of Canada is considering creating a national transition committee in relation to the bill. It states that the transition committee could "recommend mechanisms to guide future funding methodologies."[62]

2 DESCRIPTION AND ANALYSIS

Bill C-92 contains a preamble and 35 clauses. Rather than examining each provision, the description and analysis that follow focus on the substantive changes resulting from the bill.

2.1 PREAMBLE

Bill C-92 contains a 10-paragraph preamble. Preambles can be used to assist in interpreting the legislation. Among other things, the preamble:

- states Canada's commitment to implementing the *United Nations Declaration on Indigenous Peoples*;
- acknowledges the legacy of residential schools and harm caused to Indigenous peoples by colonialism;
- recognizes the importance of family and community reunification;
- situates the bill in the context of the TRC's Calls to Action;
- affirms Indigenous peoples' right to self-determination, making specific reference to the inherent right of self-government, including jurisdiction in relation to child and family services;
- acknowledges the need to respect the diversity of all Indigenous peoples; and
- affirms the need "to eliminate the overrepresentation of Indigenous children in child and family services systems."

The preamble also acknowledges

> the ongoing call for funding for child and family services that is predictable, stable, 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.

2.2 INTERPRETATION (CLAUSES 1 TO 5)

Clause 1 of Bill C-92 defines numerous terms used in the bill, including "family," which is defined as follows:

> [it] includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance with the customs or traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child.

Also defined is "Indigenous governing body," meaning "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."

Clause 2 states that the bill "is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them."[63] This is a non-derogation clause, and there have been many versions of such clauses in federal legislation over the years. Generally, non-derogation clauses are included to explain that the intent of a particular law is not to infringe Aboriginal or treaty rights.

The language used in non-derogation clauses in some bills introduced earlier in this parliamentary session, which refers to abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada, were flagged by some Indigenous witnesses during committee review of those bills as inadequate.[64]

The language used in the non-derogation clause contained in Bill C-92 (and in Bill C-91, An Act respecting Indigenous languages) is similar to the wording that was recommended by the Standing Senate Committee on Legal and Constitutional Affairs in its 2007 report, *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights*.[65]

In cases where there is a conflict or inconsistency between a provision in an existing agreement (such as a treaty or a self-government agreement) and the bill or its regulations, the provision in the agreement prevails (clause 3).

Clause 4 is a "for greater certainty" provision that establishes that unless there is a conflict or inconsistency with provisions of the bill, the bill does not affect provincial Acts or regulations.

Unless Nunavut's Acts or regulations conflict with or are inconsistent with the bill, the bill does not affect the powers of the Nunavut legislature as set out in section 23 of the *Nunavut Act* (clause 5).

2.3 PURPOSE AND PRINCIPLES (CLAUSES 8 AND 9)

The purposes of Bill C-92 are threefold. First, the bill affirms the inherent right of self-government, which includes jurisdiction over child and family services (clause 8(a)). Second, the bill sets out national principles for providing child and family services to Indigenous children (clause 8(b)). Third, the bill "contribute[s] to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples" (clause 8(c)). As the department's backgrounder explains,

> [t]hese principles would guide Indigenous communities and provinces and territories on the delivery of child and family services to keep families together and reduce the number of Indigenous children in care.[66]

Clause 9(1) states that the "best interests of the child" principle applies to the bill. The best interests of the child principle was developed in case law and enshrined in Article 3 of the United Nations *Convention on the Rights of the Child*. That article states that

> [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. [67]

The best interests of the child principle is enshrined in provincial/territorial laws relating to child custody and child protection.[68] As well, many other aspects of Bill C-92, such as preserving an Indigenous child's cultural identity, are included in some of the provincial/territorial laws relating to child and family services.

In Bill C-92, specific considerations relating to the best interests of an Indigenous child are set out in clause 10, as described in section 2.4 of this Legislative Summary.

Clause 9(2) lists concepts relating to cultural continuity that should guide the way in which the bill is interpreted and administered, including that a child's best interests are often promoted by living with family members and within their Indigenous culture (clause 9(2)(c)).

Concepts relating to substantive equality are also intended to inform the way in which the bill is to be interpreted and administered. These concepts are listed in clause 9(3) and include the need to promote a child with a disability's participation in family or group activities similar to the participation of other children (clause 9(3)(a)). Also included

is the need for a child or a child's family member to have their views considered without discrimination (clauses 9(3)(b) and 9(3)(c)), as well as the need to ensure that jurisdictional disputes do not result in a gap in services provided to an Indigenous child (clause 9(3)(e)). The concept relating to jurisdictional disputes reflects TRC Call to Action 3 that all levels of government fully implement Jordan's Principle.[69]

2.4 BEST INTERESTS OF THE INDIGENOUS CHILD (CLAUSE 10)

In the context of child apprehension, the best interests of the child is the paramount consideration, whereas in the context of providing child and family services, the best interests of the child is a primary consideration (clause 10(1)). Clause 10(3) lists the factors to be considered when assessing the best interests of an Indigenous child, which include the following:

- cultural and other aspects of a child's upbringing and heritage (clause 10(3)(a));
- the preservation of the child's cultural identity and connection to the language and territory of the Indigenous group, community or people to which the child belongs (clause 10(3)(d));
- the child's views and preferences (clause 10(3)(e)); and
- any family violence (clause 10(3)(g)).

As the factors set out in clause 10(3) are being considered, the primary consideration is "the child's physical, emotional and psychological safety, security and well-being," and the importance of the child's continuing relationship with family and the Indigenous group, community or people to which the child belongs (clause 10(2)). In addition, where possible, clauses 10(1) to 10(3) must be interpreted in a way that is consistent with the laws of the Indigenous group, community or people to which the child belongs (clause 10(4)).

2.5 PROVISION OF CHILD AND FAMILY SERVICES (CLAUSES 11 TO 15)

Clause 11 establishes that child and family services provided to an Indigenous child must take into account the child's needs and culture (clauses 11(a) and 11(b)), enable the child to learn about their family (clause 11(c)), and promote substantive equality between the Indigenous child receiving services and other children (clause 11(d)).

Where it is consistent with the best interests of the child, a child's parent, care provider and relevant Indigenous governing body is to be notified of any significant measure to be taken with respect to an Indigenous child (clause 12(1)). The notice must not contain personal information about the child, a member of the child's family or the

care provider other than what is required to either explain the measure or is required by the Indigenous governing body's coordination agreement (clause 12(2)).

An Indigenous child's parent and care provider can make representations and have party status in a civil child and family services proceeding, while the relevant Indigenous governing body only has the right to make representations (clause 13).

Services that promote preventive care are to be prioritized over other services when it is in the best interests of the child to do so (clause 14(1)). Providing preventive care in the context of prenatal services is also to be prioritized over other services if it is likely to be in the best interests of the Indigenous child to do so to prevent the apprehension of the child at birth (clause 14(2)).

Apprehensions due to poverty have been highlighted in a number of recent reports,[70] with recommendations being made that Indigenous children not be separated from their family because of concerns over poverty. Clause 15 reflects these conclusions by establishing that an Indigenous child should not be apprehended "solely on the basis of his or her socio-economic conditions" provided that it is consistent with the best interests of the child.

As mentioned above, clause 10(1) provides that the best interests of the child are the paramount consideration when a child is apprehended. Clause 15.1, which was added by the House of Commons after the bill was passed by the Senate with amendments, further specifies that where a child lives with a parent or adult member of the child's family, the service provider must demonstrate that reasonable efforts to have the child continue to reside with that person were made before removing the child. The exception to this general rule would be if immediate apprehension is in the best interests of the child.

2.6 PLACEMENT OF AN INDIGENOUS CHILD (CLAUSES 16 AND 17)

The preamble to the bill includes Parliament's recognition that "reuniting Indigenous children with their families and communities" is important. Where it is consistent with the best interests of the child, the priority placement for an Indigenous child is with one of the child's parents. The next possible placements, in order of priority, are as follows:

- with another adult in the child's family;
- with an adult belonging to the same Indigenous group, community or people as the child;
- with an adult belonging to a different Indigenous group, community or people; or
- with any other adult (clause 16(1)).

The placement priority must consider the customs and traditions of Indigenous peoples, including customary adoption (clause 16(2.1)).

Prioritizing placement with an adult within the same or a different Indigenous group, community or people reflects TRC Call to Action 4(iii.), urging the federal government to "enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases" and to include principles that "[e]stablish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate."[71]

Another factor to be considered is whether the child can be placed with or near siblings who are children or with other children to whom they are related (clause 16(2)).

In cases where a child lives with neither a parent nor another adult in the child's family, ongoing reassessment should examine the appropriateness of placing a child with either a parent or another adult in the child's family (clause 16(3)). If the child does not live with a parent or other adult member of the child's family, the child's relationship with family members should be promoted when it is in the best interests of the child to do so (clause 17).

2.7 JURISDICTION (CLAUSES 18 AND 19)

As described in section 1.4.2 of this Legislative Summary, with the exception of child and family services provisions contained in self-government agreements and the Splatsin First Nation by-law, most Indigenous child and family services agencies, authorities or communities are only able to operate because they have had authority delegated to them by the province.

In contrast, clause 18 of Bill C-92 affirms that jurisdiction in relation to child and family services is part of the inherent right of self-government that is recognized and affirmed by section 35 of the *Constitution Act, 1982*. Clause 18 also states that this jurisdiction includes legislative authority in relation to child and family services, and authority to administer and enforce laws made under that legislative authority. This reflects TRC Call to Action 4(i.):

> We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:
>
> i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.[72]

It should be noted that at least one Indigenous organization contends that the bill does not recognize full jurisdiction over child and family services.[73]

Under clause 19, the protections afforded by the *Canadian Charter of Rights and Freedoms*[74] apply when this jurisdiction in respect of child and family services is exercised by an Indigenous governing body.

2.8 LAWS OF INDIGENOUS GROUPS, COMMUNITIES AND PEOPLES (CLAUSES 20 TO 26)

An Indigenous governing body may give notice to the Minister of Indigenous Services and provincial governments when an Indigenous group, community or people plans to exercise legislative authority for child and family services (clause 20(1)). Once notice is given, the Indigenous group exercises its jurisdiction.[75]

At the request of the Indigenous governing body, the Minister of Indigenous Services and relevant provinces can enter into a coordination agreement in relation to certain aspects of the exercise of legislative authority, such as providing emergency services to ensure the safety of Indigenous children (clause 20(2)(a)) or fiscal arrangements for effectively exercising legislative authority (clause 20(2)(c)), among others. The original clause 20(2)(c) was amended by the Standing Senate Committee on Aboriginal Peoples in response to concerns that the bill lacked a specific funding provision. The final clause 20(2)(c) requires that fiscal arrangements be

> 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.

Under clause 21, the law of an Indigenous group, community or people has the force of federal law if either of the conditions set out in clause 20(3) applies:

- a coordination agreement has been entered into; or
- no coordination agreement has been entered into, but the Indigenous group, community or people has made reasonable efforts to enter into a coordination agreement in the year following the request for a coordination agreement was made.

Where an Indigenous group has exercised jurisdiction but has not entered into or made reasonable efforts to enter into a coordination agreement, the Indigenous law does not automatically prevail over federal or provincial laws.[76]

In cases of conflicts or inconsistencies with other federal Acts or regulations, the law of an Indigenous group, community or people prevails to the extent of the conflict or inconsistency (clause 22(1)). This is in keeping with conflict/inconsistency provisions in many self-government agreements. The exception to this stipulation is that the law of an Indigenous group, community or people cannot conflict with clauses 10 to 15 of Bill C-92 (“Best Interests of Indigenous Child” and “Provision of Child and Family

Services") or the *Canadian Human Rights Act*.[77] Clause 22(3) provides that the law of an Indigenous group, community or people prevails over a provincial law or regulation to the extent of the conflict or inconsistency.

Provisions in the laws of an Indigenous group, community or people apply to an Indigenous child unless the application of the provision would be contrary to the best interests of the child (clause 23). Where two Indigenous child and family services laws conflict, the law of the group, community or people with whom the child has stronger ties will prevail (clause 24(1)). The group with whom the child has stronger ties is to be determined by considering the child's habitual residence, the child's views and preferences and the views and preferences of the child's parent and the care provider.

Clause 25 sets out publication requirements relating to notices of intent to exercise jurisdiction, requests for coordination agreements and notices that a law has been made by an Indigenous group, community or people. The law that has been made must be made accessible to the public by the Minister of Indigenous services once the Minister receives a copy (clause 26).

2.9 ROLE AND POWERS OF THE MINISTER, REGULATIONS AND COMING INTO FORCE (CLAUSES 27 TO 35)

The Minister of Indigenous Services has a discretionary information-gathering role (clause 27) and the ability to enter into agreements with a provincial government and any Indigenous governing body for the collection, use and disclosure of information relating to child and family services provided to Indigenous children (clause 28). Among other things, the purpose of collecting information is to support service improvement (clause 28(b)). TRC Call to Action 2

> call[s] upon the federal government, in collaboration with the provinces and territories, to prepare and publish annual reports on the number of Aboriginal children (First Nations, Inuit, and Métis) who are in care, compared with non-Aboriginal children, as well as the reasons for apprehension, the total spending on preventive and care services by child-welfare agencies, and the effectiveness of various interventions.[78]

The Minister of Indigenous Services must undertake a review of the provisions and operation of Bill C-92 every five years in collaboration with Indigenous peoples, including representatives of First Nations, the Inuit and the Métis (clause 31(1)). Collaboration may also take place with provincial governments (clause 31(2)). The report on the review must be tabled in each House of Parliament within 30 sitting days of the day on which the report has been completed (clause 31(4)).

The Governor in Council can make regulations relating to the application of Bill C-92 or the provision of child and family services to Indigenous children provided that "affected

Indigenous governing bodies were afforded a meaningful opportunity to collaborate in the policy development leading to the making of the regulations" (clause 32(1)).

The provisions of the bill will come into force on a day to be fixed by order of the Governor in Council (clause 35).

3 COMMENTARY

The federal government refers to Bill C-92 as legislation co-developed with Indigenous partners.[79] However, a number of witnesses who testified during Parliament's study of the bill expressed the opinion that the engagement that took place with First Nations, Inuit and Métis peoples and organizations did not constitute co-development. This was noted in the Senate committee's *Seventeenth Report*, which studied the subject matter of the bill.[80]

A number of amendments that had been made in the Senate were not agreed to by the House of Commons. These included an amendment to the interpretation section in clause 1, which would have included "adoption services, reunification services and post-majority transition services" in the definition of "child and family services." Other Senate amendments that were not agreed to by the House of Commons included the following:

- requiring that health care facilities, health care providers or social workers demonstrate that preventive care services were provided to support a child's family before taking steps to apprehend a child;[81]
- requiring that if a child is at risk of being apprehended due to socio-economic conditions, positive measures be taken to remediate neglect related to those conditions;[82] and
- requiring, as part of the five-year review of the bill established in clause 31(1), that the Minister of Indigenous Services examine "the adequacy and methods of funding and assess whether the funding has been sufficient to support the needs of Indigenous children and their families."[83]

NOTES

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2. Senate, Standing Senate Committee on Aboriginal Peoples [APPA], *Seventeenth Report*, 1st Session, 42nd Parliament, 13 May 2019.
3. House of Commons, Standing Committee on Indigenous and Northern Affairs, *Nineteenth Report*, 1st Session, 42nd Parliament, 28 May 2019.
4. APPA, *Twenty-Second Report*, 1st Session, 42nd Parliament, 13 June 2019.
5. Senate, *Journals*, 1st Session, 42nd Parliament, Issue 307, 20 June 2019.

6. Statistics Canada, "Family Characteristics (22), Aboriginal Identity (9), Registered or Treaty Indian Status (3), Age (8A) and Sex (3) for the Population in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 Census - 25% Sample Data," *Data tables, 2016 Census*, Catalogue no. 98-400-X2016162. Statistics Canada's definition of "foster children" includes the population of children in private households who have been reported as foster children on the census questionnaire. It does not appear these data include those children living in institutional care, such as group homes or other types of private accommodation. According to Statistics Canada, foster children are considered "other relatives" in an economic family. For a description of these concepts, see Statistics Canada, *2016 Census of Population: Families, households and marital status*, Release and Concepts Overview, 16 June 2017.

7. Government of Canada, *Reducing the number of Indigenous children in care*.

8. *Brown v. Canada (Attorney General)*, 2017 ONSC 251 (CanLII).

9. Truth and Reconciliation Commission of Canada [TRC], *Canada's Residential Schools: The Legacy – The Final Report of the Truth and Reconciliation Commission of Canada*, Vol. 5, 2015, pp. 14–15; and Pauktuutit Inuit Women of Canada, *Proceedings Report: Pauktuutit-Hosted Child and Family Services Legislation Engagement Session*, 18–19 September 2018.

10. "Settlement Agreement," *Residential Schools Settlement: Official Court Notice*; and "Sixties Scoop Settlement," *Class Action: Sixties Scoop Settlement*.

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14. Kimberly Matheson, Amy Bombay and Hymie Anisman, "Culture as an ingredient of personalized medicine," *Journal of Psychiatry & Neuroscience*, Vol. 43, No. 1, January 2018, Ottawa, pp. 3–6; and Madeleine Dion Stout and Gregory Kipling, *Aboriginal People, Resilience and the Residential School Legacy*, The Aboriginal Healing Foundation Research Series, Aboriginal Healing Foundation, Ottawa, 2003.

15. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

16. "Legal Rights," *Indian Act*, R.S.C. 1985, c. I-5, s. 88.

17. Sébastien Grammond, "Issue 1: Federal Legislation on Indigenous Child Welfare in Canada," *Journal of Law and Social Policy*, Vol. 28, Nos. 1 and 2, 2018, p. 136; and Government of Canada, *First Nations Child and Family Services*.

18. House of Commons, "Private Members' Business M-296," *Journals*, No. 36, 2nd Session, 39th Parliament, 12 December 2007; and Government of Canada, *Submit a request under Jordan's Principle: Step 1. What is covered*.

19. House of Commons (12 December 2007).

20. Government of Canada, *First Nations Child and Family Services*.

21. Indigenous and Northern Affairs Canada, *First Nations and Tribal Councils National Funding Agreement Model for 2017–2018*; and Indigenous and Northern Affairs Canada, "Schedule 'DIAND-3: Program, Service and Activity Delivery Requirements, Cost-Sharing and Adjustment Factors,'" *First Nations and Tribal Councils National Funding Agreement Model for 2017–2018*.

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27. Nico Trocmé, Della Knoke and Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System," *Social Services Review*, Vol. 78, No. 4, December 2004, p. 594; and Nico Trocmé et al., "Differentiating Between Substantiated, Suspected, and Unsubstantiated Maltreatment in Canada," *Child Maltreatment*, Vol. 14, No. 1, February 2009, pp. 4–16.

28. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, para. 163.

29. See, for example, Saskatchewan, *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, ss. 3–4; and Québec, *Youth Protection Act*, C.Q.L.R., c. P-34.1, ss. 1–5. See also *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, para. 344.

30. Ibid., para. 116.

31. Ibid., paras. 456 and 466.

32. Ibid., para. 458.

33. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)* (2019), para. 245.

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38. Ibid.

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40. OAG (2008).

41. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* (2016), para. 344.

42. Ibid., para. 458.

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63. See "Rights of the Aboriginal Peoples of Canada," Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.

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67. United Nations, Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, Resolution 44/25, 20 November 1989.

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75. ISC, "An Act respecting First Nations, Inuit and Métis children, youth and families."

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77. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

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80. APPA, *Seventeenth Report*.

81. The amendment would have added clauses 14(1.1) and 14(1.2) to the bill.

82. The amendment would have added clause 15.1 to the bill.

83. The amendment would have added new clause 31(1.1) to the bill.