Many Ways Forward

Legislative and Service Delivery Model Review

Prepared for the Aboriginal Child Welfare Working Group

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Introduction

Within Canada provincial governments are responsible for the administration of child welfare services.[1] The child welfare system is a "mechanism for responding to reports that a caregiver's actions (or failures of action) pose a significant risk of harm to a child's physical or emotional development." [2] The placement of children in out-of-home care is "one of the system's most serious protective measures."[3] Aboriginal children are overrepresented at every stage of the Canadian child welfare system. The Auditor General of Canada has estimated that "First Nations children in the country are six to eight times more likely to be placed in foster care than non-Aboriginal children."[4]

Consensus has emerged among experts and researchers that the current levels of overrepresentation of Aboriginal children in the child welfare system holds its roots in past government colonial policies of assimilation.[5] These assimilation policies have been linked to creating "conditions of social exclusion, economic marginalization, and cultural dislocation among the nation's Aboriginal people."[6]

In recent years there has been growing public awareness and "increasing government attention [to] the challenges in Aboriginal child welfare."[7] The last decade has been marked with a number of initiatives that have "changed the nature and course of the relationship between Aboriginal people and governments in Canada."[8] In 2006, the Truth and Reconciliation Commission was established as a result of the Indian Residential School Settlement Agreement. Then, in 2008, the Prime Minister's apology on behalf of Canadians for Indian residential schools reflected "an acknowledgement at the national level that child and family policies of the past were failures with lasting impacts."[9] Further, in 2010, the federal government reversed "its 2007

[1] Terri Libesman, "Child welfare approaches for Indigenous communities: International perspectives" (2004) 20 Austl J Fam L 1 at 4 [Libesman, "Child welfare approaches"].
[2] Vandna Sinha & Anna Kozlowski, "The Structure of Aboriginal Child Welfare in Canada" (2013) 4 Int'l Indigenous Pol'y J 2 at 1[Sinha & Kozlowski, "Structure of Aboriginal Child Welfare].
[3] *Ibid*.
[4] Saskatchewan Child Welfare Review Panel, *For the Good of Our Children and Youth: A New Vision, A New Direction* (2010) Minister of Social Services at 19 [Saskatchewan Child Welfare Review, *Good of Our Children*].
[5] *Ibid* at 18.
[6] *Ibid* at 19.
[7] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare, *supra* note 2 at 1.
[8] Mary Ellen Trupel-Lafond, *When Talk Trumped Service: A Decade of Lost Opportunity for Aboriginal Children and Youth in BC* (2013) Representative for Children and Youth at 22 [Trupel-Lafond, *Talk Trumped Service*].
[9] *Ibid.*

decision regarding the endorsement of the *United Nations Declaration on the Rights of Indigenous People* in recognition of the new relationship between Canada and Aboriginal people."[10]

Historical Context

Canada has a long history of forcibly removing Aboriginal children from their parents, families, communities and cultural heritage.[11] Prior to European arrival First Nation tribes cared for the children of the community according to their own cultural practices, laws of social regulation, and traditions.[12] Many of the culturally-based systems of caring for children among Aboriginal groups shared basic tenets, including viewing children as prized gifts from the creator and valuing extended family interdependence."[13] These systems and practices were developed over thousands of years and created generations of healthy, strong, children and future leaders for their people.

It was not until the imposition of colonial practices that First Nations in Canada "lost control over the welfare of aboriginal children through the process of colonization and assimilation."[14] In 1879, the Canadian Government opened the doors of the residential school system. This was the beginning of the systematic separation of Aboriginal children from their families[15] to begin the civilization *via* assimilation action plan adopted by the Canadian Government to resolve the "Indian problem". In 1920 the *Indian Act* of 1876 was amended to make "attendance at state-sponsored schools mandatory for all school age children physically able to attend and allowed truant officers to enforce attendance by pursuing, arresting, and conveying to school truant children."[16]

The residential schools, in which Aboriginal children were forced to exist within, were riddled with sexual, physical, psychological, verbal, and cultural abuse and assaults. Children were neglected and not provided with parental guidance, love or caring. Aboriginal children were forced to live in overcrowded "poor living conditions that facilitated the spread of disease,

[10] *Ibid*.
[11] Libesman, "Child welfare approaches", *supra* note 1 at 4.
[12] Devlin Gailus Barristers and Solicitors, *Delegated Child and Family Service Agencies* (nd) at 1 [Gailus, *Delegated*].
[13] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 3.
[14] Gailus, *Delegated, supra* note 12 at 1.
[15] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 3.
[16] *Ibid*.

contributing to many preventable deaths."[17] The Superintendent of Indian Affairs, Duncan Campbell Scott, conceded that, "no less than 50% of the children who passed through these schools did not live to benefit from the education which they had received therein."[18] It was reported by *Saturday Night* Magazine that, "even war seldom shows as large a percentage of fatalities as does the education system we have imposed upon our Indian wards."[19]

The residential school experience continues to have a negative impact on Aboriginal communities across Canada. Children who attended residential schools suffered a loss of balance and parenting skills, as a result, this cycle continues to be repeated inter-generationally.

> Intergenerational or multi-generational trauma happens when the effects of trauma are not resolved in one generation. When trauma is ignored and there is no support for dealing with it, the trauma will be passed from one generation to the next ... Children who learn that physical and sexual abuse is "normal," and who have never dealt with the feelings that come from this, may inflict physical and sexual abuse on their own children ...This is the legacy of physical and sexual abuse in residential schools.[20]

During the second half of the 20th century the residential school system was slowly phased out and responsibility for Aboriginal children was placed in the hands of the child welfare system. Facilitating this shift was the introduction of section 88 of the *Indian Act* in 1951. This section made "all laws of general application from time to time in force in any province applicable to and in respect of Indians in the province."[21] Section 88 was interpreted as meaning "for the first time, provincial or territorial child welfare legislation applied on-reserve."[22]

Initially provincial and territorial governments only provided child protection services in extreme cases. Once federal funds were allocated to support provincial and territorial child welfare services on-reserve "the number of Aboriginal children placed in care increased sharply in the following years."[23] This era resulted in thousands of Aboriginal children being "permanently removed from their homes"[24] and has become known as the 60s Scoop. During

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[17] *Ibid*.
[18] Ardith Walkem & Halie Bruce, *Calling Forth our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare* (2002) Union of BC Indian Chiefs at 10 [Walkem & Bruce, *Calling Forth our Future*].
[19] *Ibid*.
[20] Aboriginal Healing Foundation, *Healing Words,* online: <www.ahf.ca>.
[21] *Indian Act*, RSC 1985, c I-5 at s 88.
[22] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 3 and 4.
[23] *Ibid* at 4.
[24] *Ibid* at 4.

this time, ill-prepared social workers were not equipped to respond to the needs and circumstances of Aboriginal communities and families that had resulted from the residential school experience. Aboriginal children were removed from their communities "without consideration of cultural differences." Decisions for removal were made "according to the ethnocentric assumptions of social workers regarding matters of perceived health, housing, diet etc."[25] It was reported by the Aboriginal Justice Inquiry that:

> Child welfare workers removed Aboriginal children from their families and communities because they felt the best homes for the children were not Aboriginal homes. The ideal home would instill the values and lifestyles with which the child welfare workers themselves were familiar: white, middle-class homes in white, middle-class neighbourhoods. Aboriginal communities and Aboriginal parents and families were deemed to be "unfit." As a result, between 1971 and 1981 alone, over 3,400 Aboriginal children were shipped away to adoptive parents in other societies, and sometimes in other countries.[26]

The effects of the 60s Scoop removals was to subject Aboriginal children to an environment that was "more culturally isolate[ing] then those earlier sent to residential schools, due to the absence of their peers in the placement."[27] As a result, Aboriginal children were further separated and disconnected from their Nations[28], history, culture and the ability to form a positive Aboriginal identity.

The Many Ways Forward

Provincial and territorial child welfare systems "share certain basic characteristics; nonetheless, they vary considerably in terms of their organization of service delivery systems, child welfare statutes, assessment tools, competency-based training programs, and other factors."[29] There are even further variations in relation to services provided to Aboriginal children and their families. Vandna Sinha and Anna Kozlowski, in *The Structure of Aboriginal Child Welfare in Canada*, provide a description of existing service delivery models in terms of governance and lawmaking authority, service providers, and funding control. This information has been reproduced in table 1 of this review.

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[25] Libesman, "Child welfare approaches", *supra* note 1 at 4.
[26] Mother of Red Nation Women's Council of Manitoba, *Understanding the Child Welfare System of Manitoba: An information toolkit for parents* (nd) National Homelessness Initiative and the Winnipeg Partnership Agreement at 3 [Red Nation, *Understanding Child Welfare*].
[27] Libesman, "Child welfare approaches", *supra* note 1 at 4.
[28] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 12.
[29] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 5.

Today, within Canada, Aboriginal peoples are provided child welfare services under one of the following models:

> **Provincial or territorial model**. This model is very similar to that for non-Aboriginal children and families; the province or territory is responsible for service provision, lawmaking, governance, and funding for off-reserve families. However, funding for on-reserve services is provided by the federal government; the reasons for and implications of this difference are discussed below.[30]
>
> **Delegated or mandated model**. The second most common service delivery model for Aboriginal children involves the transfer of responsibilities described under provincial or territorial child welfare legislation from a province or territory to an Aboriginal child welfare agency. The First Nations band or Aboriginal community assumes governance responsibility, but remains bound to provincial or territorial legislation, and receives federal (on-reserve) or provincial or territorial (off-reserve) funding. Responsibilities can be transferred incrementally to Aboriginal agencies. The most formal system for incremental transfer is in British Columbia where agencies acquire increased responsibilities as they progress through the six "gradual delegation" stages described in Table 4.[31]
>
> First Nation agencies are corporate structures which the province contracts with to deliver provincial programs. Some First Nation agencies have a certain level of Indigenous government involvement, and their Board of Directors may be chosen by a band/tribal council. In other cases, First Nation agencies are created and operate with no Indigenous Nation-based input or involvement (for example, these agencies might be created through urban organizations such as friendship centres, or other groups). In all cases, although there are Indigenous individuals involved in these agencies, they operate under provincial authority and not according to the inherent jurisdiction and authority of Indigenous Nations.[32]
>
> **Integrated model**. Some agencies operate under a model in which governance responsibilities are formally shared by the Aboriginal community and the provincial or territorial government. Manitoba child welfare agencies, for example, operate under the auspices of four regional authorities (the General Authority, Métis Authority, the First Nations of Northern Manitoba Authority, and the First Nations of Southern Manitoba Authority) that have mandates received from the cultural communities they serve and the provincial government (Manitoba Child and Family Services Act, 2009). The regional authorities have the right to direct child and family service agencies. The Minister is responsible for determining the policies, standards, and objectives of child and family services, and for monitoring and funding child welfare authorities (Manitoba Child and Family Services Act, 2009). In addition to the Manitoba agencies, there appear to be Aboriginal child welfare agencies in other jurisdictions that are at least partially integrated into provincial or territorial systems; additional research is still needed to specify the nature and

[30] *Ibid* at 7.
[31] *Ibid*.
[32] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 12.

extent of the differences between the service delivery models in these agencies and those in delegated or mandated agencies.[33]

Band-by-law model. In 1981, the Spallumcheen First Nation, the British Columbia, and the federal governments signed an agreement legally acknowledging the right of the Spallumcheen Indian Band to jurisdictional control over child welfare services to members of the Spallumcheen Nation (J. A. Macdonald, 1985). As a result, it became the only First Nation in Canada to operate under a band-bylaw model that frees it from provincial laws and standards (Union of British Columbia Chiefs, 2002).[34]

Tripartite model. The British Columbia, the federal, and the Nisga'a Lisims First Nation governments signed a treaty in 1999 agreeing that the Nisga'a Lisims Nation may "make laws with respect to children and family service on Nisga'a lands" (Foster, 2007, p. 55) as long as they are comparable to provincial standards. The Nisga'a Lisims Nation agency is funded by the federal government and is the only First Nations agency in Canada to operate under this type of tripartite model.[35]

[33] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 8.
[34] *Ibid*.
[35] *Ibid.*

Table 1: Child Welfare Agency Service Delivery Models[36]

	Service provider	Governance management authority	Lawmaker	Funding control	
Services for non-Aboriginal Children	Provincial and territorial child welfare agencies	Provincial or territorial government	Provincial or territorial government	Provincial or territorial government	
Services for Aboriginal children				**On-reserve**	**Off-reserve**
Provincial or territorial model	Provincial and territorial child welfare agencies	Provincial or territorial government	Provincial or territorial government	Federal government	Provincial or territorial government
Delegated or mandated model[1]	Aboriginal child welfare agencies	Aboriginal community	Provincial or territorial government	Federal government	Provincial or territorial government
Integrated model	Aboriginal child welfare agencies	Aboriginal community & provincial government	Provincial or territorial government	Federal government	Provincial or territorial government
Tripartite agreement[2]	First Nation child welfare agency	First Nations	First Nation (federally and provincially approved)	Federal government	
Band by law[3]	First Nation child welfare agency	First Nations	First Nation (federally approved)	Federal government	

[1] Note alternate interpretation under Saskatchewan First Nations legislation.
[2] Nisga'a Lisms First Nation Band.
[3] Spallumcheen First Nation Band.

[36] Sinha & Kozlowski, "Structure of Aboriginal Child Welfare", *supra* note 2 at 6.

Over the years the administration of provincial child welfare has been criticized due to the disproportionately high numbers of Aboriginal children within the system. In response to these criticisms "Provincial legislation has been amended to become more 'culturally sensitive' and to incorporate 'consultation' with an Indigenous child's home community regarding their care." [37] Additionally, a large "range of legislative models for the delivery of child welfare services to Indigenous communities"[38] has emerged. These include:

- Complete autonomy with the recognition of Indigenous jurisdiction over legislative, judicial and administrative matters pertaining to Indigenous children;
- Shared jurisdiction with the transfer of some functions to Indigenous communities;
- Delegated authority with jurisdiction over child protection matters retained by the state but delegation of some child protection functions to Indigenous communities; and
- Mainstream legislation which integrates Indigenous input into existing structures.[39]

Most Provincial or territorial legislation now includes provisions specific to Aboriginal children, families, and communities. The most common Aboriginal-specific provision included in legislation for all provinces and territories, except New Brunswick and Quebec, is a requirement to notify Aboriginal bands or designated representative of court hearings involving Aboriginal children.[40] Other provisions include:

- Aboriginal involvement in the design, planning and delivery of provincial or territorial child welfare services for Aboriginal children;
- That an Aboriginal representative be involved in decision-making related to protection services for Aboriginal children;
- That provincial and territorial child welfare services consult with Aboriginal representatives in cases involving Aboriginal children;
- The prioritizing of kinship care, a living arrangement in which a child is placed under the supervision of a family member for Aboriginal children being placed in out-of- home care;
- When an Aboriginal child is placed out of the home, the aspiring guardian must present a plan describing ways that the child's Aboriginal culture, heritage, spirituality, and traditions will be fostered;
- Aboriginal bands have the right to be involved in the development of or to propose their own plans of care for Aboriginal children being placed out-of-home or adopted;

[37] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 12.
[38] Libesman, "Child welfare approaches", *supra* note 1 at 3.
[39] *Ibid* at 4.
[40] Sinha & Kozlowski, "The Structure of Aboriginal Child Welfare", *supra* note 2 at 8.

- Support for the development of culturally based services. [41]

In two jurisdictions Aboriginal-specific practice standards have been developed and implemented.

1. In British Columbia, the *Aboriginal Operational and Practice Standards* was developed by the Caring for First Nations Children Society, Aboriginal child welfare agencies, Aboriginal Affairs and Northern Development, and the British Columbia Ministry of Children and Family Development; and

2. In New Brunswick, the *MicMac and Maliseet First Nations Services Standard Manual* is in operation. [42]

Another source of child welfare practices, recognized in some Canadian jurisdictions, are Aboriginal laws and customs. The Federation of Saskatchewan Indian Nations developed the *Indian Child Welfare and Family Support Act* (ICWFSA). The Ministry of Social Services of Saskatchewan has recognized the ICWFSA as being "equivalent to ministerial policies, practices and standards." [43] Other jurisdictions have provisions within their child welfare Acts that recognize the right of the province's First Nations to draft their own child protection laws. To date, no First Nations laws completely govern child protection matters for their Nation. Table 2, as adapted from Vandna Sinha and Anna Kozlowski, "The Structure of Aboriginal Child Welfare in Canada" displays primary legislative considerations for Aboriginal children, families, and communities. A key theme within the research reviewed "is that a 'one size fits all approach' does not work." [44]

[41] *Ibid* at 9.
[42] *Ibid*.
[43] *Ibid* at 11.
[44] Libesman, "Child welfare approaches", *supra* note 1 at 1.

Table 2: Considerations for Aboriginal Children, Families, and Communities in Primary or Territorial Legislation[45]

Province or Territory	Legislation	Band notification of court or placement	Aboriginal involvement in case management	Aboriginal involvement in service planning or delivery	Prioritization of kinship care	Band submission of cultural connection plan invited	Connection to Aboriginal culture - best interest of child
British Columbia	*Child, Family and Community Services Act*	√		√	√	√	√
Alberta	*Child, Youth and Family Enhancement Act*	√	√	√		√	√
Saskatchewan	*Child and Family Services Act*	√	√				
Manitoba	*Child and Family Services Act; Child and Family Services Authorities Act*	√	√	√	√		
Ontario	*Child and Family Services Act*	√	√	√	√	√	√
Quebec	*Youth Protection Act*			√	√		
Nova Scotia	*Child and Family Services Act*	√[a]					
New Brunswick	*Family Services Act*						
Prince Edward Island	*Child Protection Act*	√	√			√	√
Yukon	*Child and Family Services Act*	√		√	√		√
Northwest Territories	*Child and Family Services Act*	√				√	
Newfoundland and Labrador	*Child Youth and Family Services Act*	The Labrador Inuit Land Claim Act takes precedence over the *Child Youth and Family Services Act* (no other special consideration).					
Nunavut		Because Inuit represent the majority ethno-racial groups, the Aboriginal-specific provisions assessed here are not necessarily directly applicable to Nunavut legislation.					

Note. Based on 2010 legislation and specific statements about Aboriginal children, families, and communities.

[a] In Nova Scotia, the First Nations child welfare agency, which serves all First Nations (reserve) communities, is notified, as opposed to the child's band.

[45] Sinha & Kozlowski, "The Structure of Aboriginal Child Welfare", *supra* note 2 at 10.

Canadian Legislation and Provincial Service Delivery Models

British Columbia

British Columbia's Aboriginal peoples see section 35 of the *Constitution Act, 1982* as recognizing their "inherent right to self-government over child welfare matters." [46] It has been asserted that the British Columbia Supreme Court in *Campbell v British Columbia (Attorney General),* [2000] BCJ No 1524 at para 19 affirms this position:

> I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or to could be replaced or modified by negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty."[47]

Further, the British Columbia Court of Appeal in *Casimel v Insurance Corp of British Columbia,* [1993] BCJ No 1834 at para 24, is claimed to affirm that social self-regulation in an aboriginal right:

> I think that the conclusion which should be drawn from the decision of the court in ***Delgamuukw v. The Queen*** is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with that scope and content and the workings of the general law of British Columbia."[48]

The British Columbia *Child, Family and Community Service Act* recognizes an "aboriginal child" as those children who have Indian status and those "who are members of Indigenous Nations but are not recognized under the *Indian Act*."[49] In cases where a child is not registered under the *Indian Act*, the legislation accepts self-identification of children over the age of 12, or will rely the parents of the child to self-identify. This practice respects the decision of parents or children who choose not to identify as "aboriginal", "and parents have the option of requesting that the child's home community not be notified of child welfare proceedings."[50] One criticism of the "opt-in" identification provisions is that it "grant[s] parents the power to deny their

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[46] Gailus, *Delegated, supra* note 12 at 4.
[47] *Ibid.*
[48] *Ibid*.
[49] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 46.
[50] *Ibid*.

children their heritage and birth-right by denying the jurisdiction and interest of the Indigenous Nation of whom the child is a member, and allows an individual parent to deny their child's collective rights."[51]

The British Columbia legislation contains provisions, which allow the Minister to define what is an "aboriginal community." The *Act* provides a series of schedules that "list those organizations that the province recognizes as being aboriginal communities for the purposes of community notification and involvement."[52] Included in the list are Bands, tribal councils, and "a series of urban service delivery agencies, such as Friendship Centres and other societies."[53] Those organizations the Minister has recognized as being an aboriginal community have "jurisdiction to decide important matters of the child's future."[54]

Although notification and the involvement of aboriginal communities have been recognized under the legislation, the Union of British Columbia Chiefs believe this is not enough, as these provisions lead only to the right to be consulted. They assert that the concept of Nationhood should to be recognized by the provincial legislation, and that this will lead to "actual decision making powers" for their Nations.[55] When making decisions in relation to the best interest of the child, custody, care and adoption of Indigenous children the legislation provides that a child's aboriginal heritage is to be taken into account.[56]

Services specific for Aboriginal communities are delivered by Delegated Aboriginal Agencies. There are 23 Delegated Aboriginal Agencies located throughout the province. 20 are associated with bands and three are located in urban areas.[57] There are three tiers of delegation, each providing for an increasing, cumulative range of service responsibility:

- ***voluntary service delivery*** such as support service to families and voluntary care agreements, including temporary out-of-home placements and special needs agreements;
- ***guardianship services*** including the development, monitoring and review of Plans of Care for Aboriginal children in care, permanency planning, transitional services for children moving out of the protection system and management of out-of-home services; and
- ***child protection services***, including child protection investigation and enforcement of

[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid* at 47.
[56] *Ibid*.
[57] Trupel-Lafond, *When Talk Trumped Service, supra* note 8 at 26.

the CFCS Act.[58]

During the 1990s, Delegated Aboriginal Agencies developed and implemented the *Aboriginal Operational and Practice Standards and Indicators* (AOPSI).[59] In 2009, the Caring for First Nations Children Society completed a review of the AOPSI. The purpose of the review was to revise the standards to ensure they "reflected an Indigenous worldview and consideration of Aboriginal beliefs, values and cultural traditions, '*while also meeting legislative requirements.*' This process produced a re-draft of AOPSI in May of 2012."[60] It was reported that the British Columbia Ministry of Children and Family Development proposed to integrate "the revised final draft of the AOPSI into an overarching *Aboriginal Practice Framework*."[61] This task would include collaborative efforts between the province and British Columbia's First Nations to amend and combine AOPSI and ministry standards, but, at this time, it is unclear when this will happen.[62]

In 1999, the province adopted the *Strategic Plan for Aboriginal Services* (SPAS). The underlying principle of SPAS is to enhance Indigenous Peoples involvement "in the delivery of services, either through consultations, or through delegated service delivery agencies which contract with the province to administer provincial legislation."[63] The goals of the SPAS are to:

1. Strengthen the capacity and authority of Aboriginal communities to develop and deliver services for children and families of a nature and extent comparable to those available to any resident of British Columbia.

2. Strengthen the capacity of the ministry to appropriately respond to the ongoing need for Aboriginal services while Aboriginal communities acquire such capacity.

3. Coordinate federal obligations within provincial jurisdiction to address outstanding issues of federal fiduciary responsibility for resources delivered to Status Indians wherever they may choose to live in British Columbia.

4. Advocate within government for the development of viable Aboriginal economies and economic opportunities to address this primary determinant of the health and well-being of Aboriginal people and communities.[64]

Today the position of the Minister, as found in the Ministry's annual multi-year Service Plan, is that "Aboriginal people need to have responsibility to design and deliver their own child

[58] *Ibid* at 27.
[59] *Ibid* at 41.
[60] *Ibid*.
[61] *Ibid.*
[62] *Ibid*.
[63] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 49.
[64] *Ibid*.

and family service and [the ministry] is committed to implement changes and new approaches to improve the care, safety and well-being of Aboriginal children and families."[65] A number of key actions for the improvement of outcomes for Aboriginal children and families in relation to child welfare can be found in British Columbia's *Operational and Strategic Directional Plan*, and include:

- Building cultural competencies into practice;
- Increasing community-based initiatives;
- Working with Delegated Aboriginal Agencies and Aboriginal Affairs and Northern Development to advance the implementation of a more effective funding approach for First Nations on-reserve voluntary and non-voluntary services to improve access and close the gap in service quality; and,
- Establishing effective partnership forums to ensure full engagement of Aboriginal communities, Delegated Aboriginal Agencies and Aboriginal community service agencies in planning for services for Aboriginal children, youth and families.[66]
- To work with community partners to clarify outcomes and measures of success for Aboriginal children, youth and families.[67]

British Columbia's child welfare services are "organized around a differential response model known as the Family Development Response."[68] The Family Development Response model has been described as, "a conscientious shift towards providing a range of community-based services and supports designed to keep children at home, and a corresponding move away from investigations and apprehensions as a default response."[69] To complement the Family Development Response model, British Columbia has "recently adopted a strengths-based approach to child and family development … [k]nown as Child and Family Support, Assessment, Planning and Practice (CAPP)."[70] CAPP is an approach that "focuses on building relationships, identifying needs, and providing the opportunity, environment and resources for people to meet their needs."[71] The Ontario Commission to Promote Sustainable Child Welfare described CAPP as:

> CAPP is a service delivery model designed to foster better outcomes for children, youth, and families, by providing staff with a consistent developmental approach to practice. CAPP will incorporate all the components that are necessary to support the development of children and families including child care, early child

[65] Trupel-Lafond, *When Talk Trumped Service, supra* note 8 at 39.
[66] *Ibid* at 40.
[67] *Ibid*.
[68] Saskatchewan Child Welfare Review, *For the Good of Our Children, supra* note 4 at 24.
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.

development, addiction services, services to children with special needs, youth and child mental health services, youth justice services, and child protection. Programs will no longer be offered in silos, and their focus will be on providing a combination of supports and interventions to meet the needs of "this child, this family, and this community." Supports and interventions will be drawn from services offered by both the Ministry and through a strong cross-government approach.

At its core, the developmental approach underlying CAPP places confidence in professional capacity and decision making, utilizing good supervision, an emphasis on participation of the child and family, and collaborative team work across and between professionals in different disciplines. Different professions and practices will be drawn upon to create a holistic service for *THE* child and *THE* family based on *THEIR* needs. Those that are drawn upon to contribute to achieving the goals in the plan *form the team for that particular child and family.* There is also an intention to take *away program silos* and create an integrated service system. Dollars will then support an integrated system, rather than a series of stand-alone service streams. For example, a young person who is arrested would not have to be diagnosed with a mental illness to access the skill and knowledge of a mental health professional. The Ministry has depicted the integrated and holistic nature of B.C.'s CAPP in the illustration found on the following page.[72]

Spallumcheen Band

In 1980, the Spallumcheen Band Council, in response to the number of children being apprehended by provincial authorities (2 out of every 3 Spallumcheen children)[73] passed a band by-law pursuant to section 81 of the *Indian Act*. The by-law, which has been recognized by British Columbia's Social Services Department,[74] provides the band with "sole jurisdiction over child and family services extending to members on- and off-reserve. This bylaw has been challenged numerous times in Canadian courts, but has been upheld. However, similar attempts by other First Nations to enact child welfare bylaws have been unsuccessful."[75]

The Spallumcheen by-law, *A Bylaw for the Care of Our Indian Children: By-law #3-1980*, provides that Chief and Council will act as guardians for a Spallumcheen child deemed in need of protection. The by-law sets out the process that the Band will follow in determining a suitable placement for a child apprehended and "contains strong provisions intended to maintain Spallumcheen children's connection to their families and community, including preferences for placements within extended families and a requirement to keep the child connected with the

[72] Commission to Promote Sustainable Child Welfare, *Jurisdictional Comparison of Child Welfare System Design: Working Paper No 2* (2010) at 22 [Commission, *Jurisdictional Comparison*].
[73] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 16.
[74] Libesman, "Child welfare approaches", *supra* note 1 at 6.
[75] Gailus, *Delegated, supra* note 12 at 5.

community."[76] Provisions of the Spallumcheen by-law include:

> 1. …
> The Spallumcheen Indian Band finds:
> (a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children.
> (b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies.
> (c) that the removal of our children by non-band agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve.
>
> 3. (a) The Spallumcheen Indian Band shall have exclusive jurisdiction over any child custody proceeding involving an Indian child, notwithstanding the residence of the child.
>
> 5. The Chief and Council shall be the legal guardian of the Indian child, who is taken into the care of the Indian Band.
>
> 6. The Chief and Council and every person authorized by the Chief and Council may remove an Indian child from the home where the child is living and bring the child into the care of the Indian Band, when the Indian child is in need of protection.[77]

Nisga'a

The Nisga'a Treaty is an example of a self-government model for the provision of child welfare services. Within the *Nisga'a Final Agreement,* the Nisga'a have the authority to provide "child welfare services through their own tribal laws."[78] At this time the Nisga'a are in the process of drafting the Nisga'a Lisims Government tribal laws. Until this action is completed Nisga'a Child and Family Services will operate as a delegated agency."[79]

Provisions of the *Nisga'a Final Agreement* include a statement that "decision making power regarding Nisga'a children living off of the treaty settlement lands remains with the province."[80] However, the Nisga'a and British Columbia will negotiate regarding Nisga'a children who do not live on the treaty settlement lands:

> 92. At the request of Nisga'a Lisims Government, Nisga'a Lisims Government and British Columbia will negotiate and attempt to reach agreements in respect of child

[76] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 57.
[77] *Ibid*.
[78] Gailus, *Delegated, supra* note 12 at 4 and 5.
[79] *Ibid*.
[80] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 61.

and family services for Nisga'a children who do not reside on Nisga'a Lands. [81]

The *Nisga'a Final Agreement* also provides automatic standing of the Nisga'a Government in all child custody proceedings involving a Nisga'a child:[82]

> 94. Nisga'a Government has standing in any judicial proceedings in which custody of a Nisga'a child is in dispute, and the court will consider any evidence and representations in respect of Nisga'a laws and customs in addition to any other matters it is required by law to consider.
>
> 95. The participation of Nisga'a Government in proceedings referred to in paragraph 94 will be in accordance with the applicable rules of court and will not affect the court's ability to control its process.[83]

Lheidli T'enneh

The *Lheidli T'enneh Final Agreement* provides similar provisions for child protection, custody and adoption as the *Nisga'a Final Agreement*. One difference found within the *Lheidli T'enneh Final Agreement* is that "if the Lheidli T'enneh Government makes laws respecting child protection, it must share information with Child Protection Services and participate in British Columbia's information management system."[84]

Sechelt Indian Band Self Government Agreement

The provisions of the *Sechelt Agreement* "are not geographically limited, and thus apply to Sechelt members, both on- and off-reserve, and, further, are not restricted to those members who have status, and may be applicable to all Sechelt citizens (i.e., whether or not they have status)."[85] The *Sechelt Agreement* also "recognize[s] Sechelt's ability to pass child welfare laws."[86]

> 14. (1) The Council has, to the extent that it is authorized by the constitution of the Band to do so, the power to make laws in relation to matters coming within any of the following classes of matters:
> …
> (h) social and welfare services with respect to Band members, including, without restricting the generality of the foregoing, the custody and placement of children of Band members;
> (i) health services on Sechelt lands;
> …

[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid* at 62.
[84] Gailus, *Delegated, supra* note 12 at 5.
[85] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 63.
[86] *Ibid* at 62.

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

Saskatchewan

Within Saskatchewan there are seventeen First Nations child welfare agencies that serve on-reserve children and families. Each child welfare agency has signed agreements with the provincial government that gives them the legal authority to enforce the Saskatchewan *Child and Family Services Act*. The *Act* broadly provides that a child's cultural and spiritual needs are important to their well-being and that the Aboriginal child's band chief's or designates' perspective should be considered when making placement decisions. Additionally, the *Act* "provides for First Nation bands to be notified with respect to placement hearings, for the appearance of bands in court hearings, and for their involvement in cases from the point of initial contact with the Department (s. 25, (37))."[87]

The Federation of Saskatchewan Indian Nations has drafted the *Indian Child Welfare and Family Support Act* (ICWFSA). The ICWFAS has not been implemented to date, although, it has been recognized by the Saskatchewan ministry of social services as being "equivalent to ministerial policies, practices and standards".[88] In 2005, members of the Saskatchewan First Nations Child and Family Services Regional Table submitted the *Saskatchewan Blueprint*. This document outlined an alternative funding agreement and called for child welfare service provisions to have a "family and community focus."[89] In 2007, the Saskatchewan First Nations Family and Community Institute Inc. was established to assist First Nations child and family service agencies, by providing "research, policy analysis and development, training and standards development." [90]

In 2010, the Saskatchewan Child Welfare Review Panel submitted *For the Good of Our Children and Youth: A New Vision, A New Direction* to the Minister of Social Services. Within the report it was identified that the classic "threshold" system response to child welfare played a significant part in the deficiencies of the child welfare system to address Aboriginal child protection needs.[91] The Saskatchewan Child Welfare Review Panel described the threshold system as:

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[87] Libesman, "Child welfare approaches", *supra* note 1 at 6.
[88] Canadian Child Welfare Portal, *First Nations Child Welfare in Saskatchewan,* online: <http://cwrp.ca/infosheets/first-nations-child-welfare-saskatchewan>.
[89] *Ibid*.
[90] *Ibid*.
[91] Saskatchewan Child Welfare Review, *For the Good of Our Children, supra* note 4 at 5.

> Threshold (child welfare) systems – Systems typical of Anglo-American countries, with the common trait that families must meet minimum levels of "dysfunction" to qualify for family support services. These systems are usually associated with an adversarial legal context and an emphasis on investigation. In Saskatchewan, a child protection officer must have reasonable grounds to believe that a child is in need of protection as defined by The Child and Family Services Act in order to initiate a child protection investigation, open a case, and provide service.

The work of the Panel uncovered that "First Nations and Métis … communities want a greater role in caring for their children." [92] They saw the need for government Ministries, Aboriginal organizations and community stakeholders "to work together more effectively in planning and decision-making for the well-being of children and communities"[93] and "to become an organization known for collaborative leadership, which is consistently demonstrated by Ministry staff at all levels."[94]

Views were expressed that too many families end up in the adversarial court system. Concerns were raised that many Aboriginal families in the court system "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."[95] It was brought forward that "Provincial Court Judges and Court of Queen's Bench Judges would prefer to see more options available to resolve situations through pre-court processes. A culturally-supported process can inform or serve as an alternative to formal court proceedings."[96]

One example, of a culturally based initiative supporting families in the court process was the "Elders of Opikinawasowin where the community is working effectively with the court system to better meet family needs."[97] To further meet the needs of families involved with the child welfare system, the Government was urged "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."[98]

The research of the Panel also noted:

> [C]hild protection workers are subject to a great deal of stress and are often

[92] *Ibid* at 31.
[93] *Ibid* at 38.
[94] *Ibid*.
[95] *Ibid* at 39.
[96] *Ibid*.
[97] *Ibid* at 39.
[98] *Ibid* at 40.

> publicly criticized. There is a general view that child protection is the most difficult and least desirable social work job. When a child goes on to thrive as a result of casework intervention, child protection workers are often unrecognized and unappreciated. It is unfortunate that child welfare workers are not admired for the importance of the work that they do and for the passion and commitment they display for children, youth and families.[99]

As a result the Panel recommended the development of a "strategy to attract and retain child protection workers to deliver the new vision for child welfare and preventive family support programs."[100] The Panel saw this action as a key component to the successful implementation of a new child welfare system. The following suggestions were made as areas where attention should be focused:

- Refining selection and matching techniques for child protection staff recruitment;
- Strengthening pre-service child protection orientation and developing and implementing comprehensive training and on-site expertise regarding cultural awareness, family violence, and mental health and addictions;
- Providing salary incentives and increases to front-line staffing levels;
- Ensuring better access among front-line staff to regular supervisory support and mentorship;
- Reducing administrative demands on frontline child protection workers, allowing more time for foster family and child-in-care contact. Consider paraprofessional support to assist with administrative work so front-line staff can concentrate on meeting standards of care; as well as
- Working with educational partners to ensure that, upon graduation, child protection workers are better equipped to provide services. [101]

The Panel endorsed the *Touchstones of Hope* document as providing "an excellent framework for navigating a way forward that will reduce the extreme over-representation of Aboriginal children, youth and families involved in the child welfare system."[102] Overall the Panel made the following 12 recommendations:

1. Implement fundamental changes to the child welfare system: create an easily accessible preventive family support stream for all families who need it and a much smaller formal child welfare stream for families where the authority of the courts is required.

[99] *Ibid* at 44.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid* at 20.

2. Make safe, culturally appropriate care for all Aboriginal children and youth a priority through a planned and deliberate transition to First Nations and Métis control of child welfare and preventive family support services.
3. Include concepts contained in the *Child and Youth First Principles* and the *Touchstones of Hope for Indigenous Children, Youth, and Families* in legislation, and use these principles to guide planning and decision-making for children and youth.
4. Develop and implement a Saskatchewan Child and Youth Agenda that guarantees children and youth become a high priority in the province and that all children get a good start in life.
5. Acknowledge at all levels of government that poverty-related conditions drive child neglect and other social problems. Make significant improvements to the income support, affordable housing, and disability service systems used by Saskatchewan families.
6. Emphasize collaborative approaches to child welfare and preventive family support services within the Ministry of Social Services, across Ministries, and with community partners. First Nations and Métis governments and their agency leaders must be involved.
7. Establish family violence, mental health, and substance abuse services, available without delay, for families receiving child welfare and preventive family support services.
8. Ensure the court system works better for families: minimize the number of child welfare cases that go before the courts, move cases to resolution more quickly, and ensure that families, children and youth have accessible legal advice.
9. Take special measures to ensure children and youth in foster care and other specialized resources are safe and well cared for.
10. Improve the existing system in areas where there is an urgent need for change.
11. Develop court-recognized custom adoption processes for First Nations and Métis children and youth.
12. Develop and implement a strategy to attract and retain child protection workers to deliver the new vision for child welfare and preventive family support programs.[103]

Alberta

The Alberta *Child Welfare Act* (1999) "includes provisions with respect to consultation with a child's band and provision of culturally appropriate services (ss 62 and 73).[104] The *Act* recognizes the "importance of preserving the child's cultural identity" (s 2(p)) and requires the inclusion of "a cultural connection plan, made in accordance with the regulations, that addresses how the child's connection with aboriginal culture, heritage, spirituality and traditions will be fostered and the child's cultural identity will be preserved" (s 52(1.3)). Cultural connection plans are also required for children who are to be adopted (s 63(2)(f)).

[103] *Ibid* at 7.
[104] Libesman, "Child welfare approaches", *supra* note 1 at 7.

Blood Tribe Framework Agreement

In 2000, the *Blood Tribe/Kainaiwa and Canada Framework Agreement* was signed. The Agreement sets out the process by which negotiations for the exercise of jurisdiction over child welfare by the Blood Tribe/Kainaiwa will follow. The application of the Agreement is limited to the reserve lands of the Blood Tribe. As a result of the Agreement, the Blood Tribe is bound to meet provincial standards. The parties have also agreed to involve the province of Alberta in the negotiations to the extent necessary in order to "harmonize" the operation of Blood jurisdiction over child welfare matters on their reserve lands, with Alberta's child welfare system."[105] The relevant provisions are:

> Article 3.1
> The Blood Tribe considers children vital to the continued existence and integrity of the Blood Tribe and wishes to protect Blood Tribe children by exercising jurisdiction on child welfare matters which affect Blood Tribe children on the Blood Indian Reserve by establishing a child welfare system for the efficient administration of child welfare matters on the Blood Indian Reserve pursuant to the customs and traditions of the Blood Tribe, while providing child welfare services that are equal to, or which exceed, standards in Alberta.
>
> Article 4.3
> The Blood Tribe recognizes the prevailing policies and procedures of the Province of Alberta on child welfare matters, pursuant to the Child Welfare Act and the Blood Tribe affirms that it is prepared to enter into discussions with the Province of Alberta with respect to matters involving provincial jurisdiction, responsibilities and service delivery arrangements in the area of child welfare.

Manitoba

The Aboriginal community of Manitoba held the belief "that the child welfare system should adopt an approach that looked at the holistic healing of the family rather than apprehending children and placing them into care."[106] Tripartite agreements were negotiated for the provision of a province-wide First Nation control over child welfare services.[107] Negotiations held in 2000 "recognized Métis and First Nation's people's authority and responsibility to care for all of their children."[108] A MOU was entered into between the Assembly of Manitoba Chiefs and the province of Manitoba, which contains "an acknowledgement of the jurisdiction of the province of Manitoba, and also that 'First Nations people have a right to control the delivery of child and family services and programs for their

[105] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 60.
[106] Red Nation, *Understanding the Child Welfare, supra* note 26 at 3.
[107] Libesman, "Child welfare approaches", *supra* note 1 at 5.
[108] *Ibid*.

respective community members.'"[109] The objective of the MOU, as set out in section 1.1 is that:

> The parties acknowledge that First Nations shall be responsible for the delivery of the full range of services under *The Child and Family Services Act*, as well as adoption services under *The Adoption Act* to First Nation members residing on- and off-reserve in Manitoba.[110]

The changes of the Child and Family system meant that Aboriginal Agencies and Authorities are able to provide the following:

- More cultural awareness and using cultural methods when working with Aboriginal families
- A more holistic understanding of Aboriginal families and their communities
- A focus on preventative care for the family rather than removing the child from their family and community[111]

The Child and Family Services Authority Act was proclaimed in November of 2003. This legislation created four new child and family services authorities: a General Authority; a Métis Authority responsible for securing services to Métis families in the province; a Northern Authority responsible for services through six independent agencies with offices in reserve communities and in Winnipeg; and a Southern Authority that provides child protection services through another 10 mandated agencies.[112] Each authority, along with their agencies, have concurrent jurisdiction and is responsible for the design, management and the delivery of services. The authorities "work in partnership with the Province to design law, policies and standards for service delivery."[113]

Under this model families involved with the child welfare system "are encouraged to choose the most culturally appropriate Authority, they are free to choose a different authority if they wish."[114] In order to determine the most appropriate authority for a family the following values are applied:

> Children, families and communities belong together; decisions will be in the best interest of children; and service arrangements should be culturally appropriate, stable and timely.[115]

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[109] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 65.
[110] *Ibid*.
[111] Red Nation, *Understanding the Child Welfare, supra* note 26 at 10.
[112] Saskatchewan Child Welfare Review, *For the Good of Our Children, supra* note 4 at 23.
[113] Libesman, "Child welfare approaches", *supra* note 1 at 5.
[114] Saskatchewan Child Welfare Review, *For the Good of Our Children, supra* note 4 at 24.
[115] Libesman, "Child welfare approaches", *supra* note 1 at 5.

Due to the nature of the authorities concurrent jurisdiction, intake services are appointed to a Designated Intake Agency. The role of the Designated Intake Agency is to answer questions, screen the family for services, and provide immediate response if necessary. Under this structure "all Aboriginal children in Manitoba can be served by an Aboriginal agency."[116] The guiding principles under the *Manitoba Child and Family Services Act* include:

- Acknowledgment of the special needs of Aboriginal people in respect of culture, geography and past experiences;
- The importance of the preservation of cultural identity;
- The provision of services must involve Aboriginal people and recognize their priorities;"[117] and
- Where child protection matters are brought to court by a non-Aboriginal agency, the Aboriginal agency which services the child's community must be given notice of the proceedings (s 30(1)(e))."[118]

West Region

The Ontario Association of Children's Aid Societies, *Review of the Child and Family Services Act: Recommendations of the Ontario Association of Children's Aid Societies* describes West Region as:

> West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities, is another example of a successful Indigenous-controlled agency. The agency provides child protection and family support services and community satisfaction with the agency is high. In a 1994 evaluation, the average score by community respondents when rating the agency's success was 3.9 (out of 5). This is very high for a service with such a difficult mandate as child protection. One of the two most important goals for the agency, as nominated by the community respondents, was "to deliver community-based culturally appropriate services." The agency's stated goals were closely aligned with community feeling on these issues. Three important agency principles, which were also used as evaluation criteria, are: Aboriginal control; cultural relevance; and community-based services.
>
> Overall, it was concluded that WRCFS's holistic approach to service-delivery was effective. Important factors considered to contribute to agency success were: autonomy and control over services and policies, flexibility, creativity; sound, supportive, progressive leadership; and a collaborative approach involving community which was empowering.[119]

[116] *Ibid*.
[117] *Ibid*.
[118] *Ibid* at 5.
[119] *Ibid* at 22.

Ontario

In Ontario, "child protection services are delivered by third-party transfer agencies, and not directly by a ministry or department of government."[120] There are five First Nations agencies in Ontario. "These agencies are required to consult regularly with their bands or Aboriginal Communities with respect to matters affecting children, including matters relating to placement of children, provision of family support services, preparation of care plans, temporary care and special needs agreements, amongst other matters."[121]

The *Child and Family Services Act* of Ontario "recognizes that Aboriginal people should be entitled to provide, wherever possible, their own child and family services, in a culturally appropriate manner (s 1(2)-(5))"[122] that "recognizes their culture, heritage and traditions and the concept of the extended family."[123] The Ontario legislation also provides that "[a]n Aboriginal child placement principle applies where a child is placed in out of home care."[124] Where Aboriginal children become wards of the Crown, Section 63.1 of the *Act,* provides for the use of a plan for customary care as a permanency option for children involved with the child welfare system.[125]

Ontario Association of Children's Aid Societies, in 2010, completed the *Review of the Child and Family Services Act: Recommendations of the Ontario Association of Children's Aid Societies.* Within this document the Societies made a number of recommendations. The most notable recommendations include:

> That Part VIII be amended and proclaimed, so as to give a child of the age of 12 years or older, rights with respect to information about himself/herself, as follows:
>
> - the right to request that specific information not be shared with his or her parents;
> - the right to access his or her own file, including information about members of the child's family with whom the child resided in the same household, for the period of such joint residency.
>
> Parent Access to Information
>
> - A parent can access information about his/her child until age eighteen, subject to the child's right to withhold specific information, provided the child is not a Permanent ward (see below);

[120] Ontario Association of Children's Aid Societies, *Review of the Child and Family Services Act: Recommendations of the Ontario Association of Children's Aid Societies* (2010) Ontario Association of Children's Aid Societies at 14 [Ontario Association, *Review*].
[121] Libesman, "Child welfare approaches", *supra* note 1 at 6.
[122] *Ibid*.
[123] Ontario Association, *Review, supra* note 120 at 7.
[124] Libesman, "Child welfare approaches", *supra* note 1 at 6.
[125] Ontario Association, *Review, supra* note 120 at 8.

- For Permanent wards, a parent with an access order may obtain the information that is sufficient to give life to the requirement in subsection 61(5) that the parent's wishes concerning "major decisions" be taken into account. This should not give parents with access to a Permanent ward access to the entire child file; and
- After a child turns eighteen, the child's consent is needed to disclose information about the child to any person.

l) Notice of Information Practices

In keeping with modern approaches to information and privacy practices, the revised Part VIII should contain provisions related to giving notice of an agency's record-keeping and disclosure practices to clients, community partners and the public. Added transparency with respect to this aspect of CAS work is necessary to enhance public confidence in the role played by Societies in the protection of the most vulnerable members of the community. In addition, it is an established principle that, particularly where steps must be taken without consent, notice may fulfill the requirements of due process and fairness.[126]

Advising clients as to its information practices is consistent with the strengths-based approach encouraged by the Transformation Agenda. This will be particularly important if new statutory provisions confirm the seamless sharing of information between CASs.[127]

In 2010, the Commission to Promote Sustainable Child Welfare prepared, *Jurisdictional Comparison of Child Welfare System Design: Working Paper No 2*., promoted a *community-based model* for child welfare services. Reasons for preferring a community-based model are as follows:

> There are a number of reasons for our preference. We have been impressed with the CASs who are working with this community model now, who are acting as one of a range of community services working together to develop a flexible service response to the particular needs of children and families. Child protection may be part of the same organization as a range of other children's services, as it is in multi-service agencies, or working in a formalized partnership with other independent agencies. Where this is working well, we have seen positive cultures and working arrangements that deliver positive results; encouraging access to supportive services, preventing the need for admission to protection services, building up the range of community resources available, and minimizing the number and length of time children remain in care. We are conscious of the threat to some stakeholders that CASs may 'crowd out' the development of other community-based services for children, but we believe this threat is better managed through a positive strategy of developing a range of "frontline'' responses

[126] *Ibid* at 19.
[127] *Ibid* at 20.

to families, rather than forcibly creating a higher wall around a smaller CAS institution. [128]

In 2011, John Beaucage, submitted *Children First: The Aboriginal Advisor's Report on the Status of Aboriginal child welfare in Ontario* to the Minister of Children and Youth Services. Within his report, Beaucage made the following observations:

> 2. Culture is the foundation on which an improved relationship with the Aboriginal community will be based to help curb the excessive number of Aboriginal children "in care."
>
> - It is well documented: the loss of language and culture within Aboriginal communities is a key factor in the breakdown of family values, addictions and anti-social behaviour, to name a few consequences. A concerted effort must be undertaken by all levels of government, including Aboriginal governments, to understand the families they service and aid in a repatriation initiative that will help individuals and communities return to their traditional values.[129]
>
> 3. Off-reserve children and families are to be declared a matter of concern and steps are taken to address their issues. A province-wide task force should be established to serve urban Aboriginal children.
>
> - The number of Aboriginal people in the urban setting is growing at an unprecedented rate, largely because of lack of opportunity and housing on reserves. In many instances, the social issues found on reserves are being transferred to urban areas, resulting in many of the child apprehensions by CASs. These Aboriginal children require linkages to their culture and language, as well as to their home community. We cannot assume that because they are in an urban setting, all of their needs will be met and appropriate resources will be made available.[130]
>
> 4. Wherever possible, customary care should be the first choice; only after exhaustive efforts prove futile should a child be placed within mainstream foster care.
>
> - The first element that should be stated here is that customary care belongs to Aboriginal families, from grandparents to extended family. Family caring for family is the first option.[131]
>
> 5. Recovery/Reunification coaches who have training in Alternative Dispute Resolution (ADR) must be a part of each CAS.
>
> - A Recovery/Reunification coach's only goal will be that of recovery and reunification. The coach, who will be a trained CAS worker, will be

[128] Commission, *Jurisdictional Comparison, supra* note 72 at 53 and 54.
[129] John Beaucage, *Children First: The Aboriginal Advisor's Report on the Status of Aboriginal child welfare in Ontario* (2011) Ontario: Minister of Children and Youth Services at 10 [Beaucage, *Aboriginal Advisor's Report*].
[130] *Ibid* at 11.
[131] *Ibid* at 12.

mandated to return the child home and work with the family to ensure goals are mutually agreed upon and reached within the timeframes originally set. A position such as the one identified here will clearly work as an advocate for the family, with clear explicit links to the home community, Elders and the main child welfare worker at the CAS. There should be clear objectives and retraining within the CAS to ensure client participation and community/Elder support. This process will alleviate family stress when a decision is made. It is also the holistic nature of treating the whole family which is the best way to serve the child.[132]

7. Resource the capacity building required for designation of a CAS at the First Nation level.

- Not each First Nation strives to attain CAS status through designation by the Minister of Children and Youth Services, but it is evident that Aboriginal-run organizations are showing success, such as: Tikinagan Child and Family Services, Anishinaabe Abinoojii Family Services, Payukotayno-James and Hudson Bay Family Services, Weechi-it-te-win Family Services, Dilico Anishinabek Family Care, and Native Child and Family Services of Toronto. Weechi-it-te-win Family Services' programs are guided by the principle of "Naaniigaan Abinoojii:" children will come first. The agency's service model empowers the community and children by including community teachings and connecting children to their families and sacred lands.[133]

8. Every effort should be made by all levels of government to re-institute the Band Representative program.

- Currently, Ontario's Child and Family Services Act requires the CAS to contact a child's band or community when that child is in care with a CAS. Federal funding does not allow for the hiring of a Band Representative to act as the primary contact, leaving it up to a Social Services Director or a political representative to be the primary contact with the CAS and the courts. At times there are no primary contacts, leaving children without benefit of intervention by their community.[134]

12. Increase Aboriginal representation in CAS Governance - Create an Elders council in each CAS, and in every CAS region Aboriginal people must be a part of the board of directors.[135]

- In First Nations cultures, the grandparents are authorities on child care practices in Aboriginal families. Every CAS should also be encouraged to institute an Elders/grandmothers council that provides advice and guidance in child welfare matters. Although the councils exist in some regions, there should be more.[136]

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[132] *Ibid* at 13.
[133] *Ibid* at 15.
[134] *Ibid* at 16.
[135] *Ibid* at 20.
[136] *Ibid*.

13. The position of Aboriginal Advisor to Ontario's Minister of Children and Youth Services should be made a permanent position.

- The Advisor's visibility in the Aboriginal communities is key to successful communication between government and agencies. It is important that the position be regarded as a liaison, a position of action, an agent of change, and in the end, giving a voice to the Aboriginal community. It must remain independent of government directives yet maintain a direct connection to the Minister.[137]

15. Aboriginal Child Welfare Laws – The provincial and federal governments should have a plan in place to address and respond to the assertion of jurisdiction for child welfare by First Nations or a First Nation organization.

- Political Territorial Organizations and First Nations such as the Union of Ontario Indians (UOI), Grand Council Treaty #3 and Mohawks of Akwesasne will soon be in a position to ratify their own child welfare laws pertinent to their nations. The provincial and federal governments must prepare themselves for legal challenges as First Nations seek control and autonomy over programs and services. It may be in the best interests of all governments to enter into tripartite discussions now, rather than later, to avoid longer term, costly legal battles to determine jurisdiction.[138]

Weechi-it-te-win Family Services (WFS)

Weechi-it-te-win Family Services was described by Libesman in "Child welfare approaches for Indigenous communities: International perspectives" as:

> Weechi-it-te-win Family Services (WFS) is a regional tribal agency responsible for delivery of child and family services, including child protection, to ten Ontario First Nations reserves. WFS is the first Aboriginal agency in Ontario. It is funded by the Ministry of Community and Social Services, Ontario and the Department of Indian Affairs. Some funding was transferred from the mainstream Provincial service to WFS in 1986, and full responsibility for child welfare was assumed by the agency in 1987. WFS's service model emphasises family preservation and community development work to assist in the healing of the whole community, with minimal formal intervention and substitute care. A consensual system of "customary care" was established, with a local Tribal worker, a WFS worker and the family and/or other community members drawing up a "Care and Supervision Agreement" together for each case. The Agreement is formally sanctioned by a resolution of the Chief and Council of the First Nation. Under the WFS system, consensus may be achieved by:
>
> (a) agreement between the family and the family services worker;
> (b) agreement between the committee and the family; and
> (c) referral to the First Nation's council.
>
> Between 1988 and 1995, at least 85 per cent of placements were arranged through

[137] *Ibid* at 21.
[138] *Ibid* at 22.

> Agreements rather than through mandatory mainstream methods. Where agreement is not reached, WFS applies for a hearing in a family court. WFS operates under the provincial Ontario Child and Family Services Act. Its principles include a stated focus on tradition, family and extended family, and community control and orientation. A review team consisting of four representatives from each of the WFS and the provincial Ministry of Community and Social Services concluded that WFS had made considerable progress towards its goals of First Nations participation, creating community awareness and trust, developing a community-tribal partnership in service delivery, and providing support for community members through consensual and customary arrangements for child care and family support. WFS achieved this, in spite of inadequate funding.[139]

Quebec

The *Youth Protection Act* provides for the ability of the province to enter into agreements with First Nations and Aboriginal communities "for the establishment of a special youth protection program applicable to any child whose security or development is or may be considered to be in danger within the meaning of this Act" (s 37.5).

New Brunswick

The current New Brunswick child welfare legislation provides that "an adoption order does not terminate or affect any rights the child has that flow from his cultural heritage, including aboriginal rights" (s 85(2)). Aside from this provision, the *Family Services Act* of New Brunswick has no other statutory provisions specific to Aboriginal children. In May of 2009 a review of the child welfare services provided to New Brunswick's First Nations was conducted by the Child and Youth Advocate, which produced the report *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick*.[140] The report called for a new model of First Nations child welfare service delivery for the following reasons:

> A new model of First Nations child welfare service delivery is required not to correct the historic wrongs of the past, not because First Nations self-government demands it, nor because cost containment concerns require it. A new model is required because raising First Nations children well, with equal regard for their dignity and rights, is a mission to which we are all called. By undertaking and accomplishing this task together we can restore balance between First Nations and non-First Nations communities in New Brunswick.[141]

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[139] Libesman, "Child welfare approaches", *supra* note 1 at 21.
[140] Bernard Richard, *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick* (2010) Office of the Ombudsman and Child and Youth Advocate Province of New Brunswick at 7 [Richard, *Hand-in-Hand*].
[141] *Ibid* at 15.

To accomplish the re-visioning of a New Brunswick model of First Nations child welfare, *Hand-in-Hand* proposed the use of the *Touchstones of Hope Principles*. At the time the report was completed, each First Nation community administered their own child welfare agencies.[142] This decentralized system of delivering First Nation child welfare services was seen as "[o]ne of the greatest strengths of the existing New Brunswick First Nations child welfare service delivery model."[143] The advantages of such a system included:

- Having local service delivery points where social workers, who themselves frequently live within the community, provide services;
- The proximity and accessibility of services; and
- The personal levels of service.[144]

Since 1993, the New Brunswick First Nations Child and Family Services Agencies have had their own culturally based standards. It was noted that both the provincial standards and the First Nations standards are quite similar. In 2004, the First Nations standards were revised and approved by the Agency Directors, the Band Councils and the Minister of Social Development.[145] The *Hand-in-Hand* report indicated that frontline social workers recommended both "sets of standards should be combined into one uniform set of provincial standards that are culturally-based and differentiated according to the particular client and their needs."[146] On the other hand, experts "suggested that maintaining a separate First Nations set of standards is consistent with the principle of self-governance and is an important mechanism for developing child welfare services that are accepted and embraced by First Nations communities." [147] In the end the report recommended:

> The best way forward is for the Office, in partnership with the Department of Social Development, to develop revised provincial standards which incorporate First Nations practices. Moreover, any future additions or modifications to the standards or legislation should be filtered through a First Nations child welfare committee to ensure that the standards continue to evolve in a culturally-based manner.

Other recommendations of the *Hand-in-Hand* report include:

> 8. It is recommended that a New Brunswick First Nations Child and Family Services Office be established to provide culturally-based training, specialized services (such as adoption services and legal services), policy development, clinical support,

[142] *Ibid* at 18.
[143] *Ibid* at 33.
[144] *Ibid*.
[145] *Ibid* at 41.
[146] *Ibid*.
[147] *Ibid*.

> accounts payable, human resource functions, peer reviews, quality assurance, records keeping, central payroll services and a case management system to the Agencies.[148]
>
> 25. It is recommended that the Office establish an Elders Council comprised of up to six traditional elders, two chosen by each Advisory Council who have a demonstrated and recognized expertise in child welfare matters. It is recommended that the Elders Council convene at least twice yearly to provide guidance, information and direction on cultural practices to the Office.[149]
>
> 39. It is recommended that the First Nations Child and Family Services Standards be blended into revised provincial standards which would be more culturally sensitive and relevant in all cases, but which would in particular identify and promote the use of culturally-based standards and practices in First Nations child and family interventions whether by the Province or by a First Nations Agency. The revised standards should include (but not be limited to) the role of Elders, Advisory Committees and Family Mediators in child welfare interventions, the use of adoption and custom adoptions in First Nations families, and assistance in facilitating traditional interventions and healing practices.[150]
>
> 54. It is recommended that the Office work with the Elders Council to provide ongoing spiritual and cultural training and guidance to social workers and managers, and (in appropriate cases and with the consent of the client) to assist with interventions in individual cases.[151]

The report also stressed that child welfare interventions and services provided to First Nations should be done by "their peers and their community so that the interventions are not merely 'culturally appropriate,' but that they are in fact culturally-based. Interventions must be a reflection of the community's standards, as well as the legal standards of care imposed on parents and guardians of children."[152]

Prince Edward Island

The *Child Protection Act* of Prince Edward Island directs that the best interest of the child includes having regard for "the cultural, racial, linguistic and religious heritage of the child" (s 2(2)(i)) and "if the child is aboriginal, the importance of preserving the cultural identity of the child" (s 2(2)(j)). The *Act* provides that when an Aboriginal child, who is or is eligible to be a registered band member, is subject to investigation a designated representative of the band

[148] *Ibid* at 31.
[149] *Ibid* at 35.
[150] *Ibid* at 43.
[151] *Ibid* at 49.
[152] *Ibid* at 89.

shall be notified of the investigation and the outcome (s 12(3.1); s 13(8); and s 24(1.2)). If a matter proceeds to court, "the court shall consider the submissions at the hearing of the designated representative of the band or counsel" (s 30(2)).

Newfoundland & Labrador

The only provision in the *Child, Youth and Family Services Act* of Newfoundland and Labrador relating to Aboriginal peoples is section 2.1. This section provides that the *Labrador Inuit Land Claims Agreement Act* shall take precedence if there is a conflict between the *Labrador Inuit Land Claims Agreement Act* provisions and those of the *Child, Youth and Family Services Act.*

In 2005 the Nunatsiavut settled their self-government agreement with Canada. Child welfare services in Nunatsiavut are provided through the Labrador-Grenfell Regional Health Authority's Child, Youth and Family Services. "Currently, the Child, Youth and Family Services department is undergoing restructuring and will be adopting more protective strategies for working with children and discussions are taking place about devolving control of child welfare services to the Nunatsiavut Government."[153]

Northwest Territories

Legislation of the Northwest Territories "allows for extensive delegation of authority and responsibility for child welfare to Aboriginal corporations under community agreements. As of 2000 no community agreements had been reached."[154] In the Inuvialuit Settlement Region, the Inuvialuit Regional Corporation is in the process of negotiating a self-government agreement. There is an agreement in principle in place that provides for "First Nations, Inuit, and Métis communities to take more control over child welfare using specific agreements and provisions for custom adoption."[155]

In 2010, the Standing Committee on Social Programs of the Government of the Northwest Territories conducted a review of the *Child and Family Services Act.* The report identified that:

- Changes are needed to both the legislation and the way that services are delivered.
- Expanding on early intervention and preventative services are key elements to promoting child and family well being and supporting families.

[153] Lisa Rae, *Inuit Child Welfare and Family Support: Policies, Programs and Strategies* (2011) Ottawa: National Aboriginal Health Organization at 10 [Rae, *Inuit Child Welfare*].
[154] Libesman, "Child welfare approaches", *supra* note 1 at 7.
[155] Rae, *Inuit Child Welfare, supra* note 153 at 10.

- Increasing community engagement and empowering communities to be involved in child welfare and family support are also essential.
- The number of families receiving services in the home should be increased.[156]

Nunavut

The Department of Health and Social Services, through the Child and Family Services Branch, provide child welfare and child protection services in Nunavut. In 2011, Nunavut was in the process of reviewing its *Child and Family Services Act.* Within the *Act* there are provisions for Aboriginal communities to enter into agreements "to take more control over child welfare and custom adoption.[157] Also, in 2011, the Auditor General of Canada to the Legislative Assembly of Nunavut submitted a report that identified "significant shortcomings in the Department of Health and Social Services." [158] The report makes numerous recommendations and "calls for more community involvement to assess needs and find solutions for issues."[159]

The Inuit Children and Social Services Reference Group identified the following key issues in relation to family support and child welfare services for Inuit people.

> ***1. Addressing child and family poverty*** — Poverty, brought on by the high cost of living in Inuit communities, and addictions are major challenges for many Inuit families. Therefore, making changes to the child welfare and family support system alone, without addressing these related issues, will not be sufficient to keep children out of care.
> ***2. Fostering more community involvement*** — It is critically important to involve communities in creating the solutions to the challenges they face. Inuit community members have the knowledge and experience of child rearing practices as well as the cultural values to develop an Inuit-based child welfare and family support system.
> ***3. Taking an Inuit-specific approach to child welfare*** — An Inuit-specific approach to child welfare and family support is essential in order to build healthy Inuit families. Inuit have a distinct culture and history, and child welfare and family support practices need to reflect their values and build on the strengths of Inuit families and communities in caring for children. [160]
> ***4. Developing more culturally appropriate services*** — Culturally competent services and service providers are essential for successful interventions. A lack of knowledge about Inuit culture and values remains a problem both in the North and the South. Reference Group members recommended mandatory cultural competency training for all service providers prior to working with Inuit.
> ***5. Focusing on supporting families and preventing child welfare crises*** — Families need support before they enter a state of crisis, working together with social services staff to address their challenges. Removal of children from their homes

[156] *Ibid* at 11.
[157] *Ibid* at 10.
[158] *Ibid* at 11.
[159] *Ibid* at 11.
[160] *Ibid* at 13.

should be a last resort, after less intrusive support services have been provided.[161]

6. Improving supports in the home — Inuit families experiencing distress benefit from more in-home support. Financial supports as well as programs and services are needed. One model that has shown promise is a Nunatsiavut home-visiting program where the service provider works closely with the family in distress.

7. Supporting traditional Inuit practices — Supporting traditional Inuit practices, such as custom adoption, is essential to improving family and child security. Formal support for kinship relationships and extended family and community responsibility for children can create healthy family environments for all Inuit children.

8. Ensuring Inuit have access to legal services — Inuit families need better advice and representation in the court system. Often, Inuit families and advocates lack information on their legal rights and are unprepared for court intervention. The legal system needs to improve its services both on an individual and system-wide level.

9. Getting more Inuit knowledge in child welfare and family support — Greater direction from Inuit in the design and delivery of child welfare and family support services will improve outcomes for children. To do so, Inuit need support to increase their knowledge of different models of care.[162]

10. Maintaining cultural ties and community connections for adopted children — Significant numbers of Inuit children are adopted by non-Inuit parents and sent outside their communities and territories. This is hard on the children struggling to understand their identity, the Inuit families who lose their children, and the communities that are weakened by family breakdown.

11. Involving families and communities in decision-making — Inuit families and community members need to be more involved in decisions that affect their children and youth. Elders committees that mediate disputes and, under the right conditions, community justice committees have been effective in some communities.

12. Building capacity in Inuit communities — Building capacity in Inuit communities is key to ensuring strong and healthy Inuit families and children. Each Inuit region as well as Southern communities need to develop their own solutions and models, and will benefit from sharing information about promising developments.

Yukon

The *Yukon Children's Act*, in 1984 was modified to allow delegation of child welfare authority to Aboriginal groups, only one agreement has been made."[163] Additionally, many of the Yukon's First Nations have "self-government agreements which enable them to pass their own child welfare laws. However, as at 2000 no such laws had been passed."[164]

[161] *Ibid* at 14.
[162] *Ibid* at 15.
[163] Libesman, "Child welfare approaches", *supra* note 1 at 6.
[164] *Ibid*.

International Child Welfare Models

United Stated

In 1978 the *Indian Child Welfare Act* (IWAC) was passed. The *Act* "recognizes the authority and jurisdiction of Tribal Courts to decide custody issues involving Indigenous children."[165] The *Act* contains a "dual objective of protecting the best interest of Indian children and to promote the stability and security of Indian tribes, communities and families (*Indian Child Welfare Act* of 1978, 25 USC s 1902)."[166] Core principles found within the ICWA, include "recognition of exclusive tribal jurisdiction in child welfare matters, where all parties are members of the tribe on a reserve … [and] [t]the dual interests of individual parties and the tribal group."[167] (s. 1911(a)). Additionally, it is "recognized that cultural survival of Indian tribes depends on retention and teaching of culture to Indian children."[168]

Under the IWAC:

- State and Tribal courts have shared jurisdiction over Indian children who are not residing on a reserve (about half of all Indian children). Proceedings in a State Court must be transferred to a Tribal Court, unless there is good cause not to transfer of proceedings (at 1911 (a)).[169]

- The Tribe, Indian custodian and parents, all have full standing in matters involving Indian children in State courts.[170]

- A party seeking foster care placement or termination of parental rights of an Indian child in a State Court has to demonstrate to the Court that they have made positive efforts to provide assistance to prevent the breakdown of the relationship which led to the action being taken.[171]

- When adopting or fostering Indian children, State Courts must follow a preferred order of placement which is similar to the Aboriginal and Torres Strait Islander Child Placement Principle. The descending order of preference to be followed is: with a member of the child's extended family; with other members of the child's tribe; with another Indian family; and if the above three options are not possible, with a non-Indian family.[172]

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[165] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 68.
[166] Libesman, "Child welfare approaches", *supra* note 1 at 8.
[167] *Ibid*.
[168] *Ibid*.
[169] *Ibid*.
[170] *Ibid*.
[171] *Ibid*.
[172] *Ibid*.

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

(1) The first sets standards for State agencies to follow when they are dealing with Indigenous children, and includes requirements that the tribes be notified, efforts made to place children within Indigenous homes, and that a remedial process be put in place in an effort to have children remain within the home.

(2) The ICWA creates provision for tribes to resume jurisdiction over child welfare matters. Once a tribe has made the decision to resume jurisdiction in this area, they have powers to pass Codes, have the jurisdiction of their Tribal Courts recognized, and provide services, which are federally funded. Within the United States, there is some diversity of jurisdiction, and there are some jurisdictions where the state government maintains control over Indian child welfare matters, despite the operation of the ICWA.[173]

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

> The underlying premise of the Act is that Indian tribes, as sovereign governments, have a vital interest in any decision as to whether Indian children should be separated from their families. Subchapter I is designed to clarify the issue of jurisdiction over Indian child placements and to establish standards in for child-placement proceedings. It provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless federal law has vested jurisdiction in the state. The domicile of an Indian child who is a ward of a tribal court is deemed to be that of the tribal court. …
>
> The Act also directs a state court having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon petition of the parents of the Indian tribe. Either parent is given the right to veto such transfer. It is intended to permit a state court to insure that the rights of the child, the parents, and the tribe are fully protected.[174]

[173] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 68.
[174] *Ibid* at 69.

New Zealand

From 1847 and 1960, New Zealand had a policy of assimilation toward the countries Indigenous population. This policy "did not include a program of forced removals of Maori children from their families."[175] It was not until the 1960s and onward, "when mainstream child welfare legislation was applied without regard to Maori culture and community values,"[176] that Maori children experienced extensive contact with the child welfare system. By 1981, "49.2 per cent of all children in need of care were Maori children. In 1991 Maori constituted 13 per cent of the population."[177]

The Maori concurrently walk two paths for the development of Maori jurisdiction over child welfare. The first includes objectives "to strengthen and invigorate Maori laws and traditions in the area of child welfare."[178] The second involves "Maori efforts to become more involved in the operation of the New Zealand child welfare system."[179] Through these efforts the Maori have been able to influence legislative decisions.

The *Children, Young Persons, and Their Families Act,* 1989 of New Zealand addresses child protection and juvenile justice in a single piece of legislation. The *Act* focuses on the "wellbeing of children and young persons in the context of their families, *whanau* (kin group), *hapu* (extended kin group with many *whanau*), *iwi* (descent group with many *hapu*) and family groups."[180] The principles to be applied when exercising power under the *Act* include:

- Participation of family, *whanau, hapu,* and *iwi* in decisions affecting the child wherever possible.
- Wherever possible family relations should be maintained and strengthened.
- Consideration must always be given to how decisions will effect both the child and the stability of the child's family, *whanau, hapu, iwi* and family group (s 5)."[181]

When a Maori child is in need of care and protection section 13 provides "[w]herever possible assistance should be provided to the family to facilitate a child remaining within the family"[182] and "[a] child or young person should only be removed from their family if there is a

[175] Libesman, "Child welfare approaches", *supra* note 1 at 9.
[176] *Ibid*.
[177] *Ibid*.
[178] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 73.
[179] *Ibid*.
[180] Libesman, "Child welfare approaches", *supra* note 1 at 9.
[181] *Ibid*.
[182] *Ibid*.

serious risk of harm to the child or young person."[183] If a child is to be removed form the home, a Maori placement principle is to be followed:

> Where a child must be placed in out of home care, wherever practicable, the child should be placed with a member of the child's or young person's *hapu* or *iwi* (preferable with the *hapu*) or, if this is not possible, with a person who has the same tribal, racial, ethical, or cultural background as the child or young person and who lives in the same locality as the child or young person."[184]

Australia

In Australia the Commonwealth government has established a number of Aboriginal institutions that impact upon the area of child welfare across Australia. The contribution of these institutions have been summarized, as follows:

> **Aboriginal Legal Service:** …established to ensure that Aboriginal peoples were properly represented in court, including with respect to family and child welfare matters. …[T]he Aboriginal Legal Service has been a major contributor to policy development. Good examples of this are to be found in the development of the Aboriginal Child Placement Principle.
>
> **Aboriginal Child Care Funding:** The Commonwealth Department of community Services provides funding to the Aboriginal and Islander child care agencies, which have been developed in all major urban areas in Australia. The agencies provide an independent Aboriginal presence in both service and policymaking. …
>
> **Australian Law Reform Commission Study of Aboriginal Customary Law:**…completed a major study of Aboriginal customary law in 1982 and … provided a much improved understanding of how, in both legislation and common law, more sensitivity could be shown to the Aboriginal family. The commission recognized that Aboriginal peoples see themselves as living under 'two laws,' and it accepted their argument for court recognition of Aboriginal customary law.
>
> **Royal Commission on Aboriginal Deaths in Custody:** …the mandate…was to determine why there was a much higher proportion of Aboriginal Australians than non- Aboriginal Australians in custody. One reason for this state of affairs was attributed to the disruption of Aboriginal family life caused by family and child welfare programs. [Andrew Armitage, Comparing the Policy of Aboriginal Assimilation, at 63-64.][185]

Australia has a general "Aboriginal Child Placement Principle" which operates in all jurisdictions. The Principle "requires that Indigenous children be placed in Indigenous homes, or that their home community is consulted in the placement."[186] The legislation does provide for

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[183] *Ibid*.
[184] *Ibid*.
[185] Walkem & Bruce, *Calling Forth our Future, supra* note 18 at 71.
[186] *Ibid* at 72.

Indigenous involvement and consultation, but "ultimate decision-making authority remains with the territories and there is no recognition of the inherent jurisdiction of Indigenous Peoples" (s 12).[187] The Human Rights and Equal Opportunity Commission issued a report entitled *Bringing them Home*. The Report included suggestions for the child welfare system to "recognition and respect of Indigenous Peoples customary laws and traditions, and right of Self Determination in the area of child welfare."[188]

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

In 1994, a review of the *Children (Care and Protection) Act*, 1987 resulted in the following recommendations and observations with respect to Aboriginal and Torres Strait Islander children:

> The *Act* should give the Minister for Community Services the power to delegate certain functions to Aboriginal and Torres Strait Islander people to enable a greater degree of self determination in the provision of services to Aboriginal and Torres Strait Islander children.
>
> Aboriginal and Torres Strait Islander people called for greater emphasis on prevention and support programs.
>
> Greater Aboriginal and Torres Strait Islander control over child protection would ensure more culturally appropriate and effective child protection.[189]

[187] *Ibid*.
[188] *Ibid*.
[189] Libesman, "Child welfare approaches", *supra* note 1 at 12.

European Nations

The Saskatchewan Child Welfare Review Panel, in their report, *For the Good of Our Children and Youth: A New Vision, A New Direction* considered the following European nations child welfare service delivery models:

> ***Germany***
> In Germany, the key feature of the child welfare system is a legal framework for making help available, which is based on "perceived need" and "entitlement to help." While this includes considering the risks to a child or young person, it does not focus on risk as the necessary condition for help, as "threshold" responses do. The support a child or young person receives is determined entirely by the needs of that person.[190]
>
> ***France***
> In France, … a family needing help first goes to a social service office in the local area, which has a multi-disciplinary team including child protection workers, psychologists, maternal and child health services and specialist child and family social workers. It is a holistic approach that seeks to join maternal and child health services with those focused on problem-solving interventions. Unlike the Canadian system where there are statutory concerns, the work with families under the French system is done on a voluntary basis.[191]
>
> ***Belgium***
> The country of Belgium offers a model with better outcomes for children and families, and aspects of their child welfare system may be a good fit in Saskatchewan. Central to Belgian child protection law is the notion of "children in danger," defined as "minors whose health, safety or morality are in danger, because of the environment in which they are brought up." Parents and young families in Belgium benefit from a universal home visitation program, where health nurses visit homes during the first three years of the baby's life. In situations where the needs of families are greater, such visits continue until the age of six. Such access to families and children creates an optimum situation for early detection and intervention, preventing maltreatment and neglect.[192]

[190] Saskatchewan Child Welfare Review, *For the Good of Our Children, supra* note 4 at 25.
[191] *Ibid*.
[192] *Ibid* at 25.

UK delivery system

In England, elected local authorities are responsible for child protection and hold a general power of 'well-being' for their communities.[193] These authorities have stressed prevention, early intervention and collaboration across programs for the care of children. The Children's Trusts acts as the local body governing the collaborative efforts of all those involved with a child and family.[194] The main function of the "Children's Trust is to commission jointly and to co-ordinate commissioning among the partners to deliver a better range of services responsive to local needs."[195]

The *Children Act,* 2004 endorses the national framework: *Every Child Matters: Change for Children*. The *Act* sets out "the process for integrating services to children so that every child can achieve the five outcomes laid out in the national framework."[196] Additionally, the *Act* "places a duty on local authorities and their partners … to co-operate in promoting the wellbeing of children and young people and to make arrangements to safeguard and promote the welfare of children."[197]

In order to ensure improved outcomes for child welfare services, *Every Child Matters* called for radical change in the whole system, which included:[198]

- The improvement and integration of universal services – in early years settings, schools and the health service;
- More specialized help to promote opportunity, prevent problems and act early and effectively if and when problems arise;
- The reconfiguration of services around the child and family in one place, for example, children's centers, extended schools and the bringing together of professionals in multi-disciplinary teams;
- Dedicated and enterprising leadership at all levels of the system;
- The development of a shared sense of responsibility across agencies for safeguarding children and protecting them from harm (Safeguarding Boards); and
- Listening to children, young people and their families when assessing and planning service provision, as well as in face-to-face delivery.

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[193] Commission, *Jurisdictional Comparison, supra* note 72 at 35.
[194] *Ibid*.
[195] *Ibid* at 41.
[196] *Ibid* at 37.
[197] *Ibid*.
[198] *Ibid* at 39 and 40.

Within the English system of child welfare, "all authorities are required to report jointly on the 5 outcomes, which are further divided into 24, and illustrated in the following table."[199]

Be Healthy	Physically healthy Mentally and emotionally healthy Sexually healthy Healthy lifestyles Choose not to take illegal drugs *Parents, carers and families promote healthy choices*
Be Safe	Safe from maltreatment, neglect, violence and sexual exploitation Safe from accidental injury and death Safe from bullying and discrimination Safe from crime and anti-social behaviour in and out of school Have security, stability and are cared for *Parents, carers and families provide safe homes and stability*
Enjoy and Achieve	Ready for school Attend and enjoy school Achieve stretching national educational standards at primary school Achieve personal and social development and enjoy recreation Achieve stretching national educational standards at secondary school *Parents, carers and families support learning*
Make a Positive contribution	Engage in decision-making and support the community and environment Engage in law-abiding and positive behaviour in and out of school Develop positive relationships and choose not to bully and discriminate Develop self-confidence and successfully deal with significant life changes and challenges Develop enterprising behaviour *Parents, carers and families promote positive behaviour*
Achieve Economic Well-being	Engage in further education, employment or training on leaving school Ready for employment Live in decent homes and sustainable communities Access to transport and material goods Live in households free from low income Parents, carers and families are supported to be economically active

[199] *Ibid* at 44.

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