

Children Need Families, Not Courtrooms: Alternatives to Adversarial Litigation in Child Welfare

**A Special Report by the
Office of the Children's Advocate
Manitoba**

Prepared by Dr. David Milward

March 2016

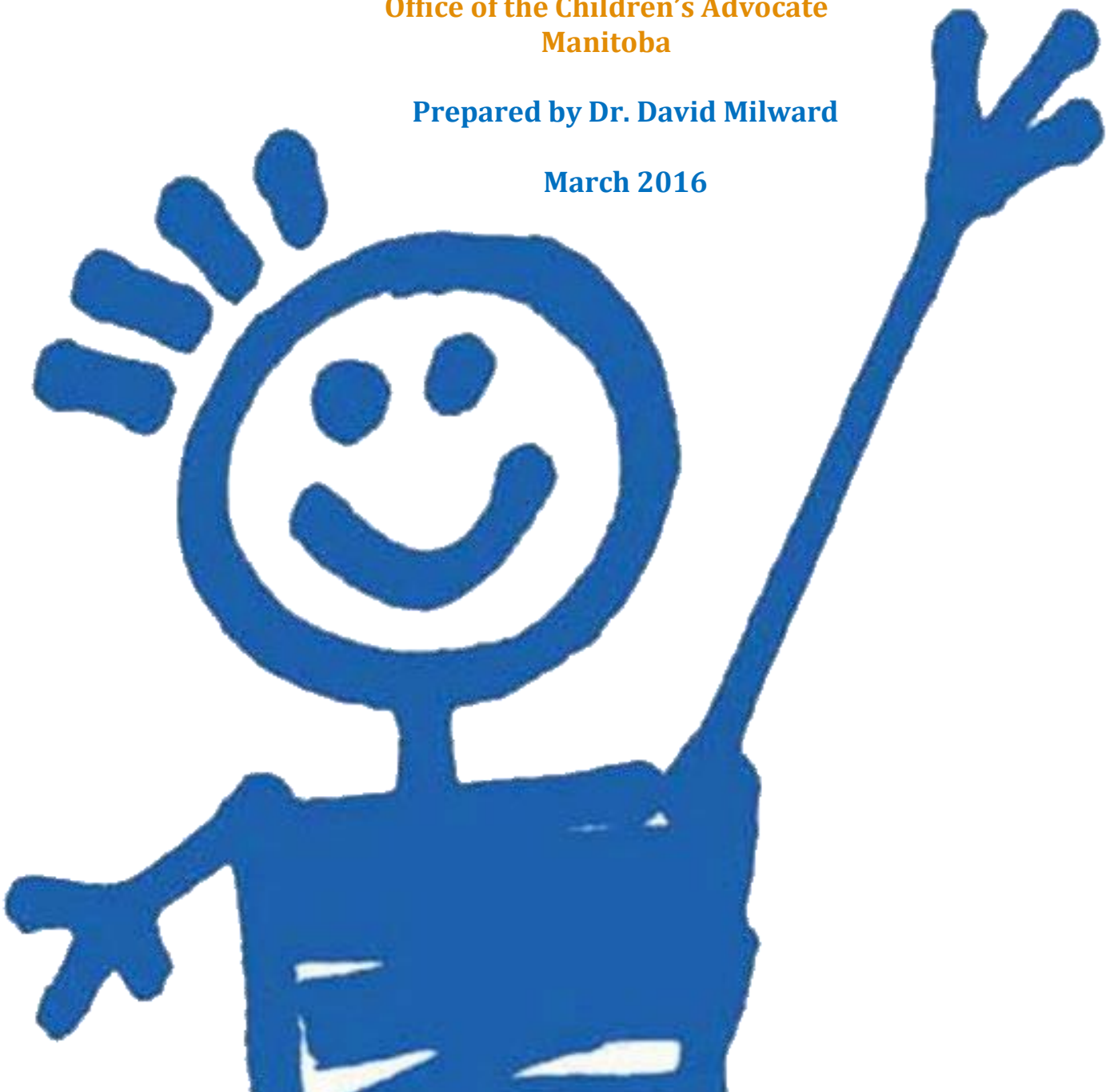


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Introduction

The purpose of this report is to explore the viability of mediation-based alternatives to resolving child welfare matters that are not grounded in common law adversarial procedure. There are indeed identifiable problems with resolving child welfare matters in an adversarial forum, including: the furthering of hostility between the parties in already tense situations following apprehension, a latent perception on the part of birth families of judicial deference to child welfare authorities, a perception of child welfare authorities having inordinate power to effect their preferred outcomes, unrealistic expectations being placed on biological parents during temporary guardianship orders, and insufficient resources being made available to meet those expectations. There is definitely an imperative to explore more constructive avenues.

The available literature suggests that there are definite benefits to be realized through mediation-based alternatives. There is also limited yet solid empirical evidence to validate that the benefits can be realized. The benefits include: greater willingness by family members to participate in the process, greater satisfaction rates, greater settlement rates, greater rates of compliance with settlements, and increased safety and stability for the children.

There are, however, potential concerns about what can go wrong with trying to implement mediation-based alternatives. These include: a perception by the birth family that child welfare social workers will continue to enjoy inordinate power to affect the outcome, perceptions that the mediator will be tilted in favour of the child welfare agency, child welfare lawyers and social workers alike experiencing difficulty with engaging or buying into a mediation-based alternative, and resource demands.

The report proceeds to make a series of recommendations. The fundamental first requirement for successful implementation of a mediation-based alternative is a process of consultation that engages the stake holders, including judges, child welfare lawyers, social workers, and community members as well. Part of the consultation process is to encourage the stakeholders to buy in following an explanation of the potential benefits, and an alleviation of concerns that they may have. Another part of the consultation is to gauge if there are any concerns or issues specific to a particular locality where an alternative may be pursued, in order to take them into account for the sake of a successful implementation. Other recommendations include: providing mediators who are trained for mediation specifically geared towards child welfare matters, ensuring mediator impartiality, and investing sufficient resources and supports so that supervisory plans reached during mediation have a real chance to lead to positive outcomes.

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The report will sometimes, while considering potential benefits, concerns, and recommendations, devote special attention to issues specific to Aboriginal peoples and child welfare. The obvious reason for this emphasis is Aboriginal over-representation in child welfare apprehensions, particularly in Manitoba. A report by the Auditor General of Canada indicates that First Nations agencies provide at least partial services to 442 of 606 First Nations groups.¹ 30% of First Nations children live in areas where First Nations agencies are responsible for conducting child welfare investigations.² Cindy Blackstock and Nico Trocmé explain:

Manitoba provincial data from 2003 indicate that although Aboriginal children compose 70% of the children in care in that province, Aboriginal families were benefiting from only 30% of the child welfare family support budget (personal communication, Elsie Flette, CEO of Southern First Nations Child Welfare Authority 2004). This is particularly distressing as the province of Manitoba has traditionally been among the most supportive of Aboriginal child welfare in Canada.³

Substantiated child welfare investigations for physical abuse were 5.97 per 1000 Aboriginal children compared to 5.33 per 1000 non-Aboriginal children, 1.00 compared to 0.60 for sexual abuse, 32.33 compared to 4.98 for neglect, 6.77 compared to 3.07 for emotional maltreatment, and 11.24 compared to 5.87 for exposure to domestic violence.⁴

Special issues that are specific to Aboriginal child welfare include: the risk of placing Aboriginal children in unsafe homes, the problems of trying to provide effective services in isolated Aboriginal communities, and accounting for Aboriginal cultural notions of family and interpersonal interaction.

Lastly, the report will explore the use of preventative initiatives as a more constructive avenue for minimizing the need for after the fact apprehensions and subsequent court room proceedings. The report now begins with a basic overview of adversarial process as a starting point.

¹ Auditor General of Canada, *First Nations child and family services program - Indian and Northern Affairs Canada* (Ottawa: Office of the Auditor General, 2008).

² Vandna Sinha & Y. Leduc, *Geographic boundaries and child populations served by First Nations and provincial/territorial child welfare agencies: Internal technical report. Technical report for the First Nations component of the Canadian Incidence Study of Reported Child Abuse and Neglect* (Ottawa: Public Health Agency of Canada, 2008).

³ Cindy Blackstock & Nico Trocmé, "Community-Based Child Welfare for Aboriginal Children: Supporting Resilience Through Structural Change" (2005) 24 *Social Policy Journal of New Zealand* 12 at 28.

⁴ Nico Trocmé *et al.*, *Understanding the Over-Representation of First Nations Children in Canada's Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect* (Ottawa: First Nations Child and Family Caring Society, 2006) at 4.

Adversarial Process Explained

Child welfare matters in court typically involve applications by a child welfare agency, following the initial apprehension of a child from the birth family, to secure (as a matter of probability) a temporary guardianship order or in some instances a permanent guardianship order which may lead to adoption. Such hearings are conducted according to the concept of adversarial justice, meaning that they are overseen by an impartial judge to decide whether the child welfare authority's application should be granted. The judge is a passive arbiter in the sense that the onus to procure and lead evidence is left with the parties themselves, in contrast to inquisitorial jurisdictions where judges are often active investigators.⁵ Each party to an adversarial prosecution competes with the other party through various means such as giving evidence in support of their cases, cross-examining adverse witnesses, and making legal and factual arguments to persuade the judge that its position is the correct one. The birth parents are usually represented by their own lawyer, often on a legal aid tariff, while the child welfare authority also retains its own counsel. The judge then renders a decision based upon the evidence presented and the arguments that have been made after both parties have had a fair chance to present their cases.⁶

There are definite reasons why common law legal systems employ adversarial procedure. Proponents hold that adversarial justice is able to facilitate the ability of the court to discover the truth of what happened in at least two ways. First, it is thought that the competitive structure of adversarial process provides each party with a tactical incentive to lead evidence in support of their positions, thereby leading to a greater sum of information available for the court's consideration.⁷ Second, it is thought that the practice of cross-examination is a win-win proposition as far as discovering the truth goes. If a witness' testimony holds up even after cross-examination, its value is enhanced and the trier of fact can then confidently rely on the testimony as an accurate accounting of the truth. If the cross-examination exposes defects in the witness' testimony, it reveals to the trier of fact why the testimony should be given little credence.⁸

⁵ Felicity Nagorcka *et al.*, "Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice" (2005) 29 Melbourne University Law Review 448.

⁶ *Ibid.*; Gerald Walpin, "America's Adversarial and Jury Systems: More Likely to Do Justice" (2003) 26 Harvard Journal of Law and Public Policy 1; Simon Brinott & Henry Mares, "The History and Theory of the Adversarial and Inquisitorial Systems of Law" (2004) 16 *Legaldade* 16.

⁷ Thomas Weigend, "Is the Criminal Process About Truth?: A German Perspective" (2003) 26 Harvard Journal of Law and Public Policy 1; Lisa Dufraimont, "Evidence Law and the Jury: A Reassessment" (2008) 53 McGill Law Journal 199 at 234-235.

⁸ Weigend, *ibid.*

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Another perceived benefit is that adversarial procedure is deemed necessary to act as a check against the prosecution as a state actor.⁹ In the particular context of child welfare, it could be suggested that the birth parents, perhaps uneducated regarding child welfare legislation and court room procedures, will be in need of the assistance of counsel to act as a check against child welfare authorities that will possess far greater familiarity with child welfare legislation, and resources to retain counsel full time. There are, however, problems with the use of adversarial procedures that are particular to child welfare matters.

Problems with Adversarial Process in Child Welfare Matters

Hostile Relations

A concern that is routinely expressed by restorative justice proponents is that adversarial processes encourage the participants to behave in a hostile fashion towards each other, thus preventing more constructive methods of reaching a resolution. These concerns extend to child welfare as well. Numerous studies have suggested that the adversarial process of child welfare courts can pit the social workers, the parents, and the children all against each other. It encourages rigid position-taking. It becomes a stumbling block to co-operation, and communication, and furthers hostility between the participants.¹⁰

It has also been suggested that lawyers, as adversarial advocates, may contribute to the problems. Sally Palmer argues that lawyers may encourage parents to adopt an inimical stance towards child protection services, preventing reception of helpful services, and undermining the social workers' role of protecting children, working with parents, and providing services.¹¹ Clare Huntington takes it a little further, suggesting that the problems may be exacerbated by lawyers who are insensitive to constraints on child welfare workers and concerns of parents and children.¹²

⁹ Robert Schopp, "Pursuing Non-Adversarial Justice within an Adversarial Structure" (2011) 37 Monash University Law Review 1.

¹⁰ Bernard Mayer, "Mediation in Child Protection Cases: The Impact of Third-Party Intervention on Parental Compliance Attitudes" in John Kelly, (ed.) *Empirical Research in Divorce and Family Mediation* (San Francisco: Jossey Bass, 1989) 89; The Honourable Leonard Edwards & Steven Baron, "Alternatives to Contested Litigation in Child Abuse and Neglect Cases" (1995) 33:3 Family & Conciliation Courts Review 275 at 278; Sally Palmer, "Mediation in Child Protection Cases: An Alternative to the Adversary System" (1989) 68:1 Child Welfare 21.

¹¹ Sally Palmer, *ibid.*

¹² Gerry McNeilly, "Mediation in Child Protection: an Ontario Perspective" (1997) 35:2 Family & Conciliation Courts Review 206 at 211.

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The point in time at which a child welfare matter finds its way into the court system may be a problem as well. Gerry McNeilly suggests that concerns about hostility with adversarial processes heightened in the sense that child welfare systems do not respond until the worst possible point in time, when the family situation reaches a crisis.¹³

In 2010, the government of Saskatchewan commissioned a child welfare review report based on consultations through stakeholder meetings that included:

- 200 from the Federation of Saskatchewan Indian Nations, including chiefs, Elders, agency staff, and others who had direct involvement with the child welfare system.
- 154 from the Metis Nation of Saskatchewan.
- 140 from the Provincial Regional Intersectoral Committees, including people who provided services such as health and education.
- The Saskatchewan Youth and Care Custody Network
- 244 front line staff, 89 supervisory staff, and 25 managerial level staff from the Ministry of Social Services.¹⁴

The report expressed concerns about the use of adversarial process as follows:

Many stakeholders indicated the court system is adversarial, and too many families have to go to court. From the perspective of families in the system, many do not have the resources to be fairly represented when they do become involved in court. Furthermore, many parents do not understand the complexities of the legal process. Provincial Court Judges and Court of Queen's Bench Judges would prefer to see more options available to resolve situations through pre-court processes.¹⁵

There are also concerns with other key participants during a contested child welfare matter as well.

Inordinate Social Worker Power

Another concern is perceptions that social workers can exercise inordinate power over the birth families, both during court room applications and during interim supervision or custody periods. There is no doubt that child welfare legislation gives social workers considerable powers for purposes of apprehension. Section 18.4(1) of Manitoba's *Child and Family Services Act*, C.C.S.M. c. 80, gives social workers the power to investigate the home when there's an allegation of child abuse or neglect, including the ability to enter the home that is under investigation and to

¹³ Clare Huntington, "Missing Parents" (2008) 42:1 Family Law Quarterly 131 at 133.

¹⁴ Bob Pringle *et al.*, *Saskatchewan Child Welfare Review Panel Report: For the Good of our Children and Youth. A New Vision, A New Direction* (Regina: Government of Saskatchewan, 2010) at 10.

¹⁵ *Ibid.* at 39.

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conduct obligatory interviews with family members. A social worker may apprehend a child without warrant on reasonable grounds that the child is in need of protection (s. 21(1)). Section 21(2) allows a social worker to affect entry into the home without warrant when there are reasonable grounds to believe that a child is in immediate danger or is unable to take care of him or herself and left without supervision. Under s. 21(5), a social worker may call upon a police officer for assistance with affecting an apprehension. Social workers having such powers may lead to concerns about mistreatment and insensitivity towards the families they are dealing with, greater willingness to use apprehension when alternatives may be more appropriate, and tight control over the devising of any supervision or visitation plans.

Some studies have validated these concerns. Mary Ivec, Valerie Braithwaite and Nathan Harris did a qualitative study based on interviews with 45 Indigenous parents and caregivers in Australia.¹⁶ Themes that they noticed in the responses included:

- Anger over the past, child welfare seen as a continuation of Stolen Generations.¹⁷
- Feeling of disrespect from and being discriminated against by child welfare authorities. Stigmatized and distrusted by child welfare authorities.¹⁸
- Child welfare authorities making promises of services and assistance that weren't followed through.¹⁹
- Feeling that child welfare authorities didn't understand the importance of family bonds that were being disrupted.²⁰

Joanne Wildgoose's study was based on an empirical review of 162 child welfare court files in Windsor, Ontario.²¹ More than half started by most intrusive action possible, apprehension. None started by judicial pre-authorization of apprehension.²² Only 6 saw adequate notice of the allegations provided to the parents.²³ Only 15 saw interim access granted to parents.²⁴ Almost 50% of cases saw parents not receiving legal representation. 63% cases saw children not receiving direct legal representation.²⁵

¹⁶ Mary Ivec, Valerie Braithwaite & Nathan Harris, "'Resetting the Relationship' in Indigenous Child Protection: Public Hope and Private Reality" (2012) 34:1 Law & Policy 80.

¹⁷ *Ibid.* at p. 87-88.

¹⁸ *Ibid.* at 87-91.

¹⁹ *Ibid.* at 91-92.

²⁰ *Ibid.* at 92-93.

²¹ Joanne Wildgoose, "Alternative Dispute Resolution of Child Welfare Cases" (1987) 6 Can. J. Fam. L. 61.

²² *Ibid.* at 63.

²³ *Ibid.* at 63.

²⁴ *Ibid.* at 63.

²⁵ *Ibid.* at 63.

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A qualitative study by Ka Ni Kahnichihk was based on in-depth interviews with 32 Aboriginal women who were at risk of or had their children apprehended, 6 lawyers representing Aboriginal women in the child welfare system, 6 community workers who worked with Aboriginal women in contact with the child welfare system.²⁶ Issues expressed by the participants included:

- Mothers felt that going through programming after apprehension was like playing a game, or jumping through hoops.²⁷
- Poor communication by social workers, being left out of the loop, no formation of a plan, or not following through when the social work said that a plan would be formed.²⁸
- Going through many social workers, with no chance to form a stable working relationship.²⁹
- Condescending treatment by social workers.³⁰
- Viewed social workers as trying to force them to parent with non-Aboriginal methods as another way of assimilation. Social workers often wouldn't allow attendance at cultural events like pow wows. They viewed their own children as receiving inadequate exposure of children to their own cultures.³¹
- Overly frequent and stringent testing for alcohol and drugs. Perceptions that it was not so much to ensure compliance, but to fish for a pretext to apprehend children or to say that plan has failed. Invasion of privacy was also a frequent concern.³²
- Some mothers felt that social workers would deliberately behave in a way designed to provoke the mothers into angry or emotional responses.³³
- Visitation rights inconsistent and at the whim of the social workers.³⁴

The concerns may be exacerbated in the sense that little is done to check the power of the social workers once child welfare matters proceed to court.

²⁶ Marlyn Bennett, *"Jumping Through Hoops": A Manitoba Study Examining the Experiences and Reflections of Aboriginal Mothers Involved with Child Welfare and Legal Systems Respecting Child Protection Matters*" (Winnipeg: First Nations Child & Family Protection Caring Society of Canada, 2008) at 15.

²⁷ *Ibid.* at 48-49.

²⁸ *Ibid.* at 50.

²⁹ *Ibid.* at 51.

³⁰ *Ibid.* at 52.

³¹ *Ibid.* at 53-54.

³² *Ibid.* at 55-56.

³³ *Ibid.* at 57.

³⁴ *Ibid.* at 60.

Judicial Deference

There have been complaints of judicial indeterminacy, and infusion of subjective personal values into decision-making process, during child welfare matters.³⁵ More specifically, Ashley Smith alleges that courts favour an economics approach that favours white middle-classed families and marginalizes Aboriginal identity and cultural ties.³⁶ Bernd Walter, Janine Isenegger and Nicolas Bala take it a little further and argue that judges are usually deferential to social workers. They also raise the concern that so-called consent orders (typically resulting in parents losing interim custody) may be illusory as parents find both the judges and the social workers stacked against them, amounting to a very real form of coercion.³⁷

Empirical studies may have validated these concerns. In Wildgoose's study 80% cases saw court granting disposition being very similar to what the child welfare agency sought (e.g. duration being the only difference).³⁸ 47% of cases saw prior involvement by child welfare agency.³⁹ All of these concerns may be further exacerbated in that the parents themselves enjoy a profound lack of power during the whole process.

Inadequate Representation for Parents

Parents may be especially vulnerable during the whole process as they typically lack sophisticated knowledge of its workings. Adversarial proceedings demands parents obtain effective representation by counsel. The Supreme Court decision of *New Brunswick (Minister of Health & Community Services) v. G.I.* recognizes that there is a Charter right to state funded counsel for indigent parents who've had their children apprehended.⁴⁰ There nonetheless remain gaps. A study by Kate Kahoe and David Wiseman found that many parents don't qualify for legal aid and yet do not assess themselves as being able to afford a lawyer. Their reported case law review found that many applications for state funded counsel under *G.I.* when not qualifying for legal aid do not succeed.⁴¹ Many of the participants in the Ka Ni Kahnichihk study also made these complaints:

³⁵ Bernd Walter, Janine Alison Isenegger & Nicolas Bala, "Best Interests in Child Protection Proceedings: Implications and Alternatives" (1995) 12 Can. J. Fam. L. 367.

³⁶ Ashley Smith, "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Lose or Save Our Children?" (2009) 25 Can. J. Fam. L. 297; Tae Mee Park, "In the Best Interests of Aboriginal Children" (2003) 16 W.R.L.S.I. 43.

³⁷ *Ibid.* at 374.

³⁸ Joanne Wildgoose, *supra* note 21 at 63.

³⁹ *Ibid.* at 63-64.

⁴⁰ *New Brunswick (Minister of Health & Community Services) v. G.I.*, [1999] 3 S.C.R. 46.

⁴¹ Kate Kahoe & David Wiseman, "Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases" (2012) 63 U.N.B.L.J. 164.

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- They had a lack of knowledge about their rights during the process.⁴²
- Some mothers had the perception that their lawyers colluded with the CFS.⁴³
- Many mothers were not allowed family advocates or supporters in courtrooms.⁴⁴

In that respect it would be worth noting Article 9 of the *United Nations Convention on the Rights of the Child*, which reads:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.⁴⁵

Our view of Article 9 is that it contains a recognition that mediation-based alternatives would be an improvement on adversarial process in terms of providing family members with an opportunity to participate in proceedings that affect them quite deeply, and to make their views

⁴² Marlyn Bennett, *supra* note 26 at 68.

⁴³ *Ibid.* at 68.

⁴⁴ *Ibid.* at 69.

⁴⁵ United Nations Committee on the Rights of the Child, General Comment No. 14 (2013) on *The Right of the Child to have his or Her Best Interests Taken as a Primary Consideration* U.N. Doc. CRC/C/GC/14 at para. 27 (May 29, 2013).

known. Aside from Article 9, we will also see in subsequent discussions that there is empirical evidence to justify our viewpoint. There are other concerns from a parental perspective as well.

Unrealistic Expectations for Parents

An offshoot of both social workers and judges having inordinate power is that they can impose unrealistic expectations on the parents. The Saskatchewan report noted that many stakeholders expressed about parents being given short timelines, and then a subsequent lack of adherence to the plans and time lines that would result in serious impacts on families (i.e. permanent tearing apart of families).⁴⁶ Consider s. 38 of the *Child and Family Services Act*, which reads:

- 38(1) Upon the completion of a hearing under this Part, a judge who finds that a child is in need of protection shall order
- (a) that the child be returned to the parents or guardian under the supervision of an agency and subject to the conditions and for the period the judge considers necessary; or
 - (b) that the child be placed with such other person the judge considers best able to care for the child with or without transfer of guardianship and subject to the conditions and for the period the judge considers necessary; or
 - (c) that the agency be appointed the temporary guardian of a child under 5 years of age at the date of apprehension for a period not exceeding 6 months; or
 - (d) that the agency be appointed the temporary guardian of a child 5 years of age or older and under 12 years of age at the date of apprehension for a period not exceeding 12 months; or
 - (e) that the agency be appointed the temporary guardian of a child of 12 years of age or older at the date of apprehension for a period not exceeding 24 months; or
 - (f) that the agency be appointed the permanent guardian of the child.

There is a fairly lengthy 24 months for a child over the age of 12. But the temporal windows are significantly shorter for a child under 12, and much more so for a child under 5. Should a parent fail to comply with the requirements set out in the order, it is possible to apply for extensions not exceeding 15 months in total for a child under 5, and 24 months for a child over 5 (s. 41(1)).

There is no cap on extensions for a child over 12, but any given extension cannot exceed 24 months (s. 41(2)). A distinct possibility, should the agency apply for it and / or should a judge see a need for it, is for a court to grant permanent guardianship to a child welfare agency with the distinct possibility that the agency can put up the child for adoption (s. 45(1)).

⁴⁶ Bob Pringle, *supra* note 14 at 39.

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The Ka Ni Kahnichihk study noted that some mothers complained of being given too much programming to the point that it become unrealistic, or that programming constantly changed producing instability and hardship for the mothers.⁴⁷ There are also often problems with the programming itself.

Insufficient Supports

There is often a great need for support services for families that get caught up in the child welfare system, and that is especially true of Aboriginal families. An Australian commission has noted Aboriginal children in Australia suffered long lasting emotional and psychological damage following adoption into non-Aboriginal homes, loss of ties to culture, community, and identity.⁴⁸

However, it is quite likely that there is a gap in Manitoba, especially as it concerns Aboriginal families. The Ka Ni Kahnichihk study noted that many mothers complained of a lack of support programs for them after their children were returned home.⁴⁹ Some mothers also indicated that they were afraid to seek help or access services on their own, since it would signal home difficulties and therefore risk losing their children afterwards. That fear was often justified since for some mothers that is in fact what happened.⁵⁰

The concern about the lack of services also extend to when children are in the child welfare system after being apprehended. In Ivec's study, many parents expressed concerns that apprehension led to negative outcomes for children. Parents had to advocate for provision of services for their out of home children. Inferior education outcomes, and eventual juvenile detention, were noted as frequent outcomes of children having been apprehended.⁵¹ The parents in Ivec's study also expressed the hope that child welfare agencies would work with communities instead of against them.⁵² As it turns out, being in the child welfare system can increase the probabilities of juvenile delinquency. Instability of home placement due to being in a child welfare system has been found to increase juvenile delinquency for children, male children in particular. One study involving 278 Black American youth, for whom investigations of abuse or neglect were substantiated, found that 5% were delinquent and 95% were not delinquent if there had only been one prior child welfare placement. Those percentages changed

⁴⁷ Marlyn Bennett, *supra* note 26 at 58.

⁴⁸ Human Rights & Equality Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: R.H.E.O.C. 1997).

⁴⁹ Marlyn Bennett, *ibid.* at 59.

⁵⁰ Marlyn Bennett, *ibid.* at 47.

⁵¹ Mary Ivec, Valerie Braithwaite & Nathan Harris, *supra* note 16 at 93-94.

⁵² Mary Ivec, Valerie Braithwaite & Nathan Harris, *ibid.* at 96.

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to 14% and 86% for two prior placements, and 15% and 85% for three or more placements.⁵³ A study of children who were substantiated as maltreated in Chicago and other Cook County suburbs found that maltreated children who were placed into care had a delinquency rate of 16%, compared to children who were not placed into care having a delinquency rate of 7%.⁵⁴ Another study of children in California's system found that children who were placed at least once in a group home were 2.5 times more likely to become delinquent in comparison to children who were placed in a foster home.⁵⁵ Placement instability has also been found to be significantly predictive for adult criminality as well. A study based on 772 persons with histories of abuse or neglect prior to age 12 found that the rates of adult arrest correlated with the degree of placement instability. The rates were 35% for no child welfare placements, 45.4% for one, 60% for two, and 76.3% for three or more⁵⁶

The Ka Ni Kahnichihk study noted other negative effects of apprehension as follows:

- Children placed in care were often physically and/or sexually abused in foster homes. Children were often threatened by foster homes not to tell their natural mothers. Some children attempted suicide. Mothers felt powerless to bring their concerns to the social workers for fear that it would make their children's situations worse. Children often grew up in the system almost their whole childhoods, and left feeling angry and abandoned.⁵⁷
- "negative emotions identified included feeling pain, hurt, depressed, stressed, angry, weak, feeling alone, powerless, unheard, unprotected, not believed, isolating themselves, feeling like they should give up, feeling they were judged, low self-esteem, shame and guilt, stigma, fear, lifelong emotional scars and suppressing all emotions and thoughts."⁵⁸

The report will now turn to the consideration of alternative methods of resolving child welfare matters that do not use adversarial procedures.

⁵³ Joseph Ryan, Mark Testa & Fuhua Zai, "African American Males in Foster Care and the Risk of Delinquency: The Value of Social Bonds and Permanence" (2008) 87:1 Child Welfare 115 at 129.

⁵⁴ Joseph Ryan & Mark Testa, "Child Maltreatment and Juvenile Delinquency: Investigating the role of placement and placement instability" (2005) 27:3 Children & Youth Services Review 227.

⁵⁵ Joseph Ryan *et al.*, "Juvenile Delinquency in Child Welfare: Investigating Group Home Effects" (2008) 30:9 Children & Youth Services Review 1088.

⁵⁶ Sarah DeGue & Cathy Spatz Widom, "Does Out-Of-Home Placement Mediate the Relationship Between Child Maltreatment and Adult Criminality" (2009) 14:4 Child Maltreatment 344 at 350.

⁵⁷ Marlyn Bennett, *supra* note 26 at 61-62.

⁵⁸ *Ibid.* at 63.

Non-Adversarial Alternatives

One term used to describe a non-adversarial approach to child welfare matters is Family Group Decision Making (FGDM), which Janess Sheets defines as: "empowering families to work together to achieve safety and permanence for children who come to the attention of child welfare systems."⁵⁹ FGDM has a strong emphasis on respectful and equitable discussion, problem solving, and the participants reaching a resolution freely without coercion.⁶⁰

Krystle Jorgan also argues that alternatives often emphasize direct child participation. Some of the ways in which mediation alternatives can facilitate child participation can include:

1. Mediators make a commitment to involve children in the process.
2. Mediators take reasonable care in determining child's ability to participate in the process.
3. Mediator opens dialogue and trust with child from the outset, but without compromising neutrality.
4. Mediator will conduct orientation with child to prepare child for the process.
5. Mediator discusses security issues and ground rules with child and other participants.
6. Mediator creates and maintains a safe and comfortable setting.
7. Mediator includes child assessment and satisfaction exercises following the session.⁶¹

First Nations have also been making a strong push to use alternatives to the mainstream court process, grounded in their traditional cultures, to facilitate resolutions to child welfare matters. Examples include the Sacred Circle program in Alberta,⁶² and the use of Family Circles in Manitoba.⁶³ Another example in Saskatchewan is described thus:

A culturally-supported process can inform or serve as an alternative to formal court proceedings. We learned of positive results being achieved in some Saskatchewan communities, including the excellent example described to us by the Elders of

⁵⁹ Janess Sheets *et al.*, "Evidence-based practice in family group decision-making for Anglo,African American and Hispanic families" (2009) 31 Children & Youth Services Review 1187 at 1187-1188.

⁶⁰ Clare Huntington, *supra* note 13 at 139-144.

⁶¹ Krystle Jorgan, "Need to be Heard: Increasing Child Participation in Protection Mediation Through the Implementation of Model Standards" (2004) 47:4 Family Court Review 715.

⁶² Gayle Desmeules, "A Sacred Family Circle: A Family Group Conferencing Model" in Ivan Brown *et al.* (eds.), *Putting a Human Face on Child Welfare: Voices from the Prairies* (Ottawa: Centre of Excellence for Child Welfare, 2007) 161; *A Sacred Circle: Family Group Conferencing Discussion Guide* (Edmonton: Native Counselling Services of Alberta).

⁶³ Steven William Kozley, *Local Knowledge as Praxis: A Reflective Critical Narrative of Child Welfare Practice and Service to Aboriginal Children and Families* (D. Phil. Dissertation, Education: University of British Columbia, 2012).

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Opikinawasowin where the community is working effectively with the court system to better meet family needs.⁶⁴

Saskatchewan has also made a proposal for an Aboriginal court workers program specifically for child welfare matters:

The court system must work better for families involved with the child welfare system. To achieve this, we urge the Government to build on emerging best practices by increasing mediation, diversion, use of Elders, and group conferencing mechanisms to resolve family services matters outside court. An important step will be establishing an Aboriginal court worker program to enhance legal resources for children, youth, and families. It will be necessary to make legislative changes to ensure that children and youth who require legal representation have access to those services.⁶⁵

First Nations frequently include autonomy over child welfare in their demands for self-determination as well. Cindy Blackstock describes the following as touchstones of Aboriginal self-determination over child welfare:

- Government authorities need to be more willing to listen, more willing to share power, with less paternalistic imposition.
- Hindered by lack of resources, training, and guidelines / terms of reference.
- First Nations parents lack understanding of system and legal issues, need for timely access to counsel.⁶⁶

The Inuit Children and Social Services Reference Group teleconferences also emphasize the following as themes of self-determination over child welfare:

- fostering greater community support for families and children, traditional Inuit child raising practices, extended familial networks
- Inuit-specific approach to child welfare, needs to be supported by stable funding, and enhanced by data collection on what drives Inuit over-representation for child apprehension.
- Culturally appropriate services, cultural competency training, increased inter-agency collaboration
- Improving supports for families in their homes
- Supporting traditional Inuit practices, customary adoption
- Ensuring that Inuit have access to legal services

⁶⁴ *Ibid.* at 39.

⁶⁵ Bob Pringle *et al.*, *supra* note 14 at 40.

⁶⁶ Cindy Blackstock, *I Want to Grow Up in My Community: A Review of the Child and Family Services Act* (Yellowknife: Northwest Territories Standing Committee on Social Programs, 2010) *Ibid.* at 10-11.

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- Inuit must gain greater knowledge of different models of care so they can have greater involvement in the design and implementation of services
- Maintaining ties to culture and community for the children
- Involving families and communities in decision-making.⁶⁷

The report now proceeds to describe some of the potential benefits offered by the alternatives.

Benefits of the Alternatives

Increased Participation

One of the key criticisms against applying adversarial process to child welfare matters is that it marginalizes the participation of the ones most directly affected, the family members. A key benefit that can stem from the alternatives is increased participation from family members. Marvin Bernstein argues that parents often feel resentment at having courts impose outcomes on them. His qualitative study of mediation programs in Canada found that parents were more satisfied with mediation because they genuinely agreed to resolutions that they had a hand in negotiated instead of having them imposed.⁶⁸ Sally Palmer's qualitative study found that older children resented a judge's ability to impose resolutions as to where they will live.⁶⁹

One must be cognizant that having a mediation process in and of itself will not necessarily or automatically ensure greater family member engagement. The process itself must be conducted in ways that are conducive to facilitating family members' participation. An example comes from the Child Protection Mediation Program in Cook County, Illinois. Meetings started with opening statements from everyone, professionals and parents included. This meant more empowerment for everyone, greater willingness to move from starting positions towards settlements, and faster resolutions.⁷⁰

Conventional mediation conferences start off with professionals sharing information with the conference chair. The Strengthening Families Conference model emphasizes inviting both parents

⁶⁷ Lisa Rae, *Inuit Child Welfare and Family Support: Policies, Programs and Supports* (Ottawa: National Aboriginal Health Organization, 2011).

⁶⁸ Marvin Bernstein, "Child Protection Mediation: Its Time has Arrived" (1998) 16 Can. Fam. L.Q. 73 at 77.

⁶⁹ Palmer, *supra* note 10 at 29.

⁷⁰ Honourable Patricia M. Martin, "Child Protection Mediation: The Cook County Illinois Experience - A Judge's Perspective" (2009) 47:1 Family Court Review 81.

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and professionals from the very start to share information about the strengths and concerns of the family.⁷¹ Also:

The main difference between Strengthening Families and traditional ICPCs was observed in the way that parents were empowered during the meetings. In the three Strengthening Families conferences where family members were present, the genogram was used not only as an "ice-breaker" but as a way to empower the parents. However, in the majority of the traditional ICPCs, professionals seemed to have the power and held it throughout the conference. In these cases the parents' role was to challenge or support the information that was presented by the professionals. In the Strengthening Families model the parents appeared to be empowered by initiating communication themselves and information sharing with the professionals and a result taking more of a lead in the conference.⁷²

What is troubling in our findings, though perhaps not surprising, is the lack of social worker engagement with fathers. As we noted, almost 50% of fathers were considered irrelevant to both mothers and children. A greater concern is that over half (60%) of fathers who were identified as a risk to children were not contacted by social workers and similarly not contacted 50% of the time when they were considered a risk to mothers. Additionally, many fathers (38.8%) who were the source of child maltreatment concerns had unsupervised visits with their children, as did a significant percentage (30.8%) of fathers identified as being violent towards mothers.⁷³

The results can nonetheless be quite impressive. June Maresca writes:

The most compelling aspect of child protection mediation is the change in dynamics that takes place when the individual interviews have been completed and the parties meet together in the office of the mediator. People who have not communicated with each other, whose communications have been marred by hostility and bitter fighting, are brought together to cooperate. Once the parties are encouraged to approach the problems jointly, with courtesy and dignity, and really listen to each other great strides are made.⁷⁴

Yvonne Darlington did a qualitative study based on interviews with 5 fathers and 5 mothers who participated in Family Group Meetings in Brisbane, Australia. Most parents described positive

⁷¹ Jane Appleton, Emmanouela Terleksi & Lindsey Coombes, "The Use of Sociograms to Exploration Collaboration in Child Protection Conferences" (2013) 35 Children & Youth Services Review 2140 at 2141.

⁷² *Ibid.* at 2143.

⁷³ Susan Strega *et al.*, "Connecting Father Absence and Mother Blame in Child Welfare Practices and Policies" (2008) 30 Child & Youth Services Review 705 at 712.

⁷⁴ June Maresca, "Mediation in Child Protection: Facilitating the Resolution of Disputes" (1995) 74:3 Child Welfare 731 at 742.

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experiences, feeling respected, feeling that their opinions were heard, and feeling that they were supported.⁷⁵ Joanne Wildgoose and June Maresca said of the Toronto Demonstration Project that "the majority of participants felt that they had been listened to, that their concerns had been dealt with and that the agreement reached was fair and mediation was preferable to the court system."⁷⁶ In a Colorado mediation project, 85% of families felt they had a real say in the plans that were worked out.⁷⁷

Janess Sheets evaluated Permanency Planning Team meetings in Texas.⁷⁸ The evaluation sample included 468 children who participated in team meetings, and 3598 in control group.⁷⁹ Children who participated in the team meetings felt more empowered during participation, had clearer sense of expectations, and were better able to identify issues in the family plan.⁸⁰ They were also less anxious in comparison to traditional services, but the effect was marginal.⁸¹ An overwhelming majority said that having a mediator present was better than meeting only with the child welfare worker.⁸²

Allan Barskey and Nico Trocmé's study is based on qualitative interviews with child welfare workers and family members in 30 cases from the Centre for Child and Family Mediation in Toronto.⁸³ They noted a number of recurring positive factors: mediators facilitated communication and kept parties informed, keeping the peace between family members and helping family members keep their emotions in check, problem solving techniques (developing options, focusing the parties, contracting), therapeutic alliance between mediator and parties, fair neutrality of mediators which included not being predisposed towards a particular outcome.⁸⁴ Child protection workers often used similar methods even in non-mediated cases though.⁸⁵ The key difference was the perception of fairness and neutrality by the parties themselves.⁸⁶

⁷⁵ Yvonne Darlington *et al.*, "Parents' Perceptions of their Participation in Mandated Family Group Meetings" (2012) 34 Child & Youth Services Review 331.

⁷⁶ Joanne Wildgoose & June Maresca, *Mediation Child Protection Cases* (Waterloo, Ontario: Fund for Dispute Resolutions, 1994) at 19.

⁷⁷ Jessica Pearson *et al.*, "Mediation in Child Welfare Cases" (1986) 20:2 Fam. L.Q. 303 at 311.

⁷⁸ Sheets *et al*, *supra* note 59 at 1188-1189.

⁷⁹ *Ibid.* at 1189.

⁸⁰ *Ibid.* at 1189.

⁸¹ *Ibid.* at 1189.

⁸² *Ibid.* at 311.

⁸³ Allan Barskey & Nicole Trocmé, "The Essential Aspects of Mediation in Child Protection Cases" (1998) 20:7 Children & Youth Services Review 629 at 633.

⁸⁴ *Ibid.* at 637-645.

⁸⁵ *Ibid.* at 646-648.

⁸⁶ *Ibid.* at 648.

Satisfaction with Outcomes and Process

Other potential benefits include greater satisfaction with the process itself, as well as the outcomes of the process. Nicolas Bala and Alan Lescheid did a survey study involving child welfare cases where a court-appointed assessor was used. Survey results indicated a 93% parental satisfaction with framework of parties consenting to selection of assessor, with judge intervening only on the issue of the assessor's qualifications.⁸⁷ An evaluation of the Surrey Court Project found an average score of 5.9 on a 7 point satisfaction scale with regards to mutually working out agreements with appropriate outcomes.⁸⁸ Marvin Bernstein's study of programs in Victoria found that half the families felt the process improved their relationship with the social worker.⁸⁹ For a child protection mediation program in British Columbia, 83% of cases had all issues resolved, 12% had some issues resolved, 5% had no issues resolved. Lawyers, family members, social workers, judges overall gave 6.2 out of 7 satisfaction rating.⁹⁰

Settlement Rates

There is furthermore evidence that mediation-based alternatives are conducive to facilitating negotiated settlements that all concerned genuinely agree to. A study of Family Team Meetings (FTM) in District of Columbia based on files of 789 children removed from home. 84% had emergency placements. The sample sizes were 195 children who did not participate in a FTM, compared to 140 pre-FTM children (went in after program started), and 454 FTM children.⁹¹ One finding of the study was that FTM children were not more likely to return to original home.⁹² There is more to the picture though. Of those still in state care at the end of the year, those who had not participated in FTM were 82.1%, pre-FTM 70%, and FTM 73.6%.⁹³ Of those return to their parents' home, those who did not participate in an FTM were 17.4%, pre-FTM 28.6%, and FTM 25.3%.⁹⁴ Furthermore:

Overall the study found that FTMs increased the likelihood of family-group-type permanency outcomes. In line with other research that family group engagement promotes kinship care, the study found that children for whom a FTM was held were

⁸⁷ Nicolas Bala & Alan Lescheid, "Court-Ordered Assessments in Ontario Child Welfare Cases: Review and Recommendations for Reform" (2008) 24 Can. J. Fam. L. 11 at 24.

⁸⁸ John Pringle, *Evaluation of the Surrey Court Project: Facilitated Planning Meeting* (Vancouver: Raincoast Business Centre, 2003) at 24.

⁸⁹ Bernstein, *supra* note 68 at 108.

⁹⁰ Jerry McHale, Irene Robertson & Andrea Clarke, "Building a Child Protection Mediation Program in British Columbia" (2009) 47:1 Family Court Review 86 *ibid.* at 93.

⁹¹ Joan Pennell, Myles Edwards & Gale Burford, "Expedited family group engagement and child permanency" (2010) 32 Children & Youth Services Review 1012 at 1015.

⁹² *Ibid.* at 1016.

⁹³ *Ibid.* at 1017.

⁹⁴ *Ibid.* at 1017.

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significantly more likely than their counterparts to be placed in kin foster homes. The case plans resulting from the FTMs also had more family-group-permanency goals than those for the two comparison groups. These family-permanency goals were reflected in the discharge outcomes for the FTM group. Those children who had a FTM exited care more rapidly than both of the comparison groups, and on discharge from care, they were reunified with parents or living with other relatives to a significantly greater extent than their contemporaries who did not have a FTM. Compared with the group entering care before the FTM program started, they had similar percentages of such discharge outcomes; however, they realized these results in a shorter follow-up period. It is possible that as a national study of family meetings reported (Weigensberg et al., 2009), the FTM led to faster access to needed child and family services, which despite inconsistencies in follow through, encouraged a faster return home.⁹⁵

Other studies have also found high settlement rates. The percentages include 95% in Colorado,⁹⁶ 86% in Florida,⁹⁷ and above 70% in five counties in California.⁹⁸ A study of the Nova Scotia Child Protection Mediation Project found that 67% of cases reached settlement before going to court.⁹⁹ An evaluation of the Victoria Child Protection Mediation Project found an 80% settlement rate.¹⁰⁰ The settlement rate was 85% for the Toronto Demonstration Project.¹⁰¹ Judicial mediation in British Columbia saw a 66% settlement rate with over 1000 cases.¹⁰² The BC Child Protection Mediation Program, which handled 285 cases in 2003/2004¹⁰³, saw a 70% settlement rate.¹⁰⁴

Compliance Rates

There is also evidence, albeit limited, that agreements produced by non-adversarial alternatives can lead to greater parental compliance in comparison with judicially imposed resolutions. June

⁹⁵ *Ibid.* at 1018.

⁹⁶ Bernard Mayer & Mary Margaret Golten, *The Child Protection Mediation Project: A Manual. An Operational Description of Mediation in Child Protection.* (Boulder, Colorado: Center for Dispute Resolution, 1987) at 19.

⁹⁷ Gregory Firestone, "Dependency Mediation: Where do we go from here?" (1997) 35: 2 Family & Conciliation Courts Review 223 at 223.

⁹⁸ Nancy Thoennes, "An Evaluation of Child Protection Mediation in Five California Courts" (1997) 35:2 Family & Conciliation Courts Review 184 at 185.

⁹⁹ George Savoury, Harold Beals & Joanne Parks, "Mediation in Child Protection: Facilitating the Resolution of Dispute" (1995) 74:3 Child Welfare 743 at 754.

¹⁰⁰ Marvin Bernstein, *supra* note 68 at 107.

¹⁰¹ June Maresca, *supra* note 74 at 739.

¹⁰² Chief Judge Robert Metzger, "Mediation in Child Protection in British Columbia" (1997) 35:4 Family and Conciliation Courts Review at 418.

¹⁰³ Bob Pringle, *supra* note 14 at v.

¹⁰⁴ British Columbia Dispute Resolution Office Bulletin, "Mediation in Child Protection Cases" (April 2004), online: British Columbia Dispute Resolution Office, www.ag.gov.bc.ca/dro/publications/bulletins/child-protection-mediation.htm.

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Maresca's study of mediation programs used in five California courts found rates of 25% compliance for non-mediated vs. 42% for mediated.¹⁰⁵ Mediated cases were also less likely to have a contested 6 month review.¹⁰⁶ Jessica Pearson's study of the Colorado Child Protection Mediation Program found that 74% of families followed through with their agreements.¹⁰⁷ Derrick Gordon's review of previous literature concluded that the factors affected fathers' engagement with the child protection process and thus greater likelihood of compliance:

- strength of attachment to child's other parent
- sense of father's own competence as a parent
- father's own education and employment
- mental health, substance abuse, mental disorders
- mental health of other family members
- prior experiences, positive or negative, with service providers
- earlier and proper identification of father's needs and concerns, which may require more home visits by professionals
- lack of father-specific services and practices¹⁰⁸

Child Safety and Placement Stability

There is also evidence, although some of it is equivocal, that mediation-based alternatives can lead to greater home and placement stability for children as well. A study of Family Group Conferencing in Texas examined the files of 80,690 youth who had been in the child welfare system.¹⁰⁹ Family Group Conferences improved chances of family reunification by 28%, placement with relatives by 73%, and decreasing odds of adoption by 45%.¹¹⁰ Conferences did not lessen time to permanency though.¹¹¹

Janess Sheets' study of Permanency Planning Meetings, also used in Texas, found that children were more adjusted after being placed with relatives in comparison to foster care ($p < 0.06$).¹¹² Children who were placed with relatives were more adjusted in comparison to families who received traditional services (i.e. apprehension and subsequent court proceedings), and children who were placed in foster care were less adjusted in comparison to families who received

¹⁰⁵ Nancy Thoennes, *supra* note 98 at 193.

¹⁰⁶ *Ibid.* at 194.

¹⁰⁷ Jessica Pearson *et al.*, *supra* note 77 at 316.

¹⁰⁸ Derrick Gordon *et al.*, "Engaging Fathers in Child Protection Services: A Review of Factors and Strategies Across Ecological Systems" (2012) 34 *Child & Youth Services Review* 1399.

¹⁰⁹ Eugene Wang *et al.*, "Expediting permanent placement from foster-care systems: the role of family group decision-making" (2012) 34 *Children & Youth Services Review* 845 at 846.

¹¹⁰ *Ibid.* at 848.

¹¹¹ *Ibid.* at 848-849.

¹¹² Sheets *et al.* at 1189-1190.

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traditional services ($p < 0.86$). A possible suggestion from the study is that the outcome may be more crucial than the process by which it is arrived at.¹¹³ Increased exit from care rates for African Americans was 32% to 11%, 40% to 13% for Hispanics, 25% to 11% for Anglos, and 48% to 33% overall.¹¹⁴

Not all studies have found improvement though. Family group conferencing had minimal impact in Sweden.¹¹⁵ No improvement (child safety, placement stability, permanence) was found for when FGDM was utilized in California, Fresno and Riverside Counties.¹¹⁶

Alexandra Wright performed an evaluation of the Awasis Pimicikama Cree Nation Kinship Care Program in northern Manitoba, based on three focus groups with Aboriginal agency staff (19 persons in total), interviews with three Aboriginal agency staff members, 18 children in Aboriginal kinship care arrangements, and 15 kinship caregivers. The study also included analysis of 18 family support files.¹¹⁷ Children indicated satisfaction with kinship arrangements during their interviews. They also stressed the importance of remaining with siblings. Children also believed that their own behavioural problems decreased, and their performance in school improved, when they were in kinship arrangements.¹¹⁸ Kinship caretakers viewed arrangements as positive, with following benefits: maintaining children's ties to culture and community, maintaining proximity and ties with biological parents, decrease in negative behaviours, improved performance in schools, strong emotional bonds with children.¹¹⁹ Perceived challenges included: lack of information about children's needs, lack of agency support, poor community supports, occasional conflict with biological parents, perception that kinship caretakers were seeking to profit (i.e. financial support) from kinship arrangements.¹²⁰ Agency staff also noted perceived benefits: increased ties to culture and community, increased placement length and stability for the children.¹²¹

¹¹³ *Ibid.* at 1190.

¹¹⁴ *Ibid.* at 1190.

¹¹⁵ Knut Sundell & Bo Vinnerljung, "Outcomes of family group conferencing in Sweden: A 3-year follow up." (2004) 28:3 Child Abuse & Neglect 267.

¹¹⁶ Stephanie Coszner Berzin, "Using sibling data to understand the impact of family group decision-making on child welfare outcomes" (2006) 29 Children & Youth Services Review 1449; Stephanie Coszner Berzin *et al.*, "Does Family Group Decision Making Affect Child Welfare Outcomes? Findings from a Randomized Control Study" (2008) 87:4 Child Welfare 35.

¹¹⁷ Alexandra Wright *et al.*, Final Report: Factors that Contribute to Positive Outcomes in the Awasis Pimicikamak Cree Nation Kinship Care Program (Ottawa: Centre of Excellence for Child Welfare and Health Canada, 2005) at 8.

¹¹⁸ *Ibid.* at 17.

¹¹⁹ *Ibid.* at 17-18.

¹²⁰ *Ibid.* at 18.

¹²¹ *Ibid.* at 19.

Time and Cost Savings

One potential benefit from the alternatives is that they can resolve matters faster in comparison to the adversarial court system. In the Toronto Demonstration Project, cases with mediation resolved within 8 to 10 weeks.¹²² Kelly Browe-Olson's evaluation of several child protection mediation programs found that mediation plans are produced one or two times faster than non-mediated plans.¹²³

Time savings can also result in monetary savings as well. A study of a mediation program in Hamilton County, Ohio, found cost savings of 39%.¹²⁴ In Ontario an uncontested child welfare matter could cost \$1,500 in legal fees to the child welfare agency.¹²⁵ Contested matters could cost a child welfare agency between \$1,500 to \$8,000 in legal fees.¹²⁶ For the Toronto Demonstration Project all costs on a mediation case averaged \$1,361, minus work time.¹²⁷

John Pringle evaluated the Surrey Facilitated Planned Meeting Project, in which 83% of files it handled reached a negotiated resolution.¹²⁸ Agency lawyers only needed to appear in court for a few minutes to confirm final agreement. Costs of mediation were 1/3 to 1/10 of those involved with going to court.¹²⁹ Time from final removal to disposition was shorter, with the result that in care costs were reduced by \$12,000 to \$14,000 per child.¹³⁰

Multiple Successes

There are also numerous other examples where alternative programs have combined several successes at once. Some of them include:

- Mik'maq Family and Children's Services in Nova Scotia. Evaluation by Dr. Fred Wien from Dalhousie University found positive impacts on community and family involvement. Diverted a significant number of cases away from the court system.

¹²² June Maresca, *supra* note 74.

¹²³ Kelly Browe-Olson, "Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases" (2009) 47:1 Family Court Review at 62.

¹²⁴ Kelly Browe-Olson, "Lessons Learned From a Child Protection Mediation Program: If At First You Don't Succeed and Then You Don't" (2003) 41:4 Family Court Review 480 at 483.

¹²⁵ June Maresca, *supra* note 74 at 739.

¹²⁶ Joanne Wildgoose & June Maresca, *supra* note 76 at 19.

¹²⁷ *Ibid.* at 19.

¹²⁸ John Pringle, *supra* note 87 at 34.

¹²⁹ *Ibid.* at 28.

¹³⁰ *Ibid.* at 36.

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- The Caring for First Nations Children Society Aboriginal Social Work Program in British Columbia. Provides culturally appropriate training, including course work and field training and supervisory-level training. Has been given to over 400 social workers.
- Yellowhead Tribal Services Agency Custom Adoption Program was developed in consultation with Elders, and has won several awards.
- Native Child and Family Services in Toronto. Considered a leader in dealing with homelessness and addictions issues, and has won several awards.
- The Manitoba Aboriginal Justice Inquiry Initiative. Clients, even if out of province, can choose to receive services from one of four culturally based authorities. 85% of all clients choose to utilize one of the four authorities.¹³¹

The Touchstones of Hope for Indigenous Children and Families philosophy was developed in Niagara Falls, in 2000, through a symposium of Aboriginal child welfare experts. The Touchstones are: self-determination, holistic response, culture and language, non-discrimination, structural interventions.¹³² Cindy Blackstock notes: "The results of this approach are just emerging, but there are encouraging signs with MCFD (Ministry of Child and Family Development) supervisors reporting that they are able to return children home much quicker than before as communities are more invested and engaged in child safety plans."¹³³

Deborah Chansonneuve evaluated the Ontario Children's Aid Society Aboriginal Liaison Group. Five years prior to release of report positive outcomes included: increased recruitment of Aboriginal foster families, family members' increased satisfaction with the process, reduced numbers of cases proceeding into the court system, increased inter-agency co-operation.¹³⁴

An evaluation of a child protection mediation program in British Columbia by Jerry McHale, Irene Robertson and Andrea Clarke noted the following benefits:

- the amount of time it takes to make decisions about children is reduced by more than one-half,
- resolutions achieved through the FPM reduced child days in care by an average of 30%, and
- thirty-four cases referred to a planning meeting over a six-month period saved eighty-two scheduled trial days.¹³⁵
- mediation deemphasizes the tone of blame

¹³¹ Cindy Blackstock, *supra* note 66 at 7-8.

¹³² *Ibid.* at 8.

¹³³ *Ibid.* at 9.

¹³⁴ Deborah Chansonneuve, *A Residential Addictions Treatment Facility for Aboriginal Women and their Children in Ottawa: A Feasibility Study* (Ottawa: Aboriginal Women's Support Centre, 2008) at 8.

¹³⁵ Jerry McHale, Irene Robertson & Andrea Clarke, *supra* note 90 at 93.

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- mediation improves the relationship between the family and the social worker
- mediated agreements are empowering for clients
- mediation is a good forum for involving extended family in the planning
- children are returned to their families earlier when issues are resolved by mediation
- mediation improves the planning for the child and family
- mediated agreements take and save time
- parents are helped by the mediator's very sensitive approach
- mediation settings are more client- and worker-friendly and allow parties more control the proceedings.¹³⁶

Terri Heath's qualitative study was based on interviews with caseworkers who participated in 26 cases from 1993 to 1994 using a mediation program in a northwestern state. 18 out of 26 resulted in an agreement instead of going to trial. Themes that emerged from the study include: avoidance of trial, facilitation of agreements, gaining trust of biological parents and adoptive parents, time savings, openness of dialogue.¹³⁷

However, it must also be noted that there are potential concerns that question the efficacy or appropriateness of trying to apply mediation-based alternatives to child welfare matters. A discussion of these alternatives now follows.

Concerns with the Alternatives

Power Imbalance

Restorative justice and mediation-based alternatives idealize a process with less adversarial competition and less emphasis on formal rules. A side effect of this endeavour is that a restorative process can become corrupted if there is a power differential between the participants. Without formal rules to impose consistency and fairness, and without lawyers as advocates, the party with the greater power has a free hand to leverage for a favourable resolution by using its advantage in order to coerce, intimidate, or manipulate the weaker party.¹³⁸

¹³⁶ *ibid.* at 93.

¹³⁷ D. Terri Heath, "Qualitative Analysis of Private Mediation: Benefits for Families in Public Child Welfare Agencies" (1998) 20:7 Children & Youth Services Review 605.

¹³⁸ Michel G. Herman, "The Dangers of ADR: A Three-Tiered System of Justice" (1989-90) 3 J. Contemporary Legal Issues 117; Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625; Ilan G. Gewurz, "(Re)Designing Mediation to Address the Nuances of Power Imbalance" (2001) 19:2 Conflict Resolution Q. 135; Terenia Urban Gill, "A Framework for Understanding and Using ADR" (1996-97) 71 Tul. L. Rev. 1313.

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The fundamental problem of imbalance remains applicable when mediation-based alternatives are applied to child welfare matters, but with its own particularities. More specifically, it is often argued that child welfare social workers can still enjoy immense and inordinate power during the process, with potentially grave consequences for children and families.¹³⁹ Tara Ney argues that the problem was exacerbated in mediation programs in northern British Columbia by a lack of legislative guidance for mediation procedures, which meant child protection departments exercised inordinate control over the process.¹⁴⁰ The results were that proceedings were often seen as unfair to parents and families. The parents were often uninformed, stressed, and vulnerable. Department workers would often try to talk parents out of seeking legal advice. Parents also frequently perceived bias by mediation convenors in favour of departments.¹⁴¹ Child welfare workers exaggerated the value of weak or unsubstantiated evidence.¹⁴² Such evidence could become persuasive, prejudicial, before a convenor.¹⁴³ Tara Ney was of the view that the burden of proof was foisted on parents and families.¹⁴⁴

Tamara Walsh and Heather Douglas did a qualitative study based on interviews with 26 lawyers and 32 child welfare workers. A theme that was frequently stressed was that there was a need for lawyers as advocates to help parents in a power imbalance against child welfare agencies.¹⁴⁵ The question is thus raised whether a lawyer's assistance as an advocate remains necessary as a balance against the social workers even during mediation sessions.

Walsh and Douglas did another study based on interviews with 26 child welfare lawyers in Queensland, Australia. Many of the participants felt that there was a tension between collaborative decision-making and safeguarding the rights of families and children.¹⁴⁶ There were more specific concerns as well. Some lawyers felt that social work departments should be working in a more supportive role earlier on.¹⁴⁷ But more lawyers felt that there was an inconsistency between an apprehension role and a therapeutic one on the part of social workers. Many also expressed the opinion that the culture shift that would be required among social

¹³⁹ *Ibid.* at 193-194. Tara Ney, Carla Bortoletto & Maureen Maloney, "Strategies to Revive Traditional Decision-Making in the Context of Child Protection in Northern British Columbia" (2013) 7:2 First Peoples Child & Family Review 60

¹⁴⁰ *Ibid.* at 194.

¹⁴¹ *Ibid.* at 195-197.

¹⁴² *Ibid.* at 199-200.

¹⁴³ *Ibid.* at 200-201.

¹⁴⁴ *Ibid.* at 201-202.

¹⁴⁵ Tamara Walsh & Heather Douglas, "Lawyers, Advocacy & Child Protection" (2012) 35 Melbourne L. Rev. 621.

¹⁴⁶ Tamara Walsh & Heather Douglas, "Lawyers' Views of Decision-Making in Child Welfare Matters: The Tension Between Adversarialism and Collaborative Approaches" (2012) 38:2 Monash U.L. Rev. 181.

¹⁴⁷ Walsh and Douglas, *Ibid.* at 203.

workers would be fundamental and too difficult.¹⁴⁸ Many of the lawyers suggested that either improvements to Family Group Meetings (FGMs) needed to be made, or that a case management system needed to be introduced as a way to reach a balance.¹⁴⁹

Qualifications and Practices

There are sometimes also concerns over the qualifications of staff involved with the alternatives. Mediation-based alternatives sometimes depend on staff with a social work background to perform assessments as to which living arrangements will be in the best interests of the children. Bala and Lescheid's survey study indicated that a lack of qualification standards may mean that assessments are performed by people who don't have the necessary skills and training.¹⁵⁰ Lack of assessor practice standards was also a concern in the survey results.¹⁵¹ Participants also indicated that assessors should use a multitude of methods, not reliant on just one data source.¹⁵² Another concern is assessor reliance on psychological testing as the instruments used have not been empirically tested for ability to gauge suitability for raising children, and may be skewed by stress stemming from the court room process itself. There were also concerns about validity of the psychological instruments as applied to families from visible minorities.¹⁵³ There were other concerns that participants identified with respect to assessor methodology. They included the need to verify prior third party reports,¹⁵⁴ that interviews should be conducted on neutral territory to provide assurance to parents,¹⁵⁵ and that in person home observance by assessors is also necessary to see how the family itself functions.¹⁵⁶

In that light, it should not be surprising that there was division in the survey results about how much input an assessor should have into the final outcome. More specifically, there was division over whether assessors should provide recommendations to judges¹⁵⁷ or not.¹⁵⁸ 75% of judges,

¹⁴⁸ *Ibid.* at 204.

¹⁴⁹ *Ibid.* at 205.

¹⁵⁰ Bala & Lescheid. *supra* 87 at 19-20.

¹⁵¹ *Ibid.* at 24.

¹⁵² *Ibid.* at 24.

¹⁵³ *Ibid.* at para. 26.

¹⁵⁴ *Ibid.* at 25.

¹⁵⁵ *Ibid.* at para. 25.

¹⁵⁶ *Ibid.* at para. 25-26.

¹⁵⁷ See also Nicholas Bala & Annalise Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2003) 20 Can. Fam. L.Q. 277.

¹⁵⁸ Timothy M. Tippins & Jeffrey P. Wittmann, "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance" (2005) 43:2 Fam. Ct. Rev. 193; American Psychological Association Board of Professional Affairs, Committee on Professional Practice and Standards, "Guidelines for Psychological Evaluations in Child Protection Matters" (1999) 54:8 American Psychologist 586.

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childrens' lawyers, and lawyers retained by child welfare agencies wanted recommendations. Only 56% of parents' counsel wanted recommendations.¹⁵⁹

There may also, depending on the program, be concerns about the qualifications of mediators who convene sessions, or the lack of qualified mediators. In the Family Mediation Manitoba program, only one of 31 mediators explicitly lists child welfare as an area for mediation practice. The others emphasize custody and separation post-divorce.¹⁶⁰

Resistance to Acceptance

Another key challenge to getting any alternatives to work effectively is getting prospective stakeholders to buy into the process. Non-adversarial alternatives have sometimes been a tough sell to child welfare authorities for various reasons. For example, the Nova Scotia Child Protection Mediation Project was compromised by a decision by Nova Scotia Departmental Committee on Mediator Training to exclude any current employees with Nova Scotia Department of Community Services or Children's Aid Societies from Mediator Training on the basis of perceived conflict of interest.¹⁶¹

Susan Carruthers argues that without an understanding of the role of mediator: "many CPWs (child welfare social workers) were concerned that mediation would call into question their professional assessment of a case and that their role as managers of the process would have to be relinquished."¹⁶² A consultation report by Nancy Johnson found that mainstream social workers admit to a lack of understanding, even a bias against, customary care.¹⁶³

In Quebec, many child protection workers feared that mediation will undermine their authority, or that they were strategies already mediation with their clients anyway.¹⁶⁴ The idea of mediation-based alternatives was met with disinterest in Hamilton¹⁶⁵ and the Yukon.¹⁶⁶ It can be a difficult sell for lawyers as well. One quarter of defence attorneys in Colorado felt their cases

¹⁵⁹ Bala & Lescheid, *supra* note 87 at 27.

¹⁶⁰ http://www.familymediationmanitoba.ca/wp-content/uploads/FMM-Directory_2014.pdf

¹⁶¹ Linda Crush, "When Mediation Fails Child Protection: Lessons for the Future" (2007) 23 Can. J. Fam. L. 55 at 65.

¹⁶² Susan Carruthers, "Mediation in Child Protection and the Nova Scotia Experience" (1997) 35:1 Family and Conciliation Courts Review 102 at 117.

¹⁶³ Nancy Johnson, "Customary Care: A Summary of Meeting Discussions on January 26, 2011" (Toronto: Tripartite Technical Table on Child Welfare, 2011) at 6.

¹⁶⁴ Linda Crush, *supra* note 161 at 65.

¹⁶⁵ *Ibid.* at 65.

¹⁶⁶ *Ibid.* at 65.

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weren't appropriate for mediation.¹⁶⁷ In the Toronto Demonstration Project many lawyers reluctant to have their cases handled by the project due to lack of knowledge concerning the project.¹⁶⁸ Lawyers in Manitoba had a clear preference for judicial mediation instead of referrals to the Mediation centre.¹⁶⁹

The Surrey Project had support from Ministry of Children and Family Development, Ministry of Attorney General of B.C., B.C. Dispute Practicum Society, and B.C. Provincial Court. But there was resistance by lawyers, judges, and child welfare workers, which reflected an entrenchment of the existing adversarial system.¹⁷⁰ The social workers were concerned about diminished role and power to affect situations,¹⁷¹ and also strain on their work time as well.¹⁷² Family members were concerned about perceived alliances between social workers and mediators, or that mediators were tied to the government.¹⁷³ Lawyers were inexperienced with mediation and unsure about their own roles in it.¹⁷⁴

Resource Demands

Funding the alternatives with adequate resources is another challenge. The Ministry of Children and Youth Services of Ontario funds assessments. They range from \$2,000 to \$30,000, with \$5,000 to \$7,000 being usual.¹⁷⁵ According to the survey results from Bala and Lescheid's study, there was a shortage of qualified assessors. It took an average 13 to 16 weeks to procure an assessment. Delays resulted from the shortage of qualified assessors, and having to co-ordinate with the family.¹⁷⁶

Mary Rauktis did a series of survey studies on barriers to successful implementation of Family Group Decision Making.¹⁷⁷ Child maltreatment rates and poverty were not found to be significantly predictive.¹⁷⁸ Receiving a pilot project grant was the strongest predictor ($p < 0.0005$). Presence of a System of Care initiative was second strongest ($p < 0.01$). Population density and

¹⁶⁷ Hon. Nancy Flatters, "Family/Child Judicial Dispute Resolution (JDR): An Overview of One Canadian Court's Settlement Conference Approach to the Pretrial Resolution of Family and Child Welfare/Protection Matters" (2003) 41:2 Fam. Ct. Rev. 182 at 190.

¹⁶⁸ Wildgoose & Maresca, *supra* note 76 at 20.

¹⁶⁹ Flatters, *supra* note 167 at 190.

¹⁷⁰ Jerry McHale, Irene Robertson & Andrea Clarke, *supra* note 90 at 89-90.

¹⁷¹ *Ibid.* at 91-92.

¹⁷² *Ibid.* at 92.

¹⁷³ *Ibid.* at 92.

¹⁷⁴ *Ibid.* at 92.

¹⁷⁵ *Ibid.* at 31-32.

¹⁷⁶ Bala & Lescheid, *supra* note 87 at 29-31.

¹⁷⁷ Mary Rauktis, "Innovation in Child Welfare: The adoption and implementation of Family Group Decision Making" (2010) 32 Children & Youth Services Review 732.

¹⁷⁸ *Ibid.* at 735.

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number of caseworkers were modestly predictive.¹⁷⁹ Social workers from both counties with established programs and counties where conferencing programs were recently implemented were interviewed as part of the study. 16% felt that effective leadership facilitated efficacy. 23% identified education and training.¹⁸⁰ The interviews also identified perceived barriers to successful implementation. As for a perception that worker attitudes could be counter-productive, the percentages were 44% in experienced counties compared to 16% in new program counties. As for inadequate resourcing, the percentages were 19% in experienced counties compared to 29% in new program counties. The Toronto Demonstration Project has had its work hampered by inadequate funding.¹⁸¹ Linda Crush argues that there is a need for sustainable long-term funding that is dependent on the quality, not the quantity, of the mediations.¹⁸²

Aboriginal-Specific Concerns

To the extent that First Nations communities try to use traditional approaches that emphasize more conciliatory processes and keeping Aboriginal children within the communities, it will often be First Nations child welfare agencies that are tasked with a lot of the work surrounding implementation. On that note, First Nations agencies and the communities they try to serve alike face some unique sets of challenges.

Some First Nations communities will resent decision-making authority being vested in an outside body, one reason being that it is seen as an external imposition of common law standards of adversarial process where First Nations may prefer to use more traditional processes. For example, in Alaska the Indian Child Welfare Act requires active efforts to reunite Indigenous children with their families. Yet the decision making is vested in the non-Indigenous adversarial court system, so the requirement gets marginalized. Family Group Conferences are seen as a way for tribes to give active voice to cultural ties, identification, family reunification.¹⁸³

Geography can present unique challenges as well. Linda Crush argues that small scale initiatives that are localized to meet the particular needs of a given First Nations community may be preferable.¹⁸⁴ However, audits conducted in 2013 by the British Columbia Ministry of Child and

¹⁷⁹ *Ibid.* at 735.

¹⁸⁰ *Ibid.* at 736.

¹⁸¹ Maresca, *supra* note 74 at 740. See also Muriel Bamblett & Peter Lewis, "Detoxifying the Child and Family Welfare System for Australian Indigenous Peoples: Self-Determination, Rights and Culture as the Critical Tools" (2007) 3:3 *First Peoples Child & Family Review* 43 at 49-50.

¹⁸² Crush, *supra* note 161 at 70; Aboriginal Adviser to the Minister, *Children First: The Aboriginal Adviser's Report on the Status of Aboriginal Child Welfare in Ontario* (Toronto: Ontario Ministry of Children and Youth Services, 2011).

¹⁸³ Laverne Hill, "Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children under the Indian Child Welfare Act" (2005) 22:1 *Alaska L. Rev.* 89.

¹⁸⁴ Crush, *supra* note 161 at 67.

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Family Development indicated that British Columbia Aboriginal child welfare agencies often struggled with having to service large geographic areas to service, geographic isolation, limited community resources, and various agencies having to operate independently of each other.¹⁸⁵

Another potential concern is that overemphasizing keeping an Aboriginal child within Aboriginal family networks can result in placing an Aboriginal child in a dangerous situation. A report by Mary Ellen Turpel-Lafond, in her capacity as the Representative for Children and Youth in British Columbia, cautions against placing too much emphasis on kinship arrangements. The report focuses on the example of a three year old girl taken from her adoptive home malnourished, physically abused, and with a broken clavicle after having been in the care of her grandparents for 18 months. Saskatchewan First Nations Child & Family Services initially advised British Columbia Ministry of Children and Family Development that there were no suitable candidates in the extended family network, but then advised that the grandfather would be a suitable candidate. Saskatchewan First Nations Child and Family Services (SFNCFS) advised that there were no concerns despite being aware of over 70 offences in the grandfather's record. A Saskatchewan First Nations child welfare agency had not performed a proper home study and evaluation.¹⁸⁶ Part of the problem was that the Saskatchewan Ministry of Child and Family Services failed to ensure that the First Nations child welfare agency concerned met provincial standards for child welfare practice.¹⁸⁷

Funding is another major concern. B.C. funding for Aboriginal child welfare initiatives from 2009 onwards was hampered by the fact that they were usually pilot-projects, no more than 3 years duration or even less, and without any clear goals or guidelines.¹⁸⁸ Focus was on structure and resources on initiatives, but wasn't on the needs of the children where it needed to be. One result was an enormous expenditure without a single child being served adequately.¹⁸⁹ Another problem was a disconnect between highly stated goals and intended outcomes.¹⁹⁰ Only the number of children being received service (even if only on the surface) was being measured, but there was no evaluation of actual outcomes.¹⁹¹ There was no measurement or evaluation of agency performance, and thus there were also weaknesses in accountability.¹⁹²

¹⁸⁵ British Columbia Ministry of Child and Family Development, Case Practice Audits. <online: www.mcf.gov.bc.ca/about_us/case_practice_audits.htm>

¹⁸⁶ Mary Ellen Turpel-Lafond, *Out of Sight: How One Aboriginal Child's Best Interests Were Lost Between Two Provinces* (Victoria, British Columbia: Representative for Children and Youth, 2013).

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* at 50.

¹⁸⁹ *Ibid.* at 52, 55-56.

¹⁹⁰ *Ibid.* at 53.

¹⁹¹ *Ibid.* at 53.

¹⁹² *Ibid.* at 53-54.

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Sometimes a First Nations agency faces multiple concerns at once. The Awasis Pimicikamak Cree Nation Kinship Care Program often struggled with a lack of resources, occasional interference from biological parents, lack of support from community itself (i.e. legitimacy issues), and burnout of kinship caretakers.¹⁹³

Recommendations

Consultation

A fundamental prerequisite to establishing a successful mediation-based alternative is to engage in a process of consultation beforehand with the various stakeholders. Failure to engage in such a process of consultation beforehand is likely to lead to significant problems or even outright failure down the road. For example, the Nova Scotia program called into question from the beginning because it was a top-down wide scale imposition from government.¹⁹⁴ Linda Crush adds:

CPM programs have been most successful when there is cohesion within the child welfare sphere. Planning of future programs needs to include educated CPWs, mediators, lawyers and judges alike and provide information on the specialized process, roles and outcomes of child protection. Without education, a culture of lingering ignorance will prevail and with it will come the power imbalances, imposed settlements, delays and adversarial procedures that have been shown to be so detrimental to a child's development.¹⁹⁵

Karen Budd suggests that there are three phases to a successful consultation: planning, data collection, recommendation.¹⁹⁶ If done properly and thoroughly, a good consultation can lay the groundwork for a successful program down the road. The Colorado program succeeded because it researched ahead of time the players (including the child welfare social workers), the available programs, and the processes in place.¹⁹⁷ Judge Leon Edwards suggests that the following stand out as special issues that merit particular attention during the consultation: 1) the program must be tailored to local needs and conditions 2) mediation can be resorted to at any stage while the legal process is in progress 3) whether or not the program should make use of co-mediators as a check and balance 4) whether or not direct children participation should be included 5) whether or not the mediation sessions should be located near the courthouse 6) agreements still need judicial

¹⁹³ Alexandra Wright *et al.*, *supra* note 117 at 19-20.

¹⁹⁴ Savoury, Beals & Parks, *supra* note 99 ; Carruthers, *supra* note 162.

¹⁹⁵ Linda Crush, *supra* 161 at 66.

¹⁹⁶ Karen S. Budd, "Assessing Parenting Capacity in a Child Welfare Context" (2005) 27Children and Youth Services Review 429 at 433.

¹⁹⁷ Mayer & Golten, *supra* note 96 at 5 & 12.

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approval to ensure compliance with legal test of best interests of the child and 7) judges must sometimes take the lead in assuring that a resolution is reached.¹⁹⁸

The consultation leading up to the Essex County Child Welfare Mediation Program identified significant barriers beforehand: 1) the need for significant resource support 2) A legal culture (i.e. lawyers and judges) that was at odds with mediation 3) a perception by many social workers that some cases were too serious for mediation and 4) concerns by social workers that they were being asked to take on roles at the same time that were inconsistent with each other, as both service providers and mediators.¹⁹⁹ A considerable amount of time was spent of educational seminars for the stakeholders to encourage them to 'buy in', extolling the potential time savings benefits and the integration of court room and social services.²⁰⁰ Certain parameters were set on the program as a result of the consultations. Any case could be referred to the program at any point during the legal process. However, the judge could perform an initial screening and exclude cases that involved a domestic violence restraining order, where there was a serious criminal charge pending, or where one of the parties concerned was legally incompetent. The mediator could also halt mediation and declare a case ineligible for continued mediation if such issues also arose in the course of mediation.²⁰¹ Other measures included: "training and educational requirements for mediators, coordination between the mediation program and the court, and program monitoring and evaluation needs."²⁰² The results were apparently successful, at least in terms of buy in. The vast majority of professionals believed it was helpful to the families. The majority of legal representatives believed it provided a more effective opportunity to advocate for their clients' causes.²⁰³

A lesson that the Essex County consultation process has for us is that a key subject that any consultation process in Manitoba will have to consider is eligibility criteria for participation in the mediation process. Should mediation be unavailable if one of the parents is charged with a serious criminal offence? If so, what ranges of criminal offences would render a family ineligible for participation in mediation? Should a parent being on a sex offender registry render the family ineligible for participation in mediation? Should a past history of child welfare apprehensions render a family ineligible for participation in mediation? If so, how extensive a past history of apprehensions is needed to cross the threshold for ineligibility? We do not at this purport to provide definitive answers to these questions as they concern establishing mediation programs in

¹⁹⁸ *Ibid.* at 75-77.

¹⁹⁹ *National Council of Juvenile & Family Court Judges, The Essex County Child Welfare Mediation Program: Evaluation Results and Recommendations* (2001). *Ibid.* at 75.

²⁰⁰ *Ibid.* at 3.

²⁰¹ *Ibid.* at 17.

²⁰² *Ibid.* at 3.

²⁰³ *Ibid.* at 74.

Manitoba. The answers to those questions will have to be determined following a consultation process that is inclusive of important stakeholders in Manitoba.

The Surrey Court Project was also preceded by a consultation process.²⁰⁴ A key participant in the program is a "Court Work Supervisor", a senior social worker who was a resource person for participating social workers, made referrals to mediation, attends court for referrals, attends all mediations, and can make settlements binding on the Ministry. All mediation sessions are also preceded by an early orientation session before the mediation itself. The orientation itself also identifies any potential power dynamics that may need to be addressed.²⁰⁵ Social worker concerns about diminished role and powers are dealt with by assurances that the mediator is there as a guide, but the social worker retains control over what the ministry ultimately does.²⁰⁶ Family member concerns about mediator partiality overcome with information, particularly during orientation sessions, about how mediation works.²⁰⁷ The consultation process also dealt with social worker concerns about time constraints by selling them on long term time savings.²⁰⁸

Procedural Fairness

Much attention has been given to problems of power imbalance in restorative justice, that a stronger party can coerce a weaker party into a lopsided resolution.²⁰⁹ While those discussions occur in a criminal justice context, they also have relevance to trying to adopt non-adversarial alternatives for child welfare matters, but with its own specific dynamics. It is no less vital that the process must be designed to ensure procedural fairness for all the participants.

There are several components for this. Fairness must be observed from the very outset and before any mediation process has ever begun. That is to say that mediation-based alternatives should be voluntary for the parties.²¹⁰ To force any of the parties into mediation is to inject a kind of imbalance or unfairness that will surely have negative repercussions for the process itself. As Michael Noone explains:

Even the suggestion of mediation can lead parties to feel compelled to mediate in order to maintain favour with the court. When parties are provided with information regarding the mediation process and choose mediation, they have committed to a collaborative

²⁰⁴ Jerry McHale, Irene Robertson & Andrea Clarke, *supra* note 90 at 91.

²⁰⁵ *Ibid.* at 90-91.

²⁰⁶ *Ibid.* at 91-92.

²⁰⁷ *Ibid.* at 92.

²⁰⁸ *Ibid.* at 92.

²⁰⁹ Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004); Carol LaPrairie and E. Jane Dickson-Gilmore, *Will the Circle Be Unbroken?: Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).

²¹⁰ Crush, *supra* note 161 at 68-69. Laurence Boulle & Kathleen Kelly, *Mediation Principles, Process, Practice* (Toronto: Butterworths, 1998)

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process that promotes responsibility of action. Further, voluntary participants recognize that the parties themselves can make better decisions about their interests. There is little difference between forcing parties to mediate and imposing solutions. Both take away the power and ability to choose how to resolve the issues from the parties. Research has shown that through buying into and owning the process, the parties will be more supportive and compliant with the outcome.²¹¹

The process will require impartial and objective mediators.²¹² Impartiality in part means preventing one party from coercing or intimidating or coercing the party, and ensuring fair discussion and equitable participation for all concerned.²¹³ Another aspect of impartiality is that a mediator (or perhaps a trained peace maker in Aboriginal programs) will have to have an open mind to different outcomes, depending on the merits of each case. It can mean that the mediator should in certain cases prefer return of the child to the original family if, on the individual merits of that particular case, there is the potential for a feasible family safety plan that will work. Any mediation-based program will quickly lose legitimacy if the mediator is simply there to rubber stamp a child welfare agency's initial apprehension and plans for permanent guardianship and adoption, irrespective of parental concerns or efforts to address their own problems. At the same time, the mediator may prefer to verify the apprehension and subsequent guardianship if discussions, and the individual merits of a case, are such that concerns about child safety cannot be satisfactorily addressed. Mediator impartiality requires a willingness to evaluate each individual case according to its own particular merits.

And indeed, such is what emerges from a study by Maureen Long and Renee Sephton based on qualitative interviews with six experienced Indigenous child welfare workers in Victoria, Australia. The child welfare workers emphasized that what is crucial is trying to accommodate, or reach a balance for, both the safety of Indigenous children and preserving their ties to their cultures and communities, which is also tied to their best interests.²¹⁴ That will be a vital task for any

²¹¹ Michael Noone, *Essential Legal Skills: Mediation* (London: Cavendish Publ. Ltd, 1996) at 7.

²¹² Berit Albrecht, "Multicultural Challenges for Restorative Justice: Mediators' Experiences from Norway and Finland" (2010) 11:1 J. Scandinavian Stud. Criminology & Crime Prevention 3; Declane Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003); Rachael Field, "Victim--Offender Conferencing: Issues of Power Imbalance for Women Juvenile Participants" (2004) 11:1 Murdoch U.E.J.L; David Milward, "Making the Circle Stronger: An Effort to Buttress Aboriginal Use of Restorative Justice in Canada against Recent Criticisms" (2008) 4:3 Int'l J. Punishment & Sentencing 124; Ross Gordon Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) 24 Man. L.J. 77.

²¹³ Hon. Leon Edwards, "Child Protection Mediation: A 25-Year Perspective" (2009) 47:1 Family Court Review 69 at 73.

²¹⁴ Maureen Long & Rene Sephton, "Rethinking the 'Best Interests' of the Child: Voices from Aboriginal Child and Family Welfare Practitioners" (2011) 64:1 Australian Social Work 96. See also Phillip Lynch,

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mediators employed in an Aboriginal-specific program, to try and reach the appropriate (and at times delicate) balance.

Whether mediators should have final decision-making authority, or whether that authority should remain in the hands of judges with mediators making recommendations, is a matter that will be left to any future consultations to resolve. There is no one right answer for every program or situation. In fact, that particular subject should probably be a matter for consultation. Consultations may very well result in one community or locale preferring that judges retain decision-making authority with mediators providing recommendations, while another community or locale may prefer that the mediators have final decision-making authority (especially if the participants work out a consensus that the mediator helped facilitate). The latter possibility contemplates that mediation programs may be overseen by persons who fulfill a hybrid role that combines facets of both mediators and arbitrators. Such a person may try their utmost to help the parties reach a consensus on how to resolve the situation, but may also make his or her own decision when the parties are unable to reach an agreement.

An additional option that may be worth exploring is whether child welfare matters should be heard by specialized administrative tribunals with appropriate expertise instead of judicial courts, with the tribunals emphasizing mediation approaches whenever possible. A possible benefit is that tribunal decisions would be made by people with relevant expertise (e.g. child psychology, social work) who would have a greater understanding of many of the issues than would legally trained judges.²¹⁵ A possible concern is that perhaps courts should retain jurisdiction over child welfare, seeing as it engages crucial concerns regarding the safety and well-being of the most vulnerable amongst us, our children. In response to that argument, we wish to point out that many important subject matters are entrusted to administrative tribunals, even those with crucial dimensions of public safety and criminality. Examples include whether to detain a mentally ill person for the sake of protecting the public²¹⁶ and decisions with respect to parole and release for offenders who have served time in federal penitentiaries.²¹⁷ Surely the possibility of setting up administrative tribunals with the expertise to address child welfare matters, and with an emphasis on mediation, cannot be dismissed out of hand. Indeed, we argue that the concept should be given serious consideration. Although we admit that the structure of any mediation-based programs are a question that must first be broached during an initial consultation process.

"Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia" (2001) 23 Sydney L. Review 501.

²¹⁵ *Seprtech Systems Inc. v. Peacock Inc.*, [2003] FCA 71, [2003] F.C.J. No. 205.

²¹⁶ *Mental Health Act*, C.C.S.M. c. M110.

²¹⁷ *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

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Tara Ney, Carla Bortoletto and Maureen Maloney emphasize that there is just as much a need for coordinator or mediator neutrality.²¹⁸ Cindy Blackstock suggests that there is a certain reality that needs to be taken into consideration. It is her observation that social workers who investigate troubled homes tend to err towards apprehension for fear of child death review, which in turn induces a climate of fear in Aboriginal communities. The fear felt by social workers is in her view misplaced because such cases are rare, and there is no empirical link between decisions not to apprehend and child deaths. On that note, impartiality by a mediator in an Aboriginal community may require giving serious consideration to keeping a child either in the family or in the community in appropriate cases. Just as with mainstream cases, routinely and unquestioningly affirming social worker decisions to apprehend may undermine the legitimacy of an Aboriginal-specific program, and exacerbate a climate of fear in an Aboriginal community.²¹⁹

There are other requirements as well. The process must allow sufficient time for parties to be heard and issues to be resolved in agreement.²²⁰ This requirement may require multiple sessions to resolve issues satisfactorily. Another is maintaining confidentiality of the discussions so that the participants can discuss matters openly and candidly, subject to the exceptions of new reports of abuse or neglect, or another change in circumstances.²²¹

A critical issue is therefore one where the interests of the participants are divergent from each other, at least to begin with. If the interests of the participants are so widely divergent or if they are unwilling to budge from what they perceive to be their own interests, then the pursuit of harmonizing their interests into a workable agreement is problematic to say the least. One could say that this reality can be just as true of child welfare matters as in applying restorative justice to criminal matters. Parents may feel very strongly about wanting to keep their children, while child welfare authorities may feel grave concerns about child safety in the home.

Does this mean that the endeavour is futile or miniscule on a practical level, no matter what we do to try to assure legal fairness in such processes? Perhaps not. Declan Roche has written a book that focuses on accountability in restorative justice.²²² He found that, aside from power differentials arising from certain kinds of offences or community power dynamics, the presence of a few strong and assertive individuals in a restorative justice meeting with relatively few participants can dominate the meeting and prove detrimental to the prospect of a genuine and voluntary agreement. Roche argues that there are possible measures to counteract this possibility, such as including a wider circle of participants so that a select few assertive individuals

²¹⁸ Tara Ney, Carla Bortoletto & Maureen Maloney, *supra* note 139 at 67-68.

²¹⁹ Cindy Blackstock, *supra* note 66 at 12-13.

²²⁰ Hon. Leon Edwards, *supra* note 213 at 73.

²²¹ *Ibid.* at 72-73.

²²² Roche, *supra* note 211 at 83-84.

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will have a much harder time imposing their will,²²³ allowing the attendance of a professional advocate who can represent a party who is identified as vulnerable,²²⁴ extensive preparatory work prior to the meeting,²²⁵ and allowing break-out sessions so that some participants may voice matters that they were hesitant to in front of the larger group.²²⁶ Measures such as these may be equally commendable in a child welfare context. They may facilitate equitable participation for all concerned, and also on a practical level improve the prospect of a genuine and workable agreement.²²⁷ And indeed, Judge Edwards argues that mediation-based alternatives in child welfare must be inclusive, the more stakeholders the better.²²⁸

Child Participation

It is also our view that children should be allowed to directly participate in mediation-based programs. Section 12 of the United Nations Convention on the rights of the Child (1989) reads:

States parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The United Nations Committee on the Rights of the child has interpreted the Article as referring:

"... to all judicial proceedings, in all instances whether staffed by judges or lay persons and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes."²²⁹

It must be noted that the concept of children participation is not universally accepted. David Jones, a child psychiatrist, holds that there are certain reasons to allow children participation as follows: i) They have a right to know and understand what is going on, and the issues that are affecting their lives ii) They will want to express and communicate their views in matters that

²²³ *Ibid.* at 87-88.

²²⁴ *Ibid.* at 91-92.

²²⁵ *Ibid.* at 92-93, 169-70.

²²⁶ *Ibid.* at 93-94.

²²⁷ *Ibid.*

²²⁸ Hon. Leon Edwards, *supra* note 213 at 73.

²²⁹ United Nations Committee on the Rights of the Child, General Comment No. 14 (2013) on *The Right of the Child to have his or Her Best Interests Taken as a Primary Consideration* U.N. Doc. CRC/C/GC/14 at para. 27 (May 29, 2013).

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profoundly affect them iii) Tense or troublesome family situations have the potential to bring harm to children, so it is right that they have a medium within which to express themselves.²³⁰ However, others suggest there are also potential concerns with allowing it. Those concerns include: i) exposing children to an anxiety and stress-inducing environment²³¹ ii) It may worsen the home environment for children if they end up having to speak negatively of other family members, their own parents in particular²³² iii) Other participants with a stake in proceedings may try elicit more favourable input from the children through coercion, manipulation or coaching.²³³

Nonetheless, we recommend that mediation-based programming allow the participation of children, as the empirical evidence that is available confirms that the benefits outweigh perceived concerns. Jennifer McIntosh did a qualitative study based in part on interviews with children and parents from thirteen who participated in a mediation program in Australia. The first stage was that a mediator would discuss the child's needs with the parents as a preparation. The mediator, previously trained by a child psychologist, would then interview the child privately. The next step would be to integrate the child's feedback into the mediation session itself, with particular attention to the needs of the child. Interviews suggested that most of the parents and children had perceived a reduction of conflict within the family, that the children had felt relieved after having had the opportunity to speak their minds, greater focus on the needs of the children, decreased stress and anxiety, improved information, and more favourable outcomes for all concerned, especially the children.²³⁴

The precise parameters of how children participation will be implemented will likewise need to be a matter of consultation. Should children be allowed to directly speak during a mediation session, or should potential concerns be addressed by allowing the children to provide input indirectly through somebody else? How would that indirect participation be facilitated? Would it be through a legal representative? Would it be through a child's representative, but not necessarily a lawyer? Would it be provided through a report by a child psychologist who assesses not just child input, but also the home situation and the child's needs? While we acknowledge that much of this would have to be worked out following consultation, we wish to recommend

²³⁰ David Jones, "Communicating with Children" in Lord Justice Thorpe & Justine Cadbury (eds.) *Hearing the Children* (Bristol: Jordan Publications, 2004).

²³¹ Perpetua Kirby & Sophie Law, "Advocacy for Children in Family Group Conferences: Reflections on Personal and Public Decision-Making" in Barry Percy-Smith & Nigel Thomas, *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (London: Routledge, 2010)

²³² Pauline Tapp, "Judges are Human Too: Conversation between the Judge and the Child as a means of giving effect to section 6 of the Care of Children Act 2004" (2006) *New Zealand Law Review* 35.

²³³ Parliamentary Assembly of the Council of Europe, Recommendation 1864 (2009) *Promoting the Participation of Children in Decisions Affecting Them*.

²³⁴ Jennifer McIntosh, "Child-Inclusive Divorce Mediation" (2000) *18:1 Mediation Quarterly* 55.

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that direct participation of the children be given serious consideration. McIntosh's study makes it clear that there is clearly the potential to realize considerable benefits through doing so, while minimizing any potential concerns.²³⁵

Consultation on the parameters of child participation will also need to be integrally bound up with consultations on the implementation and structure of any mediation program that is set up. As per our previous discussions, we explored questions of who holds the final decision making authority in mediated matters where the parties may have difficulty reaching a consensual resolution. Will it be a judge? Will it be a mediator who has the authority to make a decision in the event that the parties cannot reach a resolution? Will it be an administrative tribunal? Those questions in turn can raise the question of who the child will be providing input to? While we respect that consultations will need to address this question, and may lead to a different outcome than we anticipate, we wish to stress that there are potential concerns with allowing judges to directly interview children. Firstly, Mark Potter does indicate that there are reasons that judges interviewing children may be desirable:

- To impress upon children's minds that the judge is the decision-maker.
- It allows the children to directly express their feelings and wishes to the judge.
- It can reassure the children that the judge has understood what they had to say and will take it into account.

The judge can explain his or her decision to the children, allowing them to understand the decision and possibly accept it.²³⁶

However, there may also be concerns. One concern is that judges may compromise the appearance of their own impartiality by conducting a private interview with children. Another concern, and more crucial in our estimation, is that judges will not have the expertise and training to effectively conduct interviews with children.²³⁷ By contrast, McIntosh's research indicates that interviews conducted by mediators with the appropriate training may provide a more effective avenue. But again, we realize that these matters are ultimately to be decided upon following a process of consultation.

²³⁵ Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (London: Routledge, 2013) at 93-100.

²³⁶ Mark Potter, "The Voice of the Child: Children's Rights in Family Law" (2008) *Israeli Family Law* 140 at 146-147.

²³⁷ Judy Cashmore & Patrick Parkinson, "What Responsibility do Courts have to Hear Children's Voices?" (2007) 15 *International Journal of Children's Rights* 160 at 168.

Preparation

Preparation is also key. Educational and collaborative time must be spent with participants beforehand.²³⁸ For the British Columbia Mediation Program, Orientation sessions, a full time administrative support person, and a Court Work Supervisor were deemed crucial to successes.²³⁹ Manitoba also offers extensive preparatory support beforehand for participants in a limited mediation program for high-risk situations, as follows:

- " A new guide offering tips and information to help grandparents and other family members understand the court process related to applying for access to minor children is now available online, Family Services and Consumer Affairs Minister Gord Mackintosh announced today.
- "Manitoba modified the Child and Family Services Act to address grandparents' rights to apply for access and this guide helps explain the options that are available," said Mackintosh. "Separation and divorce can be tough on everyone and it's important that, where appropriate, any extended family member has the chance to remain in contact with a child."

The guide is intended for people who want to have legal access to a child but who are not the parents of that child. This may include grandparents, step-parents or other members of a child's family and, in exceptional circumstances, people who are not family members but who have had a significant and close relationship with a child.

"Grandparents have told us the guide will clear up confusion about the court process and help them make informed decisions about whether they need to hire a lawyer," added Mackintosh. "We've already heard they are happy to see the guide online and ready for use."

The guide was written particularly to address the interests and concerns of grandparents and has information on topics such as:

- options for access without going to court (family conciliation or mediation);
- what to expect from the court process and how to prepare;
- potential costs and options such as representing yourself; and
- personal tips from grandparents who have gone through the process to gain access to their grandchildren.

Manitoba is the only province to offer grandparent advisor services and First Choice, a special program that works with high-risk families and helps them through an alternative dispute resolution process, Mackintosh said, adding Manitoba families have welcomed the variety of

²³⁸ *Ibid.* at 73.

²³⁹ Jerry McHale, Irene Robertson & Andrea Clarke, *supra* note 90 at 93.

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programs designed to reduce conflict and demand for many of these programs has doubled over the past decade. The service has helped with 352 cases since 2006 and handled almost 1,000 requests for information or support."²⁴⁰

In the Ka Ni Kahnichihk report, Aboriginal mothers also made recommendations for the following:

- development of Aboriginal Mothers' Advocate
- development of a resource manual that sets out expectations, steps, timelines.
- development of support groups.
- allow supporters into court rooms
- post the above recommendations to a web site
- create an anthology of Aboriginal mothers' stories²⁴¹

Training

Another fundamental prerequisite is extensive training for any staff that may be involved with a mediation program. Home studies and assessments are very likely to be conducted beforehand, and to be part of the dialogue during mediation discussions. As Bala and Lescheid explain:

"Court-ordered assessments in child welfare cases are among the most challenging forensic assessments that mental health professionals undertake. Required areas of professional expertise typically include child development; adult and parental functioning; the ability of parents to meet the needs of the specific child, who may have special needs; the impact of parental addictions, family violence or mental health issues on parenting capacity; and the effect of available interventions that may address parents' deficits in meeting the needs of their children. In addition, professionals who perform assessments in child welfare should have training to deal with such issues within the forensic context."²⁴²

Recall that previous consultations have revealed that social workers involved with apprehensions often felt an unease or discomfort over having to participate in mediation sessions. Education and training programs with specific emphasis on mediation in child welfare matters could go a long way towards overcoming that reluctance, and equipping them to become effective participants in mediation sessions so as to reach negotiated resolutions that will best meet the needs of the families. There is unfortunately a lack of programs and services that fill such a need. A search of the course catalog of the University of Manitoba's Aurora Student engine reveals that the Faculty of Social Work does not provide any courses that specifically address the utilization of

²⁴⁰ Government of Manitoba News Release, "Online Guide Helps Grandparents, Extended Family Involved in Custody Disputes: MacIntosh" (January 11, 2012) Canadian Government News.

²⁴¹ Marlyn Bennett, *supra* note 26 at 70.

²⁴² Bala and Lescheid, *supra* note 87 at 18-19.

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mediation in child welfare matters.²⁴³ To our knowledge, there are no programs or services that fill such a need and are available in Manitoba for accredited social workers. Family Mediation Manitoba does provide workshops on mediation, but they emphasize applying mediation to post-divorce issues.²⁴⁴

It goes without saying that training will be crucial for mediators as well:

"The quality of mediators is critical to the success of a mediation program for several reasons. The mediators must be skilled in facilitating discussion regarding the issues at hand. The mediators must have a sense of whether a proposed agreement is appropriate given the particular family's dynamics and available community resources. Finally, the parties must have confidence in the mediator's skills and judgment. Without that confidence, some parties and attorneys will resist referrals to mediation and will not engage fully in the process, preferring the more traditional adversarial process."²⁴⁵

However, Wildgoose and Maresca add that: "... training in generic mediation is not sufficient to handle the complex dynamics that these (child protection) cases present. The mediator must have experience in managing family interactions and family conflicts."²⁴⁶ Mayer and Golten likewise state:

It now seems clear that some of the additional areas that need to be covered in (mediator) training including: the separate dynamics of physical abuse, emotional abuse, sexual abuse, neglect, failure to thrive and sibling abuse; legal and emotional issues in runaway situations; characteristics of substance abusers and their families; cross cultural issues in mediation; and more about the service actually available in each community.²⁴⁷

Additionally, a theme that often showed up in past consultations was that child welfare lawyers expressed a certain discomfort or unfamiliarity with mediation as applied to child welfare matters. We would suggest that child welfare lawyers be provided with specific training on how mediation processes for child welfare matters will work, and how lawyers can advocate for their clients' interests during those processes. There is, in fact, a specific avenue for providing such training. All lawyers licensed to practice in Manitoba are required to undergo a certain number of hours each year in what is called Continuing Professional Development, which consists of

²⁴³ University of Manitoba, Aurora Students. <online:

https://aurora.umanitoba.ca/banprod/twbkwbis.P_GenMenu?name=homepage>

²⁴⁴ For recent workshops, see Family Mediation Manitoba, Past Events <online:

<http://www.familymediationmanitoba.ca/fmm-programs/past-events/>> and Current Workshops <online:

<http://www.familymediationmanitoba.ca/fmm-programs/current-workshops/>>

²⁴⁵ Hon. Leon Edwards, *supra* note 213 at 72.

²⁴⁶ Wildgoose & Maresca, *supra* note 76 at 17; Crush, *supra* note 161 at 65.

²⁴⁷ Mayer & Golten, *supra* note 96 at 19.

seminars that address current practice needs or key contemporary practice issues for lawyers.²⁴⁸ The schedules for CPD seminars in the 2013 and 2014 calendar years have not included any seminars directed towards mediation and child welfare. We would suggest that the CPD program presents an opportunity to get child welfare lawyers acquainted with mediation processes, and have them buy in as active supporters and participants.²⁴⁹ Of course, for a mediation program to work sufficiently, it must have sufficient supports in place.

Resources

It could also be said that a mediation program will only be as good as the capital that is invested into it. A mediation program will need sufficient resources for its needs in order to succeed. Kelly Browe Olson explains:

"When new programs are developed, there must be more than adequate resources. The financial resources need to provide for the hiring of trained professionals as mediators, facilitators, and coordinators. The program personnel must understand the fundamental principles of the processes and be prepared to teach families and professionals about them. The FGC program budgets must allow these professionals to spend the large amount of time that is sometimes necessary to gather the extended family and/or community members who will be supporting the family, as well as the information needed to make a case plan. If there is more than one type of process available for families, then there should be an evaluation done to determine which process or processes will work best for a particular family. The staff must take the time to explain the fundamentals of the processes and help the family and professionals to understand what needs to be accomplished. Finally, and very significantly for long-term success, jurisdictions must ensure that there will be resources available for whatever services and plans the family and professionals decide are necessary."²⁵⁰

These concerns can be expected to come up with any mediation initiative, including mainstream ones. It is, however, worth mentioning issues that are especially pertinent to Aboriginal initiatives in the realm of child welfare.

²⁴⁸ Law Society of Manitoba, Continuing Professional Development (CPD) Activities <online: <http://www.lawsociety.mb.ca/education/continuing-professional-development>>

²⁴⁹ Law Society of Manitoba, 2014 Summary of LSM CPD Programs <online: <http://www.lawsociety.mb.ca/education/continuing-professional-development/Programs/summary-of-2014-lsm-cpd-programs>>; Law Society of Manitoba, 2013 Summary of LSM CPD Programs <online: <http://www.lawsociety.mb.ca/education/continuing-professional-development/Programs/summary-of-2013-lsm-cpd-programs>>

²⁵⁰ Kelly Browe-Olson, *supra* note 123 at 66.

Aboriginal Issues

Aboriginal Self-Determination

Aboriginal issues are important to consider whenever discussing child welfare policy, especially in Manitoba. There have been of course frequent demands for Aboriginal self-determination over child welfare.²⁵¹ Integral to demands for self-determination is an emphasis on greater decision making authority for Aboriginal child welfare agencies so that they can effect culturally appropriate placements.²⁵² What is meant by culturally appropriate placements is tapping into extended family kinship networks in Aboriginal communities, with adoption to a non-Aboriginal family called upon only as a last resort. Ideally, such arrangements also need to be enhanced by culturally-based parenting programs.²⁵³

It is also thought that the process of arriving at a culturally important placement, a contemporary adaptation of Harmony Circles, is equally important.²⁵⁴ The use of circle discussions has of course received a lot of attention when it comes to Aboriginals caught up in the criminal justice system. It is, however, thought that the circle process can also have a special relevance to Aboriginal child welfare matters.

For the circle process to work effectively, it is important to establish trust and rapport with family and community members prior to scheduling a case conference.²⁵⁵ Building and maintaining trust extends to the conduct of the circle itself. Any conflicts of interest must be declared beforehand. Family members should be allowed to bring along a third party they trust. Mediators or social workers must explain the results of any home assessment with respect and without judgment. Questions that are asked of family members must also be respectful.²⁵⁶

²⁵¹ Cindy Blackstock, "Residential Schools: Did They Really Close or Just Morph into Child Welfare?" (2007) 6 Indigenous L.J. 71. Cindy Blackstock & Nico Trocmé, *supra* note 3; Jean LaFrance & Betty Bastien, "Here be Dragons! Breaking Down the Iron Cage for Aboriginal Children" in Ivan Brown *et al.* (eds.), *Putting a Human Face on Child Welfare: Voices from the Prairies* (Ottawa: Centre of Excellence for Child Welfare, 2007) 89; Aboriginal Adviser to the Minister, *Children First: The Aboriginal Adviser's Report on the Status of Aboriginal Child Welfare in Ontario* (Toronto: Ontario Ministry of Children and Youth Services, 2011).

²⁵² *Summary of the Detailed Implementation Plan (DIP) for Restructuring the Child and Family Services System in Manitoba* (Winnipeg: Aboriginal Justice Inquiry - Child Welfare Initiative, 2003). Commission to Promote Sustainable Child Welfare, *Aboriginal Child Welfare in Ontario: A Discussion Paper* (Toronto: Minister of Children & Youth Services of Ontario, 2011) *Ibid.* at 47.

²⁵³ Cindy Blackstock, *supra* note 66 at 13.

²⁵⁴ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 47.

²⁵⁵ Joan Riggs, *Working with First Nations, Inuit and Metis Families Who Have Experienced Family Violence: A Practice Guide for Child Welfare Professionals* (Toronto: Ontario Association of Children's Aid Societies, 2011) at 106-107.

²⁵⁶ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 110-111.

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The Ontario Association of Children's Aid societies produced a practice manual based on consultations with five focus groups involving agency workers and service providers, and five focus groups with Aboriginal family members with previous involvement with child welfare in Ontario.²⁵⁷ According to the manual itself, the healing circle proceeds in four stages. The first stage is to hold an early talking circle to gain awareness of initial hurts. The second stage is a sharing circle and formation of trust between participants. The third stage is a healing circle of walking through painful memories and gaining trust in the spiritual message. The fourth stage is a spiritual circle, reclaim spiritual gifts and integrate culture into their healing practices.²⁵⁸

A cross cultural study was carried out by Brad McKenzie to develop culturally appropriate child welfare standards in consultation with nine First Nations communities in Manitoba by West Region Child & Family Services. The study suggests certain guidelines for the conduct of a circle:

1. The circle must always have in mind the development of placement planning that would emphasize placement in extended family, or even placement in community even if it wasn't extended family. Such a practice reflects cultural view that in a holistic sense the community is the family.
2. Expanded participation of family members and community includes parents having more of a say. But that consideration must be balanced with the concern not to minimize parents' behaviour that may be harmful to children.
3. Reaching decision by consensus and participation is important during the circle process.
4. It must be kept in mind that in many Aboriginal cultures, emotional support, love and care, were more important than material wealth or physical living space.
5. Stability, good communication skills, foster parents treating both foster children and biological children equally are also important.
6. Past substance abuse may be important to consider, but not overstated if it was the past and the prospective foster parents no longer had any problems.
7. The importance of culture and ceremony. Cultural training for prospective foster parents.²⁵⁹

Consultation

There is generally a need to engage in a consultation process beforehand in any effort to set up a new child welfare initiative, but it is especially so when it comes to Aboriginal initiatives. More specifically, there is a need to avoid top down approaches, especially when such approaches

²⁵⁷ Joan Riggs, *supra* note 255 at 13.

²⁵⁸ *Ibid.* at 87.

²⁵⁹ Brad McKenzie, "Developing First Nations Child Welfare Standards" (1997) 12:1 The Canadian Journal of Program Evaluation 133.

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assume that one size fits all. Aboriginal communities must instead be welcomed to a consultation and mapping process that is inclusive of grass roots community members, and that accounts for local culture and needs.²⁶⁰ One reason is that each First Nation sees customary care arrangements as being unique to their own particular cultures.²⁶¹

Rapport and Training

An important part of any Aboriginal specific-initiative will be the need for social workers to gain a rapport with Aboriginal community members. A report by the Native Women's Association of Canada notes that relations between Aboriginal families and child welfare agencies in Ontario have often been marked by hostility and mistrust.²⁶² Steven Thibodeou and Faye North Peigan did a qualitative study based on interviews with 36 First Nations social and community workers. Participants indicated a loss of trust in themselves, in their families, in their communities, and towards government and outsiders. They also indicated that certain steps are necessary to gain the trust of Aboriginal communities: acquire knowledge of the community, be there and be supportive of the community, maintain confidentiality, and make a long term commitment to the initiative.²⁶³

Training that addresses the particularities associated with Aboriginal child welfare matters and the conduct of circle-based alternatives is also important.²⁶⁴ Social worker and service provider focus groups, as part of a government of Ontario report, stressed that there would need to be initial and ongoing training for workers so that they acquire the requisite cultural knowledge, deeper understanding of the cultural differences that can inform cognitive biases and pre-judgment, as well as familiarity with the dynamics of Harmony Circles.²⁶⁵ Patricia Johnston did a qualitative study based on interviews with 10 Quallanut social workers. The participants indicated a perception that Nunavut and Inuit under represented as social workers in the territory. Quallanut social workers were ill-equipped or ill-prepared to the realities of working child welfare in the territory. Education about Nunavut and Inuit culture inadequate to prepare themselves for the reality on the ground. Lack of qualified Inuit candidates for social work positions doesn't hold.

²⁶⁰ Tara Ney, Carla Bortoletto & Maureen Maloney, *supra* note 139 at 64-66.

²⁶¹ Nancy Johnson, *supra* note 163 at 7.

²⁶² *Culturally Relevant Gender Based Models of Reconciliation* (Native Women's Association of Canada, 2010) at 23. See also Nancy Johnson, *supra* note 163 at 8.

²⁶³ Steven Thibodeou & Faye North Peigan, "Loss of Trust Among First Nation People: Implications When Implementing Child Protection Treatment Initiatives" (2007) 4:3 *First Peoples Child & Family Review* 50. See also Joan Riggs, *supra* note 255 at 96.

²⁶⁴ Cindy Blackstock & Nico Trocmé, *supra* 3 at 21-22; Nancy Johnson, *supra* note 163 at 12.

²⁶⁵ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 115-118.

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Need for more extensive culturally appropriate training and education, which will include Inuit candidates.²⁶⁶

The Ontario Report also concludes that social workers must use a holistic approach that takes into account the background, including historical phenomena such as intergenerational trauma, and the needs of family members, including socio-economic needs.²⁶⁷ Cindy Blackstock puts forward the following as Touchstones of a Holistic Response:

- Social workers must understand the impact of residential schools and intergenerational trauma on Aboriginal communities and families.
- Social workers must understand the negative impacts of being taken out of the home and being placed in the home. There must be restraint in the use of apprehension.
- Social workers must make a distinction between home conditions stemming from poverty, or from wilful neglect. The former should not be treated as a legal ground for apprehension, but instead a basis for the provision of support services.²⁶⁸

There is also a concern that social-workers still enjoy inordinate power, and can co-opt alternative processes. Tara Ney, Carla Bortoletto and Maureen Maloney recommend that social workers who participate have training in "critical reflexivity" which includes:

- training in awareness of the history of social work with First Nations People
- understanding accountability to the history of harm that is perpetuated
- exposing and becoming aware of one's role in perpetuating the oppression
- providing experiential orientation around local Indigenous culture²⁶⁹

Lyscha Marcynyszyn did an evaluation of a Lakota Sioux adaptation of the Family Group Decision Making model.²⁷⁰ Based on the feedback she received, she concluded that professionals must learn to yield a measure of decision-making power to families. They must not, for example, impose their presence during "Private Family Time". Family members must be encouraged to empower themselves. Further, the father's role in Sioux culture must be appreciated and validated.²⁷¹

²⁶⁶ Patricia Johnston, "Stuck in the Ways of the South: How Meritocracy, Bureaucracy, and a One-Size-Fits-All Approach to Child Welfare fails Nunavut's Children" (2011) 6:1 First Peoples Child & Family Review 66.

²⁶⁷ *Ibid.* at 102-103.

²⁶⁸ Cindy Blackstock, *supra* note 66 at 11-12.

²⁶⁹ Tara Ney, Carla Bortoletto & Maureen Maloney, *supra* note 139 at 64.

²⁷⁰ Lyscha Marcynyszyn *et al.*, "Family Group Decision Making (FGDM) with Lakota Families in Two Tribal Communities: Tools to Facilitate FGDM Implementation and Evaluation" (2012) 91: 3 Child Welfare 113.

²⁷¹ *Ibid.* at 130-131.

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It has also been argued that greater flexibility and sensitivity should extend not just to how social workers assess the family situations they deal with, but also the resolutions that they should be willing to agree to. The Ontario child welfare report for example concludes that social workers must strive whenever possible to meet needs of children through extended family and community networks.²⁷² The report also calls for a recognition that there are different ways to raise children among cultures. They must avoid imposing Western values on Aboriginal families. Examples, not cutting children's hair, allowing children to play with less supervision, allowing children to share beds.²⁷³

Effective Service Plans

If the process does decide to allow Aboriginal parents to maintain supervised access, consideration also has to be given to maximizing the effectiveness of any service plans in order to minimize the need for re-apprehending the children. Service plans must be designed to be realistic and not overambitious, in order to build capacity and confidence in the family. A number of concerns were raised by focus group participants about service plans during a roundtable discussion on Aboriginal child welfare roundtable held in Toronto. The concerns included:

- The focus on service plans is perceived to be on “ticking off ” another requirement on another piece of paper
- Literacy issues may impede the family’s understanding; the language and terminology used are not always accessible
- The forms can create anxiety and do not support open conversations
- The paper-driven process is not always conducive to Aboriginal culture
- Participants described that they didn’t understand their service plan or what the child welfare professional was asking of them, but they were too intimidated to ask. In the end, they felt so overwhelmed they didn’t even try to understand.
- A one-year timeline is too short; in some cases three years is necessary so that people can do the healing that they need to do
- Participants described completing their service plan, and having new conditions added, which is very demoralizing

The focus group participants made the following suggestions to improve the service planning process:

- Develop service plans with the mother and father, whenever possible
- The parent needs to know that s/he does not have to sign the service plan and needs to understand the implications of not signing it

²⁷² Commission to Promote Sustainable Child Welfare, *supra* note 252 at 103-104.

²⁷³ *Ibid.* at 97.

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- Be realistic about the demands being placed on the family
- Once a service plan has been developed, ensure that the parents have the appropriate resources and services to carry out the plan. They may require referrals and in some cases specific supports (e.g. transportation and childcare to attend appointments).
- Follow up with the service providers that have been recommended. Are they culturally appropriate and respectful?
- In addition to a paper copy, the expectations in the service plan need to be clearly explained in a conversation
- Visit families more regularly to check in and see how they are doing. When visiting, credit the family for what they are doing well.²⁷⁴

The Tripartite Roundtable also describes examples of successful service plans grounded in customary care arrangements as follows:

"Examples of successful customary care arrangements were shared. In some cases a safe home declaration was used, allowing the agency to place a child there until a home study could be completed. Aboriginal CAS participants commented that this can be implemented when you know the families and have a trust relationship with them. Some longstanding practitioners of customary care noted the importance of being consistent and using evidence based approaches to achieve successful arrangements where children are placed in First Nations families in their own communities or territories. They described their process in terms of a decolonizing approach, employing traditional concepts and empowering steps with case management and accountability."²⁷⁵

A more flexible approach to time lines for service plans is often needed, as the Roundtable continues to explain:

"One Aboriginal CAS said that because of timelines of children coming into care, they try to get First Nations to make agreements with foster homes to avoid the court process.

They suggested the process should also allow them to go to the First Nation and say, "here is your child, can you find him a home?" They further identified a need for staff education and more communications with First Nations.

One significant aspect of customary care is the removal of timelines. Participants noted that it takes most families a lot longer than six months to heal. One successful case took six years, and the children had ongoing access to the mother as she went through her healing process. There is

²⁷⁴ *Ibid.* at 109-110.

²⁷⁵ *Ibid.* at 8.

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a belief that our people will straighten up in their own time as long as we work with them. The waiting can be difficult for the worker as well as the children.

Customary care has timelines that reflect the goal: to get the child back to the parents. There is a perception that resources are not available for customary care and child welfare; thus people opt for kinship care because it offers financial support for caregivers. In fact, as noted in the MCYS guidelines, customary care is permanently funded. We need to build relationships and trust, and challenge those rules and perceptions that are not in the interests of the child."²⁷⁶

Resource Support

It is clear that funding and resources will need to be dedicated to Aboriginal child welfare initiatives in order to make them, and the service plans they come up, more effective.²⁷⁷ It is also clear that that Aboriginal child welfare programs are both inadequately funded, and receiving less funding in comparison to mainstream initiatives and programs. The *Wen:de* report in 2005 called for an additional \$109 million investment in least intrusive services in order to bring Aboriginal services into parity with non-Aboriginal services.²⁷⁸ MacDonald and Ladd also found that funding for First Nations children per capita 22% less than for provincial counterparts.²⁷⁹ Sarah Clark adds:

An additional study conducted by the Caring Society demonstrates that First Nations children, youth and families have almost no access to the \$108 billion of revenue that supports the voluntary sector to provide a myriad of social services and quality life supports to other children and families.[See Note 4 at end of document] This includes such programs as Big Brothers, Big Sisters, YMCA programming, Meals on Wheels, and countless others that many families rely on daily for support. The lack of access to voluntary sector resources coupled with the absence of municipal and provincial services means that despite the greater needs of children and youth on reserve, communities living at crisis standards have less infrastructure supports than other Canadians.²⁸⁰

²⁷⁶ Nancy Johnson, *supra* note 163 at 8-9.

²⁷⁷ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 45; The Honourable Ted Hughes, *The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children* (Winnipeg: Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, 2013) at 476-479.

²⁷⁸ John Loxley *et al.* *Wen:de: The Journey Continues* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005).

²⁷⁹ Rose Alma-MacDonald & Peter Ladd *et al.*, *First Nations Child and Family Services: Joint Policy Review Final Report* (Ottawa: Assembly of First Nations, 2013) at 94.

²⁸⁰ Sarah Clarke, "Ending Discrimination and Protecting Equality: A Challenge to the INAC Funding Formula of the First Nations Child and Family Service Agencies" (2007) 6 *Indigenous L.J.* 79 at 83; Samantha Nadjiwan & Cindy Blackstock, *Caring Across the Boundaries: Promoting Access to Voluntary Sector Resources for First Nations Children and Families* (Ottawa: First Nations Child and Family Caring Society, 2003).

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There has also been a dismissal of human rights complaint based on inequitable funding for Aboriginal child welfare agencies.²⁸¹

The Roundtable also notes that customary care initiatives often impose significant hardships on already impoverished Aboriginal communities because of a lack of resourcing. Customary care arrangements often require significant community involvement and commitment, including extended family members having to provide resources to primary caretakers, because there are not any government resources dedicated to it.²⁸² And indeed Laverne Hill asserts that, in Alaska, sufficient supports are necessary to make Family Group Conferencing work there. Otherwise, tribes are forced to use unsubsidized alternatives, like playing on the compassion of extended families to look after children without any economic assistance.²⁸³

The government of British Columbia at least appears to be developing an appreciation for the reality. The Ministry of Child and Family Development developed an *Operational and Strategic Directional Plan*, which involves building cultural competencies into social work practice, increasing community-based initiatives, advancing a more effective funding approach, closing the gap of equality in funding, and engaging planning forums with Aboriginal communities and agencies.²⁸⁴ They also produced a series of specific recommendations as follows:

- Recommendation 1, need to develop an explicit policy for the negotiation of jurisdictional transfer with a clear strategic vision.²⁸⁵
- Recommendation 2, need to develop an explicit policy for the delivery of services with a clear strategic vision.²⁸⁶
- Recommendation 3, develop a concrete plan to close the gap in funding for Aboriginal children in both health and education. The plan needs clear targeted outcomes and performance measures that would be applicable for all Aboriginal children, wherever they resides.²⁸⁷
- Recommendation 4, the Ministry must review its senior leadership team, so that Aboriginal expertise is represented and has meaningful input into decision-making processes.²⁸⁸
- Recommendation 5, the Ministry must report semi-annually on the safety and well-being of Aboriginal children.²⁸⁹

²⁸¹ <http://www.cdn-hr-reporter.ca/content/alarming-decision-first-nations-child-welfare-0>

²⁸² Nancy Johnson, *supra* note 163 at 9.

²⁸³ Laverne Hill, *supra* note 183.

²⁸⁴ British Columbia Ministry of Child and Family Development's *Operational and Strategic Directional Plan*, 2008.

²⁸⁵ *Ibid.* at 59.

²⁸⁶ *Ibid.* at 57-58.

²⁸⁷ *Ibid.* at 60.

²⁸⁸ *Ibid.* at 61.

Miscellaneous Issues

There are also certain miscellaneous challenges that must be kept in mind with establishing Aboriginal child welfare initiatives. One of them, as identified by the Phoenix Sinclair Inquiry, is a tension between maintaining confidentiality with families and sharing needed information with social workers. The Inquiry also argues that there is a need for better co-ordination between community organizations and child welfare agencies to enhance service delivery.²⁹⁰ Vandna Sinha and Anna Kozlowski also stress a need for further research on Aboriginal child welfare agencies so as to yield better results for Aboriginal children.²⁹¹

Another issue is that Aboriginal family members may not only be unaware of the legal issues in their cases (much like anybody else who has had a child apprehended), but may feel especially stressed and anxious when going to court for the first time following an apprehension. In that respect, we would also make the suggestion that the Aboriginal Courtworkers' Program of Manitoba be expanded so as to be available to Aboriginal persons who have had their children apprehended as well. The idea being that Courtworkers can help ease some of the stress and anxiety for family members, provide at least a preliminary explanation of what is happening and what the issues are, and facilitate access to counsel who could then help the family members on an ongoing basis. The Courtworkers may also provide initial information on the possibility of any mediation programs as part of the function of providing information and explanations.²⁹²

The Commission to Promote Sustainable Child Welfare in Ontario also produced a series of recommendations with a view towards enhancing the effectiveness of Aboriginal child welfare agencies, as follows:

1. There needs to be an awareness that divisions within Aboriginal communities themselves can present obstacles to effective collaboration for Aboriginal child welfare initiatives.²⁹³
2. Government ministries need to review existing policies, regulations, standards, directives, etc. for when exemptions may be appropriate such as to enhance services delivered to Aboriginal communities.²⁹⁴
3. There must be an alignment of expectations that both provincial governments and Aboriginal leaders place on Aboriginal child welfare agencies.²⁹⁵

²⁸⁹ *Ibid.* at 62.

²⁹⁰ Hon. Ted Hughes, *supra* note 270 at 476-479.

²⁹¹ Vandna Sinha & Anna Kozlowski, *supra* note 1.

²⁹² Aboriginal Courtworker Program of Manitoba. <online:
<http://www.gov.mb.ca/justice/court/aboriginalcourtworkers.html#10>>

²⁹³ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 43.

²⁹⁴ *Ibid.* at 45.

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4. A clear locus of accountability and responsibility for Aboriginal child welfare agencies must be identified and established.²⁹⁶
5. There needs to be performance indicators and evaluation processes for Aboriginal child welfare agencies.²⁹⁷
6. There needs to be protocol agreements between Aboriginal child welfare agencies and other child welfare agencies. There is also a need for culturally sensitive training and awareness so that non-Aboriginal agencies have a less intrusive effect on Aboriginal communities.²⁹⁸
7. Aboriginal child welfare services need to clearly document their practices, including steps and actions taken on each file that they handle.²⁹⁹
8. There is a need to develop of an inter-agency forum to exchange ideas and practices.³⁰⁰

The Ontario report also suggests that an initiative's involvement should not end the moment the conference that addresses the initial apprehension ends. Too often next point of contact is when another issue warranting apprehension arises. The report stresses the need for follow up meetings and support. In other words, mediation conferences should be viewed as processes instead of events.³⁰¹

Assuring Success

Assuring success for Aboriginal initiatives means having a comprehensive plan that addresses multiple factors and concerns. For example, Joan Riggs makes the follow recommendations for a systemic and holistic case management approach to child protection and family violence that can help to build a solid working relationship between child welfare organizations and the community:

- Create immediate response teams that can offer wrap around support care circles to each family member.
- Talk about the power imbalance between the workers and families and how to create balance in the relationship.
- Work with the family as part of a supportive team that includes Aboriginal service organizations, Elders, other family members and community members that the family identifies as helpers.
- Have weekly case management meetings with the team to explore questions together:

²⁹⁵ *Ibid.* at 46.

²⁹⁶ *Ibid.* at 46.

²⁹⁷ *Ibid.* at 46.

²⁹⁸ *Ibid.* at 47. See also Nancy Johnson, *supra* note 163 at 11-12.

²⁹⁹ *Ibid.* at 47.

³⁰⁰ *Ibid.* at 47.

³⁰¹ Commission to Promote Sustainable Child Welfare, *supra* note 252 at 67.

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- What are the issues in this family?
- What are the strengths of this family?
- What are the risks to this family? How can we address them?
 - How can we support this family?
 - How can we engage this family?
- Have formal and informal community service workers go with child welfare professionals in the home visits.
- Have formal and informal community service workers involved in investigations
- Pass the file on to the family service workers right after the investigations
- Involve other relevant workers (e.g. FASD worker, perinatal worker, housing staff, or anyone else working to help the family) early in the process
- Develop the service plan with the family and call it a family plan
- Identify the key worker that will be the lead and review the family's progress³⁰²

If a comprehensive and well thought out plan is put into place, there is every possibility for success. The Roundtable in Toronto describes one such example as follows:

"Despite the perceived barriers, one CAS with several years of experience in customary care indicated that they view this approach as a win-win. Since establishing their protocol with the First Nation, there have been no apprehensions. It was noted that this has resulted in substantial cost saving to the ministry for the number of children in care."

Marcynyszyn's evaluation of the Sioux adaptation of the FGDM models identified the following challenges beforehand: inadequate resources, lack of buy in from staff, resistance to change by tribal systems that have jurisdiction, the need to avoid the perception of a top-down paternalistic imposition, child welfare staff need to make a paradigm shift from having final authority to sharing decision-making power with the family itself, time constraints, and fatigue from long meetings.³⁰³ The model was nonetheless well received by Sioux communities because it was built on consultation, dialogue, and building of genuine partnerships with tribal communities.³⁰⁴

Preventative Initiatives

Another concept that is worth exploring is the greater use of preventative programming to minimize the need for child welfare apprehensions and subsequent court room litigation.³⁰⁵ The

³⁰² Joan Riggs, *supra* note 255 *Ibid.* at 107-108.

³⁰³ Lyscha Marcynyszyn *et al.*, *supra* note 270 at 126-130.

³⁰⁴ *Ibid.* at 130.

³⁰⁵ Hon. Ted Hughes, *supra* note 260 at 457-460.

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idea is that preventative programming can more effectively address the underlying social phenomena more effectively than adversarial litigation, or even mediation post-apprehension, ever could.³⁰⁶ The social phenomena driving Aboriginal over-representation in child welfare apprehensions are quite dire indeed. Vandna Sinda makes the following comparisons when it comes to risk factors for child welfare apprehension:

- Substance abuse (alcohol, drugs/solvents), 55.7% Aboriginal vs. 25.3% non-Aboriginal.
- History of foster care/group home 17.1% Aboriginal 7.8% non-Aboriginal
- Domestic violence 43.7% Aboriginal 31.6% non-Aboriginal
- Few social supports 40.3% Aboriginal 31.5% non-Aboriginal
- Health issues (physical, mental, cognitive) 30.4% Aboriginal 32.6% non-Aboriginal
- Number of risk factors, None, 19.2% Aboriginal 34.8% non-Aboriginal
- One, 23.6% Aboriginal 26.7% non-Aboriginal
- Multiple, 57.2% Aboriginal 38.4% non-Aboriginal
- Multiple primary caregiver risk factors "Unknown", 27.3% Aboriginal 10.3% non-Aboriginal
- Low income 53.6% Aboriginal 31.8% non-Aboriginal
- Housing problems 24.2% Aboriginal 14.9% non-Aboriginal
- Caregiving resource strain, 56.3% Aboriginal 46.4% non-Aboriginal
- Number of household risk factors
- None 22.2% Aboriginal 40.0% non-Aboriginal
- One 33.2% Aboriginal 32.8% non-Aboriginal
- Multiple 44.6% Aboriginal 27.2% non-Aboriginal³⁰⁷

Brittany Baker adds:

"Based on our study sample, street-involved youth in Vancouver are over 160 times more likely to have a history of being in government care compared to the general population of youth. Our study found that those with a history of being in government care were more likely to be of Aboriginal ancestry, have started using hard substances at an earlier age, have a history of physical abuse, have a parent that drank heavily or used illicit substances, and did not complete high school. Outcomes associated with the child welfare system have become a public health concern, and one that governments have failed to adequately address. However, these findings give policymakers potential areas for

³⁰⁶ Phillip Lynch, "Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia" (2001) 23 Sydney L. Review 501 at 540-541; Commission to Promote Sustainable Child Welfare, *supra* note 235; Hon. Ted Hughes, *supra* note 260 at 339-344.

³⁰⁷ Vandna Sinha *et al.*, "Understanding the investigation stage overrepresentation of First Nations children in the child welfare system: An analysis of the First Nations component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008" (2013) 37 Child Abuse & Neglect 821 at 829; See also Hon. Ted Hughes, *supra* note 260 at 451-457.

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redress and demonstrate the need for interventions to support families and youth along the continuum of risk. This includes interventions to support at-risk families before government involvement is necessary, policies for children and youth currently in care, and services to help youth successfully transition out of care and into early adulthood."³⁰⁸

It is thought that waiting until an overtly recognizable incident of child abuse or neglect occurs before intervening with an apprehension or provision of services represents a lost opportunity to deal with matters within a troubled family earlier and more effectively. Cindy Blackstock explains:

"The child welfare system is designed to intervene at the level of children and their families, but the structural risks for Aboriginal children are primarily sourced at the societal level. The child welfare system supports only marginal efforts to address structural risks, and this has frustrated efforts to redress the overrepresentation of Aboriginal children in care. For example, in a poor family living in an unsafe or crowded house with a caregiver who has addictions issues, there is a high probability that neglect will manifest. Child welfare authorities will typically respond to the risk by making a referral to addictions programs, which often having long waiting lists, and to parenting skills interventions."³⁰⁹

She continues:

"Overall, child protection workers are not equipped with the training or resources required to adequately identify and address risks beyond those manifested at the level of the caregiver. For example, risk assessment models used by child protection workers in many regions of the country do not take into risk that is sourced outside of the family. This raises the strong potential that child welfare authorities will hold First Nations parents primarily responsible to change structural risk factors that they have little ability to influence on their own. Having practiced child protection for over ten years on the front line, I believe unequivocally that parents should be held responsible for redressing the risk faced by their children, but only if they have to the ability to influence that chance. If the risk is sourced at a societal level, then the child welfare system and other allied services must be held primarily accountable for redressing the risk."³¹⁰

³⁰⁸ Brittany Barker *et al.*, "High prevalence of exposure to the child welfare system among street-involved youth in a Canadian setting: implications for policy and practice" (2014) 14 *BioMed Central Public Health* 197. Study was based on 937 files involving street-involved youth.

³⁰⁹ Cindy Blackstock, "Reconciliation Means Not Saying Sorry Twice: Lessons From Child Welfare in Canada" in Marlene Castellano (ed.), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Toronto: Aboriginal Healing Foundation, 2008) 165 at 167.

³¹⁰ Cindy Blackstock, "Reconciliation Means Not Saying Sorry Twice: Lessons From Child Welfare in Canada" in Marlene Castellano (ed.), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Toronto: Aboriginal Healing Foundation, 2008) 165 at 167-168.

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Others have argued that there is a lack of resources dedicated to nurturing families in a proactive fashion, and society ends up paying more in the long run for after the fact interventions.³¹¹ Clare Huntington in particular stresses the need for anti-poverty programming and early education initiatives as a more effective preventative regarding abuse.³¹² Blackstock again has more to say:

Too often, child welfare codifies poverty as a personal deficit instead of addressing the social problems that disadvantage families. For example, 78 per cent of all families who reported to child protection during the 2003 cycle of the Canadian Incidence Study on Reported Child Abuse and Neglect had incomes below \$40,000 per annum. Income appears to play an even bigger role for families who have had their children removed. A study of First Nations and non-Aboriginal children found that 95 percent of families who had their children removed during 2003-2005 came from families that earned less than \$25,000 per annum even though less than one percent of these same families received any poverty reduction services from child welfare.³¹³

And again:

Overall, unless the factors of poverty, poor housing and substance misuse linked back to the impacts of residential school are better addressed, and resourced, in ways that are directed by the respective Aboriginal communities, there is little evidence that substantial progress will be made on making substantial reductions in the over-representation of Aboriginal children in care.³¹⁴

The Toronto Roundtable adds:

"First Nations participants identified a number of supports and strategies to facilitate implementation of customary care. First Nations participants recalled their grandparents taking in and caring for children and providing support to other families who needed help.

They described the changes First Nations have undergone over the last few generations. With the impact of residential schools there has been a shift in values and family structure. In the view of some participants, a dependency mentality has set in, and neglect, drugs and gangs are now rampant in many First Nations communities.

³¹¹ Tara Ney, Carla Bortoletto & Maureen Maloney, *supra* note 139 at 66-67; Marsha Garrison, "Child Welfare Decision Making: In Search of the Least Drastic Alternative" (1986-1987) 75 Georgia L.J. 1745.

³¹² Clare Huntington, *supra* note 13 at 133-135; Clare Huntington, "Mutual Dependency in Child Welfare" (2007) 82 Notre Dame L. Rev. 1485 and A.J. Reynolds & D.L. Robertson, "School-Based Early Intervention and Later Child Maltreatment in the Chicago Longitudinal Study" (2003) 82 Child Welfare 633.

³¹³ Cindy Blackstock, *supra* note 66 at 4.

³¹⁴ *Ibid.* at 5.

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They spoke of the need for young people to learn about their identity – something that the education, health and child care systems have not taught First Nations youth.

The need was identified for additional tools and resources to support families and prevention, reiterating that the goal is to reunify families. They questioned why there are many resources for foster parents but none for when children are with their parents."³¹⁵

Nicolas Bala and Alan Lescheid did an Ontario study based on qualitative interviews with 27 Court of Justice and Superior Court of Justice Judges, 48 lawyers acting for parents, 45 lawyers for the Office of the Children's Lawyer, senior counsel for 53 child welfare agencies, 15 Directors of Service for all child welfare agencies, and nine assessors and staff members for Family Court Clinic staff members.³¹⁶ One of the findings of the study concerned the fact that an assessment can only be ordered after a legal finding that a child is in need of an assessment. Three quarters of judges and lawyers, and over one half of parents, approved of changing legislative provisions so that assessments could be done more proactively so that family concerns and needs can be identified earlier.³¹⁷

There are some anecdotal success stories, particularly for Aboriginal organizations in Manitoba. The Phoenix Sinclair Inquiry final report notes that there are several such organizations that are well received by their communities. These include: Andrews Street Family Centre, Ma Mawi Wi Chi Itata Centre, Wolseley Family Place, Native Women's Transition Centre, Ka Ni Kahnichihk, Eagle Urban Transition Centre, Manidoo Gi Minii Gonaan.³¹⁸ They succeed by building trust with families, declining the authority to apprehend children, finding staff and volunteers in the community, and build relationships.³¹⁹ Another example is the Wellness Centre of the Nisichawayasihk Cree Nation in Manitoba. It has an integrated and comprehensive service approach that encompasses everything that speaks to family wellness, such as youth summer camps, diabetes initiatives, FASD initiatives, maternal health programs, Elder mentoring, child & family services, parenting skills courses, and fitness classes.³²⁰

As far as empirical proof goes, there is certainly evidence that the lack of services can lead to negative outcomes for families and children. A study by Jim Silver alleges a link between

³¹⁵ Nancy Johnson, *supra* note 163 at 9-10.

³¹⁶ Nicolas Bala & Alan Lescheid, *supra* note 87 at 13.

³¹⁷ *Ibid.* at 18.

³¹⁸ Hon. Ted Hughes, *supra* note 270 at 465-474.

³¹⁹ *Ibid.* at 474-476.

³²⁰ *Ibid.* at 345-348.

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Aboriginal over-representation in child welfare and racialized poverty.³²¹ The study sets out a correlation between a lack of poverty services and child welfare apprehension rates. Cases of neglect doubled in 1993 and 1998 Ontario Incidence Studies. 2,447 files in the 1993 study, 3,053 in the 1998 one.³²² Families in poverty had not increased, but supports to families in poverty had been cut leading to deeper levels of poverty.³²³

Empirical proof as the success of preventative programming in reducing child welfare apprehensions is limited, but what is available is still encouraging. Loman and Segal did a study on the provision of material assistance services for low socio-economic status (SES) families based on a comparison of the files of 42 low SES families who received services compared to those of 61 low SES families who did not.³²⁴ The results were as follows:

Because the samples were small they (and the significance tests) are only meaningful for the low SES experimental families. The differences were not statistically significant for this group using nominal level tests ($p = 0.124$). Nonetheless, the percentage differences in later accepted reports (52.7% for no material services vs. 43.2% when services were delivered) suggest that delivery of such services to families in greatest need may have had longer term effects for reducing child maltreatment. This was then tested by using the more powerful statistical technique of survival analysis.³²⁵

Unfortunately, the commitment of resources is not enough to match the need. For example, the Phoenix Sinclair Inquiry concluded that the Healthy Child Manitoba initiative doesn't go far enough, since it uses the wrong benchmark by measuring only parental deficits. The initiative needs to emphasize children's needs as a benchmark for the provision of adequate supports and services to families so that children can reach full potential.³²⁶ It was only recently that the (then) Department of Indian and Northern Affairs made any kind of movement in a preventative direction, as a report from the Auditor General notes:

In 2008, we audited INAC's program for child and family services on reserves. We found that INAC had not defined key policy requirements related to culturally appropriate child and family services and comparability of services with those provided by provinces. Moreover, the Department had no assurance that its First Nations Child and Family

³²¹ Jim Silver, "Complex Poverty and Home-Grown Solutions in Two Prairie Cities" in Sharon MacKay *et al.* (eds.) *Passion for Action in Child and Family Services: Voices from the Prairies* (Regina: Canadian Plains Research Center, 2009) 227.

³²² Nico Trocmé *et al.*, "What is Driving Increasing Child Welfare Caseloads in Ontario? Analysis of the 1993 and 1998 Ontario Incidence Studies" (2005) 84:3 *Child Welfare* 341.

³²³ *Ibid.* at 357-358.

³²⁴ L. Anthony Loman & Gary L. Siegel, "Effects of anti-poverty services under the differential response approach to child welfare" (2012) 34 *Children & Youth Services Review* 1659.

³²⁵ *Ibid.* at 1665.

³²⁶ Hon. Ted Hughes, *supra* note 270 at 462-465.

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Services Program funded child welfare services that were culturally appropriate or reasonably comparable with those normally provided off reserves in similar circumstances. We also found that there was no link between the financial obligations of the program and the way resources were allocated to it. Because the program's expenditures were growing faster than the Department's overall budget, INAC had been reallocating funding from other programs. In our 2008 audit, we also noted that INAC had joined with the Government of Alberta and First Nations in that province to introduce a new child and family services program emphasizing prevention. This was a departure from the existing model, which focused on intervention with families and children at risk.³²⁷

There is certainly something to be said for investing more resources in more preventative directions. Consider this excerpt from a news article on the backlog of child welfare cases in Ontario:

"These limits create institutional delay. For example, according to *the Child and Family Services Act* and the Family Law Rules, a hearing regarding child protection must take place within four months of the start of the case, but in fact more than half of all child protection proceedings took more than four months in 2011-2012, the most recent year for which we have statistics.

The Ministry of the Attorney-General has attempted to speed up the process through various initiatives, such as mediation programs and the appointment of non-judge resolution officers in the family law system, as well as targeted timelines for cases in the criminal law system. However, given that the Ontario Court of Justice serves 25,000 families in crisis and hears approximately 590,000 charges in its almost 200 locations annually, it is no wonder institutional delay persists."³²⁸

Note how the backlog persisted even after the use of mediation programs. That is not to say that both mediation and preventative programs cannot be integrated together in a comprehensive approach.³²⁹ Corbin Shangreaux and Cindy Blackstock did a survey study of all First Nations child

³²⁷ *Status Report of the Auditor General to the House of Commons, Chapter 4: Programs for First Nations on Reserves* (Ottawa: Office of the Auditor General, 2011) at 23.

³²⁸ James Morton, "One Modest Proposal for Speedier Justice" (July 8, 2013) *Toronto Star*, A13.

³²⁹ Lisa Rae, *Inuit Child Welfare and Family Support: Policies, Programs and Supports* (Ottawa: National Aboriginal Health Organization, 2011); Cindy Blackstock, Ivan Brown & Marlyn Bennett, "Reconciliation: Rebuilding the Child Welfare System to better serve Aboriginal Children and Youth" in Ivan Brown *et al.* (eds.), *Putting a Human Face on Child Welfare: Voices from the Prairies* (Ottawa: Centre of Excellence for Child Welfare, 2007) 59.

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welfare agencies.³³⁰ Respondents made a distinction between preventative services and least disruptive services, but saw the need for interplay between both types of services. The respondents also saw a need for increased funding for both types of services, but without scaling back existing services. They saw it as having the potential to reduce the number of times apprehension would be necessary.³³¹ The Toronto Roundtable adds:

In addition to the above-noted comments of CASs, participants from Aboriginal CASs also talked about the impacts of organizational growth and staff turnover. They also noted that they sometimes encounter fear, resistance and anger in their work with First Nations. Aboriginal CASs are seeking to play an active role in child welfare with First Nations communities and families, to ensure that families are included as part of the plan and to strengthen partnerships. They advocated the use of their prevention programs in parenting and anger management. They emphasized that when doing risk assessment, the risks of putting children into care should also be considered. They called for funding to support the Band Representative program to ensure appropriate professional representation in court and more regular training.³³²

The risk factors being discussed in the quote are poverty, homelessness, substance abuse, social exclusion and isolation.³³³

One can of course take things even further. Steven Kozley argues that Family Circles can be used in a more proactive fashion with preventative objectives, to mold healthy families before there is ever a need for apprehension.³³⁴ He describes in his study how one such program is available for Aboriginal families in British Columbia. The keys to the program are preparation and interviews with all participants beforehand. Preparation includes instruction on guidelines and cultural protocols.³³⁵ Family members are allowed to develop a plan during private time. The approval of any plan requires consensus.³³⁶ We admit that the concept remains relatively untested. It is, however, an idea that is worth exploring. Perhaps when a social worker investigates a home and finds issues of concern, albeit short of necessitating an apprehension at that point, a more productive avenue would be to make a referral to a mediation program so that the concerns may be addressed and dealt with earlier. That in turn could mean that families can start to become healthier before the concerns worsen, and thereby avoid the need for an apprehension later on.

³³⁰ Corbin Shangreux & Cindy Blackstock, *Staying at Home: Examining the Implications of Least Disruptive Measures in First Nations Child and Family Services Agencies* (Ottawa: First Nations Child and Family Caring Society of Canada, 2004) *Ibid.* at 38.

³³¹ *Ibid.* at para. 40-42.

³³² Nancy Johnson, *supra* note 163 at 4-5.

³³³ *Ibid.* at 451-457.

³³⁴ Kozley, *supra* note 63 at 113.

³³⁵ *Ibid.* at 113-114.

³³⁶ *Ibid.* at 115-117.

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A problem in Manitoba, however, is that the *Child and Family Services Act* tends to treat child protection as a sum zero proposition. Either the child is to be apprehended following investigation (s. 22) or the child welfare agency will decide not to apprehend with a requirement to report to the parents or guardians, any person reported as having abused the child, and the child as well as long as the child is deemed capable of understanding the information (s. 18.4(2.1)). The closest thing that the *Act* provides to an in-between option is a referral of an unclear matter to a child abuse committee under s. 19 of the *Act*. However, we are concerned that the provision for a child abuse committee has restrictive parameters such that it would be incapable of realizing effective mediation-based alternatives. Consider s. 3 of the *Child Abuse Regulation*³³⁷, which reads:

- 3(2) A child abuse committee established by an agency shall consist of the following five persons:
 - (a) the agency's child abuse coordinator;
 - (b) a duly qualified medical practitioner employed, retained or consulted by the agency to review cases of suspected child abuse for the agency;
 - (c) a police officer representing a law enforcement service operating in the area within the agency's jurisdiction;
 - (d) a representative of a school division located within the area of the agency's jurisdiction;
 - (e) a staff member of the agency, other than the child abuse coordinator.
- 3(3) In addition to the persons referred to in subsection (2), the agency may appoint one or more persons to the child abuse committee who the agency considers will make a significant contribution to the committee.
- 3(4) Where a joint committee is established under subsection 19(2) of the *Act* as a child abuse committee, the child abuse coordinator from one of the participating agencies shall, with the agreement of the participating agencies, be appointed under clause (2)(a) and the child abuse coordinators from the other participating agencies may be appointed under clause (2)(e).

One of our difficulties with the scheme is that the composition of the committee would be entirely in the hands of the child welfare agency that initially conducted the investigation to be with, and that leaves us concerned as to whether a s. 19 child abuse committee could truly be at arm's length from the agency for purposes of realizing an effective mediation-based alternative. Our other difficulty lies with s. 10 of the *Child Abuse Regulation*, which reads:

- 10. A child abuse committee shall
 - (a) review every case of suspected abuse referred to the committee;

³³⁷ *The Child and Family Services Act*, C.C.S.M. c. C80, *Child Abuse Regulation*, 14/99.

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- (b) review as required, the involvement of the police, medical and hospital professionals, and others involved in the investigation and management of the case;
- (c) provide consultation in the investigation and management of the case; and
- (d) make recommendations where it is considered appropriate or necessary to protect the child or any other child.

The committee itself would have a limited mandate, whether or not to recommend going ahead with an apprehension, and perhaps providing recommendations in anticipation of a guardianship order.

As such, our report would like to admonish the government of Manitoba to consider amending the *Act* to provide explicit recognition of mediation-based programming, and to explicitly provide it as an additional option for child welfare workers to consider when conducting an initial investigation. Child welfare workers would then have more flexibility when encountering situations that may put up warning signs, but may not yet warrant apprehension. A child welfare worker could, in such a situation, make a direct referral to a mediation program. Such a referral should in our view also require the voluntary participation of family members whose home has been investigated. And of course, we wish to stress that in the event that child welfare workers find it necessary to proceed with apprehension, that they remain open to participating in a mediation program afterwards. A mediation session could very well uncover information that the agency may not have been aware of previously, and could also very well produce resolutions that will both keep the family together and look out for the child's safety. Our point is that mediation-based alternatives should be available at multiple points in time, and not necessarily restricted to after an apprehension.

Conclusion

There are sound reasons to engage to explore in earnest the implementation of mediation-based alternatives for resolving child welfare benefits. Routinely applying standard adversarial procedures to child welfare matters can be problematic. Problems including encouraging the parties to become more entrenched in their positions against each other, child welfare agencies enjoying inordinate power during the process, families having the perception that judges will be deferential in favour of the child welfare agencies, unrealistic expectations being put on the parents as part of temporary guardianship orders, and insufficient program resources to support families in their observance of guardianship order conditions. On the other hand, there are considerable benefits to be gained from mediation programs for child welfare matters. These

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include greater family satisfaction with both the process and its outcomes, greater safety and stability for children, greater compliance with resolutions, as well as time and cost savings.

However, there are challenges involved with implementing mediation programs for child welfare. These include the potential for child welfare agencies to still enjoy greater power during mediation sessions, lawyers and social workers having difficulty accepting and engaging with mediation-based alternatives, resource demands, and a shortage of qualified mediators.

Nonetheless, we maintain that it is possible to design and implement child welfare programs to maximize their efficacy and minimize the potential problems. A fundamental first prerequisite is to initiate a comprehensive process of consultation to assess what the concerns of social workers, lawyers, community members, and other stakeholders. We also make a series of recommendations that we feel should merit serious consideration, although we recognize that consultation processes may very well lead to different recommendations. Our recommendations include allowing children to have direct participation in mediation sessions, governments investing sufficient resources in mediation programs and support services, ensuring that mediation processes are fair for all the participants, and providing adequate education and training to professional staff such as social workers, lawyers, and mediators so that they can participate effectively.

Another theme we feel merits exploration is the use of preventative programming to minimize the need for apprehension and any processes subsequent thereafter. Such an emphasis can produce a safer society for children, as well as being more cost effective over the long run. Likewise, another idea that merits consideration is making mediation-based alternatives available when a social worker becomes aware of problems in the family, but the problems are not yet serious enough to clearly demand apprehension. Earlier availability presents an opportunity to deal with problems before they become more serious, and therefore more likely to result in healthier families.

