FIRST NATIONS CHILD AND FAMILY SERVICES:
WHITHER SELF-GOVERNANCE?

by

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Abstract

This thesis argues that despite political promises and rhetoric to the contrary the federal and provincial governments maintain through their policies, legislation, and regulations the continued assimilation of First Nations; under the guise of supporting First Nations attempts to resume governance over child and family services. It is my assertion that governments both federal, provincial and First Nations need to begin a process and transition towards self-governance in child and family services based on our traditional laws and practices, in order to ensure the continued survival of our nations. I have set out a number of preliminary options for assisting in the process of decolonization in the area of child welfare.

This thesis is written from my perspective as a First Nations woman engaged in the practice of law in the area of First Nations child and family services. A perspective which is inspired by the political work of my relations in the advancement of Aboriginal rights and title in British Columbia.

In chapter one I discuss the impact of colonization on First Nations children, families, communities and governments and conclude that the state (federal and provincial governments), far from promoting First Nations child welfare, have served to create enormous despair, poverty, dependency, and an erosion of First Nations cultures, languages, and governance. This chapter ends with a
discussion of First Nations values, practices and traditions in relation to child rearing and "child protection.

Chapter two examines the recent changes to child and family service delivery in British Columbia, changes which effectively continue the process of assimilation.

Chapter three examines the current delegated model of First Nations child and family services in British Columbia. I argue that the delegated model is premised on assimilation, in that First Nations are bound to comply with the very legislative and administrative models that were illustrated in chapters one and two to have had such a devastating impact on First Nations children, families, communities and governments.

Finally, the fourth chapter provides an overview of the federal and provincial constitutional framework and political "support" for self-government juxtaposed against First Nations' perspectives of their inherent right to self-government. In conclusion I propose a number of interim measures that would support First Nations resumption of self-government of child and family services. It is extremely important, in my opinion, that a process and transition towards true self-governance begin as soon as possible building upon First Nations community values and cultural practices.
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A special acknowledgment is given to my grandparents, Jack and Elizabeth Beynon, and to all of my relations, who have worked so tirelessly to advance the rights of First Nations peoples in B.C.. I thank the Tsimshian Nation for honouring me and acknowledging my contribution to the delivery of First Nations child and family services. I thank my parents, as well as Joan Athans and the Storey-Woodman family, who have all graciously cared for my daughter when I was in the throes of writing this thesis.

Finally, I thank my daughter Elizabeth, for sacrificing her fun time with me to allow me to write. Elizabeth has a strong and beautiful spirit. I am committed to working in this area on her behalf, on behalf of those of her generation, and those who will follow. My hope and dream is that while she is growing up the world will become a better and more compassionate place. I am buoyed by the fact that her friend Lola, who has witnessed our ceremonies and songs, wishes that she was an “Indian”. We have come a long way, but we have a long way to go.
My Perspective

The fact that we as First Nations have a personal and professional investment differentiates our work from those who write about us.¹

This thesis is written from my perspective as a First Nations woman engaged in the practice of law in the area of First Nations child and family services; a perspective which is inspired by the political work of my relations in the advancement of aboriginal rights and title in British Columbia. Ojibway Professor of Law, John Borrows, poignantly pointed out that writing from a First Nations perspective provides an important contribution to legal scholarship, by reinforcing how this outlook can make a difference in analyzing and conceptualizing law. Borrows incorporates a First Nations perspective into legal narrative because:

... doing so locates and particularizes law's substructures of power and provides direction about the restraint and exercises or power that are legally oppressive.²


Other First Nations legal scholars have written from their own perspectives including Mary-Ellen Turpel, "My consideration of cultural differences and the Charter has been informed by my own cultural experiences as an Aboriginal woman, lawyer, and law professor"3; and Patricia Monture, "as a woman who accepts responsibility for the traditional teachings which show us that we are responsible for seven generations yet to come"4.

Like Monture I accept responsibility for the well-being of the children of today and those of future generations. Because of this responsibility I am committed to contributing to the advancement of self-government in the area of child and family services. That is why I have chosen to write this thesis. It is a gift that I wish to bestow upon those individuals who work so tirelessly in their communities to make the world a better place for First Nations children and families. It is a tool that I humbly present to the dedicated members of the former First Nations Summit Action Committee for First Nations Children and Families, and to the First Nations Summit Task Group and First Nations Chief Negotiators; in the hopes that my work can make a small contribution towards facilitating the goals and aspirations of First Nations in B.C. to self-govern in the best interests of our children.

I have chosen to provide some biographical information in this thesis in order to inform readers of my perspective and to underscore that the whole discussion of


self-government is not merely academic but affects the day-to-day lives of our people. In sharing my perspective I set the backdrop from which I personally witness and contemplate the current state of First Nations child and family service delivery. Much of the information in this thesis is informed by my experiences, frustrations, and hopefully my insights, as a First Nations advocate. I am a First Nations woman strongly committed to the process of decolonization and social change for First Nations and Aboriginal peoples.

I believe strongly that it is my duty to carry on the work of my grandparents and my other relations in advancing the rights of First Nations peoples. I have an obligation to utilize my professional training to endeavor to advance changes that will improve the lives of First Nations children, families and communities. My writing is not only an exercise in academic inquiry; engaging in this form of study is necessary to inform the work that I am doing on behalf of the First Nations that I represent. The impact of colonization has profoundly affected and continues to affect the lives of First Nations children. I have been personally touched by some of the loses attributed to the imposition of colonial laws and practices.

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5 I have interchanged, throughout this thesis, the term First Nations, Aboriginal, Native and “Indian”, to mean the First peoples of Canada. The First peoples of Canada are land based and are identified by their various tribal affiliations, i.e., Haida, Tsimshian.

6 My daughter’s cousins have been “lost” to the child welfare system. Her father’s family comes from extreme poverty, one of her paternal Aunties has had five children taken into care. My cousin recently had here granddaughter removed from her care. She was not placed with any family members, despite the fact that myself and others would have been willing to care for her. More recently the niece of one of my cousins had her children removed and tragically one of those children died in foster care.
The work experience that informs my perspective includes the honour of working on behalf of the First Nations Summit Task Group and for the First Nations Summit Chief Negotiator Forums. In the area of child welfare I represented the former First Nations Summit Action Committee for First Nations Children and Families (formerly known as the First Nations Summit Child Welfare Committee), which promoted the advancement of self-government options for First Nations in the field of child and family services. In addition, I have had the opportunity to provide technical assistance to individual First Nations on child and family service matters as well as representing First Nations parents in child protection matters. I was provided, in 1996, with the exceptional opportunity to adjudicate children's rights as a member of the B.C. Child and Family Review Board (from 1996-1997). With the formation of a new Children's Commission I was appointed to sit as a member of the Commission's multi-disciplinary team which reviewed child fatalities. Finally, I have worked for

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7 A forum organized by the First Nations Summit on behalf of First Nations Chief Negotiators who are engaged in the treaty making process.

8 The First Nations Summit is the umbrella organization which provides a forum for First Nations in British Columbia to address issues related to treaty negotiations as well as other issues of common concern. The First Nations Summit Action Committee for First Nations Children and Families was a committee of the Chiefs in Assembly of the First Nations Summit, they ceased in Spring 2000 due to a lack of funding. The Child Welfare Committee was established by a resolution of the Chiefs in Assembly in 1993. The mandate of the Committee is:

Pursuant to the Task Force Report recommending the establishment of a policy table to discuss child welfare issues as they relate to treaty: to develop policy and legislative options for First Nations control over child welfare authority.

9 The Child and Family Review Board was established in 1996 pursuant to s. 83 of the Child, Family and Communities Services Act, S.B.C. 1994, c. 27 [hereinafter CFCSA].

10 The multidisciplinary team was established pursuant to the Children's Commission Act, S.B.C. 1997, c. 11. There are 14 members on the team including: the Children’s Commissioner, the Chief Coroner of B.C., the Deputy Provincial Health Officer and the Deputy Child, Youth, and Family Advocate.
and volunteered for such agencies as the Vancouver Aboriginal Child and Family Service Agency and the Caring for First Nations Children Society. All of these experiences have formed the backdrop for arguments presented in this thesis.

My perspective is also informed by my cultural identity and by the examples set by my relations. Many of ancestors have forged the path of advancing Aboriginal rights and title in British Columbia, a path on which I humbly follow. My mother’s family comes from Lax Kw’alaams (Tsimshian Nation) and Old Masset Village (Haida Nation). We are from the Haida Eagle Clan Sahgwaa Git’anee. I was raised away from my community, as was my mother. Despite this I come from a family that has always been committed to fighting against the injustices to which our people have been subjected. My grandfather, Jack Beynon, was the first editor of the Native Voice and one of the founding members of the Native Brotherhood of B.C. For

11 My grandfather was half Tsimshian and half Welsh, his father being a Welsh sea captain. When my great grandmother married my great grandfather, she lost her “Indian” status. In accordance with the Indian Act, when a native woman married a non-native man she was no longer considered an “Indian”, nor were her children “Indians”, therefore, when my Haida grandmother married my grandfather, she too lost her Indian status, because he was considered a “non-Indian”. Post-humously my grandmother was reinstated as an “Indian” and my mother was able to obtain her “Indian” status. The government continues to assert that my grandfather was a non-Indian despite affidavits and secondary sources proving the contrary. I, therefore, unlike my mother and my daughter do not have “Indian” status.

12 The Native Voice was the first Native newspaper in Canada and was published in B.C. by the Native Brotherhood of B.C.

13 The goals of the Native Brotherhood of B.C. as set out in their Constitution were as follows:

1. To work for the betterment of conditions, socially, spiritually and economically for its people.

2. To encourage and bring about a communication and co-operation between the white people and Native Canadians.
many years my uncle, Godfrey Kelly, was President of the Council of the Haida Nation. My grandmother, daughter of Simgigat Legaic, was strong, hardworking, and committed to advocating for First Nations peoples.

I come from a family of writers and political activists. This seems antithetical to the notion that First Nations come from oral traditions, but as far back as my great great grandfather, Simgigat Clah, my family has written. Clah wrote a diary which is being translated into English for publication. He was described as a man of great intellect. My great uncle, William Beynon, was the Tsimshian ethnographer for Maurice Barbeau and other anthropologists. His field notes are collected in Ottawa, his transcriptions have been published in a series, and his life achievements are chronicled in a book - *American Indian Intellectuals*.

3. To join with the Government and its officials and with all those who have at heart the welfare of the Natives of British Columbia and for the betterment of all conditions surrounding the lives and homes of the natives.

14 Meaning “Chief”.

15 *American Indian Intellectuals* at 142. I was unable to locate a citation for this book, and only have the photocopied pages of the discussions of my Uncle William Beynon and my great great grandfather, Simgigat Clah (Arthur Wellington).

16 Canadian Museum of Civilization, *Tsimshian Narratives*, Volumes 1 and 2 (National Museums of Canada, 1987). These volumes contain research collected by my Uncle from 1915 to 1957. The preface to the series notes that my uncle worked for anthropologist Maurice Barbeau and others, such as, Boas, Garfield and Drucker. It acknowledges, however, that he was an “anthropologist in his own right”. Barbeau and Beynon’s collaboration are known as the “Tsimshian Files” which are held at the Canadian Museum of Civilization.

17 Supra note 15.
I am particularly humbled by the sentiments expressed by my grandmother, Elizabeth Beynon (nee Kelly), articulated in a letter she wrote to the Editor of the *Prince Rupert Daily News* advocating for better education for First Nations children:

What a grand and glorious world this would be for us Natives if more people modernized their views. Who knows, perhaps in future years some of those Native children, given a chance at better education, might be sitting as Trustees of the School Board. I'm just dreaming, but why shouldn't my dreams become a reality. I understand my subject as I am the daughter of the late Chief George Kelly (Chief Legaic) who was well known up and down the entire Coast and who always worked hard for the betterment of his people and instilled in me the same desire.  

My Grandfather was also an advocate for First Nations and a gifted writer. His first editorial in the first publication of the *Native Voice* asserted that:

The *Native Voice* will assert at the beginning the firm objectives at which we aim and hope to achieve in the not too distant future. An objective which will mean an honest guarantee of equality for the original inhabitants and owners of Canada. In Canada (A Canada) where under the Indian Act we suffer as a minority race and as wards, or minors without a voice in regard to our own welfare. We are prisoners of a controlling power in our own country - a country that has stood up under the chaos of two world wars, beneath the guise of democracy and freedom, yet keeping enslaved a Native people in their own home land... At this time, our Dominion is not in a position to point a finger of scorn at the treatment meted out by other countries toward their people, until she liberates her own original and subjected race. We are in the position of the poor man mentioned in the Gospel who lived off the crumbs that fell from the rich man's table. This is particularly galling to us as the table and what is on it was at one time exclusively our own and we intend to and do demand our rightful positions on terms of equality with our fellow Canadians.

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18 Letter written by Elizabeth A. Beynon dated, January 16th, 1947.

It is because of the commitment and passion of my relations that I am now in the privileged position of being a lawyer and writer. I owe much to them and to others that have forged the path on which I travel.

The words of my Grandfather and Grandmother, written over 50 years ago, illustrate that the process of decolonization and the quest for the resumption of our rights as First Nations in our homelands began many years ago. It has been a long and arduous journey, and sadly little has changed. In fact, Grandfather's assertion that Canada is not in a position to point a finger of scorn at the treatment meted out by other countries toward their people, is still true today. In April 1999, the Human Rights Committee of the United Nations, in the conclusion of their sixty-fifth session acknowledged that the situation of aboriginal peoples in Canada is:

"the most pressing human rights issue facing Canadians... The Committee recommended that the practice of extinguishing the inherent aboriginal rights be abandoned as soon as possible."

Just as my grandmother stated in 1947, I argue that colonial governments must modernize their views and honour their political commitments. They must seriously commit to abandoning their tools of assimilation (laws and policies). The institutions which have caused so much pain for our people - the trauma of dislocation, loss,

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20 As a point of interest, I am fair haired and blue-eyed (my father is Scottish). My personal appearance has caused some (both First Nations and non-natives) to invalidate or dismiss my perspectives and my knowledge as a First Nations person. At times this is hurtful. It does not, however, lessen my passion or commitment to work on behalf of those who came before me and those who will follow. In fact my professional contribution was recently acknowledged by the Tsimshian Nation. On July 17, 1999 I was presented with an “Outstanding Tsimshian Achievement Award”. This award is truly a positive affirmation of the work I have done and will continue to do. I was extremely honoured to be chosen as one of the first recipients.

cultural genocide, and grief - are now the very institutions that First Nations are being asked to model in their resumption of self-government. The United Nations observations must be taken seriously by the Canadian and provincial governments. They must abandon their practice of extinguishing our inherent aboriginal rights and work instead, hand in hand, with First Nations to honour our laws, culture, traditions and institutions of government. This thesis provide some examples and options for beginning on this new path.

In this thesis I argue that what is necessary for the continued survival of First Nations communities and governments is the opportunity to control, design, and deliver their own child and family services based on their traditional laws and practices. For many commentators the only way to address the devastation wrought by continuing colonial policies and practices is for First Nations to resume their right to self-govern\(^22\). Until First Nations are “allowed” to resume self-governance in the integral area of child and family services, little progress can be made, and the imposition of colonial values and beliefs will continue the destruction of our culture, families and communities. The current provincial and federal regimes do not meet the needs of First Nations, and no constitutional space has been provided for First

Nations to exercise true self-governance in order to address the pressing issues and concerns of our communities. It is imperative that efforts begin now to ensure and enable a smooth transition towards self-government.

There is a paucity of information written from a First Nations perspective on the impact of colonial laws and practices on First Nations child and family services in British Columbia. My analysis will help fill the present void in the literature by specifically addressing the challenges and obstacles faced by First Nations in B.C. in their resumption of self-government over child and family services.
Chapter One: The Impact of Colonization

A. Introduction

Before addressing the specific legal context and efficacy of the current child welfare regime as it applies to First Nations peoples. It is important to situate my discussion in the context of past and present colonial practices. As social work Professor Andrew Armitage notes:

It is not possible to discuss the contemporary child welfare system without considering its historical and cultural roots in the social policy dilemmas of the twentieth-century Western society. Colonialism and the assumption that Western ways of dealing with family problems were superior to First Nations ones made it possible to impose these ways of thinking on Aboriginal peoples.23

The following examples highlight the failure of colonial laws and practices and provide the evidentiary framework for my argument that First Nations need to begin a transition to self-government of child and family services based on our traditional laws and practices; rather than be dictated to by the provincial and federal governments that have caused such pain. The imposition of colonial laws and practices has been characterized variously as cultural chauvinism24, or a form of

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conspiracy\textsuperscript{25}, and as being premised on the cultural differences and supposed cultural superiority of Europeans\textsuperscript{26}. Colonial governments assumed responsibility for First Nations children on the basis that they were more benevolent, knowing, and civilized than the culture the children came from\textsuperscript{27}. The state parenthood system for First Nations' children has taken differing forms including; firstly the residential school system, then the "sixties scoop"\textsuperscript{28}, and, more recently, the imposition of the provincial child welfare system. An examination of state involvement in the rearing of First Nations children demonstrates that the state, far from promoting child welfare, has served to promote enormous despair, poverty, dependency and the erosion of First Nations cultures, languages, and governance. As Justices Hamilton and Sinclair succinctly state that:

The intrusion of child welfare authorities in the past has been paternalistic and colonial in nature, condescending and demeaning in fact, and often insensitive and brutal to Aboriginal people. Aboriginal children have been taken from their families, communities and societies, first by the residential school system and later by the child welfare system. Both systems have left Aboriginal people and their societies severely damaged.\textsuperscript{29}


\textsuperscript{26} \textit{Supra} note 1 at 4.


\textsuperscript{28} This was a term coined to illustrate the large numbers of First Nations children that were taken from their communities and placed in foster and adoptive homes during the 1960's. This phenomena continues today and is reflected in the grossly disproportionate numbers of First Nations children in the care of the state.

\textsuperscript{29} \textit{Supra} note 27 at 509.
The following discussion illustrates examples of how First Nations have been impacted by non-Native laws and policies and provides support for my argument that First Nations must be enabled to resume self-governance pursuant to their own laws, cultures and traditions.

B. The Indian Act

Without question, this legislation (the Indian Act) struck at the heart of what was most sacred to West Coast societies. In so doing, it put in question the very survival of these nations...^30

In the Conspiracy of Legislation, the late Chief Joe Mathias^31 and Gary Yabsley^32 effectively illustrate the suppression of Indian rights in Canada. The Indian Act^33, a legislative tool utilized to “civilize the Indian”, strikes at the very heart of First Nations values and identity. Mathias and Yabsley argue that the consequences of the legislation, in terms of the loss of economic well-being, political power, cultural

^30 Supra note 25 at 34.

^31 The late Chief Joe Mathias, of the Squamish Nation was a long standing political advocate for aboriginal rights who passed away on March 10, 2000. Chief Mathias was an elected member of the First Nations Summit Task Group. The Task Group is an executive committee of the Summit that is mandated to act on behalf of the Summit Chiefs in Assembly on treaty issues.

^32 Gary Yabsley is a partner at Ratcliffe and Company law offices who specializing in “aboriginal and treaty rights law”.

^33 The Indian Act R.S.C. 1886 and amendments to date.
integrity, and spiritual strength are immeasurable. They state that from the Indian perspective, the *Indian Act* represents nothing less than a conspiracy, because:

It exhibits a clear pattern founded on a conscious intent to eliminate the Indian and 'indianness' from Canadian society.\textsuperscript{34}

The *Indian Act* attacked First Nations cultural survival on every level. This is illustrated by the fact that the *Indian Act* outlawed the right to potlatch, to practice our traditional and spiritual ways, and to hire legal counsel in order to fight land claims. First Nations were not allowed to vote. Thereby denying First Nations a voice in the development of laws, including child welfare laws, which impact them.

In terms of child welfare the *Indian Act* served to erode First Nations cultures, practices and beliefs by having the state assume the parental role for First Nations children. In short, the imposition of the *Indian Act* facilitated two colonial institutions which attacked the vital bonds between First Nations children, families and communities: the residential school system and the imposition of provincial child welfare laws.

C. Residential Schools

The residential school was a conscious, deliberate and often brutal attempt to force Aboriginal peoples to assimilate into mainstream society, mostly by forcing children away from their language, culture, and societies.\textsuperscript{35}

\textsuperscript{34} *Supra* note 25 at 35.

\textsuperscript{35} *Supra* note 27 at 514.
The most profound and devastating influence on the destruction of our cultural traditions and practices was the residential school system. There has been a great deal written about the impact of the residential school system on First Nations children, families, and communities. Most recently Fournier and Crey in *Stolen from our Embrace*, chronicled, in painful detail, the experiences of First Nations children in residential school. The residential school experience is important in understanding First Nations’ mistrust of the provincial government’s child welfare system; as these schools were the first stage in the process of forced assimilation and dislocation of First Nations children from their families and communities.

The placement of First Nations children in residential schools was a clear assertion of European cultural imperialism. It was based primarily on the belief that Europeans were superior, that is, more benevolent, knowing, and spiritually guided than First Nations, and therefore in a better position to educate First Nations children. Justices Hamilton and Sinclair outlined the rationale for the residential school system and described it as a conscious, deliberate and often brutal attempt to force First Nations people to assimilate into mainstream society, mostly by forcing

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36 See e.g.: LOCLON supra note 24; *The Development of the Child, Family and Community Service Act: An Aboriginal Perspective*, supra note 22; *Literature Review: Aboriginal Child and Family Governance*, supra note 22, and RCAP supra note 22.

the children away from their languages, cultures and societies\textsuperscript{38}. In fact in 1920 Duncan Campbell Scott the Deputy Superintendent of Indian Affairs stated that:

\begin{quote}
Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department, that is the whole object of the Bill (Indian Act).\textsuperscript{39}
\end{quote}

The federal government, pursuant to the \textit{Indian Act}, legislated the institutionalization of First Nations childhood in residential schools - schools where many were physically, sexually, and emotionally abused\textsuperscript{40}. The impact of the residential school system on First Nations children, families and communities has continuing repercussions today. Which many argue are illustrated by the alarmingly high statistics of First Nations children in care\textsuperscript{41}. First Nations children who grew up in such institutional settings were denied the opportunity to experience the workings of a real family, especially the workings of an aboriginal family in an aboriginal community, and they lost the valuable opportunity of learning how to parent.

\textsuperscript{38} \textit{Supra} note 27 at 514.

\textsuperscript{39} \textit{Supra} note 27 at 514.

\textsuperscript{40} \textit{Indian Act} 1886 R.S.C. sections 137-138.

\textsuperscript{41} British Columbia, \textit{The Children's Commissions 1998 Annual Report} (Victoria: Queens Printer, 1999). In the Commissioner's 1998 \textit{Annual Report} she (Cynthia Morton, Children's Commissioner) found that although aboriginal children and youth make up only 8\% of the B.C. population their numbers are grossly over-represented as children in care. Of a total of 4068 children in care, 1406 are First Nations and 134 are Metis. The Commissioner, found that a total of 40\% of the children in care are aboriginal (81\% in the Northwest). In reviewing plans of care she found that this number may be higher because 12\% of the children who identified as aboriginal in her review were not so identified by the Ministry of Children and Families.
Residential schools were in existence from 1861 to 1984, a total of 123 years. Those years wreaked havoc on First Nations culture, family structure, and communities. Justices Hamilton and Sinclair summarized the impact:

The loss of successive generations of children to residential schools, the destruction of Aboriginal economic bases, the decimation of their populations through diseases and the increasing dependence on government welfare have led to social chaos. This manifests itself in Aboriginal communities through staggering poverty rates, high unemployment rates, high suicide rates, lower education levels, high rates of alcoholism and high rates of crime. In individuals, the legacy of residential schools has been lowered self-esteem, confusion, self-identity and cultural identity, and a distrust of, and antagonism toward, authority.

The residential school system was operated as a form of child welfare. As noted by Social Work Professor Andrew Armitage, children who were orphaned or neglected remained in the residential schools year round. The actual child welfare system was not introduced on reserve until the 1950's corresponding with the demise of the residential school system. Marking the beginning of a new phase of cultural destruction, the imposition of provincial child welfare laws on reserve.

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42 The Development of the Child, Family and Community Services Act: An Aboriginal Perspective, supra note 22 at 14.

43 Supra note 27 at 515.

D. The Imposition of Provincial Child Welfare Systems

Another profound example of the devastating impact of colonial laws and practices is the application of provincial child welfare laws on reserve. Child welfare laws allow for state (provincial) intervention to protect children from harm and neglect. The application of provincial laws to children living on reserves resulted from legislative amendments to the *Indian Act* in 1951. Johnston, in his report on native child welfare, stated that the imposition of provincial child welfare laws in 1951 was largely due to submissions made in 1947 on behalf of the Canadian Welfare Council and the Canadian Association of Social Workers to a committee of the Senate and House of Commons appointed to consider changes to the *Indian Act*. As Johnston noted, the submission they presented was critical of the lack of services available to First Nations:

... essentially because Native peoples were not provided with services comparable in quality to those available to other Canadians.46

In his seminal report on the native child welfare system, Johnston observed that many commentators have characterized the imposition of provincial child protection

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45 The *Indian Act* was amended to include section 88, which allowed for the extension of provincial child welfare laws on reserve.

laws as an "institutional agent of colonization". He also described the similarities between the residential school system and child welfare laws:

It could continue to remove the Native children from their parents, devalue Native customs and traditions, in the process, but still act "in the best interests of the child".  

Like residential schools, the effect of the child welfare system is assimilation; the state removed children from communities to go to residential schools to be assimilated, the state now removes First Nations children from their communities. When the residential school system was closed down, the child welfare system was closing in.

As Johnston has pointed out, although child welfare laws were introduced with the best of intentions, there was little attention paid to the effect that the extension of provincial services would have on Indian families and communities. This consideration continues to be ignored. He also noted that there did not appear to be any concern that provincial services might not be compatible with the needs of First Nations communities. The Province in assuming jurisdiction over First Nations children, he argued, did not give consideration to the value of First Nations

47 Ibid. at 24.

48 Ibid. at 24.

49 Ibid. at 3.

50 This concern will be discussed in chapters two, three and four.
traditional child and family practices or to the failure of the state in parenting the Indian child. As will be detailed in chapters two and three, governments continue to fail to analyze their legislation and practice from a perspective which addresses the impact on First Nations.

The story of Richard Cardinal's tragic life and death provides a poignant example of the failure of child welfare laws to truly ensure the safety and well-being of Aboriginal children. Richard's death caused reverberations throughout the child welfare system not only in his home province of Alberta but across Canada. Cardinal, a Metis boy, was taken into care at a young age and had multiple foster placements. He was separated from his family, his community, and his culture. Finally, after living in care for many years, Richard took his own life. Remarkably Richard kept a journal of his feelings and experiences in the care of the state. Professor Bagley chronicled Richard's life in placement and noted that:

First of all, when Richard and his brother and sister were removed from the care of relatives, the child welfare authorities claimed that the children were “neglected”, departmental shorthand for extreme poverty. No efforts were made by social workers to provide income or housing support which would have prevented such removal, nor were members of his extended family consulted. Yet members of this extended family might well have cared for the children, given a modicum of material support.

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52 Ibid. at 68.
Richard's story is one of many stories that illustrate the profound and devastating impact that provincial child welfare systems have had (and continue to have) on First Nations children, families and communities. Not only did Richard lose his family when he was taken into care, his family and his community lost him.

The experiences of First Nations children with the child welfare system have also been well documented in various government reports\(^53\), academic articles and by anecdote\(^54\). In short, the articles, reports, anecdotes, and political discourse do not speak generously of the child welfare system and its impact on First Nations children, families and communities\(^55\) - with the principal impact being the high numbers of First Nations children in government care.

Patrick Johnston cited the following statistics regarding the increase of Aboriginal children in state care upon the introduction of child welfare laws on reserve:

\(^{53}\) For example: Manitoba Review on Indian and Metis Adoptions and Placements, *No Quiet Place*, the final report to the Hon. Muriel Smith, Minister of Community Services by Edwin Kimmelman (P.C.J.) (Winnipeg, Manitoba Community Services, 1985); LOCLON *supra* note 24; RCAP *supra* note 22; Manitoba Aboriginal Justice Inquiry *supra* note 27.

\(^{54}\) *Stolen From our Embrace, supra* note 37.

In 1955 there were 3,433 children in the care of B.C.'s child welfare branch. Of that number it was estimated that 29 children, or less that 1 per cent of the total, were of Indian ancestry. By 1964, however, 1,446 child in care in B.C. were of Indian extraction. Within 10 years, in other words, the representation of the Native children in B.C.'s child welfare system had jumped from almost nil to a third.\textsuperscript{56}

The numbers of children in care in British Columbia continues to be high, especially in northern regions\textsuperscript{57}. One of the most significant impacts of children being displaced from their families and communities is their loss of connection to their cultural heritage and consequent denial of an opportunity to know and embrace their cultural identity. The result for First Nations children is that they continue to grow up displaced from community and culture. Aboriginal commentators have named this cultural genocide:

Removing children from their homes weakens the entire community. Removing First Nations children from their culture and placing them in a foreign culture is an act of genocide.\textsuperscript{58}

Scholars Bala, Isenegger, and Walter, summarized child welfare literature which highlighted the emotional harm and stress for First Nations children-in-care. They too underscored the loss to the community when aboriginal children are taken into care:

\textsuperscript{56} Supra note 46 at 23.

\textsuperscript{57} Supra note 41, 81% of children in care in the northwest region of B.C. are aboriginal.

\textsuperscript{58} See especially Monture, supra note 4 at 3, as well as LOCLON supra note 24.
Aboriginal children in care often grow up in a state of dislocation in terms of their culture, family, and community, lacking any clear sense of identity or any sense of home to which they might someday be able to return... In addition to the damage at the individual level, the viability and survival of aboriginal communities and culture have been harmed and threatened.\textsuperscript{59} (emphasis added)

Johnston identified the harmful effects of apprehension for First Nations children and communities. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart. Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The native child is placed in a position of triple jeopardy.\textsuperscript{60}

Furthermore, Bagley in a study of the adoption of aboriginal children outside their communities, found that adoption breakdown for aboriginal children was much higher than for other transracial adoptions\textsuperscript{61}. This assertion was recently reinforced by the B.C. Court of Appeal concerning the adoption and placement of a young aboriginal boy:

While there are doubtless many successful instances of cross-cultural adoption and custody situations involving children or aboriginal descent and

\textsuperscript{59} Bala, Isenegger, and Walter, \textit{supra} note 55 at 404.

\textsuperscript{60} \textit{Supra} note 46 at 60.

non-aboriginals, there also exists a very considerable history of unsuccessful outcomes.  

Not only are there high numbers of First Nations children in care the majority of these children, like Richard Cardinal are not placed in First Nations homes. Johnston described the phenomena known as the “60’s scoop” as a terrible mistake. There were so many children taken from their communities in the 50's and 60's that a judicial inquiry was established in Manitoba to examine the wide-spread adoption of Aboriginal children in Manitoba. The Chair, Judge Kimmelman, stated:

In 1982, no one, except the Indian and the Metis people really believed the reality - that Native children were routinely being shipped to adoption homes in the United States and to other province in Canada. Every social worker, every administrator, and every agency or region viewed the situation from a narrow perspective and saw each individual case as an exception, as a case involving a extenuating circumstances. No one fully comprehended that 25 per cent of all children placed for adoption were placed outside of Manitoba. No one fully comprehended that virtually all those children were of Native descent... The appalling reality is everyone involved believed they were doing their best and stood firm in their belief the system was working well... The miracle is that there were not more children lost in this system run by many well-intentioned people. The road to hell was paved with good intentions and the child welfare system was the paving contractor. (emphasis added)

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63 According to the Children’s Commissions 1998 Annual Report (supra note 41) only 2.5% of aboriginal children in care are in parent/relative homes or aboriginal homes.

64 Supra note 46 at 62.

65 No Quiet Place, supra note 53 at 272-73.
Judge Kimmelman's report is over 10 years old but the problems remain the same. The impact of the removal of First Nations children by the child welfare system is in effect similar to that of the residential school removals.

There have been a number of arguments advanced to explain why there is such an over-representation of Aboriginal children in care. One of the first published analyses of the over-representation of aboriginal children in care was presented by social work Professors Hudson and McKenzie (in 1981) in which they outlined various explanations for this tragic situation:

1. The psycho-social argument, which interpreted child neglect and abuse in terms of individual deviance. This was the dominant argument recognized in the child welfare system.

2. The cultural change argument, that Native peoples were undergoing rapid social change and that this was resulting in the high rates of family dysfunction.

3. The economic deprivation argument, that Native people had been deprived of their land and had been systematically institutionalized, losing the coping capacities of their own culture but never obtaining an alternative.

4. The racial argument, that Native peoples were being systematically rejected and stigmatized by the non-Native majority.

5. The colonial argument, that the child welfare system was part of a deliberate assault on Native society designed to make changes in Native people.\(^66\)

Herbert, in her report on Child Welfare in B.C. agrees that all of the explanations provided are valid. She adds to this analysis by locating the child welfare system within the hegemony of white supremacist, capitalist, patriarchy:

\(^{66}\) *Supra* note 55 at 64.
Based on the belief of racial superiority of the white race compared to First Nations, it would make perfect sense to have these unfortunate children raised in the civilized society of Euro-Canadians... for most people it is not an overt act, it is so institutionalized in Canadian society, that most people would be horrified if anyone would believe they were acting out racist values and beliefs.67

Herbert, Kline, Monture, and others argue that the application of provincial child protection law is itself racist, a notion reinforced by many in the First Nations community68. Kline argues that, unlike the earlier colonialist mechanisms which openly segregated Indians and treated them as inferiors, the apprehension of First Nations children from their communities and its negative effects was facilitated and legitimized by a legal system that is based upon ideals of universality and neutrality in their application of the "best interest test"69. Professor Kline, in her analysis of the application of the "best interests test" by the courts and the resulting high numbers of First Nations children placed in state care argued, and I agree, that:

... child welfare law has provided a new modality of colonialist regulation of First Nations in the post-Second World War period.70

67 Supra note 1 at 20.


69 Kline, supra note 22 at 389.

70 Kline supra note 22 at 381.
First Nations scholar Patricia Monture has also argued that the judicial decisions regarding First Nations children reinforce the status quo by applying standards and tests which are not culturally relevant and therefore are racist. In fact, in the community consultation report for legislative review in British Columbia, the authors of *Liberating Our Children: Liberating Our Nations* (LOCLON) describe the "best interests test" as follows:

The "best interest test of the child" was, and still is interpreted as rescuing the children from their Aboriginal condition and placing them in a non-Aboriginal environment where they can learn the dominant cultural values.

Kline discusses the role that the courts play in applying the best interests ideology, chronicling what First Nations have always said has been their experience. In particular she provides examples of a number of ways in which judges rationalize the abstraction of Aboriginal child from culture:

- courts may explicitly deny the relevance of maintaining a First Nations child's culture and identity or assign it little weight relative to other factors;
- courts may hold that culture is important, but treat it as an abstract category that can be filled by any First Nations culture rather than that of the particular First Nation to which the child belongs;
- courts may emphasize the child's psychological bonds with her foster parents, but not consider relevant bonds with her culture;

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71 *Supra* note 4 at 12.

72 LOCLON *supra* note 24 at 19.
• courts may hold that the child needs the stability of a permanent placement, while ignoring the stability that would result from maintaining a connection to her culture;

• courts may consider parents, families, or bands who challenge removal orders or placement plans to have interests separate from, and in conflict with, the interests of the child.73

Despite legislative (Child, Family and Community Services Act74) changes, which include a best interests test that honours the preservation of an Aboriginal child’s cultural identity75, social workers and judges continue to make decisions that remove Aboriginal children from their communities76.

Justices Hamilton and Sinclair argue that interpretation of child welfare legislation is an area where cross-cultural mis-understanding frequently occurs. They note that:

For the past four decades, many problems have arisen because the interpretation of these phrases (i.e. best interests) has been left to the discretion and understanding of social workers, police and lawyers and judges who possess little or no understanding of Aboriginal culture. Cultural differences between Aboriginal families and non-Aboriginal social workers have blinded many non-Aboriginal social workers to the fact that different Aboriginal child-rearing methods are not wrong or inadequate but, rather, are acceptable alternatives.77

73 Professor Kline (supra note 22 “Child Welfare Law, ‘Best Interests of the Child’ Ideology”) provides case examples of each of these explanations in her article. Examples are also provided by E. Carasco (supra note 55) and Monture (supra note 4).

74 CFCSA, supra note 9.

75 The “best interests test” is included in section 4 of the CFCSA to be discussed in more detail in chapter two.

76 A. Armitage, supra note 23. The increased numbers of children in care has grown since the Gove Inquiry into Child Protection, and the use of court orders has increased dramatically.

77 Supra note 27 at 545.
To follow up on Judge Kimmelman’s observations the journey to hell will be continued if First Nations child and family service providers have to travel on the same road that was designed by the provincial child welfare system and does not address First Nations issues and concerns. Building upon the harsh experiences of residential school and intolerant child welfare practice the Report of the Royal Commission on Aboriginal Peoples (RCAP) recommended that:

3.2.2: Aboriginal, provincial, territorial, and federal governments promptly acknowledge that child welfare is a core area of self-government in which Aboriginal Nations can undertake self-starting initiatives. 78

This recommendation and the means to implement it are explored in chapter four.

E. First Nations Traditions & Culture

Children hold a special place in Aboriginal cultures. According to tradition, they are gifts from the spirit world and have to be treated very gently lest they become disillusioned with this world and return to a more congenial place. They must be protected from harm because there are spirits that would wish to entice them back to that other realm. They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.

Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. 79

78 RCAP supra note 22 at 53.

79 RCAP, supra note 22 at 23.
For thousands of years First Nations people have lived together in organized societies. First Nations hold collective values and beliefs which were passed down through the generations by our story tellers, through our ceremonies, and spiritual practices. Beliefs such as those presented above regarding the importance of children in First Nations culture.

In the preceding discussion evidence was presented that the practices of federal and provincial governments have silenced First Nations people by separating them from their children, from their story tellers, ceremonies, and connections with family which were integral to living in balance and harmony within one's self and one's community.

Culture provides for the continuity of a society by the passage of common beliefs and practices to future generations. Our culture has not been incorporated into provincial child welfare laws and standards. British Columbia is made up of many different cultural groupings. There are some common themes and principles that we all share such as the sentiments expressed above in the *Report of the Royal Commission on Aboriginal Peoples*. As well, Justices Hamilton and Sinclair describe First Nations child rearing as:

Learning emphasized such values as respect for all living things, sharing, self-reliance, individual responsibility, and proper conduct. Children also had to learn how to utilize the environment most effectively for economic survival.
Integral to all aspects of the education of the young was the spiritual, and events in the life cycle from birth to death were marked with ceremonies stressing the individual’s link to the spiritual and sacred. Cultural continuity was thus ensured.\textsuperscript{80}

Professor John Borrows links the importance of story-telling and other ceremonies to the retention of our laws and cultural practices:

Regardless of the form of First Nations stories, however, they function together to guide people in the resolution of disputes. First Nations frequently access their historical experiences and cultural epics in order to formulate and apply their own law. The values underlying the stories are often advanced by respected individuals and elders and are expected to be of precedential value in conducting First Nations through contemporary challenges.\textsuperscript{81}

Hamilton and Sinclair also highlight the importance of culture in retention of our laws. Laws which embrace the importance of extended family and cherish First Nations children within the context of “family” and community. Justices Hamilton and Sinclair underscore how integral culture is to the healthy development of First Nations children and communities:

Aboriginal people have the right to their own cultures. They are entitled to apply traditional approaches to meeting the needs of Aboriginal children who, for whatever reason, are in need of help or protection.

Culture is more than the values, traditions, or customary practices of Aboriginal people. Culture is also the laws, customary or contemporary, of the people who belong to a distinct society. Culture is the social and political organization of the people who constitute a distinct society. Culture also

\textsuperscript{80} Supra note 27 at 513

includes the administration of justice as a fundamental component of every organized society.

The right of Aboriginal people to control their own pace and direction of development must be retained. The use of Aboriginal social and cultural institutions, such as the Aboriginal family and the role of elders in maintaining peace and good order in their communities, and in transmitting knowledge about acceptable and unacceptable behaviour, is, we believe, the proper road to Aboriginal recovery and development.\(^{82}\)

Patricia Monture succinctly describes the cross-cultural differences of child welfare "practice" from those of dominant society. Differences that emphasize the importance of culture and traditions in comparison to the very different ideological premises of non-Native child welfare practice:

The structure of First Nation's society is based on cooperation and consensus. When difficulties arise within a community, the community responds by attempting to bring the person who is the source of the difficulty back into the community. This process naturally involves all parties - the parents, the child, the relations, and the Elders... The aim and the result is to restore balance in the community. In the case of child welfare, no parent is left believing he or she is a "bad" parent. Nor is any child alienated from the family or community. In a community which operates on norms of consensus and cooperation, the collective's rights are the focus. By contrast, the structures of the dominate society operate with the individual as the problem-solving unit. In this type of society, where the philosophy of punishment is paramount and force and coercion are validated, there are winners and losers. As the dispossessed people of this land, First Nations citizens will continue to be the losers.\(^{83}\)

In particular the role of the extended family is important in First Nations communities. Johnston described how the extended family and community participated in the rearing of First Nations children. He drew a distinction between Euro-Canadian

\(^{82}\) Supra note 27 at 264.

\(^{83}\) Supra note 4 at 6.
definitions of family and noted how the responsibility for child rearing (and child protection) was held by the whole community:

Native people also had a distinct and different concept of the family. Unlike the nuclear family definition most commonly used by non-Native people, the term “family” had a much broader meaning for Native people and included grandparents, aunts, uncles and cousins. The family for Native people was what most people refer to as the “extended family”.

Implicit in the Native notion of family was a belief that the responsibility for raising children rests with all the members of a family, not only with the child parents. Grandparents, in particular, have traditionally played a very important role in child rearing. Even more distinct from Euro-Canadian tradition was the belief that the community as a whole had a legitimate role and, indeed, a responsibility to participate in the rearing and caring of all children.  

The role of the extended family, the importance of community responsibility and child protection was also underscored by the Royal Commission on Aboriginal Peoples as well as by Mi'kmaq researchers Metallic and Young:

Traditionally, community care emphasized prevention not only to individuals but to the community as a whole through information sharing, training et cetera. For instance, when children have to placed in another home it is recommended that the placement follow the protocol of, consent. This procedure operates under consensus with the involvement of parents, family, and children. It is a process that is generally non-judgmental and supportive.

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84 Supra note 46 at 69.

85 F. Metallic and T. Young, Apoqonmaluktimk: Working Together to Help Ourselves. A report for the Atlantic Policy Congress of First Nations Chiefs (July, 1999) at 40
Finally, Johnston strikes at the crux of the problems today with the application of provincial laws and the imposition of a provincial child welfare system that does not reflect or embrace First Nations cultural traditions:

A system of child welfare is based on certain beliefs held by members of the dominant culture. Those beliefs evolve into normative standards of child rearing and define which practices should be considered good or bad, proper or improper. A problem arises if one set of standards is applied to a group with a different set of norms. Several observers have suggested that this is precisely what has happened to Native people, not only in Canada but in other countries as well, as they come into contact with child welfare services. A different approach to child rearing may have resulted in Native people receiving inappropriate and, perhaps, even discriminatory treatment by the child welfare system.\(^{86}\)

\(^{86}\) *Supra* note 46 at 71.
Chapter Two: Child Welfare in B.C.

...it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centers around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life.87

A. Introduction

This chapter examines the organizational changes and existing structure of the child welfare system in B.C. In addition, the Child, Family and Community Services Act (CFCSA)88 is critically reviewed from a First Nations perspective. The discussion in this chapter adds to the evidentiary framework presented in chapter one, suggesting that the existing child welfare regime does not meet the needs of First Nations children, families and communities. Thus providing further evidence that First Nations must begin their transition to self-government of child and family services by being enabled to deliver services that meet community needs and are derived from our traditions, laws, and culture.

There have been significant changes over the past few years to child welfare in British Columbia. Changes that saw their genesis in 1991 when new legislation for

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87 RCAP supra note 22 at 9.

88 Supra note 9.
child protection was first proposed. Some of the most significantly changes resulted from the judicial inquiry of Judge Thomas Gove into the fatality of a young non-Native child, Matthew Vaudreuil. His report provided recommendations for sweeping changes to the provincial child welfare system. In addition, within a very short period of time, new child protection legislation was proclaimed (CFCSA)\textsuperscript{89}, a new ministry (the Ministry for Children and Families) was formed as well as a new Children’s Commission (with accompanying legislation\textsuperscript{90}), and an expanded role for the Child, Youth and Family Advocate\textsuperscript{91}.

I argue that all of these changes, despite being made under the guise of benevolence, ostensibly for the betterment of First Nations children and families, amount to a continued assault on First Nation cultural survival as they do not acknowledge or include First Nations cultures, laws and traditions. First Nations’ agencies have been forced to keep up with all of these changes with little input or time for reflection. As stated by Morse:

\ldots the decision making power concerning critical issues affecting the colonized lies in the hands of the colonizers; the dominate gives little weight to the values, lifestyle and laws of the dominated; the colonialists interact with indigenous people in a manner that reflects the lower status and power of the latter; the colonizers import their standards, cultural values, laws, and

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\textsuperscript{89} CFCSA, supra note 9.
\textsuperscript{90} Supra note 10.
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systems and impose them on the colonized so as to eliminate the latters traditional structures. 92

The following discussion provides evidence that these changes have been made, for the most part, without any consultation with First Nations communities and have arguably been made without regard to the impact on First Nations children and families or First Nations agencies. The end result of this lack of sensitivity to First Nations issues and concerns is a system that continues to fail First Nations children. Johnston highlighted the problems endemic with the provincial child welfare system, concerns that are discussed in this chapter:

Shortcomings that may exist in child welfare legislation and policies are not unexpected. After all, they have been drafted by legislators, lawyers, and policy analysts, few of whom have been Native people. Even the language in which they are written may itself be value-laden and culture specific... An additional problem may result not from what the statues or policies say necessarily, but from what they are interpreted to mean. 93

The provincial child welfare system is monolithic and as such it does not have the sensitivity to address community issues. There is little room for First Nations to truly incorporate their community vision, values, and traditions into that of the provincial system. This despite the Ministry's's renewed promise and acknowledgment that:

The Ministry for Children and Families acknowledges the significant disruption in the lives of Aboriginal children, families and communities


93 Supra note 46 at 72-3.
attributed to past provincial child welfare practices. This acknowledgment signals a desire to engage in a process of reconciliation with Aboriginal communities to ensure the impact of past practices no longer hinders the healthy development of Aboriginal children and families.\(^94\)

I begin this chapter with an overview of the constitutional division of powers which describe why provincial child welfare laws apply to First Nations child and family serving agencies.

B. Constitutional Division of Powers

The federal government's position regarding the application of provincial child welfare laws to First Nations is that the provincial government has constitutional authority pursuant to section 92 of the Constitution Act, 1867\(^95\) for the delivery of child and family services under the headings "property and civil rights" and "all matters of a local or private nature". Conversely, the provincial government has argued that the federal government is responsible for Indians on reserve pursuant to section 91(24) of the Constitution Act, 1867\(^96\), which includes the delivery of child welfare services to "Indians". Many First Nations argue that pursuant to their inherent right to self-government and the constitutional protection of Aboriginal rights

\(^94\) British Columbia, Ministry for Children and Families, Strategic Plan for Aboriginal Services, (Victoria: Queens Printer, 1999) at 1.

\(^95\) Constitution Act, 1867, (U.K.) 30 & 31 Vict., c. 3.

\(^96\) Ibid.
and title, pursuant to section 35 of the Constitution Act, 1982\textsuperscript{97}, they have constitutional authority over the governance of child and family services (to be developed in Chapter four). First Nations pursuit of this goal is frustrated by the existing disputes between the federal and provincial governments.

Currently, the federal government funds First Nation agencies and the provincial government delegates its powers, duties, and functions pursuant to the Child, Family and Community Services Act (CFCSA) (to individual social workers on reserve). First Nations child and family service agencies are provided funding by the federal government to employ these workers who then administer the programs, pursuant to provincial laws and standards. In order to operate an agency a First Nation must enter into a delegated enabling agreement with both the federal and provincial government.

The jurisdictional wrangling between the federal and provincial governments over exactly who is ultimately responsible for the welfare of First Nations children and families can be traced back over many years. One of the first national commentators on this issue was Hawthorne whose federally commissioned report, The Hawthorne Report\textsuperscript{98}, criticized government policies that effectively denied First Nations...

\textsuperscript{97} Constitution Act, 1982 - Canada Act, 1982 (U.K.), c. 11.

Nations children the benefits and services available to other Canadian children. In was concluded in the Report that the:

... special status of Indian people has been used as a justification for providing them with services inferior to those available to the Whites who established residence in the country, which was once theirs.\(^{99}\)

The quagmire created by the continuing squabbles between the federal and provincial governments regarding their respective constitutional, fiscal, and moral responsibilities continues to have an enormous impact on the delivery of and quality of services. To date the federal and provincial governments have been ineffective in addressing the community needs of First Nations. Further evidence that First Nations should determine their own community needs and be provided with the opportunity to honour their moral responsibility for caring for their communities, their children, and their families. As noted in Liberating Our Children: Liberating Our Nations (LOCLON) the answer is not to further extend the bureaucratic regulation of Aboriginal life by the imposition of either federal or provincial laws on First Nations:

Arguments over the constitutional division of powers between the Federal and provincial governments result only in a question of which level of government has the right to regulate aboriginal life. This question does not address the basic issue of justice, which would recognize the rights of our people to take responsibility for our own lives. That answer can only be framed in the inherent right of our people to govern ourselves.\(^{100}\) (emphasis added)


\(^{100}\) *Supra* note 24 at 29.
C. B.C. Child Welfare System

The following review of changes made to the provincial child welfare system in British Columbia, underscores the lack of involvement and input that First Nations have had in the reformation of a system that has such a profound impact on the lives of First Nations children, communities and families. Without First Nations insights any changes to the system will continue to fail First Nations.

1. Liberating Our Children: Liberating Our Nations

In January 1996, the Child, Family and Community Services Act (CFCSA) was proclaimed. The drafting of the legislation was assisted by two reports, submitted by community panels that had been given a mandate to seek recommendations from stakeholders regarding proposed new child protection legislation. One community panel report which addressed child welfare in the context of poverty was entitled Making Changes: A Place to Start.\(^{101}\). The Ministry of Social Services (as it then was) also supported a separate panel designed to seek input specifically from the Aboriginal community. The report prepared by the Aboriginal panel was entitled, Liberating Our Children Liberating Our Nations (LOCLON). Mitchell, Absolon and Armitage noted that the decision to include an aboriginal panel was made by the

then Minister of Social Services, Joan Smallwood, because she was committed to
the development of Aboriginal child and family services, and supported:

... a move towards Aboriginal communities taking responsibility for their own
children and that there needed to be a transition, and legislation that
reflected that transition.\textsuperscript{102}

The LOCLON report provided comprehensive recommendations for changes to child
welfare. In particular the writers of the \textit{Report}, two aboriginal women, underscored
the importance of the inherent right of First Nations to self-govern child and family
services. They recommended a transition back to First Nations laws:

\begin{enumerate}
\item All legislative changes regarding aboriginal family life must be
developed in the context of strengthening the right of Aboriginal people
to exercise our inherent right to self-government.
\item Changes to family and child protection legislation must be seen only as
an interim measure which will be fully resolved through recognition of
the paramountcy of Aboriginal family law.
\item All legislation and agreements dealing with Aboriginal family and child
legislation, policy and practice must include explicit statements
guaranteeing that the intent of the legislation and/or agreements does
not abrogate or derogate from existing Aboriginal rights, or rights that
might in the future receive constitutional protection.
\item Provincial legislation must explicitly acknowledge the jurisdiction and
responsibility of Aboriginal Nations to make decisions, and resolve
problems with respect to issues of Aboriginal families and children.\textsuperscript{103}
\end{enumerate}

\textsuperscript{102} "\textit{The Development of the Child, Family and Community Services Act: An Aboriginal Perspective}" \textit{supra} note 22 at 22.

\textsuperscript{103} \textit{Supra} note 24 at 97.
While the thrust of these recommendations has not been attained, there were some "Aboriginal" recommendations that were incorporated in the Child, Family and Community Services Act (CFCSA), including the "best interests test".

Unfortunately, the legislative changes that were made do not strengthen the inherent rights of First Nations peoples to govern in the area of child and family services. There has been some indigenization of the legislation (which will be discussed later in this chapter) that unfortunately has not resulted in significant changes in practice. Nor do the legislative changes assist with the transition to self-government; because the tools necessary for the incorporation of First Nations values and traditions do not exist in the legislation. Currently First Nations child and family serving agencies must still deliver services by delegation, thereby importing the provincial child welfare system on reserve. This I assert is not an effective tool for the transition to self-government.

2. Gove Inquiry

The tragic fatality of 5 year old Matthew Vaudreuil sparked a judicial inquiry into his death which expanded into an analysis of the whole child protection delivery system in B.C. In 1995, Judge Gove released his report with sweeping recommendations for change to B.C.'s child protection practice.\(^{104}\)

\(^{104}\) Supra note 91.
In preparation for his report, a background paper was commissioned by Judge Gove to specifically address Aboriginal child welfare issues. Elaine Herbert, a First Nations scholar and trauma counselor, prepared the background paper (with my assistance). The focus of Herbert's paper was as follows:

An examination of the policies and practices of on reserve and urban First Nation initiatives of child welfare to ascertain differences in providing services to First Nation children at risk, children in care, and their families.\(^{105}\)

Herbert provided some specific recommendations that she believed needed to be "acknowledged and acted upon". Most notably she recommended that:

... that a centralized system be resourced to provide a basis for the gathering and sharing of information between the First Nations child welfare programs. As well such a center could coordinate and fund the development of community research projects that will directly inform the development and practice of child welfare and First Nations social work practice.\(^{106}\)

Herbert's analysis and recommendations represent an important contribution to First Nations child welfare in B.C. It has been six years since she completed the report and her recommendations have not been acted upon. The center she proposed would assist First Nations in their transition to self-government by providing research opportunities for examining First Nations traditional models of child welfare practice.

\(^{105}\) Supra note 1.

\(^{106}\) Supra note 1 at 83-4.
Herbert's recommendations were not incorporated into the body of Judge Gove's Report. This omission is extremely disappointing considering the significant number of First Nations' children in care and the enormous impact the Inquiry has had on child welfare practice. In light of Herbert's comprehensive background paper and her identification of systemic issues facing Aboriginal children and families, as well as her compilation of Aboriginal specific recommendations, it is disappointing that Judge Gove made the "Aboriginal recommendations" that he did. Gove's "Aboriginal recommendations" are discussed in the following analysis of the best interests test. These recommendations were added without consultation with Herbert, myself, or the First Nations community.\footnote{107}

Judge Gove did acknowledge that:

Throughout there are references to aboriginal child welfare, and two of the research papers specifically explore related issues. However, the report does not attempt to examine how aboriginal communities ought to practice child welfare, as I recognize that many aboriginal peoples either are, or in the process of becoming, responsible for child protection and child welfare generally within their communities. As I say later in the report, the larger community has much to learn from the traditional ways in which the first peoples of this province cared for their children before Europeans arrived.

Unfortunately, Judge Gove's statement is premised on the false assumption that his recommendations would not impact First Nations child and family serving agencies.

\footnote{107} This will be discussed further in this chapter.

\footnote{108} Supra note 91 vol. 1 “Executive Summary” at 6.
As Herbert outlined, in her report, these agencies currently operate as delegated offices of the Ministry of Children and Families. Agencies, therefore, have to follow Ministry policies, standards and legislation. In addition, Gove did not acknowledge that First Nations traditional practices continue today. Nor did he consider that his recommendations could have a devastating affect on the continuance of those practices. Despite his words to the contrary, Judge Gove’s recommendations based on a non-Native case review do apply to First Nations agencies.

The thrust of Gove's Report was to refocus child protection practice and the accompanying legislation (CFCSA) from a family and community model to a model and ideology focusing on the individual child. This rethinking of the child welfare system was in direct contradiction to the recommendations made in both Liberating Our Children: Liberating Our Nations (LOCLON) and Making Changes. In particular LOCLON advocated for a system of child welfare situated from a First Nations perspective; which meant providing preventative services and involving the extended family and community in child protection. The focus of child welfare on the individual child, in exclusion of their extended family and culture, was an approach that in the past resulted in the removal of Aboriginal children from their homes and communities (chapter one). In particular Armitage, a Professor of Social Work, notes that:

British Columbia's child welfare system underwent a radical change of direction as a result of the Gove Inquiry into Child Protection and the measures taken by the provincial government to implement its recommendations. Basically, a vision of a child welfare system that
recognized and built on community and family strength was replaced by one that relied on administrative expertise, reorganization and investigation.\textsuperscript{109}

The child welfare system in B.C. continues, then, to fail to incorporate a vision of child protection that would be more in keeping with First Nations cultural practices. In short it fails to honour First Nations laws and tradition, therefore continues to fail First Nations children, families and communities.

3. Transition Commissioner

Judge Gove recommended that a Transition Commissioner be appointed by the legislature for a term of three years. The role of the Transition Commissioner would be to facilitate the changes he had recommended to the child welfare system. Specifically the statutory mandate recommended by Gove (recommendation 114) was for the Commissioner to:

\begin{itemize}
  \item[a)] recommend legislative changes and to make organizational and structural changes necessary to create a new child welfare system recommended in this report; and
  \item[b)] report to the public on any matter relating to the commissioners mandate.
\end{itemize}

Cynthia Morton was appointed on February 1, 1996 as Transition Commissioner. In response to public pressure that change to the system was not occurring quickly

\textsuperscript{109} Supra note 23 at 93.
enough\textsuperscript{110}, the Premier decided (only eight months after Morton's appointment) that the mandate of the Transition Commissioner should be expedited and that the office of the Children's Commission should be fast-tracked. Morton submitted a report to the Attorney General in 1996 making recommendations premised on the \textit{Gove Report} that resulted in major changes to the child welfare system:

During Morton's short term she struck an Aboriginal Services Project Team, a team which did not have any Aboriginal staff members. The objective of this team was:

> ... to develop models for service delivery of aboriginal services that are consistent with the treaty process and self-government initiatives and that are harmonized with the other OTC work teams\textsuperscript{111}.

The Aboriginal Services Team completed an inventory of aboriginal child and family services offered through the provincial government to give more complete baseline information. They also completed an analysis of research concerning best practices in B.C. and other jurisdictions.\textsuperscript{112} the following inventory. This inventory has not been provided to First Nations nor was it developed with any consultation with the First Nations community:

\textsuperscript{110} \textit{Supra} note 23 at 99. As Armitage points out in the summer of 1996 the Ministry of Social Services found itself again embroiled in controversy over the fatalities of children in care. Premier Glen Clarke requested a report from the Transition Commissioner and moved immediately to establish a new Ministry for Children and Families.


\textsuperscript{112} \textit{Ibid.} at 29.
In addition, the Commissioner noted that the focus for the team should be transferred to the new Ministry for: strengthening and involving contacts from aboriginal communities, in the redesign of child, youth and family services.\(^{113}\)

This has not occurred. Neither the *Gove Inquiry* or the Transition Commissioner, two agents of significant change to the child welfare system in B.C., effectively included First Nations concerns, interests, or aspirations within their sweeping recommendations.

4. **Children’s Commissioner**

Immediately following her term as Transition Commissioner (at the end of 1996), Cynthia Morton was appointed as the new Children’s Commissioner. The *Children’s Commission Act* was proclaimed by the Lieutenant Governor on July 24, 1997\(^ {114}\).

The Commissioner’s mandate, as outlined in her reports and legislation, is to:

1. Set standards for and monitor the Ministry for Children and Families’ internal complaint-resolution process.
2. Hear complaints regarding decisions and services provided by the Ministry for Children and Families.

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\(^{113}\) Ibid. at 29.

\(^{114}\) *Supra* note 10.
3. Ensure that the Ministry follows the rules when planning for children and youth in care, so that children and youth will get the support they need and that their views will be incorporated into the agreement.

4. Review the deaths of children and youth.

5. Review critical injuries of children and youth in care, and recommend changes aimed at better protection.

6. Provide information to the public about the work of the Children's Commission and regarding progress of all parts of the system in making positive changes for children and youth.\textsuperscript{115}

One branch of the Children's Commission office has the mandate to adjudicate the alleged breaches of rights of children in care as well as breaches of rights under all relevant legislation affecting children. The Children's Tribunal has five Aboriginal members. The other arm of the Children's Commission employs investigators to review child fatalities. Tragically, Aboriginal children make up 20% of these fatalities. A Multi-Disciplinary Team of "experts" reviews the investigators' reports and makes recommendations. There were two active First Nations members on the Team, myself and Elaine Herbert. There are now three members.

The Children's Commissioner, like the Child Advocate, has made it clear that she has jurisdiction over children on reserve. In the transcript of proceedings (Hansard) of the former Members Committee on the response to the Gove Report, the Commissioner clearly states that:

\textsuperscript{115} Supra note 41.
... we don't lose jurisdiction over aboriginal children because their child welfare services are being offered under a delegated authority from the Ministry.\textsuperscript{116}

Concomitant with jurisdiction is the ability, or lack of ability, of First Nations to access the Commission. No new funding has been provided to First Nations agencies, from either the provincial or federal governments, to enable them to utilize the Children's Tribunal to advocate on behalf of First Nations children or youth in care whose rights have been violated. The Squamish Nation had to utilize their staff and retain legal counsel in order to pursue recognition of the cultural rights of their children in care, an issue discussed later in this chapter. This placed additional financial and human resource burdens on an agency that was already financially strapped.

Despite acknowledgment in the Commission's April 2, 1998 \textit{Fatality Release}\textsuperscript{117}, that First Nations lack trust in service providers, the office of the Commission has not acknowledged that as an institution of government it too may be viewed with suspicion. Until First Nations see this office as attempting to create real partnerships and solutions for them it will not be well received. No significant steps have been taken by the Commission to assist First Nations in their resumption of self-government except to note that:

\ldots solutions often involve complex provincial/federal/band jurisdictional and funding questions that can undermine the urgent action that is required. This


\textsuperscript{117} Press Release provided by the Children's Commission (April 2, 1998).
must be resolved to guarantee the health and safety of aboriginal children today.  

i. Children's Tribunal

The Child Family Review Board, the predecessor to the Children's Tribunal, and was established pursuant to the Child, Family and Community Services Act (CFCSA)\(^{119}\) and functioned for approximately a year. There were two First Nations members on the Review Board. It was presupposed by the Review Board that its jurisdiction covered children on reserve because the CFCSA applied on-reserve.

One high profile case handled by the Review Board involved a custody dispute over the placement of a young First Nations girl, “Susan” between her non-native foster family and her First Nations biological uncle (with support from his First Nation). The decision in the “Susan” case, rendered by Review Board member Bruce Hardy was particularly disturbing to First Nations. Hardy decided that “Susan” should remain with her non-native “foster parents”. This decision was not made available to the public, however the outcome was provided to the media by “Susan’s foster father”\(^{120}\). The main focus in Hardy’s decision-making was on “Susan” as an individual, in

\(^{118}\) Supra note 41 at 62.

\(^{119}\) Established pursuant to Section 83 of the CFCSA.

\(^{120}\) The press gave the child in question the name “Susan” to “protect” her identity, see “Girl to stay with foster family” The Province (July 23, 1997) A3 and “Foster parents win fight for native girl” The Vancouver Sun (July 23, 1997) A1.
isolation of her First Nations community and family. He acknowledged that the "foster" parents had taken her to pow wow's and had hired a Cree speaker to teach her her native language; although he did not think this constituted sufficient cultural guidance his overriding concern was for her physical and emotional well-being. Hardy decided that "Susan" should stay with her foster parents even though:

... it would be a gross mischaracterization of this decision to interpret in any way as criticism (of the native family in Saskatchewan). They are good and decent people... But my focus has to be on the child, and the child alone.\textsuperscript{121}

Yet another example of, as described in chapter one, a First Nations child being isolated from her community, family, and culture. Shortly after the decision was rendered "Susan" and her foster (now adoptive) family moved to New Zealand. Arguably there will be little opportunity for "Susan" to access her First Nations culture from so far away - most certainly her opportunity to know her biological family and community has been effectively denied.

To date there has been only one reported case of the Children's Tribunal, regarding a Metis child, and no reported cases regarding First Nations children in care.

\textsuperscript{121} \textit{Ibid. The Province.}
5. Child, Youth and Family Advocate

The *Child, Youth and Family Advocacy Act* was proclaimed by the Lieutenant Governor on August 25th, 1995\(^{122}\). Joyce Preston was appointed as the Advocate. In her 1995 *Annual Report*, she outlined the functions of her office:

- To ensure that the rights and interests of children and youth and their families relating to designated services are protected and advanced and that their views are heard and considered.

- To ensure that children and youth and their families have access to fair, responsive, and appropriate complaint and review processes at all stages of the provision of designated services.

- To provide information and advice to government and communities about the availability, effectiveness, responsiveness and relevance of designated services to children and youth and their families.

- To promote and coordinate in communities the establishment of advocacy services for children and youth and their families.\(^{123}\)

The Advocate stated quite clearly in her 1996 *Annual Report* that because the *Child, Family and Community Service Act* (CFCSA) applies on reserve so too does her legislation and jurisdiction\(^{124}\). This statement was made without any consultation

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\(^{122}\) *Child, Youth and Family Advocate Act*, S.B.C. 1994, c. 28.


with First Nations or any concerns as to whether the Advocate could adequately address First Nations concerns in a culturally appropriate manner.

The Advocate's Office has one Aboriginal staff member (a complaints officer). The Advocate, like the Children's Commissioner, should staff a senior member of her team who is First Nations and has expertise in Aboriginal child and family service issues - the mandate of the Advocate's Office covers a great many First Nations children.

The her credit, the Advocate recommended, in her 1997 Annual Report \(^{125}\), that a position be created for an "Advocate of Aboriginal Services", because she required someone with the "dedicated time and expertise to assist...". Unfortunately, due to government budget restraints, this crucial position has not been created.

Even more useful would be the creation of a First Nations Child Advocate's Office and First Nations Children's Commission. Political commitment and financial resources are necessary for this to occur.

Back in 1995 the Advocate noted that various Nations had informed her of problems identified in the development of their child and family service agreements arising partly because of the funding relationships between the various levels of

governments\textsuperscript{126}. In response she expressed considerable interest in the resolution of problems relating to self-government, funding, and the delegation of authority in child welfare matters and advised that she would be working with the people of various Nations to address the service inequities created by diverse funding arrangements. Unfortunately, to date, this has not occurred and consequently no changes have been made.

In addition, in the Advocate’s 1997 \textit{Annual Report}, she stated that in the coming year her office would strive to ensure that services to Aboriginal children and youth and Aboriginal communities would remain a priority. First Nations have not benefitted from this promise. Preston also stated that she would monitor the implementation of the \textit{MCF Strategic Plan for Aboriginal Services}\textsuperscript{127} yet her office has not sought input from First Nations regarding the \textit{Strategic Plan}. Input that is crucial in determining whether First Nations agree with the \textit{Plan} or whether First Nations believe the \textit{Plan} can be effective.

Although both the Advocate and the Children’s Commissioner raise the issue of service inequities for Aboriginal children, families and agencies, very little has been done to remedy this situation. Despite the fact that over the years many have pleaded for resolution to this problem the pubic institutions designed to advocate for children have fail to effect any positive change for First Nations. One wonders what

\textsuperscript{126} \textit{Supra} note 124 at 32.

\textsuperscript{127} \textit{Supra} note 94. The \textit{Strategic Plan} will be discussed in more depth later in this chapter.
difference any of these state institutions can truly make in the lives of First Nations children, families and communities. As structured, they are the product of a colonial regime that has failed, and continues to fail First Nations.

6. Ministry for Children and Families

A brief history of the organization of the Ministry responsible for the protection of children is provided, in order to illustrate that if anything has changed or evolved it is the Ministry’s increased control over First Nations child and family serving agencies. The Ministry shows no signs of relinquishing control and enabling First Nations transition to self-governance.

I first discuss the Ministry of Social Services’ role as the predecessor to the Ministry for Children and Families. In 1994 the Ministry hired a First Nations woman, Mavis Henry, as Deputy Superintendent and Director of the Aboriginal Services Division. The role of her Division, in a document entitled "10.1 Aboriginal Sub-Project: Child, Family and Community Service Act Implementation Project", was to further the following mission statement of the Ministry (1994):

The Ministry of Social Services recognizes the inherent responsibility and authority of Aboriginal Nations/communities for the well-being of their members and is committed to supporting Aboriginal Nations/communities in their development and delivery of social services.128

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Furthermore, the terms of reference for the Aboriginal Services Division included the following:

... to achieve greater autonomy over the provision of Aboriginal family and children services by Aboriginal peoples within the context of the CFCSA.\textsuperscript{129} (emphasis added)

The mission statement and terms of reference do not challenge the status quo nor do they reflect a devolution to First Nations based not on the Child, Family and Community Services Act (CFCSA) but on their own laws and traditional practices. It is perceived to be accepted by the Division, which is entrusted to address First Nations issues and concerns, that the system does not need to change.

\textit{i. Aboriginal Relations Branch}

Under the Ministry for Children and Families the designated Aboriginal Services Division has been restructured as the Aboriginal Relations Branch. The Ministry web-site describes the role of the Branch as follows:

The Aboriginal Relations Branch facilitates relationships with Aboriginal communities. The Branch is also responsible for facilitating and monitoring the work plan of the Ministry Strategic Plan for Aboriginal Services.\textsuperscript{131}

\textsuperscript{129} Ibid. at 3.

\textsuperscript{131} Ministry for Children and Families web-site: Http://www.mcf.gov.bc.ca/aboriginal
In addition, the Branch describes their role in facilitating their relationship with the aboriginal community as follows:

- supporting aboriginal communities to plan for and develop the capacity to deliver services to their children and families (in partnership with the Aboriginal Services Branch of the Child Protection Division);

- ensuring that protocol agreements are negotiated between Ministry offices and every Aboriginal community, outlining the aspirations of both parties and the working relationship between them; and

- negotiating agreements which provide a framework for the Director of child protection to delegate child protection and family support activity to social workers employed by Aboriginal child and family agencies.\(^{132}\)

Notably absent in this summary of the Branch's relationship building goals is any discussion of First Nations self-government aspirations and capacity building for a transition to First Nations jurisdiction. Like its predecessor, the Aboriginal Relations Branch does not appear to seek to challenge the status quo.

Although the Branch does not have a formal statement outlining its new roles and responsibilities its expanded role now includes:

1) Implementing the Strategic Plan for Aboriginal Services;

2) Generally facilitating the Ministry relationship with Aboriginal communities;

\(^{132}\) Ibid.
3) Supporting the treaty process in B.C.;

4) Providing MCF input into corporate Aboriginal policy developed by the Ministry of Aboriginal Affairs;

5) Engaging the federal government to ensure that they meet their fiduciary responsibilities to Aboriginal peoples.¹³³

Number five suggests that the federal/provincial squabble over jurisdiction continues, namely the province does not want to provide any financial resources to First Nations agencies. The Ministry according to number two supports the treaty process, yet there are no initiatives or discussions regarding how, in the pre-treaty environment, First Nations can best realize their transition to self-government.

One of the main difficulties for the Branch faces is First Nations' perception of them. In a survey completed by Directors of First Nations agencies they expressed a lack of knowledge regarding the role and mandate of the Branch:

... unclear as I have not been provided with a copy of their mandate or a work plan for their department; They have negotiated DEA's with new agencies but to date still have not signed agreements with 3 pre CFCSA agencies; Aboriginal Relations has failed in my view, to respect the differences between aboriginal peoples by consistently making policy decisions which treat aboriginal peoples as homogeneous group able to benefit from like services, jurisdictional and funding arrangements; would be interested to know what steps MCF has taken to evaluate the efficacy of this department.¹³⁴

¹³³ E-mail correspondence from Assistant Director of MCF Aboriginal Relations Branch, Bob Ayers (July 6, 1999).

¹³⁴ K.A. MacDonald, *Phase Two: Options to Address Issues Identified in Phase One*. Report prepared for the First Nations Summit and the Ministry for Children and Families (March, 2000). The number of respondents was limited but their responses reflect those raised in discussions with the First Nations Summit.
Directors also offered mixed responses as to whether the creation of Aboriginal Relations Branch had improved relationships between their Agencies and the Ministry. One Director underscored that First Nations had never had any input into what the Aboriginal Relations Branch does or, more importantly, how First Nations needs are to be addressed by the Branch. Another Director felt that the creation of the Branch had not improved relations with First Nations, and in fact it has “delayed a lot of decisions”, still another felt that “it just added another level of bureaucracy”. More specifically a Director stated that:

Aboriginal Relations Branch has created a consistent liaison for First Nations but this has not lead to improved relationships as:

1) mandate of Aboriginal Relations is unclear;
2) there is concern regarding knowledge base of staff regarding First Nations issues/experience;
3) lack of clarity between Negotiation role and service provision role;
4) since the creation of Aboriginal Relations there has been negligible contact between First Nations and the Provincial Director, ADM or Ministers despite the clear interests of First Nations in the well-being of First Nations children;
5) MCF continues to develop legislation and regulations without the involvement of First Nations peoples despite CFCSA's clear articulation that aboriginal peoples be involved;
6) there are negligible meaningful changes in MCF practice (1998 Children's Commission Annual Report).
It is significant that none of the Directors who responded to the questionnaire were consulted by the Ministry for Children and Families regarding the Ministries attempt to improve service delivery to First Nation clients. It was noted by one Director that:

MCF Aboriginal Relations leader asked if First Nations would be willing to provide such feedback - First Nations Child and Family agencies indicated a willingness to do so - no action has been taken; I have not been asked to provide feedback on MCF service delivery.

The Directors of First Nations agencies also provided the following feedback regarding improving the relationship between the Ministry and First Nations:

There needs to be a political will on behalf of the province to truly evaluate their current practices within their commitment to stop colonial practices and ensure service availability to First Nations peoples. MCF, in particular, needs to critically analyze their own system and practice regarding FN peoples. Their current approach of demanding First Nations to meet a myriad of standards for operations and practice whilst independent reviews consistently determine that MCF practice with Aboriginal children is extremely deficient is certainly open to skepticism and carves out a distressing reality for First Nations children and families. MCF must role model its voiced commitment to quality and culturally based service delivery.

One of the functions of the Aboriginal Relations Branch was to engage with the First Nations Summit Action Committee for First Nations Children and Families on a government-to-government basis in order to, as stipulated by the mandate of the Committee, develop policy and legislative options for interim measures on child and family service matters. The Branch has not assisted in facilitating any of theses changes. They have instead chosen to not consult with the Committee regarding
policy or legislative changes and often they have not bothered to even inform the Committee if changes have occurred. Changes which affect First Nations child and family service agencies. The work of the First Nations Summit Committee was in effect stymied because of a lack of integrity shown by Aboriginal Relations Branch. In fact the Committee has recently devolved as they no longer receive contribution funding to conduct their important work\textsuperscript{135}.

\textit{ii. Office of the Aboriginal Deputy Director of Child Protection}

The other arm of the Ministry which interfaces with First Nations on specific social work practice issues is the office of the Aboriginal Deputy Director of Child Protection. The Ministry web-site states that the "Aboriginal Child and Family Services" (the Deputy Directors office) is:

... committed to returning responsibility for child and family services to Aboriginal nations and communities. Aboriginal Services Branch supports the development of child protection agreements with Aboriginal communities. The branch works with Aboriginal communities to help them build capacity to provide child protection services and to assist Aboriginal child welfare agencies to meet ministry requirements under the CFCSA. The Deputy Director of Aboriginal Services is responsible for developing and measuring compliance with child protection standards for delegated Aboriginal child welfare agencies assuming responsibility for their children's safety and well-being. \textit{emphasis added}\textsuperscript{137}

\textsuperscript{135} I was retained by the First Nations Summit as legal counsel for this Committee.

\textsuperscript{137} \textit{Supra} note 131.
Thus, the Deputy Director's Office emphasizes compliance with provincial laws and standards, rather than a transition to self-government. Most Directors of First Nations agencies, according to their survey responses, feel that the creation of the Deputy Director's Office has also not improved the Ministry's relations with First Nations. One Director stated that the authority of the Deputy Director appears to be limited and the Deputy Director is accountable not to the Aboriginal community but to the Ministry's Director of Child Protection. Another respondent expressed the following views:

- The Office does provide a promising position for advocacy for First Nations children, however, the office has historically been staffed by personnel who were non First Nations or had limited experience with First Nations;

- The Office has not been successful in encouraging greater communication between the Provincial Director and First Nations Child and Family Services Agencies despite 35% of CIC being First Nations children - Provincial Director Ross Dawson only met with First Nations Directors approximately 3 times since he has been in his job;

- The Office has not provided adequate resources to line staff to assist them in preserving cultural identity of First Nations children or in ensuring involvement of aboriginal communities;

- concern that creation of this department has allowed the non aboriginal department of MCF to divest themselves of responsibility for evaluating MCF systems and services to ensure culturally appropriate and effective service delivery to FN children.\(^\text{138}\)

It appears from First Nations responses that the Deputy Directors Office has a long way to go before being accountable to the First Nations community and to the goals

\(^{138}\) Supra note 134.
and aspirations of many First Nations for the design, delivery, and governance of child and family services.

iii. Strategic Plan for Aboriginal Services

The Ministry Strategic Plan for Aboriginal Services outlines a three year plan for the provision of services to, and by, the "Aboriginal Community" (which includes persons living off reserve and Metis) 139. The Plan, acknowledges that "Aboriginal Communities" may deliver services to Aboriginal people by way of delegation from the Ministry. The Plan does not acknowledge a process whereby authority and jurisdiction are resumed by First Nations agencies in the spirit of self-government and in recognition of our inherent right to govern "child and family services".

The Ministry, in developing their Plan did not consult with First Nations nor did they accommodate feedback presented by the First Nations Summit (on behalf of First Nations in the treaty process), namely, that the Plan addressed First Nations within an "Aboriginal Community" 140 melting pot, thereby negating the importance of government-to-government discussions between the Province and the First Nations Summit within the context of treaty-making. Furthermore the Summit expressed concern that the Plan did not incorporate a vision of self-government:

139 “MCF Strategic Plan” supra note 94.

140 The Plan attempted to address the diverse issues and concerns of the Metis, Off-Reserve, and Non-Status together. The First Nations Summit made clear that they this was not viable.
The Plan does not acknowledge a process whereby it passes authority and jurisdiction to First Nations agencies in the spirit of self-government and in recognition of our inherent right to govern our own "child and family services". The Plan sees self-government as an event not as a process.\(^{141}\) (emphasis added)

In addition a respondent to the questionnaire presented to Directors of First Nations agencies described the adequacy of the Plan in the following terms:

... the Plan which is intended to improve service delivery to First Nations children and the relationship between First Nations and MCF was developed by MCF alone. The need for such a Plan, the values and beliefs underscoring the Plan and the Plan itself were not developed in partnership;

concern that not aware of jointly developed and clear implementation plans;

Plan does not recognize unique issues/experiences of FN peoples;

Plan does not reflect a government to government relationship.

The four main goals outlined in the "Plan" are as follows:

1) Strengthen the capacity and authority of Aboriginal Communities to develop and deliver child and family services of a nature and extent comparable to those available to any resident of British Columbia.\(^{\text{emphasis added}}\)

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.

\(^{141}\text{First Nations Summit Child Welfare Committee " Briefing Note: Ministry for Children and Families DRAFT Strategic Plan for Aboriginal Services" prepared for the First Nations Summit Chiefs in Assembly and the Deputy Minister of the Ministry for Children and Families (Bob Plecas) (Dec. 1, 1997).}\)
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.

It is unclear what the term “comparable” services means as referred to in goal number one. The reality is that provincial services now being delivered have failed to respect First Nations culture, laws and traditions.

Another concern with the Strategic Plan is that application of the Plan will create disparity in the capacity of First Nations to deliver services; as the Plan is premised on a regional model and there exists differential treatment in the manner in which regional budgets are dispersed. In addition, First Nations traditional boundaries cut across Ministry regional districts. For example Nations such as the Squamish are caught up in three districts and therefore have to deal with three different regional offices. First Nations under the Plan will have to negotiate budgets with the various regional executive directors (RED’s). To further complicate matters the Ministry expects that “Regions will develop a capacity to understand government-to-government relationships”, which places yet another burden on First Nations to not only educate the RED’s but the Aboriginal Relations Branch negotiators as well regarding their unique issues and concerns.

The Ministry has stated that in relation to capacity building, that they are committed to a regional realignment of existing resources over the next three to five years to First Nations communities. The fundamental concern with this policy is that the
Ministry speaks of "existing resources" with no reference to new resources yet new resources are required now.

D. Child, Family and Community Services Act

The Child, Family and Community Services Act (CFCSA) was proclaimed in 1996. It was, as explained earlier, informed by two panel reports including the Aboriginal panel report, Liberating Our Children: Liberating Our Nations (LOCLON). Although only a handful of Aboriginal recommendations were actually incorporated into the legislation the Child, Family and Community Services Act advocated a shift in practice that attempted to reflect a more community based and family approach. This approach and ideology, however, underwent a radical shift in response to the Gove Inquiry.

Armitage and Durie tracked the implementation of the new CFCSA and found that the child welfare system has not been successful in adapting to the new legislation. In particular they found that:

The broad ideas present in the early reports - setting child welfare in a context of poverty (Making Changes) and in the context of historical oppression (Liberating Our Children: Liberating Our Nations) were the first to disappear.\(^{142}\)

If this is the case, how can the system now effectively address First Nations issues. This shift in ideology places enormous constraints on First Nations child and family serving agencies as they must comply with provincial laws and standards. When the CFCSA was drafted First Nations were not included as participants in the process. The First Nations Summit Action Committee for First Nations Children and Families, whose mandate was to work on a government-to-government basis with the Province to discuss legislative and policy options for First Nations child welfare, were never consulted during the drafting process. As pointed out in my commentary regarding an article written by Armitage, this is yet another example of colonialism in practice:

Ironically, as Armitage points out, the main problems identified in Liberating Our Children were "the existence of cultural chauvinism (racism) and the imposition of European Law (colonialism)." Keeping First Nations at a distance while drafting the legislation did little to rectify these historical and contemporary problems.

Since proclamation of the legislation, there continued to be a barrier to the First Nations Summit Action Committee for First Nations Children and Families having a meaningful government to government dialogue. Changes that continued at a swift

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143 Supra note 8. They have found fulfilling their mandate to be extremely difficult. There have been many changes in the past few years in the area of child and family services, that have left the Committee playing catch-up and having to react rather than be proactive. In addition the Committee has limited financial resources to be able to keep up with all of these changes.

144 A. Armitage, supra note 23.

pace and the Committee, if time allowed, reacted to them. There was no appetite in
government to truly honour the commitments made in their government-to-
government Protocol Agreement with the First Nations Summit\textsuperscript{146}. An agreement
which outlined the Province’s commitment to developing interim measures in the
area of child welfare. The CFCSA continues to ignore First Nations culture and its
impact on First Nations children, families and communities remains destructive.

In the following section, I discuss the Child, Family and Community Services Act
(CFCSA) and in particular how the CFCSA impacts First Nations children and
families and First Nations child and family service agencies. I also highlight the
ineffectiveness of the Ministry to implement the legislative provisions regarding
Aboriginal issues which underscores the failure of the Ministry for Children and
Families to truly honour the importance of First Nations culture. The discussion
which follows provides further evidence for the necessity of First Nations to resume
governance in this area.

1. Guiding Principles and Service Delivery Principles

Section 2 of the Child, Family and Community Services Act (CFCSA) outlines the
guiding principles of the Act. In response to the recommendations made in Judge

\textsuperscript{146} Protocol Agreement signed between the Province of British Columbia and the First Nations Summit (August
20, 1993 extended to 1999). The Agreement has since been renewed and the wording has been changed, it no
longer specifically includes “child welfare” but does under s. 4(1)(c) continue to include the negotiation of
interim measures agreements.
Gove's *Interim Report*\textsuperscript{147} the guiding principles included the statement that they must be interpreted "so that the safety and well-being of children are the paramount considerations". This principle was affirmed in a submission to the *Gove Inquiry* dated February 21, 1991 from Deputy Minister Sheila Wynn, who underscored that "As Deputy Minister of Social Services, let me state clearly that our client is the child. We intend to place the child at the heart of the ministry"\textsuperscript{148}. Her statement of intention, in conjunction with Gove's recommendations, arguably changed the whole complexion and thrust of the legislation. This is not to say that the safety and well-being of children should not be paramount, but it philosophically changed the practice of child welfare from a direction that was more family and community focused to one that focused more on the individual child. Antithetical to First Nations desired approach First Nations to child welfare practice and an example of the cultural differences in First Nations child rearing and child protection described in chapter one

The focus of child welfare on the individual child, to the exclusion of their family, was an approach that in the past resulted in the removal of Aboriginal children from their homes and communities (chapter one). It should be noted that the guiding principles do contain a provision which states that "the cultural identity of Aboriginal children should be preserved". However, how can the cultural identity of First Nations children be preserved if the child welfare system advocated by Gove is


\textsuperscript{148} *Supra* note 91 vol. 2 at 207.
philosophically the same system that as illustrated in chapter one was at the root of causing such harm to First Nations children, families and communities?

A draft policy paper developed by the former Ministry of Social Services Aboriginal Services Branch (now Ministry of Children and Families Aboriginal Relations Branch) provided the following analysis of section 2:

It is important to note that this means the specific aboriginal cultural of the child. This recognizes and respects the fact that there are cultural variations and uniqueness between aboriginal nations. Consideration of this should be noted when choosing aboriginal foster placements or adoption placements for aboriginal children.\textsuperscript{149}

Despite this encouraging interpretation of section 2 the Ministry, in practice, continues to disregard the importance of First Nations children’s cultural identity and continues to treat Aboriginal culture as “homogeneous”. Negligible fiscal resources have been provided for specific cultural programming. In order to effectively honour section 2 the Ministry must train their social workers to understand and respect the distinct cultural mosaic comprising First Nations in B.C. This cannot be done in the Ministries 20 week training program which currently contains only 2 days of curriculum\textsuperscript{150} to address First Nations issues. As recently as 1997, the Ministry social work training on First Nations issues consisted of a video presentation over lunch hour.

\textsuperscript{149} British Columbia, Ministry of Social Services, \textit{CFCSA Overview: An Aboriginal Perspective} (November 16, 1995) at 6.

\textsuperscript{150} Developed by myself and Cindy Blackstock (Gitksan).
Section 3 of the *Child, Family and Community Services Act* (CFCSA) outlines the service principles under the Act. Two sub-sections specifically address the involvement of First Nations communities and child and family agencies, namely:

- **b)** aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;
- **c)** services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving services.

These service goals certainly are laudable, but again they have not been effectively incorporated into the Ministry’s practice. In an attempt to involve First Nations in the planning and delivery of services the CFCSA included a requirement for notice to be provided to First Nations regarding the commencement of court proceedings for First Nations children who have been removed and placed in the care of the state. Unfortunately, First Nations do not have the financial resources to become actively involved in the planning for those children and families. Especially if the child and family are from rural or remote areas (which comprises most of B.C. First Nations) and the court proceedings are commenced in Vancouver. No additional funds have been provided to First Nations agencies to successfully address this systemic problem. In their review of the CFCSA, Absolon and Mitchell cautioned that:

The cited section of the new Act states that Aboriginal communities or organizations must be informed at least 10 days before a hearing for a continuing custody order is held. This may be appropriate for people who do not have to travel from remote areas to attend court sessions, but may be problematic for those living in isolated communities. Poverty also means that a person may not be able to afford to attend these hearings. The importance of informing the Aboriginal community representatives is only the beginning. Unless Aboriginal communities are provided with the financial and other
support to attend and addresses the child protection hearings, this section will have limited impact.\textsuperscript{151}

First Nations must be provided with the necessary resources, both fiscal and human, to properly assist their children who may be coming into care. It is incumbent on the Ministry for Children and Families, pursuant to their guiding and service delivery principles to ensure that First Nations be provided with those resources.

Recently, the Ministry made some changes to the CFCSA regulations which have caused concern for the Directors of First Nations child welfare agencies. These relate to the definition of “aboriginal organizations” and in particular who will be provided notice. In a Ministry paper entitled \textit{Child, Family and Community Service Act Overview an Aboriginal Perspective}, they stated that:

\textit{The definition of “aboriginal organization” will be developed in policy in consultation with aboriginal people}\textsuperscript{152}

Unfortunately, without any consultation with the First Nations community, the designates identified in the regulations have been changed. First Nations child and family service agencies have been replaced by Band administrators as the designates. This change occurred despite the fact that agencies have the professional expertise to assist in the planning and support of their member children.

\textsuperscript{151}K. Absolon \textit{et al, supra} note 22 at 44.

\textsuperscript{152}\textit{Supra} note 149 at 16.
in care who are also the subject of court proceedings. Agencies as well have strict confidentiality guidelines which would protect those children. To further complicate this issue, the Ministry has also changed the CFCSA so that social workers need not inform an Aboriginal organization or other specified person if, in its opinion, doing so would: cause physical or emotional harm to any person or endanger the child’s safety.

How these exceptions are interpreted could lead to First Nations agencies being denied an opportunity to assist in the planning for their children. These amendments are arguably contrary to the delegated enabling agreements (signed on behalf of agencies delivering services) which all clearly stipulate that the purpose of their agencies is to plan and deliver services in the best interests of their children. The Ministry should consult with First Nations regarding these changes and if necessary amend the regulations to once again include agencies as the designated representatives.

2. Section 4: The “Best Interests Test”

Herbert in her background paper for the Gove Inquiry, discussed the application of the “best interests test” and how it has historically manifested in judicial discourse as ‘racism’. Judge Kimmelman established in his examination of the “60’s scoop”, that decisions made in the best interests of Aboriginal children resulted in a

153 Supra note 91.
massive exodus of children from reserves. The inclusion of section 4(2) in the Child, Family and Community Services Act (CFCSA) was designed to redress this state of affairs. Section 4(2) states that when determining the child’s best interests, the following factor should be considered:

If the child is an aboriginal child, the importance of preserving the child’s cultural identity must be considered in determining the child’s best interests.

The Draft Overview of the CFCSA From an Aboriginal Perspective notes that this section is particularly important because:

A child’s cultural identity is fundamental. It is important to note that there is a requirement to recognize the importance of a child’s specific cultural identity. This refers to a child’s cultural identity, within their specific aboriginal cultural [sic] whether that may be Haida, Metis, etc.

Ministry practice, however, has lead to a failure to effectively implement this section. The Ministry is required to complete plans of care for all children in care. This is done on a computerized system. The system is designed to first inquire if a child is First Nations and if they are so identified a band number is requested. If, however, a child is not registered as an “Indian”, or is non-status, the next field of inquiry asks whether the child is Inuit or Metis and does not ask if the child is non-status or non-registered. This is obviously highly problematic, especially from the perspective of a

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154 Supra note 9 (CFCSA).

155 Supra note 149 at 6.
non-status individual such as myself. I do not identity with Metis culture, I am Tsimshian and Haida. The Ministry's reporting system, therefore, is incapable of adequately addressing the purpose of section 4 - identifying the child's identity. Non-status children, by default become Metis. The system effectively circumvents any involvement with the child's First Nation, which will not be contacted if the child does not have a band number.

In the Ministry's paper regarding the implementation of *Liberating Our Children: Liberating Our Nations* (LOCLON) recommendations, they remarked in regards to the identification of a child's cultural heritage, that:

> Prior to the CFCSA, the extent of aboriginality captured in MSS statistics was the distinction between status and non-status. Since the CFCSA requires MSS to notify the child's aboriginal community, MSS will have a much broader and deeper statistical profile of the aboriginal children-in-care, their communities and the services they receive. In addition, the Aboriginal Negotiations Branch is currently developing a client profile of aboriginal children-in-care which will be used to improve the targeting of services.¹⁵⁶

The manner of determining an Aboriginal child's heritage is also of concern as the numbers of children identified as Metis (by default) may contribute to an artificial increase in their numbers and a rationalization to support Metis services rather than First Nations.

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A particularly disturbing recommendation of Judge Gove that, was made in the absence of any consultation with Herbert, myself, or any First Nation community, is the following:

78. The distinction in the best interests test of the new Act between “cultural heritage” and “cultural identity” should be eliminated by repealing s. 4(2) of the Child, Family and Community Services Act.

Judge Gove’s rationale for this recommendation is that:

A separate “best interests test” consideration for aboriginal children poses the risk that courts will give effect to the narrow item (“identity”), and will reason that the use of the different term in s. 4(2) meant that the legislators did not mean to have “cultural heritage” to apply to aboriginal children. Furthermore, s. 4(2) raises the question of the “cultural identity” of other cultural groups. Other ethnic groups deserve equal protection for their children. The Inquiry believes that all cultural groups are protected by s. 4(1)(e) and that s. 4(2) can be repealed. The broader term “heritage” must surely encompass “identity”.157

This recommendation effectively ignores Herbert’s analysis and also ignores the academic literature, practice literature, anecdotal evidence/reports, and political commentary on the subject; all of which underscored the importance of respecting the cultural identity of Aboriginal children. The recommendation is premised on a misunderstanding of heritage and identity. A child who is Aboriginal is of Aboriginal heritage in the broad sense. Their identity is determined by: who they are as an

157 Supra note 91 vol. 2 at 217.
individual, and how they fit in to their specific community; who their relations are; and what Nation they are from. Indeed, the importance of cultural identity is underscored in Article 30 of the United Nations Convention of the Rights of the Child:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.\footnote{United Nations Convention on the Rights of the Child, 12 December 1989, ARes./44/25.} (emphasis added)

Most significantly Gove’s recommendation ignores the recommendation of Liberating Our Children: Liberating Our Nations (LOCLON) which, in very strong words, describes the impact of colonization and specifically that of the child welfare system on Aboriginal children, families and communities:

Until very recently, Canadian courts have ignored the need for children to maintain their cultural identity, and “in the best interest of the child” they have often removed children from their culture, denying them their identity. With respect to our children, the need to maintain their culture and identity has been systematically ignored by courts considering their “best interest”... We therefore feel that for our children, these rights must be protected by law. The best interest of the child must recognize that children should be with their specific Nation...\footnote{Supra note 24 at 57.} (emphasis added)

Fortunately, the provincial government was persuaded by the recommendations found in LOCLON and adopted, in the best interests test, the preservation of a First
Nations child's identity. Absolon, Armitage, and Mitchell articulate the rationale for including section 4(2):

Interpretation of the best interests tests when pertaining to Aboriginal children has been difficult as child welfare authorities come from the dominant society and have had difficulty in understanding, the importance of considering race and culture as factors in determining the best interests of the child. The domination of non-Aboriginal people in child welfare authority positions, such as social workers, judges, lawyers, supervisors etc., combined with the structural reality of racism that permeates every mainstream institution in Canadian society, have resulted in not only a misinterpretation of the best interests of Aboriginal children, but also a lack of understanding of the challenges faced by Aboriginal peoples as a whole.  

Thus the rationale for s. 4(2) is very clear; its inclusion is an attempt to curb the tide of "cultural genocide" and its importance to Aboriginal children and community cannot be overemphasized. Justice Hall of the British Columbia Court of Appeal, in a recent B.C. case recited the words of Chief Justice Scott (Manitoba) in acknowledging the fundamental importance of cultural identity:

... no authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes. For anyone, aboriginal or otherwise,

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161 Ontario was much ahead of B.C. in including such a provision, however, as identified by M. Kline (*supra* note 22); E. Carasco (*supra* note 55); and P. Monture (*supra* note 4) interpretation of that provision has been fraught with difficulties with the “indigenous factor” being underplayed or applied without its full meaning and context.

they are the stuff from which a young person's identity and sense of self are developed.\textsuperscript{163}

The Transition Commissioner had also recommended that the changes articulated by Gove (on Aboriginal issues) be included as part of an \textit{Amendment Act} to be brought forward to the legislature - notwithstanding that the Commission did not have any Aboriginal staff members and did not consult with Aboriginal communities on the efficacy of Judge Gove's "Aboriginal recommendations". The proposed amendments did not go through. One reason being that in March of 1998, the Ombudsman provided a report to the Legislative Assembly of B.C., which reviewed the implementation of the \textit{Gove Report}. This report specifically recommended that Gove's best interest recommendation not be implemented because:

\begin{quote}
The fact remains that the issue of aboriginal children is a special case, unlike that of any other ethnic group. Subsection 4(2) seems like a legitimate provision and need not be repealed.

Subsection 4(2) simply confers an additional benefit for a group of children who are disproportionately affected by the child protection service.

In addition, the fact that subsection 4(2) imposes a duty in the case of aboriginal children and not for children from other cultural heritage is not improperly discriminatory.\textsuperscript{164} (emphasis added)
\end{quote}

\textsuperscript{163} \textit{Ibid.} at para. 18.

Although a strong argument and rationale has been provided for the inclusion of section 4(2) the section itself is of little utility, if in practice it is not effectively implemented. Furthermore Justices Hamilton and Sinclair contrasted the differences in cultural perceptions of the best interests test augmenting my argument that First Nations should govern their own child and family services:

...it becomes clear that interpretations of best interests of children are culturally bound, and not universal. Aboriginal world views of the best interest of the child; or for that matter, the views of any culture, can conflict with non-Aboriginal views. Such differences are legitimate and should be respected.  

3. Part 2: Support Services and Agreements

The ability to make family support agreements is provided in Part 2 of the Child, Family and Community Services Act (CFCSA) (sections 5 to 12). Some of these sections have not been proclaimed because, as the Ministry has stated it does not at this time have the resources to implement them. This may also be due to the philosophical shift in practice advanced by Gove. Part 2 is linked to the guiding principles set out in section 2 of the Act, which acknowledge that the family is the preferred environment for children and if, with available support services, a family can provide a safe and nurturing environment support services should be provided. Unfortunately, as will be described in more detail in Chapter Three, the funding for

165 Supra note 27 at 530.

166 Interestingly those same considerations were not applied to First Nations agencies that have been burdened financially because of legislative and policy changes made without their input.
First Nations child and family services comes mainly from maintenance dollars which are available only for First Nations children in care. There is little scope in the federal funding policy for the provision of preventative services; services which are so necessary and fundamental to First Nations communities. The lack of funding for these important (yet unproclaimed sections of the Act) affects the manner in which First Nations agencies can provide services. First Nations practice traditionally encompasses an approach that endeavours to keep children in their communities. Under the current child welfare regime and federal funding policy this is next to impossible.

4. Section 70

Section 70 of the Child, Family and Community Services Act (CFCSA) outlines the rights of children in care; including an important provision that guarantees the right of First Nations children in care to "receive guidance and encouragement to maintain their cultural heritage". The Squamish Nation, on behalf of approximately 50 of their children in care, brought complaints to the Child and Family Review Board (now Children's Tribunal) of breaches of their children's right to cultural guidance and encouragement pursuant to s. 70(1) (j). As a result the Ministry, over one and a half

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167 s. 70 of the CFCSA Act reads:

c. 70(1) Children in care have the following rights:
   (j) to receive guidance and encouragement to maintain their cultural heritage.
years later, decided to provide Squamish with funds to hire a cultural worker. During the process it was suggested by the Ministry that having Aboriginal children serviced by an Aboriginal agency should be sufficient to meet the requirements of section 70(1)(j). This pan-Indian approach goes against the spirit of the legislation (namely sections 2, 3, and 4) and minimizes yet again the importance of respecting the cultural differences of First Nations in B.C.

The Ministry’s performance record for compliance with section s. 70, especially for First Nations children, has been dismal. The Children’s Commissioner’s 1998 Annual Report found that:

Cultural planning for aboriginal children was identified in only 30 per cent (12 of 40) of the plans we reviewed. Many plans assumed that occasional contact with extended family or attending pow-wows in the summer was sufficient. Some plans noted that the child did not wish to maintain contact with aboriginal culture but failed to analyze why this was the case. MCF needs to involve aboriginal communities in ensuring the continuity of aboriginal identity and culture of children in care. Social workers need a clear understanding of MCF expectations with respect to determining how cultural needs of children are addressed.

Vancouver Aboriginal Child and Family Service Agency, an urban agency which provides family support services, has been funded (by the province) for one worker to provide “cultural support” to the culturally diverse group of First Nations children represented in the Lower Mainland. It is inconceivable that one cultural worker can

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168 I was legal counsel who assisted Squamish in the advancement of their complaint.

169 supra note 41 at 27.
adequately address the cultural needs of all these children. This fundamental disregard for the importance of First Nations culture only goes to prove that the provincial regime does not and cannot meet the needs of First Nations children. Again, advancing the argument that First Nations must design and delivery their own child and family services.

5. Section 71

Another significant provision of the Child, Family and Community Services Act (CFCSA) is the priority that must be considered when determining the placement of Aboriginal children in care pursuant to s. 71(3) which reads:

3) if the child is an aboriginal child, the director must give priority to placing the child as follows:

   a) with the child’s extended family or within the child’s aboriginal community
   b) with another aboriginal family, if the child cannot be safely placed under paragraph (a);
   c) in accordance with subsection (2), if the child cannot be safely under paragraph (a) or (b) of this subsection.

This clause represents an attempt by the provincial government to address First Nations cultural concerns. Unfortunately, there has been a failure in practice to place children in First Nations homes. According to the 1998 Children’s Commission Report only 2.5% of Aboriginal children in continuing custody are placed in Aboriginal foster homes or parent/relative homes, this despite the fact that to ensure
compliance s.71(3) is worded as mandatory rather than permissive. In the Children's Commissions review of plans of care she made a number of important recommendations, namely that the Ministry for Children and Families must:

- involve the aboriginal communities in a meaningful way in the care planning and placement of aboriginal children.
- consult with aboriginal communities about what needs to happen to ensure cultural identity and continuity for aboriginal children, and
- ensure, through appropriate training, that social workers understand their obligations to ensure cultural continuity and know how and when cultural needs are being met.

The Ministry has not effectively addressed the Commissioner's recommendations. Yet more evidence that the system is failing First Nations and that we should deliver services to our own children and families.

E. Summary

The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have contributed to these difficult pages in the history of our relationship together... In renewing our partnership we must ensure that the mistakes marked by our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural, social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal

\textsuperscript{170} Supra note 41.
communities and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike.\textsuperscript{171} (emphasis added)

Injustices cannot be undone, nor can past actions be altered. However, with the creation of the ministry, there is a commitment to undertake significant change in attitude and approach to working with the Aboriginal people of British Columbia to provide services for children and families.\textsuperscript{172}

The many changes made by the province to the child welfare regime ignore the goals and aspirations of First Nations for self-government in this area. The provincial government of British Columbia like the federal government has acknowledged their collusion in the destruction of aboriginal communities, and the harm caused to First Nations children and families. In the Ministry of Children and Families Strategic Plan for Aboriginal Services referenced above, they highlight that they like the federal government are endeavoring a process of "reconciliation" with First Nations. Unfortunately, the process whereby the Ministry is attempting to correct past wrongs is in fact replicating the past wrongs.

\textsuperscript{171} Canada, Department of Indian and Northern Development, \textit{Gathering Strength: Canada's Aboriginal Action Plan}, (Ottawa: Supply and Services, 1997) hereinafter "Statement of Reconciliation" at 5.

\textsuperscript{172} \textit{Ibid.} at 1.
Chapter Three: Delegation Enabling Agreements

A. Introduction

This chapter reviews and analyzes delegation, the current model for the delivery of child and family services by First Nations agencies. The provincial Director of Child Protection enters into a delegation enabling agreement (DEA) with a First Nation pursuant to section 93 of the Child Family and Community Services Act (CFCSA)\(^1\) and pursuant to section 92 of the CFCSA\(^2\) delegates his/her powers, duties and functions to individual social workers (employed by First Nations agencies). First Nations child welfare agencies as stipulated in their delegated enabling agreements must follow provincial legislation, regulations, standards and policies. The federal government is also a party to the agreements as they provide the funding.

Delegated enabling agreements (DEA's) far from representing the vision of First Nations for their self-government and treaty aspirations, place significant constraints on First Nations ability to work towards their vision. Professor Hudson in his

\(^1\) Section 93 of the CFCSA reads as follows:

\(\text{e. 93 (1) A director may:} \)
\(\text{(e) make agreements, including but not limited to agreements:} \)
\(\text{(v) with an Indian Band for the provision of services.} \)

\(^2\) This section of the CFCSA will be discussed in chapter four.
background paper for the Royal Commission on Aboriginal Peoples identified this very concern:

The issue that has been most problematic has been that of jurisdiction. This too is an essentially political issue.... This issue is not just a continual affront to First Nations self-government aspirations, but the study found that working under the authority of the Act, and provincial regulations and directions pursuant to it, places some significant constraints on the ability of the agency to develop its own forms of practice that are more consistent with cultural values and the socio-economic circumstances of the communities.¹⁷⁵ (emphasis added)

This chapter builds upon the evidentiary framework presented in chapters one and two. I conclude that the imposition of provincial child welfare laws through delegation enabling agreements, has not created positive results for First Nations children, families and communities. There must be more creative approaches to First Nations child welfare, particularly through the resumption of traditional laws and practices in the area of child and family self-governance. This must be facilitated by a transition to self-government which allows First Nations to build capacity for this important endeavour.

Unfortunately, the Province does not appear eager to change the status quo of merely delegating to First Nations. As Mitchell and Absolon note in their study, the

Ministry's idea of "interim measures" (that is building a transition towards self-government) occurs only through delegation:

Attitudes within the Ministry of Social Services reflect a range of commitment to supporting Aboriginal child welfare initiatives. The Minister of Social Services, the Honourable Joy MacPhail, stated that the new Child, Family and Community Services Act can be seen as an interim measure towards self-government... However, she admits that delegated authority is the only way to relinquish control of child welfare services to Aboriginal communities since "until there is self-government, responsibility for child welfare rests with the provinces"... 176 (emphasis added)

This position implicitly accepts that the provincial system of child welfare can address First Nations concerns. Chapters one and two provide evidence that would suggest otherwise. In a recent study presented to the First Nations Summit and the Ministry for Children and Families, Directors of First Nations child and family services were queried as to their impressions about the current regime. They made it clear that they had various difficulties with delegation enabling agreements (DEA) and DEA negotiations. In particular, one respondent raised the concern that in negotiations the, "Federal/Provincial government had the authority and determined the parameters which were too restrictive". More pointedly two of the Directors described the relationship between delegation and self-government as follows:

176 Supra note 22 at 18
-Delegation from the Director restricts self-government. Interim measures would be a direct relationship with Minister. MCF Funding agreement forces agencies to look like MCF agency not a First Nations Agency.

-DEA - hinders transition to self-government: lack of support; no room for capacity building; inequities not recognized; MCF controlled.\(^{178}\) (emphasis added)

At a recent National Conference, hosted by the National Caring for First Nations Children Society\(^{179}\), Directors of First Nations agencies from across Canada, stated that providing services pursuant to provincial legislation does not work, as it does not meet the needs of First Nations communities. The presenters at the conference were the best spokespersons to address the needs of First Nations communities - they share a wealth of experience and expertise in working within their communities on child and family service issues. Federal and provincial governments, if they truly want to ensure the safety and well-being of First Nations children, must listen and defer to them because they know better than anyone what works and what doesn't work in their communities. Collectively their years of unsuccessfially trying to fit First Nations traditions and values into provincial regimes has proven that the system does not work. According to First Nations Directors money and time needs to be invested now to assist First Nations in resuming self-governance of child welfare.

\(^{178}\) Supra note 134.

\(^{179}\) This was the second annual conference of the national First Nations Child and Family Caring Society of Canada. It was hosted by Kingsclear First Nation and held on May 13-15 1999 in Fredericton, New Brunswick.
In a Mi'Kmaq study the Directors of First Nations agencies in Nova Scotia echoed the sentiments expressed at the 1999 National Caring for First Nations Children Society Conference. Metallic and Young note that Mi'kmaq child welfare workers:

...are required by provincial law to provide services and programs to First Nations communities. Many directors of such agencies have expressed that community leaders are dis-satisfied with the current model of delivery and the manner in which such services are delivered.\(^{180}\)

The perspectives of the Directors of First Nations agencies in B.C. and across Canada were forseen as evidenced by the criticisms expressed in Liberating Our Children: Liberating Our Nations (LOCLON):

Even in situations where full delegation of decision-making has been made to the Aboriginal agency, final responsibility still lies with the Superintendent (now Director of Child Protection). Worse yet, the delegation of authority is not made to the agency, but is vested in the staff of social workers who are employed by the agency. As a result, ministerial policies based on Anglo-Canadian cultural values and assumptions, continue to play a role in the provision of services to our children and families.\(^{181}\)(emphasis added)

Patrick Johnston also foresaw and articulated these problems noting that the application of provincial laws on reserve was made without any attention to how they would affect First Nations communities. Nor was there any consideration made as to whether these laws would be compatible with the needs of First Nations.

\(^{180}\) Supra note 85 at 42.

\(^{181}\) LOCLON supra note 24 at 35.
The federal policy, that provincial laws apply on reserve, continues to ignore these considerations. This despite their *Statement of Reconciliation*\(^{182}\) which acknowledges the harm caused by assimilative policies.

Despite overwhelming evidence and commentary pointing to the negative impact of provincial laws, the Province persists in the belief that delegated enabling agreements represent a transition to self-government:

... the delegation enabling agreements reached under section 93 of the CFCSA will help smooth the transition to self-government.\(^{183}\)

The Ministry for Children and Families must re-assess their prevailing view that the success of a First Nations agency is based on its proximity to the structure, operations and standards of the provincial system; rather than the degree to which it provides for the well-being of First Nations children within a cultural context. A relationship of trust needs to be fostered whereby the province can acknowledge the legitimacy and efficacy of First Nations traditional laws, values, beliefs, and cultures in providing for the safety and well-being of children. The question should not be whether a First Nation meets or beats provincial standards of child welfare, but which system promotes the well-being of First Nations children within the context of their culture and community.

\(^{182}\) *Supra* note 171.

In order to address the specific cultural and social needs of their communities, First Nations must be provided an opportunity to deliver services outside of the present regime. To do so is fundamental to their cultural survival.

First Nations communities as distinct entities are threatened by the assimilative nature of provincial legislation. Language and culture as collective rights for First Nations are non-existent through provincial jurisdictional control...

Unfortunately, in the absence of negotiated self-government arrangements or final treaties neither the federal or provincial government entertain any arrangements with First Nations other than the delegated model.

B. Negotiation of DEA's

The responsibility for the negotiation of delegated enabling agreements (DEA's) is held by the Ministry for Children and Families Aboriginal Relations Branch which employs full-time negotiators. The federal government is also represented by professional negotiators. In comparison, negotiations on behalf of First Nations are conducted primarily by the Directors of First Nations agencies who have little or no formal training in negotiations. They may be provided with some support from Band council members, community members, and staff. As one Director pointed out she

184 Supra note 24 at 11.
has to conduct these negotiations "off the corner of her desk" because of all the other pressing priorities she and others have in running a child welfare agency. There are inadequate financial resources to retain skilled negotiators to represent First Nations.

Similarly, legal representation for both the federal and provincial governments is provided by a complement of specialized legal counsel, whereas, funding for legal counsel to assist First Nations is generally not made available to developing agencies: however, some funding has been provided by the province, to those Agencies who requested it. Even this level of funding, however, is not sufficient to allow a First Nation, especially if it is in a remote or isolated locale, to have a lawyer present at the negotiations. Nor is it sufficient to have legal counsel prepare comprehensive background legal opinions and strategies.

In short, the parties at the bargaining table do not have equal negotiating power. This is especially important in light of the fact that Aboriginal Relations Branch negotiators also provide advice at Treaty tables on child welfare issues, and arguably are setting the stage for the application of provincial laws and standards in treaty agreements.

\[185\] Remark made by the Director of Cowichan Child and Family Services (Lise Haddock) during discussions with the First Nations Summit Child Welfare Committee.

\[186\] To my knowledge the amount provided has ranged from 0 to $10,000.
According to their mandate the Aboriginal Relations Branch develops the treaty mandates on child and family services matters for the Ministry of Aboriginal Affairs' treaty negotiators. The mandates developed serve to provide advice to Aboriginal Affairs negotiators on provincial interests, negotiating options, and other various considerations (constitutional, financial, etc.). They are presented to Cabinet or the Deputy Minister of the Ministry for Children and Families for sign off and are then returned to Aboriginal Affairs. The Branch also provides specialized advice to Aboriginal Affairs when child welfare issues arise at the treaty tables.

Some First Nations have completed negotiating their delegated enabling agreements while others are in the process of negotiations. A few Nations, who had agencies that signed agreements pursuant to the previous child protection legislation\(^{187}\) are negotiating, what the province has characterized as "delegated confirmation agreements"- in an attempt to re-confirm their previous agreements\(^{188}\).

Delegation enabling agreements (DEA's) require First Nations to strictly follow the *Child, Family and Community Services Act* (CFCSA), as well as Ministry policies and standards. The position of many First Nations is that the negotiation of these agreements should be one step towards the transition to self-governance and treaty


\(^{188}\) Such as Squamish, Nuu'Chah'nulth, and Cowichan First Nation. This nomenclature is meaningless because what is on the negotiation table is exactly what is being negotiated under DEA's. I, therefore, will make no distinction on these grounds.
making, and they, therefore, should reflect the goals and aspirations of Nations in
the treaty making process. They do not.

Douglas Durst a scholar from the University of Saskatchewan concluded that:

Within the context of such agreements, a scenario can arise in which the
‘feds’ hold the purse strings, the province has the legal hammer, and the band
is left to do the dirty and impossible task of addressing major social problems
with insufficient human and fiscal resources. The level of self-government of
child welfare is currently capped at a co-management/delegated level of self-
government, given the federal government position that provincial legislation
is the final authority. **This restriction clearly limits the communities ability to
exercise self-determination regarding child welfare issues.**¹⁸⁹ (emphasis
added)

Currently there are sixteen operational First Nations’ child and family service
Agencies¹⁹⁰ in B.C. Fifteen of those agencies have delegated enabling agreements
(DEA’s). Spallmucheen is the exception because they signed a political agreement
with the Ministry of Children and Families pursuant to their federal by-law for the
administration of child and family services. In addition, there are six more Nations in
the developmental stage¹⁹¹. Although for the most part these DEA’s are identical,

¹⁸⁹ D. Durst, *supra* note 22 at 14.

¹⁹⁰ They are: Carrier Sekani; Central Island; Cowichan; Gitxan; Knucwentwecw; Lake Babin; Ni’tu,O; Nisga’a; Nlha’7kapmx; Northwest Allied Nations; Nuu’Chah’Nulth; Scw’exmx; Sechelt; Squamish; and Sto:lo. As well Spallmucheen is operational pursuant to their band by-law.

¹⁹¹ They are: Heiltsuk; Ktunaxa-Kinbasket; Lax’Kw’alaams; Muswamagw; Secwepemc; and Stl’atl’imx Nations.
there are a few differences in form or content in some of the agreements, highlighted in the following discussion.

1. **Parties**

The Director of Child Protection signs deletion enabling agreements on behalf of the province. Requests for by First Nations for agreements with the Minister of the Ministry for Children and Families have been refused. This reflects the fact that these negotiations are not conducted on a government-to-government basis.

2. **Funding**

A recurring theme in the discussion of the delivery of First Nations child and family services is funding. Most of the DEA agreements do not include a provision for any increases in funding either from the federal or provincial governments, should the Province make additional legislative, administrative, regulatory or policy changes that could increase First Nations costs of administration and service delivery. In addition, neither the provincial or federal government provide funding for research and development for First Nations to explore child welfare systems which would build towards their vision of self-government.
Funding is provided pursuant to a federal cabinet policy directive\textsuperscript{192} (Directive 20.1). This directive stipulates that in order to access funding the federal Government requires First Nations to 'govern' within the context of provincial policies, regulations and legislative infrastructure, furthermore, First Nations must sign a delegated enabling agreement (DEA)\textsuperscript{193} with the provincial government in order to receive funding:

s. 6.5 Provincial child and family services legislation is applicable on reserves and will form the basis for this expansion. It is the intention of the department to include the provinces in the process and as party to agreements.

This requirement precludes the inclusion of First Nations values and ideology in child and family service delivery and operates. Effectively eliminating the possibility for First Nations to develop alternative child and family service systems to better serve their peoples. This amounts to forced assimilation.

Funding is probably the most important issue facing First Nations child and family serving agencies. In particular the restrictive nature of the funding creates problems in both practice and ideology for First Nations agencies - as funding is provided when children are taken into care. The funding formula was not made in


\textsuperscript{193} These will be discussed in chapter three. They are agreements signed between the province and First Nations, for the administration by First Nations of child and family services pursuant to the CFCSA.
consultation with First Nations and, in fact, there is no rationale or information on how the funding formula was developed. In short, the formula is not transparent.

The survey results completed by the Directors of First Nations agencies established that the funding provided is inflexible\textsuperscript{194}. All but one respondent (who is in the start-up phase) indicated that the funding was inadequate. Furthermore, only one respondent (in start-up) felt that they had adequate resources for preventative services; a service which is fundamental to First Nations practice. None of the respondents received funds for the provision of cultural services despite the statutory obligations set out in section 70 of the \textit{Child, Family and Community Services Act} (CFCSA). Even more alarming, it appears none of the Directors had ever been consulted by government regarding the financial needs of their agencies. All of the Directors confirmed that their funding had not been increased to keep pace with the increased administrative burdens resulting from the proclamation of the CFCSA and implementation of the \textit{Gove Inquiry} recommendations. According to two respondents the Ministry for Children and Families has not taken any steps to ensure that agencies have adequate resources to meet legislative requirements. In their review of the CFSCA, from an Aboriginal perspective, Absolon and Mitchell highlighted the importance of the provision of adequate resourcing:

\begin{quote}
...simply returning the responsibility for family and child services to economically strained, resource scarce Aboriginal communities is inadequate. Resources must now accompany authority...\textsuperscript{195}
\end{quote}

\textsuperscript{194} \textit{Supra} note 134.

\textsuperscript{195} \textit{Supra} note 22.
Arguably the Director of Child Protection administers the *Child, Family Community Services Act* (CFCSA) differently on reserve than off-reserve violating section 15 of the *Charter of Rights and Freedoms* which states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This differential application occurs despite the fact that the law is a law of general application. On its face, this amounts to a denial of equality before the law (equality of application) and equal benefit (unequal provision of generally available services) as well as denial of equality based on place of residence (on reserve). In fact, the Supreme Court of Canada held in *Eldridge v. British Columbia*\(^{196}\) that once the state provides a benefit, it must do so in a non-discriminatory manner, and must take special measures to ensure that disadvantaged groups are able to benefit equally from government services.

The federal and provincial governments should/must provide funds to enable First Nations transition to self-government. The transitional approach is in the best interests of First Nations children and their families.

As discussed above, the federal government funds First Nations child and family service agencies pursuant to a federal cabinet directive (Directive 20.1). Presently a review of this policy directive is being undertaken by the Assembly of First Nations and the Department of Indian Affairs and Northern Development.

There are a number of problems with the Directive. For example, First Nations with less than 251 children are not eligible for funding\textsuperscript{197} to develop or deliver child welfare and must by default have services delivered by the Province. B.C. is made up of 197 Band of diverse cultures and traditions - many do not have child populations of 251. The population criteria, in effect, eliminates numerous Nations from providing child and family services. According a Director of a First Nations agency only 40\% of B.C. First Nations fit this criteria\textsuperscript{198}.

In addition, Directive 20.1 reimburses agencies for the number of children they have in care and few dollars are available for preventative programs and services. This is antithetical to First Nations’ philosophy and practice, which would concentrate on providing families with preventive services facilitating keeping children out of care and with their families, extended families, or community members. Unfortunately in the CFCSA prevention services are not mandatory and therefore the federal

\textsuperscript{197} \textit{Supra} note 192 at s. 20.1 and 20.2.

\textsuperscript{198} \textit{Supra} note 134.
government cannot be compelled "legally" to provide funds to agencies for them. In fact attempts to obtain funding for preventative services have failed. In a recent case in Manitoba, *Southeast Child and Family Services v. Canada (Attorney General)* 199, the Manitoba Queen's Bench rejected an argument made on behalf of a number of First Nations' child and family serving agencies, that Canada's decision to unilaterally discontinue discretionary funding for preventive services was a breach of their fiduciary obligation. The court held that:

In my view, there is nothing that obligates Canada to provide services to family funding. There is no aboriginal or treaty right which so provides. While clearly there is a fiduciary relationship between Canada and aboriginal people which creates certain obligations upon Canada with respect to Indian children and families, this fiduciary relationship does not obligate Canada to pay any specific amount of funding, or for any specific purpose.200

While Directive 20.1 is national in scope there is no method to account for the differing fiscal requirements associated with application of the various provincial legislative schemes across Canada. For example, B.C.'s child protection legislation and regime is one of the most comprehensive in Canada. Despite this, First Nations in B.C. receive the same levels of funding as First Nations in other provinces which may not have such a comprehensive provincial regime. In short, no new funding was granted when the CFCSA was proclaimed. The adequacy of Directive 20.1 funding has yet to be assessed in relation to the CFCSA, the *Children’s Commission Act*, new regulations, and new and additional administrative and policy requirements.

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Nor has it been assessed in light of the recommendations implemented because of the Gove Inquiry. This is remarkable considering the fact that the legislation is now four years old. In discussions with First Nations Directors, and my participation in the May 1999 National conference for the First Nations Child and Family Caring Society I discovered that funding is not only inadequate in B.C., but also in and other parts of Canada\textsuperscript{201}.

Directors of First Nations agencies in their survey responses expressed concerns regarding the application of Directive 20.1 in B.C.:

\begin{itemize}
\item[-] the funding formula is premised on a per capita model, so its application in B.C. is problematic because of the small population sizes of many B.C. First Nations. According to one commentator only 40\% of B.C. First Nations have the population base to access Directive 20.1 funding;
\item[-] the Directive has national application with no allowance for differences in provincial legislative requirements. Since the proclamation of the new Child, Family and Community Services Act and the Children's Commission Act as well as the changes made in response to the Report of the Gove Inquiry into Child Protection, there have been no changes to the funding levels provided to B.C. First Nations made pursuant to Directive 20.1;
\item[-] The Directive funds according to the numbers of children in care, but this is antithetical to First Nations desire to focus and build on healthy communities by providing least disruptive as well as preventative services and keeping families together.\textsuperscript{202}
\end{itemize}

As evidenced by the comments presented above for many First Nations in B.C. the Directive 20.1 does not provide the necessary resources for their agencies to comply

\textsuperscript{201} Supra note 179.

\textsuperscript{202} Supra note 134.
with the new legislative regime in B.C. or to operate their agencies in a manner that
honours keeping children and families together by providing necessary least
disruptive and preventative services. More importantly, the funding as noted above
does not provide resources for research and development and therefore no
resources have been made available to examine and support the transition to self-
government.

In order to redress the impact of colonization First Nations agencies require more
than "comparable" fundings to provide services. A different funding model must be
explored to ensure that B.C. First Nations are in a position to delivery culturally
appropriate services to their members according to First Nations laws and traditions,
which are not premised on an ideology of taking children into care. Agencies need
to be funded adequately to provide preventative services and to develop these
services in a culturally appropriate way premised on First Nations laws and
traditions. Time, effort and financial resources need to be provided to First Nations
to assess exactly what their community needs are and how best to meet these
needs in their transition to self-government.

   ii. Provincial Funding

The Province pursuant to the Child, Family and Community Services Act (CFCSA)
has a statutory and legal responsibility for children and families whether they live on
or off-reserve. One of the goals of the Ministry's *Strategic Plan for Aboriginal Services* is to:

Strengthen the capacity and authority of Aboriginal communities to develop and deliver child and family services of a nature and extent comparable to those available to any resident of British Columbia... (emphasis added)

The *Plan* does not discuss how this will occur. The Province remains firm in their stance that the federal government has fiscal responsibility for on reserve child and family services and that the province does not have the legal obligation to fund the delivery of services by First Nations agencies. The Provincial government, however, does provide funding to organizations such as the Metis, off-reserve, and non-status groups. A strong argument could be advanced that the B.C. government has a legal and statutory obligation to provide funds to First Nation agencies, especially if federal funds are insufficient. This was confirmed in *The Director of Child Welfare for Manitoba v. B* in which Judge Garson held that section 88 of the *Indian Act* imposes a positive duty upon provincial social service agencies to provide the same level of social services to Indians living on reserve as are provided to non-Indians, Metis and non-status Indians living in other areas of the Province. He stated that:

... irrespective of any views, that the provincial government may have as to the historical, political, financial or moral responsibility of the federal government to provincial health and social care, it is now absolutely clear that

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203 "MCF Strategic Plan" *supra* note 94 at 4.

204 *The Director of Manitoba v. B.* [1979] 6 W.W.R. 229 (Man. Prov. Ct.)
it is the legal responsibility and duty of the province to supply child welfare services in accordance with the Child Welfare Act...\(^a\)

Admittedly, the Province has on occasion provided "piece-meal" funding to First Nations Agencies. For instance, the Squamish Nation was provided provincial funding for a cultural worker. This was only done after the Nation brought complaints to the Children's Tribunal that Squamish children in care were being denied their rights to receive guidance and encouragement to maintain their cultural heritage pursuant to section 70 of the Child, Family and Community Services Act\(^b\). For the most part First Nations agencies are not provided funding from the province.

\textit{iii. Funding Provisions in Agreements}

The more recent delegated enabling agreements articulate various funding arrangements. The Carrier Sekani\(^c\), NIL/TU,O\(^d\) and Nisga'a\(^e\) agreements, for

\(^a\) Ibid. at 14.

\(^b\) This section will be discussed more in chapter four.

\(^c\) Delegation Enabling Agreement between Carrier Sekani Family Services and Director of Child Protection and Minster of Indian Affairs and Northern Development (January 29, 1998)

\(^d\) Agreement between NIL/TU,O Child and Family Services and the Director Child Protection and the Minister of Indian Affairs and Northern Development (March 5, 1999).

\(^e\) Agreement between the Nisga'a Tribal Council and the Director and the Minister of Indian Affairs and Northern Development (May 5, 1997).
instance, confirm that they are funded by the federal government pursuant to Directive 20.1. In addition, they include a clause stipulating that the Director "may" provide funds for individual residents on reserve who are not covered by the Directive. This requirement should be mandatory rather than permissive. But for the province providing funding for individuals not covered by Directive 20.1 there would be no funding to offer them (non-status or non-registered members) services as the Directive only covers registered Indians on reserve.

The Northwest Inter-Nation Family and Community Service Society agreement goes one step beyond the wording in the agreements above. It states that the Director "will" provide funding for the provision of services to persons residing on reserve for whom federal funding is not provided. The Central Island (CIFCS) agreement goes further than the Northwest agreement by incorporating a section that confirms the Director's fiscal obligation to support their agency:

Where the Director's actions or requirements have given rise to further unanticipated costs on the part of CICFS... the Director will negotiate with CICFS to provide support and resources to assist CICFS.  

There exists then, various funding arrangements that leave agencies in better or worse positions to be able to meet the statutory requirements of the legislation (CFCSA). Notably, none of the recent agreements state, as did the pre-CFCSA

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210 Delegation Enabling Agreement between Northwest Inter-Nation Family and Community Services Society No. S39949 and the Director and the Minister of Indian Affairs and Northern Development (February 8, 1999).

211 Agreement between the Director of Child, Family and Community Service Act and the Minister of Indian Affairs and Northern Development and Central Island Child and Family Services Society (December 8, 1997) at section 26.1.
Cowichan Agreement, that the delivery of services is “subject to” the provision of adequate resources, leaving First Nations as articulated by Durst at the whim of federal purse strings\textsuperscript{212}. The variations in these agreements possibly relate to a lack of expertise available to First Nations in negotiating their agreements and to the unequal bargaining power of First Nations vis-a-vis the federal government and provincial governments.

Notably absent in any of the Delegation enabling agreements is any funding for capacity building (research and development) for the transition to self-government.

3. **Who is Serviced?**

The funding for First Nations agencies is only provided for status Indians resident on reserve. Many Nations in the treaty process are negotiating the provision of services to all of their members whether they reside on or off-reserve, or on or off traditional territories. There have been different arrangements made in the various delegated enabling agreements (DEA’s) for the delivery of off-reserve services. However, a number of the agreements do not incorporate the provision of services off-reserve. The Sto:lo are currently providing services off reserve within a certain geographical area as well as the Gitxan, Central Island, NIL/TUO, Northwest Inter-Nation Family and Community Service Society, and Carrier Sekani (to a limited degree) all include provisions in their agreements for the “opportunity” to provide off-reserve services.
within certain geographical areas. The Nisga'a agreement covers the provision of services on Nisga'a lands.

In light of the issues being negotiated at treaty tables and the importance of capacity building for self-government First Nations should be provided the opportunity, in their DEA's, to service off-reserve members. Many of whom live off-reserve because of housing shortages on reserve. Administratively it is not unfeasible for First Nations to provide off-reserve services. What complicates this, however, is that Nations will not receive Directive 20.1 funds for off-reserve service delivery and therefore must seek fiscal resources from the province. In order to effect a smooth transition to self-government, which for most Nations will include the provision of services in their traditional territories, they should be encouraged to begin service delivery now. Ideally though services should be provided outside the DEA structure and be based on our traditional laws and practices.

Another factor that complicates service delivery to off-reserve members is the negotiation of agreements between the Ministry and off-reserve agencies, most notably, the Metis. According to a recent Children's Commission Annual Report of the 2,519 children in continuing custody, 1,406 are First Nations and only 134 are Metis. Despite the disparity in these numbers the Province has been providing a great deal of financial resources to support capacity building for Metis child and family services. The Metis, who are culturally distinct from First Nations, may end up servicing First Nations. First Nations individuals and the Nations from which them
come should be provided access to their own First Nation agency or as an alternative a First Nations urban agency that has developed a protocol with their Nation.

The United Native Nations and B.C. Association of Aboriginal Friendship Centers joined together as the Aboriginal Peoples Council in 1998, and by a memorandum of understanding (MOU) agreed to advocate and negotiate self governance for off-reserve aboriginal peoples.213 A day after the formation of the Aboriginal Peoples Council they signed a Framework Agreement with the Province for the development of a full range of child and family services for off reserve aboriginal communities.214 Despite limited consultation with the First Nations people residing in the urban areas for whom they claim to represent. As well the MOU and Framework Agreement were signed without any consultation with First Nations. In fact, the First Nations Summit was not even notified of these agreements. This has obvious implications for Nations in the treaty process who may be negotiating the delivery of services to their off reserve citizens. It would appear that the province has already ostensibly negotiated who will be providing those services - the APC and/or the Metis.

An Ministry information sheet provides information on the Aboriginal Peoples Council (APC) and states that one of the goals of the APC is to “implement the inherent right

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to self-government through negotiations with Canada and the Province of B.C.\textsuperscript{215}. It also states that the people who are represented by the APC are the "Aboriginal people who are geographically, culturally, socially or politically separated from their First Nation of origin and identify more closely with a pan-Aboriginal urban community" as opposed to "members of First Nations who remain closely affiliated with their Band and are politically represented throughout their elected Band or Tribal Council". How this distinction is made, in practice, and who has a voice in the decision making process, will have a significant impact on the opportunity for those living off-reserve to access either their own agency, another First Nation agency, or an urban agency, that has developed a protocol with their Nation.

4. Operational Readiness Criteria & Aboriginal Social Work Matrix

All of the delegated enabling agreements include the application of two criteria established by the Ministry for Children and Families: operational readiness criteria and the Aboriginal social work delegation matrix. The operational readiness criteria determine, according to the provincial Director of Child Protection, when a Nation is ready to deliver services and to take on additional responsibilities, such as child protection work. The "Aboriginal social work delegation matrix" determines what sort of training, etc., a worker is required to have in order to take on various social work roles. These criteria were developed by a reference group which included

representatives from the federal government, from the Ministry, as well as a few representatives from First Nations agencies. Although First Nations representatives participated with this group, no First Nations governments were directly consulted regarding the development of these standards.

The preamble to the operational readiness criteria, dated April 13, 1998, states that in order for the readiness criteria to be approved they must be vetted by the First Nations Summit and the Directors of First Nations agencies\(^\text{216}\). The criteria were provided to the First Nations Summit in draft, but their input was not solicited nor was their approval sought. This is not consultation, but perhaps is what the Ministry for Children and Families means by "vetting". The criteria, are now included in all of the delegation enabling agreements. There has not been an opportunity to analyze whether the standards reflect community values and are culturally appropriate. Their very foundation, however, is the provincial child welfare system immediately calling into question whether they are capable of reflecting traditional community standards.

Chapter Four: Self-Government

A. Introduction

Injustices cannot be undone, nor can past actions be altered. However, with the creation of the ministry, there is a commitment to undertake significant change in attitude and approach to working with the Aboriginal people of British Columbia to provide services for children and families.217

Despite the Ministry’s claim to have changed its attitude and approach to working with First Nations, much of the discussion in chapters one two and three, has illustrated that little has changed; the status quo of assimilation by delegation remains. First Nations must be provided with the adequate resources to develop and deliver their own child and family services. First Nations do not, as identified by the Children’s Commissioner, share the same vision as the federal and provincial governments on how to meet the best interests of their children. Both the federal and provincial governments have a long way to go to improve their relationships with First Nations:

The federal and provincial governments and bands across the province do not yet share a clear vision of how best to meet the needs of aboriginal children on and off reserves. Treaty negotiations offer one means of resolving these long-standing and often neglected discussions about children, but in the meantime funding formulas and lack of clarity about roles and

217 "MCF Strategic Plan" supra note 94 at 1.
responsibilities, continue to place aboriginal children at risk on reserves. Only when communities are given adequate resources for health, education and child welfare supports will we see healthier and safer aboriginal children across this province. This must be a top priority of all governments and child-serving agencies in the year to come.\textsuperscript{218}

The DEA's required by the federal and provincial governments are not negotiated in partnership with First Nations and they continue the process of assimilation. The evidentiary framework presented in the preceding chapters supports my argument that there should be a transition away from the assimilative practices of the past towards self-government aspirations of the present.

As Judge Gove acknowledged "we have much to learn from the traditional ways in which First Nations cared for their children"\textsuperscript{219}. These traditional ways continue to be eroded by the application of provincial laws and a regime which has an assimilative effect:

First Nations communities as distinct entities are threatened by the assimilative nature of provincial legislation. Language and culture as collective rights for First Nations are non-existent through provincial jurisdictional control...\textsuperscript{220}

The child welfare system with the many changes that resulted because of the Gove Inquiry (etc.) where implemented without consideration to what would be best for

\textsuperscript{218} Supra note 41 at 7.

\textsuperscript{219} Gove, supra note 91.

\textsuperscript{220} Supra note 24 at 11.
First Nations children and communities. Associate Chief Judge Murray Sinclair, in his discussion of criminal law as it pertains to First Nations peoples, identified a problem illustrated throughout this thesis that:

Attempts at reforming the system itself in ways that address other, more significant, issues have not been undertaken. The main reason, I believe, is because non-Aboriginal people who control the system have no seen the problem as lying with “the system”.  

Johnston identified this very problem within the specific context of child welfare:

Improvements in child welfare that will be beneficial to Native people may also be stymied by another barrier, one that confronts everyone who attempts social change. Large, institutionalized systems are inherently resistant to change - even changes that are desirable.

Ironically, among the future goals for the Aboriginal Negotiations Branch is the following, under the heading “community planning support”:

... providing resources needed to allow the Ministry to fully engage Aboriginal community processes to support the seamless devolution of services in a manner that respects aboriginal communities culture and values.

However, Chapters one, two and three have provided an evidentiary framework which has shown that the child welfare system and application of provincial laws are

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221 As cited in RCAP, Bridging the Cultural Divide: A Report on Aboriginal Peoples and the Criminal Justice in Canada (Ottawa: Supply and Services, 1996) at 41.

222 Johnston supra note 46 at 127

223 Supra note 131.
not working to the benefit of First Nations children, families and communities. Yet this very system is the system that First Nations must mimic. How then can the Ministry hope to support a seamless devolution of services in a manner that respects our culture and values when there has been no inclusion of First Nations traditions and in fact the current ideology of child welfare is antithetical to First Nations practice.

In light of the failure of the provincial system to address First Nations issues and concerns and to honour First Nations cultures, laws and traditions, First Nations must be provided with the capacity to resume self-governance over child and family services. As Armitage stated in his review of the Gove Inquiry:

> The case for separate Aboriginal child welfare systems rests in the need to reverse this historic imposition and to restore to Aboriginal communities the right to make policy decisions within their own cultural context.\(^{224}\)

Professor Kline has also articulated this solution to the problems endemic to the provincial child welfare system. Problems that were identified in the preceding discussion and solutions that will be advocated in this chapter:

> To transform ideology substantially, it is necessary to work on changing the material conditions and power relations responsible for its production and reproduction. In the child welfare context, this means addressing directly the power accorded to institutions of the dominant society to impose destructive child welfare regimes on First Nations in the first place. First Nations must be empowered financially, politically, and otherwise to develop their own child

\(^{224}\) Supra note 23 at 121.
welfare services outside the existing framework of existing provincial legislative regimes. This approach would be consistent with the current long-term strategies of many First Nations communities which are developing child welfare services with the more general goal of self government.\(^{225}\) (emphasis added)

This chapter reviews the various interpretations held by First Nations, provincial governments and federal governments of the right to self-government. Of crucial importance to First Nations is the failure of the state to support a transition to self-government which is premised on First Nations traditions, laws and practices. Instead, as described in chapter three, the only arrangement currently "available" to First Nations is delegation. An arrangement which imports provincial assimilative practices and beliefs.

Contemporary federal and provincial governments have expressed regret regarding their treatment of Aboriginal peoples. In 1997, the government of Canada issued their "Statement of Reconciliation"\(^{226}\) acknowledging the harm caused by their assimilative policies, and process of colonization. The provincial government, as well, made a similar acknowledgment in their Strategic Plan\(^{227}\). In this chapter I argue that the statements of regret offered by the provincial and federal governments have proved empty. Chapters one, two and three provided examples of the continuing application of assimilative policies - application of the provincial child welfare regime. The solution for First Nations is a transition enabling the

\(^{225}\) Kline *supra* note 22 at 424.

\(^{226}\) *Supra* note 171.

\(^{227}\) *Supra* note 94.
resumption of self-governance over child and family services. It is crucial at this stage in our history to displace the current colonial regimes with First Nations designed, delivered, controlled, and governed child and family services. This must occur as soon as possible in order to ensure the continued survival of our Nations, and foster the best interests of our children. We are in a state of crisis:

The incidence of SIDS deaths among aboriginal infants is approximately six times that among the non-aboriginal population. The youth suicide rate for aboriginal male youth aged 10-19 is over eight times as high as that of their non-aboriginal counterparts. For aboriginal female youth, the rate is 20 times greater than for non-aboriginal female youth. The death rate for young aboriginal children is three to four times that of children in the general population.\(^\text{228}\)

B. Federal Policy on Self-Government

In August 1995 the federal government announced in their Federal Policy Guide: Aboriginal Self-Government\(^\text{229}\) their policy on self-government. The Policy Guide acknowledges that the inherent right of self-government is an existing Aboriginal right recognized and affirmed under section 35 of the Constitution Act, 1982. It states that self-government must be exercised within the existing Canadian

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\(^{228}\) Children's Commissions 1998 Annual Report, supra note 41 at 61.

Constitutional framework and that the *Canadian Charter of Rights and Freedoms* must apply fully to First Nations governments as it does to all other governments "of Canada". The Department of Indian Affairs and Northern Development (DIAND) paper *Creating Opportunities: Progress on Commitments to Aboriginal Peoples* enunciated additional principles upon which the federal government's policy on the inherent Aboriginal right to self-government is premised:

- Due to federal fiscal constraints, all federal funding for self-government will be achieved through reallocation of existing resources. (emphasis added)

- Where all parties agree, rights in self-government agreements may be protected in new treaties under section 35, of the Constitution Act, 1982. They may also be protected through additions to existing treaties, or as part of a comprehensive land claims agreements.

- Federal, provincial, territorial and aboriginal laws must work in harmony. Certain laws of overriding federal and provincial importance, such as the *Criminal Code*, will prevail.

- The interests of all Canadians will be taken into account as agreements are negotiated.  

The federal government recognizes child welfare as an area which deals with matters that are internal to First Nations communities, integral to their distinctive culture, and essential to their operation as a government, it agrees with First Nations that this is a matter over which they could assume jurisdiction.

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231 Canada, Department of Indian Affairs and Northern Development, *Creating Opportunities: Progress on Commitments to Aboriginal Peoples* (Ottawa: Supply and Services, 1995).
Despite the federal governments commitment to self-government, to date, except for the Nisga’a, there have been no self-government agreements with First Nations that include jurisdiction over child welfare. No serious consideration has been given by government to negotiating self-government agreements for First Nations delivery of child and family services. Although the inherent right to self-government of child and family services acknowledged the existing model, in British Columbia continues to be limited to the delegated model\(^{232}\). Nor, has additional funding been provided to First Nations to actually negotiate self-government agreements or assist in the process/transition to self-government. To implement self-government agreements, the federal government describes in their policy a variety of mechanisms that can be considered, including treaties, legislation, contracts, and non-binding memoranda of understanding. These various arrangements must be explored with First Nations.

1. Gathering Strength: The Federal Response

The federal government, more recently, has continued to promote its commitment to self-government. In January 1998, the federal government issued its response to the Royal Commission on Aboriginal Peoples (RCAP) in its report entitled: Gathering Strength: Canada’s Aboriginal Action Plan\(^{233}\). The report reconfirms their policy on the recognition of the inherent right of self-government, but narrows their

\(^{232}\) There is one anomaly, Spallmucheen which exercises jurisdiction pursuant to their federal band by-law. The Spallmucheen by-law is discussed in chapter 3.

\(^{233}\) "Statement of Reconciliation" *supra* note 171.
commitment to the constitutional protection of self-government agreements by stating that only "certain provisions" in self-government agreements with First Nations may be constitutionally protected as treaty rights under section 35. The response also details how federal departments are continuing to devolve program responsibilities and resources to Aboriginal organizations, albeit under provincial laws and regulations. This, from a First Nations perspective, does not represent a transition to the resumption of First Nations self-government rights.

What continues to be problematic is the current insistence by both the federal and provincial governments that child welfare agreements be made under provincial statutory regimes. This presupposes that First Nations self-government will be the same or similar to provincial regimes and, implies that provincial regimes are superior to First Nations models or standards. A First Nation, upon signing a treaty or a self-government agreement, may have a fundamentally different approach to self-government than the existing provincially dictated operational structures. The provincial regime does not represent First Nations vision of child and family service delivery (chapters one, two, and three). It is important at this time in our history that energy and resources be directed at developing First Nations community visions of self-government. Community consultations and the resumption of traditional cultural values will best meet the needs of First Nations.
The federal government also noted in *Gathering Strength*, that it is committed to consulting with Aboriginal organizations, provincial, and territorial governments on appropriate instruments to recognize Aboriginal governments and that they are interested in consulting on the appropriate frameworks and principles which will guide jurisdictional and intergovernmental relations. Treaty lawyer Nancy Morgan has observed, however, that the Federal government's commitment does not necessarily reflect what happens in practice:

In summary, the federal government's policy on self-government has evolved considerably over the last two decades. However, First Nations involved in negotiations often find that these changes in policy are not reflected in the position the federal government brings to the negotiation table.\(^{234}\)

As noted earlier the federal government has not, except in the Nisga’a treaty, negotiated any child and family self-government agreements, Nor have either the provincial or federal government been willing to negotiate interim measures agreements for child and family services. The federal government states that it does not want to create the new legislation that is required to enable interim measures agreements\(^ {235} \).


Finally, the Department of Indian Affairs highlighted in their 1995 *Creating Opportunity* report\(^{236}\), that all federal funding for self-government will be achieved through the reallocation of existing resources. This poses a serious problem, the funding of child and family services is inadequate to address the impact of colonization and community models of self-government may at first be cost intensive because of the need to address social problems resulting from colonial practices. This should not deter federal or provincial governments from their moral responsibility to redress the impact of colonization.

C. British Columbia

*Research demonstrates that the incidence of youth suicide among aboriginal youth decreases to the degree that a band is engaged in preserving and restoring their native culture (as evidenced by such factors as participation in land claims and self-government activities), and to the degree to which health, education and other community services are band-controlled. This research found that among aboriginal bands actively engaged in such activities, the incidence of youth suicide was zero.*\(^{237}\)

In British Columbia, many First Nations are currently engaged in a new treaty making process. The First Nations Summit, an umbrella group which represents most of the First Nations in the process, holds bi-monthly meetings in order to collectively address pressing treaty related issues. Through the treaty process,

\(^{236}\) *Supra* note 231.

\(^{237}\) *Supra* note 41 at 62-3.
many First Nations will be seeking the resumption of their self-government right to
design, deliver, control and govern child and family services. Accordingly, it is
incumbent on the Ministry for Children and Families to enable the establishment of
an effective and culturally appropriate mechanisms for First Nations to achieve their
transition to self-government in this area.

On August 20, 1993, the First Nations Summit signed a Protocol Agreement with the
Province of B.C. for a three year term which was subsequently extended for another
period of three years until August 20, 1999 (now replaced by a new agreement).
That agreement includes in its preamble a number of commitments for the
negotiation of interim measures:

B. The Parties agree that a government to government relationship exists
   between First Nations and the Government of B.C.

D. The Parties want to facilitate the negotiation and implementation of
   interim measures between First Nations and the Government of B.C.

E. The Parties want changes in policy, legislation and regulations to
   facilitate the negotiation and implementation of interim measures
   agreements.

As mentioned in earlier discussion, section 4 of the Protocol Agreement set out the
scope of negotiations for interim measures including:
4.2(b) the jurisdiction and authority of First Nations in areas such as child welfare...

The former Children's Commissioner, Cynthia Morton, message in her 1998 Annual Report, highlighted the importance of beginning this work as soon as possible:

The federal and provincial governments and bands across the province do not yet share a clear vision of how best to meet the needs of aboriginal children on and off reserves. Treaty negotiations offer one means of resolving these long-standing and often neglected discussions about children, but in the meantime funding formulas and lack of clarity about roles and responsibilities continue to place aboriginal children at risk on reserves. Only when communities are given adequate resources for health, education and child welfare supports will we see healthier and safer aboriginal children across this province. This must be a top priority of all governments and child-serving agencies in the year to come.238 (emphasis added)

The blueprint for treaty making in B.C. is The Report of the British Columbia Claims Task Force (1991)239, which recommended, among other things, that the parties (federal, provincial and First Nations governments) should consider negotiating interim measures agreements when an interest is affected in a way that could undermine the treaty process. It would stand to reason that areas where government policies and practices have had the most impact on First Nations, should be given priority in the transition to self-governance. Surely, the continued survival of First

238 Supra note 41 at 7.

Nations' communities, culture, traditions and values is an interest worthy of negotiation.

The 1991 Task Force Report provided some examples of how interim measures agreements could be implemented:

...implementation of interim measures agreements may require changes in existing policies, legislation and regulations. Where existing legislation or regulations are a barrier to interim measures agreements, the provincial and federal governments are urged to enact enabling legislation or regulations which will give effect to such agreements...\textsuperscript{240}

Not only could interim measures agreements provide an avenue for First Nations to avoid some of the problems associated with the application of provincial laws and standards, they could be utilized as a useful way of testing new approaches to First Nations child welfare practice in order to determine "to determine its effectiveness"\textsuperscript{241}. Interim measures agreements could allow First Nations to build capacity and develop their vision of child and family service governance, a building block essential to determining the scope of negotiations for child and family services in final treaties. As the status quo, delegation, has not allowed for much flexibility given the current legislative constraints; and the negotiation of treaties may take years other options need to be explored. The urgency of First Nations self-governance is clearly illustrated by the research findings presented above - the survival of our children and the survival of our Nations. The Ministry for Children

\textsuperscript{240} \textit{Ibid.} at 65.

\textsuperscript{241} \textit{Ibid.} at 4.
and Families could facilitate the transition to self-government by negotiating interim measures agreements which honour First Nations aspirations, laws and traditions over this integral area.

The importance of examining this issue is underscored by the problems articulated earlier in this chapter, as well as preceding chapters and succinctly stated by that Professor Hudson from the University of Manitoba:

The issue that has been most problematic has been that of jurisdiction. This too is an essentially political issue... This issue is not just an affront to First Nations self-government aspirations, but the study found that working under the authority of the Act, and provincial regulations and directions pursuant to it, places some significant constraints on the ability of the agency to develop its own forms of practice that are more consistent with cultural values and the socio-economic circumstances of the communities.242 (emphasis added)

First Nations need to be working towards their vision of child and family in a pre-treaty environment incorporating a transitional process towards First Nations control and delivery of child and family services. According to a discussion paper prepared by the former Aboriginal Negotiations Branch it is not possible, until a treaty is signed, for First Nations to legally occupy the field of child protection except by delegation to individual workers. It notes that:

Many, perhaps all, of the aboriginal communities that decide to operate their own child welfare services will eventually enter into self-government treaties with Canada and the Province. The arrangements established by a DEA are

intended to apply in the pre-treaty period only. They are not intended to determine the course of treaty negotiations or their outcome.\textsuperscript{243}

Indeed, the Ministry for Children and Families position seems all to consistent with the overall approach described by Gary Youngman in his analysis for a governance project on child and family services:

From a governance perspective, the policy of the Province is to maintain ultimate control and jurisdiction over aboriginal children until treaties and/or self-government agreements change the status quo. Unfortunately, there doesn't appear to be any flexibility in this approach. Many First Nations feel the Province is acting in an adversarial fashion rather than a cooperative partnership approach to resolving differing perspectives in the negotiations.\textsuperscript{244}

The negotiation of interim measures would represent a positive step, transition, for both the Ministry and First Nations. In fact section 90 of the \textit{Child, Family and Community Services Act (CFCSA)}\textsuperscript{245} provides the Minister of the Ministry of Children and Families with the authority to make agreements with Indian Bands this could be read liberally to provide for the negotiation of interim measures agreements with First Nations.

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\textsuperscript{245} s. 90 of the CFCSA reads as follows: For the purposes of this Act, the minister may make an agreement with any of the following: (a) an Indian Band or a legal entity representing an aboriginal community.
The federal and provincial policies for self-government may differ but the end result is the same, as Youngman pointed out in a *Policy and Legal Analysis* paper:

The existing policies of the federal and provincial governments in regards to the recognition of self-government as an inherent right, clearly differ and demonstrate the varied approaches by each government. The federal government has done more to articulate its interests than the provincial government. Policy statements of government can often differ from the actual practice of administering and managing child and family services. For example, if it is recognized that First Nations have an inherent right to govern their children and families as a matter internal to their communities and integral to their culture, then there should be more flexible options available for how to exercise this recognized authority.... At this time the only option appears to be First Nations acceptance of provincial delegated authority. While this requirement is on a without prejudice basis to aboriginal rights, if the First Nation doesn't accept provincial jurisdiction, it cannot get federal funding. The current approach places First Nations in a take it or leave it position which promotes adversarial behavior and is not conducive to partnership building and cooperation.\(^{246}\)

The take it or leave it approach articulated by Youngman was illustrated in the Ministry for Children and Families paper regarding implementation of the *Liberating Our Children: Liberating Our Nations* (LOCLON) recommendations, which stated that:

- the Ministry of Social Services recognizes the inherent responsibility and authority of Aboriginal nations and communities in the development and delivery of social services;

- In the pre-treaty environment, though, the only way for the Ministry to provide that support is through the delegation of the authority of the Director, Child, Family and Community Services Act;

\(^{246}\) G. Youngman, *supra* note 244 at 41.
Discussions towards an actual transfer of authority (as opposed to its delegation) are therefore more appropriately addressed in treaty negotiations.\(^{247}\) (emphasis added)

In summary, the Province confines its relationship with First Nations to the fulfillment of their own expectations for child welfare practice and does not assist First Nations in the “process” of self-government. Thus reflecting the characteristics identified by Morse of colonial relationships in regarding the practice of child welfare:

... the decision making power concerning critical issues affecting the colonized lies in the hands of the colonizers; the dominate gives little weight to the values, lifestyle and laws of the dominated; the colonialists interact with the indigenous people in a manner that reflects the lower status and power of the latter; the colonizers import their standards, cultural values, laws, and systems and impose them on the colonized so as to eliminate the latter’s traditional structures.\(^{248}\)

D. First Nations

... First Nations and Inuit assert that they have never relinquished their inherent right of jurisdiction over the control and development of authorities and programs for their children by signing treaties or other agreements with the Crown.\(^{249}\)

\(^{247}\) *Supra* note 156 at 17.


The preceding chapters provided the evidentiary framework for my argument that Nations must resume their control and inherent right of governance over child and family services. Many commentators agree that the very survival of First Nations culture necessitates this\textsuperscript{250}. The solution is First Nations self-government. As stated by Hylton:

Solutions, not problems, should drive public policy development in Canada. There is ample evidence to suggest that these solutions lie in the direction of programs run by Aboriginal Peoples for themselves, that is, self-government.\textsuperscript{251}

First Nations argue that they have a constitutional right to the self-government of child and family services pursuant to section 35 of the Constitution Act of Canada. The following discussion, from a First Nations perspective, provides an overview of the inherent right of First Nations self-government of child and family services.

The Assembly of First Nations in their 1991 National Strategy on First Nations Child and Family Wellness enumerated a number of principles which were ratified by

\textsuperscript{250} Supra note 22.

resolution of the Chiefs in Assembly (June 10-15 1991). Some of the key principles included:

- First Nations have the inherent right of self-government, including the right to self-government regarding children and families. Therefore, this will include but will not be limited to:

  a) jurisdiction over children, regardless of residence;
  b) legislation for services; and
  c) standards for service.

- First Nations in the exercise of the right to self-determination, are entitled to develop and implement child and family wellness programs that address their distinctive rights and freedoms and their needs. The right to self-determination incorporates their right to address their history and traditions, their knowledge, their value systems and their, social, environmental, cultural and spiritual development.

- Child and family services for First Nations must be First Nations determined, First Nations specific, First Nations based and First Nations controlled.

- The federal government must maintain its trust responsibility and fiduciary obligation to First Nations including, child, family and community services.

- The AFN fully respects and acknowledges the exclusive domain of each First Nations government to develop policy and exercise jurisdiction according to community needs. The policy framework for First Nations child care outlined in this chapter is intended to assist First Nations in that process. 252

Clearly First Nations, are in the best position to determine what is in the best interests of our children.

E. Aboriginal Right to Self-Government

Currently the path to self-government is very much a Hobson's choice - not much choice at all.\(^{253}\)

The *Report of the Royal Commission on Aboriginal Peoples* (RCAP) underscored that the Aboriginal right to self-government is recognized and protected under section 35 of the *Constitution Act, 1982*, because it is an *inherent* right that was exercised for centuries before the arrival of European explorers and settlers. However, the *Report* also acknowledges that resumption and implementation of this right is hampered by the financial limitations of most Nations. In order to exercise the right to self-government significant fiscal resources are required.

From a First Nations perspective Section 35 of the *Constitution Act, 1982* recognizes and affirms the inherent right of self government over child and family services and provides constitutional protection for those rights. Section 35 reads in part as follows:

1) The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed.

The most direct way for First Nations to assume jurisdiction and control (self-government) is through the unilateral assumption of jurisdiction. This can be

effected by a First Nation passing its own laws, implementing customary law or simply taking control. Funding, which is only provided if First Nations assume provincial jurisdiction effectively curtails this option. In the absence of sufficient funding, federal and provincial political statements supporting our inherent rights are made in a vacuum. Morgan describes inherent laws as follows:

Inherent jurisdiction is an original source of authority that is not derived from an outside constitutional or statutory authority. Consequently, inherent jurisdiction cannot be withdrawn. Inherent jurisdiction is a critical component of a First Nation's inherent right of self-government. A First Nations inherent right to govern itself is not granted by any other government, rather the authority derived from the First Nations existence as a self-governing entity at the time of contact. There are two principal ways of exercising inherent jurisdiction. Firstly, a First Nation can enter into an agreement with the federal or provincial government which recognizes and facilitates the exercise of the First Nations inherent jurisdiction... Secondly, a First Nation may unilaterally assume jurisdiction, by for example, enacting laws, implementing customary law or simply taking control.²⁵⁴

One manner of recognizing Aboriginal rights is by negotiating agreements that are constitutionally protected. Morgan, however, observed that the only agreements between First Nations and other governments that are without doubt protected by section 35, are the original treaties entered into between Canada and First Nations and the modern land claims agreements between Canada, First Nations and provincial or territorial governments²⁵⁵. The thousands of other agreements signed by First Nations with other governments are probably not protected by section 35,

²⁵⁴ Supra note 234 at 15.
²⁵⁵ Supra note 234.
because they do not specifically stipulate that they are protected by section 35. It is possible for First Nations and the federal government to negotiate agreements regarding child welfare, though none at present have been negotiated or are being considered.

Case law to date has not recognized the governance of child and family services as an Aboriginal right. For example, a lower court in British Columbia found that section 35 did not include the right to govern child and family services (child protection) in Re Child and Family Services Act of B.C. the court states that:

Within any society there can be only one source of ultimate power or authority. Within modern democracies that is the properly constituted government. The right to determine if children are abandoned, or neglected or abused to the extent of being in need of protection, and the power to implement the appropriate remedies is an authority vested in every viable society. It is not something exclusive to aboriginal in general or to the aboriginal of Canada in particular. Being a feature common to all viable societies, I am satisfied it is not an aboriginal right as referred to in section 35(1) of the Constitution Act, 1982...

Arguably this decision is fundamentally flawed, because it fails to acknowledge that provincial child protection laws, are the very laws that have caused so much devastation to First Nations communities. This perspective of child protection laws ignores the fact that First Nations are different culturally and their laws and ways of governing are fundamentally different. The Judge, therefore, has not acknowledged what is inherent to First Nations governments.

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In contrast, the B.C. Court of Appeal held in Casimel\textsuperscript{257}, that customary adoption, is a right protected by section 35 of the \textit{Constitution}. The traditional practices of caring for children by extended family or other community members has therefore been embraced as an inherent right. Caring for children in this way, adopting them, is integral to First Nations' child and family self-governance. By analogy and by logical extension section 35 should apply to First Nations child and family self-governance.

The federal government has recognized that the governance of child and family services is a matter for self-government negotiations. In addition, under the self-government provisions in the Nisga'a treaty, governance over child and family services is included and is protected pursuant to section 35 of the \textit{Constitution Act, 1982}. The Nisga'a provision is an endorsement of what First Nations have always asserted, namely, that the right to self-government over child and family services is a constitutionally protected right.

In legal terms, the scope of First Nations inherent right of self-government remains uncertain. The Supreme Court has apparently accepted that Aboriginal peoples lived in self-governing communities on their traditional territories prior to European

contact. At the same time, in Regina v. Sparrow the Court asserted that sovereignty and legislative power were vested in the Crown. The Court addressed the subject most recently in Regina v. Pamajewon, where a number of individuals facing criminal charges relating to unauthorized gaming raised an Aboriginal rights defense claiming that the right to operate a casino on their reserve formed part of a "broad right to manage the use of their reserve lands". In rejecting this argument, and upholding convictions, the court clarified that in the future claims to an Aboriginal right of self-government will be treated in the same manner as other claims to Aboriginal rights under s.35 of the Constitution. In particular, the claimant must demonstrate that the activity or practice in question was integral to the distinctive culture of the Aboriginal group prior to contact with Europeans. The court hearing the claim must identify the precise nature of the activity claimed as a right and then determine whether it was a "defining feature" of the culture. The Supreme Court made it clear that rights of self-government framed "at a level of excessive generality" will not succeed. Instead, it is necessary to assess the particular activity in question in light of the specific culture and history of the group claiming the right. In this case, the Court found the general claim of jurisdiction to manage reserve lands overly broad and general. It characterized the activity as "high stakes gambling" and found there was insufficient evidence demonstrating that this was integral to the First Nation's culture prior to contact. Arguably the rearing of our

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children and the protection of children according to traditional laws and practices is integral to the distinctive culture of First Nations.

While the judicial definition of the scope of self-government must await further litigation, federal and provincial governments and First Nations are clearly proceeding to develop and implement self-government through treaty negotiations. I argue that the pace of these negotiations must be quickened and a transitional process should be put in place facilitating the resumption of First Nations self-government over child protection. Professor John Borrows, poignantly addresses the importance of liberating First Nations from the shackles of assimilation:

Our people are suffering. Native structures are operating under a burdensome stratum of alien regulation even though the legitimate source of power of our government extends from sovereign Aboriginal entitlement. The governing structures and sovereignty of our community must be liberated from the multiple tiers of imposed administration under which they operate...261

1. Consultation

In the past, consultation with First Nations has been ad hoc and infrequent. The Province has staff and resources that can develop First Nations child welfare programs. The First Nations have first hand experience and traditions that can benefit the provincial system. In our opinion the Province should be consulting with representative First Nations agencies such as the First

It is now firmly established in Canadian law that, as an aspect of the Crown's general fiduciary duty to First Nations, federal and provincial governments have a duty to consult First Nations about decisions that will, or are likely to, infringe their Aboriginal rights or title. To date, there has been very little if any consultation with First Nations regarding the infringements of their inherent jurisdiction over child and family services. The Supreme Court first identified the duty to consult in \textit{R. v. Sparrow}, where it stated that the Crown must justify any law that unduly infringes an existing Aboriginal right protected by s.35 of the \textit{Constitution}. As part of this justification, the Crown must show that it consulted with the affected First Nation prior to introducing measures that interfere with the exercise of the rights. In \textit{Delgamuukw v. British Columbia}, the Court stated that at a minimum the duty of consultation requires good faith consultation and meaningful efforts to substantially address First Nations concerns. It elaborated on the nature of the duty to consult in the context of Aboriginal title as follows:

The nature and scope of the duty to consult will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially

addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.  

The duty rests on the Crown in general, and, where there is more than one Crown authority involved in the infringement, the duty may be shared. The Crown's duty to consult arises in relation to Aboriginal rights established through litigation or agreement, but also extends to rights that have yet to receive formal recognition in court or by treaty. The Crown must "initiate a process of adequate and meaningful consultation...to ascertain the nature and scope of the treaty right at issue". Once the duty arises, the Crown must take three steps to fulfill it:

1) provide the affected First Nation with full information in advance on the activity likely to cause the infringement;

2) fully inform itself of the interests and concerns of the affected First Nation; and

3) make genuine efforts to consult with the First Nation.

To achieve meaningful consultation the Crown may also be required to implement a process marked by sensitivity to Aboriginal cultures and values. Where there is a

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265 Halfway River First Nation v. B.C. (Minister of Forests), [1999] B.C.J. No. 1880 (BCCA) per Huddart J.A.

266 Ibid.

prior agreement between the parties that is relevant to the infringement, the courts may impose an even higher standard of consultation on the Crown. An emerging issue is whether the duty to consult imposes a requirement that, if necessary, the Crown provide adequate funding to ensure meaningful participation by the First Nation.

First Nations have consistently asked that they be apprised of any legislative/policy or regulatory changes in the area of child and family services. Despite commitments on behalf of the Ministry for Children and Families, they have failed to provide this information; arguably an infringement of the Aboriginal right to govern child and family services.

2. Section 88 of the Indian Act

Section 35 has paramountcy over section 88 of the Indian Act. Woodward in his legal handbook on Aboriginal Law notes that:

"... through the operation of section 88 of the Indian Act, which gives some provincial laws federal force, a province may affect, regulate, diminish, impair or suspend Aboriginal rights - subject to section 35 of the Constitution Act, 1982. It is not clear that a provincial law, capable of referential incorporation as a law of general application, could survive a challenge on the basis of section 35."  

268 See e.g. Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans) (1997) 134 F.T.R. 246 (F.C.T.D.)

Arguably the Aboriginal right to govern child and family services is impaired by the application of provincial laws pursuant to section 88 of the *Indian Act*. Hogg in his book on *Constitutional Law in Canada* points out that:

The effect of s. 35 would be to require any provincial law that is adopted by s. 88 to pass the Sparrow tests of justification before the law could impair aboriginal rights.  

Would the *Child, Family and Community Services Act* pass such a test? The only way to extinguish an Aboriginal right is through constitutional amendment or with the consent of a First Nation through voluntary surrender. Neither of these requirements have occurred in the area of child and family services and arguably First Nations inherent Aboriginal right to govern child and family services continues to be denied and in fact impaired.

The Supreme Court of Canada in *R. v. Sparrow* set out a test for the determination of whether an aboriginal right has been infringed. Firstly does the legislation interfere with an existing Aboriginal right? A number of questions were posed by the court to determine if there is a prima facie infringement:

i) Is the limitation unreasonable?

ii) Does the regulation impose undue hardship?

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iii) Does the regulation deny holders of the right their preferred means of exercising their right?

iv) Does the regulation unnecessarily infringe on the interest protected by the right?

The court underscored that in answering the above questions one must look not at the purpose of the legislation but at the effect of the legislation. From a First Nations perspective the *Child, Family and Community Services Act* does deny First Nations the opportunity to exercise their right to self-govern child and family services according to their own laws and traditional practices. How a court would assess these questions is another matter. Certainly the B.C. provincial court Justice who heard the case (described above) did not agree with the arguments raised by the First Nation in question\(^ {271} \). However, if a court did find a prima facie infringement of the right to govern child and family services the next inquiry would be whether the *Child, Family and Community Services Act* could be justified as meeting a valid legislative objective. Certainly the protection of children from harm is a valid objective, however, the evidentiary framework provided in chapters one, two and three points to a conclusion that the provincial legislation has failed to support the safety and well-being of First Nations children. The *Sparrow* justification analysis consists of asking the following questions:

1. Whether there has been as little infringement as possible;

\(^{271}\) *Supra* note 256.
2. Whether fair compensation is available;

3. Whether the Aboriginal group in question has been consulted with respect to the legislation/regulation?

As argued above there has not been sufficient consultation; nor from a First Nations perspective has the infringement been as little as possible because the provincial child welfare regime has in effect ignored First Nations laws and imported assimilative practices on reserve.

3. Nisga’a Agreement

The Nisga’a are the only Nation in British Columbia to conclude a modern-day treaty\textsuperscript{272}. The Nisga’a may now develop their own laws and standards for child and family services which must be comparable to provincial laws and standards. To date the Nisga’a continue to operate their child and family services pursuant to their delegated enabling agreement. Until they are in a position to develop their own laws and standards provincial laws will apply; underscoring how problematic it is for Nations to not have an opportunity, prior to the signing of treaties, to research and develop their own standards and laws. At the very least interim measures could facilitate their process towards self-government. The Nisga’a must now start “from scratch” to develop their communities vision of child and family services and may be

\textsuperscript{272} Nisga’a Final Agreement, (August 4, 1998).
in a position to have to completely devolve their current method of child welfare practice which by necessity mimics the provincial system.

In the *Nisga’a Final Agreement* the provisions for the governance of child and family services are as follows:

89. Nisga’a Lisims Government may make laws in respect of child and family services on Nisga’a Lands, provided that those laws include standards comparable to provincial standards intended to ensure the safety and well-being of children and families.

90. Notwithstanding any laws made under paragraph 89, if there is an emergency in which a child on Nisga’a Lands is at risk, British Columbia may act to protect the child and, in those circumstances, unless British Colombians and Nisga’a Lisims Government otherwise agree, British Columbia will refer the matter back to Nisga’a Lisims Government after the emergency.

91. In the event of an inconsistency or conflict between a Nisga’a law under paragraph 89 and a federal or provincial law, the Nisga’a law prevails to the extent of the inconsistency or conflict.

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 and family services for Nisga’a children who do not reside on Nisga’a Lands.

93. Laws of general application in respect of the reporting of child abuse apply on Nisga’a Lands.

Section 89 requires the Nisga’a to make laws which include standards that are “comparable” to provincial standards. It is difficult to determine exactly what this means and the agreement does not stipulate who exactly will assess whether standards are truly comparable. The provincial Director of Child Protection would
probably be assigned this task; arguably importing his/her values from the mainstream system.

Section 90 of the Nisga’a agreement states that the Provincial Director of Child Protection can act to protect a child in the case of “emergency”. There is no definition or explanation provided regarding what would constitute an emergency. In effect, the provincial Director of Child Protection still would have the power to intrude on the day-to-day practice of the Nisga’a. In chapters one and two it was illustrated that the courts and child welfare practitioners have failed First Nations children in their application of the “best interests” test. The Nisga’a treaty leaves open the possibility that cross-cultural differences could still operate to the detriment of Nisga’a children and families.

Finally, section 92 of the Agreement does not clarify the provision of services to off-reserve Nisga’a citizens. The Nisga’a Agreement states that the Nisga’a and the province will negotiate and attempt to reach agreements respecting child and family services for Nisga’a children off reserve. It is unclear as to what would constitute an attempt to reach an off-reserve service agreement or what recourse may be available should such an attempt not be satisfactory to the Nisga’a.
4. Urban Self-Government

The Royal Commission on Aboriginal Peoples recognized the difficulty of establishing self-government for the large numbers of off-reserve First Nations people residing in urban areas. The Commission identified three main alternatives for urban First Nations governance that reflect varying degrees of autonomy: accommodation within existing public institutions; communities of interest; and nation-based government.273

In the context of B.C. the nation-based approach would from a treaty-making perspective be the most viable option. The nation based approach to urban self-government relies on the nation of origin as the basic unit of governance. The Commission acknowledged that many urban First Nations people maintain strong connections to their home communities and traditional lands. The Commission identified a number of models that might be used to achieve nation-based governance, including:

Extra-territorial jurisdiction

In this model, Aboriginal nations with a land base outside the urban area might establish urban institutions to serve their citizens living in urban areas, and make provision for political representation of urban citizens in the nation's governing body.

Host Nation

Where a municipality is located within the traditional lands of an Aboriginal nation, that nation could extend its authority and services to citizens of other nations living in the urban area. The nature of services and political representation would likely vary depending on the composition of the urban Aboriginal community.

**Urban Treaty Nation Governance**

This alternative envisions the creation of urban administration centers where citizens of treaty nations living in an urban area can access programs and services. The centers might be organized on the basis of treaty nations, treaties, or even groups of treaties.

The Commission acknowledged that for each of these models, the key challenge is establishing mechanisms for effective political representation and efficient service delivery, especially where the urban community is composed of Aboriginal people from a large number of nations.

The province has not entertained, in the pre-treaty environment exploration of these options. They have chosen instead to negotiate, as described in chapter three, with the Aboriginal Peoples Council for the urban self-government of child and family services. First Nations within the context of interim measures negotiations should be provided with the opportunity to further explore various options prior to the signing of final treaty agreements.

**F. Reconciliation**

The Ministry for Children and Families acknowledges the significant disruption in the lives of Aboriginal children, families and communities attributed to past
provisional child welfare practices. This acknowledgment signals the desire to engage in a reconciliation with Aboriginal communities to ensure the impact of past practices no longer hinders the healthy development of Aboriginal children and families.\textsuperscript{274}

Legal arguments can be advanced that the Aboriginal right of self-government for child and family services is being infringed. However, the key to rectifying this situation and the harm caused by the state is for the provincial and federal governments to accept moral responsibility for their destructive policies. The process of reconciliation must include appreciation for the fact that practices that have been identified by both governments as occurring in the past continue to occur today.

At its most general level, reconciliation represents "the action of bringing to agreement, concord or harmony."\textsuperscript{275} "Reconciliation" has become one of the watchwords of contemporary efforts to redefine the relationships between peoples, including the relationships between First Nations and Canada. In countries where ethnic, national or religious divisions have produced historic conflict between different groups, "reconciliation" is frequently the term used to describe the process of coming to terms with the past in order to create a just and equitable future.

\textsuperscript{274}Supra note 94 at 1.

\textsuperscript{275}Oxford English Dictionary, 2\textsuperscript{nd} Ed., 1989
More specifically, the process of national reconciliation has become a key objective in countries that are struggling to overcome the legacy of colonization. In South Africa, for instance, the transition to democratic rule has included the creation of a comprehensive program to address the injustices of the apartheid system. The Interim Constitution of 1993 set out the legal foundation for this reconstruction project in these terms:

**National Unity and Reconciliation**

This constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts in the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria, and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.
This constitutional statement formed the basis of the Truth and Reconciliation Commission, which has conducted ongoing public hearings into political crimes, human rights violations and other injustices committed during the apartheid era.\textsuperscript{276}

In the past decade, "reconciliation" has also become a keyword in Australia, which in 1991 passed legislation establishing a Council for Aboriginal Reconciliation with a ten year mandate to promote recognition of Aboriginal and Torres Strait Islander peoples as the original inhabitants of Australia and acknowledge and redress injustices associated with colonization. Among the Council's major tasks is the development of a "document of reconciliation" that expresses the principles which will govern the past and future relations between Aboriginal and non-Aboriginal Australians, and may eventually receive constitutional protection. Among other things, the draft "Declaration for Reconciliation" acknowledges Aboriginal and Torres Strait Islander peoples as "the original owners and custodians of traditional lands and waters", "respects and recognizes continuing customary laws, beliefs and traditions", and acknowledges that Australia was "colonized without the consent of the original inhabitants". It continues:

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.

Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.

\textsuperscript{276}Background information and key documents relating to South Africa's Truth and Reconciliation Commission may be found at the Commission's official web-site at www.truth.org.za. Review articles commenting on the legal, political, and philosophical challenges facing the Truth and Reconciliation Commission may be found in (1999) 49 U of T.L.J. 311.
We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.

And so we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.

Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.  

This theme of reconciliation, of recognition of Aboriginal peoples and redress of injustice as a necessary prelude to the restoration of harmonious relations, is also present in recent Canadian developments. Perhaps the most authoritative statement of this principle can be found in the evolving jurisprudence on the Aboriginal rights enshrined in s.35 of the Constitution. The Supreme Court of Canada has now firmly established that reconciliation is the central purpose of constitutional recognition of those rights, as described by Chief Justice Lamer in *R. v. Van der Peet*:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

> More specifically, what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards

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277 Background information about the Council for Aboriginal Reconciliation and related links may be found at the Council's official web-site.
the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.\(^{278}\) (emphasis added)

While the Supreme Court has identified reconciliation as the legal rationale for constitutional recognition of Aboriginal rights, the Royal Commission on Aboriginal Peoples has developed, through an exhaustive process of research and consultation, a comprehensive blueprint for reconciliation or a "renewed relationship" between Aboriginal and non-Aboriginal peoples in Canada. The basic principles of this renewed relationship are **mutual recognition**, which includes equality, co-existence and self-government; **mutual respect** for the basic humanity and distinctive cultures of other groups; **sharing of lands and natural resources**; and **mutual responsibility**.\(^{279}\) Through its recommendations, the Royal Commission emphasized that achievement of this renewed relationship will require a fundamental restructuring and rebalancing of political and economic power between Aboriginal nations and Canadian governments, and concerted efforts in the following key areas:

- Reconstitution of Aboriginal nations;
- Assumption of powers by Aboriginal nations;
- Reallocation of lands and resources;
- Provision of education and crucial skills for governance and economic self-reliance;


-Economic development to eliminate poverty and dependency.\textsuperscript{280}

As part of its response to the \textit{Report of the Royal Commission}, on January 7, 1998, the federal government issued their formal "\textit{Statement of Reconciliation}"\textsuperscript{281} which incorporates some of the key themes of renewal; recognition of the unique status of Aboriginal peoples as original inhabitants of Canada and stewards of its lands, waters and resources; and regret for injustices associated with colonization, including dispossession and forced assimilation through residential schools\textsuperscript{282}

This fundamental notion of reconciliation is also reflected in the recent history of treaty making in British Columbia. In 1991, the British Columbia Claims Task Force identified the reconciliation of competing interests as a central challenge in reformulating the relationships between Aboriginals and non-Aboriginals in the province:

As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship which recognizes the unique place of aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.

To the First Nations, their traditional territories are their homelands. British Columbia is also home to many others who have acquired a variety of


\textsuperscript{281}Supra 171.

\textsuperscript{282}Canada, Department of Indian Affairs and Northern Development, \textit{Gathering Strength: Canada's Aboriginal Action Plan} (Ottawa: Supply and Services, 1997) at 48.
interests from the Crown. In developing the new relationship these conflicting interests must be recognized.\textsuperscript{283}

Perhaps not surprisingly, in light of the foregoing, reconciliation is one of the principles incorporated into the preamble of the \textit{Nisga'a Final Agreement}, British Columbia's first modern treaty, which provides in part:

\begin{quote}
Whereas Canadian courts have stated that the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than litigation or conflict;

Whereas the Parties intend that this Agreement will result in this reconciliation and establish a new relationship among them...\textsuperscript{284}
\end{quote}

The Ministry for Children and Families \textit{Strategic Plan for Aboriginal Services}\textsuperscript{285} acknowledges the need for reconciliation, but this goal can only be achieved in consultation with the First Nations community. This discussion must start from the premise that the impact of colonization continues to plague First Nations communities and, in particular, that the imposition of provincial child welfare laws continues to have a destructive effect.

Within Appendix A of the \textit{Plan} the Ministry enumerated several measures to effect reconciliation:

\begin{supertabular}{l}
\textsuperscript{283} \textit{Supra} note 239 at 16.
\textsuperscript{284} \textit{Supra} note 272.
\textsuperscript{285} \textit{Supra} note 94.
\end{supertabular}
- Undertake discussions with Aboriginal communities toward participation by Ministry for Children and Families officials, at all levels, in reconciliation ceremonies, when and if desired by the local Aboriginal community.

- Ensure all ministry staff acquire an understanding of the history and cultural values of Aboriginal communities in their regions. This may include ministry participation in reconciliation ceremonies.\textsuperscript{286}

These offer an important starting place for reconciliation. Of greater significance and importance to First Nations would be a commitment by the Ministry to engage in discussions with First Nations about how best to support their transition to self-government.

In summary the federal government has a moral responsibility to commit to different funding arrangements with First Nations which would allow for research and development into customary practices and also allow for the provision of holistic and preventative services in their transition to self-government. The province must now embrace First Nations aspirations and acknowledge that there are different approaches to child welfare that can better serve First Nations children and support their safety and well-being.

G. Reparation

Sadly our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to the suppression of Aboriginal culture and values. As a country we are burdened with past actions that resulted in weakening the

\textsuperscript{286} Supra note 94.
identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some of the provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.\textsuperscript{287}

If reconciliation is a fundamental goal of restructuring the relationship between Aboriginal and non-Aboriginal peoples in Canada, reparation is one of the central mechanisms for achieving it. Reparation, broadly defined, is "the action of restoring to a proper state." More specifically, it refers to the act of remedying, making amends, or compensating for a past wrong or harm done. In this sense it is closely tied to the concept of restitution, and is a cornerstone of the common law of damages. Restitution may be defined as follows:

An equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in a position he or she would have been in, had the breach not occurred.\textsuperscript{288}

Both reparation and restitution, therefore, encompass measures designed to repair the damage, or make the injured person whole. Where possible, restitution involves acts that restore the original state of affairs, for example, the return of property improperly taken. Where it is impossible to do so, monetary compensation may be substituted to rectify, as much as money can, the harm done. The person responsible for making reparations, or restitution, is, of course, the person whose conduct caused the harm or injury.

\textsuperscript{287}\textit{Statement of Reconciliation, supra} note 171.

\textsuperscript{288}\textit{Black's Law Dictionary}, 6th ed. (West: Minneapolis, 1990)
In international law, the concept of reparation, which originally applied to relations between individuals, has been extended to address the conduct of states both with respect to individuals and to other states.

A state that has violated an international obligation is required to terminate the wrongful act and, in appropriate cases, to make reparation. What is loosely known as reparation may take two forms: reparation properly so called, or satisfaction. Reparation in its strict sense may in turn consist of either restitution pure and simple, or damages; or it may consist partly of restitution and partly of damages. The purpose of reparation is simply to restore the pre-existing conditions or to compensate for material injury.

Satisfaction is a term primarily applied to compensation for the moral or non-material consequences of an act for which a state is internationally responsible. Some of the common forms satisfaction may take include apology or amends of a diplomatic character. In some cases a pecuniary compensation is paid not as reparation for material wrong, but as an additional apology for the wrongful act committed.289

Similar principles also apply under Canadian domestic law, so that governments may be held responsible for injuries to citizens arising from government negligence or breaches of contractual or fiduciary obligations290

As noted previously, the Royal Commission on Aboriginal Peoples has outlined a detailed framework for restructuring the relationship between First Nations and Canadian governments. Though its recommendations undoubtedly go beyond the conventional remedies available through the courts, the basic thrust of the Commission's blueprint for a "renewed relationship" is consistent with the concept of reparations. The proposals are designed to remedy past and present injustice by


290 See e.g. P.W. Hogg. *Liability of the Crown*, 2nd ed. (Toronto: Carswell)
restoring First Nations' authority and capacity to develop and govern themselves on their own territories. To this end, the Commission identified a wide range of initiatives that may be summarized as follows:

**Statement of Principle**

The Commission proposed that a new Royal Proclamation be issued describing the key principles guiding the "renewed relationship", including acknowledgment of injustice and recognition of the unique histories, status and rights of Aboriginal peoples. It suggested that the Proclamation be joined with legislation creating the key institutions required to oversee the transition.

**Political Reorganization and Recognition**

The Commission viewed the nation as the fundamental political unit for Aboriginal peoples and anticipated that a period of internal political restructuring might be required to allow development of entities capable of exercising a broad range of government powers. A process to ensure recognition of newly formed Aboriginal governments would be established.

**Treaty Negotiation**

The Commission endorses the creation of a treaty process, organized through regional treaty commissions, and capable of addressing such matters as expansion of self-government powers, clarification or renewal of existing treaty commitments, and resolution of outstanding land claims.

**Redistribution of Lands and Resources**

The treaty process would serve as the mechanism to enable redistribution of lands and resources to First Nations to establish an economic base.

**Social Reconstruction**

The Commission envisions that Canadian governments will make a substantial financial commitment to ensure progress in each of four key dimensions of social, economic and cultural development: individual and collective healing; economic opportunities; education and training; and institution-building.291 (emphasis added)

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It is apparent that the Commission's blueprint for change encompasses the various elements of reparation referred to above. Canadian governments will hopefully make substantial financial contributions to support the various processes the Commission proposes for implementing the renewed relationship including support for First Nations resumption of child and family services governance.

In the Australian Human Rights and Equal Opportunity Commission's report entitled "Bringing them Home", reparation was proposed for the Aborigines in Australia for the removal of Aboriginal children from their communities. The report found the systematic removal of Aboriginal children from their communities to attend boarding schools was a gross violation of international human rights, genocide and racial discriminations and recommended that there be reparation to both individuals and communities. In particular the Commission recommended that:

42. That to address the social and economic disadvantages that underlie the contemporary removal of Indigenous children and young people the Council of Australian Governments:

In partnership with ATSIC, the Council for Aboriginal Reconciliation, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner and Indigenous community organizations dealing with Indigenous families and children's issues, develop and implement social justice packages for Indigenous families and children.

43a. 4. That every Indigenous community is entitled to adequate funding and other resources to enable it to support and provide for families and children and to ensure that the removal of children is the option of last resort; and

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43a. 5. That the human rights of Indigenous children will be ensured.

43c. 1. The transfer of legal jurisdiction in relation to children's welfare, care and protection, adoption and/or juvenile justice to an Indigenous community, region or representative organization...

Similar substantive recommendations should be implemented in Canada. We share a tragic history of colonialism with our cousins in Australia. Reparation and reconciliation must be addressed if First Nations communities are to become, once again, self-sustaining and self-governing. The Report of the Royal Commission Report on Aboriginal Peoples recommended that:

3.2.1 The government of Canada acknowledge a fiduciary responsibility to support Aboriginal nations and their communities in restoring Aboriginal families to a state of health and wholeness.²⁹⁴ (emphasis added)

H. Summary

In renewing our partnership we must ensure that the mistakes marked by our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country.²⁹⁵

²⁹⁴ Supra note 22.
²⁹⁵ "Statement of Reconciliation" supra note 171 at 5.
The federal policy on self-government recognizes child and family services as a core area of self-government. Despite this recognition, and despite First Nations clear articulation that this right is an inherent right, Governments chose to pursue policies which ensure the continuation of a colonist regime and assimilation. The federal and provincial governments continue to deny First Nations inherent right to fulfill their most important responsibility: to look after their children and to build a better future for their Nation. In order to effect change there must, as articulated by Justices Hamilton and Sinclair, be a drastic shift in thinking:

There must be a drastic shift in thinking about power and authority. The federal and provincial governments and their officials have to accept that Aboriginal people must have the necessary power and authority to govern themselves in this area. Impediments to the exercise of such power and jurisdiction must be removed.296

The federal and provincial governments have taken the first step in acknowledging that their past practices caused great harm and disruption. It is important that they now take the necessary next step forward for reconciliation and reparation to First Nations. First Nations peoples are anxious to engage in the process of decolonization and require the federal and provincial governments to do likewise. The Royal Commission on Aboriginal Peoples underscored the importance of establishing a new relationship:

Past social policy, based on false assumptions about Aboriginal people and aimed at their colonization and assimilation, has left a heritage of dependency, powerlessness and distrust. Establishing a new relationship based on mutual recognition, mutual respect, sharing and mutual

296 Supra note 27 at 264
responsibility in area of self-government is the challenge of the twenty-first century. Aboriginal people are anxious to put the past behind them and work with governments in Canada to meet that challenge. They are gathering strength for the task ahead.297

I do not endevour to propose definitive models for how individual First Nations undertake self-governance in the area of child welfare. First Nations in B.C. are made up of a complex mosaic of distinct cultural groups/tribes. They will all have different cultural traditions and practices that will form the foundation for the exercise of their Aboriginal right to self-government. There are, however, a number of principles, as articulated in Chapter one, that First Nations do share, for example, the importance of the extended family and the role of the community at large in problem solving and caring for children; rather than an emphasis on the individual child in isolation of their family and community. What I have endevoured to provide is a spectrum of options that should be explored and that could assist First Nations in their transition to self-government, with the caveat noted by the Royal Commission on Aboriginal Peoples:

We anticipate that the transition to self-government will proceed quickly in some Aboriginal nations and more slowly in others. Therefore our recommendations for policy and institution building are formulated to involve aboriginal people in decision making in existing jurisdictions and to accommodate easily a transition to Aboriginal jurisdiction when self-government is accomplished. The challenge will be to ensure there is a dialogue between policy makers and managers of new initiatives and emerging Aboriginal governments, so that momentum, efficiency, and continuity are maintained throughout the transition.298

297 Supra note 22 at 7
298 Supra note 22 at 6.
1. Options:

   i. Legislative Options

To advocate only piecemeal changes to legislative structures is to effectively accept that the lives of First Nations individuals who fall prey to the instruments of the child welfare system will not substantially change... The inevitable consequence will be the genocide of First Nations people.  

There are a number of legislative options that could assist First Nations movement/transition towards self-governance over child and family services (keeping in mind Monture’s caveat above) such as: section 90 of the Child, Family and Community Services Act which provides the Minister responsible for the Ministry of Children and Families (as opposed to the Provincial Director of Child Protection) with the authority to make agreements with First Nations.

Making agreements under this section of the Act should be further explored. Perhaps they could provide an avenue to better facilitate the transition to First Nations self-governance over child and family service delivery allowing First Nations some flexibility in the application of provincial laws in a manner that is more culturally sensitive and responsive to the needs of the community.

\[299\] Supra note 4 at 7.
The former Minister of Social Services, Joy McPhail in a presentation to the Legislature noted that the purpose of section 90 was for:

... The bill allows the Minister of Social Services to enter in agreements with Aboriginal organizations, bands and communities, enabling them to undertake full authority for the administration of this Act. This bill is an important first step in enabling First Nations to reassume jurisdiction and authority in the area of family and child services.\(^{300}\) (emphasis added)

Section 90 could be one way to acknowledge a government-to-government relationship with First Nations and facilitate interim measures agreements under the Act.

As well, section 91 of the *Child, Family and Community Services Act* (CFCSA) provides the Minister with the authority to designate one or more persons as Directors of Child Protection for the purposes of administering Parts 1 - 8 of the legislation. Designating First Nations directors as Provincial Directors of Child Protection is one way for First Nations to become more autonomous within the provincial regime. A First Nations Director(s) could explore ways of administering the legislation that would be culturally sensitive as well as sensitive to the needs of the communities.

A Ministry policy document, regarding the CFCSA from "an aboriginal perspective", notes that:

\(^{300}\) *Hansard*, Vol. 16 no. 4: 11530 (Minister of Social Services Joy McPhail).
s. 91 allows the Minister to designate the head of an Aboriginal agency as a director. Their authority will then flow from the Act rather than from a letter of delegation. Sections 90 and 91 work together so an agreement with a Band or community will set out who gets appointed, etc.\(^{301}\)

The Ministry has not entertained any notions of creating First Nation Directors, nor have they provided a rationale to explain their reluctance.

ii. Research & Development

First Nations agencies are not provided with the necessary financial resources by the provincial or federal governments for research and development initiatives. In order to properly prepare First Nations for governance over child and family services, money for research and development should be provided now acknowledging the failure of the provincial child welfare system and in the spirit of "capacity building" assisting the transition to self-government. To date, First Nations have not usually been consulted about what type of research projects would benefit their communities and who should be conducting the research, or more importantly who the researchers have been accountable to. The province has retained consultants to research various issues that affect First Nations yet this is done without First Nations involvement. For instance the development of the Strategic Plan for Aboriginal Services was developed without and consultation with First Nations yet implementation of this Plan directly affects First Nations.

\(^{301}\)British Columbia, Ministry of Social Services, CFCSA Overview: An Aboriginal Perspective (November 16, 1995) at 25
iii. Self-Government Agreements

First Nations in the resumption of self-governance of child and family services should be provided resources for their communities to research, record, and explore their traditional laws and practices in the area of child and family services. This work should be conducted on a nation by nation basis.

It is also possible, prior to the signing of treaties to negotiate self-government agreements regarding the governance of child and family services. Similar arrangements could be made pursuant to interim measures agreements.

iv. Social Justice Initiatives

As recommended in the Australian Human Rights and Equal Opportunities Report, social justice models which incorporate child protection as well as and community healing should be researched developed and funded.

v. First Nations Legislation

The Nisga'a Treaty includes a Nisga'a right to draft their own child and family laws. First Nations legislation could be implemented before or after treaty. The Governance Project cited as an example the First Nations legislation, drafted by
First Nations, that covers most Saskatchewan First Nation child and family services. A similar initiative could be undertaken in B.C. as a stepping stone/transition to self-government. Alternatively, a template could be researched and drafted on behalf of First Nations in B.C. for the post-treaty environment. The Provincial government should support this initiative in the spirit of capacity building and promotion of the best interests of First Nations children.

Conclusion

To transform ideology substantially, it is necessary to work on changing the material conditions and power relations responsible for its production and reproduction. In the child welfare context, this means addressing directly the power accorded to institutions of the dominant society to impose destructive child welfare regimes on First Nations in the first place. First Nations must be empowered financially, politically, and otherwise to develop their own child welfare services outside of the existing framework of existing provincial legislative regimes. This approach would be consistent with the current long-term strategies of many First Nations communities which are developing child welfare services with the more general goal of self-government. 303 (emphasis added)

Professor Kline’s comments succinctly reflect the goals and aspirations of First Nations for the self-governance of child and family services. The options presented in this thesis and true commitments to reconciliation and reparation on behalf of the state can begin the process of addressing what Kline and many other academics, social commentators and most importantly First Nations have been advocating - First Nations self-governance of child and family services.

I argued in this thesis that despite political promises and rhetoric to the contrary the federal and provincial governments’ policies, legislation, and regulations represent the continued assimilation of First Nations; under the guise of supporting First Nations attempts to resume governance over child and family services. The current provincial regime does not meet the needs of First Nations and no room has been provided for First Nations to engage in a transition towards the exercise of self-

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303 Kline supra note 22 at 424.
government. As argued in this thesis there currently is no transitional period, whereby First Nations can begin now to resume their rights to self-governance over child and family services, now. The transition from assimilative colonial laws and policies which use the underlying values, beliefs and practices of colonization as vehicles of change, must occur as soon as possible. The process must include and honour the development of First Nations laws and practices. The continued survival of First Nations depends on real commitments to change. In the Children's Commissioners 1998 Annual Report she made an important observation supporting self-government:

Research demonstrates that the incidence of youth suicide among aboriginal youth decreases to the degree that a band is engaged in preserving and restoring their native culture (as evidenced by such factors as participation in land claims and self-government activities), and to the degree to which health, education and other community services are band-controlled. This research found that among aboriginal bands actively engaged in such activities, the incidence of youth suicide was zero.  

First Nations are in crisis. We need to begin self-governance in this area now in order to restore balance and harmony to our communities based on our traditional values and beliefs. I am not so idealistic to believe that self-government will offer a panacea. This too was acknowledged by the Royal Commission on Aboriginal Peoples:

304 Supra note 41 at 63-3.
While we consider that protecting children's interests can be achieved best in the context of revitalized Aboriginal families, communities and nations, we do not underestimate the difficulties of turning ideals into reality.\textsuperscript{305}

In proposing alternative criminal justice models the Royal Commission acknowledged some of the difficulties First Nations will face in their resumption of traditional child welfare practices:

One thing is clear. Aboriginal society is not free of the sexism and violence that permeate the rest of Canadian society. The root causes of this problem may be somewhat different in Aboriginal society than in non-Aboriginal society, but this does not change the nature or the extent of the problem. Unless this acknowledge and concrete steps are taken to address violence, women and children will continue to be at risk in Aboriginal justice systems. On the positive side, programs such as the one at Hollow Water indicate that it is possible to design systems that emphasize holistic healing of all the parties affected by crimes of family violence and sexual assault. These represent a significant improvement over the way such cases are dealt with in the non-Aboriginal justice system.\textsuperscript{306}

First Nations will face difficulties, however, as witnessed by the Gove Inquiry, so to do the institutions of dominant society. It is important that First Nations not be admonished each time they may stumble in resuming their self-government right - so long as children remain honoured, cherished, and protected from harm. This was discussed by Justices Hamilton and Sinclair:

Every time an Aboriginal agency stumbles, some critics inevitably will cry out for its dismantling and a return to the old way. But, as we and other inquiries have concluded, the old way was neither the only way; nor the best way. The

\textsuperscript{305} RCAP \textit{supra} note 22 at 52.

\textsuperscript{306} Royal Commission on Aboriginal Peoples, \textit{Bridging the Cultural Divide: A Report on Aboriginal Peoples and Criminal Justice in Canada} (Ottawa: Supply and Services, 1996) at 274.
need for ongoing support and a commitment to Aboriginal child welfare agencies must be recognized and affirmed.\textsuperscript{307}

Finally, Ms. Debbie Foxcroft, a long-time advocate for First Nations children and one of the founding pioneers of the delivery of services to First Nations by First Nations poignantly points out that:

\begin{quote}
... we will make mistakes because we have embarked on a journey that has an uncertain outcome. But we also believe that we will correct these mistakes because we do not have a massive bureaucracy to move first. The Federal and Provincial governments believe they have experts who can teach us and guide us but the truth is that we have much to teach them...\textsuperscript{308}
\end{quote}

All First Nations need the opportunity to exercise their inherent right to protect their children. Too many generations have been subjected to the pain, dislocation, and loss caused by the imposition of colonial laws. I hope that the stepping stones I have provided will facilitate First Nations transition and resumption of self-government. We need to define our own journey and not continue on the path described by Judge Kimmelman as the "road to hell"\textsuperscript{309}. Not only do federal and provincial governments bear the responsibility to enable First Nations governance over child and family services our First Nation leaders must place the continued

\textsuperscript{307} Supra note 27 at 545.

\textsuperscript{308} Foxcroft, supra note 262.

\textsuperscript{309} Supra note 53.
survival of our children on the top of their agenda. Johnston observed over fifteen years ago, that many do not:

The child welfare issues has not received a high priority on the agenda of native leaders. Their attention has been focused on the constitution, land claims, and economic development... Although this appears to be changing, Native leaders in the past, with some notable exceptions, have been more prone to rhetoric than action when addressing the child welfare problem. In this respect, Native politicians are not so different from their provincial and federal counterparts.310.

The collective efforts of front-line workers and Directors of First Nations agencies to work together at the local, provincial and national levels will lead our First Nations leaders on the right path. In conclusion:

In the long run, recognition of our inherent right to self-government and the paramountcy of our family law provide the only legal framework for dealing with the protection and strengthening of our families and children.311

310 Supra note 46 at 126.

311 LOCLON, supra note 24 at 30.
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