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# Federal Legislation on Indigenous Child Welfare in Canada (Part I)

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## Federal Legislation on Indigenous Child Welfare in Canada

SÉBASTIEN GRAMMOND\*

Cet article se penche sur la contribution que la législation fédérale pourrait faire relativement à la gouvernance du système d'aide à l'enfance autochtone au Canada. Il explore les origines du principe supposant que le système d'aide à l'enfance autochtone doit être gouverné par la législation provinciale et explique également pourquoi le Parlement aurait la compétence pour légiférer dans ce domaine. L'article étudie la manière dont la législation fédérale peut contribuer à l'autodétermination des peuples autochtones, en se penchant sur des exemples comme la loi *Indian Child Welfare Act* aux États-Unis et les initiatives canadiennes dans les domaines de l'éducation ou de la protection de l'enfance. Il souligne ensuite ce que la législation fédérale devrait contenir afin de promouvoir l'autodétermination et de combler les lacunes du système actuel, y compris celles relevées par la Commission de vérité et de réconciliation (2005) et le Tribunal canadien des droits de la personne (2016).

This paper examines the contribution that federal legislation could make to the governance of Indigenous child welfare in Canada. It explores the origins of the assumption that indigenous child welfare must be governed by provincial legislation and explains why Parliament would have jurisdiction to legislate in this area as well. It then explores how federal legislation may contribute to indigenous self-determination, delving on examples such as the Indian Child Welfare Act in the United States and Canadian initiatives in the fields of education or child welfare. It then outlines what federal legislation should contain, in order to promote self-determination and to address the shortcomings of the current system, including those highlighted by the Truth and Reconciliation Commission (2015) and by the Canadian Human Rights Tribunal (2016).

CANADA'S CHILD WELFARE SYSTEM is one of the components of the State which has profound effects on Indigenous families and communities. Indigenous children are significantly overrepresented among those apprehended by child welfare authorities and placed with foster families.<sup>1</sup> The Truth and Reconciliation Commission noted that, by separating Indigenous children from their families and communities, the child welfare system is perpetuating the harms of residential schools through different means.<sup>2</sup> In January 2016, the Canadian Human Rights

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\* Justice of the Federal Court. The author wrote this article while he was a professor at the Civil Law Section, University of Ottawa, and an earlier version was made public prior to his judicial appointment. The author was also a member of the legal team that represented the complainant in *First Nations Child and Family Caring Society v Canada (AG)*, 2016 CHRT 2. The author wished to thank Professor Cindy Blackstock, who offered comments upon an earlier version of this paper, as well as the anonymous reviewers. The views expressed herein remain the author's.

<sup>1</sup> Vandna Sinha et al., "Kiskisik Awasisak: Remember the Children. Understanding the Overrepresentation of First Nations Children in the Child Welfare System" (Ottawa: Assembly of First Nations, 2011), online: <[cwrp.ca/sites/default/files/publications/en/FNCIS-2008\\_March2012\\_RevisedFinal.pdf](http://cwrp.ca/sites/default/files/publications/en/FNCIS-2008_March2012_RevisedFinal.pdf)> [perma.cc/Z7P3-7UY2].

<sup>2</sup> Truth and Reconciliation Commission, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015) online: <[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)> at 138 [Truth and Reconciliation Commission] [perma.cc/H9HC-WAQQ].

Tribunal found that the federal government's First Nations Child and Family Services program discriminated against Indigenous children because it was underfunded and its funding formulas created perverse incentives resulting in a greater number of placements in foster families than warranted.<sup>3</sup> The Tribunal held that the program ought to be thoroughly reformed. In February 2017, in the context of the "Sixties Scoop" litigation, the Ontario Superior Court of Justice held that the federal government was negligent when it failed to ensure the protection of the cultural identity of Indigenous children placed in foster care or adopted.<sup>4</sup>

To improve outcomes for Indigenous children, a thorough reform of the system is much needed. In the current context, self-determination must be the guiding principle. Non-Indigenous governments increasingly recognize that paternalistic solutions can no longer be relied upon. In this regard, Article 4 of the United Nations *Declaration on the Rights of Indigenous Peoples*<sup>5</sup> recognizes the right to autonomy or self-government with respect to internal or local affairs, which surely includes child welfare.

Yet, discussion about the reform of Indigenous child welfare in Canada has usually been based on what will be referred to as the "provincial paradigm," namely, the idea that provincial child welfare legislation must continue to apply to Indigenous peoples. This paradigm results from a combination of flawed assumptions regarding the constitutional jurisdiction of each order of government and the federal government's long-standing desire to minimize its involvement in this policy area. This paper seeks to challenge that assumption and demonstrate the positive role federal legislation could play in the implementation of new Indigenous child welfare systems in Canada.

This paper will begin with an explanation of the origins of the provincial paradigm and outline its detrimental consequences on Indigenous child welfare reform. The second part will demonstrate that, despite provincial jurisdiction over child welfare in general, Parliament is empowered to legislate with respect to child welfare for the Indigenous population. This argument is based on the doctrine of "double aspect" according to which both levels of government may enact legislation in relation to certain subjects, each according to its own heads of power. This explains the fact that courts have often recognized the validity of provincial legislation applying to Indigenous peoples, in particular in the field of child welfare. However, this does not deprive Parliament of its power to enact legislation regarding Indigenous peoples in relation to the same subjects under section 91(24) of the *Constitution Act, 1867*. In a nutshell, legislation regarding Indigenous child welfare would also fall under section 91(24) and, depending on how it is framed, it could be paramount over provincial legislation.

The third part of this paper will describe the main features of the legislation that Parliament might adopt to sustain the reform of Indigenous child welfare. While this proposal is aimed at First Nations children and is based on First Nations organizational and legal context, it could be adapted to the situation of other Indigenous peoples.<sup>6</sup> Much like the *Indian Child Welfare Act*<sup>7</sup> of the United States, such legislation should be based on the recognition of First Nations jurisdiction over child welfare. It should afford First Nations a variety of options as to

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<sup>3</sup> *First Nations Child and Family Caring Society v Canada (AG)*, 2016 CHRT 2.

<sup>4</sup> *Brown v Canada (AG)*, 2017 ONSC 251.

<sup>5</sup> *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UNGA, 107 Plen, (2007) 1, online: <un.org/esa/socdev/unpfii/documents/DRIPS\_en.pdf> [perma.cc/KKV8-LUMC].

<sup>6</sup> Accordingly, the phrase "First Nations" will be used here when dealing with a specific proposal that would apply only to First Nations, and the word "Indigenous" will be used when referring to all Indigenous groups who could benefit from a solution based on similar principles.

<sup>7</sup> *Indian Child Welfare Act*, 25 USC §1901–1963 (1978).

how they will exercise that jurisdiction. First Nations could exercise delegated authority under provincial legislation, as many currently do. Alternatively, they could create their own systems, based in whole or in part on Indigenous values, cultures and legal traditions. Such federal legislation should also address the situation in which a First Nation exercising delegated authority wishes to exercise its own jurisdiction with respect to some issues, thereby enabling a gradual transition towards a full exercise of its own jurisdiction. Parliament would also enact a set of rules that would complement provincial legislation where it applies, including rules prioritizing the placement of First Nations children with First Nations foster families, ensuring that poverty does not form a negative inference when deciding to remove a First Nations child from his or her family, mandating the participation of First Nations in proceedings concerning their children and forbidding the adoption of a First Nations child without the First Nations' consent. Moreover, given the findings of the Canadian Human Rights Tribunal, federal legislation should contain binding commitments regarding the proper funding of First Nations child welfare and a binding dispute resolution mechanism in this regard.

The adoption of federal legislation may seem a counter-intuitive way of promoting Indigenous self-determination. Yet, it is an idea that is increasingly gaining traction. In its report, the Truth and Reconciliation Commission issued a call for the adoption of federal legislation with respect to Indigenous child welfare. It reads in part:

We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.<sup>8</sup>

Of course, this particular proposal reflects my own opinion only. If the federal government intends to move in this direction, it is implicit that it should consult with First Nations and seek their consent, consistent with Article 19 of the UN *Declaration*.

## I. The Provincial Paradigm

### A. Origins

Provincial jurisdiction in relation to the provision of public services to Indigenous peoples was not always taken for granted. In fact, during the first 75 years of Confederation, the federal government appears to have assumed the opposite. It was the federal government that set up and funded the residential school system. Parliament inserted provisions in the *Indian Act* to make attendance mandatory.<sup>9</sup> Indeed, Residential schools were sometimes used as child welfare placements.<sup>10</sup> It was sometimes thought that section 91(24) of the *Constitution Act, 1867*, which

<sup>8</sup> Truth and Reconciliation Commission, *supra* note 2 at 143–44 (Call for Action No 4).

<sup>9</sup> See *e.g.* *Indian Act*, RSC 1927, c 98, s 10 as amended by SC 1930, c 25, s 3, which provided for the appointment of “truant officers to enforce the attendance of Indian children at school” and the conviction of parents who failed to send their children to residential school.

<sup>10</sup> Vandna Sinha & Anna Kozlowski, “The Structure of Aboriginal Child Welfare in Canada” (2013) 4:2 International Indigenous Policy Journal 5.

grants Parliament jurisdiction in relation to “Indians, and lands reserved for the Indians,” meant that reserves were enclaves where provincial laws did not apply.<sup>11</sup>

Things began to change after World War II. The federal government initiated policy changes that were based on the idea that Indigenous peoples should become more integrated into mainstream Canadian society and receive public services from the provinces, like other citizens. In the context of a major overhaul of the *Indian Act* in 1951, Parliament enacted section 87 (now section 88) of the Act, which provides that “. . . all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province . . .”.<sup>12</sup> The federal government then invited provinces to apply their legislation and to offer their public services to Indigenous peoples. Provinces often insisted on obtaining federal financial compensation as a pre-condition to service provision. As a result, a number of provincial public service programs provided to Indigenous peoples, including child welfare, typically involved some measure of federal funding for the provision of those services according to provincial legislation.<sup>13</sup>

The interaction between both levels of government with respect to Indigenous peoples was thus mainly the product of executive federalism or, in other words, negotiation and agreement between the federal government and the provinces. It was not until the 1970s that the Supreme Court of Canada started to analyze this interaction from a constitutional point of view.

A first case, *Cardinal*,<sup>14</sup> laid to rest the “enclave theory” and held that section 91(24) did not isolate Indians or reserves from provincial legislation. That case dealt with a status Indian individual who contravened provincial wildlife legislation by selling a piece of moose meat on reserve. The majority of the Court rejected the argument to the effect that section 91(24) prevented the application of provincial legislation on reserves. Provincial legislation is valid as long as it is in relation to a category of subjects mentioned in section 92.

The issue of child welfare legislation was addressed in the *Natural Parents*<sup>15</sup> case in 1975. In that case, a status Indian child was apprehended by a children’s aid society and his non-Indigenous foster family proposed to adopt him. The birth parents of the child objected, on the basis that provincial adoption legislation could not apply to “Indians,” as the severance of the original kinship bond would deprive the child of the status conferred by the federal *Indian Act*. The Court disagreed, noting that the child would keep Indian status despite the adoption. Although the decision dealt with adoption legislation, it was generally interpreted as confirming that provincial child and family services legislation is constitutionally applicable to Indigenous peoples.

Other decisions of the Supreme Court generally supported the application of provincial legislation and contributed to the consolidation of the provincial paradigm.<sup>16</sup> Provincial

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<sup>11</sup> This idea possibly originates in the United States, where early cases established that state laws could not apply to Indigenous peoples. See e.g. *Worcester v State of Georgia*, 31 US (6 Pet) 515 (1832).

<sup>12</sup> *Indian Act*, RSC 1985, c I-5, s 88 [*Indian Act*].

<sup>13</sup> Judith Rae, “Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?” (2009) 7:2 *Indigenous LJ* 1. See also Constance MacIntosh, “Indigenous Peoples and Health Law and Policy: Responsibilities and Obligations” in Jocelyn Downie, Timothy Caulfield & Colleen M. Flood, eds, *Canadian Health Law and Policy*, 4th ed (Markham: LexisNexis, 2011) 575.

<sup>14</sup> *Cardinal v Alberta (AG)*, [1974] SCR 695.

<sup>15</sup> *Natural Parents v Superintendent of Child Welfare*, [1976] 2 SCR 751 [*Natural Parents*].

<sup>16</sup> *Four B Manufacturing Ltd. v United Garment Workers*, [1980] 1 SCR 1031; *Dick v The Queen*, [1985] 2 SCR 309; *R v Francis*, [1988] 1 SCR 1025; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31.

legislation may apply to Indians or lands reserved for the Indians, provided it does not affect the “core of Indianness”<sup>17</sup> and does not “single out” Indians, for example by depriving them of specific rights.<sup>18</sup>

A more recent case appears to confirm the idea that Indigenous child welfare is under provincial jurisdiction.<sup>19</sup> A union representing the employees of an Indigenous child welfare agency sought to be certified according to provincial labour legislation. The agency objected on the basis that it is a federal employer, meaning the *Canada Labour Code* applies exclusively. The Supreme Court disagreed and held that the agency was a provincial employer, even though it had been constituted to serve Indigenous clientele, as will be discussed further below.

## B. Consequences

It is important to underline the consequences of the provincial paradigm for the Indigenous child welfare system and its reform. The provincial paradigm has resulted in Indigenous child welfare being governed mainly through the processes of provincial law-making, policy-making and executive federalism. In those processes, the voice of Indigenous peoples is often marginalized.

The first consequence of the provincial paradigm is that whatever degree of autonomy or self-government is currently exercised by First Nations depends on the will of provincial governments. Provincial governments’ level of knowledge about and willingness to address Indigenous issues varies significantly across the country. First Nations child welfare agencies are considered to hold authority as delegated by the provinces. Provincial governments decide on the level of autonomy exercised by a particular First Nations agency. Many First Nations agencies do not have the power to perform intake and assessment functions, which are often critical for a child’s path in the system.<sup>20</sup> Many other First Nations peoples are still served by the provincial system. A provincial government may also terminate a delegation of authority, as the recent example of the Saskatoon Tribal Council shows.<sup>21</sup>

Second, there are many problems of interaction between provincial legislation and the federal funding framework. While child and family services legislation is broadly similar across the provinces, there are significant differences. The classification of services for funding and administrative purposes may vary from one province to another. A service that is provided by the health department in one province might be provided by the child and family services department in another. In a context of financial restraint, provinces and the federal government may argue that the other order of government is responsible for certain expenses that do not fit clearly in recognized categories. Canadian constitutional law’s lack of clarity over financial responsibility (as opposed to legislative jurisdiction), especially in areas of double aspect, does not facilitate the resolution of those conflicts. A principle known as Jordan’s Principle has been developed, to the effect that the resolution of disputes within and between government entities should not delay the provision of services to First Nations children and that the government agency first contacted

<sup>17</sup> *Dick v The Queen*, [1985] 2 SCR 309.

<sup>18</sup> *R v Sutherland*, [1980] 2 SCR 451.

<sup>19</sup> *NIL/TU, O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 [NIL/TU, O].

<sup>20</sup> For example, the agency involved in *ibid.*

<sup>21</sup> *Saskatchewan v STC Health & Family Services Inc.*, 2016 SKQB 236.

should provide the service and resolve the jurisdictional conflicts later.<sup>22</sup> Moreover, the absence of a federal statutory framework makes it very difficult to challenge the actions of the federal government.<sup>23</sup>

Third, the provincial paradigm prevents the adoption of a coherent self-government policy concerning Indigenous child welfare. Even where it negotiates treaties or self-government agreements, the federal government allows provinces to insist on strict conditions surrounding a grant of autonomy. The contrast between treaties concluded in the territories and those concluded in the provinces is telling. While treaties concluded in the Yukon recognize Indigenous peoples' law-making power with respect to adoption and child and family services with few limitations,<sup>24</sup> those concluded in the provinces set out significant restrictions.<sup>25</sup>

## II. Federal Jurisdiction in Relation to Indigenous Child Welfare

The provincial paradigm is not based on a correct understanding of the division of powers as it affects Indigenous peoples. The application of provincial jurisdiction in child welfare does not necessarily exclude federal jurisdiction. The provincial paradigm is incorrect and results solely from Parliament's unwillingness to legislate. If meaningful reform of the Indigenous child welfare system is to take place, a new paradigm must take hold.

Federal jurisdiction stems from section 91(24) of the *Constitution Act, 1867*, which grants Parliament the power to legislate in relation to "Indians and lands reserved for the Indians." We now know that the word "Indians" in this provision means all Indigenous peoples.<sup>26</sup> That power has been given a wide scope. Section 91(24) empowers Parliament to enact laws that apply only to "Indians," or that can otherwise be said to be "in relation to Indians," even though the subject-matter of those laws would fall under provincial jurisdiction if they were to apply to non-Indigenous persons. As Professor Hogg explains:

If s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary. It seems likely, therefore, that the courts would uphold laws which could be rationally related to

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<sup>22</sup> For an overview, see The Jordan's Principle Working Group, *Without Denial, Delay or Disruption: Ensuring First Nations Children's Access to Equitable Services Through Jordan's Principle* (Ottawa: Assembly of First Nations, 2015), online: <[http://www.afn.ca/uploads/files/jordans\\_principle-report.pdf](http://www.afn.ca/uploads/files/jordans_principle-report.pdf)> [https://perma.cc/P6PU-LAYM]. See also *Pictou Landing Band Council v Canada (AG)*, 2013 FC 342.

<sup>23</sup> John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 474 at 485; Naomi Metallic & Sébastien Grammond, "Ensuring Real Accountability on First Nations Reserves" (Caledon Institute of Social Policy, 2016), online: <<http://www.caledoninst.org/Publications/PDF/1087ENG.pdf>> [https://perma.cc/Q5FT-2VKY].

<sup>24</sup> See, e.g., the *Yukon First Nations Self-Government Act*, SC 1994, c 35, s 11(1)(b) and sch III part II, item 6 "Adoption of and by citizens of the first nation," and item 7, "Guardianship, custody, care and placement of children of citizens of the first nation, excluding regulation and licensing of facility-based services outside the settlement land of the first nation." However, the lack of funding for the development of First Nations child welfare systems has meant that Yukon First Nations have not exercised that jurisdiction.

<sup>25</sup> For further analysis, see note 57 and the accompanying text.

<sup>26</sup> *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [*Daniels*].

intelligible Indian policies, even if the laws would ordinarily be outside federal competence.<sup>27</sup>

The same idea was expressed by Justice Ritchie of the Supreme Court in the *Canard* case: “s. 91(24) [...] clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces.”<sup>28</sup>

This is an example of the doctrine of “double aspect” in Canadian constitutional law: similar laws may be adopted by both levels of government where they can be characterized in two different manners that bring the law within heads of jurisdiction of each level of government. While the Supreme Court has cautioned against too wide an application of the double aspect doctrine,<sup>29</sup> the federal jurisdiction in relation to Indigenous peoples lends itself particularly well to its application. This is so because, contrary to most other areas of federal jurisdiction, section 91(24) delineates a category of persons, instead of an activity or a subject-matter. Thus, as long as federal legislation applies only to Indigenous peoples, or can otherwise be said to be “in relation to Indians,” it would appear to come under section 91(24).<sup>30</sup>

Indeed, in the *Indian Act*, Parliament has legislated with respect to a number of issues that would otherwise fall under provincial jurisdiction. Sections 42 to 50.1 of that Act deal with wills and estates of Indians. They were held to be valid in the *Canard* case.<sup>31</sup> Other provisions of the *Indian Act* deal with education, a tax and seizure exemption,<sup>32</sup> and traffic regulations.<sup>33</sup> Previous versions of the Act also contained a number of prohibitions (on drinking alcohol, on raising money for lawsuits, etc.) which would undoubtedly fall under provincial jurisdiction when applied to non-Indigenous citizens. Parliament also recently adopted legislation regarding drinkable water in First Nations communities.<sup>34</sup>

What does this mean for child welfare? There is no dispute that child and family services delivery to non-Indigenous Canadians falls under provincial legislative jurisdiction.<sup>35</sup> It has also been held that provincial legislation concerning child and family services applies to Indigenous peoples, unless there is conflicting federal legislation.<sup>36</sup> In any event, section 88 of the *Indian Act* makes “provincial laws of general application” applicable to “Indians.” This includes provincial legislation with respect to child and family services.

However, none of this negates Parliament’s jurisdiction to legislate on Indigenous child and family services if it chooses to do so. Such legislation would undoubtedly be in relation to “Indians” within the meaning of section 91(24). If federal legislation regarding the estates and wills of Indigenous persons was held to be valid, it is difficult to argue that child and family services should be treated differently.

<sup>27</sup> Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2013) (loose-leaf revision) at 28.

<sup>28</sup> *Canada (AG) v Canard*, [1976] 1 SCR 170 at 191 [*Canard*].

<sup>29</sup> *Bell Canada v Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749 at 765.

<sup>30</sup> See generally S Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 475–496 [Grammond, *Coexistence*].

<sup>31</sup> *Canard*, *supra* note 28 at 176 Laskin CJ, 193 Pigeon J, 202 Beetz J.

<sup>32</sup> *Brown v R* (1980) 107 DLR (3d) 705 (BCCA).

<sup>33</sup> *R v Francis*, [1988] 1 SCR 1025.

<sup>34</sup> *Safe Drinking Water for First Nations Act*, SC 2013, c 21.

<sup>35</sup> *NIL/TU,O*, *supra* note 19 at para 45.

<sup>36</sup> *Ibid* at para 41.

In fact, when it held that provincial adoption legislation could apply to Indigenous peoples, the Supreme Court was cautious not to foreclose the possibility of federal legislation. In the *Natural Parents* case, there was no federal legislation regulating adoption. While recognizing that provincial law with respect to adoption could apply to Indigenous peoples, Justice Martland was careful to note that “the application of the *Adoption Act* to Indian children will only be prevented if Parliament, in the exercise of its powers under [s. 91(24)], has legislated in a manner which would preclude its application.”<sup>37</sup> In saying that, he was assuming that Parliament would have jurisdiction to legislate with respect to adoption for Indigenous peoples.

An objection to this view of federal jurisdiction might be based on the recent *NIL/TU,O* decision of the Supreme Court.<sup>38</sup> That case dealt with the jurisdiction over the labour relations of an Indigenous child welfare agency, operating under a delegation from the province of British Columbia. The Supreme Court considered that the agency was a provincial undertaking, because it operated according to provincial child welfare legislation, under the authority of the provincial government. The fact that it served an Indigenous clientele was not considered to be a relevant factor. However, one must not lose sight of the fact that the division of powers with respect to labour relations is subject to a distinctive set of rules, as the majority reasons of Justice Abella make clear. The labour relations analysis starts with a presumption in favour of provincial jurisdiction.<sup>39</sup> Then, the decision-maker looks at the entity’s “normal or habitual activities” to discern whether the entity is a federal undertaking.<sup>40</sup> Implicitly, this test has been crafted so as to avoid a finding of double aspect, which would lead to the highly inconvenient result of federal and provincial labour legislation applying concurrently to the same employer.

It is obvious that the *NIL/TU,O* decision hinges upon the current federal-provincial arrangements for the delivery of child welfare services to Indigenous peoples. It does not, however, exclude the possibility that Parliament, in the future, could legislate concerning the subject-matter of the case. Justice Abella explicitly contemplates the fact that Parliament could “enact labour relations legislation dealing with ‘Indians.’”<sup>41</sup> The same is arguably true with respect to child welfare legislation concerning Indigenous children and families. In other words, there is nothing in the decision that restricts the scope of Parliament’s jurisdiction in relation to Indigenous peoples. It is only because Parliament did not in fact exercise that jurisdiction with respect to child welfare that the Court concluded that the agency was a provincial undertaking.

Thus, there is no constitutional basis for the provincial paradigm. Parliament could, if it wishes, adopt legislation regarding Indigenous child welfare.

### III. The Potential for Federal Legislation

In the past, federal intervention in the lives of Indigenous peoples was based on paternalistic assumptions and was aimed at assimilation. The consequences of that intervention were devastating, amounting to what the Truth and Reconciliation Commission termed “cultural genocide.”<sup>42</sup> The elimination of those paternalistic assumptions remains a work in progress. Any

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<sup>37</sup> *Natural Parents*, *supra* note 15..

<sup>38</sup> *NIL/TU,O*, *supra* note 19.

<sup>39</sup> *Ibid* at para 12.

<sup>40</sup> *Ibid* at para 14.

<sup>41</sup> *Ibid* at para 2.

<sup>42</sup> Truth and Reconciliation Commission, *supra* note 2 at 1–3.

reform of Indigenous child welfare must not repeat the errors of the past. It must instead be based on different assumptions and goals. The guiding principle should be self-determination, as a matter of both principle and policy. Self-determination is increasingly recognized as the dominant norm governing relations between Indigenous peoples and the State.<sup>43</sup> Research has also shown that communities that exercise self-determination have better health and economic outcomes.<sup>44</sup>

One approach to reform is rooted in the concept that self-determination simply flows from the exercise of Indigenous jurisdiction. Under this model, Indigenous peoples would simply make laws in relation to child welfare, without any approval or permission from the State. However, as discussed below, the extent to which the Canadian constitution recognizes Indigenous jurisdiction in relation to child welfare remains unclear, and governments and child welfare agencies would probably resist an assertion of Indigenous jurisdiction. In practice, some specific State recognition of Indigenous jurisdiction would be desirable.

Such recognition could flow from treaties or agreements. As described below, certain recent treaties explicitly recognize the power of specific First Nations to legislate in relation to child welfare or to create their own child welfare systems. With recognition of Indigenous jurisdiction, one could envision a national child welfare treaty, possibly signed by national Indigenous organizations. Although such an idea would raise issues that are beyond the scope of this paper, the result would be that the provisions of such a treaty would be protected by section 35 of the *Constitution Act, 1982*. Nothing said in this paper about the possibility of enacting federal legislation detracts from the desirability of treaties.

Nevertheless, legislation offers a viable option if it genuinely recognizes Indigenous jurisdiction. If it does so, legislation offers a readily available framework for Indigenous communities desirous of exercising their self-determination. It also sends a clear message to State agents that self-determination must be respected. Furthermore, it can provide a framework for the interaction between Indigenous and provincial child welfare systems.

Thus, Parliament should adopt legislation that recognizes the jurisdiction of Indigenous peoples with respect to child welfare. It should facilitate the exercise of that jurisdiction and assist Indigenous peoples who want to assume it at their own pace. There are precedents for such a federal intervention. In the United States, similar legislation has been in existence for close to 40 years. In Canada, there are several experiments in the exercise of Indigenous jurisdiction over child welfare. There are also instances where such jurisdiction is recognized in treaties or in legislation, as will be discussed below.

An outline of what this federal legislation could look like is appended to this paper. This is not meant to be a complete proposal, but rather a framework illustrating what would form the main components of a legislative reform of Indigenous child welfare. Such a proposal would promote both self-government and the equal treatment of Indigenous peoples, in a way that would respond to the calls for action of the Truth and Reconciliation Commission and the finding of the Canadian Human Rights Tribunal to the effect that a complete overhaul of the system is needed.

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<sup>43</sup> See e.g. the UN *Declaration*, art. 4.

<sup>44</sup> See e.g. Stephen E Cornell & JP Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* (Cambridge: John F. Kennedy School of Government, Harvard University, 1992); Michael J Chandler & Christopher Lalonde, “Cultural Continuity as a Moderator of Suicide Risk Among Canada’s First Nations” in LKG Valaskakis (ed), *The Mental Health of Canadian Aboriginal Peoples: Transformations, Identity and Community* (Vancouver: University of British Columbia Press, 2008).

## A. The US *Indian Child Welfare Act*

The United States provides a striking example of legislation that fosters Indigenous self-government in matters of child welfare. As John Borrows observes: “[f]ederal law recognizing self-determination seems to have stemmed the flood of Indigenous children leaving their communities and families, while generally supportive provincial legislation has made little difference in Canada.”<sup>45</sup>

The *Indian Child Welfare Act* (“ICWA”) was adopted in 1978 by the United States Congress. Its adoption was prompted by studies that revealed the overrepresentation of Indigenous children in the child welfare systems of the various states, and its deleterious effects on the children, their parents and their communities. In the preamble, the Congress describes the rationale for the adoption of the Act as follows:

The Congress finds ... that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.

...

[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

ICWA’s central provision recognizes the inherent jurisdiction of Indigenous tribes to legislate with respect to child welfare and to create tribal courts with jurisdiction to hear disputes in this matter. ICWA also contains choice-of-law and choice-of-jurisdiction provisions which have the effect of recognizing a tribe’s exclusive jurisdiction over Indigenous children residing on the tribe’s reserve, and a presumptive jurisdiction over Indigenous children who are members of the tribe but who reside outside the tribe’s reserve which can only be ousted for serious reasons.<sup>46</sup> Where a state court considers the situation of an Indigenous child, ICWA sets out a number of rules that must be applied in addition to the state’s child welfare legislation. First, there are rules to ensure that Indigenous parents genuinely consent to a placement or an adoption. Second, before any placement or adoption is ordered, the judge must be satisfied that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”<sup>47</sup> Third, the burden of proof that placement or adoption is necessary is heightened. Fourth, where a placement

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<sup>45</sup> John Borrows, “Legislation and Indigenous Self-Determination in Canada and the United States,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 474 at 489. See also Barbara Ann Atwood, *Children, Tribes and States: Adoption and Custody Conflicts over American Indian Children* (Durham, NC: Carolina Academic Press, 2010) at 193–200.

<sup>46</sup> 25 USC §1911. See e.g. *Adoptive Couple v Baby Girl*, 133 S Ct 2552 (2013).

<sup>47</sup> 25 USC §1912(d).

is necessary, the legislation provides for an order of preference intended to keep an Indigenous child as close as possible to his or her family and community of origin.<sup>48</sup> Those provisions have been a source of inspiration for the child welfare legislation of a number of Canadian provinces. However, ICWA's recognition of Indigenous jurisdiction over child welfare remains unparalleled in Canada to this day. While noting that ICWA may have a tendency to essentialize identities, Terri Libesman concludes that "ICWA has made great advances in including Indigenous Americans in decision making with respect to their children's welfare and well-being, and has served as an inspiration to Indigenous children's groups internationally."<sup>49</sup>

## B. Recognition of Indigenous Jurisdiction over Child Welfare in Canada

Despite the lack of a general statutory recognition similar to that provided for by ICWA, Indigenous jurisdiction over child welfare may exist in Canada as of right. Nevertheless, the lack of formal recognition means that this jurisdiction is more vulnerable to impingement by provincial legislation and policies.

First, it must be emphasized that Indigenous jurisdiction may exist even in the absence of any formal recognition in Canadian law. Indigenous legal traditions do not depend on recognition for their existence and effectiveness.<sup>50</sup> For example, Innu legal traditions regarding what Western jurists would describe as "adoption" remain in use even though Quebec law refuses to recognize their validity.<sup>51</sup> In fact, one should not be surprised that Indigenous peoples have always had their own ways of caring for their own children, and that state intervention has not been entirely successful in eradicating them. Indigenous jurisdiction over child welfare and adoption may very well be an Aboriginal right protected by section 35 of the *Constitution Act, 1982*. With respect to adoption, the British Columbia Court of Appeal suggested as much in a 1993 decision.<sup>52</sup> Although the proposition has not been tested yet with respect to child welfare,<sup>53</sup> the emerging idea that some Aboriginal rights are "generic" (*i.e.*, possessed by all Indigenous groups without the need to make an elaborate proof of pre-contact practices) could facilitate its acceptance.<sup>54</sup>

There are several instances where Indigenous jurisdiction over child and family services is explicitly recognized in Canadian law. First and foremost, the *Yukon First Nations Self-Government Act*,<sup>55</sup> which implements self-government agreements with Yukon First Nations, confers the power to adopt laws, applicable everywhere in the Yukon, regarding "[a]doption of

<sup>48</sup> 25 USC §1915.

<sup>49</sup> Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (London: Routledge, 2013) at 236.

<sup>50</sup> See generally Grammond, *Coexistence*, *supra* note 30 at 367–391.

<sup>51</sup> Sébastien Grammond & Christiane Guay, "Understanding Innu Normativity in Matters of Customary Adoption and Custody" (2017) 12:1 *First Peoples Child and Family Review* 12; see, however, arts. 199.10 and 543.1 of the *Civil Code of Québec*, adopted in June 2017.

<sup>52</sup> *Casimel v Insurance Corp of British Columbia* (1993) 106 DLR (4th) 720 (BCCA). See also Ghislain Otis, "La protection constitutionnelle de la pluralité juridique : le cas de « l'adoption coutumière » autochtone au Québec" (2011) 41:2 RGD 567.

<sup>53</sup> An attempt to do so was derailed for procedural reasons in *Adolescent (Dans la situation de l')*, [2001] RJQ 1660 (CQ).

<sup>54</sup> In *First Nations Child and Family Caring Society v Canada (AG)*, 2016 CHRT 2 at para 106, the Tribunal held that the transmission of Indigenous languages and cultures was such a generic right. See also Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can Bar Rev* 196 at 212–215.

<sup>55</sup> *Yukon First Nations Self-Government Act*, SC 1994 c 35 [*Yukon*].

and by citizens of the first nation” and “[g]uardianship, custody, care and placement of children of citizens of the first nation, excluding regulation and licensing of facility-based services outside the settlement land of the first nation.”<sup>56</sup>

Other treaties offer a similar recognition, but it is made conditional upon compliance with a number of principles or rules. Thus, the *Nisga’a Final Agreement* requires Nisga’a laws in matters of adoption to comply with the principle of the best interests of the child, and Nisga’a laws regarding child welfare to adopt “standards comparable to provincial standards.”<sup>57</sup> Likewise, the *Tlicho Agreement* confers jurisdiction over child welfare and adoption, subject to the principle of the best interests of the child and territorial laws regarding notification of birth parents, and subject to the power of the territorial government to develop “core principles and objectives.”<sup>58</sup> The Labrador Inuit Land Claims Agreement grants the Nunatsiavut Government the power to make laws with respect to child welfare, but spells out precisely the grounds for which a child may be found in need of protective intervention and provides that provincial legislation prevails over Nunatsiavut laws in the case of inconsistency.<sup>59</sup>

Child and family services legislation in certain provinces provides for the delegation of its application to Indigenous agencies.<sup>60</sup> However, these delegations do not allow agencies to depart from the rules found in the provincial statute. In Quebec, section 37.5 of the *Youth Protection Act* allows the government and First Nations to conclude agreements setting up alternative child welfare systems. However, the administrative requirements set by the government as a condition of concluding those agreements are particularly heavy. While a few communities have been operating their own systems on a temporary basis, no formal agreements have been signed yet. The *Service d’intervention d’autorité atikamekw*, a pilot project that has been in operation for the last fifteen years, is a success story of Indigenous self-government with respect to child welfare and has led to a massive reduction of the number of Atikamekw children placed in foster care outside of their communities.<sup>61</sup>

There are also other manifestations of Indigenous jurisdiction over child welfare in Canada. An early example was the adoption of a child protection by-law by the Spallumcheen Band (now known as the Splatshin First Nation) in British Columbia. This was a band by-law adopted under the *Indian Act*, which the federal government decided not to disallow, and the validity of which has never been challenged.<sup>62</sup> More recently, other British Columbia First Nations have embarked upon a process of defining their own child welfare systems.<sup>63</sup> At the

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<sup>56</sup> *Ibid*, Schedule II, part II, items 6–7.

<sup>57</sup> *Nisga’a Final Agreement*, 11 May 2010, c 11, ss 89, 96.

<sup>58</sup> *Land Claims and Self-Government Agreement Among the Tlicho and the Government of the Northwest Territories and the Government of Canada*, 25 August 2003, ss 7.4.4(g)(i), 7.5.5, 7.5.15.

<sup>59</sup> *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 6 December 2005, s. 17.15.5, 17.15.6, 17.15.7.

<sup>60</sup> *Child, Family and Community Services Act*, RSBC 1996 c C-46, s 93(1)(g)(iii); *Child and Family Services Act*, RSO 1990, c C.11, s 210; *Youth Protection Act*, RSQ c P-34.1, s 32.

<sup>61</sup> Anne Fournier, “De la Loi sur la protection de la jeunesse au Système d’intervention d’autorité atikamekw (SIAA) – La prise en charge d’une nation pour assurer le bien-être de ses enfants” (2016) 25 *Enfance, familles, générations*, online: <<http://www.efg.inrs.ca/index.php/EFG/article/view/470>> [perma.cc/TMS3-TGAK].

<sup>62</sup> Christopher Walmsley, *Protecting Aboriginal Children* (Vancouver : UBC Press, 2005) at 25; see also *Sims v Spallumcheen Band Council*, [1998] 2 CNLR 318 (BCSC).

<sup>63</sup> Wendy Stueck, “Wet’suwet’en Nation Makes Agreement to Reclaim Child-Welfare Services,” *The Globe and Mail*, (2 March 2017) online: <[beta.theglobeandmail.com/news/british-columbia/wetsuweten-nation-makes-agreement-to-reclaim-child-welfare-services/article34198140/?ref=http://www.theglobeandmail.com](http://beta.theglobeandmail.com/news/british-columbia/wetsuweten-nation-makes-agreement-to-reclaim-child-welfare-services/article34198140/?ref=http://www.theglobeandmail.com)> [perma.cc/5AFN-MCRB].

provincial level, certain provincial First Nations organizations have issued legislative norms regarding child welfare. In 1990, the Federation of Saskatchewan Indian Nations (now known as the Federation of Sovereign Indigenous Nations) adopted an *Indian Child Welfare and Family Support Act*, which has been applied by First Nations child and family services agencies and was recognized as equivalent to provincial standards by the provincial government,<sup>64</sup> although the practical effects of that recognition are unclear. The Assembly of First Nations of Quebec and Labrador proclaimed a *Declaration on the Rights of First Nations Children*,<sup>65</sup> which asserts, among other things, that “protection of family relations, care for children, identity, culture and language lie at the heart of the rights of self-determination and self-government of our Nations.”

Indigenous jurisdiction has been recognized in another area: education. The *Mi'kmaq Education Act*<sup>66</sup> recognizes the jurisdiction of First Nations in Nova Scotia to legislate for education, as well as a corresponding duty to exercise that jurisdiction. The main provisions of that statute read as follows:

6 (1) A community may, to the extent provided by the Agreement, make laws applicable on the reserve of the community in relation to primary, elementary and secondary education.

(2) A community may make laws in relation to the administration and expenditure of community funds in support of post-secondary education, as provided by the Agreement, for members of the community wherever resident.

7 (1) A community shall, to the extent provided by the Agreement, provide or make provision for primary, elementary and secondary educational programs and services for residents of its reserve.

(2) The educational programs and services so provided must be comparable to programs and services provided by other education systems in Canada, in order to permit the transfer of students to and from those systems without academic penalty to the same extent as students can transfer between those other education systems.

More recently, the federal government proposed legislation aimed at giving First Nations across the country greater control over education.<sup>67</sup> However, that bill did not recognize Indigenous jurisdiction in terms similar to those of the *Mi'kmaq Education Act*. Rather, it contained detailed provisions concerning the obligations of First Nations with respect to education. As a result, many First Nations opposed that legislation. The proposal was abandoned.

These examples show that First Nations have exercised their jurisdiction over child welfare and adoption and that federal and provincial governments have, in a number of instances, recognized that jurisdiction. There is no legal or policy impediment preventing such recognition

<sup>64</sup> Anna Kozłowski et al, “First Nations Child Welfare in Saskatchewan (2011),” online: <<http://cwrp.ca/fr/infosheets/first-nations-child-welfare-saskatchewan>> [perma.cc/MQP9-7UWR].

<sup>65</sup> Assembly of First Nations of Quebec and Labrador, *Declaration on the Rights of First Nations Children*, online: <<https://www.cssspnql.com/docs/default-source/centre-de-documentation/affiche-declaration-droits-enfant-pn-rognee-eng.pdf?sfvrsn=0>> [perma.cc/FBW5-M4C7].

<sup>66</sup> *Mi'kmaq Education Act*, SC 1998, c 24. See also the *First Nations Jurisdiction over Education in British Columbia Act*, SC 2006, c 10.

<sup>67</sup> Bill C-33, *An Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for related funding and to make related amendments to the Indian Act and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2013.

to be extended to all First Nations across the country. This is why the adoption of federal legislation is proposed in this regard.

### C. A Proposal

I propose the adoption of a federal *First Nations Child and Family Caring Act*. As explained below, this piece of legislation would empower First Nations to legislate with respect to child and family services and adoption. It would organize the interactions between those laws and existing provincial legislation, and set out a mechanism to ensure that Indigenous child and family services are properly funded. The proposal is inspired by the United States *Indian Child Welfare Act*, the existing Canadian treaties and self-government agreements, the *Mi'kmaq Education Act* and the existing provincial laws. I believe that the adoption of federal legislation would mark an improvement over the current methods of executive federalism.

The most critical part of this proposal is the recognition of First Nations jurisdiction to enact laws regarding child and family services and adoption. When enacted, those laws, given their recognition by federal legislation, would be paramount to provincial/territorial legislation. First Nations would not be required to enact such laws. If they do not do so, provincial/territorial legislation would still apply. This said, First Nations could decide when they are ready to assume jurisdiction over those issues, according to their own priorities. First Nations could also decide to assume jurisdiction over only certain aspects of child and family services and adoption, allowing provincial/territorial legislation to apply as to the rest. This is the model adopted by the Yukon self-government agreements, which were intended to allow Yukon First Nations to gradually assume jurisdiction over a range of issues.<sup>68</sup>

Another part of the proposed statute would impose certain minimal standards relevant for the instances when provincial/territorial legislation would still apply to Indigenous peoples, thus echoing one of the calls to action of the Truth and Reconciliation Commission.<sup>69</sup> Some provinces have adapted their legislation to improve the ways in which their child welfare system treats Indigenous children. In particular, some provinces have adopted provisions aimed at ensuring that an Indigenous child in need of foster placement is kept as close as possible to his or her extended family and community,<sup>70</sup> and provisions stating that preservation of a child's Indigenous culture and identity is an important consideration in assessing the child's best interests.<sup>71</sup> Provisions have also been implemented to ensure the participation of Indigenous communities in proceedings involving their children.<sup>72</sup> While these provisions have not been sufficient to stem the overrepresentation of Indigenous children in the child welfare system, they at least ensure that the system shows a measure of sensitivity to their distinctive situations and needs. Still, these provisions have not been universally adopted by all provinces/territories. Even

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<sup>68</sup> Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can Bar Rev 187.

<sup>69</sup> Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, online: <[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)> at 143–44 [perma.cc/SAJ5-PTE6].

<sup>70</sup> See e.g. the Ontario *Child and Family Services Act*, RSO 1990, c C.11, s 57(5).

<sup>71</sup> See e.g. the Alberta *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 2(p), or *supra*, note 70 s 37(4).

<sup>72</sup> See *ibid*, s 39(1)(4).

where they do exist, their implementation is not necessarily supported by adequate federal funding.

The proposed legislation would promote consistency in respect of First Nations rights regarding their children and families and embed best practices currently applied in some jurisdictions (e.g., family first placement principles) as a normative expectation. This would also be the occasion to add an anti-poverty provision directing decision-makers to disregard the guardian's economic situation when assessing the best interests of children,<sup>73</sup> as well as a requirement to the effect that First Nations children can only be adopted with the consent of their parents.

The Act would also establish a mechanism to ensure the proper funding of child welfare services. In addition, it would create a First Nations Child and Family Caring Authority, which could have the power to enact norms with respect to issues such as the criteria for foster families, professional qualifications that recognize the distinct cultural and linguistic characteristics of respective First Nations and address service continuity issues arising from the mobility of First Nations families across jurisdictions. The Authority's mission would also extend to statistics, awareness and training. Finally, the Act would also enshrine Jordan's Principle.

In terms of constitutional law, the paramountcy doctrine<sup>74</sup> would guarantee the effectiveness of First Nations' laws (adopted under a federal statute) and of national standards found in the federal statute itself. There would be no need to resort to the doctrine of interjurisdictional immunity: in light of the *Natural Parents* case, it would be difficult to argue that child welfare lies at the core of federal jurisdiction in relation to "Indians."<sup>75</sup>

Where a First Nations' law enacts a comprehensive child and family services scheme, the doctrine of paramountcy would likely prevent the application of provincial legislation dealing with the subjects covered by the First Nations' law. The concurrent application of both systems would likely lead to incompatible results, for instance, by reaching different conclusions as to the need for apprehension or by making different decisions as to where the child should be placed. Concurrent application of a First Nations and a provincial system to the same child would lead to a situation similar to that in which two unions would be certified to represent the same group of employees, a situation that Canadian constitutional law has always sought to avoid. It could also be compared to situations in which provincial legislation seeks to change the order of priority among creditors set out by federal bankruptcy legislation, producing different results as to which creditor is entitled to payment.<sup>76</sup>

Where a First Nation has not enacted a comprehensive scheme, such that the provincial child welfare system still applies, the doctrines of double aspect and paramountcy would also justify the application of national norms found in the Act. For example, if provincial legislation does not require that a child's First Nation be notified upon the apprehension of that child, the provincial child welfare agency would still have to comply with the requirement to that effect found in the Act. This would be an application of the double aspect doctrine. The Act would be valid federal legislation in relation to "Indians" (s. 91(24)), whereas provincial legislation would be valid as it relates to local matters in the province (s. 92(16)). Both would apply together,

<sup>73</sup> Twelve US states have legislation that contains such an exception: Child Welfare Information Gateway, *Definitions of Child Abuse and Neglect*, online: <<https://www.childwelfare.gov/pubPDFs/define.pdf#page=4&view=Exceptions>> [perma.cc/2KZ9-3PD3].

<sup>74</sup> For a recent restatement of that doctrine, see *Saskatchewan (AG) v Lemare Lake Logging Ltd*, [2015] 3 SCR 419.

<sup>75</sup> For further analysis see *supra* note 14. See also *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at paras 128–152.

<sup>76</sup> *Husky Oil Operations Ltd v MNR*, [1995] 3 SCR 453.

unless there was a conflict, in which case the federal Act would be paramount. This situation is similar to other instances in which federal legislation concerning Indigenous peoples is overlain upon provincial legislation. For example, the provisions of the *Indian Act* regarding wills and estates apply concurrently with provincial legislation on the same topic.<sup>77</sup> However, where the two sets of rules conflict, the *Indian Act* is paramount. As a result, for example, the order of distribution of property on intestacy found in the *Indian Act* displaces the equivalent provisions of provincial legislation. In contrast, the rule whereby the Minister may accept as a will “any written instrument signed by an Indian” (s. 45(2)) applies in addition to the forms recognized by provincial law for the creation of a valid will.

The proposed Act is worded as legislation with respect to First Nations, thus mirroring the scope of the current federal First Nations Child and Family Services Program. In light of the Supreme Court of Canada’s decision in *Daniels*,<sup>78</sup> which held that section 91(24) encompasses all Indigenous peoples, not only First Nations, it could be adapted to cover other groups. This would entail the identification of the political representative bodies of those groups, to which a jurisdiction over child welfare could be recognized. There are precedents where federal programs were designed in a manner that recognized the self-determination of urban Indigenous communities.<sup>79</sup>

It goes without saying that a proposal such as this one should be the object of extensive consultation with Indigenous peoples before it is adopted. As noted above, it may well be that Indigenous jurisdiction over child welfare is an Aboriginal right protected by section 35 of the *Constitution Act, 1982*. In that case, the enactment of legislation affecting such a right triggers a duty to consult and accommodate, either on the basis of an asserted Aboriginal right<sup>80</sup> or a proven Aboriginal right.<sup>81</sup> Even if we assume that section 35 is not engaged, article 19 of the United Nations *Declaration on the Rights of Indigenous Peoples* provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

For too long, governments have assumed that they can change child welfare legislation without meaningfully consulting Indigenous peoples, despite the major impacts of that legislation on their communities.<sup>82</sup> Governments should aim towards reaching agreement with Indigenous peoples on child welfare reform.

While this proposal is certainly not perfect, it aims to stimulate the discussion over Indigenous child welfare reform and liberate those discussions from the provincial paradigm in which the system is currently bogged down.

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<sup>77</sup> See e.g. *Albas v Gabriel*, 2009 BCSC 198 at para 86; *Pronovost v Minister of Indian and Northern Affairs*, [1985] 1 FC 517 (CA) at 522.

<sup>78</sup> *Daniels*, supra note 26.

<sup>79</sup> *Ardoch Algonquin First Nation v Canada (AG)*, [2004] 2 FCR 108 (CA).

<sup>80</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

<sup>81</sup> *R v Sparrow*, [1990] 1 SCR 1075; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44.

<sup>82</sup> Christiane Guay & Sébastien Grammond, “À l’écoute des peuples autochtones? Le processus d’adoption du projet de loi 125,” (2010) 23:1 *Nouvelles pratiques sociales* 99.

## **Schedule – *Proposal for a First Nations Child and Family Caring Act***

### **Purpose**

The Act will contain a purpose clause that will include the following purposes:

To enable First Nations to care for their children;

To prevent, as far as practicable, the removal of First Nations children from their communities;

To ensure that First Nations children are entitled to receive child and family caring services that are substantially equal in quality to those offered to other Canadian children;

To ensure that the child and family caring services offered to First Nations children take into account the legacy of the Indian residential schools and the specific intergenerational harms caused by those schools, the legacy of the Sixties' Scoop and the contemporary disadvantage wrought by Canada's inequitable and discriminatory child and family services program;

To ensure that the child and family caring services offered to First Nations children take into account First Nations laws, traditions, cultures and world views;

To ensure that First Nations exercising their jurisdiction or delegated authority have adequate resources to provide child and family caring services that are comparable in quality to those offered to other Canadian children while taking into account the specific needs of First Nations children and the costs of providing those services in First Nations communities.

### **First Nations Jurisdiction**

The Act will recognize First Nations' jurisdiction to make laws concerning child and family services and adoption. (Similar provisions are already found in the *Yukon First Nations Self-Government Act* or, with respect to education, in the *Mi'kmaq Education Act*.) Those laws may refer to or include the Indigenous legal traditions of the First Nation.

Provisions will be made for the joint exercise of that power by several First Nations.

The Act will provide that First Nations laws prevail over provincial/territorial laws regarding the same subject.

The Act will provide that First Nations laws may confer decision-making authority on independent First Nations decision-makers or on judges empowered to decide similar matters by provincial legislation.

## **Delegated First Nations Agencies**

The Act will provide that First Nations may enter into an agreement with a province for the purposes of exercising delegated powers under that province's child welfare legislation.

The Act will also address the situation in which a First Nation exercising delegated authority also wishes to exercise its own jurisdiction with respect to some issues, thereby enabling a gradual transition towards a full exercise of its own jurisdiction.

## **Application of Provincial/Territorial Laws**

The Act will provide that when provincial laws regarding child welfare are applied to a First Nations child:

If a First Nations child must be placed outside his or her family, every effort shall be made to place him or her, by order of priority, (a) within the extended family; (b) within the same community; (c) within the same nation; (d) in another Indigenous family; (e) in a non-Indigenous family.

Any assessment of a First Nations child's best interests or decision concerning such a child must take into account the desirability of maintaining the child's connection with his or her culture, language and community, as well as the legacy of the Indian residential schools.

The assessment of a First Nation child's best interest must not be based on poverty or the socio-economic conditions of the relevant First Nation.

The child's First Nation must be notified and a representative of the First Nation must be allowed to make representations to the judge as to what is in the best interest of the child.

No First Nations child may be adopted by non-Indigenous persons without the consent of the child's First Nation.

The First Nations Child and Family Caring Authority ("FNCFC Authority"; described below) will have the power to make regulations concerning the selection criteria and process of choosing First Nations foster families, which provincial child welfare authorities will be required to apply. It will also have the power to make regulations concerning the training and professional qualifications of the persons who will apply First Nations laws or provincial laws under delegated authority.

Section 88 of the *Indian Act* will be amended to provide that the application of provincial laws to "Indians" is subject to this Act.

## **Funding and Dispute Resolution**

In the spirit of section 36 of the *Constitution Act, 1982*, the Act will provide that, where a First Nation exercises its own jurisdiction or delegated authority, the federal government undertakes to provide it with sustainable funding sufficient to achieve the purposes of the Act and to enable it to provide services that are substantively equal to those offered to other Canadian children.

The Act will require the federal government to enact, by way of regulation, and after consulting the FNCFC Authority, rules for the funding of First Nations exercising their own jurisdiction or delegated authority. Those rules must be based on community need and contain provisions regarding:

Core funding;

Funding of preventative and least disruptive measures services;

Funding of intake, investigation and child in care maintenance services, including legal costs;

Capital funding;

Adjustments for remoteness;

Yearly adjustment for inflation;

Funding to support the development of First Nations laws and child and family caring systems.

An independent, and adequately resourced, Commissioner will be jointly appointed by the government and the FNCFC Authority to hear complaints concerning the adequacy of the rules enacted by the government to fulfill the purposes of the Act or the compliance of funding decisions concerning a particular First Nation with those rules. The Commissioner will have the power to require witnesses to testify and to order the production of documents. The Commissioner's decisions will be binding.

### **Jordan's Principle**

The Act will enshrine Jordan's Principle to the effect that where a public service is ordinarily offered to non-Indigenous Canadians, First Nations members are entitled to receive that service. When the federal government and provincial/territorial government do not agree as to the financial responsibility concerning that service, the Act will provide that the level of government to whom the request is made must provide the service or pay for the service forthwith, and settle the dispute with the other government agency later. The Act will also provide for the application of the same principle between departments of the federal government.

The Act will also provide that the Commissioner (or a delegate) has jurisdiction to hear individual complaints as to the application of Jordan's Principle. The Commissioner's decisions will be binding on the federal government.

### **Statistics, Awareness and Training**

A FNCFC Authority will be established by the Act. Its governing body will comprise a majority of members appointed by First Nations organizations.

The Authority's mission will be to collect statistics and to publish a yearly report concerning the number of First Nations children receiving child welfare services, demographics for the children and their families, reasons for their apprehension, length of placement in care, cultural placement match, funding of such services and an assessment of the achievement of the purposes of this Act.

The Authority will also design and offer training programs to ensure that social workers or other professionals who apply the Act or provincial child welfare legislation to First Nations children have the appropriate knowledge and skills with respect to the culture and laws of the relevant First Nation, the impacts of the child welfare system on First Nations and the legacy of the Indian residential schools.