

# **CALLING FORTH OUR FUTURE:**

## **Options for the Exercise of Indigenous Peoples' Authority in Child Welfare**

Union of B.C. Indian Chiefs

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*“Children will follow if you let them lead. Their footprints leave a path of simple greatness etched forever on the walls of your secret hideouts.”*

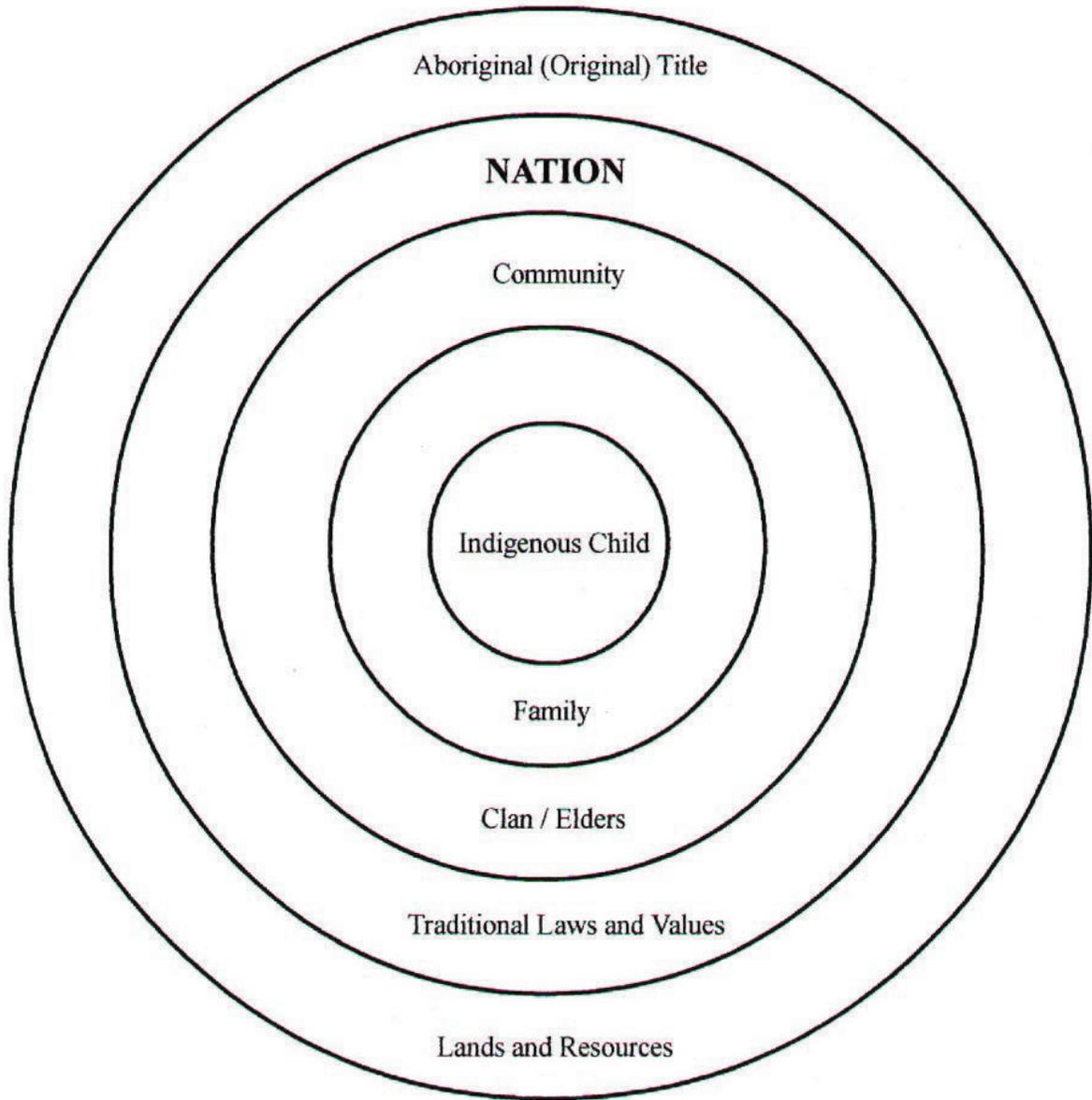
Philip Paul, Tsartlip (1981)

## **INTRODUCTION**

Through our children, we call forth our futures. To continue to exist as Peoples and as Nations, the connection between Indigenous Peoples and our children must remain unbroken. The Union of B.C. Indian Chiefs recognizes that it is essential that Indigenous Peoples assert and exercise our jurisdiction in child welfare matters for the health of our children, families and Nations. This discussion paper suggests ways that Indigenous Peoples can assert our inherent jurisdiction, flowing from our right of Self Determination, outside of delegated provincial authority (i.e., no suggestions are made for improvements to the current delegated process).

As part of its continued efforts to advocate for the Self Determination and Jurisdiction of Indigenous Peoples over child welfare, the Union of B.C. Indian entered a government-to-government relationship with British Columbia through the Joint Policy Council. In 2001, the U.B.C.I.C. undertook the writing of this paper, with funding support provided by the Province, to investigate and identify alternatives to the current model of delegated provincial authority. One purpose of this paper is to identify ways in which the U.B.C.I.C. and province can work jointly to propel the federal government to both recognize, and adequately fund, Indigenous Peoples’ exercise of our inherent jurisdiction and authority in the area of child welfare.

**Jurisdiction Model: Indigenous Nations Self Determination**



Self Determination: Our History and Goal  
Indigenous children are nested and protected within their lands,  
Nations, communities and families

## **1. UNION OF B.C. INDIAN CHIEFS' POSITION**

The mandate for this paper was confirmed at the U.B.C.I.C.'s 2001 Annual General Assembly. The position and direction of the U.B.C.I.C. Chiefs is reflected in Resolution #2001-08. The main points include:

- Our children and our families are the cornerstone of our futures, and the Union of B.C. Indian Chiefs recognizes that Our Children are Our Future;
- The provincial assertion of jurisdiction in the area of child and family services, and the delegated models which the province is urging upon our communities has resulted in a situation where our children are not being properly cared for;
- Our inherent right of Self Determination will only be achieved through the recognition of our inherent jurisdiction for our children and families, and has a strong and lasting commitment to ensuring that this right is recognized and fully implemented;
- The federal government has the overarching fiduciary duty to protect and support our jurisdiction in this area, and must be pressured to take up these responsibilities by fully funding and supporting our assertion of jurisdiction in the area of child and family services; and
- The Union of B.C. Indian is directed to plan ways for Indigenous Nations, as a unified force, to work towards asserting our inherent jurisdiction in the area of child and family services.

Indigenous Nations hold the inherent right of Self Determination. Indigenous Peoples are born into a Nation. Each Indigenous Nation is a distinct political entity, occupies a particular place upon the land, and is comprised of a people who are united in tradition, laws, culture and heritage. Indigenous Peoples have been Self Determining since time immemorial, exercising authority over matters crucial to our existence and continuation as peoples. Self Determination includes the inherent jurisdiction and responsibility of Indigenous Nations to care for, and plan for the futures of, our Nations, our children and families.

The right to care for and guard our children is a fundamental human right. The right to care for, and ensure the well being of our children, and our ability to do so, will be the bedrock of our re-newed and strengthened Nationhood. Self Determination cannot exist without authority and jurisdiction in the area of child welfare. Our survival as Peoples and as Nations requires the implementation of our inherent jurisdiction over child welfare, according to the laws and traditions of our Nations. In our children we call forth our future and our survival as Peoples, and this fundamental principle underlies Indigenous Peoples assertions of jurisdiction and authority in child welfare. Our Self Determination is embodied in our children, and our continued existence as Peoples requires the right to pass on our heritage, laws, culture and knowledge through our children.

## **2. CANADA'S HISTORY OF ASSIMILATION**

Colonization is the forced deconstruction of cultures and the imposition of alien ones. Colonization is theft. Theft of land, theft of resources, and theft of cultures, language and social organization. In Canada, the theft of Indigenous Peoples Nationhood occurred, and continues to occur, with the theft of our children. Indigenous children have historically been the battleground on which the struggle between Indigenous Peoples and newcomers has been waged. When Indigenous children are removed from their families, communities and Nations, Indigenous Nations lose our ability to call forth our future. Canada has always recognized this fact, and originally used Indigenous children as a tool for the assimilation of Indigenous Peoples.

The goal of Canada's policy of assimilation, clearly articulated in 1920 by Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, was "to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department."

### **RESIDENTIAL SCHOOLS**

Canada's first act of assimilation was residential schools. Operated by the churches, with financial support from Canada, the intent of residential schools was to "civilize" Indigenous children. Realizing in the early days of confederation that the suppression of traditional culture alone would not achieve their assimilationist vision, the federal government, in partnership with churches, created residential schools for the education of Indigenous children.

In 1892, with the intent of "elevating aboriginal peoples from their "savage" state to one of self-reliant "civilization" Canada cemented the formal partnership between itself and the churches and began to transfer funds to the churches for the operation of the Indian residential schools. By 1904, 64 residential schools were in operation throughout Canada. Children attending these schools were prohibited from speaking their languages, maintaining their traditional dress and even socializing with their own brothers and sisters. The program delivered in residential schools amounted to less than 50% of time spent on academic curriculum, with the rest spent on learning agricultural and industrial skills for the boys, and homemaking skills for

the girls, as well as religious and moral training. That the majority of the nuns and priests that operated these schools did not have formal teacher training was not considered a problem.

Upon arrival at these schools, children underwent a stripping physically and psychologically of their Indigenous identity, beginning with the removal of their traditional clothes, the cutting and ‘delousing’ of their hair, and the assignment of Christian names and clothes. Consequently, the ongoing and systematic ‘re-socialization’ of the Indigenous child began.

In 1907, the Department of Indian and Northern Affairs own chief medical officer, Dr. P.H. Bryce, reported that extremely high levels of tuberculosis could be found in each of the 15 western schools he visited. The Bryce report estimated the death rate due to tuberculosis to be between 24-42%. So shocking was the situation that the *Saturday Night Magazine* reported at the time, “even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards.” Pressed on the matter, Superintendent of Indian Affairs Duncan Campbell Scott conceded that, “no less than 50% of the children who passed through these schools did not live to benefit from the education which they had received therein.” What was not included in the annual reports was the ongoing physical, emotional, and sexual abuse many of these children suffered at the hands of their Christian guardians. Still, the schools continued to operate.

The sustained attack on Indigenous Peoples Nations, communities and families continued from 1879 until the last residential school closed in the 1980’s. It is estimated that 100,000 - 150,000 Indigenous children were forced to attend these schools in that time.

Even as Indigenous Peoples continue to fight for jurisdiction over our own children, the impact and legacy of residential schools continue to touch the lives of Indigenous Peoples, resulting from the disruption of traditional child welfare practices. The intergenerational effects are manifested in high levels of social dysfunction currently found among Indigenous Peoples.

## **SECTION 88 AND THE PROVINCIAL CHILD WELFARE SYSTEM**

By the 1950's, it was apparent that the "civilizing mission" of the residential schools was a failure and gradually the federal government began to close them down. However, Indigenous children continued to be removed from their families and Nations, only this came to be done under the guise of the child welfare system. Instead of for the stated purpose of "civilizing" Indigenous children, the new justification underlying the imposition of child welfare systems on Indigenous Peoples was the need to remove Indigenous children from their families/Nations for their own protection, in their "best interests". Canada's policy of assimilation continues in the desire to have Indigenous Peoples accept Provincial authority and be governed by foreign laws in relation to our children.

Under the Canadian constitution, Provinces hold primary responsibility for child welfare. Despite its jurisdiction in child welfare, the provinces did not participate in the residential school era since "Indians and the lands reserved for the Indians" were under exclusive federal jurisdiction. The role of the provinces regarding Indigenous child welfare changed drastically in 1951 when the federal government amended the *Indian Act* to include Section 88. Without Section 88, provincial legislation would not apply to Indians because Canada's constitution gives the federal government the exclusive power to legislate regarding Indians.

After passing Section 88, Canada began to enter agreements with the provinces whereby they paid the provinces to provide child welfare services to Indigenous Peoples. As a result, in the 1960s and 1970s, as residential schools were closed, Indigenous children came to be increasingly ensnared in provincial child welfare systems, and were apprehended from their families and communities at a shocking rate.

In 1955 there were 3, 433 children in the care of B.C.'s child welfare branch. Of that number, it was estimated that 29 children, or less than 1 per cent of the total, were of Indian ancestry. By 1964, however, 1, 446 children in care in B.C. were of Indian extraction. That number represented 34.2 per cent of all children in care. Within ten years, in other words, the representation of Native children in B.C.'s child welfare system

had jumped from almost nil to a third. It was a pattern being repeated in other parts of Canada as well.<sup>1</sup>

These numbers illustrate the fact that the provincial child welfare system merely replaced the residential school system as a tool of assimilation. As residential schools closed, the result was not that Indigenous children remained within their families and Nations, but rather that the provincial child welfare system came to be used to separate and disconnect our children from our Nations.

### **DELEGATED AUTHORITY MODELS**

The administration of the provincial child welfare system has evolved in recent years in response to criticisms of the disproportionately high numbers of Indigenous children within the system. Provincial legislation has been amended to become more “culturally sensitive” and to incorporate “consultation” with an Indigenous child’s home community regarding their care. The largest change, beginning in the late 1980s and continuing today, has been the creation of “First Nation agencies” to deliver provincial child welfare programs and enforce provincial laws.

First Nation agencies are corporate structures which the province contracts with to deliver provincial programs. Some First Nation agencies have a certain level of Indigenous government involvement, and their Board of Directors may be chosen by a band/tribal council. In other cases, First Nation agencies are created and operate with no Indigenous Nation-based input or involvement (for example, these agencies might be created through urban organizations such as friendship centres, or other groups). In all cases, although there are Indigenous individuals involved in these agencies, they operate under provincial authority and not according to the inherent jurisdiction and authority of Indigenous Nations.

Despite changes in the manner that the province delivers child welfare services, recent provincial statistics show that the overall percentage of Indigenous children in care has remained constant at approximately 35%-40% of the total number of children in care within the province. The delegated model does not represent Indigenous Peoples’ inherent jurisdiction and

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<sup>1</sup> Patrick Johnston, *Native Children and the Child Welfare System*, Toronto: Canadian Council on Social Development in association with James Lorimer & Company, 1983, as cited in RCAP, Vol. 3 at 24-25.

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Nationhood and continues to be unsuccessful at reducing the total numbers of Indigenous children apprehended under provincial laws. Though arguably driven by the best of intentions, delegated models (delivered through First Nation agencies) represent a continuation of historic policies of assimilation and continue to deny the inherent jurisdiction and authority of Indigenous Nations over our children.

Indigenous Nations are the only government that can protect and safeguard our children and families. Each Indigenous Nation has laws, traditions and customs – entrusted to our Peoples by the Creator – to safeguard our children and our future as Peoples. Delegated models of provincial authority directly challenge this authority. Our child members are interwoven in the fabric of our Nations. The flourishing of our Nations, and individual child-members, requires recognition of Indigenous Peoples inherent jurisdiction and authority. Any child welfare system which does not flow from a recognition of Indigenous Peoples jurisdiction is doomed to continue the failures of the past, because they replicate the policies of assimilation through which Canada attempted to eradicate our Nations by removing the children through whom we call forth our futures.

#### **CITIZENSHIP: ASSIMILATION THROUGH DEFINITION**

Another tool of assimilation used by Canada were attempts to define and limit citizenship in Indigenous Nations. Provisions within the *Indian Act* demonstrate Canada's insistence of determining who is, and who is not, a member of an Indigenous Nation. The issue of citizenship impacts on child welfare because members who would otherwise be recognized by their Nations as having full citizenship, rights and responsibilities, were denied "status" under the *Indian Act*, and thus Indigenous governments (with no independent means of providing services) were unable to care for these members.

Although Canada has since recognized that Bands have the right to determine membership on band "membership lists" this is a hollow recognition because bands cannot also determine when a citizen is entitled to be recognized as having "status" under the *Indian Act*, and so therefore entitled to any benefits (education, health, housing) which may flow from that recognition. Most importantly, without recognition of our Aboriginal Title and Right to benefit

from our lands and resources, Indigenous governments are unable to meet the needs of their membership.

Canada's policy of assimilation reflected in government determinations of who is, or is not, a member of our Nations has been adopted within provincial child welfare policies which require that a child have "status" in order for their home Nation or community to acquire certain rights under the provincial legislation.

### **3. INDIGENOUS ACTIVISM**

#### **WHITE PAPER**

In 1969, the government of Canada introduced the “White Paper”, the *Statement of the Government of Canada on Indian Policy, 1969*, presented by Jean Chretien who was then Minister of Indian Affairs. The purpose of the White Paper was to eliminate special status and recognition of Indigenous Peoples within Canada. The White Paper is important to a discussion of child welfare because it crystallized Indigenous Peoples’ opposition to Canada’s policies of assimilation aimed at the destruction of Indigenous Nations.

The White Paper was unanimously rejected by Indigenous Peoples as a blatant expression of Canada’s assimilationist policies. The Union of B.C. Indian Chiefs was forged during this struggle, founded on the realization that treating Indigenous Peoples as “equal Canadians” was in reality treating Indigenous Peoples as inferior Peoples, denying our Sovereignty and cultural identity, and our right to exist as Self Determining Peoples and as Nations. Having united to fight Canada’s assimilation attempts reflected in the White Paper of 1969, Indigenous Peoples began to join together to demand the recognition and implementation of our Sovereignty, including over child welfare.

#### **1970s**

In the early 1970s it was becoming increasingly obvious that provincial child welfare systems had replaced residential schools as the mechanism for removing Indigenous children from their Nations. The large numbers of children that were taken from their families subject to the new provincial authority (granted by Canada to the provinces through the inclusion of Section 88 in the *Indian Act*) came to be of increasing concern to Indigenous communities and sparked grassroots political activism throughout the province. In 1974, the Indian Homemakers Association of B.C. (a founding member of the Union of B.C. Indian Chiefs) passed a resolution calling upon the federal government to recognize Indigenous Peoples jurisdiction in the area of child welfare. The resolution demanded:

That the Federal Government place in the hands of each Band Council and members authority to decide the future of all Indian children on reserves who may be without parental control for any reason whatsoever.

In 1979, the Spallumcheen Indian Band spearheaded efforts to have Indigenous Peoples jurisdiction over child welfare recognized. From 1951 to 1979, the Spallumcheen Indian Band calculated that 130 (approximately 67%, or 2 out of every 3 Spallumcheen children) had been apprehended by the provincial authorities under the new authority granted to the province by Section 88.<sup>2</sup> In 1979 alone, the Spallumcheen Indian Band had 30 of their children within the provincial child welfare system. This crisis inspired the Spallumcheen Indian Band to draft a by-law recognizing their jurisdiction and resumption of control over child welfare.

In addition to its initial work of providing political support to the Spallumcheen people in the passage of their bylaw, the Union of B.C. Indian Chiefs maintained ongoing efforts to have Indigenous Peoples' inherent jurisdiction in the area of families and children recognized. At its 11<sup>th</sup> Annual General Assembly in 1979, the Chiefs in Assembly passed a resolution stating:

- The Provincial Government is committing an act of genocide contrary to the United Nations Agreement to which Canada is a party by removing Indian Children from their homes and their Indian communities;
- The Federal Government is reneging on its responsibilities for Indians under the B.N.A. Act;
- There is no federal legislation protecting Indian children and their rights;
- The Union of B.C. Indian Chiefs begin work on the development of an Indian Children Service Act that will protect the future generation from cultural genocide; and
- That this Indian Child Service Act be available to all Indian Governments for their implementation for their Indian Children.

## 1980s

By 1980 the Spallumcheen Indian Band had completed drafting a child welfare bylaw under section 81 of the *Indian Act*. Originally disallowed, the bylaw was accepted by then-Minister of Indian Affairs, John Munro, after an extensive lobbying effort. Spallumcheen's "A Bylaw for the Care of Our Indian Children: By-law #3-1980" is a bilingual bylaw (both in

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<sup>2</sup> *Evaluation of the Spalumcheen Child Welfare Program*, prepared for the Spallumcheen Indian Band by Amicus Populi Consulting Ltd, (1986): Vernon.

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English and in the Secwepemc language) which recognizes the Band's authority over all Spallumcheen children, living both on and off reserve. Despite the by-law, provincial authorities continued to deny and refuse to recognize the Band's jurisdiction over their own children.

Working in concert with other Indigenous Peoples, including organizations such as the Union of B.C. Indian Chiefs and the Indian Homemakers Association, the Spallumcheen Band led a strong lobby to reclaim Indigenous jurisdiction in the area of child welfare. The Spallumcheen people mobilized Indigenous Peoples, culminating in the Indian Child Welfare Caravan of 1980, to force Human Resources Minister Grace McCarthy, and the provincial government, to recognize Indigenous Peoples jurisdiction in the area of child welfare, and agree to respect the Spallumcheen bylaw.

The Union of B.C. Indian Chiefs worked very actively to support the work of the Indian Child Welfare Caravan. At the 1980 Annual General Assembly, Chief Robert Manuel reported on the work of the Health and Social Development Portfolio of the Union of B.C. Indian Chiefs in support of the Caravan:

Since Indian child care is a Social-related issue, the Health and Social Development Portfolio took an active secondary role in the organizing of the Indian Child Welfare Caravan by producing a Child Welfare Bulletin, a poster and attending the many meetings held to coordinate the Caravan. Extensive fieldwork for support throughout the Province was also done by the staff. Lectures were given to Indian University students as well as High School students. The staff also attended meetings with foster parents and many other groups interested in the Caravan to gain support, they travelled to attend the many meetings to inform the people of the Caravan held throughout the Province.

At the U.B.C.I.C.'s 12<sup>th</sup> Annual General Assembly in 1980, the Chiefs in Assembly passed a resolution requesting that:

- Indian Children presently apprehended by the Provincial Government NOT be placed for adoption;
- The provincial government immediately stop the apprehension of Indian Children unless requested to do so by Indian Governments (Chiefs and Councils);

- At the initiative of the Indian Governments of British Columbia, negotiations commence immediately with the Provincial government for the return of Indian children presently apprehended to their respective communities; and
- The Provincial government recognize and respect current and future Indian Government legislation dealing with the care and well being of Indian children.

A further resolution at the 12<sup>th</sup> Annual General Assembly called for the development of Indigenous mandated and controlled laws, and directed that the U.B.C.I.C.:

- Support the Indian Governments of B.C. to develop their own legislation for the care of their children and ... [the] transfer of the financial resources from the Department of Indian Affairs directly to the Indian Governments of B.C. that desire control over child care; and
- Assist the Indian Governments that take control of child care to design preventative programs to suit the needs of that Indian community.

Despite Spallumcheen's success, it is the only bylaw of its type that has been accepted by the federal government. Other Indigenous Peoples' efforts to have similar bylaws passed have been rejected by the federal government. The early 1980s, were dominated by Indigenous Peoples' efforts to have protection for Aboriginal and Treaty Rights included in the *Constitution Act, 1982*. Indigenous Peoples fought for inclusion of Aboriginal and Treaty Rights with the vision that constitutional recognition would nurture and protect our inherent right of Self Determination, including jurisdiction for child welfare.

### **BILL C-31**

The mid-1980s were marked by a period in which Indigenous Peoples concerns in the area of children came to be focussed on the issue of citizenship. During this period, the United Nations Human Rights Commission found that the status provisions of the *Indian Act* were discriminatory against aboriginal women (who lost status when they married a non-status person) in the case of *Lovelace v. Canada*. Canada subsequently amended the *Indian Act*, through Bill C-31 to grant status to Indigenous women, and their children, who had been denied status as a result of the operation of the *Indian Act*. Indigenous organizations, including the Union of B.C. Indian Chiefs, fought the passage of Bill C-31. Opposition to the amendments were not based on

a desire to discriminate against Indigenous women, but rather on the fact that the federal government was increasing the membership – and therefore social, political and financial obligations – of band governments without any corresponding increase in resources to allow band governments to meet the needs of an increased membership.

The debate surrounding the passage of Bill C-31 highlighted the issue of citizenship within Indigenous Nations, and forced many Indigenous Nations to address this issue. The *Indian Act* identifies a process for granting “Indian status”. Status, or recognition, as an “Indian” entitles people to certain benefits, such as housing, education or social services. The difficulty many Indigenous Nations face is that citizenship in our Nations is not the same as “status”: not all members of an Indigenous Nation have status, and not everyone who has status is a member of an Indigenous Nation. As most funding which Indigenous Peoples are eligible for from Canada flows as a result of recognition of “status” there is a discrepancy between our “citizenship” and people whom the federal government recognizes as having “status” and membership in our Nations.

During the mid to late 1980s, Indigenous Peoples activism in the area of child welfare focussed on demands that Canada recognize Indigenous Nations’ right to define our own citizenship (including defining which children are members of our Nations). Canada’s response has been duplicitous: Indigenous Nations can say that anyone is a member of their Nation; However, Canada refuses to recognize any financial obligations to anyone who they do not recognize as having “status”. Thus, Indigenous Nations continue to be denied the funding necessary to allow them to provide services, including child welfare services, to their full membership.

### **1990s**

In the 1990s, the Union of B.C. Indian Chiefs activism for child and family matters included efforts within the Joint Policy Council to work with the province to pressure the federal government to uphold its fiduciary obligations to Indigenous Peoples with respect to child welfare. On June 11, 1993 the Union of B.C. Indian Chiefs and Province signed a Memorandum of Understanding, which included a government-to-government agreement to recognize that:

1. Protection and support services for First Nations children and families are solely the responsibility of First Nations acting within the scope of their inherent right of self-determination; and
2. Provincial jurisdiction will be withdrawn from the field of child welfare and family services as First Nations assume jurisdiction in this area.

Despite the best efforts of the UBCIC and provincial Ministry to move towards Indigenous Nations resumption of jurisdiction over child welfare, discussions were stymied by the provincial government's change in leadership in 1996, and complicated by the provincial policy shift to focus on delegating authority to First Nation agencies, rather than recognizing and facilitating the jurisdiction of Indigenous Nations. Further complicating matters was the federal government's continued insistence that funding for Indigenous child welfare be contingent upon a delegated authority agreement between the province and Indigenous Peoples, as set out in Directive 20-1.

#### **4. NATIONAL AND INTERNATIONAL PERSPECTIVES**

##### **ASSEMBLY OF FIRST NATIONS**

The Assembly of First Nations has passed numerous resolutions addressing child welfare issues, and calling upon Indigenous Peoples to work in a unified fashion to force the federal government to implement its fiduciary obligations towards Indigenous Peoples in child welfare.

In 1991, an AFN resolution regarding child welfare included declarations that:

- First Nations people have a distinct status and identity recognized and affirmed by the Treaties with the Federal Crown and provisions of the Constitutional Acts, 1867, 1982 and the Royal Proclamation of 1763;
- There is a legal and political relationship between First Nations and Canada governed by the Constitution Act, s.15, 25, 35 and 91.24 and which must be adhered to; and
- First Nations are responsible for their families and their children regardless of where they reside

At their Annual General Assembly in 1996, the AFN passed a resolution critiquing federal policy, as set out in Directive 20-1, and called for the adequate funding of Indigenous Peoples jurisdiction in the area of child welfare. In 1999, the AFN called for the creation of federal child welfare legislation, in response to a Supreme Court of Canada case declining to grant custody of an Indigenous child to his Indigenous grandfather, following a consideration which included the economic means of the Indigenous grand parent who sought custody.

In 2000, the AFN undertook to complete a joint review, with the Department of Indian Affairs and Northern Development, of federal policies in the area of child welfare. This review was conducted by Rose-Alma McDonald, Peter Ladd, et. al. and is entitled **First Nations Child and Family Services Joint National Policy Review**. One objective of the Joint National Policy Review was to “identify possible improvements to current policy regarding the development and operation of FNCFS agencies that provide necessary, culturally sensitive and statutory child and family services.”

The report contained 17 recommendations, and most of these focus on improvements to the current situation (how a “trilateral process” of Indigenous Peoples, Canada and Provinces/Territories can work more effectively), rather than on a recognition of the jurisdiction of Indigenous Peoples. Of the recommendations, only 1a and 1b address jurisdiction:

1a. The joint Steering Committee of the National Policy Review recognizes that Directive 20-1 is based on a philosophy of delegated authority. The new policy or Directive must be supportive of the goal of First Nations to assume full jurisdiction over child welfare. The principles and goals of the new policy must enable self-governance and support First Nation leadership to that end, consistent with the policy of the Government of Canada as articulated in *Gathering Strength*.

1b. The new policy or directive must support the governance mechanisms of First Nations and local agencies. Primary accountability back to community and First Nations leadership must be recognized and supported by the policy.

The current status of the Joint Review recommendations remains unclear. Meetings have been held between the federal and provincial governments and “First Nation agencies” (on a regional basis, because the provincial/territorial legislation varies across the country) in an effort to implement some of the recommendations. Unfortunately, this process has only involved First Nation agencies (created by provincial delegation) in this process, and it is not Nation based. It is unclear to what degree (if any) this review proposes to incorporate any true jurisdictional changes. It is important to note that Indigenous Peoples have levelled criticism at the AFN due to its shift in policy away from jurisdiction and towards cooperation.

## **INTERNATIONAL COMMUNITY: SELF DETERMINATION AND CHILD WELFARE**

Self Determination is the right of Peoples to call forth their own futures according to the laws and traditions given to them by the Creator, and with access to the Lands and Resources also given them by the Creator. In the international community, many Indigenous Peoples from around the world struggle to have their right of Self Determination recognized in the face of the continued denial of this right by colonial nation-states. There are a number of opportunities within the international community that Indigenous Peoples can employ in order to forward our calls for jurisdiction in the area of child welfare. These options include using international instruments, and participating in international forums (either through the United Nations, or international Indigenous organizations).

### **International Instruments**

Within the international community a number of instruments (declarations, statements of principles of human rights, etc.) which have been assented to by various nation-states (including Canada) recognize the right of Self Determination and impact upon the area of child welfare. Although these instruments are not legally compelling, they create a standard of conduct against which Canada is measured, and impact Canada's credibility and integrity in the international community.

International covenants reflect standards which have been accepted within the international community regarding the rights of Peoples to Self Determination, and the right of Peoples to call forth their future through their children. While the international instruments provide useful language, there is a lack of enforcement mechanisms that Indigenous Peoples can use to force nation-states to honour these international norms and standards. However, Indigenous Peoples have used, and continue to use, the international forum as a tool for attempting to embarrass nation-states to uphold their Human Rights.

The following international human rights instruments contain provisions setting minimum standards for the rights of Indigenous Peoples (in particular, the right of Self Determination) and child welfare.

#### Draft Declaration on the Rights of Indigenous Peoples

The United Nations Working Group on Indigenous Populations was established in 1982 by the Economic and Social Council under the auspices of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Working Group prepared a Draft Declaration on the Rights of Indigenous Peoples, which was adopted by the Sub-Commission in 1994.

The Draft Declaration on the Rights of Indigenous Peoples represents one of the most important developments in the protection of the rights and fundamental freedoms of Indigenous Peoples, and includes statements which impact upon child welfare matters and the right of Indigenous Peoples to have our jurisdiction recognized.

The Draft Declaration on the Rights of Indigenous Peoples calls for fair and mutually acceptable procedures for resolving conflicts between Indigenous Peoples and States, involving means such as negotiations, mediation, arbitration, national courts, and international and regional human rights review and complaints mechanisms. The Draft Declaration on the Rights of Indigenous Peoples states that it contains the minimum necessary standards for the survival of Indigenous Peoples. Some of the main provisions related to child welfare and jurisdiction, are:

#### Article 3

Indigenous peoples have the right of **self- determination**. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

#### Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

#### Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, **including the removal of indigenous children from their families and communities under any pretext.**

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or **self-government** in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, **social welfare**, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Most nation-states with Indigenous populations have been unwilling to accept the Draft Declaration, and it has yet to be ratified. Nation-states, including Canada, have consistently refused to acknowledge that Indigenous Peoples are “Peoples” at International law. The reason for this refusal is that an international recognition of Indigenous Peoples, as “Peoples” challenges the sovereignty of nation-states, and their ability to proceed as though Indigenous Peoples were merely a “domestic” concern and not separate sovereign Peoples with rights to Land, Resources, and Self Determination.

The Draft Declaration on the Rights of Indigenous Peoples highlights several values which Indigenous Peoples can rely upon to advance our jurisdiction and authority in the area of child welfare. First, the Draft Declaration on the Rights of Indigenous Peoples firmly locates children as members of their Indigenous Nations. Domestic policy in Canada (including provincial child welfare legislation) views children as separate individuals, distinct from their Nations. The result of Canada’s policy is that (1) Indigenous children are treated as though they need to be shielded from their Indigenous Nation (thus, arguments about the “best interests of the child” can be used to ground apprehensions which remove children from their Nations, and sever their ability to remain connected to, and part of, their Nations); and, (2) Indigenous Nations interest in ensuring the safety and well-being of their child-members is reduced to the interests of an “interest group” with a right to be “consulted”, while the Canadian governments maintain overarching power and authority.

Second, the Draft Declaration on the Rights of Indigenous Peoples recognizes that the Right of Self Determination must be implemented through our children and recognition of our inherent jurisdiction and authority for child welfare, because it is through our children that Indigenous Peoples call forth our futures. The Draft Declaration requires that nation-states act in the best interests of Indigenous Nations by recognizing Indigenous Peoples jurisdiction and authority over child welfare as a necessary step to ensure the survival of Indigenous Peoples.

International Covenant on Civil and Political Rights  
[Ratified by Canada on 19 May 1976]<sup>3</sup>

Article I

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

This Covenant, ratified by Canada, contains a recognition of the Right of Peoples to Self Determination, and calls upon nation-states to not only recognize this right but further to work progressively to promote and foster Indigenous Peoples Self Determination. Canada is in violation of the commitments it made in this Covenant as a result of its continued refusal to recognize Indigenous Peoples Right of Self Determination, and its child welfare policies aimed at assimilating Indigenous Nations.

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<sup>3</sup> Similar provisions are contained in the International Covenant on Economic, Social and Cultural Rights that was also ratified by Canada in 1976.

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International Convention on the Elimination of All Forms of Racial Discrimination  
[Ratified by Canada on 14 October 1970]

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

Indigenous Peoples view the impact of this article as protecting our right to exist as Peoples, with a recognition of the fact that Canadian government policies which deny our Right of Self Determination and Jurisdiction for Child Welfare are a form of discrimination and genocide.

Convention on the Rights of the Child

[Ratified by Canada on 13 December 1991]

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

### Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a **child** belonging to such a minority or **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, to profess and practise his or her own religion, or to use his or her own language.**

The Convention on the Rights of the Child establishes a “Committee on the Rights of the Child” to monitor whether member-states are meeting their obligations under the Convention. States report to this body. The Committee does not address complaints filed by individuals, but could request that nation-states provide information on their compliance with the Convention. NGO’s with ECOSOC consultative status can make presentations to the Committee, and Indigenous Peoples could use this Covenant to put international pressure on Canada, arguing that Canada’s current child welfare policies put it in violation of Article 30.

### **United Nations Human Development Index**

In 1998, the Department of Indian Affairs and Northern Development conducted an internal review, applying the United Nations Human Development Index to Indigenous communities. The United Nations Human Development Index is a tool which measures the relative health and well-being of citizens of various nation-states by considering factors such as life expectancy, infant mortality, suicide, unemployment and poverty. In 1998, Canada ranked number one on the scale. In that same year, when the measure was applied to Indigenous communities, Indigenous Peoples were found to rank 60<sup>th</sup>, equivalent to the conditions in many third world nations. In its annual report for 1998 the Canadian Human Rights Commission called upon the Canadian government to take action to address this discrepancy.

The application of the United Nations Human Development Index to the condition of Indigenous Peoples highlights the devastating effects Canada’s continued policy of assimilation of Indigenous Peoples, as reflected in our impoverishment and social problems. Our continued position remains “wards of the state” – with no practical or real control in determining our own

futures as Peoples. In practical terms, the Human Development Index is useful because it provides a concrete comparison that emphasizes the assertions of Indigenous Peoples regarding the continued impact of colonization on our Peoples and Nations.

### **Impact of International Instruments**

Although Canada is a signatory to many of the international instruments, and claims to support their objectives, the reality that Indigenous Peoples face is much different. For practical purposes, Canada's adherence to the various international instruments has not translated to a federal recognition of our Right of Self Determination, or of the right to care for our children and families. Canada's continued denial of our Right of Self Determination is reflected in the insistence that Indigenous Peoples enter into a form of delegated service agreement with provinces in order to be eligible for federal funding in the area of child and family services.

### **International Forums**

Internationally, Indigenous Peoples (who are not recognized as nation-states) have no standing at the forums where most international meetings occur. The international forums that are open to Indigenous Peoples include those that are associated with the United Nations, and International Indigenous organizations.

### **Consultative Status with ECOSOC**

The United Nations Economic and Social Council ("ECOSOC") grants certain Non-Governmental Organizations ("NGOs") consultative status. Indigenous organizations with consultative status include the Grand Council of the Crees of Quebec, the Inuit Circumpolar Conference, and the World Council of Indigenous Peoples. Benefits of consultative status with ECOSOC include the ability to submit written statements, translated to the languages of the United Nations and widely distributed; opportunities to make presentations to the ECOSOC; and, assistance with organizing international events. Consultative status increases the public posture of Indigenous groups and provides access to a public forum through which to put pressure on Canadian governments.

## International Indigenous Organizations

There are many international organizations promoting the rights of Indigenous Peoples which provide a forum for Indigenous Peoples to work together in order to advance calls for Self Determination, and recognition of our jurisdiction and authority for our children. The Working Group of Indigenous Populations (WGIP), a committee of the Commission on Human Rights, has served as the primary forum for Indigenous Peoples within the United Nations. At meetings of the WGIP, Indigenous Peoples have equal status with nation-states and the WGIP can provide an effective public forum. In addition, there are other international organizations where Indigenous Peoples come together to address specific issues of concern, including the rights of children and Self Determination, and these can provide a useful forum for Indigenous Peoples.

## **5. CURRENT JURISDICTIONAL AND LEGISLATIVE FRAMEWORK**

In order to advance and fully examine Indigenous Peoples assertions of jurisdiction and authority for child welfare, it is necessary to examine the Canadian constitutional framework which gives rise to delegated models of provincial authority. Indigenous Peoples are enmeshed within the Canadian constitutional framework, and there are inherent limitations flowing from this fact. The following sections examine (1) the Constitutional protection afforded to Indigenous Peoples through Section 35 of the *Constitution Act, 1982*; (2) federal legislation and policy regarding Indigenous Peoples and child welfare; and, (3) provincial legislation and policy.

### **6. SECTION 35**

The Constitution of Canada defines the powers of Canadian governments to pass laws and sets out the division of powers between the federal and provincial governments. The Constitution also gives courts the power to examine government legislation and actions, and to decide whether these actions are unconstitutional and therefore invalid. In 1982, the Constitution of Canada was amended, to include Section 35 which states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35 requires that all government actions “recognize and affirm” aboriginal and treaty rights, and gives Indigenous Peoples a mechanism to challenge government actions which abrogate aboriginal or treaty rights. In addition to limiting federal and provincial actions, Section 35 protects Indigenous Peoples’ authority and jurisdiction, including over child welfare. Section 35 could be used in two separate ways to advance Indigenous Peoples jurisdiction and authority over child welfare: (1) To challenge existing federal or provincial laws where these infringe upon Indigenous Peoples aboriginal or treaty rights; and (2) To protect assertions of Indigenous Peoples’ own traditions and laws over child welfare.

## CHALLENGE TO EXISTING GOVERNMENT LEGISLATION AND POLICY

Section 35 operates to render federal or provincial laws unconstitutional where they are found to unjustifiably infringe upon an existing aboriginal or treaty right. An aboriginal right was defined by the Supreme Court, in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, as a tradition or practice that was

...of central significance to the aboriginal society... [The Aboriginal peoples] must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly *made the society what it was*.

Where provincial laws interfere with an aboriginal child welfare right, and prevent an Indigenous community from exercising traditional laws, the provincial laws could be challenged using Section 35. For example, if traditional law recognizes that a grandmother has automatic custody where parents are unable to parent, but provincial laws refuse to recognize the grandmother's right to care for the child (i.e., claiming that she is too old, or not financially able), Section 35 allows Indigenous Peoples to challenge the provincial decision.

## ASSERTIONS OF INDIGENOUS LAWS AND TRADITIONS

Section 35 protects the governance powers of Indigenous Peoples which flow from our Right of Self Determination: *R. v. Pamajewon* (1996), 138 D.L.R. (4<sup>th</sup>) 204 (S.C.C.). The protection afforded by Section 35 to governance rights has been described as flowing from the “original sovereignty which Aboriginal nations exercised over their own peoples and territories prior to being colonized and integrated into the Canadian state” with the result that

As the right is inherent, flowing from the original sovereignty of the Aboriginal nations, its expression is not determined by the Constitution. In other words, section 35(1) guarantees the right, but does not specify the manner in which it may be exercised. That is left to the Aboriginal peoples who are free to choose their own forms of government in accordance with their own traditions, values, and present needs.<sup>4</sup>

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<sup>4</sup> Kent McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” 61 Osgoode Hall L. J. Vol. 34 No. 1, at 64, 66-67.

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The Courts have not been asked to consider whether there is a right under Section 35 for Indigenous Peoples to exercise jurisdiction over child welfare. Section 35 should operate to protect an Indigenous law - not passed under the *Indian Act*, but reflecting the laws and traditions of the People - over child welfare. Section 35 protects Indigenous Peoples' jurisdiction, and where Indigenous Peoples have traditional laws and customs for child welfare, which are interfered with by federal or provincial law, Section 35 could be used to shield these laws.

### **LIMITATIONS OF SECTION 35**

There are limitations to using Section 35 to assert Indigenous Peoples authority and jurisdiction over child welfare. To draw the protection of Section 35, an aboriginal right has to be "proven" according to the tests established by Canadian courts who have the ultimate power to decide whether or not a right exists. Once an aboriginal right is proven to exist, Canadian governments can still infringe upon those rights where they can show that their actions are "justified". It is likely that governments would argue that their actions were to protect children, and Indigenous Peoples would have to be prepared to illustrate how government actions, in reality, harm Indigenous children.

A further limitation on using Section 35 is the fact that it is a domestic instrument which recognizes Canadian sovereignty, and not the inherent sovereignty of Indigenous Nations. The Courts have suggested that the purpose of Section 35 is to reconcile the existence of aboriginal rights with Canadian sovereignty. And, while aboriginal rights are protected within the Canadian constitutional framework, they will not be allowed to challenge Canadian sovereignty. Thus, there are inherent limitations to using Section 35 to protect assertions of Self Determination and Sovereignty. From the perspective of Self Determination and Sovereignty over child welfare matters, an international forum or mechanism is better suited than domestic Canadian courts.

## **7. FEDERAL**

### **ROYAL PROCLAMATION, 1763**

In 1763, the British Crown sought to establish its sovereignty and set forth the principles to guide its relationship with Indigenous Nations in the *Royal Proclamation of 1763* which set out the principles which were to guide the newcomers' interactions with Indigenous Peoples. The *Royal Proclamation, 1763* not only recognized the Sovereignty and Nationhood of Indigenous Peoples, it explicitly recognized that the consent of Indigenous Peoples is required in the mediation of the relationship between the Crown and Indigenous Peoples. In effect, the *Royal Proclamation, 1763* not only staked the honour of the Crown on respecting the Sovereignty and right of Self Determination of Indigenous Peoples, but also bound newcomers by the proposition that any actions they wished to take which impact Indigenous Peoples (i.e., any access to land and resources, or any political and social developments) had to be done with the consent of the Indigenous Peoples.

The *Royal Proclamation, 1763* also contained the implicit promise of the Crown to guard Indigenous Peoples and to protect our ways of life. These obligations were incorporated into the *British North America Act of 1867* and continue to ground the federal Crown's obligations, including in the area of child welfare. The promises set forth in Canada's founding documents, require that the Crown take progressive action to recognize and protect Indigenous Peoples' re-assertion of jurisdiction over our children and families, to ensure our survival as Peoples.

### **FEDERAL FIDUCIARY DUTIES TO INDIGENOUS PEOPLES**

#### **Sources and Implications of the Federal Fiduciary**

At the time of confederation, the Canadian government assumed the protective and trust obligations enshrined in the *Royal Proclamation, 1763* to Indigenous Peoples. The federal fiduciary is most clearly reflected in Section 91(24) of the *Constitution Act, 1867* which grants the federal government exclusive jurisdiction over "Indians and the lands reserved for the Indians". Section 91(24) is the historic and current means by which the federal government

assumes near complete control over the lives of Indigenous Peoples, including Indigenous children, and forms the basis of the *Indian Act*. These constitutional and legislative provisions have given rise to a fiduciary obligation on the part of the federal government to act in the best interests of Indigenous Peoples.

In the context of child welfare, a fiduciary duty on the part of the federal government arises from several sources. First, the fact that the federal government imposed control over Indigenous Peoples and Indigenous governments through the *Indian Act* and other federal policies, designed to weaken and eliminate Indigenous government and to assimilate Indigenous Peoples into Canadian society. As part of this process, the federal government focussed on child welfare, establishing residential schools and mandating the attendance of Indigenous children at those schools. The federal government also legislated (through Section 88 of the *Indian Act*) to have provincial child welfare laws apply to Indigenous Peoples, and has paid the province to administer its child welfare laws over Indigenous Peoples. Historically, the federal government has acted as though it assumes a responsibility for Indigenous children. This fact gives rise to the modern right of reliance and a reasonable expectation of Indigenous Peoples that the government will continue to uphold and honour this obligation of the Crown.

### **Devolution of the Federal Fiduciary Duty**

The federal government can only devolve its fiduciary obligations upon the attainment of Self Determination of Indigenous Peoples. The fiduciary relationship between Canada and Indigenous Peoples reflects an historic power imbalance, and will only cease once this power imbalance has been corrected. Indigenous Peoples have consistently stated that the most obvious continuation of this imbalance is the denial of our right and responsibility to benefit economically from our Aboriginal Title Lands and Resources to sustain our Peoples and our Nations. The federal fiduciary is governed by a restorative principle and can only cease once Indigenous Peoples Nationhood has been fully restored, including governance structures, laws, and the exercise of jurisdiction.

The principle of the fiduciary duties owed to Indigenous Peoples by colonizing nation-states was confirmed in an advisory opinion given by the International Court of Justice in regard

to the Self Determination of Indigenous Peoples in Namibia. The International Court of Justice said that:

...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them... [T]he ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.

What the International Court of Justice said was that colonial powers hold a *sacred trust* (fiduciary duty and obligation) to Peoples whose territories the colonial power has occupied, which trust will not be dissolved until the Peoples achieve Self Determination.

Canada argues that its fiduciary can be devolved with the consent of Indigenous Peoples, without a corresponding need for the restoration of our full and complete Nationhood. Canada takes the position that it can divest itself of its fiduciary duties to Indigenous Peoples through having us agree to administer Canadian laws, programs and services, while refusing to recognize our Aboriginal Title and Right of Self Determination.

In accepting a delegation of provincial authority for child welfare, Indigenous Peoples risk unintentionally assisting the federal government's goal of devolving its fiduciary duty to provide child welfare services. Through provincially delegated agencies, Indigenous Peoples can be seen to provide *de facto* consent by assuming the responsibility for child welfare, with no corresponding recognition of their jurisdiction in this area, and with no corresponding commitment to Canada to provide on-going adequate funding.

The federal government takes the position that it does not have a fiduciary duty or obligation to recognize and support Indigenous Peoples assertions of jurisdiction and authority over child welfare, and is not willing to facilitate the full participation and control of Indigenous Peoples over our own child welfare systems. Rather, it Canada's position that its fiduciary obligations in this field are met when it enters into funding arrangements with either the province directly, or through First Nation agencies (which administer provincial laws) to provide child welfare services. The federal government treats its fiduciary obligations in this area as though they were mere financial obligations and do not extend beyond this. The result of the federal policy is to impose provincial jurisdiction on Indigenous Peoples by insisting that a delegation

agreement with a province be in place before Indigenous Peoples can be eligible for federal funding.

## **INDIAN ACT BY-LAWS**

The *Indian Act* contains provisions, under Section 81, which allow band councils to pass bylaws. Section 81 was the section used by the Spallumcheen Indian Band to pass the Spallumcheen bylaw. The provisions of Section 88 which may allow for the passage of child welfare by-laws are:

81.(1) By-laws – The council of a band may make by-laws and inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

- (a) to provide for the health of residents on the reserve and to prevent the spreading of infectious diseases;
- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances;
- (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section

Section 81 by-laws are a form of delegated federal authority. Under Section 82(2), Canada maintains ultimate approval of these by-laws, and the Minister has the power to disallow them.

To date, the federal government has refused to pass another child welfare bylaw similar to the Spallumcheen bylaw. Concerted effort by Indigenous Peoples would be required in order to have a child welfare bylaw passed under the *Indian Act*. A child welfare bylaw would allow the federal government to recognize Indigenous Peoples partial re-assumption of jurisdiction for child welfare without requiring new legislation, and would represent an improvement over the current system where Canada requires that Indigenous Peoples seek delegated provincial authority. *Indian Act* bylaws fall short of Self Determination, or a recognition of our inherent

rights in child welfare matters, because they are nonetheless an area of delegated authority, and the federal government would maintain ultimate power to disapprove bylaws passed by Indigenous Peoples.

### **IMPACT OF SECTION 88**

The federal government, under section 91(24) of the *Constitution Act, 1867*, has exclusive jurisdiction and power to legislate over “Indians and the lands reserved for the Indians”. The ability to pass laws in relation to Indians and the lands reserved for Indians comes within the exclusive jurisdiction of the Federal Government and not the Province. In 1951, Canada amended the *Indian Act* to include Section 88 which reads:

**88. Subject to the terms of any treaty** and any other Act of Parliament, 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, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

As a result of the operation of Section 88, provincial laws of general application apply to Indians, provided that they do not

- (1) affect the status and capacity of Indians;
- (2) touch upon a matter which is the subject of a treaty, or a conflicting piece of federal legislation; and
- (3) touch upon matters which are addressed through the *Indian Act* or regulations passed under the *Indian Act*.

Provincial laws only apply where they are allowed by Section 88. If the field is already occupied by federal legislation (including a band bylaw), or if they are in conflict with a federal law, then the provincial laws cannot apply to Indians.

The result of Section 88 in child welfare was that the federal government argued that child welfare (including on reserves) now fell within the provincial legislative framework. The province was willing to take over this jurisdiction, but argued that the funding of the services provided remained the responsibility of the federal government. An arrangement was reached that continues to this day: the federal government recognizes the jurisdiction of the provinces over Indigenous children, and enters into funding agreements whereby they pay the province for providing child welfare services to Indigenous children. The new delegated modes currently imposed in British Columbia and other provinces are the latest manifestation of the federal government's continued recognition of provincial authority to the detriment of Indigenous Peoples.

Band bylaws, once they have received ministerial approval, are considered to be "federal regulations" and are therefore protected under Section 88: *R. v. Jimmy*, [1987] 3 C.N.L.R. 77. The courts have recognized that the Spallumcheen child welfare by-law has the same force and effect of a federal regulation and operates to exclude provincial jurisdiction: *S. (E.G.)v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318 (B.C.S.C.). Where a Band passes a child welfare bylaw under the *Indian Act*, this bylaw would be accorded the status of a federal law, and operate to exclude provincial jurisdiction.

At present, the federal government has refused to allow any additional Section 81 bylaws in child welfare which would follow the Spallumcheen example, and through the operation of Section 88 explicitly determines that the provincial child welfare laws will be the laws which have exclusive jurisdiction over Indigenous children. In force and effect, Section 88 of the *Indian Act* perpetuates and legitimates the presumed authority of the province to exercise what amounts to exclusive jurisdiction over Indigenous children and families, and to keep Indigenous peoples in a state of wardship.

With regard to Indigenous Peoples jurisdiction over child welfare, Section 88 has two main impacts. First, it is the mechanism which Canada uses to devolve its fiduciary duties to Indigenous Peoples by passing these obligations onto the provinces. Second, if there were existing federal laws in place (either through federal Indigenous child welfare legislation, or

through the recognition of band bylaws) Section 88 would operate to protect these laws from the application of provincial child welfare laws.

## **DIRECTIVE 20-1**

Federal policy in the area of child welfare is set out in Directive 20-1. Directive 20-1 was originally adopted in 1991 and makes provision for the administration and funding of child and family programs on reserve. Directive 20-1 requires that Indigenous Peoples have delegated authority from the province in order to be eligible to receive federal funding. The AFN-DIAND Joint Review characterizes the system established under Directive 20-1 as “agencies had to be provincially mandated, were federally funded and services had to be First Nation delivered.”

The stated aims of Directive 20-1 are:

1. The department is committed to the expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances. This commitment is independent of and without prejudice to any related right which may or may not exist under treaties.
2. The department will support the creation of Indian designed, controlled and managed services.
3. The department will support the development of Indian standards for those services and will work with Indian organizations to encourage their adoption by provinces/territories.
4. The expansion of First Nations Child and Family Services (FNCFS) will be gradual as funds become available and First Nations are prepared to negotiate the establishment of new services or the take over of existing services.
5. Provincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements.

The lack of choice that the federal government allows Indigenous peoples with respect to child welfare under Directive 20-1 (with its requirement that Indigenous Peoples must acquire a form of delegated authority from the province in order to be eligible for federal funding) violates the rights of Indigenous Peoples to Self Determination. The current child welfare system is

structured so that it looks as though the Indigenous Peoples agree with provincial legislation and ultimate authority. In reality, if Indigenous Peoples want even a superficial level of involvement or control of child welfare, federal policy forces Indigenous Peoples to accept the delegation of provincial authority.

In 2000, the AFN and DIAND completed a Joint National Policy Review, and there are currently proposed changes to Directive 20-1. However, as discussed above, the proposed changes do not address issues of jurisdiction, but rather make suggestions for improvements within the existing framework.

### **FEDERAL *INHERENT RIGHTS* POLICY**

The federal government has recognized that the inherent right of self government exists, and is protected by Section 35 of the *Constitution Act, 1982*. Federal recognition is subject to the *Inherent Rights* policy which falls far short of Self Determination, and allows only for negotiated recognition of “self-government” rights. Areas where the federal government is willing to negotiate recognition of self government, are those where the federal government is interested in devolving the fiduciary responsibilities it owes to Indigenous Peoples. In particular, the federal *Inherent Rights* policy only extends to those matters considered to be “internal” to a particular Indigenous group, and does not recognize Sovereign rights. The *Inherent Rights* policy is structured to define “self-government” as a form of self-administration of government programs and services, as opposed to reflecting any real authority or inherent powers of Indigenous Peoples.

In child welfare, the *Inherent Rights Policy* has meant that the federal government is only willing to negotiate the right of Indigenous Peoples to administer existing laws, rather than recognizing Indigenous Peoples inherent jurisdiction and authority. In practice, the *Inherent Rights Policy* has resulted only in delegated authority models within child welfare.

## ROYAL COMMISSION ON ABORIGINAL PEOPLES

The federal government struck the Royal Commission on Aboriginal Peoples in order to examine a broad range of issues impacting Indigenous Peoples. Included in the RCAP is a lengthy discussion of the devastating social impacts that Canadian government policy has had on Indigenous Peoples. Volume Three, *Gathering Strength*, contains the main recommendations on the issue of jurisdiction in the area of Indigenous Peoples child welfare issues. Some of the main recommendations addressing the issue of jurisdiction are listed below:

The Commission recommends that

### 3.2.1

The government of Canada acknowledges a fiduciary responsibility to support Aboriginal Nations and their communities in restoring Aboriginal families to a state of health and wholeness.

### 3.2.2

Aboriginal, provincial, territorial and federal governments promptly acknowledge that child welfare is a core area of self-government in which Aboriginal Nations can undertake self-starting initiatives.

### 3.2.3

Aboriginal, provincial, territorial and federal governments promptly reach agreements on the authority of Aboriginal Nations and their communities for child welfare, and its relation to provincial, territorial and federal laws respecting child welfare.

### 3.2.4

Block funding be provided to child welfare agencies mandated by Aboriginal governments or communities to facilitate a shift in focus from alternative child care to family support.

### 3.2.5

Until community of interest governments are established in urban and non-reserve areas, voluntary agencies endorsed by substantial numbers of Aboriginal people resident in the areas be authorized under provincial or territorial law to act in the field of child welfare

(a) Where numbers warrant; and

(b) With levels of funding comparable to those of agencies providing comparable services to the general population and sufficient to meet the service needs of Aboriginal people.

3.2.10

Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal Nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.

3.2.11

Federal, provincial and territorial governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly.

3.2.12

Aboriginal Nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to

- (a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;
- (b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and
- (c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.

For the most part, RCAP recommendations promote the assertion of Indigenous jurisdiction within the existing federal/provincial framework and have not moved beyond this to a recognition of Indigenous Peoples inherent jurisdiction flowing from our right of Self Determination. The federal response to the RCAP recommendations was the *Gathering Strength* initiative which does not recognize the inherent rights of Indigenous Peoples, but rather continues the historic assimilationist policies originally articulated in the White Paper, 1969.

## CONCLUSION

Federal policy in the area of child welfare is governed by a refusal to recognize, adequately fund, and support Indigenous Peoples jurisdiction. At the same time, the federal government works actively to promote and enhance provincial authority over Indigenous Peoples and children. Section 88 serves two purposes for the federal government: (1) Allows the federal government to abdicate its responsibilities to Indigenous Peoples by placing social and legal responsibility for the provision of child welfare on the Provinces; and, (2) Reduces the federal fiduciary to mean simply fiscal responsibility.

## **8. PROVINCIAL**

Under Section 92 (13) (property and civil rights within the province) of the *Constitution Act, 1867*, the province is vested with exclusive control of child and family matters as this applies to their own citizens. The inclusion of Section 88 in the *Indian Act* has the impact of making provincial child welfare laws apply to Indigenous Peoples, where there are no other federal or recognized Indigenous laws in place. In this section, we provide a brief overview of the current provincial legislation and policy relating to Indigenous children and families, and the manner in which these provisions touch upon issues of jurisdiction. The two main pieces of provincial legislation that impact Indigenous children are the *Child, Family and Community Service Act* (the *CFCSA*) and the *Adoption Act*.

The *CFCSA* addresses child protection issues, and sets out the process the province will follow to take children into custody (either voluntary or not). The *CFCSA* applies to children who the government has identified as being “in need of protection”. The *Adoption Act* sets out the process that will be followed in placing children for adoption. Both pieces of legislation set out processes that are to be followed where a child has been identified as “aboriginal”, including steps for the involvement of the “aboriginal organization” identified to have a connection to the child. For example, the legislation requires that the Ministry notify the aboriginal organization where there are child protection hearings, and offer an opportunity for the aboriginal organization to be involved in the structuring of care plans for aboriginal children.

### **DEFINING THE “ABORIGINAL CHILD”**

For the purposes of provincial legislation, an “aboriginal child” is a child:

- (1) who is registered (or entitled to be registered) under the *Indian Act*;
- (2) where a child is under 12 years of age, where one (or both) of their parents defines themselves as “aboriginal”;

(3) where a child is 12 years of age or older, where the child self-defines as aboriginal;  
and

(4) a Nisga'a child, as defined in the Nisga'a Final Agreement.

The legislation identifies an “aboriginal child” as not only children who have Indian status, but also children who are members of Indigenous Nations but are not recognized under the *Indian Act*. Where children are not registered under the *Indian Act*, the legislation relies on either the parents or the child themselves (where a child is 12 years or older) to identify the child as aboriginal. It is important to note that the parent(s) or children can choose not to identify as “aboriginal”, and parents have the option of requesting that the child’s home community not be notified of child welfare proceedings.

The “opt-in” identification provisions grant parents the power to deny their children their heritage and birth-right by denying the jurisdiction and interest of the Indigenous Nation of whom the child is a member, and allows an individual parent to deny their child’s collective rights. For Indigenous Nations, membership in an Indigenous Nation is enriching, providing a rich and detailed culture and history, as well as a community of people to which one automatically belongs at birth. The fact that one individual (a parent) is able to deny another individual (a child) such a rich heritage and citizenship undermines the very idea of Nationhood.

## **DEFINING THE “ABORIGINAL COMMUNITY”**

Provincial legislation also makes provision for the Minister to define what is an “aboriginal community”. The definition of “aboriginal community” is set out in a series of schedules, which list those organizations that the province recognizes as being aboriginal communities for the purposes of community notification and involvement. The organizations listed include Bands, tribal councils, and also a series of urban service delivery agencies, such as Friendship Centres and other societies. The provincial government can choose to recognize an urban collective of aboriginal people, organized into a delegated social services delivery agency - who may or may not have any ties with the child’s Indigenous Nation(s) - as the “aboriginal community” having jurisdiction to decide important matters of the child’s future.

Although the provincial legislation incorporates notification and involvement of “aboriginal communities” there is no recognition of the concept of Nationhood. The involvement allowed in the legislation can be characterized as a right to be “consulted” as opposed to actual decision making powers. The involvement of urban service delivery agencies, in the context of Indigenous children, is an issue of major concern because there is no clear provision for acknowledging and respecting the fact that the children who fall within the system are members of Indigenous Nations and Peoples. Mere “aboriginal” involvement does not acknowledge the issue of Nationhood.

## **ABORIGINAL INVOLVEMENT/CONSULTATION**

Provincial legislation directs the Ministry on how to involve the “aboriginal community” and to take a child’s “aboriginal heritage” into account when making decisions regarding the custody, care and adoption of Indigenous children. Some of the main provisions of provincial legislation with respect to Indigenous children are listed below. We have emphasized, **in bold**, those provisions which specifically impact upon Indigenous children:

### ***CFCSA:***

**2** This Act must be interpreted and administered so that the **safety and well-being of children are the paramount considerations** and in accordance with the following principles:

- (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) the **cultural identity of aboriginal children should be preserved;**

**3** The following principles apply to the provision of services under this Act:

- (b) **aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;**
- (c) services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services;

**4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:**

- (a) the child's safety;
- (b) the child's physical and emotional needs and level of development;
- (c) the importance of continuity in the child's care;
- (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
- (e) the child's cultural, racial, linguistic and religious heritage;**
- (f) the child's views;
- (g) the effect on the child if there is delay in making a decision.

**(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.**

**92 (1)** Subject to the regulations, a director may delegate to any person or class of person any or all of the director's powers, duties or functions under this Act.

(2) A delegation of the powers, duties or functions of a director must be in writing and may include any terms or conditions the director considers advisable.

**93 (1)** A director may do one or more of the following:

- (g) make agreements, including but not limited to agreements
  - (iii) with the Nisga'a Nation, a Nisga'a Village, an Indian band or a legal entity representing an aboriginal community for the provision of services,

***Adoption Act:***

**7 (1)** Before placing an aboriginal child for adoption, the director or an adoption agency must make reasonable efforts to discuss the child's placement with the following:

- (a) if the child is registered or entitled to be registered as a member of an Indian band, with a designated representative of the band;
- (a.1) if the child is a Nisga'a child, with a designated representative of the Nisga'a Lisims Government;

(b) if the child is not a Nisga'a child and is not registered or not entitled to be registered as a member of an Indian band, with a designated representative of an aboriginal community that has been identified by

(i) the child, if 12 years of age or over, or

(ii) a birth parent of the child, if the child is under 12 years of age.

(2) Subsection (1) does not apply

(a) if the child is 12 years of age or over and objects to the discussion taking place, or

(b) if the birth parent or other guardian of the child who requested that the child be placed for adoption objects to the discussion taking place.

**46** (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

(2) Subsection (1) does not affect any aboriginal rights a person has.

## **STRATEGIC PLAN FOR ABORIGINAL SERVICES (SPAS)**

Provincial child and family services policy regarding Indigenous children is governed by the Strategic Plan for Aboriginal Services (SPAS) which was adopted by the province in 1999.

The goals of the SPAS are to:

1. Strengthen the capacity and authority of Aboriginal communities to develop and deliver services for children and families of a nature and extent comparable to those available to any resident of British Columbia.
2. Strengthen the capacity of the ministry to appropriately respond to the ongoing need for Aboriginal services while Aboriginal communities acquire such capacity.
3. Coordinate federal obligations within provincial jurisdiction to address outstanding issues of federal fiduciary responsibility for resources delivered to Status Indians wherever they may choose to live in British Columbia.
4. Advocate within government for the development of viable Aboriginal economies and economic opportunities to address this primary determinant of the health and well-being of Aboriginal people and communities

The underlying principle of SPAS reflects a desire to have Indigenous Peoples involved in the delivery of services, either through consultations, or through delegated service delivery agencies which contract with the province to administer provincial legislation. As part of the

delegation process, the Ministry enters into protocol agreements with aboriginal communities or service delivery agencies which will include:

2. A clear statement that the Director of Child Protection has responsibility for child protection in the province.
3. A clear statement acknowledging an Aboriginal community's **interest** in ensuring the safety of Aboriginal children. [Emphasis added]

The process that the province follows in relation to the First Nations delegated agencies is set out in the *Aboriginal Operational and Practice Standards and Indicators* manual. The delegation of Ministerial authority is to the employees of the agency and not to the agency itself. The Agency and delegated employee(s) acknowledge that the provincial legislation applies and commit to “meet or beat” provincial standards. There are a range of levels of delegated authorities that the province enters into, which accord varying degrees delegated authority. For example, agencies/employees with a “level 12” delegation can only address voluntary care agreements and provide family support services; “level 15” is the highest level of delegated status and allows the delegated agency/employee to determine if a child is “in need of protection” and therefore the power to apprehend that child.

## **IMPACT OF PROVINCIAL LEGISLATION**

Provincial legislation focuses on providing “culturally sensitive and appropriate services” to Indigenous Peoples, absent any consideration of the Sovereign rights or Nationhood of Indigenous Peoples. This has meant, for example, that the province has delegated child welfare service provision to aboriginal agencies within urban areas, which acquire jurisdiction over Indigenous children, often to the exclusion of the Indigenous Nation of whom those children belong. Provincial legislation does not recognize the inherent right and responsibility of Indigenous Nations to make decisions regarding our own citizens and does not respect the laws of Indigenous Nations over our children.

In practice, the “best interests of the child” test has been used against Indigenous Peoples as a justification for removing Indigenous children from their families, Nations and cultures. Although there are provisions within the provincial legislation which require that any

consideration of the “best interests of the child” recognize the necessity of continuing the child’s ties to their family, community and heritage, ultimate determination of what is in the “best interests of the child” remains with the province. As Marlee Kline observed:

The best interests of the child standard serves in practice to privilege an understanding of children as decontextualized individuals whose interests are separate and distinct from those of their families, communities and cultures.<sup>5</sup>

Inherent in the “best interests of the child” test, when married to ultimate provincial authority, is the assumption that Indigenous Peoples and Nations cannot determine and ensure what is in the best interests of their child members. The legislation only requires that the Ministry “consider” the importance of preserving a child’s aboriginal identity when dealing with Indigenous children. The importance of this bond, and membership in an Indigenous Nation, is only one factor among a series of factors to be considered in determining the best interests of a child. The bottom line is that the provincial government, and not the Indigenous Nation, is responsible for determining what is in the “best interests” of an Indigenous child.

Although the underlying objectives of the “best interests of the child” test are to safeguard and protect the interests of children, the current system does not allow the fulfilment of this objective. Instead, when the best interests of the child test is applied within the provincial child welfare context, the interests of Indigenous children are harmed because the province is not suited to know or assess any of the factors which come into play in terms of membership within an Indigenous Nation, or the ways in which this citizenship is fostered and benefits Indigenous children. Membership within an Indigenous Nation is not merely “cultural” it involves Sovereign rights and incorporates political, social and economic rights that cannot be addressed under the provincial legislation; the fullness of the relationship of a child with, and within, their Indigenous Nation is not accounted for.

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<sup>5</sup> Marlee Kline, “Child Welfare law, “the best interests of the child” ideology, and First Nations.” v.30:2 Osgoode Hall Law Journal, 375.

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## **PROVINCIAL REGIONALIZATION/PRIVATIZATION INITIATIVES**

The province has recently signalled its plan to expand delegated models throughout the province, as part of an overall restructuring plan which will privatize the delivery of child welfare services. The plan is to transfer responsibility for the delivery of social services to regional organizations, and the province would contract with private child welfare agencies to deliver services. It has been proposed that separate “First Nation Agencies” be developed on a regional basis to participate in this effort to privatize the delivery of these services to Indigenous Peoples. The restructuring would follow the current process. Provincial authority would govern, and these agencies would not be nation-based, nor reflect the laws and traditions of Indigenous Peoples.

## **CONCLUSION**

The problem that Indigenous Peoples face in attempting to assert control in the area of child welfare, and to truly call forth our futures, is exacerbated by the federal government’s position that it will only fund child welfare programs in the context of delegated provincial authority. Provincial legislation regarding children and families affects the heart and soul of Indigenous Nations and impacts upon our ability to call forth our futures.

In practice, the federal government has entered into funding arrangements with the Province to compensate them for providing child welfare services to Indigenous children. The federal and provincial governments have also entered into delegation enabling agreements with various Bands or tribal organizations whereby the Province “delegates” its authority in this area to these agencies. Ultimate decision-making power and legal responsibility remains with the Province, including authority to determine which services will be delivered, and how they will be delivered. With the creation of delegated service delivery agencies, the federal and provincial governments have created an Indigenous civil service to deliver government programs and policies. Under delegated models, there is no recognition of Indigenous Peoples inherent jurisdiction, and no reflection of our own laws and traditions. Delegated models represent the imposition of self-administration under foreign laws and ultimately the institutionalization of neo-colonial policies.

## **9. CASE LAW AND LEGAL HISTORY**

The bulk of case law involving Indigenous children and child welfare have involved considerations of the application of provincial laws to Indigenous children. There are two separate streams of decisions in this regard: (1) provincial jurisdiction, considerations of whether provincial law is applicable to “Indian” children; and, (2) operation of provincial laws, cases where individual Indigenous people went to court to challenge decisions made by provincial child welfare authorities. These areas are discussed briefly below.

### **CASES CHALLENGING PROVINCIAL JURISDICTION**

Cases which originally considered matters involving Indigenous children and the child welfare system did so in the context of deciding whether or not provincial child welfare laws apply to Indigenous children and communities through the operation of Section 88 of the *Indian Act*. As the federal government holds exclusive jurisdiction to legislate with regard to “Indians” there was an outstanding question of whether or not provincial child welfare laws could apply to Indians.

In *Natural Parents v. Supt. of Child Welfare*, [1976] 2 S.C.R. 751 the Supreme Court of Canada confirmed that provincial adoption laws applied to a status Indian child, but could not operate to cancel a child’s Indian status (because the issue of status was an area where the federal government had specifically legislated). Subsequent cases have also confirmed that provincial child welfare legislation applies to Indigenous children, in the absence of any federal laws to the contrary: *Re Family & Child Service Act (British Columbia)*, [1990] 4 C.N.L.R. 14 (B.C. Prov. Ct.). However, as discussed above, legal considerations have confirmed that provincial child welfare laws do not apply where there are existing federal laws in place. This is the case with the Spallumcheen child welfare bylaw which operates to exclude provincial jurisdiction from applying to Spallumcheen children.

In *Casimel v. I.C.B.C.*, [1992] 1 C.N.L.R. 84 the B.C. Court of Appeal affirmed the rights of Indigenous Peoples in the area of customary adoptions, defining this right as a right to “self regulation”, and stating that none of the

...aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishments and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with the scope and content the workings of the general law in British Columbia.

## **CASES CHALLENGING THE OPERATION OF PROVINCIAL LAWS**

These cases are those in which Indigenous people have gone to court in order to challenge provincial decisions regarding Indigenous children. These cases occur as challenges to the way the province has exercised its jurisdiction, and not as challenges to that jurisdiction. While a full discussion of these cases is outside of the mandate of this paper, these cases illustrate the manner in which current provincial laws operate in a discriminatory manner against Indigenous Peoples.

Legal scholars, including Patricia Monture-Angus and Marlee Kline, have analyzed decisions relating to Indigenous children and concluded that the application of provincial laws to Indigenous children by the courts has resulted in systematic racism, resulting in the removal of Indigenous children from their families and Nations and thus that Canadian courts continue to uphold the colonial practices of the Canadian government.

First Nations distrust the child welfare system because it has effectively assisted in robbing us of our children and our future. ...Judicial decisions on child welfare reinforce the status quo by applying standards and tests which are not culturally relevant. This is a form of racism.

These racist standards and tests of child welfare law were developed by judges. The most important tests is the “best interests of the child”. Madame Justice Wilson wrote for the Supreme Court of Canada: “the law no longer treats children as property of those who gave them birth but focuses on what is in their best interests” [and claimed that the importance of a child’s aboriginal heritage “abates over time”]....

There is evidence that the importance of heritage does not abate over time. The assertion that the importance of heritage abates over time really reflects a belief in the value and possibility of the assimilation of racial minorities... This belief is not grounded in First Nations tradition and culture, but is a reflection of government policies and “white” values. It is a belief that conceptualizes and prioritizes the rights of

individuals over collective rights. And it is a test that effectively forces the assimilation and destruction of First Nations peoples.<sup>6</sup>

## CUSTOMARY LAWS

In a Report compiled for the Law Reform Commission of Canada in 1974 entitled **Family Law and Native People**, Douglas Sanders discussed several cases arising in the North where the Courts recognized and protected Inuit family law customs: *Re Katie* (1961) 32 D.L.R. (2nd) 682; *Re Deborah*, (1972) 5 W.W.R. 203; *Re Beaulieu's Petition*, (1969) 67 W.W.W. 669. These cases recognized that Inuit custom adoptions are legal and did not require that formal/legal steps were taken in order to be valid.

Child welfare legislation across the country has since been amended to recognize Indigenous Peoples customary adoption laws. The *Indian Act* also contains provisions which recognize the customary adoptions of Indigenous Peoples. In British Columbia, recognition of customary adoptions is done through Section 46 of the *Adoption Act*. Recognition of Indigenous adoption laws is not automatic. Even though an Indigenous Nation may recognize an adoption, provincial legislation still requires that the province also agree to recognize the adoption in order for the adoption to be valid under provincial laws.

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<sup>6</sup> Patricia Monture, "A Vicious Circle: Child Welfare and The First Nations" (1989) 3 Canadian Journal of Women and the Law 1 at 11, 12 and 14, as cited in John Borrows and Leonard Rotman **Aboriginal Legal Issues Cases, Materials and Commentary**, Toronto: Butterworths, 2000. See also: Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology and First Nations," (1992) 30 Osgoode Hall L.J. 375.

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## **10. CASE HISTORIES**

This section examines alternatives which have been used by other Indigenous Peoples, both Nationally and Internationally, regarding assertions of Indigenous Peoples authority for child welfare, and includes a brief summary of the structure of other child welfare arrangements that Indigenous Peoples entered into. We have also considered to what extent these remain “delegated” or where Indigenous Peoples were able to find ways to move outside of a model of state/territorial/provincial delegation.

### **A. CANADA**

The example afforded by Spallumcheen is unique within Canada because it represents the only instance where Indigenous Peoples jurisdiction over their own children has been recognized by the federal government, both on and off reserve, and not subject to provincial laws or standards. Although there are differences across the country, the limitations which have generally been placed on the child welfare systems negotiated by Indigenous Peoples are that they are limited to a reserve land base or subject to provincial delegation or standards. To varying degrees, the situation in other provinces is similar to that in B.C. Provincial child and family legislation makes provision for the notification and consultation of aboriginal communities in decisions made regarding their children, and provides for the creation of delegated child welfare agencies. In most cases, the authority of First Nation agencies is delegated and ultimate decision-making power remains vested with the provincial Ministry.

#### **Spallumcheen:**

In 1980, the Spallumcheen Indian Band passed “A Bylaw for the Care of Our Indian Children: By-law #3-1980” in both English and the Secwepemc language. The bylaw recognizes the Band’s authority over all Spallumcheen children, living both on and off reserve.

Some of the relevant portions of the Spallumcheen bylaw are as follows:

1. ...

The Spallumcheen Indian Band finds:

(a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children.

(b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies.

(c) that the removal of our children by non-band agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve.

3. (a) The Spallumcheen Indian Band shall have exclusive jurisdiction over any child custody proceeding involving an Indian child, notwithstanding the residence of the child.

5. The Chief and Council shall be the legal guardian of the Indian child, who is taken into the care of the Indian Band.

6. The Chief and Council and every person authorized by the Chief and Council may remove an Indian child from the home where the child is living and bring the child into the care of the Indian Band, when the Indian child is in need of protection.

The Spallumcheen bylaw makes chief and council guardians of the first instance for a Spallumcheen child deemed in need of protection, and contains provisions setting out the process that the Band will follow in determining a placement of a child apprehended under the bylaw. The bylaw contains strong provisions intended to maintain Spallumcheen children's connection to their families and community, including preferences for placements within extended families and a requirement to keep the child connected with the community.

The Spallumcheen bylaw has been challenged numerous times before the Canadian courts. As a general rule, the Courts have upheld the jurisdiction of the Band and confirmed that the bylaw operates to exclude provincial jurisdiction. Some of the main cases to have considered the bylaw are as follows:

*Alexander v. Maxime*, [1996] 1 C.N.L.R. 1 (B.C.C.A.) The Court overturned a custody and guardianship order of the Band; However, it did not rely upon provincial legislation to do so, and rather relied on the inherent jurisdiction of the Court. The B.C. Court of Appeal did not address whether or not the by-law was validly passed pursuant to the *Indian Act*, or whether the federal government could, or had, validly allowed the bylaw.

*S.(E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 306 (B.C. Prov. Ct.): This case involved an application brought by the foster parents of a child seeking an order for custody of the child. In this case, the Court found that the purpose of the bylaw was to deal with child protection matters. As the foster parents were seeking an order for custody (which the Court said is different from child protection) the Band's bylaw did not apply. The court commented on the purposes of the by-law:

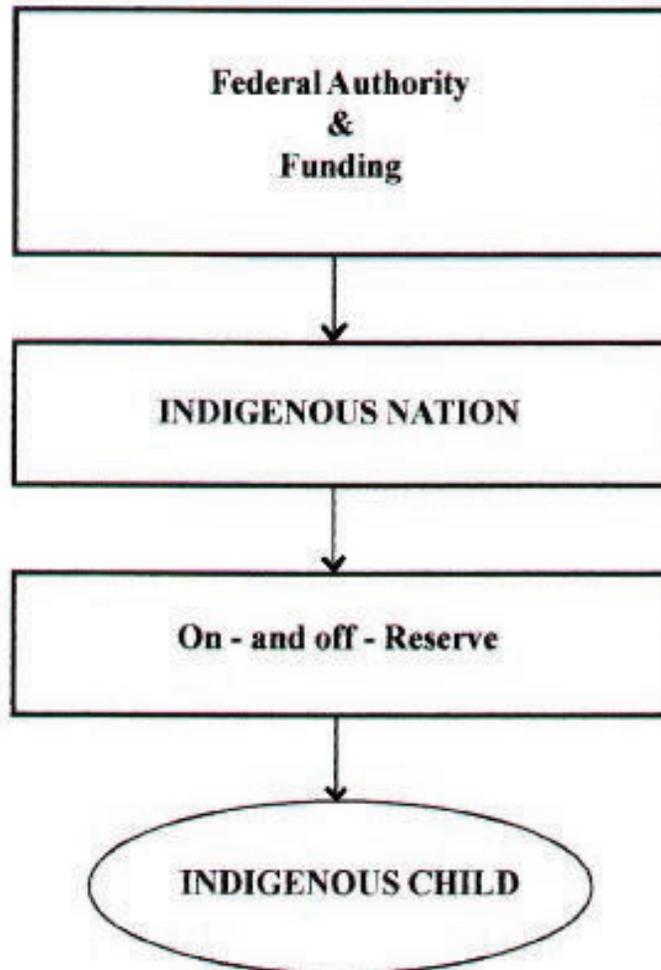
The By-law is intended – and in this regard one must remember that it has been approved by parliament – to provide to the Spallumcheen Band ‘exclusive jurisdiction over any child custody proceeding involving a (Spallumcheen) child’. If the forum approved by parliament for determination of ‘child custody proceedings’ regarding Spallumcheen children is the Band Council, and thereafter the Band as a whole, it is inherently inconsistent to contemplate a separate forum (that is, the Provincial Court) for consideration of the same issues.

*S.(E.G.) v. Spallumcheen Band Council*, [1999] 2 C.N.L.R. 318 (B.C.S.C.): On appeal of the decision of the B.C. Provincial Court, the B.C. Supreme Court upheld the jurisdiction of the Band. The Court declined to overturn the Band's decision, recognizing the Band's authority to make decisions relating to Spallumcheen children. The by-law:

...provides a clear statutory scheme whereby the Band, consistent with enunciated goals and priorities set out in the by-law, is to exercise responsibility for the care of children within its care

To date, the Spallumcheen bylaw is the only band bylaw of its type which the Minister of Indian Affairs has not disallowed. It is important to note that the passage of the by-law was accompanied by a concerted lobbying effort on the part of the Spallumcheen and other Indigenous Peoples.

**Jurisdiction Model: Federal Delegation (*Indian Act* bylaws or Federal Child Welfare Legislation)**



Federal Delegation: Through direct federal Child Welfare legislation, or recognition of s.81 *Indian Act* bylaws

(ie. Spallumcheen, United States *Indian Child Welfare Act*)

**Alberta (Blood Tribe Framework Agreement with Canada):**

The Blood Tribe/Kainaiwa and Canada Framework Agreement sets out a process the parties agree to follow to negotiate “The Exercise of Jurisdiction over Child Welfare by the Blood Tribe/Kainaiwa”. This framework agreement was signed in April, 2000. The agreement is limited to the reserve lands of the Blood Tribe, and Canada’s negotiating mandate will flow from their inherent rights policy, as set out in Canada’s *Approach to Implementation of the Inherent Right and Negotiation of Self Government*.

Article 3.1 of the Framework Agreement provides that:

The Blood Tribe considers children vital to the continued existence and integrity of the Blood Tribe and wishes to protect Blood Tribe children by exercising jurisdiction on child welfare matters which affect Blood Tribe children on the Blood Indian Reserve by establishing a child welfare system for the efficient administration of child welfare matters on the Blood Indian Reserve pursuant to the customs and traditions of the Blood Tribe, while providing child welfare services that are equal to, or which exceed, standards in Alberta.

In addition to being bound to meet provincial standards, the parties have also agreed to involve the province of Alberta in the negotiations to the extent necessary in order to “harmonize” the operation of Blood jurisdiction over child welfare matters on their reserve lands, with Alberta’s child welfare system. Section 4.3 contains the following statement on the Blood Tribe’s recognition of the jurisdiction of the province of Alberta:

The Blood Tribe recognizes the prevailing policies and procedures of the Province of Alberta on child welfare matters, pursuant to the Child Welfare Act and the Blood Tribe affirms that it is prepared to enter into discussions with the Province of Alberta with respect to matters involving provincial jurisdiction, responsibilities and service delivery arrangements in the area of child welfare.

The Agreement negotiated by the Blood Tribe is limited to Indigenous children living on reserve, and requires that the Blood agree to meet provincial standards in delivering child welfare services. The province maintains exclusive jurisdiction for all children who do not

reside on the reserve. The fact that the Agreement is limited to reserve lands greatly limits the scope of the jurisdiction recognized because of the fact that the majority of Indigenous Peoples live off reserve.

**Nisga'a Final Agreement:**

The Nisga'a Agreement contains numerous provisions on child welfare. Nisga'a Lisims Government is granted exclusive authority over child welfare matters on Nisga'a Lands (the treaty settlement lands). Any laws that the Nisga'a pass must be "comparable to provincial standards". Provided that the Nisga'a laws meet or beat provincial standards, they have precedence over provincial laws. Despite Nisga'a authority over child welfare on Nisga'a Lands, the province has jurisdiction if the province determines that there is an emergency and a child is at risk. However, Nisga'a will resume jurisdiction over that child once the province has determined that the emergency is over.

The Nisga'a Agreement contains the provision that Nisga'a and B.C. will negotiate regarding Nisga'a children who do not live on the treaty settlement lands:

92. At the request of Nisga'a Lisims Government, Nisga'a Lisims Government and British Columbia will negotiate and attempt to reach agreements in respect of child and family services for Nisga'a children who do not reside on Nisga'a Lands.

This provision is reflected in provincial legislation which calls for the notification of the Nisga'a Government on a basis similar to other "aboriginal organizations". Ultimate decision-making power regarding Nisga'a children living off of the treaty settlement lands remains with the province.

The Agreement contains provisions which recognize automatic standing of the Nisga'a Government in all child custody proceedings involving a Nisga'a child:

94. Nisga'a Government has standing in any judicial proceedings in which custody of a Nisga'a child is in dispute, and the court will consider any evidence and representations in respect of Nisga'a laws and customs in addition to any other matters it is required by law to consider.

95. The participation of Nisga'a Government in proceedings referred to in paragraph 94 will be in accordance with the applicable rules of court and will not affect the court's ability to control its process.

With regard to adoptions, Nisga'a can make laws for the adoption of Nisga'a children. However, those laws only apply outside of the treaty settlement lands with the consent of the parent(s), or where a court has dispensed with the requirement that the parents consent to the application of Nisga'a laws. The Agreement provides that the province will recognize the authority of Nisga'a laws where the province has a child who may be subject to adoption. However, the provincial Director can refuse to recognize Nisga'a laws for the adoption of a child if "it is determined under provincial law that there are good reasons to believe it is in the best interests of the child to withhold consent."

The positive features of the Nisga'a Final Agreement pertaining to child welfare matters include the ability of the Nisga'a to make their own child welfare and adoption laws, and to have standing in any judicial proceedings involving a Nisga'a child. However, the agreement clearly defers to provincial jurisdiction outside of Nisga'a Lands.

### **Sechelt Indian Band Self Government Agreement**

The Sechelt Agreement contains provisions recognizing Sechelt's ability to pass child welfare laws. At present, Sechelt has not elected to pass child welfare laws, and this is identified as an area which will be developed by agreement with the federal and provincial governments.

**14.** (1) The Council has, to the extent that it is authorized by the constitution of the Band to do so, the power to make laws in relation to matters coming within any of the following classes of matters:

(h) social and welfare services with respect to Band members, including, without restricting the generality of the foregoing, the custody and placement of children of Band members;

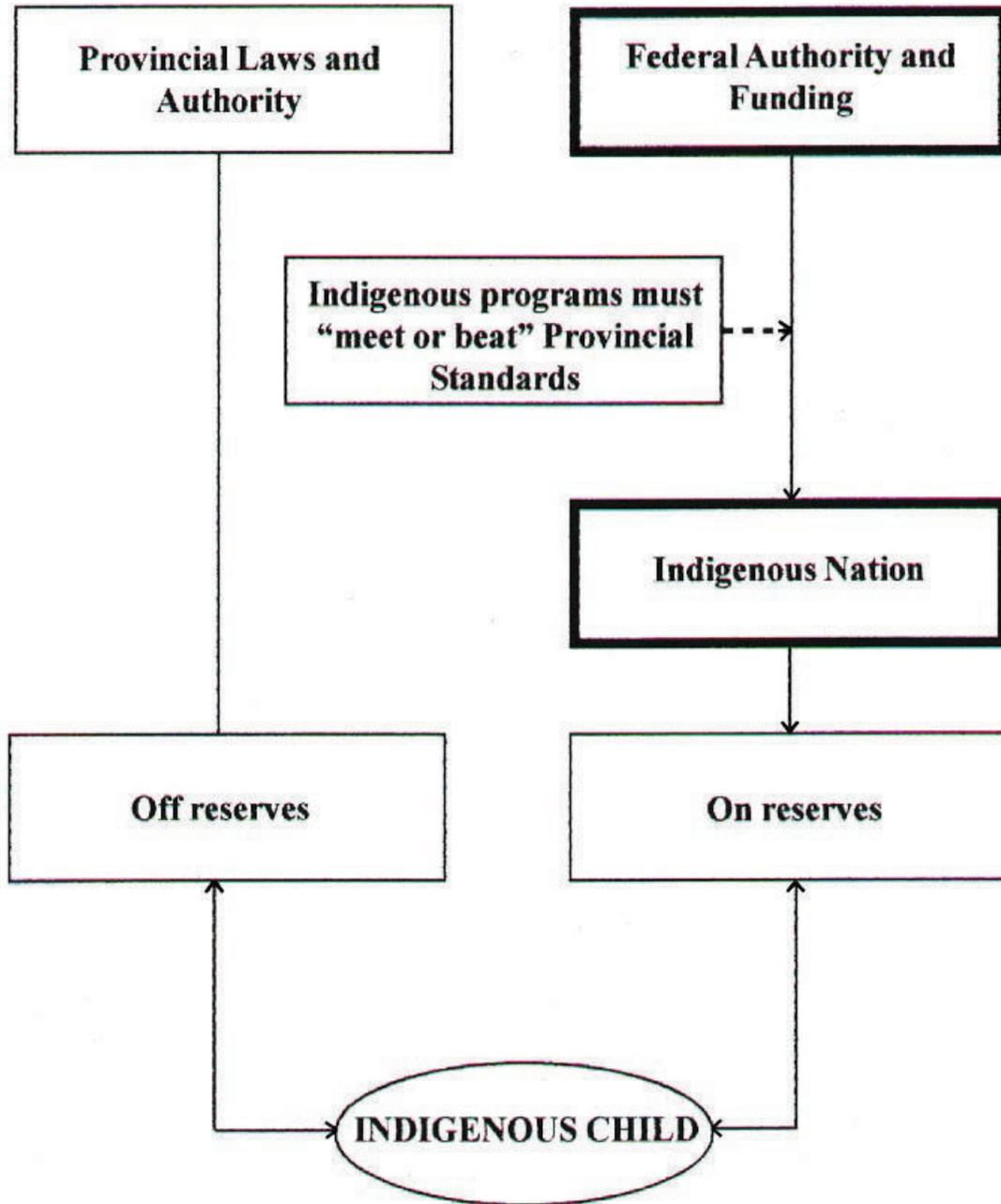
(i) health services on Sechelt lands;

(u) matters related to the good government of the Band, its members or Sechelt lands.

The provisions of the Sechelt Agreement are not geographically limited, and thus apply to Sechelt members, both on- and off-reserve, and, further, are not restricted to those members who have status, and may be applicable to all Sechelt citizens (i.e., whether or not they have status).

Although negotiations subsequently broke down, Sechelt was negotiating a tri-partite agreement with Canada and B.C. to set out the process that Sechelt would follow in developing child welfare laws. Provisions included in the draft agreement reveal the limitations that both provincial and federal governments tried to impose, which often sought to reduce the child welfare jurisdiction originally recognized in the Sechelt Agreement. The proposed agreement would have restricted the application of Sechelt child welfare laws to a specific geographic area (a limitation not included in the Sechelt Agreement), and made the exercise of those laws subject to provincial standards. Funding distinctions were made between “status” and “non-status” Sechelt members. Thus, although the initial provisions of the Sechelt Agreement are not geographically limited, do not rely upon provincial jurisdiction, and are not limited to “status” members, the tripartite negotiations surrounding the passage and implementation of Sechelt child welfare laws indicated a desire on the part of the federal and provincial governments to limit the exercise of the authority of the Sechelt in the original Sechelt Agreement.

**Jurisdiction Model: Federal Delegation Currently**



Federal Delegation Currently  
(ie. Blood Tribe and Nisga'a)

**Manitoba:**

In Manitoba, there are numerous agreements between various band governments and the federal government.

Each child welfare agreement... is an individual document which was negotiated between governments and bands or tribal councils. The services provided under the agreements varied; some covered only preventative and support services, leaving all statutory authority with the province, while others provided for the band or tribal council to exercise statutory authority pursuant to a province/band agreement. The signatories to agreements also varied. Where the agreement covered support funding, it was usually made between DIAND and the band or tribal council; where the agreement was for the exercise of statutory authority, there was sometimes a tripartite, band/province/department agreement and sometimes two separate agreements – a band/province agreement providing for the exercise of statutory authority and a band/department agreement providing for program funding.<sup>7</sup>

In 2000, the Assembly of Manitoba Chiefs and the province of Manitoba entered into an MOU on child welfare matters. The preamble to the MOU contains an acknowledgement of the jurisdiction of the province of Manitoba, and also that “First Nations people have a right to control the delivery of child and family services and programs for their respective community members.” The objective of the MOU, as set out in section 1.1 is that

The parties acknowledge that First Nations shall be responsible for the delivery of the full range of services under The Child and Family Services Act, as well as adoption services under The Adoption Act to First Nation members residing on- and off-reserve in Manitoba.

In the companion Protocol Agreement, the parties agree that the purpose of the process will be to “provide the framework and structure for the implementation process leading to the establishment of separate and distinct province-wide child and family services mandates for both First Nations and Metis people”. A Joint Management Committee is created to develop an

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<sup>7</sup> Armitage, 123.

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Implementation Plan, which will include recommendations for legislative amendments and a training process for First Nations personnel.

The process currently underway in Manitoba operates exclusively within the jurisdiction of the Province. The Indigenous Peoples have entered into an agreement which, ultimately, will give them administrative authority over all Indigenous child welfare matters in the Province; However, these administrative powers will be administered and carried out under provincial law.

Notwithstanding the delegated authority provisions, the province of Manitoba's commitment to provide for a framework and structure of Indigenous child and family services, as well as a commitment to support Indigenous personnel training could be useful with some strong modifications.

## **Ontario**

The provision of child welfare services to Indigenous communities in Ontario has long followed a delegated model, originally put in place by an agreement between the province and federal government in 1965. Ontario was the first province to officially legislate consideration of the aboriginal identity of children in child welfare decisions. The current practices within the province of Ontario have been summarized as follows:

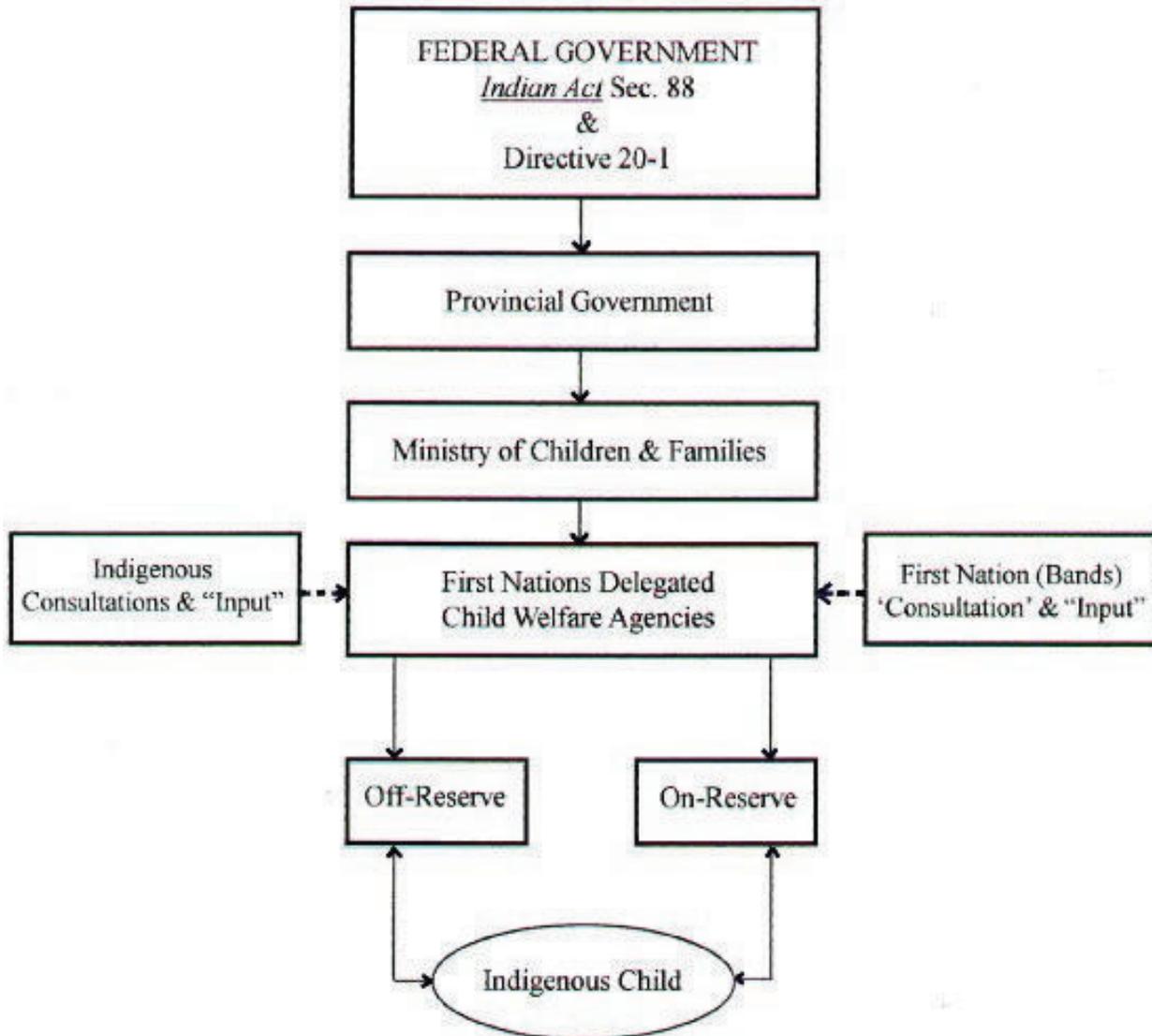
The Ontario *Child Welfare Act* of 1984 was the first provincial legislation to recognize the rights of Aboriginal children and families to obtain culturally appropriate services. It also recognized the rights of Aboriginal communities to participate in the protection of their children. An agency may be designated as an Aboriginal child and family authority by the band or community. Furthermore, courts are directed to place Aboriginal children in Aboriginal communities. When this is not possible, communities have thirty days to develop culturally relevant plans before an out-of-community placement is approved. Aboriginal agencies, however, are required to administer provincial child welfare legislation, and the final authority for decision-making rests with the provincial court.<sup>8</sup>

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<sup>8</sup> Douglas Durst, "The Wellness of Aboriginal Children: Seeking Solutions through Self-Government" in Aboriginal Self-Government in Canada, Saskatoon: Purich Publishing Ltd. At 195.

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**Jurisdiction Model: Provincial Delegation**



Provincially Delegated Model

## **B. UNITED STATES**

In 1978, the American government passed the *Indian Child Welfare Act* (ICWA) 25 U.S.C. §§ 1901-63 (1978) which recognizes the authority and jurisdiction of Tribal Courts to decide custody issues involving Indigenous children. The *ICWA* was enacted with specific recognition of the sovereignty rights of Indigenous Nations within the United States.

There are two separate streams for dealing with child welfare contemplated within the *ICWA*:

- (1) The first sets standards for State agencies to follow when they are dealing with Indigenous children, and includes requirements that the tribes be notified, efforts made to place children within Indigenous homes, and that a remedial process be put in place in an effort to have children remain within the home.
- (2) The *ICWA* creates provision for tribes to resume jurisdiction over child welfare matters. Once a tribe has made the decision to resume jurisdiction in this area, they have powers to pass Codes, have the jurisdiction of their Tribal Courts recognized, and provide services, which are federally funded. Within the United States, there is some diversity of jurisdiction, and there are some jurisdictions where the state government maintains control over Indian child welfare matters, despite the operation of the *ICWA*.

The impact and operation of the *ICWA* has been described as follows:

The underlying premise of the Act is that Indian tribes, as **sovereign governments**, have a vital interest in any decision as to whether Indian children should be separated from their families. Subchapter I is designed to clarify the issue of jurisdiction over Indian child placements and to establish standards in for child-placement proceedings. It provides that an **Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation,**

unless federal law has vested jurisdiction in the state. The domicile of an Indian child who is a ward of a tribal court is deemed to be that of the tribal court. ...

The Act also directs a state court having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon petition of the parents of the Indian tribe. Either parent is given the right to veto such transfer. It is intended to permit a state court to insure that the rights of the child, the parents, and the tribe are fully protected.<sup>9</sup>

The United States Supreme Court was asked to consider the *ICWA* in ***Mississippi Band of Choctaw Indians v. Hollyfield***, 490 U.S. 30 (1989), where Indian parents moved off the reserve in an attempt to avoid the application of tribal jurisdiction. The Supreme Court confirmed tribal jurisdiction and also the fact that the purposes of recognizing tribal jurisdiction was both to protect the Tribes themselves, and the child-members of the Tribes:

Tribal jurisdiction...was not meant to be defeated by the actions of individual members of the tribe, for Congress was not solely about the interests of the Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. ...In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside of their culture.

The provisions of the *ICWA* which allow for a parent(s) to challenge the jurisdiction of tribal courts – where the child is not living on a reservation – provides a challenge to the authority of the Tribes. However, under the *ICWA*, even where a parent vetoes a transfer of jurisdiction to a tribal courts to deal with the matter, the Tribe nonetheless maintains its standing as a party to any proceedings involving one of its child members, even though the matter is brought before a state court.

There are proposed amendments underway to the *ICWA* currently being considered by Congress, which would:

- Require that the parental objection to a transfer of jurisdiction to a Tribal Court (currently the parent has an automatic veto) be consistent with the purposes of the

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<sup>9</sup> Getches, David H. et al, *Cases and Materials on Federal Indian Law* (4<sup>th</sup>) American Casebook Series, West Group: St. Paul, Minn., 1998, at 662. Emphasis added.

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ICWA, including the recognition that “there is no resource more vital to the continued existence and integrity of Indian tribes than their children”;

- Provide a mechanism for Indian Tribes to resume exclusive jurisdiction where states now have concurrent jurisdiction. Indian Tribes who do not have reservations can resume this exclusive jurisdiction, as long as the area where they intend to resume this jurisdiction is identified (the geographic scope is limited by the federal *Indian Self Determination and Education Assistance Act*);
- Create criminal penalties for persons, other than a parent or the child themselves, who conceals the fact that a child is an Indian to avoid having the *ICWA* apply; and
- Expand the definition of an “Indian child” beyond a strictly biological definition to encompass a cultural definition of citizenship. The proposed definition of an Indian child would include children who “an Indian tribe...considers...to be part of its community”.

In the United States the Indian Tribes are recognized as having inherent standing and interest in matters which impact upon children who are their citizens. The rights of the Nation, as a sovereign political entity, receive recognition. The current state of the law in Canada does not allow Indigenous Nations separate standing, or any recognition of jurisdiction in matters involving their own members. Provincial legislation does call for the notification of an “aboriginal community”, and notification provisions are specifically set out in the Nisga’a Agreement. Tribal involvement, in the United States, is not limited merely to the right to be “consulted” but also incorporates standing as a separate party in proceedings involving their child members, and recognition of their inherent jurisdiction.

## C. AUSTRALIA

In Australia, child welfare policy falls within the jurisdiction of territorial governments. Child welfare matters are left with individual territories and are not subject to any over-arching federal legislation, and as a result the child welfare laws vary from state to state. However, unlike Canada, jurisdiction over Indigenous peoples is shared between the Commonwealth (federal) and state governments, and the federal government does not have exclusive constitutional jurisdiction over Indigenous Peoples. The Commonwealth government established a number of Aboriginal institutions that impact upon the area of child welfare across Australia. Andrew Armitage summarized the contribution of these institutions, as follows:

**Aboriginal Legal Service:** ...established to ensure that Aboriginal peoples were properly represented in court, including with respect to family and child welfare matters. ...[T]he Aboriginal Legal Service has been a major contributor to policy development. Good examples of this are to be found in the development of the Aboriginal Child Placement Principle.

**Aboriginal Child Care Funding:** The Commonwealth Department of community Services provides funding to the Aboriginal and Islander child care agencies, which have been developed in all major urban areas in Australia. The agencies provide an independent Aboriginal presence in both service and policymaking. ...

**Australian Law Reform Commission Study of Aboriginal Customary Law:** ...completed a major study of Aboriginal customary law in 1982 and ... provided a much improved understanding of how, in both legislation and common law, more sensitivity could be shown to the Aboriginal family. The commission recognized that Aboriginal peoples see themselves as living under 'two laws,' and it accepted their argument for court recognition of Aboriginal customary law.

**Royal Commission on Aboriginal Deaths in Custody:** ...the mandate...was to determine why there was a much higher proportion of Aboriginal Australians than non-Aboriginal Australians in custody. One reason for this state of affairs was attributed to the disruption of Aboriginal family life caused by family and child welfare programs. <sup>10</sup>

There are Commonwealth-funded Aboriginal and Islander child care agencies (AICCAs), which are advocacy organizations. The AICCAs work in areas such as day cares and parent

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<sup>10</sup> Andrew Armitage, Comparing the Policy of Aboriginal Assimilation, at 63-64.

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education, but not child protection. It does not appear as though the AICCAs are nation-based, and do not address jurisdictional issues. The AICCAs often work with the territorial governments, through cooperation agreements or contracting to provide other services. However, the extent of the influence of these organizations varies depending on their relationship with the territorial governments:

Where there is a comprehensive relationship between the state and AICCA, the latter is notified of every Aboriginal child with whom a statutory agency is working, participates in all planning and case management, and controls placements; where the relationship between the state and AICCA is less comprehensive, the former decides which Aboriginal children to refer to the latter. AICCAs are urban agencies, located in major towns and cities; service to rural Aboriginal communities and peoples is restricted to visits.<sup>11</sup>

In Australia, there is a general “Aboriginal Child Placement Principle” which operates in all jurisdictions (sometimes as a matter of policy, sometimes as a matter of statutory requirement) which requires that Indigenous children be placed in Indigenous homes, or that their home community be consulted in the placement.

The Human Rights and Equal Opportunity Commission examined the current relationship between Indigenous Peoples and the child welfare system in Australia, and issued a Report entitled **Bringing them Home**. The Report included suggestions for the recognition and respect of Indigenous Peoples customary laws and traditions, and right of Self Determination in the area of child welfare. However, it appears that the Australian system continues to operate much like the Canadian system and there have been no changes to recognize the inherent jurisdiction of Indigenous Peoples:

The way present legislation responds...is merely allowing Aboriginal community organisations to become part of the process ... There is no support for the development of genuine Indigenous child care or child welfare as, for instance, there has been in the United States under the jurisdiction of the *Indian Child Welfare Act*. (Nigel D’Souza, elder, as quoted in *Bringing Them Home*)

Although there is provision made for Indigenous involvement, ultimate decision-making authority remains with the territories and there is no recognition of the inherent jurisdiction of Indigenous Peoples.

## D. NEW ZEALAND

Child welfare policy has developed differently in New Zealand than in Canada, primarily as a consequence of the fact that Maori children were largely ignored in child welfare policy until the 1950s. As well, the government in New Zealand is a central government, and there are no individual province/territories who are vested with jurisdiction over child welfare matters.

On the issue of jurisdiction, there are two separate streams of initiatives within the area of child welfare: First, those that are Maori driven, and whose objectives are to strengthen and invigorate Maori laws and traditions in the area of child welfare; Second, those that involve Maori efforts to become more involved in the operation of the New Zealand child welfare system.

The first set of strategies is the most fundamental, as it aims at strengthening Maori institutions and is based on the resources and commitment of the Maori people. The second set of strategies is more closely related to the statutory requirements, more understandable to Pakeha [non-Maori] ways of thinking, and, in the end, is part of an overall strategy in which control remains in Pakeha [non-Maori] hands.<sup>12</sup>

### Maori driven initiatives

The Maori driven response is best illustrated by the *Te Kohanga Reo (Language Nests) Movement* which was proposed at a national meeting of Maori elders. The program relies very little on government support and is primarily funded through the voluntary participation of community members, uses existing community infrastructure, and relies upon the “gift” contributions of participants, which are provided to the program each week.

*Te Kohanga Reo* is a movement based on the Maori community’s ability to care for its own children in a culturally appropriate manner. The program of activities which constitutes *Te Kohanga Reo* is designed both to use and to strengthen Maori whanau (extended families), hapu (subtribes), and iwi (communities). *Te Kohanga Reo* is a uniquely Maori response to the high rates of Maori child neglect and delinquency that are recorded in the mainstream data. It is a response that recognizes the situations

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<sup>11</sup> Armitage, p. 65.

<sup>12</sup> Armitage, p. 182.

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documented as symptoms of the break-down of traditional family and tribal structures, accompanied by a loss of pride in being Maori.

*Te Kohanga Reo* is designed to address these problems through offering four interrelated programs/statements. These are:

- (1) a pre-school Maori culture and language immersion program which provides the next generation with an introduction to Maori culture and language that their parents often cannot provide
- (2) a community intergenerational development program which draws upon grandparents and elders to educate both children and young parents in traditional Maori ways
- (3) a response to the alienation of the present generation of teenagers and young people by demonstrating to them the child care capacity of their community
- (4) a political statement of the capacity of the Maori community to act and care for its own in the 1990s.<sup>13</sup>

The second initiative is the *Maatua Whangi* (the Parental, Nurturing Family), a Maori initiative funded by the Departments of Maori Affairs and Social Welfare. The goals of the program are to strengthen ties within extended families and tribal groups, so that these connections can be used in situations where a child is in need of protection. The philosophy is that the relationships identified through this initiative can be used to either place children taken into care, or to provide parental support to avoid taking children into care. The *Maatua Whangi* has served as a mechanism for the involvement of Maori cultural values within the child welfare system, and represents an “attempt to base service on tribal relationships rather than on the legislation, definitions, and thought patterns of the Department of Social Welfare.”<sup>14</sup>

### **Child Welfare initiatives “within the system”**

Similar to Canada, options “within the system” do not address the issue of jurisdiction, but rather attempt to make the system operate in a more “culturally appropriate” manner. These efforts include initiatives to train workers within the child welfare system about Maori values, and amending legislation to be more culturally appropriate and sensitive to Maori values.

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<sup>13</sup> Armitage, pp. 173-174.

<sup>14</sup> Armitage, at 178.

## **E. CONCLUSION**

Despite Indigenous Peoples concerted efforts to exert full authority and jurisdiction over child welfare matters, for the most part, these efforts have been limited to consultation and delegated authority within state/territorial/provincial frameworks.

Canadian models examined here shared the following features:

1. The only area of exclusive jurisdiction (non-provincially delegated) is limited to reserves or treaty settlement lands. [Spallumcheen and Sechelt excepted]
2. All federal funding requires a delegation of provincial authority [Spallumcheen and Blood (on reserve) excepted]
3. All models require that the Indigenous Peoples agree to “meet or beat” existing provincial standards in child welfare [Spallumcheen excepted]
4. None recognize the inherent jurisdiction of Indigenous Peoples, and all require some level of delegated authority.
5. Where the delegation is from the federal government, there is a greater level of control and actual authority in the Indigenous Nation. [Spallumcheen]

Two exceptions to the strictly state/territorial/provincial delegation pattern in the international examples surveyed were (1) the *Indian Child Welfare Act* in the United States which recognizes Tribal sovereignty and jurisdiction; and (2) the Maori Traditional Language Nests program which is founded and exercised under the inherent jurisdiction of the Indigenous Peoples and does not draw its jurisdiction from any other level of government.

Within Canada and Australia, Indigenous Peoples vision of Self Determination, and jurisdiction over child welfare matters has not been fully achieved. The Spallumcheen Bylaw provides the closest example in Canada, although it is an *Indian Act* bylaw. We can anticipate that Indigenous Peoples will continue to push for the full recognition of their Sovereignty over child welfare matters.

## **11. RECOMMENDATIONS**

*"Let us put our minds together and see what kind of life we can build for our children"*

-Sitting Bull

It is clear that Canada's history of assimilationist policies in the area of child welfare, including the provincially delegated models enforced since the off-loading of authority to the provinces through Section 88 of the *Indian Act*, have been an appalling failure. Indigenous children have been robbed of their Indigenous families, communities and Nations, and of their birthright and Legacy as members of Nations. Canadian child welfare policies represent a continuing act of genocide against Indigenous Peoples. Delegated authority models within the Canadian framework have served only to perpetuate the colonization of Indigenous Peoples and a denial of the inherent right of Self Determination of Indigenous Peoples at international law.

It is equally clear that, for Indigenous Peoples to call forth our futures and ensure the survival of our Peoples, our Nations must exercise our jurisdiction and authority to care for and protect our children. This can only be achieved through a process of decolonization grounded in the reinvigoration of our traditional laws and based on our inherent right of Self Determination.

- 1.1 Indigenous Peoples, Canada, and the Province of British Columbia accept that the only viable option to delegated authority models in child welfare is the recognition and support of Indigenous Peoples assertion of the inherent Right of Self Determination.

### **IMPLEMENTING THE INHERENT RIGHT OF SELF DETERMINATION**

Recognition of Indigenous Peoples jurisdiction for child welfare, as embraced within our inherent right of Self Determination, must include the right of Indigenous Peoples to choose the child welfare systems for our communities and Nations, and to have these reflect our traditions and laws.

## **Union of B.C. Indian Chiefs**

- 2.1 UBCIC undertake an extensive lobbying/education effort within Indigenous communities (incorporating all members, whether they have status or not, and whether they live on- or off-reserve), to educate Indigenous Peoples about the need to re-assert and re-implement our inherent jurisdiction over child welfare.
- 2.2 UBCIC develop a Declaration on Indigenous Child Welfare Jurisdiction asserting the fundamental principle of Self Determination and our right to guard our own children.
- 2.3 UBCIC work with Indigenous Peoples to gain consultative status within ECOSOC as a Non Governmental Organization (NGO) in order to have our inherent jurisdiction recognized over child welfare within the international community.
- 2.4 UBCIC establish relationships with other Indigenous Peoples and organizations working at the international level to forward our Right of Self Determination over child welfare.
- 2.5 UBCIC review the international instruments which Canada has ratified and identify those areas where Canada is in violation of its commitments to uphold the economic, social and political rights of Indigenous Peoples, including in the area of child welfare.
- 2.6 UBCIC work with Indigenous Nations to use the International Human Development Index to highlight discrepancies between Canada's international commitments to human rights and their domestic policy imposed on Indigenous Peoples.
- 2.7 UBCIC work with Indigenous Peoples, including the Assembly of First Nations and other Indigenous organizations, to compel Canada to abandon its present interpretation of Section 35.
- 2.8 The UBCIC work with the Spallumcheen Indian Band to articulate the success of the Spallumcheen bylaw in their efforts to reconnect Spallumcheen children and break the cycle of disconnection which are the legacy of past federal and provincial actions.

*“Have lots of children, have lots of children, when you get older, you will need them, they will become the best friends you have. When you need help, they will help you.”*

- Moses Alfred (Kwakiutl, 1943)

## **Indigenous Nations**

- 3.1 Consistent with our Right of Self Determination, Indigenous Nations reinvigorate and re-implement jurisdiction over child welfare. This would include:
- (a) Indigenous Nations, working on a Nation-basis, develop and ratify declarations asserting their jurisdiction and authority over child welfare, in keeping with their traditional laws;
  - (b) identifying all child members of each Nation who are currently under the provincial system and taking steps to assert our inherent jurisdiction and responsibility for these children, by ensuring that they are re-connected to their communities and Nations;
  - (c) identifying all adult members of each Nation who were removed from their communities and Nation as a result of federal and provincial child welfare laws and who are not presently connected to their Nations, and taking steps to re-connect these people to their home Nations and communities;
  - (d) taking steps to re-invigorate the traditions of the Indigenous Nation which served to protect children and keep families intact, including traditional language immersion programs for children and youth, and recognizing the role of our elders in guiding and determining this process; and
  - (e) taking active steps to prevent the child-members of our Indigenous Nations from being removed from their communities and Nations in the future.
- 3.2 Indigenous Nations provide legal protection and support for Indigenous Peoples (grandmothers, aunties, etc.) who take over child welfare responsibilities, according to the traditions of their own people, and are challenged in this assertion of jurisdiction under provincial child welfare laws.

**FEDERAL**

- 4.1 Canada abandon its interpretation of Section 35 of the *Constitution Act, 1982* which limits Indigenous Peoples' right of Self Determination to one of "self government" or "self administration".
  - 4.2 Canada recognize that Section 35 includes a right of Self Determination which embraces the economic, political and social rights of Indigenous Peoples, including inherent jurisdiction over child welfare.
  - 4.3 Canada and the Province recognize that Section 35 nurtures and protects the right of Indigenous Peoples to determine how they will reinvigorate and exercise their jurisdiction, including in the area of child welfare, flowing from their own traditions and laws.
  - 4.4 Canada amend its policies which prevent Indigenous Peoples from exercising our inherent Jurisdiction for Child Welfare, including Section 88 of the *Indian Act*, the *Inherent Rights* Policy, and Directive 20-1.
  - 4.5 Canada and the Province adhere to the fundamental principle enshrined within the *Royal Proclamation, 1763* that Indigenous Peoples' Informed Consent is required in relation to all matters which impact our survival and continuation as Peoples, including child welfare.
  - 4.7 Canada recognize that its actions must be governed by a Principle of Restoration in exercising its fiduciary duties to Indigenous Peoples. The Principle of Restoration requires:
    - (a) Canada recognize that its fiduciary duties represent a sacred trust and cannot be devolved through delegated service delivery agreements;
    - (b) Supporting Indigenous Peoples attainment of Self Determination and full Nationhood, including full recognition of our Aboriginal Title;
    - (c) Canada actively support and nourish Indigenous Peoples re-assertions of inherent jurisdiction over child welfare matters; and
    - (d) Canada shield Indigenous Peoples jurisdiction from the application of provincial child welfare laws.
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- 4.8 Canada recognize the right of those Indigenous communities that choose to pass child welfare by-laws, pursuant to Section 81 of the *Indian Act*.
- 4.9 Canada acknowledge the success of the Spallumcheen Child Welfare Bylaw in ensuring the health and well-being of Spallumcheen children, and Peoples.
- 4.10 Canada abandon its policy (outlined in Directive 20-1) requiring Indigenous Peoples to operate under a provincial delegation of authority and be bound by provincial laws and standards in order to receive funding.
- 4.11 Where Indigenous Peoples have resumed jurisdiction in the area of child welfare (whether through a federally recognized bylaw, or according to the traditions and customs of their own People) Canada adopt the practices of the United States federal government and actively shield Indigenous jurisdiction from infringement by any other level of government.
- 4.12 Canada recognize that its fiduciary obligations include all members of an Indigenous Nation, whether they live on- or off-reserve, and that Indigenous Peoples jurisdiction over their child members is not limited to “the lands reserved for the Indians”.
- 4.13 Canada recognize that the right of Self Determination includes the right of Indigenous Nations to define their own citizenship, and honour its obligations (financial and otherwise) to all citizens of Indigenous Nations and not only those people who Canada identifies as having Indian status.
- 4.14 Canada recognize that the inherent right of Self Determination includes the right to establish economic, social and political structures for the administration of justice relating to child welfare matters, and could include tribal courts or other traditional legal forums.
- 4.15 Canada follow the example of the United States federal *Indian Child Welfare Act*, and pass similar legislation recognizing the jurisdiction and authority of Indigenous Nations. Essential features of Federal Indigenous Child Welfare Legislation would include:
  - (a) Indigenous Nations resume jurisdiction over child welfare, including the right to pass their own laws according to the traditions and customs of their Nations, and re-establish traditional legal mechanisms;
  - (b) Provisions for full federal funding to Indigenous Nations who resume child welfare jurisdiction;

- (c) Ensures that once an Indigenous Nation resumes jurisdiction over child welfare, no other level of government authority (i.e., provincial or territorial) would apply to the child-members of that Nation;
- (d) Recognition that once an Indigenous Nation has resumed jurisdiction, custody of child members of that Nation is automatically transferred to the Indigenous Nation whenever they come into care of another level of government;
- (e) Recognize the authority of the Indigenous Nation to define their own citizenship, based on the laws and traditions of the Indigenous Nation;
- (f) Recognize Indigenous Nation jurisdiction whether the child-members live on- or off-reserve;
- (g) Recognize the right of the Indigenous Nation to decide in all matters pertaining to the adoption of an Indigenous child;
- (h) Recognize that it is within the jurisdiction of the Indigenous Nation to determine what is in the “best interests” of their child members;
- (i) Include explicit recognition that the federal fiduciary obligations to Indigenous Peoples require that the Sovereignty of Indigenous Nations be recognized; and
- (j) The purpose of the Indigenous Child Welfare Legislation is the restoration and continuation of Indigenous Nations.

## **PROVINCIAL**

- 5.1 The UBCIC and Province work together, through the Joint Policy Council, to pressure Canada to ensure that the federal government upholds its fiduciary obligations to Indigenous Nations for child welfare. This would include:
- (a) Pressuring Canada to allow the passage of child welfare bylaws under Section 81 of the *Indian Act*;
  - (b) Support the passage of federal Indigenous Child Welfare Legislation; and
  - (c) Committing to an action plan which sets out the steps that the UBCIC and province will take in order to jointly pressure the federal government to change its child welfare policies towards Indigenous Peoples.
- 5.2 The UBCIC and provincial government work together to insist the federal government resume its responsibilities in this area, and release the province from the fiduciary obligations over child welfare transferred to the province through Section 88 of the *Indian Act*.
- 5.3 The Provincial government recognize and accept that the Right of Self-Determination includes the right of Indigenous Peoples' to define themselves as Nations and not merely as communities.
- 5.4 Where there are off-reserve (non-Nation based) aboriginal agencies, these agencies will be required to adhere to the provincial government's recognition and acceptance of Indigenous Nations' jurisdiction.
- 5.5 The Provincial government recognize Indigenous Peoples Right of Self-Determination includes the right to determine citizenship and the right to protect our Indigenous child member's birthright, whether they reside on- or off-reserve, are status or non-status.
- 5.6 Where Indigenous children who are members of a Nation within B.C. come into the temporary care of urban agencies under delegated authority, these agencies be required to recognize and affirm the Nation status of the child; and work with the Nation to either return the child to their Nation and/or community or provide for services in keeping with the Nations directives.
- 5.7 Where a child is not a member of an Indigenous Nation in B.C. and comes into care of an agency under delegated authority, the agency will be mandated and

resourced to work with the child's Indigenous Nation to either return the child to their Nation and/or community or provide for services in keeping with the Nations directives.

- 5.8 The provincial government enter inter-jurisdictional protocol agreements with other provinces and Indigenous Nations to ensure delegated urban child care agencies are able to quickly and efficiently provide for the return of Indigenous children to their Nation if the Nation so desires.
- 5.9 The province commit to the following goals with regard to Indigenous Nations and child welfare:
- (a) Strengthen the jurisdiction of Indigenous Nations for the development of Indigenous institutions for the retention of Indigenous children in accord with Indigenous Nations' laws, and consistent with the inherent right of Self-Determination; and
  - (b) Recognize and affirm that the Right of Self-Determination includes the right to viable Indigenous economies based on Indigenous Peoples' Aboriginal (Original) Title to Lands and Resources, recognizing that the denial of Aboriginal Title harms the health and well-being of Indigenous Nations, communities and children.
- 5.10 The Provincial government recognize and affirm that Indigenous Peoples, through our governments and institutions, are the only parties with appropriate jurisdiction and traditional knowledge to determine the best means of preserving the cultural identity of an Indigenous child member.
- 5.11 The Province and Indigenous Peoples come to inter-jurisdictional agreements setting out how they will exercise their separate jurisdictions, and explicitly make provision for the province to transfer custody of an Indigenous child apprehended by provincial child care agencies to the Indigenous Nation, consistent with Indigenous Nations jurisdiction over child welfare.

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**APPENDIX A: REVIEW OF LITERATURE**

Although a comprehensive literature review is beyond the scope of this Paper, below we discuss some of the main research reviewed in the preparation of this paper which specifically addresses the issue of Indigenous Peoples' jurisdiction over child welfare. Some portions of the literature review are taken from a paper prepared for the Union of B.C. Indian Chiefs on this issue by John Harrison.

Armitage, Andrew, **Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand.** Vancouver: University of British Columbia Press, 1995.

This book compares the assimilationist policies that the colonial states of Australia, Canada and New Zealand have used against Indigenous Peoples. the book contains separate chapters dealing with policies of assimilation in child welfare in each of these countries, and includes extensive discussions of the jurisdictional issues impacting child welfare.

B.C. Human Rights Commission, **Removal of Aboriginal Children from their families by the Ministry of Children and Families,** Discussion Paper, January, 2001.

The goal of this paper was to address the disproportionately high removal of Indigenous children from their families. The report identifies a broad range of societal factors as contributing to the high rate of apprehension of Indigenous children, including poverty and lack of due process in family court proceedings. As the goal of the commission is to focus on individual rights, and its powers are statutorily defined, the report did not identify or discuss issues of jurisdiction.

Community Panel, Family and Children's Services, **Liberating our Children,**  
**Liberating our Nations.**

This was a provincial committee which was asked to review provincial child welfare legislation and policies and to make recommendations. The Report includes recommendations (1) about how to improve the current provincial legislation and policies; and, (2) "To ensure that legislation relating to Aboriginal children and families does not create or perpetuate impediments to Aboriginal communities assuming responsibility for their children and families in accordance with the aspirations of those communities." The recommendations which address questions of jurisdiction are as follows:

The Inherent Right to Self Government

1. All legislative changes regarding Aboriginal family life must be developed in the context of strengthening the right of Aboriginal people to exercise our inherent right to self-government.
2. Changes to family and child protection legislation must be seen only as an interim measure which will be fully resolved through the recognition of the paramountcy of Aboriginal family law.
3. All legislation and agreements dealing with Aboriginal family and child legislation, policy and practice must include explicit statements guaranteeing that the intent of the legislation and/or agreements does not abrogate or derogate from existing aboriginal rights or rights that might in the future receive constitutional protection.
4. Provincial legislation must explicitly acknowledge the jurisdiction and responsibility of Aboriginal Nations to make decisions, and resolve problems with respect to issues of Aboriginal families and children.

Aboriginal Family and Children's Services

6. Governments must recognize the right of each Aboriginal Nation to extend its responsibilities for family and child services and decision making to all members of that Nation, whether they are registered as Indians or not, and whether or not they reside on or off lands reserved for Indians, in accordance with the aspirations of the Aboriginal people who comprise each Nation.

Paramountcy of Aboriginal Law

Recommendations 52 to 56 deal with "Ending the Legalized Abduction of Aboriginal Children", and include the following:

53. When Aboriginal Nations enact their own laws with respect to families and children, provincial legislation must acknowledge the paramountcy of these laws with respect to any provision of the *Family and Child Service Act*, the *Family Relations Act*, the *Adoption Act*, the *Infants Act*, the *Public Trustee Act*, any subsequent amendments to any of those acts, and any legislations involved in the enforcement of those acts.

Durst, Douglas, **First Nations Self Government of Social Services; an Annotated Bibliography**, University of Regina, 1996.

This work provides an extensive literature review of existing research in the area of self government and child welfare. In the analysis of existing literature, several levels of Self Determination, as reflected in current child welfare models are discussed:

1. **Benevolent colonialism:** Funding agreements between Indigenous Peoples and governments for the application of external programs within communities with no consultation nor consideration of appropriateness, effectiveness or impact.
2. **Integrated:** Which includes the incorporation of Indigenous input into existing structures, with no real change in the existing structures.
3. **Co-management/Delegated:** Durst characterizes the current Delegation Enabling Agreements as falling within this category. Authority is delegated to Indigenous agencies (not Nations), but ultimate power remains with the federal/provincial governments. In the case of British Columbia, power and ownership remain vested with the Director of Child Protection under the *CFCSA*.
4. **Co-jurisdictional:** Durst claims that co-jurisdictional models are rare in child welfare, but states that “It remains possible and feasible within the Canadian system to negotiate and implement a co-jurisdictional agreement in an identified area”. The Spallumcheen model is held up as a unique occurrence of co-jurisdiction within Canada. Other examples, which are partly co-jurisdictional, cited include the James Bay and Northern Quebec Agreement and; the Hollow Water Council negotiated agreement for limited legislative (unlike other agreements) as well as administrative (common to all delegated agreements) aspects of child welfare.

Durst identifies five types of arrangements from the 1987 federal report *Indian Child and Family Services in Canada*:

1. **Band-Federal Bipartite**-primarily in the area of Social Assistance
2. **Band-Federal/Band-Provincial Tripartite** where the Band delivers a provincial program after having secured separate federal funding
3. **Band-Provincial-Federal Tripartite** the current practice in British Columbia regarding delegated First Nation agencies. Any jurisdiction/authority of

Indigenous Peoples is “capped” at co-management/delegation and the agency or community is left with little real power. The programs follow provincial laws and standards, while the federal government provides the funding.

4. **Band-Provincial Bipartite** these agreements involve services delivered by the province over which the federal government has no jurisdiction. Current examples could include the Local Education Agreements and examples in Ontario where the delivery of Child welfare services is already covered by the *Canada-Ontario 1965 Indian Child Welfare Services Agreement*.
5. **Provincial-Federal Bipartite** since the federal government and the province of British Columbia already have a bipartite agreement for the provision of services to First Nations Children “ordinarily resident on reserve” the federal government purchases these services from the province.

Federation of Saskatchewan Indians, **Indian Control of Indian Child Welfare A Report by the Health and Social Development Commission of the Federation of Saskatchewan Indians**, Saskatchewan: 1983.

This paper identifies the root problem in the area of child welfare as a lack of Indian control over child welfare, and ties the issue to Self Determination, concluding that as long as Indian do not have control in this field they cannot ensure the “continuity and stability of their culture from generation to generation.” The paper reviews jurisdictional issues regarding responsibility for child welfare and argues for the assumption of federal responsibility in this area rather than a delegation of authority to the provinces.

Huamani, Ana Maria Pacheco, **Handbook on the Rights of the Child**, Switzerland: Mandat International, 2000.

This paper provides a brief overview of international covenants and summary of international organizations which impact upon the rights of children. The paper was written for NGO’s and Indigenous Peoples organizations to assist them to use international covenants to lobby their governments to protect the rights of children. The paper provides a contact list of international organizations addressing the rights of children. Also of interest on international issues is a handbook entitled Indian Rights – Human Rights: Handbook for Indians on International Human Rights Complaint Procedures, Indian Law Resource Center: Washington, 1984.

MacDonald, Kelly, **Literature Review: Aboriginal Child & Family Governance**, (1997), The First Nations Family and Child Care Workers' Society Governance Project.

This is a comprehensive review of existing legislation, service delivery models current in 1997 and situations that parallel the developments in British Columbia around the world. The Paper follows the path of child welfare from a review of the impacts of colonization including the residential school, relocations and the effects of the *Indian Act*, and reviews of the impact of child welfare legislation and jurisdictional issues. The paper discusses cooperative efforts between existing aboriginal agencies and urban groups, the Ministry for Children and Families and the First Nations Directors through “partnership” efforts. The examples discussed are service delivery and administrative agreements, and remain within the delegated model.

MacDonald, John A., **Child Welfare Policy and The Native Indian Child in British Columbia**, November, 1979.

The author is a social work professor, and the objectives of the paper are “firstly to explore and document the extent of child welfare problems among Native Indian children in British Columbia; and secondly to explore past proposals and recent initiatives in legislation, policy, and programs, designed to reduce significantly the level and severity of child welfare problems among Native families.”

McDonald, Rose-Alma, Peter Ladd, et. al. **First Nations Child and Family Services Joint National Policy Review**, prepared for the Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000.

This Joint National Policy Review commissioned by AFN and DIAND has as its objective to “identify possible improvements to current policy regarding the development and operation of FNCFS agencies that provide necessary, culturally sensitive and statutory child and family services.” The document provides a good overview of the current system. The report contained 17 recommendations, and most of these focus on improvements to the current situation (i.e., focus on how a “trilateral process” of Indigenous Peoples, Canada and Provinces/Territories can work together), rather than on a recognition of the jurisdiction of Indigenous Peoples. Of the recommendations, 1a and 1b are the only areas where jurisdiction is addressed. They read:

1a. The joint Steering Committee of the National Policy Review recognizes that Directive 20-1 is based on a philosophy of delegated authority. The new policy or Directive must be supportive of the goal of First Nations to assume full jurisdiction over child welfare. The principles and goals of the new policy must enable self-governance and support First Nation leadership to that end, consistent with the policy of the Government of Canada as articulated in *Gathering Strength*.

1b. The new policy or directive must support the governance mechanisms of First Nations and local agencies. Primary accountability back to community and First Nations leadership must be recognized and supported by the policy.

**Report of the Royal Commission on Aboriginal Peoples, *Gathering Strength*, Vol. 3,**  
Ottawa: Supply and Services, 1996.

The Government of Canada struck the Royal Commission on Aboriginal Peoples (RCAP) in 1990 which presented its final Report in 1996. The RCAP Report consists of five volumes covering all aspects of the relationship between Indigenous Peoples and the Canadian governments and society. Volume 3 is entitled *Gathering Strength* and contains the key recommendations regarding child welfare.

The RCAP Report recognized that many of the difficulties faced by Indigenous Peoples are compounded by socio-economic problems, issues of jurisdiction, and called strongly for changes in the area of child welfare. Recommendation 3.2.2 calls for all levels of government “to recognize that child welfare is a **core area of self government** in which Aboriginal Nations can undertake **self starting initiatives**”, Recommendation 3.2.3 suggests that governments reach agreements on the authority of First Nations in relation to federal and provincial legislation. Additionally, the RCAP Report highlighted the financial difficulties that Indigenous Peoples face in attempting to assert child welfare jurisdiction. Recommendation 3.2.4 suggests the establishment of block funding for programs mandated by First Nations or aboriginal groups to allow the shift from protective services to prevention programs.

The RCAP Report, through out, recommends strategies for developing the “capacity” of Indigenous Peoples and governments beyond those currently witnessed through the *Indian Act* or negotiated agreements.

Sanders, Douglas, **Family Law and Native People A Report for the Law Reform Commission of Canada**, 1974:

Report prepared for the Law Reform Commission of Canada which focussed on the following subjects (1) customary family law, (2) the *Indian Act* membership system, and (3) the care and custody of children. The Report included the recommendation that Indigenous Peoples customs in the family law area (marriage, divorce, adoption, etc.) be recognized.