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Jurisdiction and funding models for Aboriginal child and family service agencies[1]

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Aboriginal child and family service models vary across Canada

Aboriginal children occupy a unique position in the Canadian child welfare system. From a social perspective, Aboriginal families experience many disadvantages related to poverty and a history of discrimination. At the same time, the special rights and legal status of Aboriginal people are recognized in Canadian legislation, and government child welfare policies increasingly have provisions that give Aboriginal people control over child welfare services for Aboriginal children. This information sheet provides a brief overview of the various models of child and family services for Aboriginal peoples across Canada (see Box below), with a special emphasis on models for First Nations peoples on reserves.

First Nations and Aboriginal child and family service agencies have evolved amid a lengthy history of disputes between the federal government, provincial/territorial governments, and First Nations governments. Across Canada, there is considerable variation in the authority that Aboriginal communities exert over the delivery of child welfare services to their communities, ranging from the provision of support services before and after child welfare investigations to authority over providing a full range of services on reserves and, in a few cases, off reserves. The type of service model available to a First Nations family is dependent on two factors: where the family lives and what type of agreement is in place between the federal, provincial/territorial and First Nation governments for the delivery of child welfare services to members of that First Nation.

Use of Terms

The terms "First Nations" and "Indian" refer to those persons identified and registered as "Indians" under the federal *Indian Act.* These people are often referred to as "Status Indians." The term "Aboriginal" is broader. The *Constitution Act* of 1982 defines Aboriginal people as Indians, Inuit, and Métis. As the term is commonly used today, however, Aboriginal includes people with registered and non-registered Indian Status, Inuit, and Métis.

Aboriginal heritage of knowledge

For thousands of years, North American Aboriginal peoples have lived in communities that practised effective ways to raise, care for, and protect their children. These ways, gathered and shaped over time, form a heritage of knowledge and are still useful and relevant for Aboriginal communities today. In fact, it is probably essential for Aboriginal communities to draw upon such knowledge to ensure the well-being of their children.[2]

Aboriginal peoples place great emphasis on the responsibility of the extended family and the community to ensure the well-being of children. An Aboriginal child in a traditional community has access to a large network of kinship and informal community care that provides a set of values and expectations for behaviour.

The Aboriginal outlook on life emphasizes the survival of the community as a whole. Children are seen as gifts from the Creator, to be nurtured within a flexible system that

includes extended family and community members who have the responsibility to provide safety and care for all. In Aboriginal cultures, the individuality of each child is respected, and children are taught the interconnected relationships between the land, their communities, and their ancestors.

Colonialism shaped policies on child welfare

Since they first came to North America in the late 1400s, Europeans primarily viewed the resources of the land (the "New World" as they called it) as theirs by right of "discovery" and, later, occupation. This perspective led to a widespread lack of attention to, and little interest in, preserving the cultures and the traditions of Aboriginal peoples.

From today's perspective, the behaviour of the early Europeans who came to Canada can be seen as arrogant, because they assumed power and believed their way of life was superior. They did little to preserve the traditional Aboriginal ways of life and did many things to destroy it. The overall approach to Aboriginal peoples by those newcomers of European descent is often referred to today as "colonialism."[3]

One aspect of colonialism has been particularly clear in government child welfare policy during the first hundred years after Confederation: a pronounced lack of confidence in Aboriginal ways of raising children. Over many decades, government policies generally reflected a belief that child raising based on European cultural traditions was superior to all other ways of parenting, and this led to practices such as the establishment of residential schools as well as the widespread adoption of Aboriginal children into non-Aboriginal families.

Another aspect of government policy was to assimilate Aboriginal people into the culture of the European colonists. In the residential schools, children were forbidden to speak the languages of their parents and to practice their spiritual and cultural traditions.[4]

The harm caused to First Nations children and communities by the dislocations of the residential schools and adoptions is now widely recognized. Many of these children experienced significant erosion of their cultural identity, and suffered profound, long-term negative psychological consequences that continue today.[5]

The current overrepresentation of Aboriginal children and youth in the child welfare system is well documented.[6] Aboriginal children in Canada are more likely to be investigated by child welfare agencies than non-Aboriginal children. Once investigated, cases involving Aboriginal children are more likely to be substantiated, more likely to require ongoing child welfare services, more than twice as likely to be placed in out-of-home care, and more likely to be brought to child welfare court.[7] There is significant evidence that the multiple disadvantages and challenges faced by some Aboriginal families today are symptomatic of intergenerational dysfunction stemming from the earlier disruptions to family life.[8]

Mealtime at First Nations Residential School, Norway House, 1956.
Photographic Image NA 3239-6 courtesy of Glenbow Museum Archives.

Adding to this harm, especially for First Nations peoples on reserves, has been a chronic lack of child welfare services characterized by decades-long disputes between federal and provincial governments about who should fund these services.

Child welfare for First Nations: Who runs services and who pays for them?

Disputes over funding and providing child welfare services: Nobody's responsibility?

When Canada was first constituted as a nation, the *Constitution Act* of 1867 designated First Nations peoples and the lands reserved for them to be the responsibility of the federal government, with the *Indian Act* being the primary piece of legislation for governing First Nations peoples. Child welfare matters for the general population were designated a provincial responsibility. It was not clear which level of government was to take responsibility for child welfare for First Nations peoples on reserves.

Although legal experts agree that the federal Parliament has the jurisdiction to legislate on at least some aspects of First Nations child welfare, it has not enacted any child welfare laws during the course of Canada's history.

Up until the 1950s, only the most minimal child welfare services were delivered on reserves, usually by federal Indian agents. In fact, these agents often did little more than place children in the residential school system. The provincial governments rarely offered provincial child welfare services to First Nations people on reserves, claiming that the First Nations were the responsibility of the federal government.

The federal *Indian Act* was revised in 1951 with the addition of Section 88. This clarified that provincial legislation applied to First Nations people by stating that all provincial laws of "general application" applied to First Nations, unless those laws were inconsistent with the *Indian Act* or dealt with matters for which the *Indian Act* made provision. Since the *Indian Act* contains no reference to child welfare, Section 88 implicitly extended provincial child welfare protection laws and services to the reserves.[9] However, provincial governments were reluctant to extend such services because the federal government did not provide funding.

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Funding disagreements between the federal and provincial/territorial governments, lasting more than 20 years, resulted in very few child and family services being available to First Nations people living on reserves compared to levels available to the general population. Despite the same provincial laws being applicable throughout the provinces, provincial child welfare agencies often failed to provide supportive services on reserves, generally only intervening in "life and death situations," and then frequently responding by permanently removing children from their families and communities.

In the 1970s, the courts indicated that this situation was discriminatory and illegal, and would not be tolerated. In response, the two levels of government started to make bilateral agreements under which provincial/territorial governments were authorized to deliver child welfare services on reserves, with the federal Department of Indian and Northern Affairs Canada (INAC) reimbursing the provinces/territories for all or part of the services provided.

A Supreme Court of Canada landmark case, *Natural Parents* v. *Superintendent of Child Welfare*[10] confirmed the provinces' legal responsibility to provide child welfare services on reserves. Despite this, some provincial/territorial governments continued to be reluctant to extend a full range of child welfare services to reserves, claiming that the federal government should more fully fund these services.

How did this affect kids' lives?

As the residential schools began to close and schools were built in the reserves, increasing numbers of First Nations children were able to grow up in their families and communities during their school years. However, poverty levels were high, funding levels for child welfare services were low, and provincial and territorial child welfare workers offered few support services to families struggling to raise their children. Instead, First Nations children were apprehended in large numbers by child welfare workers and adopted into non-Aboriginal homes. Over 11,000 children of Indian status were adopted between 1960 and 1990, with as many as one-third of all children in some reserves being permanently removed by child welfare agencies.[11] There is now a large body of literature to document the destructive effects of these apprehensions, effects that, in the dislocation from their cultural identities that Aboriginal children experienced, were in some ways similar to those of the residential school experiences.[12]

Modern context: First Nations child and family service agencies

First Nations have mounted significant advocacy for rights of self-government over the child welfare programs that affect their lives, and began developing their own child welfare organizations in the

1970s. A major step forward occurred with the *Canadian Charter of Rights and Freedoms* (1982), which recognized and affirmed the rights of Aboriginal people. After the *Charter* came into effect, the federal and provincial/territorial governments, as well as the courts, increased their recognition of Aboriginal rights, and provincial/territorial child welfare legislation began to be enacted which gave greater recognition to the needs and status of Aboriginal children, allowing First Nations child and family service agencies to be established.

The development of First Nations child and family service agencies gained momentum in 1991 when the federal Department of Indian and Northern Affairs Canada established a framework policy, known as Directive 20-1, to provide federal funding for child welfare services to First Nations communities. This policy allowed First Nations to control and manage child and family service agencies that operate according to provincial and territorial child welfare laws, and to receive federal funding for doing so. Since the implementation of Directive 20-1, more than 110 First Nations Child and Family service agencies have been established.[13] The Directive applies throughout Canada with the exception of Ontario. In Ontario, First Nations child welfare agencies are funded by the provincial government, which in turn receives federal money through a funding formula set out under the 1965 Indian Welfare Agreement.[14]

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Jurisdictional issues continue to be disputed today. Although the provinces have argued that the federal government must fund child welfare services on reserves, in 1997, Justice McInnes of the Manitoba Court of Queen's Bench held that the provincial governments must ensure that status Indian children on reserves receive equal access to services and equal benefit under child welfare law.[15]

Across Canada, the First Nations child welfare agencies on reserves are funded and structured in a variety of ways. These "jurisdiction and funding models" differ because they resulted from agreements made by individual First Nations, provincial governments, and the federal government. The main jurisdiction and funding models are summarized below.

First Nations agencies based on reserves: Several models of jurisdiction

Delegated on-reserve agencies: The most common model

The "delegated agreement" is the most common model for the provision of First Nations child welfare services on reserves. In this model, the provincial and federal governments negotiate an agreement with a First Nation or Tribal Council, and the province delegates authority for provision of child welfare services to a First Nations child and family service agency that is established pursuant to the agreement. This agency, often referred to informally as a delegated agency, operates according to provincial child welfare legislation. The federal government provides full or partial funding for the agency according to Directive 20-1 (or, in Ontario, according to a separate funding agreement with the province and the federal government, as described below).

In a delegated agreement, First Nation agencies may be delegated to provide a full range of child protection services (fully delegated or fully mandated), or only family support and guardianship services (partially delegated or partially mandated). The family court judges who deal with child welfare cases are responsible for cases involving intervention such as apprehension, and the making of guardianship and adoption orders for Aboriginal children under delegated agreements.

The strength of this model is that it:

- gives First Nations an opportunity to apply provincial laws in ways that are as consistent as possible with First Nations values, beliefs and customs; and
- is a capacity-building measure, with the ultimate goal of many First Nations being to develop self-government.

Approximately 92 First Nations child and family service agencies are fully delegated at the present time, with responsibility for a full range of child welfare services. There are an estimated 21 partially delegated agencies, of which over half are located in British Columbia (C. Blackstock, personal communication, October 3, 2005).

Delegated on-reserve agencies in Ontario are funded by the province with federal flow-through

This model of funding is used only in Ontario. First Nations child and family service agencies receive delegated child welfare authority for either the full range of child welfare services (fully mandated), or a partial range of services such as foster home recruitment and family support (pre-mandated). First Nations child and family service agencies in Ontario are funded by the province, which in turn receives federal money according to a funding formula set out under the 1965 Indian Welfare Agreement.[16] These agencies apply provincial law, and as with other child welfare cases in the parts of the province covered by the agreements, the Ontario Court of Justice is responsible for dealing with cases involving legal intervention, such as apprehension, and the making of wardship and adoption orders.

Spallumcheen Band by-law: A unique situation

The *Indian Act* allows band Chiefs and Councils to pass band by-laws that apply on reserves. These by-laws must be approved by the Minister of the federal Department of Indian Affairs in order to take effect.

In the 1980s, the Spallumcheen First Nation in British Columbia passed a by-law giving itself sole jurisdiction over child and family services on its reserve lands.[17] This by-law sets standards for the provision of child welfare services and decision-making, and stipulates that decisions about cases are to be made by the Spallumcheen First Nation rather than the provincial courts. After receiving the agreement of the British Columbia Minister of Human Resources to recognize the by-law, the band signed an agreement with the federal government, which agreed to support and fund services. The Spallumcheen by-law has been challenged before the courts, which have upheld the by-law and the jurisdiction of the Spallumcheen First Nation.[18] The Department of Indian Affairs, however, has made it clear that no further child welfare band by-laws will be authorized, so this remains the only example of this model in Canada.

Some tripartite treaties and agreements approach self-government

The treaties made between First Nations governments and the federal government set out the responsibilities and treaty rights for each party. The extent to which existing treaties affirm community law-making by First Nations with respect to child welfare differs from treaty to treaty. In British Columbia, where many treaties are still under negotiation, child welfare is often a core item over which First Nations seek jurisdiction.

Although many First Nations would like to have sole jurisdictional authority for their child and family services, a First Nations self-government model has yet to be fully implemented anywhere in Canada.

Some treaties, such as the Nisga'a Treaty, include provisions for the development of Nisga'a laws governing child and family services, provided those laws meet provincial standards. This is part of a treaty that resolved land claims issues and gives a significant degree of self-government to the Nisga'a people in British Columbia. Although the Nisga'a

Bands and band councils

There are over six hundred Indian reserves in Canada. These are areas of land that have been set aside by the government for the exclusive use of Aboriginal peoples. Most reserves were established pursuant to a treaty between an Indian community and the Crown. Status Indians, who are recognized as having rights under the *Indian Act*, are almost all members of a particular band. A band is a political unit, and members of a band are governed by an elected band Council and Chief. Generally, one band is responsible for each reserve, though there are situations where two or more reserves are joined into a single band. Many band members live on a reserve, but band members may live elsewhere and still retain some of the rights of band membership.[19]

currently operate a delegated child and family service agency, plans are underway to draft and implement child welfare laws based on their traditional laws.[20]

The provincial and federal governments have, in some cases, transferred their authority for child welfare to a First Nation without a treaty, but rather through a tripartite (three-way) agreement that gives the First Nation full responsibility for child welfare services for members. The terms of these agreements often require that the First Nation observe provincial standards or regulations in the creation of their laws. For example, the Sechelt First Nation in British Columbia has assumed the ability to enact child welfare legislation under this form of tripartite agreement.[21]

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Not all reserves have First Nations child welfare agencies

Although the majority of reserves now have a First Nations–controlled child welfare agency, this is not the case for all reserves. A community may lack the resources to establish such a service, or the community may not have been able to reach an agreement with the federal and provincial (or territorial) governments for such an agency. Reserves with fewer than 251 Status Indian children are ineligible for child and family service funding from the federal government under Directive 20-1. In these situations, First Nation children and families receive child welfare services from non-First Nations agencies acting under provincial legislation.

Child and family service agencies serving off-reserve communities are growing

Child welfare law and practice has been slowly evolving so that no matter where they reside, children with an Aboriginal heritage, including Métis and Inuit as well as both Status and non-Status First Nations, are being accorded some recognition of their cultural heritage as a factor in their best interest.[22] With more than half of all Aboriginal people in Canada now living off-reserve, many of them in urban settings, Aboriginal child and family service agencies are expanding to serve off-reserve communities.

Members of a First Nation who are living off-reserve continue to have at least some of the rights of band members, and band councils may be involved in child welfare proceedings in the courts concerning children who live off-reserve. Some First Nations child and family service agencies on reserves are extending their mandates to provide services to members living off-reserve, and some provide services to all Aboriginal peoples resident off-reserve within a specific geographic territory.

In Nova Scotia, the Mi'kmaw Family and Children's Services of Nova Scotia provides services to First Nations people on reserves province-wide and is able to continue services for a three-month period if a family moves to an off-reserve location. After that time, the case is transferred to the local jurisdiction if a longer intervention is required. The Mi'kmaw agency also provides culturally appropriate services to approximately 60 Status and Non-Status Indian, Métis and Inuit children who are in permanent care with other agencies (Joan Glode, personal communication, September 29, 2005).

Manitoba provides the broadest range of services to Aboriginal people living off reserves. As a result of the Aboriginal Justice Inquiry-Child Welfare Initiative, there are four province-wide child welfare Authorities with concurrent jurisdiction: two First Nations (northern and southern), one Métis, and one general. Aboriginal people receiving child welfare services have the opportunity to select the Authority that they prefer.[23]

Outside of Manitoba, three urban areas in Canada (Victoria, Vancouver and Toronto) have mandated Aboriginal child and family service agencies providing a full range of services under provincial legislation and funding. In most cases, Aboriginal child and family service agencies in urban settings deliver services to a diverse population of Aboriginal peoples and often have protocol agreements with other First Nations or Aboriginal child and family service agencies operating in the province to ensure consistency of service for clients who move from one area to another. [24]

In situations where there is no Aboriginal child and family service agency available to serve them, urban or off-reserve Aboriginal families receive child welfare services from the provinces or provincially licensed child welfare agencies.

Where the statutory child welfare agency is not controlled by the First Nations community, there are increasingly various other non-mandated social service agencies operated by Aboriginal people that provide culturally appropriate services to Aboriginal children, youth, and families. They receive funding from a variety of sources including federal, provincial, or municipal governments, and may provide support for families and children receiving child welfare services from non-Aboriginal controlled agencies.

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2 Bennett, M., Blackstock, C., & De La Ronde, R. (2005). *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada*. Winnipeg, MB: The First Nations Child and Family Caring Society of Canada.

3 Ibid.

4 Milloy, J.S. (1999). *A National Crime: the Canadian government and the residential school system, 1879 to 1986*. Winnipeg: MB: University of Manitoba Press.

5 Sinclair, M., Bala, N., Lilles, H. & Blackstock, C. (2004). Aboriginal Child Welfare. In: N. Bala, M. Zapf, R. Williams, R. Vogl & J. Hornick (Eds.), *Canadian Child Welfare Law: Children, Families and the State*. 2nd Ed. (pp. 199–244). Toronto: Thompson Educational Publishing.

6 Approximately 5% of all children in Canada are Aboriginal, but an estimated 40% of children and youth placed in out-of-home care in Canada are Aboriginal. Between 1995 and 2001, there was a 71.5% increase in the number of First Nations children from reserves being placed into care. See Trocmé, N., Knoke, D. & Blackstock, C. (2004). Pathways to overrepresentation of aboriginal children in Canada's child welfare system. *Social Services Review*, *78* (4), 577–601.

7 Trocmé, N., Knoke, D., Shangreaux, C., Fallon, B. & MacLaurin, B. (2005). The experience of First Nations children coming into contact with the child welfare system in Canada: the Canadian incidence study on reported abuse and neglect *(CIS-2003)*. In: First Nations Child and Family Caring Society of Canada. (2005). *Wen:de: we are coming to the light of day*. Ottawa, Ontario: Author.

8 Bennett, M., Blackstock, C., & De La Ronde, R. (2005). *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada*. Winnipeg, MB: The First Nations Child and Family Caring Society of Canada.

9 Sinclair, M., Bala, N., Lilles, H. & Blackstock, C. (2004). Aboriginal Child Welfare. In: N. Bala, M. Zapf, R. Williams, R. Vogl & J. Hornick (Eds.), *Canadian Child Welfare Law: Children, Families and the State*. 2nd Ed. (pp. 199–244). Toronto: Thompson Educational Publishing

10 Natural Parents v. Superintendent of Child Welfare, 1976, 60 D.L.R. 3rd 148 S.C.C.

11 Royal Commission on Aboriginal Peoples. (1996). *Report of the Royal Commission on Aboriginal Peoples.* Ottawa: Indian and Northern Affairs Canada.

12 Bennett, M., Blackstock, C., & De La Ronde, R. (2005). *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada*. Winnipeg, MB: The First Nations Child and Family Caring Society of Canada.

13 Blackstock, C. (2005). *Aboriginal Child Welfare Jurisdiction and Funding: Draft Fact Sheet*. Paper prepared for the First Nations Child and Family Caring Society of Canada. Ottawa, Ontario.

14 Canada and the Province of Ontario. (1965). *Memorandum of Agreement Respecting Welfare Programs for Indians between Canada and Ontario.* Ottawa, Ontario.

15 MacDonald, K. & Walman, K. (2005). *Jurisdictional Issues: First Nation Child and Family Services*. Paper prepared for the First Nations Child and Family Caring Society of Canada. Ottawa, Ontario.

16 Canada and the Province of Ontario. (1965). *Memorandum of Agreement Respecting Welfare Programs for Indians between Canada and Ontario.* Ottawa, Ontario.

17 S. (E.G.) v. Spallumcheen Band Council, (1999) 2 C.N.L.R. 306 (B.C. Prov. Ct).

18 Union of BC Indian Chiefs. (2002). *Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority on Child Welfare*. Union of BC Indian Chiefs, British Columbia.

19 Sinclair, M., Bala, N.,Lilles, H. & Blackstock, C. (2004). Aboriginal Child Welfare. In: N. Bala, M. Zapf, R. Williams, R. Vogl & J. Hornick (Eds.), *Canadian Child Welfare Law: Children, Families and the State*. 2nd Ed. (pp. 199–244). Toronto: Thompson Educational Publishing.

20 Blackstock, C. (2005). *Aboriginal Child Welfare Jurisdiction and Funding: Draft Fact Sheet*. Paper prepared for the First Nations Child and Family Caring Society of Canada. Ottawa, Ontario.

21 Ibid.

22 Sinclair, M., Bala, N.,Lilles, H. & Blackstock, C. (2004). Aboriginal Child Welfare. In: N. Bala, M. Zapf, R. Williams, R. Vogl & J. Hornick (Eds.), *Canadian Child Welfare Law: Children, Families and the State*. 2nd Ed. (pp. 199–244). Toronto: Thompson Educational Publishing.

23 Aboriginal Justice Inquiry Child Welfare Initiative. (2001). *Conceptual Plan for the Restructuring of Child Welfare in Manitoba.* Winnipeg, Manitoba: Joint Management Committee.

24 Blackstock, C. (2005). *Jurisdiction and Funding Models for Aboriginal Child and Family Service Agencies Serving Off Reserve Communities*. Paper prepared for the First Nations Child and Family Caring Society of Canada. Ottawa, Ontario.

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