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The Children Parliament Left Behind: Examining the Inequity of Funding in *An Act respecting First Nations, Inuit and Métis children, youth and families*

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THE CHILDREN PARLIAMENT LEFT BEHIND:

EXAMINING THE INEQUITY OF FUNDING IN *AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES*

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An Act respecting First Nations, Inuit and Métis children, youth and families (the *Act*) came into force in January of 2020, containing many innovative provisions aimed at affirming the jurisdiction of Indigenous peoples and providing services for Indigenous families. Ground-breaking provisions within the *Act* create a positive obligation on the government to provide services to Indigenous children who otherwise would have been apprehended due to their socioeconomic status. However, the *Act* lacks a concrete funding provision. This legislative comment conducts an exercise in statutory interpretation to conclude that the current omission of a funding provision within the legislation is at odds with the nature, purposes, and context of the legislation. The *Act* leaves a gap in funding (through no fault of the child's community) for children living in communities that have assumed jurisdiction over their own child and family

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services without having signed a coordination agreement, as well as for children in communities that have not assumed jurisdiction. This gap results in an inequitable funding distribution that helps some children out of poverty while leaving others behind, based on characteristics entirely out of the child's control. Knowledge of this dangerous gap is crucial in compelling legal actors to urgently push for legal solutions, so that no child is denied the protections offered in sections 15 and 15.1 of the *Act*.

> [T]he worst poverty is experienced by Indigenous children. . . . Rather than lifting Indigenous families out of poverty with housing, income and employment supports, our society has chosen to blame them for the economic policies of the Indian Act and pay other families to provide foster care.

— Senator Patti LaBoucane-Benson[1]

PART I: INTRODUCTION

New, ground-breaking Indigenous child welfare legislation passed through the House of Commons and the Senate in 2019 and came into force in January of 2020. Formerly Bill C-92, now *An Act respecting First Nations, Inuit and Métis children, youth and families* (the *Act*), this Act contains a number of innovative provisions aimed at affirming the jurisdiction of Indigenous Peoples and establishing national standards for services provided to Indigenous families.[2] While the *Act* has been critiqued on a number of grounds for not going far enough, it undoubtedly pushes the law over a few lines that, up to this point, had not yet been crossed.

One of these newly crossed lines can be found in sections 15 and 15.1 of the *Act*. These sections are the first of their kind to mandate that an Indigenous child cannot be apprehended solely on the basis of poverty and to outline

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1 *Debates of the Senate*, 42-1, Vol 150, No 302 (13 June 2019) at 2340 (Dr Patti LaBoucane-Benson).

2 See *An Act respecting First Nations, Inuit & Métis children, youth & families*, SC 2019, c 24, s 15 [*Act*].

the service providers' corresponding duty to demonstrate that reasonable efforts were made to keep the child with their family before apprehending. The strong language in these provisions has the potential to transform the lives of Indigenous children facing poverty in years to come. However, these provisions do not address a key concern that is necessary for such a transformation. At a glance, these provisions appear to create a positive obligation on the government to provide support to Indigenous children who would have otherwise been apprehended due to their socioeconomic status. However, a crucial question remains: can funding be compelled to actually provide these supports?

This legislative comment seeks to assess whether funding can be compelled to support the provision of services provided for within the *Act*, such as in sections 15 and 15.1, and ultimately concludes that these sections create a positive onus on service providers to provide preventative services to Indigenous families, which requires funding. Part I of this legislative comment begins with a review of the relationship between poverty, child welfare, and Indigenous children, which serves to ground this work in the realities Indigenous children face within Canada's current child welfare system. This background information is followed by a brief overview of the structure of the legislation, a review of the lack of funding in the new legislation, and the debate around a funding clause that took place in both the House of Commons and the Senate. Next, Part II interprets the language in sections 15 and 15.1 to assess how these provisions may be applied and when they compel the provision of services to Indigenous children. The crux of this legislative comment is Part III, which conducts an exercise in statutory interpretation to

conclude that the current omission of a funding provision within the legislation is at odds with the nature, purposes, and context of the legislation. Part III demonstrates that there is a gap in funding for children living in communities that have assumed jurisdiction over their own child and family services but have not signed an agreement. This legislative comment concludes with a discussion of the necessity of legal strategizing to solve the problems created by the lack of concrete funding and proposes a few legal avenues for addressing these problems, recognizing that the legal community must stand with and support Indigenous communities to make this legislation work.

SOCIETAL CONTEXT

Indigenous children are alarmingly overrepresented in the child welfare system. Only 7.7% of all children in Canada under 14 are Indigenous; yet, 52.5% in foster care are Indigenous.[3] A 2005 study of three provinces found an appalling disparity: while one in 150 non-Indigenous children are in care, one in ten Status Indian children are in care.[4] In terms of economic conditions, only 7% of non-Indigenous children live in poverty, while a shocking 38% of Indigenous children in Canada live in poverty.[5]

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[3] See Indigenous Services Canada, "Reducing the Number of Indigenous Children in Care" (last modified 7 June 2021), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1541187352297/1541187392851>.

[4] See Cindy Blackstock et al, "Wen:de: We are Coming to the Light of Day" (2005) at 42, online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/WendeReport.pdf>.

[5] See Indigenous Services Canada*, supra* note 3.

Data from the Canadian Incidence Study of Reported Child Abuse and Neglect in both 2003 and 2008 ("CIS-2008") reveals that the most prevalent reason for children being placed in group homes and residential treatment centres is neglect.[6] In 2008, 61.7% of children placed in group homes and treatment centres were removed based on maltreatment categorized as neglect.[7] These studies include cases of 'physical neglect' within that category of neglect.[8] Physical neglect covers the failure to provide basic needs[9] and is defined as:

> The child has suffered or is at substantial risk of suffering physical harm caused by the caregiver(s)' failure to care and provide for the child adequately. This includes inadequate nutrition/clothing, and unhygienic, dangerous living conditions. There must be evidence or suspicion that the caregiver is at least partially responsible for the situation.[10]

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6 See Mélanie Doucet, Élodie Marion & Nico Trocmé, "Group Home and Residential Treatment Placements in Child Welfare: Analyzing the 2008 Canadian Incidence Study of Reported Child Abuse and Neglect" (2018) at 3, online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/194e.pdf>.

7 See *ibid* at 2.

8 See *ibid* at 3.

9 See Anne Blumenthal, "Child Neglect I: Scope, Consequences, and Risk and Protective Factors" (2015) at 1, online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/141E.pdf>.

10 Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008: Major Findings* (Ottawa:

This definition demonstrates a clear connection between physical neglect and socioeconomic condition. The factors of inadequate nutrition, clothing, hygiene, and living conditions are all inherently connected to inequities in access to resources, which may be based on education, income, and/or occupation.[11] Nico Trocmé, principal researcher for the Canadian Incidence Study of Reported Child Abuse and Neglect, has stated that "[m]ost Indigenous children end up in care because their parents are poor" and that "neglect is another way to describe poverty."[12] CIS-2008 revealed that Indigenous families were eight times more likely to be investigated based on a suspicion of neglect.[13] The First Nations Caring Society's second Wen:De report, cited with approval in *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, found that poverty and poor housing are two of the key drivers of neglect for Indigenous children—factors which are "arguably outside the control of parents;" "[a]s such, parents are unlikely to be able to redress these

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Public Health Agency of Canada, 2010) at 66, online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/en/CIS-2008-rprt-eng.pdf>.

11 See Kristen Shook Slack et al, "Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics" (2004) 9:4 Child Maltreatment 395 at 396–397; Anne Blumenthal, "Child Neglect II: Prevention and Intervention" (2015) at 6, online (pdf): *Canadian Child Welfare Research Portal* <cwrp.ca/sites/default/files/publications/en/142E.pdf > .

12 Katie Hyslop, "How Poverty and Underfunding Land Indigenous Kids in Care" (14 May 2018), online: *The Tyee* <thetyee.ca/News/2018/05/14/Indigenous-Kids-Poverty-Care/>.

13 See *ibid.*

risks and it can mean that their children are more likely to stay in care for prolonged periods of time and, in some cases, permanently."[14] Overall, this paints a clear picture: many Indigenous children are being removed because their families are facing poverty.

STRUCTURE OF THE NEW LEGISLATION

The new legislation is structured into two key sections: National Standards and Jurisdiction. The National Standards section applies from January 1, 2020 onwards and sets out uniform principles across the country for the provision of child welfare services to Indigenous children. The National Standards section includes four sub-sections: A) Purposes and Principles, B) Best Interests of Indigenous Child, C) Provision of Child and Family Services, and D) Placement of an Indigenous child. The National Standards section applies to all service providers, including both Indigenous Governing Bodies and Provinces.[15] Whether or not an Indigenous Governing Body enters into a coordination agreement, the National Standards section will still apply.

This section includes a number of ground-breaking provisions, including sections 15 and 15.1, which will be

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14 *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 at para 161 [*Caring Society*]; Blackstock et al*, supra* note 4 at 13.

15 'Indigenous Governing Body' is defined in section 1 of the *Act* as "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." See *Act, supra* note 2, s 1.

discussed further in Part II. Another ground-breaking provision is the addition of cultural continuity to the best interests of the child analysis under section 10(2) of the *Act*. This principle of cultural continuity is not included in the best interests of the child provision in the *Divorce Act* and stands as a new and positive addition to Canadian jurisprudence that prioritizes the "ongoing relationship with [the child's] family and with the Indigenous group, community or people to which [the child] belongs and of preserving the child's connections to [their] culture."[16]

The second section of the *Act* is the Jurisdiction section, which affirms that First Nations can create their own laws, administration, and dispute resolution for child and family services.[17] The Jurisdiction section also sets out the process through which an Indigenous governing body may enter into a coordination agreement with the government with respect to the provision of services and fiscal arrangements. The question of which service delivery agency will apply in individual circumstances will depend on whether that First Nation has put forward their own legal regime for child welfare services or has decided to keep on a government agency as a service provider.[18] This section of the *Act* takes the positive step of recognizing that "jurisdiction over Indigenous children properly rests in

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16 *Act, supra* note 2, s 10(2).

17 See Mary Ellen Turpel-Lafond (Aki-Kwe), "Primer on Practice Shifts Required with Canada's *Act Respecting First Nations, Inuit and Métis Children, Youth and Families Act*" (2019) at 6, online (pdf): *The University of British Columbia, Indian Residential School History and Dialogue Centre* <si-rshdc-2020.sites.olt.ubc.ca/files/2019/12/Policy_Primer_Report_ENG.pdf>.

18 See *ibid* at 6–7.

Indigenous peoples themselves," but it has been critiqued for failing to remove federal and provincial oversight and powers of intervention over Indigenous communities on child welfare matters.[19] Crucially, there is a five-year review necessitated by section 31 of the *Act*, which requires the Minister to review the provisions and operations of the *Act* every five years after coming into force, and this review must be "in collaboration with Indigenous peoples, including representatives of First Nations, the Inuit and the Métis."[20]

LACK OF FUNDING IN THE NEW LEGISLATION

While the new legislation is the first federal child welfare law and sets out a number of ground-breaking provisions, a crucial mechanism is strikingly lacking from the new *Act*. There is no mechanism within the *Act* that provides for the funding necessary to support many of the provisions within the *Act*, including sections 15 and 15.1. This flies in the face of recommendations from scholars and Indigenous communities. Dr. Cindy Blackstock, Indigenous scholar and Executive Director of the First Nations Child and Family Caring Society, suggested to the House of Commons that language around equality of funding should be included in the legislation.[21] Justice Grammond of the

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19 Yellowhead Institute, "*An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*: Does Bill C-92 Make the Grade?" (2019) at 16, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2019/03/does-bill-c-92-make-the-grade_-full-report.pdf>.

20 *Act, supra* note 2, s 31(1).

21 See *House of Commons Debates*, 42-1, Vol 148, No 409 (3 May 2019) at 1025 (Rachel Blaney) [*House of Commons Debates* (3 May 2019)].

Federal Court has also stated that "given the findings of the Canadian Human Rights Tribunal, federal legislation should contain binding commitments regarding the proper funding of First Nations child welfare."[22] In the *Act* as it stands today, there is no corresponding budget, dollar amount, or principles enshrined within the *Act* outlining that funding will be provided under certain circumstances.

Despite the lack of a concrete mechanism, there are two places in the *Act* where funding is mentioned. The first is in the preamble, which includes the following statement:

> [T]he Government of Canada 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.[23]

This statement was included in the legislation from the first reading through to Royal Assent. There were critiques at the House of Commons that this language alone was not sufficient to ensure adequate funding for the commitments within the legislation. At the second reading in the House of Commons, NDP Members of Parliament, Peter Julian and Rachel Blaney, argued that "without adequate funding, [Bill C-92] will simply be jurisdiction to legislate over our own poverty" and that "the strongest

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22 Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 J L & Soc Pol'y 132 at 134.

23 *Act, supra* note 2, Preamble.

recommendation is really about making sure that the language is in the legislation, not in the preamble," respectively.[24]

The second mention of funding is in section 20(2), which was not included in the first reading but added later by the Standing Committee on Indigenous and Northern Affairs at the House of Commons. This section provides that:

> The Indigenous governing body may also request that the Minister and the government of each of those provinces enter into a coordination agreement with the Indigenous governing body in relation to the exercise of the legislative authority, respecting, among other things,
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> […]
>
> (c) fiscal arrangements, relating to the provision of child and family services by the Indigenous governing body, that are sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people

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24 *House of Commons Debates* (3 May 2019), *supra* note 21 at 10, 1025, 1245 (Peter Julian & Rachel Blaney).

> to exercise the legislative authority effectively.[25]

At the report stage in the House of Commons, Liberal Member of Parliament and (at the time) Minister of Indigenous Services Seamus O'Regan stated that this amendment "guarantees that funding will be sustainable, needs-based and consistent with the principle of substantive equality, so that long-term, positive results for Indigenous children, families and communities are secured."[26] In response to criticism that the bill does not include more specific funding measures, Liberal Member of Parliament Mike Bossio said the following:

> [To include specific funding in the bill itself would] do an injustice to the intent of the bill, which is to be a framework for indigenous communities to define. It is for indigenous communities to define what is sustainable and what is needs based. That definition will be different depending in what part of the country the community happens to be. There is no one size fits all when it comes to what is sustainable and what is needs based.[27]

Overall, Members of Parliament argued between two opposing perspectives: one that more concrete funding mechanisms within the legislation are necessary, and the

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25 *Act, supra* note 2, s 20(2).

26 *House of Commons Debates*, 42-1, Vol 148, No 425 (3 June 2019) at 1840 (Hon Seamus O'Regan) [*House of Commons Debates* (3 June 2019)].

27 *Ibid* at 2015.

other that existing funding models have supported a broken system and funding should be organized through coordination agreements with each individual community.[28]

The debate continued at the Senate, where, at the committee stage, the Senate added an amendment requiring the Minister to study the adequacy and methods of funding and report back to Parliament every five years, in cooperation with an advisory committee, including members appointed by Indigenous governing bodies.[29] This concrete funding mechanism was rejected by the House of Commons because it was found to not be "consistent with the main objectives of the bill" and was not included in the final version of the bill.[30] In response to the amendment being removed, Senator Harder asserted that funding could instead be assessed through the existing reporting structure in the bill, and Senator Glen Patterson gave the following critique:

> [T]he government saw fit to reject amendments that would have included reporting back on the adequacy of funding measures. Without the inclusion of a Royal Recommendation, there is limited funding that can be shifted from existing monies to address the issues covered by this bill. But it

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28 See *ibid* at 1840.

29 See *Debates of the Senate*, 42-1, Vol 150, No 302 (13 June 2019) at 2350 (Hon Dennis Glen Patterson) [*Debates of the Senate* (13 June 2019)].

30 *Debates of the Senate*, 42-1, Vol 150, No 307 (20 June 2019) at 1520 (Hon George J Furey).

> was the hope of the committee that the inclusion of this amendment would help to ensure that funding levels are adjusted to meet the needs based on direct input from Indigenous people.[31]

Without a Royal Recommendation, the Minister cannot access new funds to support the responsibilities included within the *Act*, and, as Senator Patterson mentioned, the existing funding that could be shifted to cover these new responsibilities is very limited.[32] As well, there is no guarantee within the *Act* that those existing funds will be shifted in actuality. However, from a legal perspective, this does not mean that the responsibilities outlined in the *Act* can be shirked. The next section of this legislative comment assesses that there are provisions within the *Act* that require funding to support new responsibilities, such as sections 15 and 15.1. There is strong language within sections 15 and 15.1 that necessitates the provision of support services for Indigenous families to provide evidence that reasonable efforts were made for Indigenous children living in poverty to remain with their families. In order to go on to examine whether funding can be compelled in Part III, it is first necessary to establish that there are provisions within the *Act* that oblige the provision of services—services which would ultimately require funding in order to provide.

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31 *Ibid* at 1530.

32 See *Debates of the Senate* (13 June 2019), *supra* note 29 at 2350 (Hon Dennis Glen Patterson).

PART II: SECTION 15 AND 15.1 NECESSITATE THE PROVISION OF SERVICES

This section will use sections 15 and 15.1 specifically as a case study to illustrate the potential impact of inequitable funding within the *Act*. Section 15 of the *Act*, titled 'Socio-economic conditions,' reads:

> **15** In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.[33]

Section 15.1 of the *Act* was added in by the Senate, and it creates a reverse onus on the service provider to show that reasonable efforts were made to have the child continue to reside with their family. This section, titled 'Reasonable efforts,' reads:

> **15.1** In the context of providing child and family services in relation to an Indigenous child, unless immediate apprehension is consistent with the best interests of the child, before apprehending a child who resides with one of the child's parents or another adult member of the child's family, the service provider must demonstrate that he or she

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33 *Act*, *supra* note 2, s 15.

> made reasonable efforts to have the child continue to reside with that person.[34]

Taken together, do these two clauses require the provision of services to Indigenous children living in poverty? Read in its plain meaning, section 15 conveys that Indigenous children are not to be apprehended on the basis of their socioeconomic condition, to the extent that this is possible, taking into account the best interests of the child. The plain meaning of section 15.1 conveys that unless immediate apprehension is in line with the best interests of the child, a service provider has to demonstrate that 'reasonable efforts' were made to have the child remain with their family before apprehending. Given that section 15.1 opens with "In the context of providing child and family services…", it is a reasonable assumption that "reasonable efforts' must include the provision of services where necessary and possible.

In British Columbia, the Ministry of Children and Family Development's Policy 1.1 "Working with Indigenous Children, Youth, Families and Communities" defines 'reasonable efforts' within the context of the *Act*. This policy, used by child and family service providers, defines 'reasonable efforts' as:

> Active efforts, which prioritize preventive and support services, to have a child continue

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34 *Ibid*, s 15.1.

> to reside with one of the child's parents or another adult member of the child's family.[35]

This definition supports the assumption that 'reasonable efforts' must include the provision of services where necessary and possible, as service providers are guided to "prioritize preventative […] services."[36] This is also supported by former Saskatchewan judge Dr. Mary Ellen Turpel-Lafond's policy primer on the *Act*, which instructs that upholding section 15.1 puts a reverse onus on service delivery staff, who must prioritize "preventative steps and programming over other interventions which might lead to the removal of a child."[37] Upholding sections 15 and 15.1 creates a positive onus on service providers to provide preventative services to Indigenous families, and these services require funding.

PART III: STATUTORY INTERPRETATION

The interpretation issue that this legislative comment seeks to assess is whether or not the *Act* can compel funding for the provision of support services to Indigenous children in order to uphold the responsibilities within the *Act*, such as the responsibilities in sections 15 and 15.1. This section will begin to approach this issue from the perspective of statutory interpretation.

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35 British Columbia, Ministry of Child and Family Development*, Policy 1.1, Working with Indigenous Children, Youth, Families and Communities,* (Core Policy: Child Safety, Family Support & Children in Care Services), (effective 1 January 2020) at 14.

36 *Ibid*.

37 Turpel-Lafond, *supra* note 17 at 5.

The modern principle of statutory interpretation used by the courts directs that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] This section will conduct this exercise in interpretation through the modern approach, assessing the remedial nature of the legislation, the intention of the legislature, the purpose of the legislation, and the broader context of the legislation. The assessment in this section reveals a tension between the intention of the legislature pushing in one direction and the nature, purposes, and context of the legislation pushing in the other.

i. THE NATURE OF THE ACT AS BENEFITS-CONFERRING LEGISLATION

The *Act* is undoubtedly a benefits-conferring piece of legislation, as it is a mechanism for providing benefits and protections to Indigenous children in relation to the child welfare system. Per *Rizzo & Rizzo Shoes Ltd*. (*Rizzo*), benefits-conferring legislation "ought to be interpreted in a broad and generous manner," and "[a]ny doubt arising from difficulties of language should be resolved in favour of the claimant."[39] This principle is upheld in section 12 of the *Federal Interpretation Act*, which states that enactments that are deemed remedial "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[40] As well, the

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38 *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21 [*Rizzo*].

39 *Ibid* at para 36.

40 RSC 1985, c I-21, s12 [*Federal Interpretation Act*].

Supreme Court of Canada in *Nowegijick v The Queen* held that statutes relating to Indigenous peoples should be liberally construed, with ambiguities resolved in favour of Indigenous peoples.[41] Thus, the benefits-conferring nature of the *Act* provides a guide for interpretation moving forward, instructing that interpretation should be generous and broad, with disputes in interpretation more likely to be resolved in favour of those to whom benefits are being conferred—in this case, Indigenous children.

ii. THE INTENTION OF THE LEGISLATORS

Given the importance of parliamentary supremacy, the courts will face difficulties reading-in an intention or commitment within the legislation that is not there. It is important to turn to the intention of the legislators in order to assess what commitments were made with regards to funding.

As was briefly mentioned in Part I, there is a section of the preamble that assists in interpreting the intention of the legislature with regards to funding:

> And whereas the Government of Canada 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-

41 [1983] 1 SCR 29, 144 DLR (3d) 193.

> term positive outcomes for Indigenous children, families and communities;[42]

A plain reading of this recognition of the need for funding in order to secure positive outcomes appears to be, on its face, a mere acknowledgement rather than a commitment in itself. The phrase "acknowledges the ongoing call for" clearly is not the same as if it had stated "commits to" or "provides for." As reviewed in Part I of this legislative comment, there was a division within Parliament regarding what mention of funding should be made within the legislation. Several Members of Parliament and Senators pushed—unsuccessfully—for the inclusion of a budget or for strong principles for future funding within the *Act*. On the other side, Parliamentarians argued that funding should instead be provided for through individually negotiated coordination agreements with Indigenous communities, not through the *Act* itself. NDP Member of Parliament Rachel Blaney argued that "principles [around equality of funding] need to be in the legislation to make sure that Indigenous children in this country are finally funded at the same level as all other Canadian children" and that "if this is not part of the legislation, it will be considered hollow legislation."[43] Conversely, Liberal Member of Parliament and Minister of Indigenous Services Seamus O'Regan, argued that "[funding] levels should be discussed and designed through the coordination agreement process to ensure they

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42 *Act, supra* note 2, preamble.

43 *House of Commons Debates* (3 May 2019), *supra* note 21 at 1250 (Rachel Blaney).

reflect the unique needs of each community and are not a one-size-fits-all approach."[44]

Overall, the contentious debate ended with a number of more concrete funding amendments being rejected at the committee stage of the House of Commons and rejected again after being proposed by the Senate. Without these amendments, it becomes clear that in the *Act*, the legislators' intent was to provide for funding through coordination agreements with individual Indigenous communities; this occurred despite objections from Members of Parliament and Senators along the way who called for more concrete upfront funding mechanisms to be included within the legislation itself. However, this intention to provide funding after-the-fact is at odds with key purposes of the legislation. As I will go on to argue, this proves discriminatory—through no fault of communities—towards Indigenous children living in communities that have assumed jurisdiction over their own child and family services but have not, or will not, pursue coordination agreements, as well as those living in communities that have not exercised their jurisdiction.

iii. THE PURPOSES OF THE LEGISLATION

Interpreting the legislation cannot stop with an assessment of the intention of the legislature. In *Vriend v Alberta* (*Vriend*), the Supreme Court of Canada found that the effects of the legislation "must be understood in the context of the nature and purpose of the legislation."[45] The

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44 *House of Commons Debates* (3 June 2019), *supra* note 26 at 1840 (Hon Seamus O'Regan).

45 [1998] 1 SCR 493 at para 94, 156 DLR (4th) 385 [*Vriend*].

overarching objective of this legislation is to provide child welfare services to Indigenous children, a purpose which is found in the summary of the legislation and reflected throughout. However, there are a number of other purposes of the legislation that operate in conjunction with that objective. These purposes are expressed in the preamble of the *Act*, in section 8 of the *Act*, titled 'Purposes and Principles', and by Members of Parliament and Senators who explicitly outlined the purposes of the legislation in the House of Commons and the Senate.

A) Implementing International Obligations

The *Federal Interpretation Act* outlines the value of the preamble in assessing the purposes of a piece of legislation: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."[46] In the *Act*, the preamble includes a number of lines that aid in assessing the purpose of the legislation. The preamble begins by referencing Canada's international obligations that are relevant to the *Act*:

> Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;
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> Whereas Canada ratified the United Nations Convention on the Rights of the Child and the

[46] *Federal Interpretation Act*, *supra* note 40, s 13.

> International Convention on the Elimination of All Forms of Racial Discrimination.[48]

Read together with section 8(c), which states that "[t]he purpose of this Act is to […] contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples,"[49] it is clear that a key purpose of this legislation is to implement Canada's international obligations to Indigenous peoples and to children. As well, legislators at the House of Commons have made clear that ensuring that the *Act* aligns with both the *United Nations Declaration on the Rights of Indigenous Peoples*[50] and the *Convention on the Rights of the Child*[51] is a key object of this legislation.[52] The Minister of Indigenous Services stated in the House of Commons that the *Act* will "help to ensure that indigenous child and family services […] would be fully aligned with the United Nations Convention on the Rights of the Child […] and the United Nations Declaration on the Rights of Indigenous Peoples."[53] It is demonstrable from the preamble, section 8(c), and the clear statements of the leading legislators of

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48 *Act, supra* note 2, preamble.

49 *Ibid,* s 8(c).

50 UNGAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/61/49 (2008) at 16 [*UNDRIP*].

51 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*UNCRC*].

52 See *House of Commons Debates*, 42-1, Vol 148 No 392 (19 March 2019) at 1320 (Hon Seamus O'Regan).

53 *Ibid*.

the *Act* that one purpose of this legislation is to be in alignment with *UNDRIP* and *UNCRC*.

Turning to what it means to be in alignment with those obligations, it is necessary to look within both *UNDRIP* and *UNCRC*. Article 21 of *UNDRIP* outlines that:

> States *shall* take *effective measures* and, where appropriate, special measures to ensure continuing improvement of their [Indigenous peoples'] economic and social conditions. Particular attention *shall* be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.[54]

The original intention for the *Act* to provide for funding only after it is passed through coordination agreements with individual Indigenous communities who have assumed jurisdiction is not in alignment with Article 21 of *UNDRIP*, which requires effective measures to ensure the improvement of economic conditions for, in particular, Indigenous children. Waiting for a coordination agreement leaves an undoubtable gap for Indigenous children living in a community that has assumed jurisdiction over its own child and family services but has not yet negotiated a coordination agreement, or which does not intend to negotiate a coordination agreement, as well as which has not assumed jurisdiction. It must be noted that this gap is through no fault of the community itself, as there are numerous reasonable reasons for not pursuing a

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54 *UNDRIP, supra* note 50, art 21 [emphasis added].

coordination agreement or assuming jurisdiction, not limited to the extreme inequity of resources available to the government as compared to Indigenous communities. Overall, any funding for effective measures in line with Article 21 put in place only by a coordination agreement to provide services for Indigenous children living in poverty per sections 15 and 15.1 of the *Act* is, consequently, not equally provided to those Indigenous children under the same circumstances but in communities that have assumed jurisdiction yet have not made such agreements and thus do not have access to that funding. As well, any funding provided for services through a coordination agreement is then not equally provided to Indigenous children in communities which have not assumed jurisdiction. This gap in services is not *effective*, nor is it paying the particular attention that *shall* be paid to the rights and special needs of Indigenous children, per Article 21.

The *UNCRC* contains a similar provision to the above Article from *UNDRIP*. Article 27 of the *UNCRC* states in part that

> States Parties recognize the right of *every child* to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. . . .
>
> States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and *shall in case of need provide material assistance and support*

> *programmes*, particularly with regard to nutrition, clothing and housing.[55]

The after-the-fact funding provided through individual coordination agreements leaves a gap in adherence to Article 27 of the *UNCRC*. Any support provided through a coordination agreement that would be in alignment with Article 27 is not equally available to Indigenous children in communities that have assumed jurisdiction but not signed agreements, nor to Indigenous children in communities that have not assumed jurisdiction, thus selective provision of funding in this way does not uphold the right of *every child* to an adequate standard of living.

B) Promoting Substantive Equality

Beyond the alignment with international obligations, the selective provision of funding through coordination agreements is also not in alignment with another key purpose of the *Act*—the promotion of substantive equality. The promotion of substantive equality in the provision of child and family services is outlined not only in the preamble, but also in the legislation itself in section 11(d):

> **11** Child and family services provided in relation to an Indigenous child are to be provided in a manner that. . .

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55 *UNCRC*, *supra* note 51, art 27 [emphasis added].

> **(d)** promotes substantive equality between the child and other children.[56]

To selectively provide funding through coordination agreements provides for unequal funding for the provision of services required under sections 15 and 15.1 of the *Act*. Services are not being provided in a manner that promotes substantive equality when two Indigenous children living in the same conditions of poverty—one in a community that has assumed jurisdiction over child welfare services and reached a coordination agreement and another in a community that has not—will have access to different levels of funding for services to aid the service provider in making reasonable efforts to have the child continue to reside there, per section 15.1.

iv. The Context of the Legislation

When interpreting legislation, it is necessary to look at the entire context of the legislation, per *Rizzo*.[57] We can first look to the context within the *Act* itself, then broaden to the context outside of the *Act*. Within the *Act*, section 8(b) outlines one of the purposes of the *Act* as to "set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children."[58] The lack of funding provisions is at odds with this purpose, given that a lack of funding will mean those national principles cannot practically be implemented. Similarly, section 14(1) of the *Act* sets out that where

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56 *Act, supra* note 2, s 11(d).

57 See *Rizzo, supra* note 38 at para 21.

58 *Act, supra* note 2, s 8(b).

promoting preventative care is in the best interests of the child, services that promote preventative care are "to be given priority over other services."[59] Again, this section is at odds with the lack of concrete funding provisions, given that priority cannot be effectively given to services promoting preventative care without adequate funding for such services in the first place.

When we broaden the context to that outside of the *Act* itself, this legislation is situated firmly in the context of *Caring Society.*[60] To begin with, the *Caring Society* case was a key catalyst for the government to pursue Bill C-92, and it imposes obligations on the government. In the *Caring Society* case in 2016, the Canadian Human Rights Tribunal (CHRT) found that Canada had been discriminating against Indigenous children by providing inequitable and insufficient funding for child and family services and ordered Canada to cease the discriminatory practice, as well as to take measures to prevent this practice from occurring in the future.[61] This decision has prompted the reform of Indigenous child welfare legislation, leading to the passing of the *Act*. In the House of Commons, at the report stage of the *Act*, Member of Parliament Christine Moore acknowledged that "this bill was crafted following court rulings stating that Indigenous children were victims of a discriminatory funding system and identifying our obligation to remedy that. It took five court rulings for a

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59 *Ibid*, s 14(1).

60 See *Caring Society*, supra note 14.

61 See *ibid* at paras 472–474.

bill to be introduced."[62] Unfortunately, the inequitable provision of funding on a community-by-community basis in the *Act*, leaving out children in communities that have assumed jurisdiction over child welfare services but have not signed agreements, is not in line with the orders of the *Caring Society* case. The CHRT recognized in their decision that equitable funding provisions are central to delivering services effectively, finding that "[i]t is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services."[63] The ongoing inequitable provision of funding is in direct conflict with the order of the CHRT to stop the practice of discriminating against Indigenous children by providing inequitable and insufficient funding.

The legislation is also situated within the context of of the Truth and Reconciliation Commission (TRC)'s Calls to Action.[64] From 2009 to 2015, TRC listened to over 6000 witnesses to better understand and produce a report on the legacy of residential schools across Canada, as well as to produce calls to action for what needs to happen next to lay a foundation for reconciliation. The very first call to action is regarding child welfare, and it states:

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62 *House of Commons Debates* (3 June 2019), *supra* note 26 at 2050 (Christine Moore).C

63 *Caring Society*, *supra* note 14 at para 464.

64 See Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation* (Final Report of the Truth and Reconciliation Commission of Canada), vol 6 (Montreal: McGill-Queen's University Press, 2015) at 223–41.

> We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:
>
> . . . *Providing 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.[65]

This explicitly calls for adequate resources to be provided by the government to enable keeping Aboriginal families together. Sections 15 and 15.1 of the *Act* provides for the goal of keeping Aboriginal families together regardless of socioeconomic condition, but the lack of concrete funding within the *Act* fails to provide for the rest of this call to action—the provision of adequate resources. Overall, the intention of the legislature to provide funding through community-by-community coordination agreements is at odds with the nature, purposes, and context of the *Act*.

CONCLUSION

This legislative comment has used the modern approach to statutory interpretation to conclude that the intentional omission of a funding provision within the *Act* is at odds with the nature, purposes, and context of the legislation. These conflicts create serious problems that will require

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65 *Ibid* at 223 [emphasis added].

urgent strategizing in law to solve. As it currently stands, the inequitable provision of funding in the legislation leaves out children in communities that have assumed jurisdiction over child welfare services but have not signed coordination agreements, as well as children in communities that have not assumed jurisdiction. This decision leaves it up to each individual community that has assumed jurisdiction over their own child welfare services to decide when, or whether at all, to enter into a coordination agreement. It must be noted that the decision of whether or not to pursue an agreement or to assume jurisdiction takes place within an immense imbalance of power. It is costly to draft legislation in order to assume jurisdiction and/or to pursue an agreement with the government, and the federal and provincial governments have access to enormous resources and fiscal discretion that Indigenous communities simply do not have equal access to, due to chronic underfunding. Indigenous communities also face numerous other barriers created through the ongoing violence of colonization that require significant time and effort, such as a lack of clean water on reserves. If communities choose to not pursue an agreement, or if they cannot come to an agreement with the government, through no fault of the community itself, children will fall through the cracks. Indigenous children living in a community that has reached an agreement with the government for funding to cover the support services necessitated in provisions such as sections 15 and 15.1 of the *Act* will have access to funding for services, while children living in communities that have assumed jurisdiction but not signed agreements, or living in communities that have not assumed jurisdiction, will not. The choice made by Parliament to provide for funding on a community-by-community basis through coordination

agreements with individual Indigenous communities undoubtedly raises discriminatory implications, and one legal strategy to pursue may be to argue that this is discrimination that crosses the line of unconstitutionality under section 15 of the *Charter*, arguing that a funding provision must be read in, or the legislation should be sent back to Parliament for review. Another legal strategy may be to use the National Standards section of the *Act*, which must be used to interpret and to apply the *Act*, in order to argue that the principle of substantive equality found in this section bars the inequality of funding.[66]

Overall, the practical impact of this inequality of funding can leave an Indigenous child in poverty in one community, while aiding a child out of poverty in another. It is no secret that economic interventions help children in poverty. Studies show that the introduction of additional financial support to parents has a direct causal effect on reducing the risk of children experiencing maltreatment.[67] There is no excuse for extending a helping hand to one child while turning away from another, based on a differentiating characteristic entirely out of their control. We cannot allow children to continue to fall through the cracks. The legal community must stand with and support

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66 See also *Caring Society*, *supra* note 14 at paras 399–404. The tribunal found that the government "is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. If AANDC's [the government's] conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory." *Caring Society*, *supra* note 14 at para 403.

67 See Maria Cancian, Mi-Youn Yang & Kristen Shook Slack, "The Effect of Additional Child Support Income on the Risk of Child Maltreatment" (2013) 87:3 Soc Serv Rev 417.

Indigenous communities to make this innovative piece of legislation work for all Indigenous children. In the words of Member of Parliament Rachel Blaney,

> I look forward to this legislation. I hope it brings the best, because that is what I want to see. I want to see the best for our children. They certainly are worth it. The concern is whether it will happen. Will the funding and resources be there? […] These are the things we will be watching for, and these are the things that must happen for the trust to be built.[68]

[68] *House of Commons Debates* (3 June 2019), *supra* note 26 at 1955 (Rachel Blaney).