THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Aboriginal Law Section, Child and Youth Law Section,
Family Law Section
April 2019

Executive Summary
Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*

The CBA Aboriginal Law, Child and Youth Law, and Family Law Sections (CBA Sections) appreciate the opportunity to comment on Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families. The Aboriginal Law Section is comprised of lawyers who specialize in Indigenous law and related issues. The Family Law Section is comprised of lawyers who specialize in family law, and act for all parties in family law disputes. The Child and Youth Law Section is comprised of lawyers with expertise in aspects of law that affect children and youth including children's rights, responding to law, policy and legal research developments on matters affecting Canadian children.

The CBA Sections see Bill C-92 as the kind of first step required to bring needed reform to child and family services for First Nations, Inuit and Metis communities. Bill C-92's goals are laudable, consistent with the Truth and Reconciliation Commission's (TRC) Calls to Action, the constitutional rights of Indigenous Peoples in Canada, and international law. However, as drafted the Bill makes no guarantee (enforceable or otherwise) about funding for Indigenous-led child welfare systems. As such, the Bill risks doing more harm than good. While Bill C-92 relies on important mechanisms of federalism to achieve its aims, some refinements should be made to ensure that the national child welfare standards it attempts to set for Indigenous children will be effective.

In the comprehensive submission that follows, the CBA Sections offer eight recommendations to ensure the full implementation of a substantively equal system for Indigenous child and family services:

1. Consistent with the TRC's Calls to Action and the orders of the Canadian Human Rights Tribunal, the CBA Sections recommend amending the Preamble in Bill C-92 to expressly commit the federal government to its role in providing predictable, stable, sustainable, needs-based and substantively equal funding for child and family services in Indigenous communities.
2. The CBA Sections recommend replacing the phrase "acknowledges the ongoing call for" with "commits to providing" in the second last clause of the Preamble.
3. The CBA Sections recommend adding reference to the independence of dispute resolution mechanisms contemplated in subsection 20(5).

4. Consistent with Articles 3, 6, 19, 30, 34, 35, 36 and 39 of the United Nations Convention on the Rights of the Child (UNCRC), the CBA Sections recommend amending the Preamble and section 8 to refer to Parliament's affirmation of the right of Indigenous children to physical, emotional and psychological safety, security and well-being.
5. The CBA Sections recommend amending the Preamble to refer specifically to the federal government's international obligations under the UNCRC and United Nations Declaration on the Rights of Indigenous People as part of the federal government's nation-to-nation commitments.
6. The CBA Sections recommend amending the definition of "care provider" to exclude foster parents whose sole connection to an Indigenous child is by way of a child protection placement.
7. The CBA Sections recommend amending subsection 10(3) to add continuity in the child's care and the possible effect of disruption of that continuity, and the effects on the child of delay in the final outcome of a case, as factors in determining the best interests of an Indigenous child.
8. The CBA Sections recommend amending subsection 10(3)(b) to specify that a child's gender identity and expression be considered among the needs of the child in weighing "best interests".

Without amendments to address these important areas, Bill C-92 risks being at best little more than another hollow promise, and at worst an instrument for perpetuating further harm to another generation of Indigenous children.

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Bill C-92 – An Act respecting First Nations, Inuit and Métis children, youth and families

CANADIAN BAR ASSOCIATION
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April 2019

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Aboriginal Law Section, Child and Youth Law Section, and Family Law Section, with assistance from the Advocacy Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the Aboriginal Law Section, Child and Youth Law Section, and Family Law Section.

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I. INTRODUCTION

The CBA Aboriginal Law, Child and Youth Law, and Family Law Sections (CBA Sections) appreciate the opportunity to comment on Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*. The Aboriginal Law Section is comprised of lawyers who specialize in Indigenous law and related issues. The Family Law Section is comprised of lawyers who specialize in family law, and act for all parties in family law disputes. The Child and Youth Law Section is comprised of lawyers with expertise in aspects of law that affect children and youth including children's rights, responding to law, policy and legal research developments on matters affecting Canadian children.

The CBA Sections see Bill C-92 as the kind of first step required to bring needed reform to child and family services for First Nations, Inuit and Métis communities. However, several shortcomings and ambiguities in Bill C-92 risk undermining this important and necessary initiative.

Indian Residential Schools, child welfare practices like the Sixties Scoop, and discrimination in the federal government's on-reserve child and family services have done significant and lasting harm to First Nations, Inuit and Metis children, families and communities over decades. While these harms have been recognized by government authorities, there has been slow progress on improvements intended to protect First Nations, Inuit and Métis children. This is a national crisis and the statistics are well known. The Minister of Indigenous Services has recognized the dire state of child and family services for Indigenous children, calling it a humanitarian crisis.[1]

In January 2016, the Canadian Human Rights Tribunal (CHRT) made damning findings about the federal government's knowledge of severe inequities in its on-reserve child and family services program. These inequities gave an incentive for removing First Nations children from their families and from their communities.[2] The engine of this incentive was the federal government's failure to adequately fund prevention-based services, while reimbursing maintenance expenses for children taken into care at cost. Taking children into care was a means for social workers to

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1 See, for example, online.

2 *First Nations Child and Family Caring Society of Canada et al v AG Canada*, 2016 CHRT 2.

access funding for services and products that would not be paid if children remained in their homes. The severe inequities caused by the federal government's underfunding of child and family services on-reserve has been confirmed in four subsequent non-compliance orders.[3] The matter of long-term reform is still pending.

The CHRT recognized in February 2018 that the state of child and family services for Indigenous communities is not only a humanitarian crisis, it is an existential one:

> Given the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence.
>
> The building of a Nation-to-Nation relationship cannot be more significant than by stopping the unnecessary removal of Indigenous children from their respective Nations. Reforming the practice of removing children to shift it to a practice of keeping children in their homes and Nations will create a channel of reconciliation. […].[4]

Similarly, in *Brown v Canada*, the Ontario Superior Court of Justice found the federal government liable for breaching a common law duty of care in relation to the Sixties Scoop, by neglecting to take steps to prevent Indigenous children placed in the care of non-Indigenous foster or adoptive parents from losing their Indigenous identities. The Court recognized the "great harm" caused by the Sixties Scoop:

> The 'scooped' children lost contact with their families. They lost their aboriginal language, culture and identity […] the loss of their aboriginal identity left the children fundamentally disoriented, with a reduced ability to lead healthy and fulfilling lives.[5]

Five of the Truth and Reconciliation Commission's 94 Calls to Action[6] address the woeful state of child and family services for Indigenous children and families, urging:

1. closer supervision of the child protection system, including better resourcing, better education and training for that system;

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3 *First Nations Child and Family Caring Society of Canada et al v AG Canada*, 2016 CHRT 10; *First Nations Child and Family Caring Society of Canada et al v AG Canada*, 2016 CHRT 16; *First Nations Child and Family Caring Society of Canada et al v AG Canada*, 2017 CHRT 14; and *First Nations Child and Family Caring Society of Canada et al v AG Canada*, 2018 CHRT 4.

4 *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2018 CHRT 4 at paras 452-453.

5 *Brown v Canada*, 2017 ONSC 251 at para 7. In August 2018, the Ontario Superior Court of Justice and the Federal Court of Canada approved the settlement of this proceeding and of related class actions.

6 http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf

2. public reporting on the state of child and family services for Indigenous children in Canada (including outcomes);

3. full implementation of Jordan's Principle;

4. enactment of Indigenous child welfare legislation; and

5. development of culturally appropriate parenting programs for Indigenous families.

The CBA has encouraged all levels of government, as well as other public and private institutions in Canada, to carefully consider the Calls to Action and take appropriate steps towards reconciliation.[7] Bill C-92 is one such step, although an incomplete one, offering an opportunity to return control over child and family services to Indigenous communities.

Fully recognizing laws made by Indigenous communities is a key measure in decolonizing child and family services, as it would in large part return matters to the *status quo* prior to European control – Indigenous communities would have jurisdiction to determine how best to enable their children and families to thrive. Given the legacy of colonialism, sufficient resourcing is key to making this exercise of jurisdiction effective and successful, rather than another chapter of discrimination against Indigenous children and their families by the federal government.

Bill C-92 also establishes important minimum standards for Indigenous children dealt with exclusively by provincial or territorial child and family services, or in Indigenous communities that have yet to enact their own laws. Caution must be taken to ensure that those minimum standards do not interfere with key elements of the provincial or territorial child protection system protecting child safety and well-being.

The CBA Sections offer eight recommendations to ensure the full implementation of a substantively equal system for Indigenous child and family services:

1. consistent with the TRC's Calls to Action and the orders of the CHRT, amend the Preamble in Bill C-92 to expressly *commit* the federal government to its role in providing predictable, stable, sustainable, needs-based and substantively equal funding for child and family services in Indigenous communities.

2. replace the phrase "acknowledges the ongoing call for" with "commits to providing" in the second last clause of the Preamble.

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7 See, for example, *Responding to the Truth and Reconciliation Commission's Calls to Action* (Ottawa: CBA, 2016) at 1.

3. add reference to the independence of dispute resolution mechanisms contemplated in subsection 20(5).

4. consistent with Articles 3, 6, 19, 30, 34, 35, 36 and 39 of the United Nations Convention on the Rights of the Child (UNCRC), amend the Preamble and section 8 to refer to Parliament's affirmation of the right of Indigenous children to physical, emotional and psychological safety, security and well-being.

5. amend the Preamble to refer specifically to the federal government's international obligations under the UNCRC and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as part of the federal government's nation-to-nation commitments.

6. amend the definition of "care provider" to exclude foster parents whose sole connection to an Indigenous child is by way of a child protection placement.

7. amend subsection 10(3) to add continuity in the child's care and the possible effect on the child of disruption of that continuity, and the effects on the child of delay in the final outcome of a case, as factors to consider in determining the best interests of an Indigenous child.

8. amend subsection 10(3)(b) to specify that a child's gender identity and expression be considered among the needs of the child in weighing "best interests."

Without amendments to address these important areas, Bill C-92 risks being at best little more than another hollow promise, and at worst an instrument for perpetuating further harm to another generation of Indigenous children.

II. CHILD AND FAMILY SERVICES

A. Domestic law regarding child and family services

Each province and territory has established child welfare laws as the foundation for publicly funded services to protect children from abuse and neglect, and to support families so they can stay together. Generally, child welfare is a matter of provincial or territorial responsibility under subsection 92(16) of the *Constitution Act, 1867* (matters of a merely local or private nature). The federal government has a role with respect to Indigenous peoples, pursuant to subsection 91(24) of the *Constitution Act, 1867* (Indians, and Lands reserved for the Indians).[8]

The historic federal role in Indian Residential Schools as an instrument of the child welfare system is well-documented. In recent years, the federal role has taken the form of funding and control over the First Nations Child and Family Services Program, an on-reserve program for

[8] The Supreme Court of Canada confirmed in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 that First Nations (including those without *Indian Act* status), Inuit and Métis peoples fall within the meaning of the word "Indians" in subsection 91(24) of the *Constitution Act, 1867*.

delivering child and family services to First Nations children living on-reserve. This program is an executive action, taken under the authority of the Minister of Indian Affairs and Northern Development.[9] As a result, the federal role has also had an impact on the protection and placement of Indigenous children in foster care, and in continuing custody arrangements.

Provincial and territorial laws and authorities also apply to delivery of child and family services to Indigenous children and families living off-reserve. Generally, First Nations child and family services agencies provide services on-reserve under section 88 of the *Indian Act,*[10] which says "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province". Most provincial and territorial statutes have provisions particular to Indigenous children and youth.[11] The approaches vary from substantive directions to participants in the child welfare system about how to interpret the best interests of Indigenous children (for instance, British Columbia and Ontario), to largely procedural provisions typically involving notification to *Indian Act* bands (Manitoba, Northwest Territories and Prince Edward Island), to mere mentions that the province or territory may enter into agreements for child and family services with *Indian Act* bands. The laws of Saskatchewan, New Brunswick, Newfoundland and Labrador, and Yukon are largely silent on Indigenous child welfare.[12]

Historically, the failure of provincial and territorial child welfare systems to address the needs of Indigenous communities led the federal government to executive action in the on-reserve context. In 1946-1948 and again in 1959-1961, Joint Committees of the Senate and the House of Commons called on provinces and territories to offer more services following disruptions in customary care in Indigenous communities. In the face of inaction by the provinces and territories, the federal government entered into the *Canada-Ontario Welfare Services Agreement* in 1965 (instrumental to the Sixties Scoop in Ontario), and in the 1970s and 1980s began supporting on-reserve child welfare agencies in an *ad hoc* fashion. Following a moratorium on

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9 Department of Indian Affairs and Northern Development Act, R.S.C. 1985, c. I-6.

10 R.S.C. 1985, c. I-5.

11 *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, see for instance ss 2(f), 3(b), 4(2), 71(3); *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, see for instance ss 1.1(d), 2(1)(c), 2(1)(j)(iii), 71.1; *The Child and Family Services Act*, CCSM c C80 at Preamble, point 11; *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, see for instance ss 17(2), 64(5)(g), Part IV, 74(3)(b), 80; *Youth Protection Act*, RSQ, c P-34.1, see for instance 2.4(5)(c), 71.3.1; *Children and Family Services Act*, SNS 1990, c. 5, see for instance ss 39(4)(da), 42(1)(ca), 44(3)(e), *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, see for instance ss 2(2)(j), 12(3.1), 13(7), 18.1, 24(1.2); *Child and Family Services Act*, SNWT 1997, c.13, see for instance ss 12.3(2), 25(2); *Child and Family Services Act*, SNWT (Nu) 1997, c. 13, see for instance ss 2(2), 2(3), 25(c).

12 *The Child and Family Services Act*, SS 1989-1990, c C-7.2; *Family Services Act*, S.N.B. 1980, c. F-2.2; *Children's Law Act*, R.S.Y. 2002, c. 31.

these *ad hoc* arrangements, the federal government established the First Nations Child and Family Services Program (FNCFS Program) in 1991, which in 2016 was found to discriminate against First Nations children and families on the basis of race and national or ethnic origin.[13] Reform of that program is ongoing under the CHRT's supervision.

Bill C-92 offers an opportunity for Parliament to return control for child and family services to Indigenous communities and end the ongoing humanitarian crisis that began with the Indian Residential Schools system. Federal, provincial and territorial governments have all failed to redress this crisis for many years, despite its notoriety.

B. International law

In addition to domestic law, international human rights law grants children rights to have their basic needs provided for, to be protected from all forms of violence, to actively participate as engaged service recipients (in keeping with their age and stage of development), and to have their best interests treated as a primary consideration in all decisions affecting them. For Indigenous children, these rights are recognized in overlapping instruments of international law. The importance of making decisions consistent with the best interests of children and in keeping with their cultural and language rights is recognized in the UNDRIP, UNCRC, and the United Nations Committee on the Rights of the Child's General Comment 11.

Article 7(2) of UNDRIP recognizes that "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or forcible violence, including forcibly removing children of the group to another group."

Article 19(2) of UNCRC says that "protective measures should, as appropriate, include effective procedures […] to provide necessary support for the child and for those who have the care of the child", while Article 20 states that in cases where children are temporarily or permanently deprived of their family environment, "[w]hen considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." Article 30 says that "a child […] who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture […] or to use his or her own language." Article 2(1) says that children have the right not to be

[13] This is contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

subjected to discrimination of any kind, "irrespective of the child's or his or her parent's or legal guardian's race […] national, ethnic or social origin".

Concerning the best interests of the child, General Comment 11 says at paragraph 33 that:

> [t]he principle of best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systemically apply the principle by considering the implication of their decisions and actions on children's rights and interests. In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.

Significantly, paragraph 48 says that:

> In State parties where indigenous children are overrepresented among children separated from their family environment, specially targeted measures should be developed in consultation with indigenous communities in order to reduce the number of children in alternative care and prevent the loss of their cultural identity.

The Concluding Observations of the UN Committee on the Rights of the Child delivered to Canada in 2012 are also relevant. In particular, paragraph 33 recommends that Canada:

> (a) take urgent measures to address the overrepresentation of Aboriginal […] children in the criminal justice system and out of home care; [and]
>
> (b) take immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination.

Bill C-92 is an important opportunity for Canada to meet its international obligations under these overlapping instruments.

III. ACHIEVING SUBSTANTIVELY EQUAL CHILD AND FAMILY SERVICES

As drafted, Bill C-92 refers just once to funding. This reference is in the Preamble, acknowledging "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".

While "[i]n keeping with the modern emphasis on purposive analysis, heavy reliance on the Preamble is often judged appropriate",[14] this acknowledgment will form an important part of

[14] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at 447 and 453).

interpreting Bill C-92, the CBA Sections believe that the funding reference in the Preamble falls short of Call to Action #1's exhortation:

> the federal, provincial, territorial and Aboriginal governments to commit to reducing the number of Aboriginal children in care by […] [p]roviding adequate resources to enable Aboriginal communities and child welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.

The Preamble reference to funding also falls short of the federal government's legal obligations under the CHRT orders about funding for the FNCFS Program, none of which have been judicially reviewed.

In its initial 2016 decision that the FNCFS Program discriminated against 165,000 Indigenous children living on-reserve based on their race and national or ethnic origin, the CHRT recognized that funding approaches are central to effective delivery of child and family services:

> [Canada's] authorities are concerned with comparable funding levels; whereas, provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.
>
> […] human rights principles, both domestically and internationally, require [Canada] to consider the distinct needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.[15]

While Bill C-92's reference to "needs-based" funding, rather than "comparable" funding, is consistent with the CHRT's order, merely acknowledging an ongoing call is not. In the non-compliance orders made since the Tribunal's initial decision, the federal government has been ordered to "determine budgets for each individual FNCFS Agency based on an evaluation of its

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15 *First Nations Child and Family Caring Society of Canada et al v AG of Canada*, 2016 CHRT 2 at paras 464-465.

distinct needs and circumstances,"[16] and to fund several specific items at their actual cost pending long-term reform of the FNCFS Program.[17]

In the context of the FNCFS Program, there has not been an "ongoing call" about funding, but rather legal orders with which the federal government must comply. The CHRT has held that its orders apply until either long-term reform of the Program is complete, or a self-government agreement is reached for a First Nation to provide its own child welfare services. Without adequate funding mechanisms, Bill C-92 will risk becoming an "escape hatch" for the federal government from the CHRT orders related to the Program.

Over and above the FNCFS Program, which applies only to First Nations children with *Indian Act* status who are ordinarily resident on-reserve, a plan to ensure adequate funding for child and family services led by Indigenous communities is required. If funding is inadequate, those tasked with protecting children will be unable to do so, and the purpose and guiding principles of the legislation will remain unmet.

The 2018 report of the Canadian Association of Social Workers illustrates the problems of insufficient funding from the perspective of social workers.[18] Almost two-thirds reported burnout, compassion fatigue and post-traumatic stress tied to unmanageable workloads.[19] The social workers also expressed concern about inadequate resources available in communities to work with families to help address the child protection concern.[20]

In March 2017, the Nova Scotia government made over 80 amendments to its child and family services legislation, with little funding to support the operational impact of these changes.[21] Recently, the Nova Scotia College of Social Workers framed the state of child protection in Nova Scotia as "child welfare on the brink". The College emphasized that funding is needed to support the expanded call for intervention under the amended legislation, particularly in light of

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16 *First Nations Child and Family Caring Society of Canada et al v AG of Canada*, 2016 CHRT 16 at para 160(A)(2).

17 *First Nations Child and Family Caring Society of Canada et al v AG of Canada*, 2018 CHRT 4 at paras 410, 416, and 420.

18 (2018*) Understanding Social Work and Child Welfare: Canadian Survey and interviews with Child Welfare Experts*. 3,258 (2,462 English-speaking and 796 French-speaking) social workers were surveyed across Canada.

19 *Ibid* at 5.

20 *Ibid* at 7.

21 https://childwelfareonthebrink.org.

increased complexity of cases and limited community resources to meet the need.[22] The current situation in Nova Scotia has been linked to an increase in child poverty in that province, while in many other regions there has been a decline over the same period.[23]

Underfunded child welfare programs will cause harm to children. Insufficient funding to support work undertaken when Bill C-92 becomes law will not promote the recognition or changes that Bill C-92 seeks to foster and support, nor is it consistent with Jordan's Principle, as the lack of funding will continue to drive service gaps and poorer outcomes for Indigenous children. compared to non-Indigenous children In 2012, Michael Wernick as Deputy Minister of Aboriginal Affairs and Northern Development Canada acknowledged this point when he said that legislation without funding would not fix the problem.[24] In light of the fundamental importance of funding to the delivery of child and family services, the approach cannot be left to case-by-case agreements in potentially hundreds of communities in diverse regions. What is required is not an "acknowledgment" of a "call" for predictable, stable, sustainable, needs-based and substantively equal funding, but rather a clear *commitment to ensure* funding is available to an Indigenous community that assumes jurisdiction over its own child and family services.

RECOMMENDATION

1. **Consistent with the TRC's Calls to Action and the orders of the CHRT, the CBA Sections recommend amending the Preamble in Bill C-92 to expressly *commit* the federal government to its role in providing predictable, stable, sustainable, needs-based and substantively equal funding for child and family services in Indigenous communities.**
2. **The CBA Sections recommend replacing the phrase "acknowledges the ongoing call for" with "commits to providing" in the second last clause of the Preamble.**

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22 *Supra*, note 18.

23 The Canadian Centre for Policy Alternatives-Nova Scotia reported that child poverty increased from 18.1% in 1989 to 21.5% in 2016. https://www.policyalternatives.ca/publications/reports/2017-report-card-child-and-family-poverty-nova-scotia.

24 See para. 212 of 2016 CHRT 2, citing the Deputy Minister's testimony to the House of Commons Public Accounts Committee in 2012.

IV. FEDERALISM

Bill C-92 relies on federalism principles for a framework under which Indigenous-led child welfare systems might be established. Bill C-92 represents a significant step in the Nation-to-Nation relationship, as it opens federalism principles to Indigenous governments.

In *Canadian Western Bank v Alberta*, 2007 SCC 22, the Supreme Court of Canada defined federalism as follows (at para 22):

> federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

Bill C-92 recognizes the exclusion of Indigenous governments from the division of powers among "the original members" in 1867. Subsection 18(1) commits the federal government to recognizing and affirming Indigenous peoples' pre-existing right of self-government and legislative authority concerning child and family services. This recognition is made effective in its reliance on two concepts: cooperative federalism and paramountcy.

The Supreme Court of Canada described cooperative federalism in *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 (at para 17):

> Cooperative federalism is a concept used to describe "the network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the [constitutional] amending process [...] It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action [...] .

The "coordination agreements" described in subsection 20(2) of Bill C-92 are the kind of cooperative federalism mechanism that permits a redistribution of power among different levels of government without a constitutional amendment. Under coordination agreements, Indigenous governing bodies that have exercised legislative authority to establish their own child welfare laws may negotiate with the federal and provincial or territorial governments to

determine how their laws will interact with both legislative spheres. These agreements will require extensive consultations and significant cooperation among all three levels of government. Given the extensive nature of consultation and the range of circumstances in which Indigenous governing bodies will find themselves, clear and effective dispute resolution systems will be necessary. The references to dispute resolution in Bill C-92 are too vague, being left to regulation. To be effective and to carry the authority necessary to command the respect of all three levels of government, these dispute resolution mechanisms and any person, body or authority overseeing them must be independent. This independence will involve not only the perception of the parties, but also structural considerations such as resourcing and capacity.

RECOMMENDATION

3. **The CBA Sections recommend adding reference to the independence of dispute resolution mechanisms contemplated in subsection 20(5).**

Where agreements are not possible, Bill C-92 relies on a further principle of federalism – paramountcy – to give primacy to decisions by Indigenous governing bodies that have exercised their legislative authority over child welfare. Subsection 21(1) gives the force of federal law to Indigenous child welfare laws where coordination agreements have been concluded, or where no agreement has been concluded despite at least 12 months of reasonable efforts. The impact is spelled out in subsections 22(1) and 22(3): the Indigenous laws will prevail over federal and provincial laws "if there is a conflict or inconsistency".

The reference to "conflict or inconsistency" evokes a key concept of the doctrine of federal paramountcy described by the Supreme Court of Canada in *Alberta (Attorney General) v Moloney*[25]:

> This doctrine recognizes that where laws of federal and provincial levels come into conflict, there must be a rule to resolve the impasse. When there is a genuine "inconsistency" between federal and provincial legislation, that is, when the operational effects of provincial legislation are incompatible with federal legislation, the federal law prevails [citations omitted].

In *Orphan Wells Association v Grant Thornton Ltd.*,[26] the Court recently summarized the two kinds of "conflict or inconsistency" that trigger the paramountcy doctrine (at para 65):

> The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises

25 2015 SCC 51 (at para 16).

26 2019 SCC 5.

> where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'. The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does not entail a direct violation of the federal law's provisions. The party relying on frustration of purpose must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose [italics in original, citations omitted].

These would be the threshold for applying subsections 22(1) and 22(3) of Bill C-92. Indigenous child welfare laws will prevail over federal, provincial or territorial laws where compliance with those laws would deny the Indigenous child welfare law, or where they are incompatible with the Indigenous law's purpose.

The doctrine of paramountcy also applies to principles in Bill C-92 that apply to child and family services to Indigenous children at a national level. These principles would apply to non-Indigenous authorities applying provincial or territorial laws.

While some have expressed concerns that the principles in Bill C-92 may lower the bar in some jurisdictions, the CBA Sections view the bill as instead setting a floor below which the provinces and territories may not fall. The principles in sections 9-17 set minimum standards for Indigenous children and families dealing with provincial or territorial systems. If a region opts to provide greater protection or consideration to Indigenous children, families or communities served by non-Indigenous authorities, it is difficult to see how this would pose an operational conflict with Bill C-92's principles, or how the initiative would frustrate Bill C-92's purposes, which section 8 says are to "affirm Indigenous peoples' rights and jurisdiction in relation to child and family services and to set out national standards in relation thereto".

V. CHILD WELFARE STANDARDS

The principles in Bill C-92 would, in the absence of Indigenous laws, guide Indigenous communities and provincial and territorial authorities in the delivery of child and family services to keep families together and reduce the number of Indigenous children in care. However, reference to the operational direction necessary for child welfare legislation is absent from Bill C-92.

Despite including "child protection services" in the meaning of "child and family services", Bill C-92 is relatively silent about operational direction for child protection, with the exception of a reference in subsection 11(a) to the need for child and family services to take into account an

Indigenous child's "needs, including with respect to his or her physical, emotional and psychological safety, security and well-being".

Operational direction for child protection in child and family services legislation begins with the enumeration of child protection grounds, a central element of the system as they define key points when state authority is to intervene in a family's life, and on what grounds:

- When a professional or community member is obliged to report a situation to a child and family services agency;
- When a child and family services agency is permitted to take steps that intrude on a family's life;
- When a child and family services agency must remove a child from a person's care;
- When a child and family services agency may start a court proceeding in respect of a child without removing that child from a person's care; and
- When a court must find a child in need of protection or intervention services.

Without direction on these points, these matters will have to be addressed in Indigenous child welfare laws (in keeping with the principles in sections 9-15, in particular sections 11 and 14(1)) or under provincial and territorial laws.

The CBA Sections believe that, without operational direction, Bill C-92 should include a stronger reference to the need to uphold the physical, emotional and psychological safety, security and well-being of Indigenous children. A dated but still relevant "Panel of Experts Report" recommended that "the paramount purpose" of Ontario's child protection legislation should be "to ensure each child's entitlement to safety, protection and well-being."[27]

To ensure that those implementing Indigenous and provincial or territorial child welfare laws focus on the paramount need to keep Indigenous children safe, in keeping with Canada's obligation under Articles 3, 6, 19, 30, 34, 35, 36 and 39 of the UNCRC, the reference to the physical, emotional and psychological safety, security and well-being in subsection 11(a) should be repeated in the Preamble and in section 8.

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27 Ontario, Panel of Experts on Child Protection. Mary Jane Hatton, *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection* (Toronto: Ministry of Community and Social Services, 1998).

RECOMMENDATION

4. **Consistent with Articles 3, 6, 19, 30, 34, 35, 36 and 39 of the UNCRC, the CBA Sections recommend amending the Preamble and section 8 to refer to Parliament's affirmation of the right of Indigenous children to physical, emotional and psychological safety, security and well-being.**

5. **The CBA Sections recommend amending the Preamble to refer specifically to the federal government's international obligations under the UNCRC and UNDRIP as part of the federal government's nation-to-nation commitments.**

The CBA Sections believe that the definition of "care provider" in Bill C-92 is overbroad and may draw unintended parties into child protection proceedings, including "stranger" foster parents, who would fall within the meaning of a person "who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child's parent". Care providers are given important rights and considerations in Bill C-92, including for the consideration of a child's best interests in section 10, and a right to party status in court proceedings in section 13.

While the CBA Sections agree that a broader definition of "care provider" may assist in giving standing to members of an Indigenous child's family with an important role in that child's life, for instance through customary care relationships, we do not see a unilateral right for foster parents to participate in child protection proceedings as a positive development.

RECOMMENDATION

6. **The CBA Sections recommend amending the definition of "care provider" to exclude foster parents whose sole connection to an Indigenous child is by way of a child protection placement.**

The absence of operational direction in Bill C-92's sections dealing with the best interests of Indigenous children, for matters such as an enumeration of child protection grounds, risk assessment, or timelines, leaves interpretation of the "best interests" test in a curious place.

The Supreme Court of Canada summarized the application of the "best interests" test in the context of child and family services in *Catholic Children's Aid Society of Metropolitan Toronto v M. (C.)*.[28] Child and family services must seek "to balance the best interests of children with the

[28] [1994] 2 S.C.R. 165.

need to prevent indeterminate state intervention, while at the same time recognizing that the best interests of the child must always prevail" (at p. 200). The Prince Edward Island Court of Appeal affirmed the need for this balance in *W. (N.) v PEI (Director of Child Welfare)* [29]:

> The legislation is premised on the recognition that a child should only be removed permanently from the family when factors which have created a situation dangerous to the physical and mental well being of the child cannot be improved by assistance given to the child and the parent or parents by the state or the community. Legislators and courts have long ago abandoned the notion that children may be found in need of protection because a court may deem it to be in the best interests of the child. There is a presumption children are to be left with their parents, and the autonomy and integrity of the family unit is to be maintained until such time as it is demonstrated they are in need of protection as defined by the *Act*. The autonomy and integrity of the family unit is to be maintained, not because this is a right of parents, but because of the recognition that a child's best interests are most appropriately served when they are raised by their parent or parents.

Bill C-92 proposes a "best interests" test in section 10 that is fairly consistent with interpretations under the *Divorce Act*[30] governing private custody matters between citizens. Bill C-92's definition of "best interests of the child" omits some child protection principles often found in provincial or territorial child and family services legislation, such as the importance of continuity of care in the child's family or community, or the impact of delay on a child.

RECOMMENDATION

7. **The CBA Sections recommend amending subsection 10(3) to add continuity in the child's care and the possible effect of disruption of that continuity, and the effects on the child of delay in the final outcome of a case, as factors in determining the best interests of an Indigenous child.**

To be consistent with the UNCRC, the CBA Sections also suggest that clause (3) be amended to read "the child's views and preferences, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained."

The definition of "best interests" omits reference to gender diversity among Indigenous youth, despite subsection 9(3) specifying that children are to exercise their rights without discrimination based on gender identity or expression. While many colonial policies and practices have resulted in the loss and degradation of Indigenous cultures, gender diverse

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29 (1997), 33 R.F.L. (4th) 323 at 330-331.

30 R.S.C. 1985, c. 3 (2nd Supp.).

Indigenous children may experience their communities' ceremonies or cultural practices differently. Explicitly recognizing the needs of gender diverse Indigenous children and youth in section 10, not solely in the substantive equality principles in section 9, would ensure those needs are considered.

RECOMMENDATION

8. **The CBA Sections recommend amending subsection 10(3)(b) to specify that a child's gender identity and expression be considered among the needs of the child in weighing "best interests."**

VI. CONCLUSION

Bill C-92's goals are laudable, consistent with the TRC's Calls to Action, the constitutional rights of Indigenous Peoples in Canada, and international law. However, as drafted the Bill makes no guarantee (enforceable or otherwise) about funding for Indigenous-led child welfare systems. As such, the bill risks doing more harm than good. While Bill C-92 relies on important mechanisms of federalism to achieve its aims, some refinements should be made to ensure that the national child welfare standards it attempts to set for Indigenous children will be effective.