

Adoption Protections for Indigenous Children in the United States

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Introduction

The 2015 Truth and Reconciliation Commission report “Honouring the Truth, Reconciling for the Future” emphasized that federal, provincial, and territorial governments must commit themselves to reconciling with First Nations peoples (Truth and Reconciliation Commission of Canada, 2015, pp. 20-1). In order to further the aims of reconciliation, the rights of Indigenous communities to care for their children must be respected (Truth and Reconciliation Commission of Canada, 2015, p.228). The overrepresentation of Indigenous children in care seriously endangers the rights of Indigenous communities to care for their children. This information sheet focuses on adoption, the most permanent form of out of care placement, which presents the greatest potential to disrupt Indigenous children’s ties to their communities. Though specific statistics on adoption are not available, data from the 2016 National Household Survey indicates that Indigenous children aged 0-14 years are placed in foster care at 13.1 times the rate of non-Indigenous children. The disproportionate placement of Indigenous children in out of home care, including adoption, is directly tied to the high poverty rates experienced by Indigenous children, a result of the continued legacy of settler-colonialism (Macdonald & Wilson, 2016; Brittain & Blackstock, 2015).

Legislative reform represents one means of precipitating structural change. More specifically, in response to the disproportionate placement of First Nations children in care, in late January 2018, Indigenous Services Minister Jane Philpott announced a six-point plan for improving Indigenous child welfare, including a proposal for federal legislation (Tasker, 2018).¹ Although such legislation would be a first in the Canadian context, the United States has had federal child welfare protections for Indigenous children, the Indian Child Welfare Act (ICWA), since 1978. Such legislation might serve as a useful point of reference in drafting and implementing federal child welfare legislation for Indigenous children in Canada. Additionally, as of 2018, 33 states have passed some form of adoption protections for Indigenous children. The National Conference of State Legislatures, NCSL, has compiled a list of all state laws related to ICWA’s provisions

¹ Many different terms, including “Aboriginal,” “Indian,” “Native,” and “Indigenous” are used to refer to the Indigenous peoples of North America. In this information sheet, when discussing a particular piece of legislation, the terminology mirrors the language of the law. When no term is specified, “Indigenous” is used.

(National Conference of State Legislatures 2018). In this information sheet, we build on that listing, describing in more detail those provisions pertaining specifically to adoption. Considered alongside federal ICWA, these state provisions may provide useful models for provincial and federal lawmakers in Canada in drafting child welfare protections for First Nations, and other Indigenous, children.

A Brief History of Federal ICWA

As in Canada, Indigenous children in the United State faces high rates of apprehension as a result of historical and contemporary colonialism (Subcommittee on Indian Affairs,1974; National Council of Juvenile and Family Court Judges, 2017, p. 8). The United States enacted federal Indigenous child welfare legislation in the form of the Indian Child Welfare Act, ICWA, in 1978 (National Indian Child Welfare Association, 2015). ICWA serves to protect the best interests of Indigenous children by preventing the unwarranted breakup of Indigenous families and communities (National Indian Child Welfare Association, 2015). Preventing the placement of Indigenous children in care is essential for the wellbeing of Indigenous children, families, and communities, as a child in care may not have access to his birth family, Indigenous community, or culture. This lack of access inhibits the Indigenous child’s process of identity formation, hampers the transmission and preservation of cultural knowledge, and threatens the sovereignty of Indigenous peoples (“Subcommittee on Indian Affairs,1974, pp. 6-7; Jaffke, 2006, pp. 746-7). Some of federal ICWA’s key provisions include:

- Recognition of tribal authority;
- Protection for the rights and responsibilities of Indian parents;
- Cultural protections; and
- Administrative protections;

Please see Table 1 below for additional details of ICWA protections.

Table 1.

Key provisions of federal ICWA

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Protection of Tribal Rights</p>	<ul style="list-style-type: none"> • Recognition of tribal jurisdiction over child custody proceedings involving an Indian child (§1911(a)); • Requirement that every state give tribal Indian child custody proceedings the same faith as the proceedings of any other entity” (§1911(d)); • Creation of a process for transferring proceedings from a state court to a tribal court (§1911(b)); • Recognizing the right of the child’s tribe or Indian custodian to intervene in state court custody proceedings (§1911(c)); • Requirement to providing notice to the child’s tribe of pending court proceedings (§1912(a)); • Mandating tribal resolution for different order of adoption placement (§1915(c)); and • Creation of a process for reassumption of jurisdiction over child custody proceedings by a tribe (§1918).
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Protection of Indian Parents’ Rights</p>	<ul style="list-style-type: none"> • Creation of regulations, such as specifying the process for obtaining parental consent and the process for withdrawal of parental consent, regarding parental rights termination orders (§1912(f)) and the voluntary termination of parental rights (§1913(a), (c)); • Requirement that any party seeking termination of parental rights provide evidence that active efforts have been made to provide services “designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful” [emphasis added] (§1912(d)); • Restriction of termination of parental rights to those cases in which a finding that continued custody by the parent or Indian custodian is likely to result in “serious emotional or physical damage to the child” is “supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses” [emphasis added] (§1912(f)); • Creation of processes for vacating a voluntary termination of parental rights “obtained through fraud or duress” (§1913(d)); • Creation of a process for petitioning courts to invalidate termination rights that violated ICWA protections of parental and/or tribal rights contained in §§1911-13 (§1914); and • Providing for the application of the higher standard applicable to protect rights of parent or Indian custodian of Indian child in cases wherein federal and state protections exist (§1921)
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Cultural Protections</p>	<ul style="list-style-type: none"> • Prioritization of adoption placement “with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; (3) other Indian families’ (§1915(a)); • Requires application of “the prevailing social and cultural standards of the Indian community” of residence or to which ‘the parent or extended family members maintain social and cultural ties” in child placement requirements (§1915(d));

Administrative Protections	<ul style="list-style-type: none"> • Creation of a process for the appointment of counsel for a parent or Indian custodian who is deemed indigent “in any removal, placement, or termination proceeding” (§1912(b));
	<ul style="list-style-type: none"> • Recognizing the right of each party to a custody proceeding to examine reports or other documents filed with the court pertaining to the case (§1912(c));
	<ul style="list-style-type: none"> • Recognizing the right of an Indian person to apply for information pertaining to the tribal affiliation of his parent(s) and “other information as may be necessary to protect any rights flowing from the individual’s tribal relationship” (§1917);
	<ul style="list-style-type: none"> • Creation of a process for enacting and revoking agreements between states and tribes for child custody proceedings (§1919);
	<ul style="list-style-type: none"> • Establishes process by which the U.S. Secretary of the Interior may authorize grants for the “establishment and operation of Indian child and family service programs on or near reservations” (§1931)

Ongoing Indigenous Child Welfare Concerns in the United States

Despite the adoption of ICWA, Indigenous children in the United States remain overrepresented in foster care. Indeed, a report by the National Council of Juvenile and Family Court Judges for fiscal year 2015 reveals that, nationally, “American Indian/Alaska Native children are overrepresented in foster care at a rate of 2.6 times their rate in the general child population” (National Council of Juvenile and Family Court Judges, 2017, p. 80). This rate varies significantly by state, with some states—in general, those home to comparatively small numbers of Indigenous people—not demonstrating any disparity, while others, such as Minnesota and Nebraska, demonstrating disproportionality index numbers of 13.9 and 7.7, respectively (National Council of Juvenile and Family Court Judges, 2017, p. 14). In an effort to address the disproportionate placement of Indigenous children in care, several state legislatures have passed protections for Indigenous children. Considered alongside federal ICWA, these state provisions may provide useful models for lawmakers in Canada.

Table 2 and 3 below identify state statutes with provisions for Indigenous children, and indicate the types of protections for Indigenous children these statutes include.

Table 2 indicates:

1. **Name(s)/ Sections of State Statute with Provisions for Indigenous children:** Identifying the names and numerical designations of state statutes containing adoption provisions for Indigenous children is aimed at helping researchers, advocates, and other individuals more easily locate relevant pieces of legislation.
2. **State versions of ICWA/ Indian Family Preservation Acts:** As of 2018, six states have passed their own versions of ICWA/ Indian Family Preservation Acts. In addition, California has incorporated many of federal ICWA’s provisions into its Family Code. Due

to this, a checkmark with an asterisk in California’s cell recognizes the enhanced protections afforded to Indigenous children under California state law.

3. Citation of federal ICWA: Indicates whether the state statute cites ICWA.

4. Recognition of tribal authority: These forms of recognition include the responsibility to contact or consult with the Indian child’s tribe; recognition of tribal jurisdiction; right of the tribe to intervene in or be party to proceedings; and protection against the Existing Indian Family, “EIF”, defense.

Table 2.
State-level ICWA provisions

Jurisdiction	Name of Law(s)/ Section of State Statute w/ Provisions for Native children	State Version of ICWA	Cites ICWA	Tribal Authority
Alabama	Alabama Code Title 12. Courts § 12-15-314	×	✓	×
Alaska	Alaska Title 25. Execution of Consent; Consent as Power of Attorney § 12-23-60	×	✓	×
Arizona	Arizona Revised Statute §§ 8-105.01, 8-106, 8-515.05, 8-535	×	✓	✓
California	California Code, Family Code, Indian Children §§170-185; California Code, Welfare and Institutions Code, Division 2, Part 1, Chapter 2, Article 10; California Code, Probate Code, Division 4, Part 1, Chapter 1	✓*	✓	✓
Colorado	Colorado Revised Statutes, Title 19. Children's Code, §19-1-126; Title 24. Government-State, §24-60-1803	×	✓	✓
Delaware	Delaware Annotated Code, Title 31, Chapter 3, Child Welfare, Subchapter VI. Interstate Compact on the Placement of Children	×	✓	✓
Florida	Florida Statutes §§ 39; 409	×	✓	✓
Idaho	Idaho Code, Title 32, Domestic Relations, Chapter 11 Uniform Child Custody Jurisdiction and Enforcement Act; Chapter 17, De Facto Custodian Act	×	✓	✓
Indiana	Indiana Code Title 31, Family Law and Juvenile Law, § 28-6-1, Interstate Compact for the Placement of Children	×	×	✓
Iowa	Iowa Code Title VI Human Services, Chapter 232B-- Indian Child Welfare Act	✓	✓	✓
Kansas	Kansas State Annotated Statutes, Title 38, Minors	×	✓	×
Louisiana	Louisiana Children's Code	×	✓	×
Maine	Maine Revised Statutes, Title 22, Health and Welfare	×	✓	×
Michigan	Michigan Compiled Laws, Chapter XIIB, 712B.1, "Michigan Indian family preservation act"	✓	✓	✓
Minnesota	Minnesota Statutes, §§256.01, Commissioner of Human services; Powers, Duties; 257C, De Factor Custodian and Interested Third Party; 259, Change of Name, Adoption; 260.012 Duty to Ensure Placement Prevention and Family Reunification, Reasonable Efforts; 260.751-260.835, Minnesota Indian Family Preservation Act; 260.851-260.92, Interstate Compact on the Placement of Children	×	✓	✓
Mississippi	Mississippi Code, Title 93--Domestic Relations, Chapter 27-- Uniform Child Custody Jurisdiction and Enforcement Act. 93-27-104-- Application to Indian Tribes	×	✓	✓

Missouri	Missouri Revised Statutes, Title XXX Domestic Relations, Uniform Child Custody Jurisdiction and Enforcement Act, 452.715-- Application to Indian tribes	×	✓	✓
Montana	Montana Safe Haven Newborn Protection Act, Montana Annotated Code, §§40-6-405; 41-- Minors, Chapter --Child Abuse and Neglect; 42-2-604, Adoption; 42-4, Placements for Adoption; 52-2-117, Child Welfare Services-- Indian child welfare specialist	×	✓	✓
Nebraska	Nebraska Indian Child Welfare Act, Neb. Rev. Stat §§43-1103; 43-1501 to 1516	✓	✓	✓
New Mexico	Safe Haven for Infants, N.M. Stat. Ann. §24-22; Children's Code General Provisions Act, N.M. Stat. Ann. §32A-1-8, 14; Adoption Act, N.M. Stat. Ann. §32A-5; Kinship Guardianship, N.M. Stat. Ann. §40-10B	×	✓	✓
Nevada	Protection of Children from Abuse and Neglect, Nev. Rev. Stat. 432B.397	×	✓	×
North Carolina	N.C. Gen. Stat. §48, Adoption	×	✓	×
North Dakota	N.D. Cent. Code 14-14.1, Uniform Child Custody Jurisdiction and Enforcement Act; N.D. Cent. Code §27-20, Uniform Juvenile Court Act	×	✓	×
Oklahoma	Okla. Stat. tit. 10 §40.1 to 40.9, Indian Child Welfare Act	✓	✓	✓
Oregon	Or. Rev. Stat. §109.309, 312, 350, Adoption-- petition, consent, decree; Or. Rev. Stat. §125.025, Protective Proceedings-- court authority; Or. Rev. Stat. §418.627, Child Welfare Services-- Placement consistent with ICWA; Or. Rev. Stat. §§419A, 419B	×	✓	✓
South Carolina	S.C. Code Ann. §27-16-80, The Catawba Indian Claims Settlement	×	✓	×
South Dakota	S.D. Codified Laws Ann. §25-5A Voluntary Termination of Parental Relation; 26-7A, Juvenile Court; 26-8A Protection of Children from Abuse and Neglect	×	✓	✓
Tennessee	Tenn. Code Ann. §36-1, Adoption	×	✓	×
Utah	Utah Code Ann. §62A4a, Child Welfare Services	×	✓	×
Vermont	Vt. Stat. Ann. tit. 15A, Adoption Act; 33 Juvenile Proceedings	×	✓	×
Washington	Wash Rev. Code §§ 13.34, Dependency and Termination of Parent-Child Relationship; 13.36, Guardianship; 13.38.010 et. seq., Washington state Indian child welfare act; 26.10, Non-parental Action for Child Custody; 26.33, Adoption; 74.13, Child Welfare Service;	✓	✓	✓
Wisconsin	Wisc. Stat. §§46, Social Services; 822, Uniform Child Custody Jurisdiction and Enforcement Act; 938 Juvenile Justice Code	✓	✓	✓
Wyoming	Wyo. Stat. §14-3, Child Protection Act	×	✓	×

Table 3 indicates:

- 1. Rights and responsibilities of Indian parents:** These include consent to adoption procedures specific to Indian children, including withdrawal of consent to adoption; duty of parents to disclose Indigenous heritage for the purposes of determining applicability of ICWA; and termination of parental rights and procedures.
- 2. Cultural protections:** These include provisions for culturally appropriate services; provisions to maintain cultural connections; kinship care; customary care or custom adoption; and postadoption agreements.
- 3. Administrative concerns:** These include ICWA provisions for interstate placement; agreements between state social services directors and tribes; responsibility for ICWA

compliance; provisions on information collection, access to records, confidentiality, and disclosure of records; specific funds for adoption; and ICWA grants

- 4. Provisions from the 2016 ICWA Federal Guidelines:** Specifically, this section indicates whether the statute includes provisions pertaining to the “active efforts” standard and qualified expert witness requirement.

Table 3.

State forms of adoption protections for Indigenous children in the United States

Jurisdiction	Rights and Responsibilities of Indian Parents	Cultural Protections	Administrative Concerns	Provisions Consistent with 2015 Federal Guidelines [may predate the federal guidelines]
Alabama	×	✓	×	×
Alaska	✓	×	×	×
Arizona	×	×	×	×
California	×	✓	✓	×
Colorado	×	×	✓	×
Delaware	×	×	✓	×
Florida	×	×	✓	×
Idaho	×	×	×	×
Indiana	×	×	×	×
Iowa	✓	✓	✓	✓
Kansas	×	✓	×	×
Louisiana	×	×	✓	×
Maine	×	✓	✓	×
Michigan	✓	✓	✓	✓
Minnesota	×	✓	✓	✓
Mississippi	×	×	×	×
Missouri	×	×	×	×
Montana	✓	×	✓	✓
Nebraska	✓	✓	✓	✓
New Mexico	✓	✓	✓	×
Nevada	×	×	×	×
North Carolina	✓	×	×	×
North Dakota	×	×	×	✓
Oklahoma	×	✓	✓	×
Oregon	✓	✓	✓	✓
South Carolina	×	×	×	×
South Dakota	×	×	✓	×
Tennessee	×	×	✓	×

Utah	×	×	×	×
Vermont	✓	×	×	×
Washington	✓	✓	✓	✓
Wisconsin	✓	×	✓	✓
Wyoming	×	×	×	×

Conclusion

The tables underscore that adoption protections for Indigenous children vary considerably between states. Though federal ICWA applies in each state, lack of direct federal oversight of ICWA implementation likely hinders state compliance (Kern, 2009, p. 51). For this reason, incorporating part or all of federal ICWA’s provisions into state law may bolster ICWA compliance, as it promotes awareness of ICWA’s protections and provides state judges, attorneys, and social workers with additional incentive to abide by ICWA’s provisions (Summers & Wood, 2014, p. 5). However, ability to ensure ICWA compliance also depends on funding. Given the limited financial resources of many smaller tribes and other Indigenous organizations in the United States, as well as complications arising from the politics of federal recognition, funding to promote ICWA’s enforcement and implementation can prove elusive (ICWA Compliance Task Force, 2017, pp. vi, 3; Fort, 2012, p. 536). Thus, in drafting child welfare protections for Indigenous children, federal, provincial, and territorial lawmakers in Canada must also consider how to provide equitable support for such protections.

In order to further the aims of reconciliation, child welfare systems in Canada must acknowledge and respect the rights of Indigenous communities to care for their children. The provisions outlined in this spreadsheet represent some promising approaches to ensuring that Indigenous children remain connected to their families, communities, and cultures. Though legislative solutions represent one tool for combatting the overrepresentation of Indigenous children in care, comprehensive reform depends on transforming oppressive social structures. In concert with systematic reforms, such as policies that address poverty resultant from colonialism, federal, provincial, and territorial child welfare protections for Indigenous children may help preserve Indigenous families and communities. Doing so will enable Canada to truly realize the aims of reconciliation.

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