THE ROAD BACK FROM HELL?
FIRST NATIONS, SELF-GOVERNMENT, AND THE UNIVERSAL GOAL OF CHILD PROTECTION IN CANADA

by

SONIA RUTH HARRIS

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Department of

The University of British Columbia
Vancouver, Canada

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Abstract

The Canadian child welfare system has increasingly found itself under attack for its treatment of First Nations children. The charge is made that it imposes a colonial regime on First Nations families which negates the importance of their cultural identity, and devalues their cultural practices and traditions. Self-government is consistently advanced as the only appropriate response. The question this thesis addresses is whether too much faith is placed in self-government, without sufficient protections for children in the communities.

The issue of First Nations child welfare is placed within the wider debates over the need for decolonisation in Canada. It is a premise of this thesis that First Nations hold an inherent right to self-government which demands respect for their sovereign authority in core areas such as child welfare. However, self-government is not a panacea for First Nations communities. The legacy of colonialism continues to manifest itself in the socio-economic problems prevalent on many reserves. These problems pose a direct challenge to self-governing child welfare agencies and to the safety of the children in their care.

This raises the dilemma of how to ensure the fundamental rights of First Nations children are effectively protected, whilst also respecting the ‘sovereign’ jurisdiction of First Nations communities. The attempts of non-native society to impose controls on First Nations governments, principally through the imposition of the Canadian Charter, are rejected on the basis they continue to perpetuate a colonial philosophy. However, adopting a theory of ‘rejuvenated universalism,’ and on the basis of a dialogue with three native controlled child welfare agencies in British Columbia, it is argued that agreement on
fundamental standards of child welfare could be forged across native and non-native cultures. It is suggested these standards should be guaranteed in a Children’s Charter binding all governments in Canada. A Children’s Charter which has been developed through fully inclusive cross-cultural dialogue, and which consequently reflects the values of all the various cultures, would provide an essential mechanism for the external evaluation and review of child welfare agencies in Canada, whether native or non-native, according to their own freely accepted values and principles.
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Introduction

On June 26th, 1984, Richard Cardinal, a seventeen year old Metis child was found hanging in the garden of his latest foster home. Richard committed suicide after a lifetime spent in the care of the Alberta social services. Between the ages of four and seventeen Richard experienced twenty-eight different placements in Alberta, sixteen of those were foster homes, twelve were group homes or a form of secure facility. By the age of six Richard was already in his eighth foster home after just two years in care. By the age of nine he was in his eleventh foster home. Four years was the longest Richard spent in any one home. By the age of thirteen he was experiencing psychological problems manifested by bed-wetting, getting into trouble with the law, and failing at school. At the age of sixteen he was arrested for shop lifting and placed on probation. He had already attempted suicide twice. Richard spent the last two years of his life in various youth homes and shelters before his final placement. After one failed attempt at suicide, he finally hung himself from a tree in the back garden. A judicial inquiry into his suicide shocked Albertans. Presided over by Justice White of the Provincial Court, the Inquiry revealed "serious inadequacies in the provincial child welfare system." The death of Richard Cardinal initiated a large-scale review and eventual reform of child protection in Alberta. His suicide provides a shocking example of the non-native system failing a native child.

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1 *Richard Cardinal - Cry from the Diary of a Metis Child*, Canadian Film Board, 1986.


3 See pp. 33 - 91 above, for an analysis of the 'non-native child welfare system' and the exclusion of First Nations perspectives.
On May 17th, 1997, the Nisga’a Tribal Council and the British Columbia Ministry for Children and Families announced that the Nisga’a Nation located in the Nass Valley were to begin the process of retaking control over their community’s child welfare. The statement explains that in recognition of the inherent right of the Nisga’a people to jurisdiction over child welfare, they would initiate the first of a number of phases, the ultimate aim of which would be the introduction of Nisga’a legislation providing the mandate for a fully autonomous Nisga’a controlled child welfare agency. The Nisga’a thus become the latest First Nations community to attempt to prevent tragic deaths like Richard Cardinal’s by removing child protection from the jurisdiction of the province and returning it to the community. Over 45000 Indian people on reserves, and more than 28000 off-reserve Indian people in Canada, are now served by native controlled child welfare agencies. By 1987, twenty per cent of the bands across Canada had been successful in establishing agreements with the federal and provincial governments to run their own programs. The number continues to grow. For example, by 1991 in British Columbia, 133 out of 196 bands were involved in some level of formal planning to undertake


6MJI, ibid. at 530 - 531.

7 British Columbia, Family and Children’s Services and Ministry of Social Services and Housing, Protecting our Children, Supporting Our Families: A Review of Child Protection Issues in British Columbia (Victoria, B.C. Ministry of Social Services) at 56 [hereinafter Protecting Our Children].
responsibility for providing child welfare services to their families and children. The Nisga’a, as part of their larger aim of self-government, will thus, with many other First Nations communities, take the first tentative steps towards establishing a parallel child welfare system that is free from the damaging intervention and control of the dominant non-native ‘colonial’ government.

It is rare to find academics, judges, and political leaders of whatever persuasion in agreement, especially on an issue so emotionally charged and difficult as child welfare. However the issue of First Nations child welfare would appear to be the exception to the rule. There is striking agreement, particularly among the academic community, that the policies and practices of the Canadian federal and provincial governments over the last century on the welfare and protection of First Nations children are indefensible. Support

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for the actions of the two levels of governments is conspicuous by its absence. What is even more striking however, is that not only are these voices united in criticism, they are also united in the solution. The solution consistently asserted is First Nations self-government, integral to which is autonomous control of their own child welfare, free from the ethnocentric laws, standards and scrutiny of the provincial or federal governments.  

The contention that self-government is the answer in the sphere of child welfare, is often presented in the literature as a self-evident truth, appearing in the last paragraph following a convincing castigation of the existing system. Similarly politicians tend to emphasise child welfare as an obvious example of the powers which would be central to a self-governing First Nations community. However, very little attention is being paid to the implications of self-government for the children within those communities. The blind faith being placed in First Nations control over child welfare, within a regime of self-government, is a cause for concern. Whilst recognising that there have been clear governmental violations of First Nations human rights in the sphere of child welfare, there


Ibid.

are grounds for concern that this vulnerable group will be no better protected by their own communities if control over child welfare is restored. Self-government may well prove to be fundamental to addressing the devastating effects of colonialism, including the restoration of the family, but the concern this thesis will address is that too much trust is being placed in this institution without sufficient fall back protection for children in the communities.

On March 6, 1988, Lester Desjarlais shot himself at the home of his latest foster parents. He was fifteen years old. Lester was a member of the Sandy Bay reserve community in Manitoba. His life had been destroyed by horrific physical and sexual abuse at the hands of his family, and those in places of trust within the community. By the time of his death Lester was drinking heavily, sniffling solvents, and shoplifting. At the time of his suicide Lester was a ward of the Dakota Ojibway Child and Family Services, a native controlled child welfare agency operating under provincial mandate. Lester had been their client from 1982 when the Dakota Ojibway Tribal Council assumed responsibility for the community’s child welfare. At the Inquiry into his death Justice Giesbrecht was absolutely damning of Dakota Ojibway,

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13 Manitoba, Office of the Chief Medical Examiner, The Fatality Inquiries Act: Respecting the Death of Lester Norman Desjarlais (Brandon: Ministry of Social Services and Housing, 1992) (Associate Chief Judge Brian Dale Giesbrecht) [hereinafter Desjarlais Inquiry].

14 Dakota Ojibway exercises delegated powers of child protection from the Director of Child Welfare of Manitoba. The structure of the agency was determined by the Dakota Ojibway Tribal Council but the agency operates under provincial legislation and is ultimately answerable to the province. The agency has a centralised structure under the auspices of Dakota Ojibway Tribal Council, with regional offices providing services to the reserve communities.
"It was negligence and incompetence pure and simple...The agency that was supposed to be protecting the boy was compounding his agony...The inmates were running the asylum.“

Justice Giesbrecht presented a portrait of a child welfare agency that was headed by unqualified, incompetent staff; an agency that was rendered useless by political interference and manipulation by powerful families on the reserve; an agency trying to serve a community in total denial of rampant violence and sexual abuse, denial that existed even within its own staff; and an agency that was abandoned by the provincial government at the earliest opportunity. Clearly self-governing child welfare agencies are not a panacea, and bring with them their own dangers and risks for the safety and well-being of First Nations children. The death of Lester Desjarlais provides a shocking example of a native child welfare agency failing a native child.

Child welfare is a problem to which no community can claim to have the perfect solution. No matter how sophisticated and carefully developed a child welfare system is, children continue to be abused and children continue to die. The extent of the problem of child abuse and neglect in many First Nations communities is a tragic legacy of colonialism. The circle of abuse initiated by the residential schools continues to be perpetuated today by the provincial child welfare system. However although exacerbated by the forces of colonialism; child abuse and neglect is not a phenomenon restricted to the First Nations people. Child abuse and neglect would seem to be a common experience which crosses cultural and national boundaries.

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15 Desjarlais Inquiry, supra note 13 at 35 - 36.
On July 9th, 1992, Matthew Vaudreil, a non-native boy, died in Vancouver.\footnote{British Columbia, \textit{Report of the Gove Inquiry into Child Protection in British Columbia: Matthew's Story}, vol. 1 (Vancouver, B.C., 1995) [hereinafter \textit{Matthew's Story}].} In 1994 his mother pled guilty to his manslaughter. His “tortured” body was a disturbing testimony to the neglect and abuse he had suffered throughout his five and one half years. For the duration of his short life Matthew had been a client of the B.C. Ministry of Social Services. Despite numerous reports of the abuse and neglect of Matthew, and his mother’s own history of an abusive childhood leading to severe emotional and coping difficulties, problems which were known to the Ministry, it failed to protect Matthew. In the words of Justice Gove who headed the Inquiry into Matthew’s death,

> “Although the Ministry’s legal and financial authority was to protect Matthew, services were in fact directed more to the benefit of his mother. The Ministry, its employees and contractors lost sight of why a child protection service exists, and who they were supposed to be protecting... The safety and well-being of the child were not paramount in the Ministry’s handling of Matthew’s case.”\footnote{\textit{Matthew’s Story}, \textit{ibid.}, at 6.}

The death of Matthew provides shocking evidence of the non-native system failing a non-native child.\footnote{A very similar case to that of Matthew Vaudreil has recently been the subject of a report by the B.C. Children’s Commissioner. The problems identified after Matthew’s death were apparent in this case including a lack of communication between service providers and the ability of the mother to control and manipulate the child protection staff. Mavis Flanders died of a heroin overdose in March 1997 and it was six days before her body and her 22 month old son Chabasco were found. See Children’s Commissioner’s report released July 1997. Justine Hunter, “Workers Reject Blame for Addict Mom” \textit{The Vancouver Sun} (Saturday July 5, 1997) at A1 and C1.}

The problem of how to protect children from abuse is one that echoes through the corridors of power around the world. The provincial and First Nations governments are not immune to these challenges. Native and non-native child welfare systems will face
common problems protecting the children within their respective jurisdictions. The immediate dangers are perhaps greater for First Nations children as their communities battle against the difficult social and political problems left as the legacy of colonialism.\(^{19}\)

However this paper will contend that the potential dangers of self-government for First Nations children can be mitigated if the future of child welfare in Canada is one that is characterised by a sharing of knowledge and co-operation, not by division, exclusivity, and cultural chauvinism by all sides.\(^{20}\) There is clearly an urgent need to make room for all cultures to have an equal voice in developing appropriate child protection in Canada. However, whilst respecting their cultural autonomy and diversity, it will be contended that the cultures should continue to work together through a new and open discourse. It is hoped that the product of this co-operation will be the elucidation of common ground across the cultures, common ground that will form the basis for fundamental principles and standards that will apply to native and non-native child welfare agencies across Canada.\(^{21}\) This thesis will suggest that the autonomy of First Nations people can be respected, whilst ensuring that minimum accepted standards of child care and protection are maintained. In essence this study will advocate the development of a culturally legitimate Children’s Charter which binds both First Nations, provincial, and federal governments in their policies and practices towards the children in their care.

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19 See chapter 3 pp. 196 - 216, below, for a discussion of the social and economic legacy of colonialism in First Nations communities.

20 See in general chapter 5, below, for a discussion of post-colonial concepts of “power-sharing” and the questioning of cultural fundamentalism in a post-colonial State.

Chapter One
The Argument for Self-Government and First Nations Control Over Child Welfare -
the Problems with the Current System

"The road to hell was paved with good intentions and the child welfare system was
the paving contractor."\textsuperscript{22}

An apparent consensus exists that self-government is the answer to avoiding
another tragedy such as that of the death of Richard Cardinal.\textsuperscript{23} But why is there such a
strength of feeling in support of a fundamental restructuring of First Nations child welfare
in Canada? Is the current system really so indefensibly bad? The reasons which are
frequently purported to dictate the necessity of First Nations self-government, including
control over child welfare, lie in the colonial relations between the Canadian Government
and the First Nations people. Certainly the current debate over the future of First Nations
child welfare in Canada cannot be appreciated without placing the issue within the context
of colonialism, for it is this colonial history which makes self-government seem like such
an obvious and necessary solution. It is now common to hear the claim that the Canadian
Government's intervention in the lives of First Nations families and communities
amounted to 'cultural genocide'.\textsuperscript{24} That policy of intervention has been strongly
condemned.\textsuperscript{25} The history of government intervention is dominated by the residential

\textsuperscript{22} \textit{No Quiet Place}, supra note 9 at 276.

\textsuperscript{23} \textit{Supra} note 10.

\textsuperscript{24} Cultural genocide has been characterised as a campaign directed at the complete destruction of a
distinctive culture and communities, with the long-term objective being the total assimilation of its people
into the dominant society. See \textit{Liberating Our Children}, supra note 9 at 16.

\textsuperscript{25} \textit{Supra} note 9.
schools which are widely accepted as the early stronghold of the Government's assimilationist policy, and thus the principal tool of cultural genocide. The residential schools are thought to have initiated a 'circle of abuse,' which is perpetuated today by the practices of the provincial child welfare agencies, the ethnocentricity of child welfare legislation, and the continuing prejudice and 'colonialism' of the judiciary. Together these incidents of government intervention in the lives of First Nations children are argued to have contributed to a social and cultural crisis in many communities. Supported by statistics and case law, these arguments provide ammunition for the condemnation of the current treatment of First Nations children in Canada. It is through self-government that the First Nations people seek to reclaim their children, and thereby their communities.

The critics of the current provincial child welfare system make clear one irrefutable point: the child welfare system in Canada has failed First Nations children and families. The general force of their arguments cannot be denied and they present a convincing case that changes have to be made. Their indictment of the Canadian child welfare system is therefore presented here in a fairly uncritical form. However, whilst supporting the basic position that changes have to be made, certain aspects of the critique of the current system will be questioned throughout the thesis. In particular, the analysis presented by many scholars of the provincial child welfare system tends to be supported by false dichotomies

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26 See especially, "A Vicious Circle" supra note 9; "Best Interests of the Child Ideology" supra note 9; Carasco, supra note 9; "Colonisation of Native People" supra note 9.

27 See below at pp. 26 for the available statistics on First Nations children in care.

28 See below at pp. 56 - 88 for a critical analysis of the case law.
between the native and non-native cultures, and by an overly simplistic analysis of the 'colonial' relations between native and non-native Canada. Insufficient attention is also paid to differing circumstances in individual communities. For example, traditional child welfare practices may still be prevalent in some communities, but in others they are not. This precludes an even-handed analysis of alternatives to self-government, such as the continuing reform and sensitisation of the present child welfare system. In looking at the implications of self-government for First Nations children this thesis will therefore complicate some of the assumptions and arguments often made about First Nations culture, and the inability of the dominant system to respond sensitively to existing differences.

1. The Legacy of Colonialism

1.1 The Residential Schools

The issue of First Nations child welfare is often dominated by the tragic history of residential schools.\(^29\) The imperial government, through tools of language, literature, religion and education, established a ferocious civilising mission in Canada aimed at eradicating the 'savage' Indian in the child and effecting the assimilation of the 'barbarian other' to the 'superior white culture'.

\(^{29}\) For the most recent analysis of the history and impact of the residential schools see Royal Commission on Aboriginal Peoples, The Report of the Royal Commission on Aboriginal Peoples. Looking Forward Looking Back, vol. 1 (Ottawa: Minister of Supply and Services, Canada, 1996) [hereinafter Looking Forward Looking Back]. For the most detailed and scholarly history on the residential schools to date see J. R. Miller, Shigwauk's Vision (Toronto: University of Toronto Press, 1996). See also MJI, supra note 5 at pp 511 - 516; Liberating Our Children, supra 9 at pp 18 - 19; J. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989) [hereinafter Skyscrapers Hide the Heavens]; Celia Haig-Brown, Resistance and Renewal: Surviving the Indian Residential School (Vancouver: Tillacum Library, 1988) [hereinafter Resistance and Renewal].
"Europeans assumed the superiority of their culture over that of any Aboriginal peoples. Out of that misconception grew the European conviction that in order for the Indians to survive, they would have to be assimilated into the European social order."30

The underlying assumption behind this conviction was that the First Nations were a dying race, and the only way in which they could survive was to become ‘civilised’ and assimilated with European society.31 The federal government determined that assimilation of First Nations people into the dominant society could not be successfully achieved without first ‘civilising the savages’ and this demanded that First Nations children be forcefully removed from their families and their communities to isolate them from all ‘contaminating influences’.32 Nicholas Davin was sent to the United States to report on their “aggressive civilisation policy”, and he similarly concluded that the only way to civilise the aboriginal people was to remove their children from disruptive influences.33 He concluded his report to Ottawa with the words,

“if anything is to be done with the Indian, we must catch him young.”34

The government thus turned to the established church and missionaries to carry out this policy through the medium of ‘large, racially segregated, industrial” residential schools


31 MJL, supra note 5 at 513.

32 Ibid.

33 Ibid.

34 Report on Industrial Schools for Indians and Half-Breeds, by Nicholas Davin (Ottawa: Public Archives, 14th March, 1879) (cited by MJL, ibid. at 513).
based on the American model. As the Royal Commission on Aboriginal peoples recently recognised, the unequivocal purpose of the residential schools was to ‘kill the Indian in the child’. The “substandard” education the children received was a secondary concern. The paramount goal was to rid them of their language and culture. Speaking in 1920 to the House of Commons, Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs, articulated the federal government’s aims,

“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 this Bill.”

This policy was pursued with vicious determination in the residential schools. First Nations children were punished for speaking their native languages, taught to be ashamed of their ‘savage’ history and culture, whilst the achievements and virtues of European society were ‘naturally’ glorified. The attempt to rid First Nations children of their language and culture was often brutally effective as described by one former resident,

“The elimination of language has always been a primary stage in a process of cultural genocide. This was the primary function of the residential school. My father, who attended Alberni Indian residential School for four years in the twenties was physically tortured by his teachers for speaking Tseshaht: they pushed sewing needles through his tongue, a routine punishment for language offenders... The needle tortures suffered by my father affected all my family (I

35 Ibid.


37 MJII, supra note 5 at 514. See also Liberating Our Children, supra note 9 at 17.

38 MJII, ibid.

39 Cited in J. R. Miller, Skyscrapers Hide the Heavens, supra note 29 pp 206 - 207 (cited by MJII, Ibid.).

40 Liberating Our Children, supra note 9 at 19.
have six brothers and sisters). My dad’s attitude became ‘why teach my children Indian if they are going to be punished for speaking it?’ so he would not allow my mother to speak Indian to us in his presence. I never learned how to speak my own language. I am now therefore, truly a ‘dumb Indian’.” (Randy Fred)  

The most appalling legacy of the residential schools was the horrific physical, sexual and emotional abuse. In many cases the school officials appear to have attempted to literally beat the Indian out of the child,

“The boarding schools taught us violence. Violence was emphasised through physical, corporal punishment, strappings, beatings, bruising and control. We learned to understand that this was power and control.” (Janet Ross)

The effects of residential schools on First Nations people was profound and has caused a continuing crisis in the communities. Generations of First Nations children spanning from the late nineteenth century to the late 1960s have grown into adults who are ashamed of who they are, despise everything so essential to their identity, who do not know or are too scared to speak their native language, who will not or cannot express and pass on their cultural values and traditions, and who know nothing of a loving and caring family. All they know is discipline administered through violence and abuse. This violent regime initiated a ‘circle of abuse’ which continues to tear many First Nations communities apart.

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41 Randy Fred, “Introduction” in Celia Haig-Brown, Resistance and Renewal supra note 29 at 1-2 (cited by the MJII, supra note 5 at 514).

42 MJII, ibid.; Liberating Our Children, supra note 9 at 18-19.

43 Cited by MJII, ibid. at 515.

44 Ibid.; Liberating Our Children, supra note 9 at 18 - 19.

45 Liberating Our Children, ibid. at 19.

46 Ibid.
Crucially it caused a breakdown in traditional native methods of child-rearing and parenting, including the traditional role of the extended family.\(^\text{47}\) Many parents simply did not know how to parent, having never been ‘parented’ themselves.\(^\text{48}\) Abuse was often the only tool they knew in dealing with children,

‘For many victims of the residential school system, not only were cultural values lost, but the experience of family relationships and the natural process of parenting were lost as well. In their place was substituted an example of child care characterised by authoritarianism, often to the point of physical abuse, a lack of compassion and in many cases, sexual abuse. For those victims, the residential school system blurred natural limits on what normally would develop as mature love and sexual relationships.’\(^\text{49}\)

Clearly the issue of child welfare cannot be discussed without appreciating the devastating effect of the residential schools on First Nations family life, and without recognising the complicity of the federal government in a policy which in essence amounted to an attempt by a colonial government at cultural genocide.

1.2 Provincial Education - 1960s to 1990s

The charge of cultural genocide does not however end in history with the residential schools. The government’s policy of ‘civilising’ and ‘assimilating’ would appear to have extended well into the 1970s, and many commentators claim that the practice of cultural genocide still continues today through the child welfare practices of the provincial

\(^\text{47}\) Ibid. at 22; \textit{MJI, supra} note 5 at 515.

\(^\text{48}\) \textit{Liberating Our Children, ibid.}; \textit{MJI, ibid.}

\(^\text{49}\) \textit{Liberating Our Children, ibid.} at 18 - 19.
In the 1960s the Government turned away from the medium of the residential school as a tool of assimilation in search of a more effective method. Residential schools had continued to separate and exclude, rather than integrate, and thus a new solution was agreed upon whereby the special status of the First Nations people would cease. ‘Special and separate status’ became the convenient excuse for the ‘isolation, poverty and discrimination’ so clearly suffered by the First Nations people. The equal status of First Nations people in Canadian society was now to be sought by absolute assimilation. To ensure ‘that the Indian people could participate equally and achieve their full potential as Canadians’, the federal government believed it was necessary for them to receive services ‘through the same channels and from the same government agencies’ as all other Canadians. Central to this new policy was education, and as part of the solution the residential schools would be closed, and First Nations children would be educated within the mainstream public system with all other Canadian children. The government’s new policy was encapsulated in the White Paper of 1969 which proposed the abolition of any special and separate status for Indian people by, for example, repealing

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51 MJI, supra note 5 at 514.


53 Ibid.

54 This policy built upon the work of anthropologist Diamond Jenness and his ‘Plan for Liquidating Canada’s Indian Problems within 25 Years.” His core proposals were to abolish Indian reserves, scrap the treaties and integrate Indian students into the public school system. MJI, supra note 5 at 514.
the Indian Act and phasing out the Department of Indian Affairs.\textsuperscript{55} Although the white paper resulted in a humiliating defeat for the Government after an outcry by the First Nations communities who interpreted the policy as a threat to their distinct identity and culture,\textsuperscript{56} the residential schools were successfully closed and First Nations children were transferred into the mainstream public education system.\textsuperscript{57} Again, however, the negative image of the Indian as savage was imposed upon First Nations children through the teachings and history texts of the white education system.\textsuperscript{58} No provision was made for education in their own language, or for learning their own values, culture, traditions, and history, except as perceived through the eyes of the dominant colonials. First Nations children were again exposed to a system which although not engaging in physical and sexual abuse, continued its emotional abuse through the rape of their identity, and through its alienating forces. The objective of the mainstream education system, although more subtle than the residential schools, was still to make First Nations children 'white' on the inside by instilling in them and extending to them the 'benefits and values' of white society. Thus the ethos of the residential schools continued and still continues to a large degree today.

\textsuperscript{55} "Spallumcheen Indian Band By-Law," \textit{supra} note 52 at 83.


\textsuperscript{57} \textit{MJI, supra} note 5 at 514.

\textsuperscript{58} The problems with the mainstream education system were countered to some degree in the early 1970s by many First Nations communities taking control of their own education at the local level. See F. Cassidy and R. Bish, ed., \textit{Indian Government: Its Meaning in Practice} (Lantzville: Oolichan Books, 1989) at 10.
1.3 Provincial Child Welfare - 1960s - 1990s

However, an even greater force of cultural genocide than education had now appeared within the First Nations communities: the white professional social worker. During the 1960s the jurisdictional debates over the delivery of child welfare and protection services to the First Nations communities came to a head. Child welfare is generally the responsibility of the provincial government. However, until the 1960s, the provincial government had taken the position that the delivery of child welfare on reserves came under the jurisdiction of the federal government as a matter pertaining to Indians and lands reserved for Indians. Consequently, prior to the 1950s it was rare for

59 The following critique of the child welfare system, including the work of social workers and the judiciary, is based on literature which takes a strong critical approach, supra note 9. However the arguments presented will be challenged in various ways throughout the thesis. In particular see chapter 5 which argues that the cultural differences between the parties are not so polarised as often suggested, and that the provincial child welfare system has responded well to the colonial charges laid against it through changes in social work philosophy, legislative amendments, and increased sensitivity among the judiciary.


61 In 1938 the Supreme Court of Canada held that child protection and adoption were subjects entirely within the control of the provincial legislatures: Reference Re Adoption Act [1938] S.C.R. 398; "Child Welfare and the Native Indian Peoples" ibid. at 301.

provincial child welfare services to be offered on Indian reserves. Children in need of protection were apprehended by the Indian agent and either placed with another family on the reserve or sent to residential schools. Although the federal government has legal jurisdiction over First Nations child welfare, it is not obligated to provide services under sec. 91 (24) of the Constitution Act, and is clearly extremely reluctant to do so. In 1951 the Indian Act was amended to include section 88. Section 88 was intended to clarify the position as to the extent that provincial legislation applies to First Nations reserve communities. It states,

“Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in any province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder.”


64 Ibid.; MJI, supra note 5 at 516.


66 Bala, Hornick, and Vogl, supra note 63 at 183.
Since the remaining section of the Indian Act of 1952 made no reference to child welfare or child protection, sec. 88 appeared to provide legal authority for the extension of provincial child welfare laws and services to Indian reserve communities. The Supreme Court of Canada dealt with the issue of jurisdiction over child welfare and the effect of section 88 in Natural Parents v Superintendent of Child Welfare (1975). Chief Justice Laskin held that, "when section 88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity, but rather to have in mind provincial legislation, which per se, would not apply to Indians under the Indian Act, unless given force by federal reference." Sec. 88 provides the means for referential incorporation. Justice Ritchie reasoned however, that a provincial law of general application is binding on all citizens of its own force, including status Indians,

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67 Ibid.; See also "Spallumcheen Indian Band By-Law," supra note 52 at 78; Carasco, supra note 9 at 117. For further discussion on the jurisdictional dispute between the federal and provincial governments and the effect of sec. 88 see D. Sanders, "The Constitution, the Provinces, and Aboriginal Peoples" in J.A. Long and M. Boldt, eds., Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: Uni of Toronto Press, 1988). Sanders summarises the pre-sec. 88 position on the application of provincial law to Indians as follows: Provincial laws do not apply when they are in conflict with the provisions of federal Indian legislation; Provincial laws will not apply if they directly affect the use of Indian reserve lands, even though the Indian Act has no provisions on the matter; Provincial laws will not apply if they pick out Indians or Indian reserves for special discriminatory treatment; Provincial laws will not apply if they affect "Indians as Indians" even though the Indian Act has no provisions on the matter. However, following the inclusion of sec. 88 in the Indian Act, provincial laws of general application which affect "Indians as Indians," but do not particularise them for special consideration, may now apply to them. For the effects of this jurisdictional change see further its application in the following recent cases, R v Francis, (1988) 51 D.L.R. (4th) 418 (S.C.C.); Corp. of the Township of Brantford v Leslie and Helen Doctor [1995] O.J. No. 3061 (QL) (Ont. Ct. of Justice). See also the Supreme Court decisions in Dick v Queen (1985) 23 D.L.R. (4th) 33 (S.C.C.); R v Horseman [1990] 4 W.W.R. 97 (S.C.C.) Four B Manufacturing Ltd. v United Garment Workers of America [1980] 1 S.C.R. 1031; R v Kruger [1978] 1 S.C.R. 104.


69 Ibid. at 706.
provided it does not affect a right granted to an Indian under the Indian Act. Consequently there is no need for referential incorporation of provincial child welfare legislation. It applies as of right. Although providing differing rationales the Supreme Court was clear on the applicability of the Adoption Act to status, on reserve Indians. However whilst sec. 88 provides the legislative base for the provision of provincial child welfare services, the provinces were reluctant to accept this new and extensive jurisdiction without the federal government providing adequate financial compensation. The lack of financial commitment from the federal government thus created a situation in which both the federal and provincial governments refused to accept full constitutional and legal responsibility for First Nations child welfare. This still reflects the basic position and First Nations communities are the inevitable victims.

The experience of First Nations reserve communities with the provincial child welfare authorities appears to be one of contradictions. On one hand the story is told of

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70 Ibid. at 726.

71 Carasco, supra note 9 at 117.

72 MJI supra note 5 at 517; “Spallumcheen Indian Band By-Law,” supra note 52 at 78; “The Special Case,” supra note 9 at 524; Carasco ibid. at 116; Bala, Hornick and Vogl, supra note 63 at 183. The provincial government is also reluctant to accept child welfare jurisdiction because of the opposition of the First Nations communities. There was, and still remains, considerable opposition within the First Nations communities to the extension of provincial jurisdiction to the reserves. The First Nations perceive such provincial encroachment as a tool of assimilation and as eroding their special fiduciary relationship, based on a history of nation to nation co-operation, with the federal government. The provincial government has accepted jurisdiction for non-status Indians and Metis not covered by the Indian Act, as well as off-reserve Indians who reside principally in urban centres.

73 Bala, Hornick and Vogl, ibid. at 184.

74 Ibid.

75 MJI, supra note 5 at 517; Carasco, supra note 9 at 116.
white professional social workers coming onto the reserves and removing First Nations children who they considered to be at risk in huge numbers.\textsuperscript{76} On the other hand the story is told of the provincial agencies refusing to provide services to the First Nations communities, and social workers failing to go to reserves to follow up reports of abuse and neglect, thus placing the lives of First Nations children at risk.\textsuperscript{77} The truth would seem to be that there is a great disparity in the level and quality of services provided to Indian communities by the various provinces, depending on the specific agreement reached between the province and the federal government on their respective responsibilities and funding obligations.\textsuperscript{78} Some provincial agencies extend limited services, some extend none, and some will only intervene to apprehend a child in a “life and death” situation.\textsuperscript{79} Certainly it would seem that on the whole the jurisdictional debate between the two governments severely limited the scope of services that were provided on Indian reserves.\textsuperscript{80} In 1966 the Hawthorne report which had conducted a comprehensive survey of conditions on Indian reserves concluded that in respect to child welfare services, “the situation varies from unsatisfactory to appalling.”\textsuperscript{81} In the same year, the federal and provincial government signed an agreement to share the costs of extending social services,

\textsuperscript{76} See \textit{e.g.} \textit{MJI}, supra note 5 at 519 - 520.


\textsuperscript{78} Bala, Hornick and Vogl, \textit{supra} note 63 at 184; Carasco, \textit{supra} note 9 at 116.

\textsuperscript{79} \textit{MJI}, supra note 5 at 517.

\textsuperscript{80} “Spallumcheen Indian Band By-Law” \textit{supra} note 52 at 78.

\textsuperscript{81} Cited by \textit{MJI}, \textit{supra} note 5 at 518.
including child welfare, under the Canada Assistance Plan. However this did not secure the same level of services to Indian communities as provided to the general population, and services still depended on individual provincial arrangements with the federal government. For example, in British Columbia an informal agreement was reached in 1962 whereby the B.C. Ministry of Human Resources provides basic child protection and welfare services to Indian families on reserve, and both emergency and preventive child welfare services to Indian families living off reserves. The province is reimbursed by the federal government on the basis of a per diem charge for each Indian child in care. The Ministry’s family counselling, family support, and special services for children programs, are not provided for reserve communities. This still reflects the basic position. Despite the subsequent 1966 cost sharing agreement it remains the case that comprehensive child welfare services are not provided by the provincial Government to First Nations communities in B.C.. The provincial government of Saskatchewan has consistently taken the more extreme position that the provision of child welfare services on reserves is a federal responsibility and provincial authorities should only intervene, if at all, in life and death situations. Similarly in northern communities in Manitoba, whilst DIAND

82 Ibid.
83 Carasco, supra note 9 at 116; Bala, Hornick, and Vogl, supra note 63 at 184.
84 “Spallumcheen Indian Band By-Law” supra note 52 at 78.
85 Ibid.
86 Ibid. at 78 and 83.
87 Liberating Our Children, supra note 9 at 41.
88 Carasco, supra note 9 at 116.
provides limited services, the provincial government only intervenes in "life and death" situations. The general result of this jurisdictional dispute therefore is that First Nations communities throughout Canada experience provincial child welfare services as a wholly negative force which comes into the community in a 'crisis situation' to remove the child, usually never to be returned. Preventive 'helping' services are simply not made available. Although this debate has now been raging since the 1960s, there does not appear to have been any substantial change in the provision of services on First Nations reserves.

The apprehension of First Nations children became the standard operating procedure with child welfare authorities in most provinces, and thus the provincial child welfare system began to do exactly as the residential schools had done a generation before. The extension of provincial child welfare services to First Nations communities is now under the same condemnation as residential schools. The child welfare agency arguably became the new force of colonisation by removing another generation of First Nations children from their family and their communities; that is, it came to represent the

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89 The disparity in the services provided to First Nations reserves continues to exist despite the ruling in Director of Child Welfare for Manitoba v B [1979] 60 W.W.R. 229 (Man. Prov. Ct. Fam. Div.). The court clearly held that general provincial child welfare legislation applied to the First Nations reserves, and further the unequal provision of child welfare services to First Nations people was a violation of their most basic rights and could not be tolerated: "the refusal by the provincial department was not only unfair, unjust and discriminatory but also illegal. I am further persuaded that there is no constitutional impediment either inhibiting or preventing the provincial government from providing the requested services. But most importantly, the present law it obligatory that the province of Manitoba provide the same social and child care services under the Child Welfare Act to treaty Indians resident in Manitoba as other residents of the province receive." See Carasco, ibid. at 117 - 118.

90 Native Families and the Law, supra note 77 at 14.

91 MJI, supra note 5 at 519.
government's continuing endeavour to assimilate and destroy the First Nations communities and their distinctive way of life,

"Gradually, as education ceased to function as the institutional agent of colonisation, the child welfare system took its place...Those who hold to this view argue that the Sixties Scoop was not coincidental; it was a consequence of fewer Indian children being sent to residential school and of the child welfare system emerging as the new method of colonisation." 92

The charge is made that white professional child protection workers arrived on the reserves and removed First Nations children in vast numbers, placing them in white foster and adoptive homes, even outside of Canada, in order to ‘give them a better chance in life’. 93 It was their belief that a white home could provide the children with a far superior way of life, culturally, spiritually and materially. 94 The result: another generation of First Nations children alienated from their roots and culture, deprived of their family and community, and suffering a crisis of identity from the tension between their physical ‘Indian-ness’ and the assimilationist expectations of the white society in which they lived. 95 For many they could never meet that expectation. This new generation of alienated children often grew up confused and frustrated, frustration which sometimes manifests in substance abuse and violence. 96 In essence, the circle of abuse which began with the


93 MJL, ibid. at 519.

94 Ibid.

95 Liberating Our Children, supra note 9 at 20.

96 Ibid. at 22.
residential schools is made complete by the actions of the provincial child welfare agencies.

1.3 (i) The "Sixties Scoop"

The impact of the provincial child welfare system on First Nations communities is firmly brought home by the record of the steadily escalating admissions of First Nations children to provincial care.97 From the 1960s to the present day, it is clear that First Nations children have been disproportionately over-represented within the non-native child welfare institutions. The oft-quoted statistics from Patrick Johnston in 1983 still make the point.98 He reports that in 1955 there were 3433 children in care in British Columbia; 29 of those children were of "Indian ancestry". That equates to less than 1% of the number of children in care. In 1964 there were 1446 children in care in British Columbia of "Indian ancestry. That equates to 34.2% of all children in care; a jump in ten years from virtually no native children in care, to one third of the total number. Although there were regional variations because of the inconsistency in the services provided, the general picture is the same. The figures for 1981 - 1982 provide clear evidence of the continuing over representation of First Nations children in care across Canada.99 In Saskatchewan 63% of the total number of children in care were native; in Prince Edward

97 See e.g. MJI, supra note 5; "Best Interests of the Child Ideology," supra note 9 at 387; "Spallumcheen Indian Band By-Law," supra note 52 at 79-80; Liberating Our Children, ibid. at 1 - 2; Carasco, supra note 9 at 112.

98 Native Children and the Child Welfare System, supra note 92 at 23 (cited by the MJI, ibid. at 519).

99 Gathering Strength, supra note 9 at 25.
Island the percentage was 10.7; Manitoba 32%; Alberta 41%; the Yukon 61%; and British Columbia 40%. In fact the only province in which the percentage of native children in care was not disproportional to the total percentage of native people in the province was the North West Territories. To give a general picture of the impact of these removals on First Nations communities, whereas in Canada as a whole less than 1% of non-native children find themselves in care - for native children the percentage in care is just under 5%, at 4.6%. These statistics are not only a historical phenomena. The number of children in involuntary care, i.e. as the result of a court order, in British Columbia in 1992 stood at 3393; 1751 of those children were “aboriginal”. That equates to 51.6% of the total number of children in care as a result of court order. Yet, in 1992, aboriginal people made up only 4% of the province’s population. The percentage of aboriginal children in care in 1992, either as a result of a court order or a voluntary agreement, stood at 32.5%; that is 1 in 33 First Nations children were wards of the province. That compares to 1 in 500 non-native children. To take the Spallumcheen as a striking example of the profound effects of these statistics, in 1980 the Band consisted of 350 members, during the 1970s, 80 of their children were committed to the care of the Superintendent of Child Welfare. The majority of the children were placed in non-native foster homes off the

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100 Ibid. at 25-26.
101 Liberating Our Children, supra note 9 at 1-2.
102 Ibid.
The Spallumcheen were thus in a position where, if they did not take action, there would be nobody under sixteen left living in the community.

1.3 (ii) Colonisation or Legitimate Concern?

The disproportional representation of First Nations children in the provincial child welfare system is clear. However this reality should not be too hastily attributed to the colonising intentions of the government or the stereotypical 'white, middle class social worker' working in the communities. The child protection workers must arguably have had some substantive grounds for the large number of apprehensions; that is they must have had a basis on which to conclude that the child in question was 'in need of protection'. Certainly during the 1960s the grave social and economic conditions in which many First Nations people lived were coming to the attention of the Euro-Canadian population. Conditions on the reserves were often appalling. The First Nations communities formed a marginalised, severely disadvantaged group who had been dispossessed of their lands and their traditional economic base without sharing the benefits

103 "Spallumcheen Indian Band By-Law," supra note 52 at 88.

104 Justice Giesbrecht in the Desjarlais Inquiry warns against these one-sided and distorted portrayals of history, which he argues do not fairly reflect the actions and intentions of the social workers involved: Desjarlais Inquiry, supra note 13 at 271 - 274. A more balanced approach to the actions of the social workers which recognises their 'best intentions' and that many First Nations children were living in abusive conditions should be adopted.

105 MJI, supra note 5 at 517.

106 For further discussion of the social and economic legacy of colonialism see below, at chapter three. For a discussion of First Nations poverty in the context of child welfare see especially, "Spallumcheen Indian Band By-Law" supra note 52 at 80 - 82; "Child Welfare and the Native Indian Peoples" supra note 9 at 285 - 288.
of the ‘progressive’ forces of development and industrialisation.\(^{107}\) Housing was well below accepted standards, usually overcrowded,\(^{108}\) and many homes did not have running water.\(^{109}\) Poor living conditions were exacerbated by the fact that Native families tend to be larger than non-native families.\(^{110}\) Many communities suffer from high unemployment,\(^{111}\) welfare dependency,\(^{112}\) poverty\(^{113}\) and various social problems, particularly alcohol abuse. In 1994 the Gove Inquiry in British Columbia reported that one in five aboriginal children is born with an alcohol or drug related health problem requiring special services and skills.\(^{114}\) For individuals, the “social chaos” surrounding them, and the legacy of the residential schools, resulted in “low self-esteem, confusion of self-identity

\(^{107}\) M. Jackson, *Locking Up Natives in Canada: Report to the Canadian Bar Association Committee on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988) at 6 - 7.

\(^{108}\) ‘Spallumcheen Indian Band By-Law,” *supra* note 52 at 81-82. The presence of several generations of the family in the same dwelling house is not simply the result of poverty but has cultural roots in the extended family tradition. It is quite usual for adult children to remain in their parents dwelling long after marrying and becoming parents themselves. See *e.g.* *No Quiet Place,* *supra* note 9 at 133.

\(^{109}\) *Liberating Our Children,* *supra* note 9 at 19.


\(^{111}\) According to the 1981 Census only half of the adult native population under 65 years of age were employed, compared to two thirds of the Euro-Canadian society. Where First Nations people were employed they were more likely to be engaged in short-term seasonal work. High levels of unemployment naturally resulted in high levels of poverty. “Child Welfare and the Native Indian Peoples,” *ibid.* at 287.

\(^{112}\) In the early months of 1985 it was found that almost 50% of Indians living on reserve in Canada were in receipt of social assistance. *Ibid.*

\(^{113}\) Poverty in First Nations families is exacerbated by the high number of single parent families headed by a female. In 1981 female headed single-parent families comprised 17% of all Native families compared to 9% of non-native families in Canada. In 1981 native single parent mothers had incomes of only 38% of their non-native counterparts. *Ibid.* at 288.

\(^{114}\) *Matthew’s Legacy,* *supra* note 8 at 32.
and cultural identity, and distrust of and antagonism towards authority." One of the manifestations of these difficult conditions, exacerbated, if not causally linked, to the residential school experience was the prevalent violence and sexual abuse within many First Nations communities. Certainly there would appear to be legitimate grounds for concern by the non-native child welfare agencies when it is considered that statistics presented to the Manitoba Justice Inquiry by the Native Council of Canada suggest that 70% of First Nations girls are sexually abused by the age of sixteen.

These problems became more visible to non-native society in the 1960s as large numbers of First Nations people migrated to the urban centres in search of work and better educational opportunities. The culture shock they experienced as they tried to adapt to urban life caused additional stress and pressures on the family, particularly as their deprived economic status followed them into the cities. The culture shock was made all the more difficult by the loss of support from the community and extended

\[115\] MJI, supra note 5 at 515.

\[116\] For a discussion of the problems with violence and sexual abuse within reserve communities, see below at chapter three. See above at page 11 for a discussion of the links between the residential school experience and contemporary social problems in the communities.


\[118\] MJI, supra note 5 at 517; See also, Bala, Hornick and Vogl, supra note 63 at 175; "Spallumcheen Indian Band By-Law," supra note 52 at 82.

\[119\] Bala, Hornick and Vogl, ibid.
family. Many urban First Nations children were visibly living in poverty, well below general standards of living, and in a family home in a clear state of crisis. Consequently, they were widely considered by white society to be neglected and in need of help. On the surface, therefore, the disproportionate number of children in care could be accounted for by the combination of housing problems, substance abuse, and unemployment on and off reserves. It has long been argued that there is a close association between poverty and child neglect. Thus if the province is to treat all children equally, applying the same principles of protection and universal standards of care, it is to be expected that in areas of high unemployment and poverty there will be more apprehensions for child neglect and abuse. However, the problem runs deeper than these explanations would suggest. To focus on the economic and social problems in urban and reserve communities which can often lead to lower standards of child care, sometimes amounting to neglect, whilst

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120 Even within reserve communities the effects of disease, starvation and poverty had seriously weakened the traditional extended family network of support. Liberating Our Children, supra note 9 at 16 and 22.

121 Ibid. at 19; MJI supra note 5 at 518.

122 See for example, National Council of Welfare, In the Best Interests of the Child, A Report by the National Council of Welfare on the Child Welfare System in Canada (Ottawa: National Council of Welfare, 1979); Pelton, Leroy H., ed., The Social Context of Child Abuse and Neglect (New York: Human Sciences Press, 1981) (cited in “Child Welfare and the Native Indian Peoples,” supra note 9 at 288); “Colonisation of Native People,” supra note 9 at 66; “Best Interests of the Child Ideology,” supra note 9 at 378. The Gove Inquiry adopts the conclusion of the Community Panel, Family and Children’s Services Legislation Review, 1992, that: “Poverty is a child welfare issue and when governments allow children to live in poverty, they are in effect, committing systemic child neglect.” A 1994 report of the Canadian Institute of Child Health concluded that poor children are twice as likely to suffer psychiatric disorder and three times more likely to drop out of school early. Poor children also run a higher risk of low birth weight, chronic health problem and fatal injuries. It also found that children from single parent families were more likely to need protective services. Matthew’s Story, supra note 16 at 24 - 25.

123 See especially “Child Welfare and the Native Indian Peoples,” supra note 9 at 288; “Best Interests of the Child Ideology,” supra note 9; “Colonisation of Native People,” supra note 9; Liberating Our Children, supra note 9; “A Vicious Circle,” supra note 9, for an analysis of child welfare placed within the wider context of colonialism in Canada.
certainly important, provide only a partial explanation of the problem.\(^{124}\) The emphasis on socio-economic factors has the tendency to encourage the argument that the provincial child welfare system is an innocent party, simply doing its best for First Nations children by responding appropriately to the reality of poverty stricken communities.\(^{125}\) Such explanations for child neglect focus on the problems in the First Nations communities and with individual parents\(^{126}\) without critically considering the behaviour and practices of the child welfare officials and the ‘dynamics of the interaction that occurs between the service provider and the consumer.’\(^{127}\) This latter factor is central to the whole question of First Nations child welfare.

2. The Ethnocentricity of the Canadian Child Welfare System and the Continuing Colonisation of First Nations Children

Scholars such as Kline, McKenzie, and Hudson, argue that the real reason for such disproportional numbers of First Nations children in care lies not only with the problems of poverty and ‘systemic discrimination,’ but also with the continuing colonial attitudes


\(^{125}\) Contra, the Royal Commission refer to the arguments of Timpson who suggests that the assimilationist and colonialist explanations of the ‘Sixties Scoop’ underplays the reality that First Nations families were dealing with severe disruption caused by social, economic and cultural changes. Many First Nations people were also dealing with the stress of relocation. He suggests that these factors combined with the federal government policy of paying ‘child in care costs’ led to the large number of apprehensions, not a policy of assimilation or the colonial nature of the system. \textit{Gathering Strength, supra} note 9 at 26.

\(^{126}\) “Best Interests of the Child Ideology,” \textit{supra} note 9 at fn 8, p. 378, “Complicating the Ideology,” \textit{supra} note 9 at 123.

\(^{127}\) “Colonisation of Native People,” \textit{supra} note 9 at 67.
and ethnocentricity of the Euro-Canadian child welfare system.\textsuperscript{128} These critics argue that the existing child welfare system has been built on a legacy of colonialism, and it continues to exclude indigenous concepts of child welfare by ‘pushing them outside the boundaries of the Euro-Canadian legal imagination’.\textsuperscript{129} The standards, views, and values applied are those of non-native Canada; the insights of First Nations are rejected as unworthy. Consequently, from the moment of apprehension to the final determination by the judge, the system is criticised for its cultural insensitivity, imposing ethnocentric values on a foreign culture, and failing to recognise the importance of the child’s cultural identity.\textsuperscript{130} It is further argued that the inherent colonialism of the system, and the assumption of cultural superiority that underlies it, has been cloaked by its façade of ‘universal’ and ‘neutrality’.\textsuperscript{131} Kline argues that liberal legal discourse is structured in such a way that racism is rarely explicit.\textsuperscript{132} Building on Fitzpatrick’s work on the ‘Innocence of Law’,\textsuperscript{133} Kline suggests that the apparent impartiality of the law is secured by the ‘universal’

\textsuperscript{128} Supra note 123.


\textsuperscript{130} Supra note 123. See also Carasco, supra note 9; “Complicating the Ideology,” supra note 9.

\textsuperscript{131} “Best Interests of the Child Ideology,” supra note 9 at 389.

\textsuperscript{132} Ibid.

\textsuperscript{133} P. Fitzpatrick, ‘Racism and the Innocence of Law’ (1987) Journal of Law and Society 119. Fitzpatrick argues that racism is integral to the law. He suggests that the foundations of liberal legal systems: the principles of equality and universality, which purportedly stand opposed to racism, actually import racism into the law because of their culturally biased ethnocentric origins. That is, Fitzpatrick argues the concept of universalism is inherently racist because it depends on the exclusion of an ‘other’ in order to constitute its own identity.
standards which it applies equally to all children, of whatever culture, in Canada.\textsuperscript{134} However, she argues that these objective, universal standards, degrade and exclude the First Nations own traditional values and practices, and wholly negate the importance to First Nations children of their cultural identity.\textsuperscript{135} Devaluing native culture and lifestyle, facilitated by the application of ethnocentric standards, is also argued to have contributed to a culturally biased perception of native families and communities as impoverished, primitive, socially disorganised, and unsuitable for children.\textsuperscript{136} This devaluation allows the dominant society, through the child welfare agencies, to continue to justify the imposition of its own superior standards, whilst constructing itself as an innocent party in the disparate impact and destructive effects of child welfare law.\textsuperscript{137} The child welfare system has consequently been characterised as a more nuanced and apparently innocent, but equally devastating, "new modality of colonialist regulation".\textsuperscript{138} Many scholars and First Nations people argue that First Nations communities will only be able to resolve the crippling difficulties they face, and begin to rebuild their communities, if the inherent colonialism within the system is recognised and addressed.\textsuperscript{139} As more than one First Nations commentator has pleaded,

"Our Children are our Future"

\textsuperscript{134}``Best Interests of the Child Ideology,'' \textit{supra} note 9 at 389.

\textsuperscript{135} \textit{Ibid.} at 393.

\textsuperscript{136} ``Colonisation of Native People,'' \textit{supra} note 9 at 70.

\textsuperscript{137} \textit{Ibid.}; and ``Best Interests of the Child Ideology,'' \textit{supra} note 9 at 388.

\textsuperscript{138} \textit{Ibid.}

\textsuperscript{139} See especially ``A Vicious Circle,'' \textit{supra} note 9; and \textit{Liberating Our Children, supra} note 9.
and the "circle of abuse" must be broken.\textsuperscript{140}

This analysis of the 'colonialism' of the provincial child welfare system relies heavily on the analysis of power relations in colonial societies which is identified in some post-colonial literature.\textsuperscript{141} In particular the arguments of Fitzpatrick on the exclusion of the 'other', and Said's theory of Orientalism, can be used to illustrate the colonial attitudes of non-native society and their continuing subjugation of the First Nations people. \textsuperscript{142} These insights whilst drawing out the colonial policies of the past, and the existing prejudices within the current system, are too simplistic to fully appreciate the complex colonial relations that exist in Canada. In particular, they create false boundaries and dichotomies between native and non-native people which ignore the implications of cultural hybridity. This approach also obscures the opportunities for 'resistance' within the dominant framework and for the various cultures to work together.\textsuperscript{143} For this reason the 'colonial' analysis presented by Kline and others, and to be discussed here, should be

\textsuperscript{140} See e.g. Grand Chief Joe Miskokomon, Union of Ontario Indians, cited by the Royal Commission in Gathering Strength, supra note 9 at 23; \textit{ibid.}


\textsuperscript{142} \textit{Ibid.}

\textsuperscript{143} For an analysis of resistance within the post-colonial context see e.g. E. Said, \textit{Culture and Imperialism} (New York: Knopf Random House, 1993).
treated with caution.\textsuperscript{144} For example, one result of their analysis is that they tend to
downgrade the important efforts of the provincial governments in recent years to
‘indigenise’ the provincial child welfare systems to incorporate the insights of First
Nations people and address non-native society’s ethnocentrism.\textsuperscript{145} The following
discussion will highlight some of their analytical shortcomings, and this theme will be
developed at greater length in chapter five.

2.1 The Cultural Insensitivity of the Provincial Child Welfare Agencies

2.1 (i) Cultural Differences in Attitudes Towards Children

Critics argue that the ‘colonialism’ of the provincial child welfare system begin at
the moment of intervention with the cultural prejudices, ignorance, and misunderstanding
of non-native child protection workers. These scholars argue that a significant factor in the
large number of seizures of First Nations children is the constant misapprehension by
white child welfare workers, of traditional child rearing practices within First Nations
cultures as neglect.\textsuperscript{146} It was clearly apparent to the early settlers that the First Nations

\textsuperscript{144} Kline does recognise the vulnerability of the borders of colonial ideology and the opportunity for
“resistance” within the dominant framework which allows “something real” to be gained. The
vulnerability of dominant ideology allows oppositional interpretations to occasionally gain acceptance and
push for its reconstruction. The First Nations people are not powerless victims of the system. Thus Kline
admits that some of the case law “reveals space within the legal framework of child welfare for judicial
decisions that give priority to the maintenance of connections between a First Nations child, her extended
family and her First Nation.” “Best Interests of the Child Ideology,” \textit{supra} note 9 at 394. However despite
recognition of the complexity of colonial relations including the potential to “resist” within the dominant
framework, Kline’s subsequent analysis of the case law overwhelmingly focuses on the colonial
subjugation of First Nations people.

\textsuperscript{145} See below at chapter five pp. 400 - 434 for an analysis of attempts to sensitise the dominant system.

\textsuperscript{146} For a discussion of traditional aboriginal child rearing practices and the misunderstanding of non-
native social workers see especially \textit{MJI, supra} note 5 at 524 - 525; \textit{Liberating Our Children, supra} note 9
at 5 - 10; \textit{No Quiet Place, supra} note 9 at Part V; Bala, Hornick and Vogl, \textit{supra} note 63 at 175 - 179;
people had a different approach to raising and teaching their children from that of European Society. In line with their ‘civilising’ ambitions the early settlers dismissed First Nations child rearing methods as ‘negligent, irresponsible and ‘uncivilised’.”

This denunciation of First Nations child welfare practices was intrinsically linked to the European assumption as to the inherent superiority of their culture over that of the ‘native savages’. The values learned from one's own culture would inevitably seem to form the basis of one's evaluation of another culture, and the “cultural chauvinism” that results means the dominating culture will always assume that its values are the only adequate reflection of appropriate behaviour. All other cultures are regarded as abnormal. “Cultural chauvinism is thus the foundation for cultural genocide.” Morse argues that the scope for cultural insensitivity by non-native child welfare workers is made possible by

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*Literature Review, supra note 117 at 8-15; “The Special Case,” supra note 9; Carasco, supra note 9 at 114; “Colonisation of Native People,” supra note 9 at 70.*

147 MJI, ibid. at 512-513.

148 Ibid. at 513.

149 Ibid. at 512; Liberating Our Children, supra note 9 at 5; See also “Cross-Cultural treatment,” supra note 9. For a general discussion on the assumed superiority of a colonising culture see, The Post-Colonial Studies Reader, supra note 141.

150 “Cross-Cultural treatment,” ibid.; “Colonisation of Native People,” supra note 9 at 69. For a further discussion on ethnocentric values, the roots of ethnocentricity, and the process of enculturation see A. Renteln, International Human Rights - Universalism v’s Cultural Relativism (Newbury Park: Sage Publications, 1990). The First Nations people are of course not unique in that they too are likely to be guilty of cultural chauvinism. However that chauvinism is not of course supported by the force of the Western countries.

151 Ibid.; MJI, supra note 5 at 512; Liberating our Children, supra note 9 at 5.

152 Liberating Our Children, ibid.
the flexible guidelines that exist in child welfare legislation.\footnote{153} He argues that these broad legislative provisions give professional staff considerable latitude in the interpretation of specific provisions relating to child neglect, thus allowing them to be interpreted according to the social worker’s own cultural values and biases.\footnote{154} The new field of professional social work which flourished in the post-Second World War era thus provided the means by which the child welfare standards of the dominant society could be imposed on the First Nations communities.\footnote{155}

It is consistently suggested that there exist a number of key differences in the approach to raising children between native and non-native society that led white social workers to conclude that First Nations children were being neglected.\footnote{156} The care of a native child living within a traditional reserve community is often described in idealistic ‘romanticised’ terms.

‘Life for a child on a Reserve or in a native community is described as one of safety, love, adventure, and freedom. A child feels, and is welcome in any home and may join any family for a meal. A mother is not concerned if a child does not return home for a meal or even to sleep. The mother knows that some family is willingly provided for the child.’\footnote{157}

\footnote{153} B.W. Morse, “Indian and Inuit Family Law and the Canadian Legal System” (1980) 8 Am. Indian Law Review 199 at 202 [hereinafter Morse]. The experiences of some native controlled child welfare agencies in British Columbia would suggest that the flexibility in provincial legislation can be a medium of cultural sensitivity and diversity because of the scope allowed for differing interpretations and applications of the values and standards. See below at chapter 5.

\footnote{154} Ibid. at 202.

\footnote{155} MJII, supra note 5 at 561.

\footnote{156} Supra note 146. The differences between the cultures that commentators identify, and the dichotomous representations of native and non-native cultures that are characteristic of their comments, will be discussed in greater detail below at chapter 5.

\footnote{157} Bala, Hornick, and Vogl, supra note 63 at 175 (citing Justice Kimelman, No Quiet Place, supra note 9 at 163).
The reality can often be far from one of ‘safety, love, adventure and freedom’, as the experience of Lester Desjarlais makes strikingly clear,\(^{158}\) and purported differences between native and non-native child welfare practices should not be unquestioningly assumed. Culturally based differences in child rearing practices clearly prevail in many First Nations communities and respect for those differences is of vital importance. However, the extent of those differences, and even the survival of some traditional child welfare practices, differs from community to community.\(^{159}\) The literature to date, whilst seemingly aware that there are many divergent First Nations cultures and traditions, tends to argue in an essentialist form that there is a strong dichotomy between child welfare practices in native and non-native society.\(^{160}\) Whilst acknowledging the importance of these differences for many communities, it is also important to recognise the diversity and hybridity of many contemporary First Nations cultures which bring into question these polarised distinctions.

\(^{158}\) *Desjarlais Inquiry*, supra note 13. In commenting on the constant references made by Dakota Ojibway Child and Family Services at the Inquiry as to the importance of the extended family, Mr. Justice Giesbrecht remarks on the total absence of support or concern for the fate of Lester by his extended family or the reserve community. It was clear that no one was prepared to accept responsibility for him and he was thus, ‘like a stray animal in the Sandy Bay community’. *Desjarlais Inquiry*, *ibid.* at 21. This demonstrates well the need not to ‘romanticise’ about traditional aboriginality. It is essential to remain aware of the reality of life in many First Nations communities and to recognise the destructive effects of colonialism on First Nations traditional values and cultural practices. For further discussion see below at chapter three.

\(^{159}\) There are many divergent cultures and traditions of the First Nations people, but commonalties across the cultures can be identified. Each community and its cultures and traditions should however be treated as unique.

\(^{160}\) *Supra* note 146.
Aboriginal parents are often said to adhere to a norm of non-interference. It is argued by commentators that First Nations parents respect their child's individuality and allow the child greater freedom to develop in his or her own way. Independence and self-sufficiency is emphasised. A common theme identified in the literature is the emphasis on the importance of the child taking responsibility for his/her actions from a very young age. Commentators argue that First Nations teach their children,

"...to assume adult roles in an atmosphere of warmth and affection. Learning emphasised such values as respect for all living things, sharing, self-reliance, individual responsibility, and proper conduct."

First Nations children are consequently said to be given a much wider reign to explore and discover things for themselves. The literature suggests that this contrasts sharply with the authoritarian, interventionist methods of non-native parents, who direct and control their child's development by making clear what is expected of them, and the consequences for them should they disobey the instructions.

"Indian parents pay high respect to the individuality of their children, allowing them great freedom to grow and develop in natural ways. Parents instruct their children about right and wrong, but allow them the decision. Non-Indian parents tend to believe that it is the parents responsibility to direct and control children

161 "The Special Case," supra note 9 at 527.
162 Bala, Hornick and Vogl, supra note 63 at 176.
164 MJI, supra note 5 at 513; No Quiet Place, supra note 9 at 162.
165 MJI, ibid.
166 Bala, Hornick and Vogl, supra note 63 at 176.
167 Ibid.
until they have internalised the values of the parents, and have been prepared for their superior role in the scheme of things."^168

Critics conclude that the freedom allowed to First Nations children has often been misinterpreted by non-native social workers as neglect or the actions of a parent who does not care.\(^169\)

The First Nations' non-interventionist approach to parenting is suggested by commentators to lead naturally to a less disciplinarian model than that practiced in European society,

"In view of current ideas about child rearing, it is interesting to reflect that no aspect of behaviour shocked the French more than their refusal to use physical punishment to discipline their children. On general principles, the Huron considered it wrong to coerce or humiliate an individual publicly. To their own way of thinking, a child was an individual with his or her own needs and rights rather than something amorphous that must be moulded into shape."^170

However, in other First Nations, parents did employ the method of instruction whereby shame and humour was used to encourage the child to behave.\(^171\) Critics argue that this has often been interpreted by non-native social workers, unfamiliar with aboriginal customs, as psychological abuse.\(^172\)

Commentators also argue that First Nations children are socialised differently from non-aboriginal children.\(^173\) They suggest, for example, that aboriginal children are taught
not to express emotions in public except at appropriate times. Critics argue that a quiet child, displaying great emotional self-control, has been misunderstood by non-native social workers as displaying the signs of abuse and neglect. Similarly, a parent who shows no public emotion when his/her child is apprehended is judged, by the non-native participants, to be indifferent to the child’s removal.

Closely linked to the greater freedom allowed to aboriginal children is the role of the extended family. The extended family model is still prevalent in many communities. It is argued that serial and communal parenting is common, with children regarded as ‘communal resources rather than as the private property of their parents.’ First Nations children would be allowed to wander more freely within the community, with parents relying upon the tradition of communal, collective responsibility for children, to ensure that the child would remain safe. In particular, the parents would be confident that members of their extended family would always provide a meal and a bed for the child, who would receive the same love and care in the home of an aunt or uncle or grandparents as he/she would in their own home. If for any reason the parents were unable to care for

174 Ibid.

175 “The Special Case,” supra note 9 at 527.

176 Bala, Hornick and Vogl, supra note 63 at 176.

177 “The Special Case,” supra note 9 at 527.

178 No Quiet Place, supra note 9 at 163.

179 Ibid. at 161 and 163; See also Bala, Hornick, and Vogl, supra note 63 at 177. Again the experiences of Lester Desjarlais and the survival of the tradition of the extended family will be discussed in greater detail below.
the child, the extended family would provide the appropriate support system to take over the parenting responsibility,

"Traditionally the care of a child is the overall responsibility of an extended family, with members of that extended family playing various roles. In the event that any member of the family might be disabled or absent, there are many more people to take on their responsibilities. More importantly, it was never necessary to surrender children to the care of strangers. There were always people to whom the child was bonded and amongst whom he or she felt secure."\(^{180}\)

The Aboriginal community panel established in British Columbia to review the provincial legislation, argues that this notion of the extended family’s collective responsibility for the child contrasts sharply with the western notion of a nuclear family, and the perception of children as the ‘property’ of their parents.\(^{181}\) Justice Kimelman provides one example of this misunderstanding over cultural values,

"It is a frequent demand that a child care agency will make of a mother of native descent that, in order to regain custody of her child, she establish her own independent domicile. This demand goes against the native patterns of child care. In the Native tradition the need of a young mother to be mothered herself is recognised. The grandparents and aunts and uncles expect the demands and the rewards of raising the new member of the family. To insist that the mother remove herself from the supports of her family when she needs them most is unrealistic and cruel."\(^{182}\)

The tradition of allowing the child greater freedom, and relying on the extended family to provide alternative care, is now problematic in those communities who have

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\(^{180}\) Liberating Our Children, supra note 9 at 10.

\(^{181}\) The Aboriginal Committee point out that the english word ‘family’ derived from its latin root ‘familia’ meaning a household of slaves: Liberating Our Children, ibid. at 13-14. Contra see e.g. the comments with which Madam Justice Wilson opens her judgment in Racine v Woods, [1983] 2 S.C.R. 173 [hereinafter Racine]: “This appeal emphasises once more, this time in an interracial context, that the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests.”

\(^{182}\) No Quiet Place, supra note 9 at 132 - 133.
experienced a breakdown in traditional values and the mechanisms of social order or where the culture of the community has evolved to adopt a more individualistic ethos.\textsuperscript{183}

Clearly differences in child rearing practices do exist between at least some native and non-native communities, and have often been interpreted as neglect by biased outsiders. However it must be appreciated that the cultures are by no means as diametrically opposed as the analysis of some commentators would suggest and the contrasts consistently drawn between the native and non-native cultures should not be assumed. For example, on one hand the Desjarlais inquiry raises questions as to the continuing prevalence of the notion of collective responsibility for children within the community, with many communities seeming to adopt a more ‘nuclear’ approach to parenting responsibilities,\textsuperscript{184} on the other hand to argue that Western culture treats children as the ‘property’ of their parents is to fly against the prevalent view in non-native society to the effect that children have individual rights which override any claims by the parents.\textsuperscript{185}

Changes in both First Nations communities and non-native society may mean that they sometimes share a great deal in common. It is certainly a matter of concern that if traditional practices no longer predominate in First Nations communities, blindly relying on those practices may place First Nations children at risk.

\textsuperscript{183} \textit{Ibid.} at 163. For further discussion on the complexity and diversity of First Nations communities and the dimensions of culture in those communities, see above at chapter 3. For an excellent analysis of the diverse cultures of the First Nations, the cultural challenges that lie ahead in both the urban and reserve context, and the role of culture and tradition in shaping contemporary First Nations communities see Menno Boldt, \textit{Surviving As Indians. The Challenge of Self-Government} (University of Toronto Press, 1993) at 167 - 221.

\textsuperscript{184} \textit{Desjarlais Inquiry}, supra note 13 at 23 - 26.

\textsuperscript{185} \textit{Racine}, supra note 181.
However, despite this caveat, the common charge brought against non-native professional social workers retains a strong element of truth: that the evaluation of aboriginal parenting by non-native child protection workers, particularly when aboriginal communities had been isolated from the influences of non-native society and these traditional practices remained strong, attributed little respect to the different value systems, cultural practices, or attitudes towards children, that are important to the First Nations communities.\(^{186}\) Consequently, commentators argue that either through genuine misinterpretation and ignorance, or a paternalistic attitude of superiority by which the First Nations must be educated in appropriate child rearing methods, these traditional practices and values are consistently treated as constituting neglect. Whether consciously or unconsciously, non-native child welfare workers have become the vehicle for the imposition of European middle-class standards of child care on peoples to whom such practices and values are largely foreign.\(^{187}\)

2.1 (ii) Giving First Nations Children A Better Chance in Life?

The same imposition of 'middle-class,' ethnocentric standards, is argued by Morse to extend to the conditions in which First Nations children live; that is the standard of housing, opportunities in terms of education and recreation, and access to basic services

\(^{186}\) "Colonising Native People" \textit{supra} note 9 at 69. It should be emphasised that there is no evidence to support the view held by some non-native people that family violence is part of First Nations culture. As Mayor Pat McMahon from Yellowknife puts it, the myth that abuse is part of native cultures is "hogwash": \textit{Gathering Strength}, \textit{supra} note 9.

such as health care. The economic and social problems within the communities undoubtedly led to increased incidents of child neglect and abuse. However, the response of the non-native child protection workers, and the courts, to the reality of poverty in many communities, has been strongly criticised as imposing upon the First Nations people the middle class standards of white society, standards which they are rarely able to meet.

"The situation of Indians in North America has led to drastic social disorganisation in many cases, and often the children are the first to suffer the effects. But often Indian children are taken into foster care through court orders simply because social workers feel they will give the children a better opportunity off the reservation." It would seem poverty is treated by some social workers as a legitimate basis for a finding of neglect. The historical reasons for this state of poverty are never considered as a relevant factor. There is strong evidence throughout the case law of professional social workers ignoring the systemic poverty, and the cultural values and practices of the First Nations people, in deciding what action to take in the best interests of the child. For example, in Tom v The Children’s Aid Society of Winnipeg, 1982, (Man.C.A) the

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188 Ibid. at 205 (citing Indians and the Law (Ottawa: The Canadian Corrections Association, 1967 at 18)); “Colonising Native People,” supra note 9 at 66.

189 No Quiet Place, supra note 9 at 144-145; see also, supra note 122 for literature on the correlation between poverty and child neglect.

190 For the courts imposition of middle-class standards on the home environment see below at p.75.


192 MJI, supra note 5 at 519.

hostility of the Winnipeg Children’s Aid Society (a non-native child welfare agency) to the neighbouring Fort Frances Children’s society, because of their policy of trying to place First Nations children within the extended family on their reserve, is clear. The Winnipeg Society would accept only one relevant standard and value system: that of the dominant society,

“The Winnipeg Society does not approve of the practice of the Fort Frances society of allowing children to be nurtured by an extended family on an Indian reserve. The Winnipeg society appears to prefer that a child be placed either in a foster home or in adopting home with two caring parents who meet the Winnipeg society’s standards as to housing, maturity and parenting capacity. The Winnipeg society is not adverse to placing children in Indian reserves, but only if there is on the reserve a couple who is willing and able to meet the Winnipeg’s Society’s standards.” [Mr. Justice O’Sullivan] 194

It can be argued that the provincial child welfare agencies tend to exhibit bias towards a non-native prospective adoptive family, as against the child’s natural native parents who want to raise the child themselves, even when there is no indication of the mother’s unsuitability, because of the ‘better chance in life’ afforded by the former. The possibility of agency bias towards ‘superior white homes’ comes through strongly in C.A.S. v J.T. [1993] B.C. Sup. Ct. 195 Justice Melvin made the following comments on the actions of the agency towards the two parties involved,

‘In the case at bar, the Alberta Staff acted quickly to assist in obtaining the mother’s consent. Miss Smith was travelling in an opposite direction when she received some sort of information that the Tearoe were present at Miss Sawan’s home and the matter of adoption was being addressed. She quickly changed direction and travelled to the Sawan residence in order to facilitate. Those same

194 Ibid. at 213.

people did nothing to assist Miss Sawan with reference to the revocation other than advising her of the obligation to write in the ten day period.”

The Supreme Court held, taking into account the agency’s behaviour, that the consent of the mother had been successfully revoked. However this was later overturned by the Court of Appeal.\[^{196}\]

\[2.1\](iii) **Differences in Child Protection Philosophy**

The suggested differences between the philosophy of the non-native system and the First Nations traditional approach to children is emphasised by considering how the community would approach protecting the child’s welfare. The Manitoba Justice Inquiry argues that First Nations communities would almost certainly take into account the wider needs and interests of the family and the community.\[^{197}\] The Inquiry argues that the First Nations community is likely to take a ‘community/family centred’ approach to child welfare as opposed to the ‘child centred’ approach of the dominant system. This dichotomy is perhaps not as clear cut as the Inquiry suggests. For example, the Gove Report testifies to the move within the dominant system in recent years from a ‘child-centred’ to a ‘family-centred’ approach to child welfare.\[^{198}\]


\[^{197}\] *MJI, supra* note 5 at 529-531. See also *Liberating Our Children, supra* note 9 at 5 - 10.

\[^{198}\] *Matthew’s Legacy, supra* note 8 at 245 - 247.
the priority in non-native child welfare philosophy is the best interests and welfare of the child, regardless of the needs of its family or community.\textsuperscript{199} It argues that the First Nations believe that the best interests of the child are secured by ensuring a supportive extended family.\textsuperscript{200} Pursuing a policy which by removing the child leads to social disorganisation and the further erosion of community values and norms is not considered to be in the long term interests of the child.\textsuperscript{201} Critics consequently argue that the provincial child welfare agencies are considerably more interventionist than First Nations communities would traditionally consider appropriate.\textsuperscript{202} First Nations communities prefer to keep the family intact whenever possible and address the problems of the whole group not just the child.\textsuperscript{203} The First Nations community is therefore unlikely to equate apprehension with removal from the family.\textsuperscript{204} Children are apprehended to remove a child from a particular situation, while maintaining the maximum possible contact with the family and community.\textsuperscript{205} The long term goal remains to reunite the child with its family. If that is not possible then a placement with the extended family is sought.\textsuperscript{206} It is interesting

\begin{footnotesize}
\textsuperscript{199} MJI, supra note 5 at 529.

\textsuperscript{200} Ibid.

\textsuperscript{201} Ibid. See also “Best Interests of the Child Ideology,” supra note 9 at 403.

\textsuperscript{202} MJI, ibid.

\textsuperscript{203} Ibid. Again it should be noted that the ideal that a child is best looked after within its own family would be the philosophy of most western social workers. See e.g. Matthew’s Legacy supra note 8 at 245 - 247.

\textsuperscript{204} Ibid.

\textsuperscript{205} Ibid.

\textsuperscript{206} Ibid.
\end{footnotesize}
that despite a move in recent years to take a family centred approach to child welfare in
the dominant system, both the Desjarlais Inquiry and Gove Inquiry are highly critical of
this philosophy and call for a return to a system that places the child at the centre and
perceives the child as the client, not the parents.\textsuperscript{207} Both Mr. Justice Gove and Mr. Justice
Giesbrecht emphasise that a concern with the problems of the family and particularly
trying to help the parents must not draw attention away from the fact that the child’s
safety and welfare must come first in all circumstances.\textsuperscript{208}

\textbf{2.1 (iv) Foster and Adoption Placements}

The problem of bias and cultural insensitivity, which leads to the unwarranted and
disproportional apprehension of First Nations children, is certainly aggravated by the fact
native children in care are usually placed in a white foster family or group facility at some
distance from their home. It is unusual for apprehended First Nations children to be
returned to their family, or placed with their extended family or community.\textsuperscript{209}

\textsuperscript{207} Desjarlais Inquiry, supra note 13 at 278 - 279; Matthew's Legacy, supra note 8 at 245 - 147.

\textsuperscript{208} Differences in child protection philosophy will be re-examined in chapter five in a dialogue conducted
with three native controlled child welfare agencies in British Columbia. As one example of a different
approach the Spallumcheen band will apprehend more readily than non-native agencies, but by doing so
are able to return more children to their families. All three native agencies support apprehension where
necessary but try to find a placement for the child within the extended family and community.
Reconciliation with the immediate family remains the long term objective. Whilst this is consistent with
the comments of the MJI, it would not appear to be substantially different from non-native social work
practices.

\textsuperscript{209} Morse, supra note 153 at 204. The prevalent practice of placing aboriginal children in non-native
foster homes is well-evidenced. For example, in 1987, 78 Indian children were placed for adoption in
British Columbia, and 51 of the children were adopted into non-native homes, “The Special Case” supra
note 9 at 525; Monture claims that that only 22% of native adoptions will be in a First Nations home, “A
Vicious Circle” supra note 9 at 3. See also Johnston, supra note 9 who argues that the philosophy of non-
discrimination between Indian and white children with regard to placement was well-intentioned and
accepted by the Provincial Government, encouraged by the inter-racial adoption policy of the Open Door
welfare agencies have taken little to no account of the traditional First Nations method of dealing with a crisis in the family.\(^\text{210}\) Incorporating the tradition of the extended family is apparently problematic for the dominant child welfare system. Should a member of the extended family offer their services to the child welfare agency they will be assessed according to the same provincial criteria and standards as the agency applies to all other prospective adoptive/foster homes.\(^\text{211}\) These criteria focus on material wealth, stability, educational opportunities, and employment status, not the cultural suitability of the home, the protection a child's cultural identity, and certainly not respect for First Nations traditional practices.\(^\text{212}\) There would seem to be a strong difference between the cultures on the relative importance attached to economic, educational and other opportunities, compared to the importance of maintaining relationships with parents, extended family, and community.\(^\text{213}\) The non-native philosophy would place greater emphasis on the former, whereas the First Nations community would place greater emphasis on the

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\(^\text{210}\) See especially Morse, *ibid.* at 205; *Native Families and the Law, supra* note 77 at 22; *Liberating Our Children, supra* note 9 at 22; *No Quiet Place, supra* note 9 at 226; *"A Vicious Circle" supra* note 9 at 5 - 6.

\(^\text{211}\) Morse, *ibid.* Interviews with the three native controlled child welfare agencies in British Columbia indicated that whilst they are formally expected to apply provincial standards to prospective foster homes, those standards are now treated more flexibly in order to encourage placement with members of the extended family or reserve community.

\(^\text{212}\) *Ibid. ;* See also *MJL, supra* note 5 at 530.

\(^\text{213}\) *MJL, ibid.* at 530.
latter.\textsuperscript{214} This difference is clearly manifested in the principles applied to finding appropriate foster and adoption homes, whereby the First Nations perspective is excluded from consideration. The materialistic criteria of the non-native child welfare system immediately raises problems for First Nations people who have less resources, poor overcrowded housing, will have limited access to education and health facilities, and are more likely to be dependent on welfare.\textsuperscript{215} Even those child welfare agencies who have recognised the need to place First Nations children in First Nations homes and communities have encountered difficulties in finding suitable placements.\textsuperscript{216} There would certainly seem to be a problem with the lack of suitable native placements. For example, in British Columbia there is evidence that since the introduction of the moratorium on cross-cultural adoptions in 1992, the number of native children in group homes has dramatically increased because suitable homes within the First Nations communities cannot be found.\textsuperscript{217} Many social workers have attributed the lack of prospective adoptive/foster parents coming forward to provide suitable placements, as further

\textsuperscript{214} \textit{Ibid.}

\textsuperscript{215} \textit{Native Families and the Law, supra} note 77 at 20 - 22.

\textsuperscript{216} Usma, Spallumcheen, and Xolhmi:lh, the native controlled child welfare agencies in British Columbia that I visited all experienced difficulties in finding enough native foster homes, particularly for older children or children with special needs. See below at chapter 5.

\textsuperscript{217} \textit{Matthew's Story, supra} note 16 at 247. This same problem was already evident in 1975 when the Royal Commission reported that despite a program of publicity among First Nations organisations and reserves to recruit native adoption homes, the number of homes obtained was very small. The Royal Commission identified the reasons for this as intimidation by non-native staff, the formal requirements of the legal adoption process, and the economic unfeasibility of many native families providing for another family member. \textit{Native Families and the Law, supra} note 77 at 20 - 22. Similar problems were experienced in the US in trying to find Afro-American adoptive homes for Afro-American children, \textit{Native Families and the Law, ibid.} at 30.
evidence of a lack of concern among the First Nations communities for their children. However, the more plausible reason behind the lack of First Nations foster and adoptive homes is not indifference, but rather the "alien criteria" to which they are subjected, and the whole bureaucratic process of investigation and assessment with which they must comply. Such a process is far removed from their traditional notions of communal responsibility. Not surprisingly First Nations families who could provide extremely valuable care for native children, are unwilling to approach the provincial child welfare agencies who they often fear and resent. Providing alternative care through the provincial adoption program is made considerably more difficult for First Nations people because western adoption differs in important respects from their own traditional 'custom adoption'. Most significantly First Nations adoption emphasises continued contact between the birth parents and the child to secure knowledge of his/her roots, and security in his or her sense of identity. Many First Nations people also believe that adoption is a private matter between the natural and adoptive parents who ideally should know each other to secure compatibility. This is antithetical to western notions of 'new legal

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219 Morse, supra note 153 at 205; Native Families and the Law, supra note 77 at 20-22; Sommerlad, ibid. at 170.

220 Sommerlad, ibid.

221 Morse, supra note 153.

222 Native Families and the Law, supra note 77 at 38.
identity' and confidentiality. There is also the basic problem that many First Nations families simply cannot afford to foster or adopt.\textsuperscript{223} Many members of the wider community are already living on or below the poverty line, whilst the position of the extended family becomes untenable when it is considered that they do not always come within the criteria for reimbursement of incurred expenses.\textsuperscript{224} Further, restricting foster home payments, when made, to a flat regular rate leaves these families on the poverty line, but with an additional child to provide and care for.\textsuperscript{225}

In conclusion, significant responsibility for the current crisis in First Nations child welfare must be laid at the door of the child welfare agencies and their professional employees. The cultural chauvinism inherent in their standards and judgments, and their refusal to try and recognise the potential value of the culture and traditions of First Nations people has caused considerable suffering for many First Nations families and devastated whole communities. The lack of native child protection workers, and the paucity in cross-cultural education for non-native social workers, only confirms the lack of appreciation or importance attributed to native culture by the provincial child welfare system.\textsuperscript{226} The basic validity of these criticisms, and the way in which non-native child welfare agencies have failed First Nations children and communities are not refuted.

\textsuperscript{223}Ibid. at 37 - 43.

\textsuperscript{224} Morse, \textit{supra} note 153 at 205; \textit{ibid}. B.C. has changed its policy to provide remuneration for relatives who are also foster parents but the problem remains in other provinces, for example Manitoba. See \textit{No Quiet Place, supra} note 9.

\textsuperscript{225} \textit{Native Families and the Law, ibid}. See also \textit{No Quiet Place, ibid}. at 249 on the importance of subsidised adoption to help native families overcome the financial hurdles to adoption.

\textsuperscript{226} \textit{No Quiet Place, ibid}. at 132.
However, some of the assumptions that are made by commentators as to the polarised differences between First Nations and non-native cultures are questioned on the basis that they no longer reflect reality. Whilst sensitivity to cultural diversity is important, extreme representations obscure the discussion and lead to suggestions for reform that can place First Nations children at risk.\(^{227}\)

### 2.2 First Nations Child Welfare in the Courts

The problems of cultural colonialism and ethnocentrism do not however improve at the next stage of the provincial child protection process: adjudication in the courts. The courts have been similarly implicated in the process of cultural genocide. Scholars such as Kline, and Carasco, argue that the damaging application of racist, ethnocentric standards to First Nations people, is compounded by the bias of the judiciary, and the insensitivity of their decisions.\(^{228}\) In essence critics argue that there has been no attempt by the judiciary to mitigate the colonising effects of child welfare law. In interpreting child welfare legislation with its prior Euro-Canadian bias, the judiciary have supported social worker’s cultural chauvinism and negated the perspective and practices of the First Nations people. It is thus argued that the full force of the law has been used to legitimise and sanction the colonising mission of the Canadian government.\(^{229}\) The court has approved care orders on

\(^{227}\) See below at chapters 3 and 5.

\(^{228}\) See in particular, Carasco, supra note 9; “A vicious Circle,” supra note 9; ‘Best Interests of the Child Ideology,” supra note 9; “The Special Case,” supra note 9.

\(^{229}\) Sally Engle Merry argues that the law is central to the process of colonisation. She quotes Chanock who describes the law as at “the cutting edge of colonialism”. They argue that, central to the civilising mission it legitimated control over the indigenous people and enforced compliance with the new legal and political culture. Sally Merry Engle identifies as the central feature of colonialism, “the process in which
the basis of culturally biased criteria, and continues to reject the importance of cultural context to a child's security and happiness under the best interests principle. Underlying the courts' decisions is seemingly a deep-seated belief in the superiority of non-native culture and practices. This sense of superiority permeates their every judgment. If these charges against the law and the judiciary are well-founded, not only does it indict the current child welfare system, but it reinforces the claim that freedom from this whole system is the only solution.

As the following case law analysis demonstrates the child welfare system is legitimately criticised for its treatment of First Nations children. The courts are undoubtedly guilty of prejudice and complicity in the unwarranted removal of First Nations children from their families and communities. Again however, whilst the thrust of these arguments is admitted there should be caution in simply condemning the legal framework and the judicial interpretation of its standards. Important efforts have been made in recent years to 'indigenise' provincial child welfare and there is strong evidence in the case law of increasing cultural sensitivity by the judiciary. These efforts at least demonstrate that it is not impossible for the two cultures to work together and for the

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230 See especially "Best Interests of the Child Ideology," supra note 9 at 395 - 396.

dominant system to incorporate the insights and perspectives of the First Nations people. These issues will be considered in more detail in chapter five.

2.2 (i) The Best Interests of the Child

The criticism of judicial decisions, particularly the interpretation and application of culturally biased child welfare legislation, has focused on two key principles in child protection: whether a child is in need of protection, and the child’s best interests. Kline focuses her study on the best interests principle as the fundamental legal standard in Canadian child welfare law, and argues that its liberal form ‘serves to portray the apprehension and placement of First Nations children away from their families and communities as natural, necessary, and legitimate, rather than coercive and destructive.’\textsuperscript{232} In particular she claims it has legitimated the judiciary’s refusal to give recognition to the ‘indigenous factor.’\textsuperscript{233} Kline argues that the courts’ construct the child’s best interests as divorced from his or her cultural context.\textsuperscript{234} The child is treated as an individual, separate and distinct from its family, community, and culture.\textsuperscript{235} This renders the child’s culture and heritage unimportant and irrelevant to his or her best interests.\textsuperscript{236} Consequently, the actual

\begin{itemize}
\item \textsuperscript{232} “Best Interests of the Child Ideology,” \textit{supra} note 9 at 389 and 394.
\item \textsuperscript{233} \textit{Ibid.} at 393 and 396. The indigenous factor encapsulates the principle that a child’s native heritage and cultural identity is central to his/her security and happiness and the future of his or her community, and should therefore be the foundation for any decision concerning his/her future. The phrase was first constructed by Carasco but is now widely used to represent the child’s place within his or her culture.
\item \textsuperscript{234} \textit{Ibid.} at 396.
\item \textsuperscript{235} \textit{Ibid.}
\item \textsuperscript{236} \textit{Ibid.}
\end{itemize}
removal of the child from his or her cultural community is made to seem unproblematic.\textsuperscript{237} The individualistic liberal approach of the courts certainly has the tendency to construct the child as a decontextualised individual, to whom culture and tradition can be of no importance. For example, in \textit{Natural Parents v Superintendent of Child Welfare}\textsuperscript{238} the judge at first instance held that the issue could,

\begin{quote}
"...only be resolved in the light of the best interests of the child himself. He [had to] be considered as an individual not as part of a race or culture"\textsuperscript{239}
\end{quote}

The child’s culture and heritage were simply treated as irrelevant to his best interests. Justice Wilson took the same decontextualised approach in \textit{Racine v Woods}.\textsuperscript{240} She made very clear her view that the child was a distinct and abstract individual and the child’s cultural heritage did not impact on that individual identity,

\begin{quote}
'It doesn’t matter if Sandra Racine was Indian and the child was white and Linda Woods was white... it has nothing to do with race, absolutely nothing to do with culture, it has nothing to do with ethnic background. It’s two women and a little girl, and one of them doesn’t know her. It is as simple as that, all the rest is of no consequence, except to the people involved, of course" (Madam Justice Wilson citing Dr. McCrae)\textsuperscript{241}
\end{quote}

The ethnocentricity of the ‘best interests’ principle is not difficult to demonstrate through the case law. The lack of recognition given to the indigenous factor in judicial decision making is propounded as the strongest example of the court’s refusal to consider

\begin{footnotes}
\item[237] \textit{Ibid.}.
\item[238] [1976] 2 S.C.R. 751 (S.C.C.).
\item[239] \textit{Ibid.} at 768. For commentary see “Best Interests of the Child Ideology,” \textit{supra} note 9 at 397.
\item[240] \textit{Supra} note 181.
\item[241] \textit{Ibid.} at 188.
\end{footnotes}
the wider ‘colonial’ implications of refusing to recognise the importance of the child’s culture and heritage. As Monture argues, the courts have “underemphasised, undervalued or ignored” the unique character of First Nations children which requires a response that is particular to their needs. It is significant that the leading authoritative ruling on the best interests of the child fails to mention the importance of maintaining a child’s cultural identity and heritage.

"The dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as an adult."

The infamous example of the judiciary’s refusal to consider the “indigenous factor” as being of fundamental importance to the best interests of the child is found in the decision of Madam Justice Wilson in Racine v Woods. Although the Supreme Court did not reject the relevance of the indigenous factor in determining the best interests of the child, it was given very little weight. In Racine Justice Wilson granted an application for the adoption of a seven year old status Indian child by non-native foster parents, against the

242 "A Vicious Circle," supra note 9 at 3.

243 "Best Interests of the Child Ideology," supra note 9 at 400.

244 King v Low [1985] 1 S.C.R. 87 at 101.

245 Supra note 181.

246 For commentary see Carasco, supra note 9 at 123, and “A Vicious Circle,” supra note 9 at 12 - 14.
wish of the natural mother to raise the child herself within her own culture and tradition. The court concluded,

"In my view when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes."\textsuperscript{247}

Monture argues that there is strong evidence to the contrary: that the importance of cultural background and heritage does not abate over time but remains extremely important to the child's security and identity, especially during adolescence.\textsuperscript{248} She suggests that the reasoning behind Wilson's negation of this evidence is her unspoken belief in the value and possibility of the assimilation of First Nations children into Euro-Canadian society: that native children in white homes will come to identify with the white culture and their white parents, and cultural identity will cease to be an issue.\textsuperscript{249} That this isn't the case has been suggested by numerous commentators who speak of the crisis of identity these children suffer in knowing they are not 'white' but yet feel completely disassociated from their own roots and heritage.\textsuperscript{250} They have no clear sense of identity, of who they really are. Carasco refers to the 'substantial documentary evidence' concerning the removal of native children from their community, and the reality that placement with

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{247} Racine, \textit{supra} note 181 at 187.
\item \textsuperscript{248} Monture, \textit{supra} note 9 at 13.
\item \textsuperscript{249} Ibid.
\item \textsuperscript{250} See \textit{e.g.} "Transracial Adoption," \textit{supra} note 9 at 437 - 467; Carasco, \textit{supra} note 9 at 114; "Colonisation of Native Peoples," \textit{supra} note 9 at 71; Sommerlad, \textit{supra} note 218 at 173; "The Special Case," \textit{supra} note 9 at 525; Bala, Hornick, and Vogl, \textit{supra} note 63 at 177; \textit{Native Families and the Law}, \textit{supra} note 77 at 28 - 30 and 33 - 34; \textit{No Quiet Place}, \textit{supra} note 9; \textit{MJI}, \textit{supra} note 5 at 523 - 524; \textit{Liberating Our Children}, \textit{supra} note 9 at 20; \textit{Gathering Strength}, \textit{supra} note 9.
\end{enumerate}
\end{footnotesize}
non-native families, for either foster care or adoption, is extremely problematic.\textsuperscript{251} Even
the best-intended, most capable of foster parents often seem incapable of preventing the
'high incidence of unhappiness, rebellion and 'anti-social' behaviour' exhibited by native
children in their care.\textsuperscript{252} The judiciary however do not seem to acknowledge these
problems,

"I believe that interracial adoption, like interracial marriage is now an accepted
phenomenon in our pluralist society. The implications of it might have been
overly dramatised by the respondent in this case." (Madam Justice Wilson)\textsuperscript{253}

Confident of the value and benefits of family life lived in non-native communities the
courts determine the best interests of the child in a way which "effectively forces the
assimilation and destruction of First Nations people."\textsuperscript{254} The devastating loss of their own
culture and heritage is effectively ignored, as the loss is considered to be more than
compensated for by the benefits of white society.

The decision of Racine has been debated at length in the literature and the
propriety of the decision on the facts remains a question of open debate. However, the
legal importance of the decision lies in the way the comments of Justice Wilson have been
consistently relied upon to justify downgrading the importance of the child's cultural
identity.\textsuperscript{255} Although the courts may be giving increasing emphasis to an aboriginal child's

\begin{footnotes}
\item[251] Carasco, \textit{ibid}. at 115.
\item[252] \textit{Ibid.}
\item[253] Racine, \textit{supra} note 181 at 188.
\item[254] "A Vicious Circle," \textit{supra} note 9 at 13.
\item[255] See generally, Bala, Hornick, and Vogl, \textit{supra} note 63 at 178 - 179.
\end{footnotes}
right to his or her culture, Kline argues that other considerations are still given a higher priority in determining the child’s best interests. She argues that the indigenous factor has seldom been recognised as an overriding, or even substantially weighty factor, and is often relegated to secondary importance behind such factors as the stability and security of the alternative home, and the bond which has developed between the alternative care-giver and the child. These latter factors are often determinative of the suitable placement for the child. The B.C. Court of Appeal in J.F.T. v C.A.S., 1993, (B.C.C.A.) overturned the decision of the B.C. Supreme Court, which had distinguished Racine on the facts and placed overriding emphasis on the child’s native heritage. The Court of Appeal, however, decided the case on the sole basis of the strength of the bonds with the child. Even though the child was only 18 months old, this time period was still considered sufficient for the bond with the foster parents to be more important than the child’s cultural heritage. Racine was cited as authority for the proposition that the importance of heritage will be overridden by the fact of bonding in cases of this kind,

"The welfare of the child is the paramount concern. This child presently lives in a loving, stable, comfortable environment, with a family that has looked after all his needs for virtually all his life. By all accounts the child is thriving. To end that relationship would destroy the family bonds that have been established between the child and the adoptive parents. Although she offered no specific plans for the future it is quite possible that Ms. S could also provide a loving environment in which the child could thrive if he were returned to her. But in the absence of any evidence from which it could be inferred that there ever was or now remains any

256 "Best Interests of the Child Ideology," supra note 9 at 399 - 406.
257 Ibid.
258 Supra note 195. The case concerned an application for revocation of consent to adoption by an 18 year old native girl. The child at the time of appeal was only 18 months old.
bond between the natural mother and child or that such a bond could now successfully be established, it is impossible to conclude that the best interests of the child require the consent to be set aside...As in the Racine case, the cultural background and heritage must give way in the circumstances of this case.” (Proudfoot J.A)

The same reasoning was employed in Re Child Welfare Act (Chipewa), 1986, in the Alberta Court of Queen’s Bench. The court acknowledges that “an important consideration in this case is the native background,” but then goes on to dismiss its significance in the particular case at bar, because of the strong psychological bond between the foster parents and the child. Despite taking judicial notice of the problems which can arise from cross-cultural adoptions, Justice Sulaltycky held,

‘[Dexter] is bonded only to his foster parents who wish to adopt him and it is in the public interest and his interest that the door to such adoption be opened by granting the permanent wardship order sought. In my view this is a case in which the best interests of the child lie in termination of natural relationships, and existing emotional ties, and any cross-cultural exposure arising from these ties.”

The trend in the adoption cases which concern the rights of the natural parents, as against the adoptive parents where the latter already have custody of the child, all reveal a similar trend. Where both the parties are deemed equally capable of providing a satisfactory

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261 The case was concerned with an application for permanent wardship to facilitate adoption. The child had been in the care of the foster parents for the five year duration of his temporary wardship.


263 Cases referred to here include: Natural Parents v Superintendent of Child Welfare, supra note 238 Racine, supra note 181; and King v Low, supra note 244.
home for the child, the bond already established between the adoptive parents and the child, together with problems involved in removing the child and re-establishing him or her with a new family, tip the scales in favour of the adoptive parents. Critics argue that these decisions fail to give due consideration to the long term interests of the child, because they fail to acknowledge the strong possibility that a child deprived of his/her culture and heritage will suffer a damaging crisis identity in adolescence. As Kline argues, the legitimate concern with the stability and security of the child's environment is unjustifiably separated from the maintenance of the child's native identity and heritage. The child's identity and cultural heritage are argued by many commentators to be essential factors in establishing a sense of security and stability in the child's life, and without the security of knowing his or her cultural roots and heritage, the child becomes extremely vulnerable. In essence these decision implicitly assume that non-native culture is more than adequate to meet the child's needs, thus downgrading the value and importance of First Nations cultural heritage.

A more difficult case in which the importance of culture is balanced by the judiciary against other factors relevant to the child's interests is where the child has special needs. The 'best interests of the child' test has frequently been invoked to justify the removal of special needs children from their community because of the lack of adequate

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264 Carasco, supra note 9 at 124.
265 Supra note 250 for a selection of literature on the crisis in cultural identity which can be caused by trans-cultural adoption.
266 "Best Interests of the Child Ideology," supra note 9 at 403.
267 See e.g. ibid.
facilities on the reserve to meet any special treatment or educational needs.\textsuperscript{268} As one in five native children are born with foetal alcohol syndrome this rationale has the potential to justify removing a large number of children.\textsuperscript{269} This justification was adopted by Justice McDermont in \textit{S.A.L. and G.I.L. v Legal Aid Manitoba 1982} (Alberta C. A.)\textsuperscript{270} in determining that the best interests of the child would be met by remaining with non-native foster parents. His reasoning was based on the access the non-native parents could provide to medical facilities, and the security and stability of the home environment they offered. He did not address at all the importance of the child’s cultural heritage,

“In this case there are two very serious and important reasons which require that the natural parents wishes be disregarded. Firstly, the availability of medical facilities and, secondly, the effect that taking the custody from the foster parents and giving it to the natural parents would have on the child. Third if the child went to live with the natural parents, in about three years time, if she was to continue her schooling, during the school year she would have to go away from home, for after 7th grade there is no school available where the natural parents live.”

These same factors were led to justify the decision to give permanent custody to the Superintendent of Family and Child Services in \textit{McNeil v Superintendent of Family and Child Services 1983} (B.C.C.A.).\textsuperscript{271} Justice MacFarlane took strong judicial notice of the importance of the child’s culture and heritage but decided that only a family in Vancouver

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\textsuperscript{268} "A Vicious Circle," \textit{supra} note 9 at 15.
\textsuperscript{269} \textit{Matthew’s Legacy, supra} note 8 at 32.
\textsuperscript{271} [1983] 3 C.N.L.R. 41. The case involved competing custody applications by the Superintendent of Family and Child Services and the natural mother’s half brother who was supported by the Nisga’a Nation. The child had special needs having been born with a drug addiction. The child was at the time healthy and normal but there were fears about its future health.
\end{flushright}
or Victoria would be able to “understand” and provide the facilities for dealing with her future health concerns,

“Ties to the Nisga’a people are of importance. That is not in dispute. Education and training in the Nisga’a community and experiencing the Nisga’a culture would be valuable. The value of that however must be weighed against the detriment of placing the child in a position which would make her vulnerable to her mother’s unstable character and reputation. The superintendent has been charged with the responsibility for this child since birth, and understands, or has the resources to deal with, all the complex problems associated with a child in such circumstances. On the other hand we have the appellant who is sincere and well-motivated, but he does not know the child...They cannot be expected to understand, or to be in a position to deal with her special problems, many of which lie ahead.”

The recognition given to the importance of the child’s ties with the Nisga’a are a significant improvement on S.A.L. and G.I.L. v Legal Aid of Manitoba, but the judgement reveals an inappropriate assumption by the judge that the child’s extended family was incapable of understanding or coping with a special needs child, whereas a non-native family could. This is basically a racist assumption as to the superiority of non-native parents, which is being cloaked by concentrating on the best interests of the special needs child. The potential health problems also overshadow the concerns raised about the mother’s interference with the child, a factor which will always be a risk in recognising the extended family tradition of alternative child care in First Nations cultures. However, rather than confront this conflict and be seen to override the traditional practice of the Nisga’a, the court relies on the child’s special needs to justify removal. Whilst no commentator would want to deny these children the best care and treatment that is available, and consequently these decisions are superficially harder to criticise, they certainly give little recognition to the First Nations view that in some cases the child
remaining within his or her community and culture, will be more important than future access to a 'better' education, or specialised health care. More basic, however, is that all these cases fail to address the real problem, which is that First Nations children are being forced to leave their families, community and culture to reside in non-native society, because they are denied, on the basis of race, the necessary facilities to meet their needs within their own communities.272

Even where the courts are prepared to consider the relevance of cultural identity, they have insisted that the importance of maintaining links with the child's culture and heritage is to be proved for every individual child in every case.273 General observations about the importance of cultural identity, and the traumatic effects of losing that identity by being placed in non-native homes, will not suffice.274 The potential for harm must be proved in relation to every individual child. Again this provides further evidence of the non-native judiciary implicitly assuming the superiority of non-native culture, and the insignificance of native culture except in particular instances. If the contrary cannot be proved in the individual case, the 'obvious' assumption is that non-native culture will most adequately serve the child's needs. The court certainly does not call on non-native culture to prove its value. This attitude was firmly established in John v Superintendent of Child Welfare (B.C.S.C.),1982,275 where Perry L.J.S.C. of the British Columbia Supreme

272 "A Vicious Circle," supra note 9 at 15.
273 "Best Interests of the Child Ideology," supra note 9 at 398 - 399.
274 Ibid.
Court, held that the proposition "that an Indian child has a better chance in life by living among his relatives and among others of his race," could not be accepted unless it was "possible to demonstrate that this [was] so, by way of some cogent evidence, with particular reference to this child." The judge accordingly attached little weight to evidence demonstrating in general terms the experience of identity crisis and dislocation faced by First Nations children when raised in non-native homes. The evidence had to pertain to this particular individual child. The necessity of proving the importance of culture to each individual child also means that in cases where the natural parents have weak links with their community, and limited participation in cultural activities, it is unlikely they will be able to establish that maintaining links with native culture and heritage is important to the child. This is particularly problematic for urban Indians and those who are alienated from their community. In C.J.K. v Children's Aid Society of Metropolitan Toronto, 1989, (Prov. Ct.) custody was denied to the First Nations grandmother of three apprehended children because, inter alia, there was no evidence that she would "ensure the retention and respect for the Indian culture." This was supported by a finding that the children had no sense of native identity. Similar reasoning is found in Children's Aid Society of Owen Sound and County of Grey v M.B., 1985, where the Ontario

276 Ibid. at 47. For commentary see "Best Interests of the Child Ideology" supra note 9 at 398.

277 "Best Interests of the Child Ideology," ibid.

278 Ibid.


280 For commentary see "Best Interests of the Child Ideology," supra note 9 at 399.

Provincial court held not only that the importance of culture to the child must be empirically proven in every case, but further that that exposure must be "quality" exposure,

"There is no hard empirical evidence before the courts on the benefits of culture. The court does not think it is enough to say there is exposure therefore it is good. If we accept that it is important for an Indian child to be exposed to the Indian culture, as does the new Act, that there is a uniqueness of Indian and native cultural heritage and tradition, and there is a need to preserve the child’s cultural identity, it seems to me that that exposure must still have the potential of being quality exposure." (Justice Gammell)

On the facts, the court held that the mother had spent her life crossing between the white culture and her native culture, and had "even lived with a white man". The clear implication by the judge was that the mother wasn’t a "real Indian" if she flirted with white society in this way, and consequently, "she has not really been able to expose the child to the Indian culture in a very meaningful way." Thus where the family involved are urban Indians who do not match the judge’s image of a "real Indian", i.e. an on-reserve status

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282 This reasoning is similar to that found in R v Van der Peet (1996) 2 S.C.R. 507 (S.C.C.) and the "integral to a distinctive culture" test which was established by the Supreme Court. The courts would seem to be taking the position that 'special treatment' for aboriginal people is only justified if there is something distinctly 'aboriginal' about their claim. The way they determine if something is distinctly aboriginal is to ascertain if the activity in question was a feature of pre-contact society. This effectively freezes aboriginal cultures, denying them a contemporary form. This reasoning is reflected in the court’s understanding of the legitimacy of claiming the importance of the indigenous factor in First Nations child welfare. If the parents do not reflect the judge’s view of what traditional pre-contact aboriginality is, it is unlikely to be successful. An Indian living a contemporary lifestyle is denied his aboriginal identity because it does not meet the court’s perception of pre-contact frozen ‘aboriginality.’ Cultural identity is denied a contemporary form. For an analysis of the Van der Peet decision see J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 Constitutional Forum 27. Similar judgements about the "native qualities" of the natural parents are made in Re Child Welfare Act (Alta Q.B.),1986, [1986] A.J. No. 539 (QL) where Justice Rowbotham held, "...the natural father, Joel McLean, wishes to have Clayton raised in a native environment. On many similar occasions in the past, when other factors have been favourable for the native upbringing of the child, I have decided that it was in the best interest of a native child to be raised with his or her own native people. The situation in this application is markedly different. The plans of the natural father and the grandmother would not place Clayton among his own people. They propose to place him at 2 years of age in a city environment..."
Indian who has resisted the lure of the city, there will be a heavy burden on the natural parents to prove the value and importance of maintaining the individual child’s links with his or her heritage and culture.  

The evidence of judicial insensitivity to the importance and value of aboriginal culture continues to grow. Even when the courts have recognised the importance of culture to the individual child, and have attributed significant weight to the indigenous factor, either through ignorance, misunderstanding or because the courts are considering culture in abstract terms, they assume that exposure to any First Nations culture will be adequate to secure the child’s connection with his or her cultural identity. This will be so even if that exposure is facilitated by non-native foster parents. Consequently, in several decisions the court has found that as long as the alternative caregivers in some way expose the child to native heritage, they are fulfilling the demands of the ‘indigenous factor’. For example in Children’s Aid Society of Owen Sound and County of Grey v M.B., 1985, when dealing with the issue of the child’s contact with her culture, the court seemed satisfied that the efforts of the non-native foster parents and their contact with native people sufficed to meet the child’s needs,

"The proposed adoptive white parents are prepared to expose the child to native culture such as would be secured by reading, attending exhibitions, libraries, cultural displays, museums and pow wows. Both have worked in Indian

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283 See also the decisions in Re C.I.W.S. 1 C.N.L.R. 51 [1987] and V.S. and J.S. v M.M. and C.M. [1989] N.W.T.R. 169. The romanticism and freezing of aboriginal identity in pre-contact form and its effects on litigation concerning First Nations was considered by Hugh Braker (LLM candidate University of British Columbia, and First Nations lawyer from the Nuu-chah-nulth nation) in a presentation to the Faculty of Law, University of British Columbia, February 1997).

284 "Best Interests of the Child Ideology," supra note 9 at 401 - 402.

285 Supra note 281.
communities in the James Bay area, the mother as a teacher for a year and the
father as a builder of schools. They have fostered Indian children and are the
adoptive parents of two Indian boys.”

In Re A.B., 1989, Justice Landerkin of the Alberta Provincial Court assumed that
because the foster parents of the native child lived, “contiguous to a large Indian
reserve...it would be a fair inference that this physical location would allow this part of
their heritage to be explored.” The court did not consider it to be relevant whether the
reserve was the child’s original community, or even if the reserve was part of his or her
Nation. The question of culture certainly was not considered in terms of the child’s
continuing exposure to the particular culture and heritage of his or her specific
community. Kline argues that the courts adopt this attitude because once the child has
been constructed as an individual abstracted out of his/her culture there is no need to
maintain the specific link. Another plausible explanation is that out of ignorance or
misunderstanding, the judiciary assume there is only one tradition and value system uniting

286 Justice Dickson applied similar reasoning when hearing a petition for adoption in Wilson v Young
(1983), [1984] 2 C.N.L.R., 185; 28 Sask R. 287 (Sask. Fam. Ct.). He gave a clear example of how any
evidence of native heritage in background of the adoptive parents, and vague promises of exposure, will
satisfy the court that the requirements of cultural identity are met, "Emily acquired native culture by birth
and it is important to her that she becomes well acquainted with it. Implicit in his testimony is the
suggestion that Emily will be cut off from her natural parents, and consequently her birth culture, if she is
adopted into the non-native home of the applicants. That fear is groundless. Emily has been informed of
her origin...Her foster mother proudly lays claim to some native blood. The entire family has attended
native social and cultural events."

supra note 9 at 401.

288 Re A.B., ibid. at 154; “Best Interests of the Child ideology,” ibid.

289 “Best Interests of the Child Ideology,” ibid.

290 Ibid.
all the individual indigenous First Nations. Thus exposure to any 'indigenous culture' will be adequate.\textsuperscript{291}

Thus as Kline concludes, there is substantial evidence that in some cases the importance of maintaining a child’s cultural identity and links with his or her community is completely ignored because the courts understand culture as being separate from, and irrelevant to, the question of the child’s best interests; in others it is given very little weight; and in others a heavy individualistic burden is placed on those asserting it to prove its importance to the individual child.\textsuperscript{292} All these examples serve to demonstrate that the non-native child welfare system constantly downgrades the value and importance of native culture, and the benefits and security it can provide for the child. Underlying the devaluing of native culture is a belief in the adequacy, if not superiority of non-native culture in meeting the child’s best interests.

\textit{2.2 (ii) The Exclusion of Community Perspectives}

The individualistic, abstract form of the best interests test, also causes difficulties in the court’s perception of the role of the community in securing the child’s best interests.\textsuperscript{293} The differing insights of First Nations culture, particularly the collective

\textsuperscript{291} It should be noted that the evidence on the harm caused by cross-cultural adoption is not unquestioned. Since the moratorium on non-native adoption was introduced in B.C. there has been a serious problem in finding suitable homes for First Nations children, \textit{supra} note 217. There is a strong argument that as a last resort a loving home where a substantial and genuine effort is made to keep the children in contact with their non-native culture and community, is significantly better than no home at all.

\textsuperscript{292} "Best Interests of the Child Ideology," \textit{supra} note 9 at 396.

\textsuperscript{293} See especially, "Best Interests of the Child Ideology," \textit{ibid.} at 410 - 414; Carasco, \textit{supra} note 9 at 127 - 129.
perspective on child welfare issues, is rejected as irrelevant by the non-native system; it is outside the boundaries of their individualistic legal understanding.\textsuperscript{294} The child is viewed by the courts as an individual, not as a member of a collective, and consequently the needs and interests of the collective in relation to the child are given little consideration.\textsuperscript{295} A band which wishes to challenge the removal of a child, or argue that its collective interests should be a relevant factor in the decision, will be faced with strong opposition from the courts. The band may want to argue that their collective concerns mean that the best interests principle can only be met by the child remaining within his or her community.\textsuperscript{296} This argument is not unlikely to be raised as many communities struggle to rebuild themselves from the ruins of colonial oppression. Keeping their children within the community is vital to that process.\textsuperscript{297} Many commentators argue that First Nations have traditionally accorded priority to collective concerns, even if the individual interests of the group members must suffer.\textsuperscript{298} The courts, however, will not acknowledge these collective concerns within the liberal ideology of the best interests test.\textsuperscript{299} The ethos behind the

\textsuperscript{294} "A Vicious Circle," \textit{supra} note 9 at 6.

\textsuperscript{295} "Best Interests of the Child Ideology," \textit{supra} note 9 at 411. The argument that First Nations communities would place their collective interests before the individual best interests of the child should be treated with caution and will be re-examined below at chapter 5. The collective - individualistic dichotomy is not true for all First Nations cultures. See especially on this point M. E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 at 16 - 17, where she argues, "I would take issue with some scholars on their projection of 'society' as an either - or [individualistic or collectivist], and caution against an attempt to typify, for example, an Aboriginal society in such a fashion."

\textsuperscript{296} "Best Interests of the Child Ideology," \textit{ibid.} at 410.

\textsuperscript{297} \textit{Ibid.}

\textsuperscript{298} \textit{Ibid.}; See also "A Vicious Circle," \textit{supra} note 9 at 6.

\textsuperscript{299} "Best Interests of the Child Ideology," \textit{ibid.} at 411.
concept of the child’s best interests in Canadian child welfare law encourages an assumption that the collective interests of the group will be antithetical to the individual interests of the child. This of course is not necessarily the case. To secure the collective interest of the group in preserving their distinct cultural identity and heritage, and thereby helping to re-establish community viability, is very much in the interests of individual First Nations children. However the courts are repelled by any argument that the individual interests of the child should be ‘sacrificed’ to the community collective interest. Concerns about the impact of the child welfare system upon the collective interests of the First Nations, or a particular band, are liable to be deemed irrelevant or illegitimate by the court. Justice Little in Kenora-Patricia Child and Family Services v Rose F., (Ont. Prov. Ct. Fam. Div.), 1988, sent a strong warning to First Nations communities who intervene in proceedings concerning First Nations children, that they had better have substantive arguments, backed by supporting evidence, or the courts will ‘punish’ their interference. In the case at bar, the band made a general argument concerning the damaging effects of removing the child from his or her community, and that therefore the child should be placed with a member of his or her extended family or a member of the child’s native

300 Ibid. The liberalism of John Stuart Mill, for example, is based on securing protection for the individual against the abuses and will of the majority. J.S. Mill, “On Liberty” in J. Banfield, ed., Readings in Law and Society (Captus Press, 1992). This interpretation of liberalism was recently given strong judicial recognition in the Supreme Court by Madam Justice L’Heroux-Dube giving judgment in R v Morgentaler (1988) 1 S.C.R. 30 (S.C.C.).

301 This was the approach of Kelowa Edel, Manager of Child Welfare, Xolhmi:ih Child and Family Services, Sto:Lo Nation. (Interview with Kelowa Edel, Manager of Child Welfare, Xolhmi:ih Child and Family Services, Sto:Lo Nation (April 17th, 1997) Sto:Lo Nation). See below at chapter 5.

302 “Best Interests of the Child Ideology,” supra note 9 at 412

community. The court ordered costs against the band because it had advanced only general arguments to support its position, without making specific reference to a plan for the child.  

Justice Littel in awarding costs stated,

"I appreciate very much and sympathise with the position of the Islington Band but there are many children of the reserve who have become wards of the state and that the Band has developed a position to encourage consideration of Section 53 (4) and (5) by the Society, and ultimately by the court, before wardship is ordered. However, the Band is obliged with respect to every individual case before the court to develop the position not based on an opinion with regard to the effect of the child welfare system on the reserve, but rather a position based on the facts of the particular case before the court. That was not done in this case and I am of the view that this matter was unnecessarily prolonged because the band developed this position and was unwilling or unable to call evidence in support of that position."

The provincial and federal governments have met with equal opposition in attempts to facilitate the community’s involvement. The Regional Children’s Guardian of Alberta had his decision to remove a nine year old Cree child from his or her non-native foster parents quashed in an action for judicial review in N.P.P. v Regional Children’s Guardian, 1988 (Alta. Q.B.). The Guardian had decided that rather than sanction adoption by the foster parents, the child should be placed with an aunt on his or her mother’s reserve. The court found that the guardian had made an error of law in interpreting the word “family”, in sec. 2 (a) of the legislation, as including members of a band who share a common ancestry. The court insisted that “family” included only the ‘nuclear’ family as

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304 “Best Interests of the Child Ideology,” supra note 9 at 412 - 413.
305 Ibid. at 413.
307 Ibid.
308 Ibid.
understood in non-native Canadian society.\textsuperscript{309} The courts clearly have difficulty in accepting the collective as a legitimate party to custody proceedings. They certainly will not sanction any attempt of the band, as a group, to be granted custody of a child. The courts’ demand an individual person to perform the parental roles. Thus in Simenoff\textsuperscript{v} J.A., (B.C.C.A.), 1992,\textsuperscript{310} the court would not countenance the argument that a tribe or band was capable of exercising custody over a child,

"The second reason why the Akhiok tribe’s request for custody could not be granted is that the tribe is not a person eligible to apply for or be granted child custody under the Family Relations Act. Custody is a personal relationship between an adult individual with duties and responsibilities and a child to whom the duties and responsibilities are owing. The entire thrust of the custody provisions of the Act is towards that person to person relationship. Regardless of the nature of the tie that binds the members together, the notion that such a group can be regarded as an individual for purposes of child custody is entirely foreign to the concept of custody, and to the individual duties and responsibilities implicit in the concept."\textsuperscript{311}

Collective notions of parenthood simply do not conform to the judiciary’s culturally rooted perception of the ‘nuclear’ family and they are not prepared to widen their understanding to incorporate the First Nations differing insights.\textsuperscript{312} Similarly the courts are fiercely reluctant to accept the argument that the collective interests of the group should override the best interests of the child. This comes through very clearly in Simenoff\textsuperscript{313} and

\begin{itemize}
\item \textsuperscript{309} \textit{Ibid.}
\item \textsuperscript{310} \textit{S (S.M.) v A (J.P.)} (1992) 64 B.C.L.R. (2d) 344 (B.C.C.A.) [hereinafter Simenoff].
\item \textsuperscript{311} \textit{Ibid.} at 354.
\item \textsuperscript{312} Contra, the decision can be defended as an example of the court refusing to allow the tribe to place their ‘political’ interests before the child’s best interests. Concern has been expressed concerning the politicisation of First Nations child welfare. See e.g. \textit{Matthew’s Story, supra} note 16 at 246.
\item \textsuperscript{313} \textit{Supra} note 310.
\end{itemize}
Jane Doe v Awasis Agency of N. Manitoba, 1989, (Man. C.A.).\textsuperscript{314} In both these cases the court condemned the tribe/band’s actions of putting their collective political goals before the individual interests and welfare of the child. A contrary conclusion would be abhorrent to the liberal individualistic rights based approach of Canadian law. The prevalence of this view was strongly reaffirmed by Justice Giesbrecht in the Desjarlais Inquiry.\textsuperscript{315} In his view First Nations children are the ultimate responsibility of the provincial government, not an asset of the First Nations communities, and consequently must be given the same provincial protections as all other Canadians. In particular their interests must not be sacrificed to those of the group,

‘[Indian children] are not the “property” of one ethnic or racial group any more than any Canadian child is “property”. The Child and Family Services Act recognises that aboriginal heritage is important but in order for a person to appreciate her culture and traditions, that person has to first survive childhood. The primary right of a child to a true childhood comes before racial, ethnic or religious considerations\textsuperscript{5}.

This is a clear denial of the authority of the First Nations people over their own children, and in fact can be argued to treat First Nations children as an “asset” or possession of Canadian society. Justice Giesbrecht’s statement has the worrying connotation that the provincial government remains the ‘saviour’ of First Nations children from the ‘barbaric savagery of the Indians’. This is paternalistic colonialism alive and well in 1992.


\textsuperscript{315} Desjarlais Inquiry, supra note 13.

\textsuperscript{316} Justice Giesbrecht, \textit{ibid.} at 158.
Both the disregard for the collective concerns of the band, and the courts' reluctance to give serious consideration to the indigenous factor, are exacerbated by the lack of input and involvement by First Nations communities in the child welfare system. The First Nations have experienced great difficulty in securing their active involvement in child welfare decisions. In addition to the threat of costs imposed in Kenora-Patricia Child and Family Services v Rose F, the courts have sought to limit the intervention of First Nations communities even when it is statutorily provided. For example, in Northwest Child and Family Services Agency v S.J.T., (Man. Q.B.), 1990, Anishnaabe Child and Family Services was refused leave to intervene in an application for guardianship of a native Anishnaabe child who resided off the reserve. The court held that the community, through Anishnaabe, could only intervene in cases of children residing on the reserve, the agency had no extended jurisdiction over off-reserve band members. Thus the community could take no part in the proceedings. The problem with the inherent racism of the system is clearly exacerbated by the lack of involvement of the First Nations communities. The future of First Nations children is being determined by a non-native value system imposed on them through a foreign non-native court. It would greatly facilitate the courts understanding of the First Nations position and concerns if their direct contribution to the proceedings was substantially increased.

317 "Best Interests of the Child Ideology," supra note 9 at 412.

A Child in Need of Protection? The Expected Standard of Care

The culture blind application of the best interests test is clearly vulnerable to the attack that it is a colonising force in the lives of First Nations communities because of its liberal individualistic form, refusal to give serious consideration to the indigenous factor, devaluing of native culture, and its failure to recognise and include the wider collective interests of the First Nations community. However, the colonising force of child welfare law extends beyond the best interests standard. There is still further ammunition for the critics of the current child welfare system, and particularly the critics of the court’s role in the process of ‘cultural genocide’. They argue that another clear example of the imposition of white ethnocentric standards through ‘universal’ child welfare legislation, is the standard of parental care demanded when determining if the child is in need of protection, or should be returned to its parents.\textsuperscript{319} As was argued earlier in the context of the practices of social workers, in determining whether the child has been neglected, or if called on to determine the suitability of a native home environment, it is argued that the courts are imposing culturally biased standards as to cleanliness, organisation, and standards of good parenting.\textsuperscript{320} The standard of care the courts apply, arguably ignores both the poverty and degradation many First Nations communities suffer at the hands of Euro-Canadian society, and the distinctive value system of many First Nations communities.\textsuperscript{321} The irrelevance of these factors was strongly confirmed by Chief Justice

\textsuperscript{319} See especially, “Complicating the Ideology,” \textit{supra} note 9; Carasco, \textit{supra} note 9 at 130 - 132.

\textsuperscript{320} “Complicating the Ideology,” \textit{ibid}. at 123 and 126.

\textsuperscript{321} \textit{Ibid}. at 123, 125, and 129.
Monim in Director of Child Welfare v B.B. (Manitoba C.A.), 1988. The Court of Appeal overturned the finding of the trial judge that although the living conditions were poor, they were not so far out of the ordinary for the region as to justify the order for permanent guardianship, holding,

"I do not accept as sound principle enunciated by the trial judge that there are certain standards or norms which are acceptable for Easterville but unacceptable for the rest of the province. Economic conditions may differ but there is only one standard of care to be considered and applied whether the infants reside or whether the household is situated in Easterville, The Pas, Churchill, Brandon, Crescent-wood, Tuxedo, West Kildonian or the Core area."

In a short judgement, the Supreme Court on appeal, stated that it disagreed with this test, but affirmed the decision on the facts. However, the Court of Appeal’s reasoning is not an isolated incident. In Children’s Aid Society of the Districts of Sudbury and Manitoulin v M.E. (Ont. Prov. Ct.) 1983, the court stated that in giving the children a better chance in life they were not imposing middle class standards. If the parents were inadequate they were inadequate regardless of culture,

"In stating that these children are entitled to something better than what their parents have given to them in the past, I am of the opinion that I am not imposing middle class standards on this family. Surely whether they are native or non-native does not make any difference when you consider the seriousness of the alcohol problem which the parents have and the exposure of those two infant children to this problem and the consequences of it."

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323 Ibid. at 114.
As Kline argues, "dominant middle-class ideals of cleanliness and tidiness are central to the court’s ideological constructions of good motherhood, and have particularly oppressive effects for many First Nations women confronted by the child welfare system." 326 A First Nations mother is presumed to be a 'bad mother' if she lives a nomadic life and the home she provides is not stable, clean and tidy. 327 Because of the disproportionate poverty suffered by First Nations women these standards have a particularly harsh impact on judgments as to their suitability. 328 These factors are taken as indicative of the quality of the mother’s care, and can lead to the child’s removal, even if there is no actual neglect. However, it can be argued that such lifestyle characteristics do not constitute neglect, but are rooted in cultural differences. 329 For example, in L.O. and S.O. v Superintendent of Child Welfare (NWT. S.C.), 1984, 330 a nineteen month old Inuit girl suffering from serious skin rashes was apprehended from her caregivers because, in the opinion of the court, their house, "was just not tidy enough for such a tender-skinned little girl." 331 The Inuit community on the other hand did not view untidiness as a sufficient reason to remove the child. 332 They considered the parents to be "respected and well-liked" within the

326 “Complicating the Ideology,” supra note 9 at 128.
327 Ibid. at 126.
328 Ibid. at 127.
329 Ibid.
331 Ibid. at 298 (cited in “Complicating the Ideology,” supra note 9 at 128).
332 “Complicating the Ideology,” ibid. at 128.
community and their home was regarded as the child's proper home. It would seem therefore that both the issues of cultural chauvinism, and poverty, are ignored by the court when assessing if the child is in need of protection, or can return to a suitable home environment.

‘White middle class’ ideology discriminates not only against First Nations homes and communities when judgements are made as to their physical suitability, but also when judgments are made as to the character of the mother. Kline argues that First Nations women are consistently constructed by the courts as “bad mothers” because they do not always meet the dominant cultural expectations, and ideology of a good mother, that predominates in non-native society. Thus they are less likely to be successful in retaining their children. Kline argues that the court draws on an ideological concept of motherhood which scrutinises the individual’s behaviour and blames the individual for her problems. The root of those difficulties in the colonial relationship that exists between the First Nations and Canada are not considered as relevant. The problems many First Nations women experience, such as alcohol dependency, are considered by the judiciary not as symptoms of colonial oppression, but as personal defects which they must resolve within a reasonable time if their children are to be returned. For example in Director of Child


\[337\] *Ibid.* at 125.
Welfare of Manitoba v B (Man. Prov. Ct. Family Div.), 1979, the court referred to substantial alcohol abuse by the mother as an aspect of her “lifestyle.”

The dominant ideology of motherhood also creates the expectation that mothers be “unselfish and self-sacrificing.” First Nations mothers are frequently drawn as quite the opposite which again reveals the prejudices of the court. The characterisation of alcohol or financial problems as personal problems, implies that the mothers who fail to resolve these difficulties are acting selfishly and callously. On the other hand those First Nations mothers who do turn around their lives and show a commitment to their child by fighting for his/her return, are also characterised by the court as selfish or acting for their own particular interests. A determination to win the return of the child is often interpreted as being motivated by “vested”, often political interests, rendering the parent incapable of reaching an impartial determination of the child’s interests. This would appear to be the attitude taken by Madam Justice Wilson towards the natural mother in Racine v Woods.

Several of the comments in the judgment indicate the courts disapproval of the mother,

“It is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about...As has been emphasised many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious

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339 “Complicating the Ideology,” supra note 9 at 125.
340 Ibid. at 126.
341 Ibid.
342 Ibid. at 135; “Best Interests of the Child Ideology,” supra note 9 at 407 - 410.
343 “Best Interests of the Child Ideology,” ibid. at 407.
344 Supra note 181.
obligations...It takes a very high degree of selflessness and maturity - for most of us probably an unattainable degree - for a parent to acknowledge that it might be better for his or her child to be brought up by someone else.  

Thus Justice Wilson identified a 'natural' self-interest in parents which was particularly prevalent in the character of this 'politically - minded' First Nations woman. Her attempts to fight the child welfare system and retrieve her child, are portrayed only in a negative light. In contrast the court gave very little recognition to the mother’s successful efforts at rehabilitation and overcoming the problems in her life so she could offer her daughter a secure and stable home.

2.2 (iv) The Exclusion of First Nations Laws, Traditions, and Practices

The final substantive criticism levelled at the court to support the contention that the current child welfare system is an indefensible vehicle of cultural genocide and incapable of acting sensitively and appropriately towards First Nations people, is that they have consistently failed to recognise the legal validity, under Canadian child welfare law, of aboriginal cultural norms, customs, and practices. In particular they give no consideration to the differing approaches and insights of the First Nations people to child rearing. Thus cultural practices such as the extended family support system and customary

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345 Ibid. at 185. For commentary see “Best interests of the Child Ideology,” supra note 9 at 408.

346 “Best Interests of the Child Ideology,” ibid. at 409.

347 Ibid.

348 Ibid. at 410.

349 See especially, Morse, supra note 153; Bala, Hornick and Vogl, supra note 63 at 179 - 180; and “Complicating the Ideology” supra note 131 - 134.
adoption have not been given firm legal status. With regard to both the initial decision to apprehend, and the appropriate residential placement, the involvement and commitment of extended family members to caregiving, when the parents for some reason are unable to fulfil their responsibilities, is given insufficient weight and recognition by the courts. With regard to both the initial decision to apprehend, and the appropriate residential placement, the involvement and commitment of extended family members to caregiving, when the parents for some reason are unable to fulfil their responsibilities, is given insufficient weight and recognition by the courts. The mother’s individual capacity to cope is not countered against the ability of the extended family as a whole to fill the void. In *Mooswa v Minister of Social Services for Saskatchewan* (Sask. Q.B.), 1976, the court was called on to determine if an apprehended child should be returned to her mother who had recently overcome an alcohol dependency. Even though the mother had moved in with her own mother and started a new life, and was perfectly adequately caring for a new born child, the court was not prepared to give weight to the evidence that the grandmother would be heavily involved in the care of the child. The mother was expected to make a fresh start without her mother’s help. Similarly in *Re PLC.* (Alta Q.B.), 1986, the issue was whether a two and a half year old child was in need of protection. The court ignored the evidence that three other children were adequately cared for, in part due to the involvement of

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350 “Complicating the Ideology,” *ibid.* at 132.


353 “Complicating the ideology,” *supra* note 9 at 132.


355 *Ibid.* See also the decision in *Flanders v Bruce* (1986) B.C.J. No. 2280 (B.C.S.C.), a custody battle, where the father’s claim which was combined with a claim by his mother, the grandmother, was treated as a claim by a non-parent as the claim was chiefly hers, and consequently the claim was decided under different principles, which put the father and grandmother at a disadvantage.

extended family members. The court was only concerned with the inadequacies of the mother. The courts clearly find it difficult to distance themselves from the dominant ideal of the nuclear family, with the parents as the two clear primary caregivers. The mother is expected to take sole responsibility for the child. To 'muddy' this picture with a number of indeterminate caregivers is something they are unwilling to do.

The courts have also shown themselves to be unwilling to accept the valid operation of indigenous family law. The refusal to acknowledge the First Nations own law and traditions as applicable to a case concerning a First Nations child, is another example of the determination of non-native Canadian society to make First Nations communities comply with their values and standards, rather than respect the community’s right to self-governance or autonomy. This issue has become particularly important in the sphere of customary adoption. It is claimed that the Indian and Inuit peoples have maintained a system of adoption, pursuant to their law, in spite of the child welfare system. However despite the suggested prevalence of these practices among the Inuit in the Arctic and Indians in many provinces, they have generally been forced to operate outside of the system. There has been very limited recognition of their legal validity. In

357 "Complicating the Ideology," supra note 9 at 133.
358 Ibid.
359 Ibid. at 124.
360 See especially Morse, supra note 153 at 206 - 207 where he argues that one way in which the First Nations can reassert their authority is through recognition of the validity of traditional or customary law.
361 Ibid. at 250.
362 Ibid.
the North West Territories, Judge Sissons in Re Adoption of Katie E-7 1807 (N.W.T.T.C.), 1962, held that custom adoptions by Indian and Inuit parents were common and had not been abrogated by federal legislation. He then gave a declaratory order stating that "adoptions" made according to the laws of the territories including adoptions in accordance with Indian or Eskimo custom, were such that they had the same effect as if they had been made pursuant to the terms of the Child Welfare Ordinance. This procedure of obtaining a declaratory order for custom adoptions has become widespread among the Inuit and is accepted by the federal government. The validity of Indian custom adoption was upheld on the same grounds in Re Beaulieu's Adoption Petition (N.W.T.T.C.), 1969. Consequently the validity of custom adoption with or without judicial approval is beyond doubt in the Northwest Territories. However the validity of custom adoptions in other provinces is still extremely doubtful, and the recognition of indigenous family law is more the exception than the rule. It is perhaps too early to place too much weight on the decision of the B.C.C.A. in Casimel v Insurance Corp. of B.C. (B.C.C.A.), 1993, where legal recognition was afforded to customary adoption for the purposes of insurance benefits. Remedial legislation to explicitly

363 (1962) 38 W.W.R. 100 (N.W.T).
364 Morse, supra note 153 at 251.
365 Ibid.
366 Ibid. at 253.
368 Morse, supra note 153 at 253.
recognise the validity of custom adoptions would be needed to place their status on a more secure footing.\textsuperscript{370} Outside of adoption there is absolutely no recognition of the indigenous traditional social institutions and laws for dealing with child welfare and protection.\textsuperscript{371} The court has simply imposed its own foreign child welfare system upon the First Nations communities.

The strength of these criticisms is clear, and many of the problems with provincial legislation and judicial insensitivity that have been identified cannot be challenged. However, in recent years there have been some important efforts at increasing the sensitivity of the provincial child welfare systems, including specific recognition of the importance of aboriginal culture in some provincial legislation, and an important change in judicial attitude towards issues such as the importance of the ‘indigenous factor’. Many of these changes are recent and are not reflected in the critical literature. They are by no means perfect and are only a partial response to the problems of colonisation. The efforts at indigenisation clearly do not affect the strength of the claim to self-government that the previous discussion supports. However, the recent reforms in legislation which attempt to incorporate aboriginal perspectives, recognise the centrality of culture, and include the traditions and practices of the First Nations, combined with the evidence of increased sensitivity by the judiciary should be noted. The success or otherwise of efforts to reform

\textsuperscript{370} See for example, the recommendations made by the Royal Commission on Family and Children’s Law in 1975: \textit{Native Families and the Law}, supra note 77 at 40, “Recommendation 24: An Indian custom adoption should be recognised as a legal adoption under new adoption legislation.”

\textsuperscript{371} For a detailed discussion of Indian and Inuit family law see Morse, \textit{supra} note 153; N. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” (1984) 4 C.N.L.R.
the provincial child welfare systems is not the focus of this thesis, but these reform efforts will be re-examined in chapter five.

3. Conclusion

The criticisms of scholars such as Kline, Monture and Carasco are certainly convincing. The effect on the First Nations communities of losing one generation after another generation of their children from their communities cannot be underestimated. The loss of family, community, and culture causes profound trauma for the individual and the community as a whole. For the individual it has meant a loss of identity and the support systems which enhance his/her self-identity. Self-esteem among First Nations youth is extremely low. First Nations children have been caught in the tension between the expectations of non-native society to assimilate and emulate their non-native role models, and having to face the discrimination and prejudice visible minority groups meet every day. But perhaps most devastating is the loss of their family, their sense of belonging to a community, and the loss of pride in his or her distinct cultural heritage. The distress for the individual is clear,

'Aboriginal families like our family and I marvelled that we weren't all stark raving mad. I met 'white' people whose experiences of life from first consciousness were of continual affirmation of their being; their self-esteem had never been attacked or questioned in any way; they had no concept of rejection by their families; and the community around them. They were totally confident of their place in society; and they disported themselves with the physical and

372 See especially, Liberating Our Children, supra note 9 at 19 - 22; the Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol. 4 (Ottawa: Ministry of Supply and Services, 1996) at 149 - 161; Gathering Strength, supra note 9.

373 Liberating Our Children, ibid.
social demeanour of people who knew nothing of the never-ending quest to
know who one is; nothing of the struggle to assert one's existence in the
world."\textsuperscript{374}

It is argued that white foster homes are not culturally equipped to create an environment
in which a positive image in a First Nations child can be developed.\textsuperscript{375} The result is many
adoption placements will break down.\textsuperscript{376} This loss of identity and the feeling of rejection is
often manifested in delinquency and crime in adolescence, and so a cycle of incarceration
and abuse is perpetuated.\textsuperscript{377} The alternative is often suicide. In essence the child is left
"seriously and permanently impaired."\textsuperscript{378} For the communities the removal of their children
means another generation to whom the traditions, culture and values of the society are lost
and another generation of alienated individuals who in turn will subject their own children
to their frustrations and confusions.\textsuperscript{379} The social values and common heritage which holds
the community together have often been lost and the communities have found themselves:

\textsuperscript{374} P. O'Shane, "The Psychological Impact of White Colonialism on Aboriginal People" (1995) 3
Australasian Psychiatry 149, at 154. Pat O'Shane is here expressing her own experiences as an aboriginal
child growing up in Australia.

\textsuperscript{375} Liberating our Children, supra note 9 at 20.

\textsuperscript{376} Ibid.

\textsuperscript{377} No Quiet Place, supra note 9 at 158. See also "A Vicious Circle," supra note 9; and Liberating Our
Children, supra note 9 at 22. It should however be recognised that the circle of abuse is not restricted to
First Nations children. The Gove Inquiry makes a similar comment with respect to non-native children
who are taken into care: "It is profoundly saddening that one of the highest risk factors for the
commission of abuse and neglect is that the parent was once a child in the care of the Ministry."

\textsuperscript{378} No Quiet Place, ibid. at 147.

\textsuperscript{379} Kenn Richard - Executive Director, Native Child and Family Services of Toronto, reported to the
Royal Commission, 1996, that, '[m]ost of our clients - probably 90% are in fact victims themselves of the
child welfare system." The Royal Commission therefore conclude that the family dysfunction of today is a
legacy of disrupted relationships in the past, Gathering Strength, supra note 9 at 34.
in a state of disintegration.\textsuperscript{380} Fundamental to this disintegration was the fact that basic aboriginal parenting skills and traditional responsibilities were never passed on to large numbers of children,

"The future of our communities lies with our children, who need to be nurtured within their families and communities." (Charles Morris, Executive Director, Tikinagan Child and Family Services)\textsuperscript{381}

If the children are not nurtured in their communities the circle of abuse will continue. By continuing to sanction the disproportional and often unwarranted removal of First Nations children from their communities, the child welfare system, from the social workers to the judiciary, is directly implicated in exacerbating this pattern of social disintegration,

"The cultural chauvinism of the Europeans resulted in tragic consequences for our people. History since that time has been one of colonisation, oppression, and genocide."\textsuperscript{382}

In conclusion, it is clear why many aboriginal people view the provincial child welfare system as a powerful vehicle of cultural genocide. On this evidence, it has consistently devalued and ignored the values, traditions, and special concerns of the First Nations people. This provides strong support for the contention that a subtle process of colonisation has continued beyond the residential schools, whereby the supposed superiority of non-native values, standards, and lifestyle has been imposed upon yet another generation of First Nations children. Given these arguments, the conclusion that

\textsuperscript{380} For a more detailed discussion of the prevalent conditions in many First Nations communities, see below at chapter 3 pp. 195 - 233.

\textsuperscript{381} Gathering Strength, supra note 9 at 11; see also Liberating Our Children, supra note 9 at 22.

\textsuperscript{382} Liberating Our Children, ibid. at 13.
the devastating impact of the child welfare system on the First Nations people can only be reversed by immediately initiating a process of decolonisation, is the only appropriate response. Decolonisation can be achieved in a variety of ways, and some of the arguments of critics obscure solutions such as the potential for successful indigenisation of the system, whilst romanticising others. However, the strong view in the literature remains that colonial authority must be terminated; self-government has to be the answer. Given the overwhelming agreement on this solution, yet the wholesale failure to address its implications for First Nations children, it is to self-government that this thesis will turn.
Chapter Two
Self-Government - The Path to Decolonisation.

“What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what the common law says, and in spite of what have been the policies of this government to the present day.” (Herb George - Gitksan - Wet’suwet’en Government)

The implications of First Nations control over child welfare must be considered within the larger context of the general movement towards self-government in First Nations communities. Inevitably the manner in which self-government is implemented, particularly the scope of its powers and any possible limitations on its autonomy, will determine the degree of control enjoyed by child welfare agencies within those communities. In agreement with the critics of the provincial child welfare system, post-colonial literature on decolonisation would seem to suggest that the most effective method of reversing the debilitating effects of five centuries of colonialism is to return to First Nations people control over their own lives and destiny. Self-Government provides one way in which that control and autonomy can be secured. It is a premise of this thesis that

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the process of decolonisation must be moved forward and that self-government is one method by which the decolonisation of First Nations can be realised.

In recent years "self-government", has become the "buzz word" of First Nations leaders and non-native politicians alike. Self-government is consistently hailed as the obvious answer to the appalling human rights violations that have been suffered by First Nations people in Canada. However, self-government has now formed a central part of Government policy for at least a decade, and despite the rhetoric of non-native leaders, for many First Nations communities, it is still an incoherent and distant dream. Clearly the uncertainty that surrounds the concept of self-government continues to provide ammunition for the opponents of the right, particularly those who fear the effects of self-government on national unity. Given this continuing threat to the effective implementation of self-government, it is important to examine the manner in which the right can be secured and implemented within the Canadian legal and political framework. Despite wavering in political support, it would seem that the Canadian Government has advanced so far down the road towards self-government that to turn back now would be extremely difficult. For the moment, therefore, the right to self-government appears to be secure and there is no reason to think that in the next few years the First Nations will not be able to proceed along their desired road to autonomy. More importantly for First Nations children, the moves towards autonomous control over child welfare continue to

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2 In May of this year the Reform party who are the chief advocates of these fears won a convincing victory in the Western Provinces in the Federal elections, indicating perhaps a loss of public support for First Nations self-government. For an attack on the right of First Nations to self-government see Mel Smith, *Our Home or Native Land?: What Governments Aboriginal Policy is Doing to Canada* (Victoria B.C.: Crown Western, 1995).
advance as a matter of priority out of recognition that successful child welfare is vital to
the overall success of self-government.

1. The Implementation of Self-Government

The contemporary fight of First Nations people for recognition of their right to
self-government has spanned three decades, culminating recently in the Report of the
Royal Commission on Aboriginal peoples. During those years the methods by which First
Nations have sought to secure self-government have varied. The 1983 Penner report,
which is credited with bringing coherence and credibility to the concept of self-
government, outlined the avenues by which the right could be attained. It recommended
that the methods to realise and protect a right to self-government within the current
Canadian framework were, recognition of the right as already existing under sec. 35 of the
Constitution Act, 1982; explicit constitutional protection by amendment of the
Constitution; and finally the passing of umbrella or particularised self-government
legislation to oversee the transferral of power to First Nations communities. As the right
to self-government developed in Canada over the last three decades, leaders have at

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4 Recognition of self-government as a pre-existing right protected by sec. 35 can be achieved either through litigation and judicial recognition, or through the process of negotiation, the resulting agreement being protected under sec. 35 as an aboriginal or treaty right. See below at pp. 136 to 162.

5 See below at pp 128 to 136.

6 See below at pp 108 to 128.
various stages focused upon one or other of these methods as providing the most appropriate solution. The main concern of the federal government has been to subject self-government to their limitations, and keep its development and implementation under their control. The main concern of First Nations has been to use self-government to overcome the damaging effects of colonisation, particularly the social and economic problems within their community. They are particularly concerned to prevent the paternalistic intervention and control of the Canadian government. The method of implementation by which the right to self-government is realised, has important implications for the realisation of these goals, with important consequences for the status of the resulting governments, and the nature and scope of their powers. It is contended that whilst self-government may become a reality in Canada, the current approach of the federal government subverts the aims of First Nations people and their decolonisation in Canada.

1.1 The Development of the Concept of Self-Government in Canada

The struggle of First Nations people for recognition of their right to self-government has been an important part of First Nations relations with non-native society since settlement. However, it is in the 1970s that contemporary First Nations rhetoric on

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8 For an analysis of the constant struggle of First Nations people since settlement for recognition of their self-governing status see J. Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-
the right to autonomy and self-government first clearly emerged, in part, as a response to the Government’s White Paper of 1969. The White Paper’s ethos of equality reflected the general mood in Canada, and more specifically, the attitudes towards First Nations people prevalent since the end of the Second World War. In the post war period the civil liberty claims of disadvantaged groups in Canada were increasingly framed in terms of equality. The primary concern was to bring an end to all visible discrimination, especially in areas such as social welfare and education. However, for First Nations people, equality within mainstream society also entailed the risk of assimilation. Consequently, much to the federal government’s embarrassment, the White Paper was fiercely rejected by First Nations communities. They interpreted the paper, not as an attempt to secure their equal status in Canada, but as an unequivocal attempt at assimilation. First Nations also responded to this perceived attack on their special status by the development of national

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leadership bodies.\textsuperscript{11} These national bodies proved to provide a sufficiently unified and powerful forum to carry forward the self-government initiatives of the 1980s and 1990s.

In the 1970s the movement towards self-government was implicit; that is there was no outwardly declared fight for recognition of the right to self-government.\textsuperscript{12} First Nations communities focused on land claims, and fishing and hunting rights, both of which fitted comfortably within the larger legal system in Canada. The claim of First Nations people to good title and rights deriving from prior occupation of the land, at least in theory, would receive a sympathetic hearing from the courts.\textsuperscript{13} This was in fact the case, and by 1973 First Nations had won acceptance of their land claims in treaty and non-treaty areas. In 1973 the controversial issue of aboriginal title was considered by the Supreme Court of Canada in Calder v Attorney-General of British Columbia,\textsuperscript{14} a decision which was widely regarded as a significant victory for the First Nations.\textsuperscript{15} All of the Supreme Court justices, except Pigeon, who did not express an opinion on the matter, held that

\begin{itemize}
  \item \textsuperscript{12} D. Sanders, Lecture Series, supra note 9.
  \item \textsuperscript{13} Macklem argues that in the realm of property and land rights deriving from prior occupation, native and non-native society would probably agree on the justice of the First Nations cause: “One advantage to a claim of prior occupancy in this context [aboriginal title] is that it enjoys normative significance for non-Aboriginal and Aboriginal people alike. A claim of prior occupancy conforms to a relatively straightforward non-Aboriginal philosophical and legal conception of just holdings with respect to land, namely all things being equal, prior occupants of land have a stronger claim to use and enjoyment than newcomers.” See P. Macklem, “Normative Dimensions,” supra note 1 at 10.
  \item \textsuperscript{15} P. Kulchyski, Unjust Relations: Aboriginal Rights in Canadian Courts (Toronto: Oxford University Press, 1994) at 62.
\end{itemize}
Aboriginal title existed in law, and where it was not extinguished continued to have force. The question in Calder was thus not whether aboriginal title was good in law but whether or not the title of the Nisga’a had been extinguished. In the same year, Quebec and the North West Territories were also facing litigation on land claims. In response to this growing litigation and particularly the decision in Calder, settling Indian and Inuit land claims became a major concern of the Canadian Government.

The rhetoric of self-government came relatively late in this process. The self-government initiative, as it developed in the 1980s, was essentially a repackaging of earlier claims under a more overarching notion. However, with self-government rhetoric, the focus shifted from land claims to the survival of the cultural collectivity; that is the survival

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16 Ibid. at 61 - 62. A question remains over the exact nature and effect of the aboriginal title which the Supreme Court recognised. Aboriginal title was characterised as 'sui generis', and the underlying title of the Crown was not questioned. It would seem the federal government could still extinguish title so long as there was “clear and plain intention.” The strength of aboriginal title therefore remains unclear.

17 Ibid.

18 In Montreal at the end of 1972 an application was bought by the Inuit and Cree of Quebec to prevent the multi-million dollar James Bay Hydro Electric Development on their traditional territories. Mr. Justice Malouf granted the Cree and Inuit an injunction and ordered work on the project to cease and banned the developers from trespassing on Indian lands. The injunction was lifted by the Court of Appeal which was upheld by the Supreme Court but the issue of Indian title was still to be settled. The position of the government and Hydro-Electric was now extremely uncertain so they embarked upon negotiations to settle the native title issue. Negotiations resulted in the James Bay and Northern Quebec Agreement, 1974. In the North West Territories Chief Francis Paulette had also initiated legal action in 1973 to forbid the registration of any transfer affecting certain lands in the NWT. This was followed five years later by the Baker Lake litigation in which the federal court defined the four criteria that had to be met before the court would find aboriginal title. The court held that the Inuit of Baker Lake met that criteria. See D. Purich, Our Land. Native Rights in Canada (Toronto: Lorimer, 1986), and D. Sanders, Self-Government- A Summary (Faculty of Law, University of British Columbia, 1996) [unpublished] at 2 [hereinafter Self-Government Summary].

19 Self-Government Summary, ibid. at 1.

20 Ibid.
of First Nations groups as distinct communities with distinct cultures, histories, and heritage. To give substance to their claim for autonomy the difference and uniqueness of First Nations people began to be emphasised. The need for recognition of cultural difference was integral to the first move towards First Nations self-government: the successful transfer of control over local education in the 1970s. However it is in the early 1980s that self-government gains momentum with the inclusion within the Constitution Act, 1982, of the recognition and affirmation of “existing aboriginal and treaty rights”, and the constitutional debates that this provision initiated.

1.2 Acceptance of the Inherent Right to Self-Government

Since the release of the 1983 Penner report it is fair to conclude that the right to self-government has enjoyed wide political support. In the 1990s political support advanced to accept self-government as an inherent right of First Nations; that is, a right which arises from within First Nations communities and does not rely upon grant or recognition from the governments of Canada,

“It is essential that the right of self-government be explicitly identified in the Constitution as inherent in nature. No other word can do justice to the fact that the right springs from sources within the Aboriginal nations, rather than from the written constitution.”

21 Ibid.

22 Ibid. See also Self-Government in Practice, supra note 9 at 10. The Nation Indian Brotherhood had produced a policy paper on Indian Control of Indian Education in the early 1970s which was extremely influential in Indian communities and concluded, “Band councils should be given total or partial authority for education on reserves, depending on local circumstances, and always with provisions for eventual complete autonomy...”

Recognition that the right to self-government is inherent is of vital importance. According to the opposing view First Nations people have no rights of government except those that the federal and provincial governments are prepared to grant them. According to the inherent right principle, “Aboriginal peoples are the heirs to ancient and enduring powers of government that they brought with them into confederation and still retain today.”

The inherent rights policy can be founded on a principle of self-determination, or recognition of the prior occupancy and prior sovereignty exercised by First Nations people over the land base which is now Canada. The underlying justifications for the inherent right policy have important implications for its potential scope.

1.2 (i) The Right to Self-Determination

Rene Tenasco, a Councillor on the Kitigan Anishinabeg Council, Manaiwaki, Quebec, explained his understanding of the principle of self-determination to the Royal Commission,

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"Self-determination is looking at our desires and our aspirations of where we want to go and being given the chance to attain that...for life itself, for existence itself, for nationhood itself..."²⁶

The Royal Commission argues that self-determination is closely linked to the concept of sovereignty.²⁷ Sovereignty is given a similar meaning,

"[Sovereignty] is the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities, and nations."²⁸

Sovereignty is regarded by many First Nations as a gift from the Creator.²⁹ It cannot be shared, taken away, nor its basic terms negotiated.³⁰ It is an inherent attribute, flowing from sources within a people or nation, rather than external sources such as international law.³¹ Rights flowing from sovereignty do not need legal sanction to exist,

"What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what the common law says, and in spite of what have been the policies of this government to the present day. If this issue is to be dealt with in a fair way, then what is required is a strong recommendation from this Commission to government that the source of our rights, the source of our lives and the source of our government is from us. That the source of our lives comes from Gitskan-Wet’suwet’en law." (Herb George Gitksan-Wet’suwet’en Government).³²

²⁶ Restructuring the Relationship, ibid. at 108.
²⁷ Ibid.
²⁸ Ibid.
²⁹ Ibid. at 109. For First Nations perspectives on self-determination and sovereignty see especially, Aboriginal Self-Determination, supra note 7 at 33, 34 - 35, 36 - 40, 40 - 41, 63 - 69, 70 - 76, 80 - 81, 82 - 84, 111 - 113, 114 - 117, 118 - 121, 122 - 123; and Nation to Nation, supra note 7 at 3 - 11 and 199 - 292; Self-Government in Practice, supra note 9 at 32 - 39.
³⁰ Restructuring the Relationship, ibid.
³¹ Ibid.
³² Ibid. at 110.
The Royal Commission argues that sovereignty finds its natural expression in the principle of self-determination. Self-determination is conceptualised as the right of "all peoples, or nations, to be able to determine their own political future or destiny free of external interference." Self-government is one way First Nations could determine their political future. It can constitute a domestic, constitutional expression of the right of First Nations to self-determination.

1.2 (ii) Prior Occupation and Sovereignty over Canadian Soil

The inherent right can also be founded on pre-existing First Nations sovereignty which non-native society attempted to usurp through their colonial policies. In claiming self-government First Nations communities focus on the history of their colonial relations.

33 Ibid. at 108.

34 “Normative Dimensions,” supra note 1 at 23. The right of the First Nations peoples to self-determination can be grounded in international law. In 1982 the United Nations established the Working Group on Indigenous populations under the aegis of the International Labour Organisation. The working group has completed a Draft Declaration on the Rights of Indigenous Peoples which recognises the right of Indigenous peoples to self-determination (reproduced (1996) 9 St. Thomas Law Review 212). The draft declaration is now before the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The preamble recognises that Indigenous peoples have the right to freely determine their relationships with states in a spirit of co-existence, mutual benefit, and full respect. It recognises no right to separation or the creation of independent sovereign states. Erica-Irene Dae’s Chair of the Working Group reasons that the right to self-determination means, “[t]he existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically.” A right to secession will only arise if, “the national political system becomes so exclusive and non-democratic that it no longer can be said to be “representing the whole people.”” See Restructuring the Relationship, supra note 3 at 169 - 172; “Normative Dimensions,” ibid. at 23 - 31. For a general discussion of the right to self-determination in international law see Maureen Davies, “Aspects of Aboriginal Rights in International Law” in Brad Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1989) at 16 - 46; R. Barsh, “Indigenous Peoples and the Right to Self-Determination in International law” in Barbara Hocking, ed., International Law and Aboriginal Human Rights (Toronto: Carswell, 1988) at 68 - 80.

with the Crown, and the inequality, prejudice and oppression they have suffered as a consequence. Clearly the fact they exercised prior occupation and sovereignty over the land, is key to their understanding of their claims for autonomy. It is argued that out of fairness, those who occupied the land first have a stronger claim than subsequent arrivals. This is certainly the view of some First Nations leaders,

“What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is under the law of the Creator. Our forefathers did their part, and now we have to do ours. Aboriginal rights means aboriginal responsibility, and we were put here to fulfil that responsibility.” (Oren Lyons)

However, it is suggested by Macklem that the argument based on prior occupancy weakens when applied in a context other than self-government over land use. It is therefore usually combined with a claim to prior sovereignty. The arguments based on prior sovereignty claim that aboriginal people ought to be entitled to exercise jurisdiction

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36 Supra note 7 and note 29. See e.g. “Normative Dimensions,” ibid. at 10 - 11 where Macklem recites the testimony of Gitskan chiefs on their legitimate claim to the land: “It has always been our belief that God gave us this land...and we say that no one can take our title away except He who gave it to us to begin with.” (Chief James Gosnell, 1983). See also the plaintiff’s opening address in Delgamuukw v British Columbia, Opening address May 11, 1987, reported at [1988] 1 C.N.L.R. 14.


39 “Normative Dimensions,” ibid. at 12.

40 Ibid. at 13.
over their lands and people, because they exercised sovereign authority before European contact,

"It is a matter of historical record that before the arrival of the Europeans...First Nations possessed and exercised absolute sovereignty over what is now called the North American continent." (Georges Erasmus and Joe Sanders)\(^{41}\)

It is argued that inherent aboriginal sovereignty should not be viewed as surrendered or extinguished by the founding of European governments on the land, or by treaties with the Crown.\(^{42}\) Instead, pre-existing sovereignty should be recognised in the contemporary form of aboriginal self-government.\(^{43}\) Central to the claim of prior sovereignty is the assertion that British and French claims to sovereignty over First Nations is unfounded. Various international law arguments concerning the legitimacy of conquest and settlement can be raised in this context.\(^{44}\) For example, applying the principle of conquest, it can be

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\(^{41}\) Georges Erasmus and Joe Sanders, "Canadian History: An Aboriginal Perspective" in Nation to Nation, supra note 7 at 3 (cited in "Normative Dimensions," ibid. at 13). The treaties signed between many First Nations and the Canadian government are argued to represent clear evidence of the fact that the Crown historically treated First Nations as sufficiently autonomous to warrant the signing of treaties and that it was desirable to reach agreement with First Nations before subjecting them to a foreign law. This supports the assertion that First Nations were self-governing and entitled to govern themselves, and that this fact has long been recognised by the Crown. ("Normative Dimensions," ibid. at 22 - 23). See also P. Fitzpatrick, "The Constitution of the Excluded - Indians and Others" in Ian Loveland, ed., A Special Relationship? The Influence of American Public Law in Britain (New York: Oxford University Press, 1995) [hereinafter "Constitution of the Excluded"] for a discussion of the need for the American authorities to recognise the independent status of the Indians in order to negotiate the surrender of land.

\(^{42}\) "Normative Dimensions," ibid. at 13.

\(^{43}\) Ibid. Macklem goes on to argue that the right to self-government should be exercised within Canadian federation as a compromise between recognition of complete aboriginal sovereignty and assimilationist policies. However the argument of prior sovereignty does not lead logically to self-government exerciseable only within Canadian federation. Rather it can ground a right to an 'absolute sovereignty' exerciseable outside of the colonial Canadian state. Macklem dismisses this conclusion but it is not clear on what grounds this leap of logic is being made other than 'pragmatic' reasons. "Normative Dimensions," ibid. at 13 - 17.

\(^{44}\) Ibid. at 13 - 14. See also "Constitution of the Excluded" supra note 41; "Borders of Legal Imagination," supra note 24 at 450 - 452; "Construction of Canadian Identity," supra note 24 at 480 - 487; "An essay on Sparrow," supra note 24 at 511 - 516.
argued that First Nations were not conquered, should not have been conquered, or even if they were, it should not have eradicated their sovereignty. Applying the principle of settlement it can be argued that settlement does not by itself eradicate the sovereignty of other groups already occupying the land. Further, the international law on which these assertions rest can be attacked as an expression of colonial power designed to serve the interests of the West. The principles of international law were clearly based on the illegitimate premise that First Nations were inferior to European nations and therefore incapable of exercising sovereignty. On this basis the West took the view that mere settlement as opposed to conquest or treaty, was sufficient to assert sovereignty over Aboriginal people. As more than one commentator has noted, for the Canadian state to be founded on such an assertion of racist colonial power is unacceptable by both native and non-native standards.


46 Ibid. at 14. Support for this contention can be found in the fact that indigenous systems of government and law continued to exist until regulated or displaced by the Canadian government. See Restructuring the Relationship, supra note 3 at 187 - 188. The Royal Commission rely heavily on the judgment of Justice Monk in Connolly v Woolwich (1867), and the judgment of Chief Justice Marshall in the decision of the United States Supreme Court in Worcester v Georgia (1832) 8 US (6 Peters) 515). Justice Marshall held that, “[c]ertain it is that our history furnishes no example of, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians...He [the King] also purchased their alliance; but never intruded into the interior of their affairs, or interfered with their self-government so far as respected themselves only.” This statement was heavily relied upon by Justice Monk in Connolly.


48 Ibid.

49 Ibid. See also the conclusions of “Construction of Canadian Identity,” supra note 24 at 487; “An Essay on Sparrow,” supra note 24 at 516; “Borders of Legal Imagination,” supra note 24 at 452.
Founding a right to self-government on the basis of prior sovereignty, or on the principle of self-determination, has the potential to be extremely expansive in scope in terms of the autonomy it supports for aboriginal communities. It can support the conclusion that Canada enjoys no sovereign authority over Aboriginal people and that First Nations hold an existing right to independence from Canada. Macklem tries to avoid this conclusion by arguing that even if the initial assertion of sovereignty was unjustified, valid reasons can be offered for why the assertion of British/French sovereignty, at some later point, should be recognised. He suggests that, 'regardless of historical reasons behind its existence there are pragmatic reasons to continue to respect Canadian sovereign authority over Aboriginal people.' One of these reasons may be the point generally raised in the international law context, that if the sovereignty of the nation state and its existing boundaries were to be questioned, chaos and anarchy would be the result.

"If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability."

50 "Normative Dimensions," ibid. at 29.
51 Ibid. at 15.
52 Ibid.
53 Ibid. at 16, citing James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1990) 75 Iowa Law Rev. 837 at 840.
However, whilst acknowledging the force of these pragmatic reasons, I would question Macklem’s conclusion that they can justify the assertion of British and French sovereignty. If that initial assertion is illegitimate, this should be recognised in the current debates on self-government and decolonisation. In particular it should inform the scope of that right. There may be other considerations to account, for example claims of surrender of sovereignty through treaty, or the wish of the First Nations to recognise aboriginal sovereignty within the confines of the Canadian state. However, the starting point for discussion should be that First Nations were subjected to an assertion of sovereignty by a colonial power, which is not justified by either legal or moral reasoning. Self-government as a means of decolonisation should be understood and interpreted on that basis.

The inherent right theory therefore entails that First Nations communities have a claim to sovereign powers within their jurisdiction. This view implies that the exercise of these governing powers is not a concern of the federal and provincial governments. First Nations have the right to govern their own communities, as they have for centuries, and this right is completely independent of the actions of the federal and provincial governments. The practical implication of this position, in terms of the manner of implementation, is that it minimises the significance of the governments’ interpretation of contemporary self-governing powers.\(^{54}\) This is not a conclusion to which the federal and provincial governments have been prepared to accede. The crucial political question in the last few years has therefore not been whether First Nations have a legitimate claim to self-government, but rather the way in which the right will be recognised and implemented. As

\(^{54}\) *A Commentary, supra* note 23 at 12.
suggested above, the method of implementation is central to any controls and limits that the federal and provincial governments may wish to impose.

1.3 Legislation - the Conservative Approach

Self-government legislation is usually regarded as the most conservative method of implementing self-government and thereby the least desirable if a fundamental restructuring of governmental powers in Canada is the objective sought. Certainly the use of legislation is frequently criticised for falling short of First Nations claims.\(^{55}\) By using legislation the federal government can maintain the position that it granted self-government to First Nations. Self-governing powers are thereby negated as finding their source from within the communities as a pre-existing sovereign right.\(^{56}\) Further, it is argued that the resulting First Nations government, as a pure creation of federal statute, is subordinate to the federal and provincial government, not the equal third order of government that is claimed.\(^{57}\) First Nations government effectively remains a municipal-style government under federal control. It can exercise only those powers which it’s superior, the federal government, decides to delegate to it and in the manner which they


\(^{56}\) Ibid. See above at pp 100 to 108.

\(^{57}\) See especially, Surviving As Indians, ibid.
dictate. Self-government legislation can thus be interpreted as antithetical to the inherent right policy and the process of decolonisation. However, self-government legislation should not be too hastily dismissed. Despite these criticisms self-government legislation has been endorsed by some First Nations communities as a means of securing ‘real’ autonomy from the federal and provincial governments. This position was most recently taken by First Nations communities in the Yukon.

1.3 (i) National Self-Government Legislation

The introduction of self-government legislation was first proposed by the federal government in the 1980s as a means of responding to the initiatives of many First Nations communities in the mid-1970s, and particularly to pressure by some bands in British Columbia who wanted more powers over land management to encourage investment and economic growth. It was hoped these legislative proposals would meet the growing


demands of First Nations for control over their communities, without changing the basic constitutional structure and division of powers of Canadian federalism. At this stage both the federal and provincial governments were extremely wary of self-government and its implications for governance and ultimate sovereignty in Canada. It is thus understandable that through its legislative proposals the federal government would seek to keep the powers and status of First Nations government limited and subject to its overriding jurisdiction. The reaction of the First Nations to the proposals was one of obvious disappointment,

“We are disappointed in the extreme by the narrow and limited version of self-government which the Minister has put forward. It seems deliberately to be slanted to focus discussion on the minor and administrative aspects of self-government, when it could range to far more broad and mature concepts.” (Blood Band)

The federal proposals, the *Optional Indian Band Government Legislation*, were presented to the Penner Committee in 1983 but the Committee would not endorse the legislation.

60 The constitutional theory which prevailed in Canada at the time was that there existed two orders of government in whom was vested all the sovereign and legislative powers of State: the provincial and federal governments. There was no space within the constitutional division of powers under sections 91 and 92 of the *Constitution Act 1867* for a third order of government. Band councils could administer delegated responsibilities permitted by the Indian Act but they could not form part of the constitutional structure of government in the same way as the federal and provincial governments. See “Implementing Self-Government,” *supra* note 24 at 192.


63 The proposal included the following: the development of a band charter as a requirement of entry into Indian band government legislation; the power to pass by-laws, adopt other pertinent laws by reference, enter into agreements with other bands and government authorities for the provision of services on reserve, and the power to enter into agreements with banks and to raise financial resources by the levy of taxes; greater control over their lands; and the authority to determine their own membership; and the
The Committee remarked that the principal reason witnesses before them had rejected the Government's proposal was that, "the proposal involve[d] a delegation of power rather than a recognition of the sovereignty of Indian First Nations governments." Under the legislation the federal government remained firmly in control over both the scope, and the manner of exercise of the power devolved. The Committee concluded that, "[t]he proposal envisages Indian governments as municipal governments and fails to take account of the origins and rights of Indian First Nations in Canada." The delegated and subordinate nature of the Indian government envisaged was clear,

"Since Band governments established under federal legislation would be junior governments, much like municipal governments are junior to the provinces which create them, the federal government would continue to play some kind of supervisory role, by which is meant that it could have the authority to review and reject band by-laws if necessary." *(Optional Indian Band Government Legislation Proposal)*
This, along with other paternalistic proposals,\(^6\) was argued to reveal the "deep-seated colonial mentality" of the Canadian government.\(^6\) In effect the legislation amounted to little more, "than a transfer of administrative responsibility" to an administrative agent of the existing power structure.\(^7\)

The federal government's legislative proposals contained no recognition that First Nations had an inherent right to self-government which could fundamentally challenge the existing constitutional status quo. Self-government legislation can however be more progressive than the federal government's vision. The Penner Committee recognised the importance of entrenching the right to self-government within the Constitution as the "surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government."\(^7\) However despite this premise it recommended an "interim legislative solution" pending the outcome of the constitutional changes.\(^7\) Penner suggested that legislation would facilitate successful constitutional entrenchment by giving certainty and clarity to the concept of self-government.\(^7\)

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\(^6\) For example the report contained a suggestion that the Indian band would have to demonstrate a level of ability in order to qualify under the legislation; the 'readiness' of the band was 'naturally' to be determined by DIAND. *Ibid.* at 24.

\(^6\) *Ibid.* at 24 (citing the Indian Association of Alberta).

\(^7\) "The Penner Committee," *supra* note 59 at 4.

\(^7\) *The Penner Report*, supra note 55 at 44.


\(^7\) *Ibid.* at 50.
road to self-government would begin by constituting First Nation governments from existing band councils. The Committee recommended that the federal government introduce an Indian First Nations Recognition Act which set down criteria for recognising the self-governing status of acceptable bands. Under this legislation a panel was to be established by a newly constituted Ministry of State for Indian First Nations relations, in co-operation with designated Indian representatives. The panel would make recommendations for recognition to the Governor in Council. A second piece of legislation was recommended to authorise the federal government to contract with individual First Nations governments on the scope of their legislative authority and funding. Finally, a third piece of legislation was thought to be necessary to facilitate the process by which the federal government could occupy the jurisdictional field under section 91 (24) of the Constitution Act 1867, and then "vacat[e] these areas to recognised Indian governments." 

The advantage of Penner’s umbrella legislation is that it is relatively easy to accomplish through parliamentary support. The legislative scheme as proposed by the Committee left sufficient flexibility for the details and scope of self-government to be worked out on an individual community basis. Each Indian First Nation government would then have been free to assume as much jurisdiction as it wished and to develop and expand

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74 The criteria for recognition suggested are: (a) support by a significant majority; (b) a system of accountability; and (c) a membership code, and procedures for decision-making and appeals, in accordance with international covenants. Ibid. at 57.

75 “The Penner Committee,” supra note 59 at 7.
that scope over time.\textsuperscript{76} Despite the criticisms of self-government legislation, the Committee's recommendations have been characterised as overwhelmingly vindicating the aspirations of First Nations on self-government at the time.\textsuperscript{77} However, Penner's endorsement of self-government legislation was only as an interim solution. The most important recommendation of the committee from the First Nations perspective was that the right to self-government should be constitutionally entrenched.\textsuperscript{78} Clearly Penner agreed, and did not see legislation as the ultimate solution. However, in line with the Committee's recommendations, the Liberal Minister of Indian Affairs, John Munroe, introduced self-government legislation, Bill C-52,\textsuperscript{79} into the House of Commons in the spring of 1984. The Bill was significant in terms of child welfare for it recognised the Indian government's executive powers over the provision of social services including child care and child welfare.\textsuperscript{80} These powers could be assumed as of right. It also provided that through negotiation of an acceptable agreement, and subject to appropriate limitations, the

\begin{itemize}
\item \textsuperscript{76} As Doug Sanders points out however, the report contains no recognition of the negotiating problems faced on the Indian side. It simply "buys into" the negotiation model. There is also little serious discussion of the powers which are feasible under the band government model. \textit{Ibid.} at 11.
\item \textsuperscript{77} \textit{Ibid.} at 11. Doug Sanders argues that the report, "adopts and legitimises Indian thinking and terminology. It is not distanced, balanced, fair, neutral or expert...There is no criticisms of Indians or their positions."
\item \textsuperscript{78} \textit{The Penner Report, supra} note 55 at 44 (Recommendation 2, chapter 4). See, "The Penner Committee," \textit{ibid.} at 2; "Self-Government Summary," \textit{supra} note 18 at 1.
\item \textsuperscript{79} Bill C-52, \textit{An Act Relating to Self-Government for Indian Nations}, 2nd session, 32nd Parl., 1983 - 84 [hereinafter Bill C-52].
\item \textsuperscript{80} Bill C-52, cl. 17 (1)(d), "The government of an Indian Nation that is recognised has the following 20 powers within the boundaries of the lands of the Indian Nation: (d) the provision of social services, including, without restricting the generality of the foregoing, housing, child care and welfare."
\end{itemize}
band could assume the power to pass child welfare legislation.\textsuperscript{81} This would allow the community not only to design and implement the delivery of child welfare services in a culturally appropriate manner, but to pass child welfare legislation based on their cultural values, traditions, and laws. Autonomy over child welfare, subject to “appropriate limitations,” would thus be extensive. However, it is these undefined “appropriate limitations” that have the potential to negate the capacity of self-government legislation to realize full First Nations autonomy.\textsuperscript{82}

The importance of constitutional entrenchment, as compared to the vulnerability of proceeding by legislation, was clearly demonstrated when the Bill was withdrawn due to the defeat of the government in the federal elections. Power now changed into the hands of the Progressive Conservatives who did not reject self-government as a legitimate claim, but did reject the concept of umbrella self-government legislation.\textsuperscript{83} Bill C - 52 was thus forgotten.\textsuperscript{84} The new policy advanced by the conservative government was “Community Based Self-Government Negotiations.”\textsuperscript{85} Apart from the Sechelt self-government legislation, this policy did not produce a single agreement.

\textsuperscript{81} Bill C-52, cl. 19 (k), “The government of an Indian Nation may acquire by way of an agreement made pursuant to section 18, to the extent specified in the agreement, but subject to any limitations set out therein, the power to make laws in relation to matters coming within the following classes of subjects: (k) family law in relation to members in of the Indian Nation permanently resident within the boundaries of the lands of the Indian Nation, including marriage, separation, divorce, legitimacy, adoption, child welfare and guardianship of minors and incompetents.”

\textsuperscript{82} See below, at chapter four for an analysis of the federal government’s approach to “appropriate limitations” and the effect of these limitations on the scope of self-governing autonomy.

\textsuperscript{83} “Self-Government Summary,” \textit{supra} note 18 at 2.

\textsuperscript{84} “Self-Government in Practice,” \textit{supra} note 9 at 19.

\textsuperscript{85} “Self-Government Summary,” \textit{supra} note 18 at 2. For an analysis of the community-based negotiation policy see \textit{e.g.} \textit{Surviving As Indians, supra} note 1 at 90 - 94.
1.3 (ii) Local and Regional Self-Government Legislation

The prospect of nation-wide umbrella self-government legislation effectively died with Bill C-52, and there is no reason to suppose that unless it is married to constitutional entrenchment, it will ever form the basis of future national policy. However legislation has proved to be an important tool for achieving self-government on a local and regional level. There are now some notable examples of regions and localities who successfully secured self-government through individual enabling legislation whilst the federal, provincial and First Nations national leadership were deadlocked in constitutional battles.86

The Cree Naskapi (of Quebec) Act, 1984

The first such piece of legislation was the Cree-Naskapi Act87 which was passed in 1984 to replace the Indian Act in the area covered by the James Bay Agreement and Northern Quebec Agreement.88 The Act sets out the delegated powers and jurisdiction of Cree and Naskapi local governments.89 Local governments established under the legislation clearly remain under federal jurisdiction. Admittedly the responsibilities of the

86 Supra note 58. For other examples of bands pursuing a measure of delegated self-governing authority under the auspices of the Indian Act see “Self-Government in Practice,” supra note 9 at 39 - 50.


88 The James Bay and Northern Quebec Agreement (Quebec: Editeur officiel du Quebec, 1976) provided for subsequent negotiations concerning Cree local government [hereinafter J.B.N.Q.A.].

89 Aboriginal Peoples and Government Responsibility, supra note 87 at 177.
federal government in the day-to-day administration of band affairs and band lands has been limited.\textsuperscript{90} For example, the general power to disallow by-laws is abolished.\textsuperscript{91} However the Act indicates specific areas which Canada may regulate including local taxation, by-laws concerning hunting and trapping, elections, special band meetings, and fines and sentences for breaking band by-laws.\textsuperscript{92} Those powers which are delegated to the local governments include the \textit{delivery} of health and social services.\textsuperscript{93} The services are delivered through a regional board attached to the Cree Regional Authority, a public corporation to which powers to coordinate and administer programs must be delegated by Cree bands.\textsuperscript{94} However, ultimate jurisdiction over social and health services is transferred from the federal government to Quebec.\textsuperscript{95} This means that bands' responsibilities are limited to program and service delivery. Child welfare policy and service design remain with Quebec, as does legislative power over child welfare. This severely limits the communities' ability to incorporate their own cultural values, traditions and practices into

\textsuperscript{90} \textit{Ibid.} at 181.

\textsuperscript{91} \textit{Ibid.}

\textsuperscript{92} \textit{Ibid.} Sections 11 and 13 of the James Bay Agreement also provide for the founding of regional governments for the Cree and Inuit. The James Bay Agreement gives the Kativik regional government the powers of a northern village municipality over those parts of the territory which are not part of the village corporations, and regional powers over the whole territory including the municipalities. Peters concludes that the extent to which Kativik exercises these powers can considerably reduce Quebec's administrative responsibility for residents in the area. \textit{Ibid.} at 184.

\textsuperscript{93} \textit{Cree Naskapi Act, supra} note 58 sec. 21 (h) states: "The objects of a band are (h) to establish and administer services, programs, and projects for members of the band, other residents of Category 1A and 1 A-N land and residents of the Category III land referred to in paragraph 6 (b)."

\textsuperscript{94} \textit{Aboriginal Peoples and Government Responsibility, supra} note 87 at 196. The Crees successfully negotiated the provision that Quebec should deliver these services "to the maximum extent possible" through the Cree board.

\textsuperscript{95} JBNQA ss 14 and 15 (see especially sec. 14. 0.2) and North-Eastern Quebec Agreement sec. 10.
child welfare. Provision is however made to encourage the maximum possible employment of native people within health and social services. The provisions for the Naskapi and Inuit are similar, although the Naskapi have secured a guarantee from Quebec that it will consult with the Naskapi Health and Social Services Consultative Committee before modifying any program relating to the Naskapi communities. A combination of the land claim agreements and local government legislation has certainly increased the control which these communities have over their lives and their cultures. However, the scope of delegated authority is extremely limited by the overriding jurisdiction of both the federal and provincial government. The provisions for child welfare demonstrate well the deep limitations on the bands' self-governing authority. They have secured no right to legislate on child welfare, or even to design appropriate services. They are strictly limited to program delivery under the authority of the provincial child welfare system. The agreements are dynamic and negotiations to increase autonomy and control are ongoing. However, despite the numerous pieces of legislation to implement the agreement there would appear to be a lack of political will to make even the existing provisions on paper a reality. Consequently the Cree now express serious reservations about the possibility of proceeding in this manner with the federal government.

96 JBNQA 14.0.19.
97 NEQA 10.3 to 10.5.
98 Aboriginal Peoples and Government Responsibility, supra note 87 at 208.
99 Ibid.
100 Ibid. at 210. There have been severe difficulties in implementation, exacerbated by the lack of guarantees and binding language in the initial agreements, which threaten to overshadow their
The Sechelt Self-Government Act, 1986

On the other side of Canada, out of very different circumstances and objectives, the Sechelt Band in British Columbia have also managed to secure a level of autonomy under self-government legislation. The Sechelt Self-Government Act, 1986, displaces the control of the Indian Act over the Sechelt community. It provides for the establishment of their own band constitution, for control over their own band lands, and for the founding of relatively autonomous community government with a wide range of powers. The self-government model provided by the Sechelt is strongly determined by the band’s ‘unique character.” The Sechelt are a highly urbanised, prosperous, well-located band, holding lands with “immense development potential.” Further the Sechelt are “socially, economically, and politically well integrated into the surrounding community.” The main objective of the band in pursuing self-government was to gain control over their own land base to enable effective development. The Indian Act had frustrated their achievements. Aboriginal Peoples and Government Responsibility, ibid. at 208 - 212; See also “Self Government in Practice,” supra note 9 at 150 - 154.

101 Ibid. at 209. See also Matthew Coon-Come, Grand Chief, Grand Council of Cree (of Quebec) in Aboriginal Self-Determination, supra note 7 at 114.


103 Aboriginal Peoples and Government Responsibility, ibid. at 297.

104 Ibid. at 298.

105 Ibid.

106 Ibid. at 305.

107 Ibid. at 308.
development ambitions and, whilst supporting the constitutional entrenchment of self-government being sought by the national leaders, they did not want to wait for the constitutional issue to be resolved.\footnote{108} The Sechelt Indian Band Self-Government Act enables the federal Government to exercise its exclusive jurisdiction under s. 91 (24) of the Constitution Act, 1867, and delegate authority and responsibilities to Sechelt government.\footnote{109} It specifies that the powers and duties of the band are to be carried out in accordance with a band constitution, the contents of which are specified, and which must be approved by referendum of the band and the federal Cabinet.\footnote{110} The Constitution sets out the legislative powers of the council selected amongst a set of general powers contained in the statute.\footnote{111} Significantly laws passed under the constitution are not by-laws, they have the status of federal laws.\footnote{112} The powers of the Sechelt Indian Band range from laws that normally would be classified as municipal, such as zoning and land use, provincial such as social and welfare services, and federal such as the management of fisheries.\footnote{113} The legislative powers of the council are specified under sec. 14 of the \textit{Sechelt Indian Band Self-Government Act} and include provision for child welfare,
"14 (1) The Council has, to the extent that it is authorised by the constitution of the Band to do so, the power to make laws in relation to matters coming within any of the following class of matters: (h) social and welfare services with respect to Band members, including without restricting the generality of the foregoing, the custody and placement of children of Band members."

Sechelt have therefore secured a much greater degree of autonomy over child welfare than the Cree-Naskapi, including the right to incorporate their own traditional standards and practices in legislation. One important limitation on the band's legislative powers is that jurisdiction must be provided in the band constitution, which is subject to the approval of the Governor in Council. The federal statute also provides that provincial laws of general application, presumably including child welfare, will continue to apply unless the band has occupied the jurisdictional field.

The Sechelt have clearly secured ‘a large measure of political and administrative autonomy.’ The federal government is restricted to approving the constitution, establishing rules for referenda, and approving procedures relating to the transfer of lands.

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114 Sechelt Self-Government Act, supra note 58 sec. 11

115 Ibid. sec. 38: “Laws of general application of British Columbia apply to or are in respect of the members of the band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the Constitution of the Band or a law of the Band.” The federal statute also provides that there can be a further transfer of Band Council powers to a quasi-local government body: the Sechelt Indian Government District, if the transfer is approved by the Band, and if the provincial government has passed legislation relating to the District. (ss 17 - 22). The provincial government’s relationship with Sechelt is provided in the Sechelt Indian Government District Enabling Act, S.B.C. 1987, c. 16 which is much more modest in scope than the federal legislation. It recognises the Sechelt Indian Government District as a municipality; establishes an advisory council; ensures provincial laws apply (including child welfare unless the band has enacted legislation); confers provincial benefits associated with full municipal status; suspends direct provincial property taxation; and enables the delegation of provincial responsibilities to the band. The scope of band council powers that have been transferred to the Sechelt Indian Government District closely resemble those of a typical local government corporation. Aboriginal Peoples and Government Responsibility, supra note 87 at 316.

116 Aboriginal Peoples and Government Responsibility, ibid. at 327.
from the federal government to the band.117 The province’s role is also limited since it explicitly concedes federal jurisdiction.118 British Columbia simply treats the District as another municipal power. However, despite achieving everything they desired, particularly control over their lands, Sechelt government is unequivocally a creation of the federal government. As Taylor and Paget conclude “while the band has an unprecedented degree of local autonomy it most emphatically is not fully autonomous.”119 The initiative was welcomed by the province and the federal government, but it has been condemned by the Union of B.C. Chiefs who feel that the Sechelt have ‘sold-out’.120 Saul Terry, the President of the B.C. Chiefs expressed concern “that native Indian government structures were being cast aside in favour of municipal type arrangements, governed entirely by provincial government legislation.”121 Most significantly the Union criticises the model for falling short of constitutional entrenchment of self-government by proceeding through an Act of Parliament, rather than through constitutional protection of “inherent jurisdiction.”122 Clearly the Sechelt model does not meet the aims of the First Nations national leadership, but equally the Sechelt have achieved more than municipal

117 Ibid. at 312.

118 Ibid. at 319.

119 Ibid. at 312.

120 The initiative received strong support from the province because it provided support for its position that self-government could be achieved by a municipal style arrangement, without invoking the inherent right theory. Ibid. at 310.

121 Ibid. at 297.

122 Ibid. at 340.
government. What is perhaps most important however is that through legislation the Sechelt have achieved exactly what they themselves wanted: concrete, practical, and working self-government with the support of both the federal and provincial government. Clearly a negotiated and legislated form of self-governance, albeit limited, can be successful for some communities.

*The Yukon Self-Government Agreements, 1994*

The most recent self-government legislation to be successfully negotiated was in the Yukon. The Umbrella Final Agreement was signed on 29th May, 1993, making it the most recent insight into thinking on self-government, other than the Nisga’a Agreement in Principle. In 1989 the federal government approved the negotiation of self-government agreements parallel to negotiations on land claims. The Yukon passed umbrella self-government legislation in 1994 which provided the framework for individual communities to negotiate arrangements for their own Nation. Four First Nations have now concluded self-government agreements under the legislation and eight are pending. The self-government agreements are purposely not constitutionalised under sec. 35 and

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126 The Yukon legislation will be considered in more detail throughout the thesis. For commentary on the Yukon agreements see “Implementing Self-Government,” *supra* note 24.

127 The four self-government agreements are: The Champagne and Aishihik First Nations Self-Government Agreement; the First Nation of Nacho Nyak Dun Self-Government Agreement; the Teslin Tlingit Council Self-Government Agreement; and Vuntut Gwichin Self-Government Agreement. The four agreements are practically identical. I will be using the Teslin Tlingit Agreement as an example.
contain an explicit clause to that effect, although the coincident land claims agreement is
given treaty protection.\textsuperscript{128} It is claimed that the federal government adamantly refused to
entrench the self-government agreements despite the declared willingness of the
territory.\textsuperscript{129} However the Yukon has retained the right to have the agreement
constitutionally protected in accordance with advances made elsewhere in Canada.\textsuperscript{130} The
agreements are based on the traditional clanship system and have a strong traditional
orientation. This emphasis on tradition is combined with an emphasis on cross-cultural
cooperation between the province and the self-governing communities, to enable
traditional governing structures to operate effectively in contemporary society.\textsuperscript{131} The
scope of First Nations jurisdiction outlined under the umbrella agreement is extensive,
providing for executive, legislative, and limited judicial powers.\textsuperscript{132} It provides that the
territory and the federal government will negotiate the devolution of programs and

\textsuperscript{128} Umbrella Final Agreement, supra note 58 para. 24. 12. 1 states, "Agreements entered into pursuant to
this chapter and any legislation enacted pursuant to implement such agreements shall not be construed to
be treaty rights within the meaning of sec. 35 of the Constitution Act, 1982."

\textsuperscript{129} The former premier of Yukon has stated, "The constitutional entrenchment of self-government
agreements has been controversial. Both the Yukon First Nations and the Yukon Government has asked
Ottawa to constitutionally entrench self-government agreements arising from the Yukon land claim. The
federal government has so far refused. Tony Penniket, Premier, Government of Yukon writing in,
Aboriginal Self-Determination, supra note 7 at 143.

\textsuperscript{130} Umbrella Final Agreement, supra note 58 para. 24. 12. 2 states: "Nothing in this chapter or in the
Settlement Agreements shall preclude Yukon First Nations, if agreed to by the Yukon First Nations, from
acquiring constitutional protection for self-government as provided in future constitutional amendments."

\textsuperscript{131} The need for cooperation between the governments is particularly strong in the agreements extensive
training provisions. Umbrella Final agreement, ibid. chapter 28. See also the Implementation Agreement,
supra note 58 at Appendix B and Annex E, which sets down comprehensive arrangements for the creation
of cross-cultural training boards constituted by government experts, nominees from the Council of Yukon
Indians and community representatives to identify training needs and set priorities in order to provide an
effective First Nations workforce to carry out self-governing powers.

\textsuperscript{132} Umbrella Final Agreement, ibid. chpt. 24.
services that fall within the First Nations sphere of responsibility. Health and social services are explicitly stated to fall within this jurisdiction, including family and child welfare, and adoption. Provision is also made for First Nations government to assume certain legislative powers. Again the “guardianship, custody, care and placement of children,” and “social and welfare services” are explicitly included within this head of jurisdiction. This allows First Nations government to set its own standards and practices of child welfare within the communities, and provides a legislative mandate for its own child welfare agencies. Clearly it was the hope of both the First Nations and the territory to have the agreements constitutionally entrenched. However, the legislation is otherwise comprehensive, and the degree of independence and autonomy achieved, despite using legislation, would appear similar to that provided in the Nisga’a Agreement.

In all these cases the region or band has secured a considerable measure of autonomy from the federal, provincial, or territorial governments. There would generally seem to have been substantial satisfaction among the group involved that they had secured

133 Ibid. para 24. 3.

134 Ibid. para 24. 3.2.3 (g).

135 Ibid. para 24.1.2.1.

136 See for example, Teslin Tlingit Agreement, supra note 58 para 13.2.

137 The jurisdictional issue over child welfare is not as complex in the Yukon, as all Yukon law falls under federal jurisdiction. There is consequently no potential conflict with the powers of a province under sec. 92 of the Constitution Act, 1867.

138 In general Peter Hogg and Mary Ellen Turpel seem to consider the Yukon self-government agreements a creative and valuable example of what is possible within the existing constitutional framework, despite the lack of constitutional protection. “Implementing Self-Government,” supra note 24 at 196 and 217.
the scope of authority and power they wanted. For some communities, the use of legislation has meant that self-government is now a living reality within Canada, and it certainly provides one potential means by which communities can negotiate self-governing jurisdiction with the federal and provincial governments. However, the strength of the criticisms directed at legislation as an effective means of decolonisation should be acknowledged. When legislation is used to implement the right to self-government, the resulting First Nations government remains subordinate to and dependent on the federal government for its powers and authority. First Nations government must meet federal standards as it is exercising federal jurisdiction not its own. It is clearly not recognised as an equal third order of government under the Canadian Constitution with existing sovereign powers within its sphere of jurisdiction. Legislation does not restore any level of ‘sovereignty,’ and it does not acknowledge the normative reasons behind self-government encapsulated by the principles of self-determination and prior sovereignty. By failing to make any challenge to the existing constitutional status quo no effort is made to address the colonial context in which the claim to self-government is made. In cases where legislation has been used the First Nation involved has usually acknowledged that legislative recognition of self-government is not the long term solution. The Cree-Naskapi, Sechelt, and Yukon First Nations, all continue to support the fight for the more extensive restructuring of powers in Canada that constitutional recognition of the inherent right could entail. For example, the Yukon Self-Government agreements contain an explicit

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139 “Self-Government in Practice,” supra note 9 at 154. The disillusion among the Cree-Naskapi seems to be more concerned with the government’s failure to subsequently live up to its promises than the actual content of the agreement.
reservation of their right to benefit from subsequent agreement on the constitutional status of self-government, and the Sechelt are currently involved in treaty and land claim negotiations with the federal and provincial governments in British Columbia. It would seem therefore that legislation is still perceived, even by those who pursue it, as a secondary and temporary medium until the constitutional issue is settled. It clearly does not represent the aspirations of many First Nations communities, or the current policy of the federal government. Given the security provided by constitutional entrenchment, and perhaps most importantly the symbolic and practical significance of recognising the inherent right of First Nations to govern themselves as sovereign political entities, it is inevitable that the view remains, despite these successful examples, that only constitutional recognition will fully satisfy the legitimate claims of the First Nations.

1.4 The Inherent Right and Explicit Constitutional Entrenchment

To secure constitutional entrenchment of the inherent right to self-government has been the goal of First Nations people from the early 1980s. Recognition of their right to form a third order of government in Canada, exercising sovereign powers which find their source within the community, independent of the actions of the federal and provincial governments, is the most clear assertion of the right of First Nations to autonomy and

140 Umbrella Final Agreement, supra note 58 para 24. 12. 2.
141 Aboriginal Peoples and Government Responsibility, supra note 87 at 314.
control over their own communities. Securing recognition of this right provides the mechanism by which they can begin to peel back the processes of colonisation. The significance of establishing their right to self-government in the constitution is clear to the First Nations. As Rosemarie Kuptana, President of Inuit Tapirisat of Canada, argues, to entrench the inherent right of the Aboriginal peoples to self-government in the Canadian Constitution is to “allow us to become equal partners in Canada.” These sentiments are echoed by the Assembly of First Nations,

“A constitutional amendment is now required to undo the wrong created by the BNA Act and to place First Nations on an equal constitutional footing with the provinces and the federal government.”

The view of the First Nations is clear: the current constitutional division of powers in Canada cannot prevail; First Nations must be free to govern themselves as an equal sovereign power, without facing the interference and scrutiny of a colonial government. Constitutional entrenchment of the inherent right to self-government is the most effective means of achieving that goal. The Penner Committee in 1983 had no doubt as to the implications of constitutional entrenchment,

“If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers. Indian governments may have implicit legislative powers that are now unrecognised.”

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143 See generally, supra note 7 for First Nations perspectives on sovereignty, self-government and the implications for autonomy.


145 Reflections on a Decade of Change, supra note 7 at 9.

146 Ibid.

147 The Penner Report, supra note 55 at 43.
The need for constitutional entrenchment constituted the major recommendation of the Committee,

'The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada. The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government is by means of a constitutional amendment. Indian First Nations governments would form a distinct order of government in Canada, with their jurisdiction defined.'

The challenge made to the constitutional status quo by constitutional entrenchment of an inherent right to self-government is obviously less appealing to the federal and provincial governments. A right secured in this way, and not by their own legislative acts, cannot be controlled and circumscribed according to their wishes. In essence they lose their constitutionally protected power to determine and control the scope and form of future First Nations systems of governance both at the time of implementation and thereafter,

'This area of [First Nations] exclusive jurisdiction must be constitutionally protected, so that governments cannot arbitrarily interfere in the internal affairs of First Nations. In other words, self-government agreements must be constitutionally entrenched.'

Under the constitution the autonomy of First Nations people would clearly be given strong protection. In the sphere of child welfare the federal and provincial government would have no right on which to intervene and impose their standards on the equal sovereign powers of the First Nation. First Nations powers to implement their own child welfare laws, traditions and values would in theory be unlimited. Their autonomy and freedom

148 Ibid. at 44.

149 Tony Penniket, Premier, Government of Yukon, in Aboriginal Self-Determination, supra note 7 at 143.
from ethnocentric colonial standards would be complete. Further, as argued above, by recognising the history of Canadian domination over First Nations as one of colonialism, a history which has obscured their legitimate sovereign right to govern themselves, First Nations potentially have a claim, should they wish to pursue it, for separation and independence from Canada. Constitutional entrenchment of the right to self-government could thus have far reaching implications for the place of First Nations within Canadian society, and for these reasons constitutional entrenchment of the right has been much more difficult to secure.

1.4 (i) The First Minister’s Conferences on First Nations and the Constitution

The struggle for constitutional entrenchment of the right to self-government really began after the inclusion of sec. 35 within the Constitution Act, 1982. Section 35 (1) states,

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.”

The aboriginal rights which had been given constitutional protection by sec. 35 were left undefined and their meaning and effectiveness was extremely unclear. The substance of section 35 was intended to be resolved in four subsequent First Ministers Conferences on Aboriginal Constitutional Matters to be held between 1983 and 1987. The federal government proposed the constitutional entrenchment of the aboriginal ‘right to self-

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150 See above pp 106 - 107.

governing institutions” at the first conference in 1984. However six of the provinces were opposed to constitutional recognition of the right to self-government. The B.C. government, for example, argued that First Nations could achieve effective self-government by becoming regular municipalities. The opposition of the provinces was founded on the fact that there had not been a thorough analysis of the implications of self-government, and more particularly, they feared the possibility of the development of a third level of government. Apart from this outright opposition from the provinces the major point of difference was on the extent to which the right should be defined. In the final First Ministers conference the dominant issue became the exact wording of the right to self-government. However negotiations could forge no agreement. The federal government wanted the potential powers of First Nations governments to be fully listed and defined before entrenchment. In this way the federal government would be able to maintain some control over the scope of First Nations jurisdiction and authority. The First Nations leadership were opposed to such initial limitations being placed upon their powers. They feared that a list would be restrictive and thus wanted to keep the right general and undefined, the substance of which would be developed over time. The preoccupation of the Canadian government with listing the powers of First Nations

152 Aboriginal Peoples and Government Responsibility, supra note 87 at 303.

153 Ibid.

154 Ibid.

155 Ibid.
governments made final agreement impossible. The conferences thus ended in failure with the three sides in dead lock.

1.4 (ii) The Charlottetown Accord

The next round of the struggle for entrenching the right to self-government in the Constitution occurred in the early 1990s. In 1992 the federal and provincial governments again attempted to settle the constitutional crisis, and learning from their mistakes at Meech Lake, the process this time included the significant involvement of the First Nations. A parallel constitutional process was established which undertook to consult with aboriginal communities across Canada on the constitutional issue. The Charlottetown Accord which resulted from this round of constitutional negotiations contained major provisions on aboriginal self-government. Most significantly the Accord marked the first acceptance of the language of “inherent right” by the provincial and federal governments. The draft amendments to the constitution incorporated into sec.

156 Under the “Aboriginal Constitutional Process” the Assembly of First Nations was mandated and funded to consult Indian peoples across Canada. The AFN’s mandate was specifically to develop proposals for Indian self-government and to present them to the Special Joint committee of the Senate and the House of Commons on a Renewed Canada. The Special Joint Committee was to examine the proposals along with those of the federal and provincial government before making its recommendations to Parliament. Unfortunately the parallel consultation process was not completed on time and their conclusions do not therefore inform the recommendations of the Committee. See especially, Surviving As Indians, supra note 1 at 94 - 95. For the recommendations which emerged from the aboriginal consultation process see, The Aboriginal Constitutional Process: Summary and Recommendations, in Surviving As Indians, ibid. at Appendix 14 pp. 316 - 319.

157 Until this point the federal government had resisted the use of “inherent” right on the basis that it could be construed as giving First Nations a right to self-determination and separation independently from Canada. The government maintained that its reluctance to use the word “inherent” did not mean that they were purporting to grant to First Nations the right to self-government. They claimed to recognise that the right to self-government came from within their own communities, independently of the actions of the federal or provincial governments, and the constitution of Canada would therefore only be recognising a pre-existing right. Nevertheless they were fearful of any claims that could be made to
explicit recognition of the inherent right of First Nations to self-government. The effect of this is clarified by describing the resulting First Nations government as "one of three orders of government in Canada."  

An obligation is placed on all governments in Canada to negotiate agreements which will provide for the implementation of the right. The self-government provisions enjoyed major political support from all sides. However, despite the belief of the aboriginal leadership who negotiated the agreement that they had secured a massive victory in securing recognition of the inherent right, the Accord was ultimately rejected in First Nations communities. The opposition of many First Nations community leaders, voiced strongly by the Manitoba chiefs, centred on the fear that the right was too circumscribed, particularly by the reservation of federal paramountcy, to be exercised if necessary, to secure "peace, order, and good government in Canada." It


Draft Legal Text of the Charlottetown Accord (October 9, 1992) [hereinafter Charlottetown Accord] para 29.1 states, "Sec. 35.1 of the Constitution is repealed and the following substituted, '35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada; 35.1 (2) The right referred to in subsec. (1) shall be interpreted in a manner consistent with the recognition of the government's of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.'"

Ibid. para 29: A new section 35.2 (1) of the Constitution would state, "The government of Canada, the provincial and territorial government and the Aboriginal peoples of Canada, including the Indians, Inuit and Metis peoples of Canada, in the various regions and communities of Canada shall negotiate in good faith the implementation of the right of self-government, including (a) jurisdiction....with the objective of concluding agreements elaborating relationships between governments of Aboriginal peoples and the government of Canada and provincial and territorial governments."


Charlottetown Accord, supra note 158 para 29, suggested amendment to the Constitution Act, 1982, to include sec. 35.4 (2): "No aboriginal law or any other exercise of the inherent right to self-government under sec. 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of
was also argued that the right was too dependent on negotiating specific agreements with the government, and that the Accord would destroy the Crown's fiduciary duty towards First Nations people. The debates surrounding the Accord also marked the first clear signs of non-native politicians beginning to speak out against self-government. The Reform Party attacked the Accord on the basis that,

"The Charter is being very carefully rewritten to systematically except aboriginal governments from any democratic requirements." 

Consequently, despite the seemingly huge victory of securing recognition of the inherent right to self-government in the constitution, Charlottetown failed to satisfy the demands of the aboriginal communities. It is very clear by this stage that the First Nations vision of self-government was of extensive unfettered powers over core areas such as child welfare. Any attempts of the federal government to circumscribe the scope of those powers or impose limits upon them were rejected as unacceptable to their sovereign status.

The defeat of the Charlottetown Accord effectively brought this round of the fight for constitutional change to an end. Hylton argues that Canada is tired of the peace, order and good government in Canada. See "Accord a Big Break for Natives?" ibid.; David Roberts, "Manitoba Chiefs Poised to Reject Charlottetown Deal" The Globe and Mail (October 7th, 1992). Other limitations on the right that were disliked included the commitment to exercising the right within Canada which foreclosed sovereignty in the international sense; the five year delay before the right would become justiciable; and the lack of an entrenched agreement on the financing of aboriginal self-government. See Geoffrey York, "Native Governments Await the Test of Time" The Globe and Mail (July 7, 1992).

162 "Accord a Big Break for Natives?" ibid.
163 David Roberts, "Native Leaders Undeterred by Rift Over Constitution" The Globe and Mail (October 9, 1992). These fears were founded in the provisions which devolved certain federal powers to the provinces, and by the intention to extend the right of self-government to the Metis and Inuit as well as First Nations.
constitutional struggle, and the defeat of Charlottetown effectively closes any hope of constitutional reform in the immediate future. The prospects for explicit entrenchment of the right to self-government in the constitution would now appear to be bleak. However, the defeat of the Charlottetown Accord has not turned the attention of the First Nations leadership away from constitutional recognition of their inherent right. They have proceeded on the basis that the constitutional talks of the early 1990s resulted in acceptance by both the federal and provincial governments that First Nations have an inherent right to self-government. The Royal Commission on Aboriginal People, established in 1992, was equally determined that the defeat of the Charlottetown constitutional reform package would not prove an impenetrable obstacle to the movement towards self-government. However post-1992 there is a significant change in the debate over the constitution. Instead of a concern with explicit recognition of the right under sec. 35, the emphasis changes to a renewed focus on the argument that the right to self-government is already constitutionally protected as an existing right under sec. 35. Constitutional reform, whilst desirable for clarity, is thus rendered unnecessary for securing First Nations’ desired sovereign autonomy.


167 Penner had already recognised this possibility in 1983 (Penner Report, supra note 55 at 43 - 44) but post-Charlottetown see e.g. “Implementing Self-Government,” supra note 24; A Commentary, supra note 23; Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa: Minister of Supply and Services, Canada, 1993) [hereinafter Partners in Confederation]; Restructuring the Relationship, supra note 3.
1.5 An Existing Right to Self-Government Under Sec. 35

1.5 (i) Self-Government in the Courts

If self-government is a right already included by implication in section 35 of the Constitution Act, 1982, the real issue becomes securing recognition of that fact in a manner which is consistent with the reasoning behind the inherent right policy. Perhaps the most obvious solution would be to seek judicial recognition that self-government is an existing right protected under sec. 35 of the Constitution. If a general comprehensive right to self-government were to be given judicial recognition First Nations would have the legal basis for a strong claim to possess the right to exercise sovereign unlimited powers over child welfare. Until 1990 it had not been clear what the courts would do with section 35. However in 1990 the First Nations secured another

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168 However contra, both Penner, and Hogg and Turpel warn against this method of recognition of the inherent right under sec. 35 because of the uncertainty, delay, and expense inevitably involved. Penner Report, ibid. at 45; “Implementing Self-Government,” ibid. at 190. This is also the view of the federal government, see Federal Policy Guide, supra note 142 at 3; and generally Restructuring the Relationship, supra note 3. Justice McEachern was clearly of the opinion that negotiations not litigation were the appropriate way forward after hearing the evidence in Delgamuukw for four years, “It is my conclusion reached upon a consideration of the evidence which is not conveniently available to many, that the difficulties facing the Indian populations of the territory, and probably throughout Canada will not be solved in the context of legal rights. Legal proceedings have been useful in raising awareness levels about a serious national problem. New initiatives which may extend for years or generations, and directed at reducing and eliminating the social and economic disadvantages of Indians are now required. It must always be remembered, however, that it is for elected officials, not judges to establish priorities for the amelioration of disadvantaged members of society.” Delgamuukw v British Columbia (A.G.) (1993) 104 D.L.R. (4th) 470, 30 B.C.A.C. 1 (B.C.S.C.).

169 There had of course been extensive discussion of sec. 35 in the academic literature. There was basic agreement that section 35 was intended to provide substantial protection for aboriginal rights. For example, Slattery argued that sec. 35 recognised the fact that some of the rights originally vested in aboriginal communities had survived the assertion of crown sovereignty. The section thus operated in a remedial fashion to rescue these rights from their previously “precarious position.” He argues that rights under sec. 35 in theory were absolute and not subject to the sec. one override or sec. 33. B. Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1983) 8 Queen’s L.J. 232. See also B. Slattery, “The Hidden Constitution: Aboriginal Rights in Canada.” (1984) 32 Am. J. of Comp. Law 361.
significant victory in the Supreme Court decision of R v Sparrow. Sparrow was the first supreme court decision on the meaning of section 35, and the first indication that sec. 35 could have a significant substantial content. The Supreme Court, headed by Chief Justice Dickson giving his last judgment, appeared to create for itself an agenda by which it would redress the dismal judicial legacy on aboriginal issues. The judgment proclaims that section 35 marks "the culmination of a long and difficult struggle in both the political forum and the courts," and that through sec. 35 the government of Canada had made a promise to the aboriginal people that their constitutional rights would be recognised.

Slattery here argues that sec. 35 does not resurrect aboriginal or treaty rights that had been extinguished by lawful acts before the Constitutional Act 1982 came into force. However he argues that sec. 35 officially confirms the doctrine of aboriginal rights, whereby the original rights of native American peoples are held to have survived the Crown's acquisition of sovereignty, except insofar as these were incompatible with the Crown's ultimate title or were subsequently modified by statute or other lawful acts. He contends that sec. 35 rights are subject to reasonable limits although the standard will be higher than that demanded under section 1. In his view the rights are shielded by constitutional entrenchment against restrictions by ordinary statute, except perhaps in cases of emergency. See also K. McNeil, "The Constitution Act 1982 ss 25 and 35" (1988) 1 C.N.L.R. 1 where he argues that existing in sec. 35 means "unextinguished" and therefore rights merely restricted are protected by the section and given full force; N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95; I. Barkin, "Aboriginal Rights: A Shell without a Filling" (1990) 15 Queen's L.J. 307, where he argues that sec. 35 provides the framework for protecting the rights of the aboriginal peoples but it is an empty box that demands to be filled; and W. Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II. Sec. 35: The Substantive Guarantee" (1988) 22 U.B.C. Law. Rev. 207, where he discusses the potential of sec. 35 for protecting the group's "different-ness" and their right to control their own communities. The academic literature on sec. 35 was given a high profile in the Sparrow judgment.

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172 Doug Sanders, Lecture delivered as part of the Self-Government course offered at University of British Columbia, Faculty of Law (Jan. - March 1997).

173 Sparrow, supra note 173 at 1105.

174 Ibid. at 1110.
The court appears to set out to fulfil that promise. The decision contains extensive discussion on how the phrase "existing aboriginal and treaty rights of the aboriginal peoples of Canada" is to be interpreted.\(^ {175}\) The court takes "existing" to mean unextinguished in 1982, rather than demanding that the right in question had to be exercised in a particular way and at a particular point in history.\(^ {176}\) It is argued that Aboriginal rights as entrenched in the constitution were intended to "help aboriginal peoples survive and develop, culturally and economically."\(^ {177}\) The Supreme Court agrees and characterises aboriginal rights in "a progressive forward looking manner."\(^ {178}\) The "frozen rights" analysis is explicitly rejected allowing for the evolution of the right over time, that is the rights are not restricted to the traditional practices of pre-contact society,

"...the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use professor Slattery’s expression in "Understanding Aboriginal Rights", the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour." Clearly then an approach to the constitutional guarantee embodied in sec. 35 (1) which would incorporate "frozen rights" must be rejected."\(^ {179}\)


\(^ {176}\) This was the view of sec. 35 that was propounded by McNeil, supra note 169. The decision in Sparrow states, "the academic commentary lends support to the conclusion that "existing" means unextinguished" rather than exerciseable at a certain time in history." Sparrow, supra note 170 at 1091.

\(^ {177}\) D. Sanders, "Indian Self-government" (Faculty of Law, University of British Columbia, 1996) [unpublished] at 3 [hereinafter Indian Self-Government].

\(^ {178}\) Ibid.

\(^ {179}\) Sparrow, supra note 170 at 1093.
The court firmly rejects the notion of ‘extinguishment by regulation.’\textsuperscript{180} On the question of extinguishment, the court holds that the intention of the legislature to extinguish the rights in question must be “clear and plain.”\textsuperscript{181} Mere regulation of the right, even if extensive, will not suffice.\textsuperscript{182} Further, it is held that the aboriginal rights in question are not to be defined and their scope determined according to the manner in which they were regulated and exercised in 1982. In the courts view to adopt a definition of rights that took past regulations as the determining factor would be to “incorporate into the Constitution a crazy patchwork of regulations.”\textsuperscript{183} The right is recognised in its complete, unregulated form. However, once the right is established as existing and thus constitutionally protected under sec. 35, the court makes clear that it is not absolute; that is future regulation by the federal government is still possible.\textsuperscript{184} The court demands, however, that the government bear the burden of justifying any legislative regulation that infringes upon or denies aboriginal rights.\textsuperscript{185} Thus regulation must be “enacted according to a valid objective,” and “the legislative objective to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal people.”\textsuperscript{186}

\textsuperscript{180} “Indian Self-Government,” \textit{supra} note 177 at 3.

\textsuperscript{181} \textit{Sparrow}, \textit{supra} note 170 at 1099.

\textsuperscript{182} \textit{Ibid}.

\textsuperscript{183} \textit{Ibid}. at 1091.

\textsuperscript{184} \textit{Ibid}. at 1109.

\textsuperscript{185} \textit{Ibid}.

\textsuperscript{186} \textit{Ibid}. at 1110.
The decision in Sparrow was heralded by First Nations leaders as a major victory. Aboriginal rights appeared to have been given substantial content and strong constitutional protection. The analysis of the Supreme Court seemed to extend naturally to cover a right to self-government. Arguments could easily be formed on the basis that First Nations communities had lived for thousands of years under complex systems of governance and continued to govern their own communities in important respects. As noted in Sparrow,

"The evidence reveals that the Musqueam have lived in the area as an organised society long before the arrival of European settlers."

In Sparrow the existence of the right was based on the anthropological evidence that, "the salmon fishery has always constituted an integral part of their distinctive culture." It would appear straightforward that the right to govern and regulate their communities according to their own traditions has also "always constituted an integral part of their distinctive culture." Although traditional models of government have been extensively regulated, undermined and subverted by the imposition of elected band government under the Indian Act, a Sparrow analysis would seem to suggest that the Indian Act whilst regulating self-government had not extinguished it. Aboriginal communities continue to

187 See especially, Restructuring the Relationship, supra note 3 at 202; "Indian Self-Government," supra note 177 at 3; Binnie, supra note 171 at 232.

188 Sparrow, supra note 170 at 1094.

189 Ibid. at 1099.

190 Contra, an argument can be made that federal Indian legislation wiped out any form of inherent jurisdiction in Aboriginal peoples and substituted a restricted form of delegated governmental authority. However the Royal commission contends that this argument is unfounded for whilst the federal legislation clearly purported to alter the existing governmental structures of Aboriginal groups and attributed a much restricted range of legislative powers on individual and entities that may not have possessed them before, they took for granted the existence of Aboriginal groups as distinct political entities and introduced or authorised changes in their internal political structures. The Royal Commission thus conclude that "while it is true that federal Indian legislation severely disrupted and distorted the political structures of
recognise a form of community government, and some First Nations have even managed to avoid the demands of the Indian Act and retain more traditional systems of government. On this reasoning self-government is now constitutionally protected in full and comprehensive force, and could be exercised by First Nations communities if they so desired. First Nations would have full unlimited sovereign powers to govern their own communities. Further, as Sparrow makes clear, “the right to do so may be exercised in a contemporary manner.” The Royal Commission elaborates on the meaning to be attributed to this phrase in the context of self-government,

“The constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of aboriginal peoples, and the existence of a federal system in Canada.”

However, whilst Sparrow was a hugely significant decision, it also had weaknesses that left uncertain its potential to secure a right to self-government under sec. 35. The

Aboriginal peoples, leaving them with limited powers the legislation did not evince a clear and plain intention to strip them of all governmental authority.” Restructuring the Relationship, supra note 3 at 212.

For example, the Indian Act does not apply to some communities in the north.

“Indian Self-Government,” supra note 177 at 3. For an example of such an argument see “A Genealogy of Law,” supra note 8. Using the example of his home community the Chippewas of the Nawash Band in Southern Ontario, Borrows argues that although self-government has often been regarded as extinguished or delegated from the British Crown, the Nawash Band continue to govern themselves as “an inherent exercise of community sovereignty.” Self-government remains a living reality in their community. This assertion is demonstrated by an examination of the interaction of Borrows’ ancestors with the foreign settlers.

Sparrow, supra note 170 at 1093.

Restructuring the Relationship, supra note 3 at 203.

Supreme Court does not touch upon the question of the management of the fisheries, even though this had been dealt with and decided against the Musqueam in the Court of Appeal. Neither does the Supreme Court judgment address the more general right to self-government. However, the decision of the Court of Appeal that the federal government has sole authority over management of the fisheries does not bode well. Even less encouraging for the self-government argument is the Supreme Court’s response to the AFN’s submissions on the right of the Musqueam to regulate the fisheries as part of their right to the resource. The judgment emphasises the Crown’s ultimate sovereignty over the land and First Nations people,

'It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.'

It is simply taken as given in Sparrow that the aboriginal right to sovereignty has been extinguished by the assertion of British sovereignty. Asch and Macklem argue that this clear assertion of sovereignty by the Court seriously undermines any broader aim of self-government. The decision in Sparrow concedes that the contemporary existence of the

196 Sparrow, supra note 170 at 1103.

197 The assumption of British sovereignty can be justified on a number of grounds. Contrary to the prior sovereignty justification for self-government discussed above, it is argued that inherent Aboriginal government powers were automatically terminated as a matter of British law when the British Crown and parliament asserted sovereignty over Canadian territory. Variations of this basic argument are also suggested. For example, that Aboriginal powers were extinguished when the Crown appointed a governor and set up a local law-making authority, such as an assembly or the governor in council. Alternatively, that Aboriginal powers came to an end when the Constitution Act, 1867, became applicable to the territory in question and divided legislative powers between the federal and provincial governments, with exclusive jurisdiction over Indian Affairs being granted to the federal Parliament. Restructuring the Relationship, supra note 3 at 206 - 207.

198 “An Essay on Sparrow,” supra note 24 at 506. See also critical literature, supra note 195.
inherent right depends simply on whether the right had been extinguished by Canadian or imperial legislation before 1982.\textsuperscript{199} Asch and Macklem therefore argue that rather than endorse an inherent rights approach, the court in \textit{Sparrow}, "betrayed a reliance upon a contingent theory of aboriginal right."\textsuperscript{200} As a result the possibility that sec. 35 can include a right to sovereignty exercised through self-government is "rendered fragile".\textsuperscript{201} In essence First Nations cannot be held to have sovereign authority to govern themselves if that sovereignty is subordinate to the intentions of the Canadian government. It is a delegated approach, not an inherent rights approach to self-government and thereby is potentially extremely limited in its meaning and scope. Inherent powers having been extinguished, the Canadian Government would have to grant to First Nations, by an act of delegation, the right of self-government.\textsuperscript{202} They would again be firmly in control. This view of the assertion of British sovereignty and its effect on the right to self-government was adopted in the B.C. Supreme Court in the now notorious judgment of Justice McEachern in \textit{Delgamuukw v British Columbia (A.G.)}, 1991,\textsuperscript{203}

\textsuperscript{199} The Royal Commission suggests one solution to this. It argues that some of the rights covered by section 35 (1) are so closely connected with the basic identity and communal well being of Aboriginal peoples that it is hard to imagine they could ever have been completely extinguished by unilateral Crown acts. It concludes that "it is unimaginable that, in their own homelands, Aboriginal peoples should ever be denied Aboriginal and treaty rights that are central to their existence as peoples. This broader approach reinforces the conclusion that the inherent right of self-government still exists for all Aboriginal peoples in Canada and that this right exists notwithstanding the terms of legislation passed before 1982." \textit{Restructuring the Relationship, supra} note 3 at 203.

\textsuperscript{200} "An Essay on \textit{Sparrow}," \textit{supra} note 24 at 507.

\textsuperscript{201} \textit{Ibid.} at 506.

\textsuperscript{202} \textit{Ibid.}

"In my view it is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty. Such sovereignty in North America was established in part by Royal grant as with the Hudson’s Bay Company in 1670; by conquest, as in Quebec in 1759; by treaty with other sovereign nations, as with the United States settling the international border; by occupation, as in many parts of Canada, particularly the prairies and British Columbia; and partly by the exercise of sovereignty by the British Crown in British Columbia through the creation of Crown colonies on Vancouver Island."

The court held that the establishment of British sovereignty had completely extinguished any aboriginal sovereignty or rights to self-government,

"...the aboriginal system, to the extent it constituted aboriginal jurisdiction of sovereignty, or ownership apart from occupation for residence and use, gave way to a new colonial form of government which the law recognises to the exclusion of all other systems." 204

Again as noted above, 205 this assertion of sovereignty, means that the "colonialist version of the settlement thesis lies at the heart of our constitutional identity" and thus the "Canadian constitutional ideology structurally depends on premises that are racist and colonial." 206

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204 These arguments about the effect of the assertion of British sovereignty on Aboriginal jurisdiction are claimed by the Royal Commission to be wrong. It states that under the doctrine of Parliamentary sovereignty the group and its laws would become subordinate to parliamentary power. Thus if Parliament exercises this power to override or amend the indigenous laws in question or to abolish inherent Aboriginal jurisdiction, Crown courts will give effect to this act. However so long as Parliament does not act in this manner, exhibiting a clear and plain intention to extinguish aboriginal jurisdiction, Aboriginal laws and jurisdiction remain essentially intact. Restructuring the Relationship, supra note 3 at 208. The argument over the Constitution Act 1867 is countered by the Royal Commission in its assertion that the Constitution Act 1867 did not materially increase the power of Canadian governments to deal with Aboriginal institutions of government. Its main effect was to transfer powers formerly held by the governments of the provinces to the new federal government, powers that were held to the exclusion of the provinces. It did not address the question of inherent aboriginal jurisdiction and thus does not affect it. Ibid, at 210.

205 See above pp 105 - 107.

206 "Construction of Canadian Identity," supra note 24 at 487. The critical literature on Sparrow consistently argues that sec. 35 demands that the assertion of British sovereignty and its underlying
In contrast Asch and Macklem point out that if the court in *Sparrow* had truly embraced an inherent theory of aboriginal right founded on the basis of prior sovereignty, it would have protected aboriginal sovereignty and self-government from state interference,

"Aboriginal sovereignty and native forms of self-government, essential as they are to the establishment, maintenance and reproduction of aboriginal identity, would acquire the status of a right. A rejection of the settlement thesis would permit the conclusion that aboriginal sovereignty and forms of self-government continue to exist within the meaning of, and are therefore ‘recognised and affirmed’ by sec. 35 (1), at least in cases where they were not expressly extinguished by true acts of cession."  

Sec. 35(1) if given its full effect would protect First Nations governments from interference by requiring the state to justify its very assertion of sovereignty. If you reject the assertion of British sovereignty over First Nations, then a sec. 35 (1) right cannot be subject to the limitations imposed by the Canadian state at will. As Macklem argues, sec. 35 entails rejecting the automatic assumption that parliament has the authority to regulate native life so long as it conforms to acceptable regulatory techniques. Instead it affirms a sphere of autonomy for native people over those matters that are central to their individual and collective self-definition, presumably including child welfare. Thus in Macklem’s view sec. 35 ‘ought to be viewed as authorising and indeed requiring the


207 “An Essay on *Sparrow*,” *ibid.* at 513.


judiciary to assess the legitimacy of the assertion of Canadian sovereignty over Canada’s First Nations.”

He continues that Parliament and the legislatures cannot assume that they are entitled to regulate sec. 35 rights without consent if the claim of sovereignty underlying the legislative action is suspect. However, in Sparrow the court shows no indication that it is prepared to wander through this particular minefield.

These problems do not however mean that the fight for judicial recognition of the inherent right to self-government should be abandoned as a lost cause. It is by no means certain that a self-government right could not be recognised by litigation on sec. 35. For example, the Royal Commission disagrees with Asch and Macklem’s assumption that the First Nations continuing right to self-government in a sovereign form is incompatible with the assertion of Crown sovereignty.

“It is a mistake to think that under the doctrine of parliamentary sovereignty the power of an aboriginal group to formulate and enforce its own laws is automatically terminated once the Crown assumes authority. The doctrine of parliamentary sovereignty maintains simply that the group and its laws are now subordinate to parliamentary powers. If parliament exercises this power to override or amend the indigenous laws in question or to abolish inherent Aboriginal jurisdiction, Crown courts will give effect to this act. However, so long as Parliament does not act in this manner, Aboriginal laws and jurisdiction remain essentially intact...So, the simple fact that the British Crown gained control over a certain Canadian territory did not mean that inherent Aboriginal jurisdiction was automatically superseded.”

However, it would appear that the fears over the ability of Sparrow to secure recognition of the inherent right to self-government under sec. 35 were justified when the Supreme

210 Ibid. See also “Construction of Canadian Identity,” supra note 24 at 476.

211 “Borders of Legal imagination,” ibid. at 452.

212 Restructuring the Relationship, supra note 3 at 208.
court handed down its decision in *R v Pamajewon*\(^{213}\) in 1996.\(^{214}\) It had been thought that the Supreme court in *R v Sioui*\(^{215}\) had indicated it was prepared to recognise that the right to self-government was an aboriginal right under the common law of Canada.\(^{216}\) However, in *Pamajewon* the supreme court adopted the highly restrictive test for aboriginal rights developed in a string of commercial fishing cases, notably *R v Van der Peet*.\(^{217}\) It was held in *Van der Peet* that in order to be an aboriginal right an activity must be a practice, tradition, or custom which is integral to the distinctive culture of the aboriginal group in question.\(^{218}\) In applying *Van Der Peet* Chief Justice Lamer held that the exact nature of the activity in question must first be determined and then it must be established on the evidence, that the activity constituted “a defining feature of the culture in question.”\(^{219}\)

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\(^{213}\) *R v Pamajewon* [1996] 92 O.A.C. 241 (S.C.C.) [hereinafter *Pamajewon*].

\(^{214}\) The case concerned criminal charges that had arisen out of high stakes bingo and other gambling activities which took place on the Shawanaga First Nations Reservation pursuant to the Shawanaga First Nation lottery law which was enacted by the Band Council. The law was not a by-law passed under sec. 81 of the Indian Act but claimed legitimacy from the Band’s inherent right of self-government. A second case concerned the gambling activities of the Eagle Lake First Nation under their Lottery Law. They claimed the legitimacy of the law on the basis of the Band’s inherent right to be self-regulating in its economic activities.


\(^{216}\) *Restructuring the Relationship*, supra note 3 at 205. In *Sioui*, *ibid.* the court had affirmed that the British Crown allowed peoples “autonomy in their internal affairs, intervening in this area as little as possible.” For supporting arguments see the Royal Commission’s analysis of *Connolly v WoolRich*, *Restructuring the Relationship*, supra note 3 at 187 - 188.


\(^{218}\) *Van der Peet*, *ibid.* at para. 46, per Lamer C.J. Lamer C.J. explained the test in the following way: “[T]he test for identifying the aboriginal rights recognised and affirmed by section 35 (1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, on other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with Europeans.” *ibid.* at para 44.

\(^{219}\) The *Van Der Peet* test has been subject to considerable criticism for its “frozen rights” analysis which would seem to be clearly contradictory to the evolutionary, ‘contemporary’ approach taken in *Sparrow*. 
applying the first part of this test Lamer characterises the claim in Pamajewon not as one of self-government, but as “the right to participate in and to regulate high stakes gambling activities on the reservation.” He rejects the broader characterisation of the right which was submitted by the appellants, “to manage the use of their reserve lands,” as ‘excessively general’, and holds that “any asserted right to self-government must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.” A general claim to self-government will not suffice. In applying these principles Lamer went on to find that gambling did not form an integral part of the distinctive cultures of the Ojibwa; it was simply not of “central significance” to their lives. Justice L’Heureux-Dube, who concurs with Lamer’s conclusion, would appear to differ on this point from her colleague.

220 Pamajewon, supra note 213 at 252.
221 Ibid, at 253.
222 Ibid.
223 This conclusion is formed in spite of the fact that the anthropological evidence demonstrated that informal gambling activities did take place on a small scale. However Lamer seemed to demand evidence of the “twentieth century phenomena” of commercial lotteries and large-scale activities being practiced in seventeenth century Ojibwa society. He concluded that as this sort of gambling was not part of First Nations historic cultures and traditions and was never the subject of aboriginal regulation it could not be an “existing aboriginal right”. Ibid, at 254 - 255. As in the commercial fishing cases the judgment demands a ridiculous level of specificity in the ‘constitutional’ right claimed (see further on the inappropriateness of fragmenting rights that have been given constitutional protection: McNeil, “The Constitution Act 1982 ss 25 and 35” 1988 1 C.N.L.R. 1) and an even more ridiculous body of evidence showing that the right was exercised in that exact form in pre-contact society. Not only does this make a mockery of aboriginal rights being able to play a significant part of contemporary life for aboriginal people, seeking as it does to protect only those precise traditions and practices that were exercised 300 years ago, but it is bad jurisprudence as it is in direct antithesis to the progressive, evolutionary approach set down by the Supreme Court in Sparrow.
She comments that she is going to “characterise the claim broadly” in order to assess its scope properly. Unfortunately her broad characterisation of the right does not take the form of self-government, but rather “an existing aboriginal right to gamble.” She agrees with Lamer that to accept the appellant’s claim that “a broad authority exists in their bands to make decisions regarding natives’ social, economic, and cultural well-being which includes regulating gambling activities” is “overly broad.” The court expressly reserves judgement on the existence of a general right of self-government. However implicit in the judgement is the clear indication that the Supreme Court will not consider a general claim that First Nations have a right to be self-governing, and further, Madam L’Heureux-Dube indicates that if she had dealt with the issue, she would have adopted her approach in Van der Peet which emphasises the assertion of British sovereignty, and the approach of Osborne J.A. in the Court of Appeal in Pamajewon where he asserts that the right to governance, like all other aboriginal rights, “must be given an historic context.” The

224 Pamajewon. ibid. at 257.

225 Ibid.

226 The interpretation that L’Heureux-Dube gives to the Van der Peet test is better than that of Chief Justice Lamer. Rather than emphasising the historical cultural test she asks whether “gambling as a practice is connected enough to the self-identity and self-preservation of the appellants aboriginal societies to deserve the protection of sec. 35(1) in the contemporary context. She bases this analysis on the following section of her judgment in Van der Peet: “[Aboriginal practices customs and traditions would be recognised] if they are sufficiently significant and fundamental to the culture and social organisation of a particular group of aboriginal people.” This at least provides scope for a contemporary form of aboriginality to be recognised. She concludes however that regulation of gambling regulation is not sufficiently important. Ibid. at 258 - 259.

227 Van der Peet. supra note 217 at para 117. Lamer C.J. also relied on the assertion of British sovereignty in Van der Peet to ‘rescue’ his reasoning on the aboriginal prior right to land and governance from the logical conclusion that the British Crown and thus the court could have no jurisdiction over the ‘sovereign’ First Nations peoples. See “The Trickster,” supra note 219 at 28.

228 Pamajewon. supra note 213 at 260.
combination of these approaches certainly suggest that the Supreme Court has no intention of giving any substantive meaning to the right to self-government, even if they are prepared to acknowledge the existence of the basic right.

At this point Sparrow is not dead, but it is certainly suffering from a debilitating limp. The judgment of Chief Justice Dickson in Sparrow at least opened the possibility of establishing the inherent right to self-government through a positive interpretation of section 35. That possibility has not been absolutely precluded by the subsequent Supreme Court decisions, certainly for specific self-governing powers such as child welfare. However following Pamajewon the prospect of gaining any positive determination from the courts on a general right to self-government is extremely doubtful. This does not mean however that recognition of self-government as an inherent right under sec. 35 cannot be recognised by other means. There is an alternative to litigation: securing recognition of the inherent right to self-government through negotiated agreements. This is the route that would appear to have the potential for success, and is clearly preferred by the federal government. By this route self-government looks like it can finally become a reality for many First Nations communities in Canada.


It would seem that using litigation to secure recognition and implementation of the inherent right to self-government has never been the preferred approach, particularly

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among the non-native judiciary and politicians. Binnie, for example, argues that Sparrow will never provide the legal basis for recognition of the right to self-government because to apply the Supreme Court's interpretation of sec. 35 to this right "would afford too much immunity from other levels of government to Aboriginal communities." According to Sparrow the right would be recognised in its complete unregulated form which would raise difficult legal questions as to the ability of the court, or government, to regulate various areas of common interest. Followed through to its logical conclusion they would have no basis on which to limit the sovereign jurisdiction of the communities. As Binnie concludes, the courts will not grant a right to self-government in this way, because to do so, "would leave the courts with inadequate mechanisms to regulate the overlapping interests of communities occupying contiguous territory." The issues surrounding self-government are so complex and highly politicised that this is clearly an area into which the courts do not want to go. It is understandable why the courts would take the position that the political implications of recognising the inherent right to self-government, and more particularly the need for 'reconciliation' between aboriginal claims

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230 Supra note 168.

231 Binnie, supra note 171 at 218.

232 Ibid. See also the commentary of J. Borrows on Van der Peet where he suggests that the implications of recognition of prior occupation and sovereignty and the difficulty of reconciling those implications with British sovereignty, pushed Chief Justice Lamer into adopting the restrictive definition of 'aboriginality' which he uses in a misplaced attempt to reconcile native and non-native interests, "If Aboriginal peoples have prior rights to land and participatory governance, how did the Crown and Court gain their right to adjudicate here? He has to stem the flow. He has to regain his footing. He plants a flag: "Aboriginal rights recognised and affirmed by section 35 (1) must be directed towards their reconciliation with the sovereignty of the Crown." He now has a purpose with which to capture both the Aboriginal and the right." "The Trickster," supra note 219 at 28.

233 Binnie, ibid. at 218.
and other interests, can only be properly resolved by negotiation. Binnie therefore argues that the Sparrow decision, marking the highpoint of aboriginal rights in the courts, was intended to send a warning shot to the politicians and drive them back to the negotiating table.\textsuperscript{234} It was intended to stand as a threat as to what the courts could do. As the court noted in Sparrow, sec. 35, as interpreted by Dickson, provides a strong constitutional foundation for negotiations between First Nations and Canadian governments.\textsuperscript{235} If this was indeed the intention of the court, the tactic may well have worked. Since the judgment in Sparrow the federal government has announced its inherent rights policy and negotiations have begun with many communities across Canada.\textsuperscript{236} At the same time the courts have retreated from the progressive position taken in Sparrow, with the 'conservative' decisions in the commercial fishing cases and Pamajewon. One possible explanation for their regressive decisions in all these cases could be that whilst the litigation was ongoing there were, or had been, attempts to find a political settlement of the issue. For example, the facts as found in Pamajewon made it clear that Ontario had been prepared to negotiate an arrangement with the two bands, but the bands had broken off the talks in favour of claiming their full aboriginal right.\textsuperscript{237} Sanders argues that the Supreme Court, aware of this background, would be averse to upsetting the province's attempts to meet First Nations claims, whilst maintaining control over gaming in the

\textsuperscript{234} Ibid. at 240.

\textsuperscript{235} Ibid. at 240 - 241.

\textsuperscript{236} For the most recent analysis of the current position on self-government see J. Hylton, ed., \textit{Aboriginal Self-Government in Canada: Current trends and Issues} (Saskatoon: Purich Publishing, 1994) [hereinafter \textit{Current Trends and Issues}].

\textsuperscript{237} Pamajewon, \textit{supra} note 213 at 244 - 245.
province. The courts in essence were reluctant to find an ‘unregulated’ comprehensive right in the First Nation bands to regulate their own gaming under sec. 35, and thereby override the political attempts to find a ‘reconciliation’ between the aboriginal right in question and the other legitimate interests of the surrounding communities. Self-government will have to be introduced in a negotiated, “orderly,” and regulated manner, under the watchful eye of the federal government. The federal and provincial governments are not ready to simply recognise an unlimited absolute right of First Nations communities to govern themselves.

The federal government has however finally responded to continuing First Nations pressure and adopted the “inherent right” position as its official policy on self-government. In 1993, following similar innovations by the NDP in Ontario and B.C., the federal liberals made an election promise in the ‘Liberal Red Book’ to act on the basis that self-government was an inherent right, recognised under sec. 35. This led to the federal policy statement announced in 1995 which is to guide negotiations on self-government.

The Federal policy guide begins with the statement that,

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239 Ibid.

240 Current Trends and Issues, supra note 236 at 239 - 240; “Indian Self-Government,” ibid. at 6 - 7. The government immediately began to act on this policy. The B.C. Treaty Process is now well under way with negotiations stretching across the province. In November 1994 a political accord was signed between the minister of Indian Affairs and the Mi’kmaq of Nova Scotia, in which the parties agreed to conduct further negotiations implementing the Mi’kmaq’s inherent right of self-government regarding education. In December of 1994 a framework agreement was concluded between First Nations communities in Manitoba, represented by the Assembly of Manitoba chiefs and the Queen represented by the minister of Indian affairs. The thrust of the agreement is to dismantle the operations of DIAND in Manitoba, restore jurisdiction to First Nations peoples, and recognize First Nations governments. Restructuring the Relationship, supra note 3 at 205.
"The Government of Canada recognises the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. It recognises as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages, and institutions, and with respect to their special relationship to their land and their resources."\(^{241}\)

The federal policy statement makes clear that whilst recognising the "inherent" nature of the right, the federal government wishes to proceed by a process of negotiations,

"The Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government."\(^{242}\)

The right to self-government is further delineated by the policy guide. In the view of the federal government, self-government is to operate within the framework of the Canadian Constitution;\(^{243}\) it does not include a right of sovereignty in the international law sense;\(^{244}\) and it will not result in sovereign independent nation states.\(^{245}\) The objective of the federal government is to develop "co-operative arrangements" that should, "enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of


\(^{242}\) Ibid.

\(^{243}\) Ibid.

\(^{244}\) Ibid. at 4.

\(^{245}\) Ibid. at 4.
Canadian society.” Self-Government will be negotiated with individual Aboriginal groups, with the agreement being tailored to meet their unique needs and particular circumstances. The federal policy is extremely shrewd in ensuring that the federal government, even though accepting the inherent rights policy, is able to keep a strong hold on the content, form, and scope of self-government. The policy states that, “prior to the conclusion of self-government agreements, federal and provincial laws would continue to apply to the extent that they do currently.” In effect this means that until First Nations have negotiated and come to an agreement with the federal and provincial government their inherent right is to no avail. Any attempt at unilateral action will almost certainly be knocked down by the courts under their reasoning in Pamajewon. The Canadian government is therefore still very much in control of any progress made on self-government.

The treaty process currently being pursued in British Columbia is one means by which First Nations communities can establish their right to self-government under the federal policy. Since the federal government’s new policy was announced several

246 Ibid. at 4.

247 Ibid. at 5. The new federal policy moves away from negotiations with the Assembly of First Nations on a national scale and envisages instead direct negotiations with community chiefs and regional leaders.

248 Ibid. at 11.

249 See above pp 148 to 154.

250 The Federal policy states, “The government of Canada is prepared, where the other parties agree, to constitutionally protect rights set out in negotiated self-government agreements as treaty rights within the meaning of section 35 of the Constitution Act, 1982.” Clear constitutional protection as a treaty right is clearly preferable but the policy suggests agreements could also be given effect through legislation, contracts and non-binding memoranda of understanding. Federal policy Guide, supra note 128 at 8.
communities across Canada have begun negotiating new treaty agreements or agreements which build on existing treaties.\footnote{251} The new policy has generally been welcomed and its success was arguably marked by the signing of the Nisga'a Agreement in Principle in British Columbia in 1996.\footnote{252} There are now one hundred and twenty of the one hundred and ninety bands in British Columbia involved in self-government negotiations.\footnote{253} The resulting agreement does not have to be constitutionalised as treaties are already directly enforceable under sec. 35 of the Constitution, and no legislation will be required to implement their provisions. Treaty enforceability is not open to question under sec. 35 and there is nothing to suggest that the retreat from Sparrow will be repeated in this context.\footnote{254} The treaty process in B.C., unlike that considered and rejected in Penner, is

\footnote{251} The government states that it does not propose to re-open, change or displace existing treaties through implementation of the inherent right to self-government and the negotiation of self-government agreements. However it is prepared to negotiate new self-government agreements that build on the existing treaty relationship. For those groups who have existing land claim agreements the government is not prepared to re-open those agreements but it is prepared to negotiate self-government agreements for those who do not already have them. For those communities where self-government agreements already exist the government is "prepared to explore issues related to constitutional protection of aspects of the self-government arrangements set out." \textit{Ibid.} at 9 - 10. For the current position on treaty negotiations in British Columbia see \textit{Treaty News}, Federal Treaty Negotiation Office (March, 1997). For general background on the treaty negotiation process see Stewart Bell and Gordon Hamilton, "Treaties in the Making" \textit{The Vancouver Sun} (Thursday December 15th, 1994).

\footnote{252} \textit{Nisga'a Treaty Negotiations: Agreement in Principle} (Ottawa: Government of Canada; Victoria: British Columbia; Nisga’a Tribal Council, 1996) [hereinafter \textit{Nisga’a Agreement}]. The Nisga’a agreement is the most recent and potentially progressive thinking on self-government.

\footnote{253} D. Sanders, Lecture as part of the self-government course offered at Faculty of Law, University of British Columbia (January - March 1996).

\footnote{254} The preamble of the Nisga’a Agreement expressly refers to sec. 35 as the basis for the agreement, "Whereas sec. 35 of the Constitution recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada." The general provisions establish that the Final Agreement will be a treaty for the purposes of sec. 25 and 35 of the Constitution Act. The Agreement covers the constitution of Nisga’a government, accountability, legislative powers and jurisdiction, and provisions for the administration of justices. The Nisga’a Agreement in Principle will be considered in more detail in chapter four.
triptite.\textsuperscript{255} The provinces are included in the process in line with the federal government policy statement that their involvement is necessary and that ‘triptite processes are the most practical, effective, and efficient way of negotiating workable and harmonious intergovernmental arrangements.’\textsuperscript{256} Recognition of the inherent right to self-government through tripartite agreements that are protected under sec. 35, is the current approach to self-government in Canada. First Nations issues are relatively quiet as the tripartite negotiations are pursued. There is no uniform approach, few guidelines, and no one model that can be applied with variations to differing communities.\textsuperscript{257} The treaty process would thus seem to leave considerable scope for widely variant degrees of autonomy over areas of First Nations jurisdiction, with the federal government maintaining a large measure of control over how the inherent right will work in practice.

1.5 (iii) \textit{The Approach of the Royal Commission}

The latest recommendations to emerge on the recognition and implementation of the inherent right to self-government are those of the Royal Commission.\textsuperscript{258} The Royal Commission on Aboriginal peoples has been active since 1992 in pushing forward the

\textsuperscript{255} \textit{Penner Report, supra} note 55 at 45 - 46.

\textsuperscript{256} The policy states that any self-government negotiations without provincial participation would be strictly limited to matters that within exclusive federal jurisdiction and would not result in sec. 35 treaty rights. \textit{Federal Policy Guide, supra} note 142 at 24.

\textsuperscript{257} "Indian Self-Government," \textit{supra} note 177 at 6.

\textsuperscript{258} See especially, \textit{Restructuring the Relationship, supra} note 3.
agenda on First Nations self-government. Following the defeat of the Charlottetown Accord in 1992, there was a concern that the momentum towards self-government and recognition of the inherent right would be lost. The Royal Commission was thus set up partly out of a need to ensure that self-government remained on the political agenda. Its final report was published in 1996. By the time of its publication the new federal government policy had been announced, but Pamajewon had not yet been handed down by the Supreme Court. The Royal Commission consequently builds upon the interpretation of section 35 in Sparrow and assumes that self-government will be recognised as an existing aboriginal right under section 35. In 1993 the Royal Commission released a preliminary report entitled ‘Partners in Confederation’ in which it argues,

‘Section 35(1) of the Constitution Act, 1982 guarantees the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. As the paper explains, there are persuasive grounds for believing that this provision includes the inherent right of self-government.”

The full Report of the Royal Commission released in 1996 also begins from the premise that as a matter of Canadian Constitutional law, Aboriginal peoples have the inherent right to self-government within Canada. The right is argued to derive from the original status of Aboriginal peoples as independent and sovereign nations in the territories they

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259 For a brief background to the mandate of the Royal Commission see Current Trends and Issues, supra note 236 at 240 - 242.

260 Ibid. at 240.

261 Restructuring the Relationship, supra note 3 at 199 - 213.

262 Partners in Confederation, supra note 167 at 1.

263 Supra note 261.
occupied; a status which was recognised in the treaties and alliances with the incoming nations.\textsuperscript{264} This position basically endorses the prior occupation and prior sovereignty justifications for First Nations self-government. The ‘nation to nation’ relations between the indigenous people and the settlers, in the view of the Commission, gave rise to a body of intersocietal customary law that was common to the parties and eventually became part of the law of Canada.\textsuperscript{265} It is argued on the basis of this body of customary law, that under the common law doctrine of Aboriginal rights, Aboriginal peoples have an inherent right to govern themselves within Canada.\textsuperscript{266} The Commission uses the nineteenth century family law case of \textit{Connolly v Woolrich} as authority for the recognition of this principle in Canadian jurisprudence.\textsuperscript{267} Applying the common law reasoning, the Commission thus conclude that the right to self-government finds its source outside the formal written constitution, in unwritten legal sources, notably “long standing custom and practice.”\textsuperscript{268} The right remains inherent however in the sense that it originates from the collective lives and traditions of First Nations people rather than from the Crown or Parliament.\textsuperscript{269} 

\textsuperscript{264} \textit{Restructuring the Relationship}, supra note 3 at 185.

\textsuperscript{265} \textit{Ibid}.

\textsuperscript{266} \textit{Ibid} at 186 - 193.

\textsuperscript{267} \textit{Connolly v Woolrich} concerned the status of a relationship under Canadian law and particularly whether the couple were validly married under Cree law by mutual consent. The male partner later decided to treat the marriage as invalid and was married again in a catholic service. The case involved the division of his estate under his will and the claims of the children from the first union who had been excluded. The eldest son claimed a share of the property on the basis that half of Connolly’s property belonged to the first ‘wife’ and would fall to him, the eldest son, on her death. The marriage under Cree law was upheld as legally valid and the son entitled to a half share of the property. \textit{Restructuring the Relationship}, \textit{ibid} at 186 - 189.

\textsuperscript{268} \textit{Ibid} at 189.

\textsuperscript{269} \textit{Ibid} at 192.
aboriginal rights are given constitutional protection by sec. 35 of the Constitution Act. Self-government is one such protected aboriginal right. As the Commission concludes,

‘The inherent right [of Aboriginal self-government] is now entrenched in the Canadian constitution, therefore, and provides a basis for Aboriginal governments to function as one of three distinct orders of Government in Canada.’

As with the federal policy, the Royal Commission concludes that the right to self-government must be exercised within the Canadian confederation. They argue that over a period of time and by a variety of methods First Nations joined the Canadian federation whilst retaining their rights to their laws, lands, political structures, and internal autonomy as a matter of Canadian common law. An important difference between the Royal Commission and the federal policy statement lies in the preferred method of implementation. The Royal Commission takes the inherent right policy to its logical conclusion and argues that those powers within the core of aboriginal jurisdiction can be unilaterally assumed at the will of First Nations, without the necessity for agreement with the federal and provincial governments. In this core area if an Aboriginal government were to pass legislation, any inconsistent federal or provincial legislation would be automatically displaced. However the Commission continues that where federal and aboriginal law conflict, aboriginal law will prevail unless the federal regulations conform to

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270 Ibid. at 166.
271 Ibid. at 214.
272 Ibid. at 193 - 199.
273 Ibid. at 215.
274 Ibid. at 217.
the standard set down in Sparrow: "the law must serve a compelling and substantial federal objective and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples."275 Again, as with Sparrow the consistency of the Royal Commission's approach to federal regulation with its rhetoric on First Nations sovereign jurisdiction is questionable.276 Outside of the core area the Commission argues self-government will need to be implemented by way of negotiation and treaty.277 Therefore it is only in areas requiring extensive coordination between the three orders of government, or which attract transcendent federal or provincial concern, that an aboriginal community will not be able to legislate at its own initiative.278 The Commission states that the treaty must specify which areas of jurisdiction are exclusive and which are concurrent, and in the latter case the treaty must specify which legislation will prevail if a conflict arises.279 Until such an agreement is concluded the periphery remains in abeyance, and federal and provincial laws continue to apply within their respective areas of legislative jurisdiction.280

275 Ibid. at 216.

276 Ibid. at 214 and 240. The retention of federal regulatory powers and the effects on First Nations sovereign autonomy will be considered in more detail below, at chapter four pp. 279 - 289.

277 Ibid. at 215. Whilst holding to this view as to the unilateral implementation of the inherent right of self-determination and self-government, the Commission does acknowledge that because of certain practical considerations, "Unless the federal and provincial governments are prepared to acknowledge the existence of a certain Aboriginal nation and to co-operate in establishing a process for implementing the nation's right of self-determination it will be difficult for that nation to exercise its right in a full and effective manner." Ibid. at 183. The necessity for agreement is all the stronger if the courts are not prepared to recognise the inherent right to self-government. A community taking unilateral action may find that its legislation, and actions taken pursuant to that legislation, are struck down as without jurisdiction.

278 Ibid. at 167.

279 Ibid. at 167 - 168.

280 Ibid. at 168.
The Commission agrees with the federal government policy that the resulting treaty would give rise to treaty rights under sec. 35 (1), but adds that even if a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched.\(^{281}\)

1.6 The Right to Self Government: A Summary

The Royal Commission is unequivocal about the important implications of sec. 35 for traditional assumptions about sovereignty and government in Canada,

“Overall the enactment of section 35 of the Constitution Act, 1982 has had far-reaching significance. It confirms the status of Aboriginal peoples as equal partners in the complex federal arrangements that constitute Canada. It provides the basis for recognising Aboriginal governments as constituting one of three orders of Government in Canada: Aboriginal, provincial and federal. These governments are sovereign within their several spheres and hold their powers by virtue of their inherent status rather than by delegation. In other words they share the sovereign powers of Canada, powers that represent a pooling of sovereignties.”\(^{282}\)

Along with the federal government, many of the provinces, and the First Nations, the Royal Commission recognises the inherent right of First Nations people to self-government and it would appear to, at least in theory, recognise the implications of that recognition: it acknowledges that First Nations governments constitute one of three equal governments in Canada, they are sovereign within their sphere of jurisdiction, and those powers are in no way dependent on grant by the federal or provincial government; their

\(^{281}\) Ibid.

\(^{282}\) Ibid. For a more detailed analysis of the implications of the inherent right and the concept of ‘shared sovereignties’ see, Restructuring the Relationship, ibid. at 240 - 244.
source is from within the community. The result is a sharing of sovereignties in Canada. That right is recognised under sec. 35 of the Constitution. The legal framework is thus in place to make self-government a reality in Canada. On the principle of the inherent right, with some exceptions, notably the Supreme Court, there seems to be general agreement. However whilst recognising the validity of the claim, securing legal recognition of the right seems to have been a constant uphill struggle. The federal government and the Royal Commission now agree that in order to reflect the status of the right being claimed it must be constitutionally entrenched. However the federal government does not agree with the Royal Commission that self-government powers can be unilaterally assumed. The earlier policy of proceeding through legislation to create subordinate levels of government exercising delegated powers, has been replaced as the basis of federal policy. However, whilst recognising the need for constitutional recognition of the right, the federal government will not relinquish its control over the manner in which the right is implemented and exercised. There is still a great deal of uncertainty over the exact implications of the inherent right policy, and the federal government is obviously determined to control the changes that will occur. Whilst recognising the existence of the right under sec. 35, the federal government is thus pursuing a policy of negotiation and agreement to translate the principle into practice. By making agreement a prerequisite to

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283 Ibid.

284 As will be discussed below at chapter 4, the Royal Commission also attempts to limit and restrict the right to self-government although they argue it can be unilaterally assumed. As will be argued below the reasoning of the Royal Commission leads it into the same contradictions that the courts under Sparrow, and the federal government in its policy guide, are clearly guilty of.
implementation, the federal government ensures that its voice is very clearly heard in any move towards autonomy. Despite the incoherence of this argument since the right is 'inherent' and the agreement of the federal government is therefore strictly irrelevant, given the complex issues that self-government raises, to proceed by negotiation and agreement is the most realistic approach. First Nations would probably endorse this position. A unilateral declaration of autonomy over an area such as child welfare may well be theoretically possible but it fails to deal with the crucial issue of funding. The community will need the agreement of the federal government to secure the resources to make a child welfare system work. Negotiations are therefore a matter of practical necessity. The Royal Commission agrees that negotiations are the most practical manner in which to proceed, and it is also the approach the Courts would endorse. The courts could well be accused of playing politics in the last few years and the standard of their decision making has suffered as a result. It is still unclear whether they will recognise the inherent right. The prospects certainly do not look good. If the court recognises the comprehensive, unregulated right to self-government under Sparrow, the federal government would find it harder to justify imposing limits and controls in the negotiation process. This may explain their reticence. Whilst one can sympathise with the courts in not wanting to be pushed into a position of recognising First Nations full uncompromised sovereignty, it should also be clear that refusing to recognise their legitimate claim amounts to an abdication of responsibility. At the very least judicial recognition of the inherent right and its full implications would place First Nations on a stronger, more equal footing, with the federal and provincial governments in the negotiation process. As
chapter four will explore, judicial recognition of the equal sovereign status of First Nations is something from which the communities would benefit greatly as they enter negotiations. It would certainly give them added strength as they face the attempts of the federal government to take away with the left hand, what it gave with the right.

2. The Scope of Powers Under the Inherent Right

Having established prima facie their inherent right to self-government, and negotiations now under way in many parts of the country on the best way in which that right can be implemented, the focus has now shifted to the extent of the authority and scope of the powers that will fall within First Nations self-governing jurisdiction. More particularly, the question is whether the recognised sphere of aboriginal self-government will include control over a fully autonomous child welfare system. The scope of the powers envisaged under self-government will obviously differ according to the view of self-government supported. However the one thing on which there does not appear to be any doubt is that self-government will include a right to control child welfare.

The Penner Committee identified three areas of “critical concern” in determining the scope of self-government jurisdiction. These three critical areas were those considered by First Nations who presented before the Committee as “central to the culture

285 The devolution policy of the federal government in the 1980s clearly included community control over child welfare. This was reflected in Bill C-52, and the self-government legislation of the Cree-Naskapi, Sechelt, and the Yukon Indians. The provinces have supported this policy by a process of delegating child welfare jurisdiction over First Nations communities to native controlled child welfare agencies. The Penner Committee, the Federal Government Policy Guide, and the Royal Commission all advocate that control over child welfare would be within the core of First Nations self-governing jurisdiction.

286 Penner Report, supra note 55 at 27 - 35.
of the First Nations.”\textsuperscript{287} It was argued that in these three areas only Indian control of legislation and policy would ensure the survival and development of Indian communities.\textsuperscript{288} Child welfare was identified as one of those areas of critical concern.\textsuperscript{289} In discussing the scope of self-government powers Penner claims that “self-government would mean that virtually the entire range of law making, policy, program delivery, law enforcement and adjudication powers would be available to an Indian First Nations government within its territory.”\textsuperscript{290} In areas such as child welfare, self-government powers would thus be comprehensive and freedom from the ethnocentric standards of the dominant system secured. The Cariboo Tribal Council made the following submission to the Committee on the scope of First Nations jurisdiction,

“Our Indian Governments are to have exclusive jurisdiction to make laws in relation to matters coming within these classes of subjects: people, resources and lands, without limiting the scope of the possible subjects to be under the jurisdiction and authority of our peoples.”\textsuperscript{291}

The Committee endorsed this position agreeing that full legislative and policy making powers on “matters affecting Indian people” should be among the powers exercised by Indian governments. Although this statement is broad and ill-defined, it would almost certainly include jurisdiction over child welfare. From the early 1980s, the scope of self-government powers were therefore defined according to matters essential for the

\begin{itemize}
\item \textsuperscript{287} \textit{Ibid.} at 27.
\item \textsuperscript{288} \textit{Ibid.}
\item \textsuperscript{289} \textit{Ibid.} at 31 - 33.
\item \textsuperscript{290} \textit{Ibid.} at 63.
\item \textsuperscript{291} \textit{Ibid.} at 63.
\end{itemize}
preservation of the distinct identity of First Nations people as a cultural community. Child welfare was accepted as integral to that objective. 292

The Charlottetown Accord, the federal government policy statement, and the Royal Commission also adopt a process for determining the scope of aboriginal powers that ties jurisdiction to the survival of First Nations as a distinct cultural entity. Para. 29 of the Charlottetown Accord indicates the scope of self-governing powers that was envisaged by the three parties in 1992,

"The exercise of the right referred to in subsec. 1 includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction, (a) to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions... so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies." 293

Again, language such as "to control their development as peoples" is almost certainly wide enough to incorporate child welfare. 294 The federal government policy of 1995 gives a similar determination of the scope of self-government jurisdiction,

"Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities,

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292 As discussed above, the legislative initiatives that followed on from Penner all included child welfare within their self-governing powers. See above pp. 111 to 126. See Bill C- 52, supra note 79 sec. 17 (1)(d) and sec. 19 (k); Cree Naskapi Act, supra note 58 sec. 21 (h); Sechelt Self-Government Act, supra note 58 sec. 14 (h); Umbrella Final Agreement, supra note 58 at chapter 24.2.1.10 and 24.3.2.3 (g).

293 Charlottetown Accord, supra note 158 at para 29.

294 The Charlottetown Accord was significant because the federal government effectively gave up its policy of the 1980s, and which dominated the First Ministers Constitutional Conferences, of trying to impose a list of self-governing powers as a prerequisite to recognition of the right, and agreed to a general formulation of the scope of First Nations powers such as embodied in the Accord. See "Talks Shape Third Order of Government" The Globe and Mail (May 12, 1992).
traditions, languages, and institutions, and with respect to their special relationship to their land and their resources.\textsuperscript{295}

Again the scope of jurisdiction is very closely tied to those matters integral to aboriginal culture and identity, and essential to their survival as a community. A strong case can be made prima facie that child welfare comes within this criteria.\textsuperscript{296} The policy statement goes on to recognise this fact. The scope of self-government that the federal government is prepared to negotiate is delineated by three categories.\textsuperscript{297} The first category is constituted by the core jurisdictional areas: those matters that are "integral to the group, integral to its distinct Aboriginal culture and essential to its operation as a government or institution."\textsuperscript{298} Adoption and child welfare are specified within the list of core subject matters.\textsuperscript{299} Whilst this is no surprise given the willingness of the federal and provincial governments to facilitate native control over child welfare in recent years, jurisdiction over adoption is a new concession.\textsuperscript{300} An important adjunct to child welfare jurisdiction is the inclusion

\textsuperscript{295} Federal Policy Guide, supra note 3.


\textsuperscript{297} For a commentary on the federal government's delineation of self-governing powers see "Indian Self-Government," supra note 177 at 7 - 9.

\textsuperscript{298} Federal Policy Guide, supra note 142 at 5.

\textsuperscript{299} Ibid.

\textsuperscript{300} In general whilst the provincial governments have been willing to delegate jurisdiction over First Nations child welfare to the communities, that jurisdiction has not included control over adoption. See e.g. the delegation agreements in British Columbia between the province, and Usma Nuu-chah-nulth and Xolhmi:lh, neither of whom have received delegated authority over the adoption of community children.
within the core of jurisdiction of mechanisms for the administration/enforcement of Aboriginal laws, including the founding of courts or tribunals. This is important as it provides a means by which internal disputes over child welfare can be resolved without having to rely on the provincial system. The government is also prepared to negotiate jurisdiction on matters that are not integral to aboriginal culture or the implications of which extend beyond the group. There is a third category of powers over which the federal government has declared it will not negotiate.

The Royal Commission similarly begin with a general statement as to the scope of powers that will fall within the jurisdiction of the First Nations, and again this statement ties the jurisdiction to matters integral to the culture, identity, and survival of the community as a distinct entity,

"Generally the sphere of inherent Aboriginal jurisdiction under section 35 (1) of the Constitution Act, 1982, comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories."

Under the Nisga’a agreement the Nisga’a take control of the delivery of child welfare services and their right to legislate in the sphere of child welfare and adoption (provided the best interests of the child is the predominant consideration) is also recognised. Nisga’a child welfare and adoption legislation will take precedence over conflicting federal and provincial laws: “Nisga’a government may make laws in respect of child and family services on Nisga’a lands, including the protection of children. In the event of an inconsistency between Nisga’a laws pursuant to para 49, and federal or provincial laws of general application, Nisga’a laws will prevail to the extent of the inconsistency.” Nisga’a Agreement, supra note 252 chapter “Nisga’a Government” paras 46, 47, 48 (adoption provisions), and paras 49, 50 and 51 (child and family services).


303 Ibid. at 6 - 7.

304 Restructuring the Relationship, supra note 3 at 185.
Again this broad format for the scope of aboriginal jurisdiction would seem to cover control over their own child welfare system, and this is confirmed in the Commission's more detailed analysis of First Nations powers. The jurisdiction of First Nations government is divided into two categories: the core and the periphery. The core area of jurisdiction is defined as,

"all matters that (1) are vital to the life and welfare of a particular Aboriginal people, its culture and identity; (2) do not have a major impact on adjacent jurisdictions; and (3) are not otherwise the object of transcendent federal or provincial concern."

The periphery of the jurisdiction constitutes the rest of the powers that come within aboriginal government and includes,

"matters that have a major impact on adjacent jurisdictions or that attract transcendent federal or provincial concern. Such matters require substantial coordination among Aboriginal, federal and provincial concern."

The total sphere of authority including both the core and periphery is argued to be approximately the same as the scope of the federal powers under sec. 91 (24) of the Constitution Act, 1867. The Royal Commission attempts to give a concrete indication

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305 Ibid. at 213 - 225.
306 Ibid. at 167.
307 Ibid.
308 There have been various academic proposals as to the scope of jurisdiction that would pass to self-governing First Nations communities. Slattery proposed the position that seems to have been adopted by the federal government: self-government powers should extend to any matters that would come within federal legislative jurisdiction under sec. 91(24) of the Constitution Act, 1867. The exact scope of federal jurisdiction under sec. 91 (24) is not clear, the exact scope of legislative powers under sec. 91 (24) never having been defined by the courts, but it is unlikely that the province would challenge an assumption of child welfare jurisdiction under this head given the ongoing jurisdictional dispute. The Royal Commission agree with Slattery that aboriginal and federal powers should be treated as concurrent, with aboriginal paramountcy in areas of conflict. Federal laws would continue to apply until the aboriginal legislature occupied the field. Aboriginal laws would have paramountcy over provincial law, but federal law could have paramountcy if it met the justificatory standard in Sparrow. Another view which would also seem to
of the various powers which will fall respectively into the core and the periphery. Listed under the core jurisdiction is "family matters, including marriage, divorce, adoption, and child custody; and social services and welfare, including child welfare." Again this core of jurisdiction also includes "the administration of justice including the establishment of courts and tribunals with civil and criminal jurisdiction." As discussed earlier the Royal commission argue that core powers can be implemented by unilateral self-starting initiatives on the part of the First Nations community, whereas powers in the periphery can only be implemented by negotiated agreement.

Given the possibility of a community deciding to implement its own child welfare regime by unilaterally deciding to pass its own child welfare laws pursuant to the inherent right under sec. 35 of the Constitution, the question may well arise in litigation as to whether First Nations have an inherent right to self-government over child welfare. This is

have influenced the Royal Commission was argued by Michael Asch. He suggests the broader definition of the scope of aboriginal powers endorsed by the federal government, Charlottetown and the Royal Commission: that aboriginal governments should have the powers necessary for aboriginal communities to reproduce themselves as distinct communities. An alternative view was suggested by Ryder that aboriginal governments should have the same powers as those currently exercised by provincial governments. See B. Slattery, "First Nations and the Constitution: A Question of Trust (1992) 71 Canadian Bar Review 261; M. Asch, "Aboriginal Self-Government and the Constitution of Canada" (1992) 30 Alberta Law Review 465; and B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308. See "Indian Self-Government," supra note 177 at 6. It should be noted that the jurisdictional debate over First Nations child welfare is unlikely to be revived in the context of on-reserve First Nations children. There currently exists an unhappy compromise and First Nations control is a useful solution to the deadlock. However the matter of off-reserve First Nations children and particularly funding for services is likely to be a matter of considerable difficulty as the federal government has so far refused to accept financial responsibility for off-reserve non-status children. See above at chapter one pp. 18 - 25 for discussion on the jurisdictional dispute.

309 Restructuring the Relationship, supra note 3 at 218.

310 Ibid.

311 Ibid. at 167.
essentially the same question that was before the Supreme Court in Pamajewon but instead of gaming the issue is child welfare. It is interesting to speculate on whether a specified right to self-government over child welfare would be any more successful than the claim in Pamajewon. Sanders has suggested that in areas of family law, such as child welfare and adoption, the Supreme Court is likely to be more sympathetic to modern applications of traditional laws and practices.\textsuperscript{312} As Sanders points out, a strong indication of the courts sympathy to aboriginal control over family law matters are the decisions concerning customary adoption in the Northwest territories: Re Katie,\textsuperscript{313} and Casimel v I.C.B.C. in British Columbia.\textsuperscript{314} A claim to self-government over child welfare would also be helped by the familiarity of the courts with native controlled child welfare agencies working within the system which continue to exercise a degree of autonomy and control over the communities child welfare practices. A claim to the survival of self-governing child welfare regimes could be based on this continuing autonomy and community control of child welfare, albeit extremely circumscribed by provincial jurisdiction, and the contemporary existence of traditional child welfare laws and practices such as custom adoption.\textsuperscript{315} However, on a strict application of Lamer C.J.'s judgement in Pamajewon, the case for finding a right of self-government over a contemporary child protection system does not look that strong. Applying Van der Peet the court must first identify the exact

\textsuperscript{312} "Indian Self-Government," \textit{supra} note 177 at 13.

\textsuperscript{313} \textit{Re Katie} (1961) 32 Dominion Law Reports (2d) 686.


\textsuperscript{315} See especially B. W. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980) 8 American Indian Law Review 199 [hereinafter Morse], for an analysis of the survival of indigenous legal regimes in the sphere of family law. Discussed above at chapter one pp. 84 - 89.
nature of the activity claimed, in this case to implement and control a child protection system; and then determine on the evidence whether that activity could be said to be a “defining feature of the culture in question.”316 Taken in a contemporary sense a strong case can clearly be made that child welfare is so fundamental to the cultural identity of a child and the cultural survival of the community that such a system is an “integral part of the distinctive culture.”317 However given the historical “frozen rights” analysis that has been imposed on aboriginal claims, the question becomes whether on the evidence it can be established that there was a child protection system operating for a substantial period of time in pre-contact society, such that it can be said to have formed an integral part of their distinctive society. The claim now looks more doubtful for whilst evidence can undoubtedly be provided of the extended family system and customary adoption operating in many communities,318 a child protection system such as envisaged today in contemporary First Nations communities clearly did not exist in pre-contact societies; a fact arising from the basic claim that before settlement such a system wasn’t necessary.319

316 Pamajewon, supra note 213 at 253.

317 Ibid. These arguments would enjoy strong support from the consistent policy of the federal government since the early 1980s on the centrality of child welfare to the survival of the distinct cultures of the First Nations and similarly the recent recommendations of the Royal Commission. As discussed above when defining the scope of self-government according to what is integral to the survival and contemporary vitality of distinctive First Nations cultures, child welfare has always been included. By defining self-government powers in a contemporary context rather than binding the scope of jurisdiction to historical practices the federal policy and the Royal Commission are clearly considerably more advanced than the courts in terms of the potential scope of self-government.

318 See especially, Morse, supra note 315.

319 The claimant would also have to overcome the problem of potential extinguishment whereby the argument would undoubtedly be made that the province’s comprehensive assumption of legislative jurisdiction over First Nations child welfare including reserves, had completely exhausted the jurisdictional field and extinguished any remaining aboriginal right to regulate their own child welfare activities. (This is basically the same argument that is generally made as to the regulation of First Nations
Under *Sparrow* there would here be no problem for the right would be allowed to naturally evolve and develop according to the changing demands upon it. However, a frozen rights analysis does not afford that luxury. To draw an analogy with the facts in *Pamajewon* there may well have been evidence of “informal” child welfare and protection practices “taking place on a small scale,” but there is no evidence of the “large-scale activities subject to community regulation of the sort at issue.” At the very least Lamer’s judgment throws substantial doubt on whether a contemporary right to control and develop a child welfare system would be found upon the current Supreme Court reasoning.

Despite the question over judicial recognition of the right to operate an autonomous child welfare system, it is still safe to conclude that control over the child welfare system has been identified as one area which is essential to the cultural integrity, identity, and very survival of First Nations communities, and thus constitutes a core area of self-government jurisdiction. There can be little doubt that within a community’s self-

governments under the Indian Act.) However, ironically the jurisdictional debate over First Nations child welfare may actually work in the favour of the First Nations by demonstrating the reluctance of both the province and the federal governments to accept responsibility for this head of jurisdiction. A strong case against a “clear and plain intention” to extinguish could obviously be made. Application of *Sparrow*, *supra* note 170 at 1099.

320 *Pamajewon, supra* note 213 at 254.

321 It should be noted that L’Huereux-Dube’s judgment would afford a stronger case for contemporary recognition of the right as she places emphasis on the aspect of the *Van der Peet* test which focuses on the contemporary significance of the right rather than the historical context; that is she asks whether the practice is “connected enough to the self-identity and self-preservation of the appellants’ aboriginal societies to deserve the protection of section 35.” This is more consistent with the approach of the federal government and the Royal Commission and as argued above it is likely a child welfare system would pass this test. However, L’Huereux-Dube’s position is by no means clear for in her final statement on self-government she refers to the ‘historical context’ in which the claim must be viewed. *Pamajewon, ibid.* at 258 and 260.
government powers, as determined by the governments of Canada, there will be included control over child welfare. Moreover as a community moves towards self-government, child welfare is likely to be one of the first areas over which they assert authority.\textsuperscript{322}

3. \textbf{Prospects for Self-Government: Conclusion}

It is now clear that there is widespread support for the principle that First Nations people have an inherent right to self-government within Canada. The inherent right is protected under sec. 35 of the Constitution Act, 1982, but whilst recognising the right, the constitution does not create it. The right to self-government arises from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied.\textsuperscript{323} Despite the recent disappointing decisions on aboriginal rights in the Supreme Court, and the prospect of difficult negotiations with the federal and provincial governments, it does seem as if the political process has at least advanced to a position by which the right to self-government, in some form, can become a reality for many communities. Essentially, although the federal government will undoubtedly try to limit self-government in forthcoming negotiations, political recognition of the inherent right and the need for decolonisation provides the basis on which First Nations can renegotiate their way into Canada. Their inherent right and all that that entails has to be the starting

\textsuperscript{322} This is the pattern followed by the Nisga’a Nation. The Agreement in Principle was signed in February 1997. In May the Nisga’a announced its plans for a gradual transition of control over child welfare to the community, the objective being the introduction of their own child welfare legislation to provide the mandate for a fully autonomous, Nisga’a controlled child and family services. British Columbia, Ministry for Children and Families Area Office, \textit{News Release 97:042 “Nisga’a Tribal Council to Assume Responsibility for Child and Family Services”} (13 May, 1997).

\textsuperscript{323} \textit{Restructuring the Relationship, supra} note 3 at 184.
point for restructuring governance in Canada. It certainly should not be assumed that the federal government policy is the last word on the subject. The government has recognised the inherent right, the legitimacy of the claim must be obvious to the court, First Nations should hold onto its full meaning to secure their equal status, for the first time, in determining the future of Canada. On the question of the court's role in this process it should again be noted that whilst they refuse to take the logic of Sparrow to its full conclusion the position of the First Nations in government to government negotiations is being unfairly weakened.

In conclusion, it will be assumed in the coming chapters that self-government is an inherent right of First Nations people that has been recognised as existing under the Canadian Constitution. It will further be assumed that in the next few years negotiations on implementing self-government will be undertaken to turn the current rhetoric into reality. Self-government for many aboriginal communities is a now a very real prospect and whilst the governments fight out the limits and restrictions on the right, and address the future place of First Nations people in Canada, the implications of this movement for First Nations children must now be addressed as a matter of urgency.
Chapter Three
The Benefits and Potential Risks of Self-Government for First Nations Children

"The agency that was supposed to be protecting the boy was compounding his agony. The Inmates were Running the Asylum."

The remarks of Justice Giesbrecht at the Inquiry into the death of Lester Desjarlais could be dismissed as yet another example of the white colonial judiciary imposing racist, paternalistic judgments on the First Nations people. His damning criticism of Dakota Ojibway Child and Family Services, a native controlled child welfare agency mandated by the Manitoba provincial government to deliver child welfare services to the Sandy Bay reserve community, stand in stark contrast to the glowing report of native controlled child welfare agencies delivered by the Manitoba Justice Inquiry a year before. The Manitoba

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1 Mr Justice Giesbrecht, Manitoba, Office of the Chief Medical Examiner, The Fatalities Inquiries Act - Respecting the Death of Lester Norman Desjarlais, (Brandon: Ministry of Social Services and Housing, 1992) at 36 [hereinafter Desjarlais Inquiry].

2 Dakota Ojibway Child and Family Services provide child protection services, including apprehension and placement of children in care, to the First Nations communities that constitute the Dakota Ojibway Tribal Council. Dakota Ojibway Child and Family Services was first conceived in 1979 out of dissatisfaction with the present services delivered by non-native agencies. The reserve communities joined together under the umbrella of Dakota Ojibway Tribal Council to operate services for their communities, which in addition to child welfare included policing and probation. The child welfare services are mandated by the province. In 1981 Dakota Ojibway signed separate agreements with both the provincial and federal governments transferring child care from non-native agencies serving eight bands within the Tribal Council’s territory. The agency operates under provincial legislation, it must follow provincial policy and guidelines, and is ultimately answerable to the province. However the internal structure and daily operation of the agency is determined by the Dakota Ojibway Tribal Council who enjoy considerable autonomy in the design and delivery of child welfare services. Dakota Ojibway Child and Family Services was the first mandated Aboriginal child welfare agency in Canada. See, Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba. The Justice System and Aboriginal People, vol. 1 (Winnipeg, Manitoba: Queen’s Printer, 1991) (Commissioners: Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.M. Sinclair) at 528 [hereinafter MJI]; Desjarlais Inquiry, ibid. at 159 - 160.

3 MJI, ibid. at 527 - 533 and 544 - 546. Although the comments of the Manitoba Justice Inquiry are restricted to Manitoba, native controlled child welfare agencies have been established across Canada as part of the process of ‘indigenising’ provincial child welfare systems. As with Dakota Ojibway these native controlled agencies operate under the mandate of the province and exercise delegated powers, but the design and delivery of services is under the control of the community. This chapter will discuss the possible benefits and risks of self-government for First Nations children by drawing on the experiences of
Justice Inquiry said of the native controlled child welfare agencies operating within the province, that their achievements had been little less than "remarkable". The Inquiry concludes,

"We believe that aboriginal child welfare agencies have been an outstanding success and that they warrant further support and encouragement. They are dealing with aboriginal families with sensitivity, commitment and ability."

The Inquiry further warned that the agencies should not be deterred by "meddlers and minor scandals." The Manitoba Justice Inquiry is not alone in speaking of native controlled child welfare agencies in glowing terms. For example, the Yukon Government has officially stated that the delegation of child welfare services in their territory has had a


4 MJI ibid. at 532.

5 Ibid. at 530.

6 Comment by Justice Giesbrecht, Desjarlais Inquiry, supra note 1 at 173.
clear positive outcome. The closest models to self-governing child welfare agencies that are possible within the existing legal framework have certainly generated tremendous praise for the protection and services they provide to aboriginal children, and for the wider effects of this positive transition of control on the community. Are the damaging criticisms of Justice Giesbrecht thus best forgotten as the scandal mongering of a "meddler"? Self-government is an inherent right of the aboriginal people; it can never be taken away from them. It will clearly have a profound effect, hopefully for the better, on the lives of aboriginal children and their communities. However, if there are potential problems in the transition to First Nations control, problems that could endanger the life and safety of aboriginal children, they need to be addressed. Self-government provides the hope for a better future, but if another generation of aboriginal children are lost to abuse and suffering, realising a right to self-government will be a hollow victory. Ensuring that aboriginal children have a safe and healthy environment within their communities is central to securing the future of the First Nations as distinct communities within Canada,

"We believe that the creator has entrusted us with the sacred responsibility to raise our families...for we realise healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities." (Charles Morris Executive Director, Tikinagan Child and Family Services.)

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7 Protecting Our Children, supra note 3 at 531.

8 See above at chapter two.

9 See above at pp. 182 to 193 for a discussion of the advantages both to First Nations children and the wider community of transferring control over child welfare services to First Nations.

10 See above at pp. 193 to 257 for potential risks in the transition of control over child welfare to First Nations communities.

11 Gathering Strength, supra note 3 at 11.
The criticisms of Justice Giesbrecht must therefore be taken seriously, especially in light of the fact that a number of the problems he identifies echo the fears and concerns of many aboriginal women concerning the future protections for vulnerable groups within self-governing First Nations communities. In considering the implications of self-government for First Nations children both the advantages, and the potential risks, must be considered. The devolution of control over child welfare to First Nations communities is still sporadic and therefore experience with these agencies is limited. However, the abuses that were evident in Lester’s case, and the evidence that the conditions on the reserve exacerbating those problems are not limited to Sandy Bay, provides a strong indication that there are significant risks in expanding community control without more effective safeguards in place. The abuses are not inevitable; nor does Lester’s case show that these abuses are a universal problem. Certainly there will be communities who can report a very different experience. However, the severity of the problem in Sandy Bay, even without supporting evidence that this is not an isolated incident, demands these potential risks are addressed.

1. Self-Government - the Hope for a Better Future

Many of the problems within contemporary First Nations communities can be directly attributed to the force of a colonial government. The need for decolonisation to enable First Nations people to rebuild their devastated communities is now widely supported by post-colonial theory. Building from an appreciation of the debilitating effects of the forces of colonialism, it is argued by some theorists that if the First Nations communities are to begin to address the consequences of their destroyed self-image, and the 'culture of dependency' that now predominates, they must be given recognition as


For a general overview of post-colonial theory and the process of decolonisation see, Bill Ashcroft, Gareth Griffiths and Helen Tiffin, eds., The Post-Colonial Studies Reader (London: Routledge, 1995).

The phrase ‘Culture of dependency’ is used by Boldt to describe the phenomenon whereby First Nations cultures and social systems have become “designs for surviving on government grants and social assistance rather than by their own productivity.” Boldt argues that “[s]tructural, social, and psychological dependence” marks contemporary aboriginal societies. For an analysis of the loss of First Nations' traditional economies and the cultural crisis it exacerbated see Surviving As Indians, supra note 13 at 170 and 172 - 174.
distinct and autonomous cultural groups within the Canadian system.¹⁶ Key to this status is the right of the group to be guaranteed the space which is necessary to enable them to rejuvenate their cultural and traditional values, and to re-establish their unique identity as distinct peoples.¹⁷ By re-establishing control over their lives, both as a community and as individuals they can recapture their pride and build a new positive self-image,

"Aboriginal Peoples see self-government as one of the main vehicle for repairing the damage done to their national cultures and restoring vitality of their languages, way of life and basic identities."¹⁸

Essential to the rebuilding of communities is economic growth, self-sufficiency, and jobs. Economic and cultural growth made possible under self-government provides the hope for healthy functional communities in the future.¹⁹ Without doubt securing prosperous

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¹⁶ See especially, C. Taylor, "The Politics of Recognition" in Charles Taylor and Amy Guttmann, eds., Multiculturalism (New Jersey: Princeton University Press, 1990) [hereinafter "The Politics of Recognition"]. See also, Surviving As Indians, ibid. at 176 - 180 and 200 - 203; W. Kymlicka, Liberalism, Community and Culture (Oxford University Press, 1991) at 135 - 205. Charles Taylor agrees with the post-colonial analysis that identity is partly shaped by the recognition received from others. Consequently a group can suffer fundamental damage if the society around them portrays to the group, in some authoritative form, a demeaning picture of themselves: "Nonrecognition or misrecognition can inflict harm, and can be a form of oppression." ['Politics of Recognition," ibid. at 25] Consequently it is argued by Taylor that significant harm has been caused to the First Nations people by this process of misrecognition and imposed identity. He contends that since arriving in Canada in 1492 the Europeans have consistently projected an image onto the First Nations people of their inferiority and "uncivilised behaviour". ['Politics of Recognition," ibid. at 26]. This negative self-image was reinforced by the dominant system's gradual destruction of the communities' pre-contact structures and systems. Many of the problems they face today, manifested particularly in abuse and despair, are arguably the direct result of colonisation by Europe, and particularly the destructive effects of colonisation on their cultural heritage, self-image, and identity. "Politics of Recognition," ibid.

¹⁷ See generally, "Politics of Recognition," ibid.

¹⁸ Restructuring the Relationship, supra note 12 at 140.

healthy communities, which have re-established community standards and values, will have a dramatic effect on the current levels of violence and abuse on the reserves. Attacking the underlying causes of the problem can help alleviate the symptoms. Children will be the direct beneficiaries of such a process,

"Indian people would likewise benefit from a new approach to self-government. Ending dependency would stimulate self-confidence and social regeneration. Instead of the constant and debilitating struggle now faced by band councils, which are expected to administer policies and programs imposed by DIAND, Indian First Nations governments would get on with the business of their own government affairs." 20

Having recognised the damage that has been caused by the 'culture of dependency' created under colonialism, the natural conclusion to improving this situation focuses on restoring aboriginal culture and traditions, and the abolition of the paternalistic relationship between the First Nations and the governments of the dominant society. 21 That is, one answer to improving the lives of aboriginal people is self-government. Without doubt the best interests of aboriginal children lie in the context of revitalized aboriginal families and communities. If self-government can promote such revitalised communities it can only benefit their children. 22

The fact that the community is once again in control of its own future, is a key component of the rebuilding exercise. The sense of ownership felt by the community under


21 Current Trends and Issues, supra note 3 at 39.

22 Gathering Strength, supra note 3 at 52.
self-government initiatives can clearly have an important effect on the success of the social and welfare programs that are in place. There is a strong commitment in many First Nations communities that it is time to take control of their own problems.

“Our people have to take responsibility for our children and the problems we have had over the years. For too many years we have had non-natives telling us how to run our lives and it has really screwed up our families and communities.”(Debbie Foxcroft)

Problems such as substance and alcohol abuse have begun to receive a great deal of time, resources, and effort. Justice Giesbrecht in the Desjarlais Inquiry found that many aboriginal communities were already “well on their way in the process of reclaiming their communities and their true lives.” Alkali Lake, Poundmaker’s Lodge, Hollow Water, and Putawagan are cited as key examples of communities who have taken control of their own problems and begun, by their own initiative, the process of individual and community healing. The Royal Commission argues that by looking to themselves for solutions,

23 See especially, Current Trends and Issues, supra note 3 at 34 - 48 for an analysis of the importance of community control over social welfare programs. See further Gathering Strength, ibid. at 39 - 42.

24 Debbie Foxcroft (Executive Director of Usma, Nuu-chah-nulth) reported in J. Lavoie, “Island Program puts Indians in Control of Abuse Programs.” Victoria Times Colonist (August 1, 1992).

25 The need for ‘community healing’ has become a primary concern within many First Nations. Various methods of community healing have been introduced. For a discussion of these initiatives see, Gathering Strength, supra note 3 at 39 - 42, 83 - 86, and 107 - 347; Perspectives and Realities, supra note 12 at 53 - 62; Current Trends and Issues, supra note 3 at 67 - 89; MJI, supra note 2 at 492 - 498; Bridging the Cultural Divide, supra note 13 at 148 - 168; Desjarlais Inquiry, supra note 1 at 243 - 244.

26 Desjarlais Inquiry, ibid. at 244.

27 Ibid. The Sto:Lo Nation is another strong example of where the process of community healing is regarded as a matter of priority. In dealing with problems of family violence and abuse one particularly successful program, among many offered, is STOP. The program is aimed at stopping oppressive practices and includes education on violence and anger control. There is a strong emphasis on the importance of cultural identity and heritage. The sixteen week program is extremely popular with community members and unlike many other programs, participants tend to see the course through to the end. Interview with Kelowa Edel, Manager of Child Welfare, Xolhmi:lh Child and Family Services (April 17th, 1997) Sto:Lo Nation [hereinafter Kelowa Edel].
instead of turning to outside agencies, the communities bonds are thereby strengthened and the social norms and values of the community re-established. In particular, the ability of the community to care for their own members, particularly their children, is restored. By empowering the local community programs can be developed that address their needs, are realistic, and therefore work. There are encouraging signs that programs designed and delivered by aboriginal people are more effective in attaining their objectives than programs that are designed and delivered by non-aboriginal people. A very recent study into the AIDS crisis in many First Nations communities has come to the same conclusion. To be effective the service must be designed and delivered by aboriginal people.

The importance of the community’s sense of control and ownership in securing the success of community programs is clear in the context of child welfare. On the effectiveness of non-native controlled services Hylton concludes,

"[Non-native] Family service programs are not as effective in preventing the breakdown of Aboriginal families; foster care and adoption placements more often fail."

The problems with the current child welfare system have been explored in chapter one. In essence the proponents of self-government hope to guarantee a more effective and

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28 Gathering Strength, supra note 3 at 85.


30 Current Trends and Issues, supra note 3 at 39.

31 Watershed Writing and 2-Spirited People of the 1st Nations, A Community-Based Discussion on: the Social, Moral, Ethical and Legal Implications of Conducting Blind HIV Seroprevalence Studies in Aboriginal Communities (November, 1996).

32 Current Trends and Issues, supra note 3 at 40.
culturally appropriate child welfare service. The advantages of community control over child welfare services is arguably reflected in the work of native controlled child welfare agencies.\textsuperscript{33} The Manitoba Justice Inquiry argue that these agencies have greatly improved the services delivered to First Nations children within their communities and have become remarkably effective in dealing with even the most difficult child welfare cases in a very short period of time.\textsuperscript{34} The suggested reasons behind this improvement are varied. For example, the agency can concentrate their efforts and focus their resources on the needs of the community they serve, rather than deliver inappropriate services designed for non-native urban communities.\textsuperscript{35} Services previously denied and of particular importance to the community are now being provided.\textsuperscript{36} As suggested above, by involving the First Nations community in both the design and delivery of the service, native controlled child welfare programs would seem to be more successful in fostering the community's sense of responsibility for the program. It is argued that native controlled child welfare agencies have been able to generate a level of community support and involvement far beyond that which existed for non-aboriginal agencies.\textsuperscript{37} The sense of invasion once felt by the community is replaced by a sense of control.\textsuperscript{38} The program consequently enjoys much

\textsuperscript{33} For the literature which has evaluated the advantages of community control over child welfare see supra note 3. See especially, \textit{MJI}, supra note 2 at 531 - 533; \textit{No Quiet Place}, supra note 3 at 118 - 120.

\textsuperscript{34} \textit{MJI}, \textit{ibid.} at 531.

\textsuperscript{35} \textit{Current Trends and Issues}, supra note 3 at 40; \textit{MJI}, \textit{ibid.}

\textsuperscript{36} \textit{Current Trends and Issues}, \textit{ibid.} at 43.

\textsuperscript{37} \textit{MJI}, \textit{supra} note 2 at 532.

\textsuperscript{38} \textit{Current Trends and Issues}, \textit{supra} note 3 at 40 - 41.
greater trust and acceptance from the community.\textsuperscript{39} Xolhmi:lhn Child and Family Services,\textsuperscript{40} Nuu-chah-nulth Child and Family Services,\textsuperscript{41} and the Spallumcheen Child Welfare Program,\textsuperscript{42} all confirm this experience in the communities they serve. The acceptance of the program both by the individual client, and the general community, and an appreciation of the fact that it is there to help them, not simply remove their children to distant places, is crucial to its effectiveness in preventing abuse. For example, more members of the community are willing to inform the agency of incidents of abuse that come to their attention. Debbie Foxcroft, the then manager (now Executive Director) of Usma Nuu-chah-nulth Child and Family services, observed that reports of sexual abuse increased when the program took over the responsibility from the social services minister,

"People are more willing to come forward because they know we are going to do something. Sexual abuse affects the whole community, but before people were afraid to report something to the ministry if it was a family member or neighbour [for fear] the child might be taken out of the community."

Marika Czink the current child welfare manager at Usma agrees,

"The community provide a great deal of background information for the workers. A community based service means that they are much happier to provide the agency with information voluntarily...Most complaints and requests for help come from community members. There are expectations of the agency that they are there to help as well as apprehend. There has been a general acceptance of

\textsuperscript{39}Current Trends and Issues, \textit{ibid.} at 43; MJI, \textit{supra} note 2 at 532.

\textsuperscript{40}Kelowa Edel, \textit{supra} note 27.

\textsuperscript{41}Interview with Marika Czink, Case Work Supervisor, Usma Family and Child Services, Nuu-chah-nulth (April 21st, 1997) Nuu-chah-nulth Tribal Council offices, Port Alberni [hereinafter Marika Czink].


\textsuperscript{43}Debbie Foxcroft, "Indians in Control of Abuse Programs," \textit{supra} note 24.
the program by the community which means that they are more willing to come to the agency for help.”

This experience is echoed by Xolhm'i:lh Family and child Services,

“It is important that the agency is community based. It means that they receive a lot more information. They know the community better. They are a helping face within the community.” (Kelowa Edel)

It would seem that by fostering trust and acceptance in the community, more parents will also come to the agency voluntarily for help. This is evidenced by the extent of parental and community involvement in deciding where to place a child, the number of self-referrals, and the number of voluntary care agreements to which parents agree. The native controlled child welfare agencies in British Columbia have experienced a significant increase in the number of parents who willingly come to the agency for help and cooperate fully in the decision making process,

“Families are significantly more willing to come to the agency for voluntarily for help. A relationship is being built between the community and the agency. the agency is becoming known and accepted and the community is a lot more open if there are families with problems. It is not the case that they are just seen as coming in and snatching children anymore. They are seen as wanting to help and people are more willing to come to them. There are no statistics on this but now about one half to one third of care agreements are voluntary.” (Kelowa Edel)

Bryan Watt of the Spallumcheen Child Welfare Program reported an almost identical, if not stronger experience, in the Spallumcheen community,

“There is a greater willingness by members of the community to come in and ask for help. One of the striking things about the program is the number of parents who use voluntary care agreements. They are not seen as such a threatening thing

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44 Marika Czink, supra note 41.
45 Kelowa Edel, supra note 27.
46 MJII, supra note 2 at 532.
47 Kelowa Edel, supra note 27.
as the Province’s voluntary care agreements. The voluntary agreement allows respite care for parents to give them a chance to get their lives back together.” (Bryan Watt) 48

Family involvement in planning for the child’s future is argued to help their prospects of being reunited with their children at some future point,

“The voluntary agreement allows respite care for the parents to give them a chance to get their lives together. Placing a child into care is used as preventive mechanism not as a last resort. The chances of Spallumcheen children being apprehended are higher but so are the chances of getting your children back. The band uses apprehension creatively. It provides shock treatment for the parents to get them to regain control of their lives before it is too late. There is consequently a better chance of apprehended children going home.” (Bryan Watt) 49

More generally, by involving the community and the family in the design and delivery of the program, the level of awareness among the residents on issues such as violence, substance abuse, and child welfare can be substantially increased. 50 With this greater awareness can come greater interest, involvement, and support for addressing the problems.

The close involvement of the community in the design of the program can also ensure that the agency delivers culturally appropriate services and can create culturally appropriate solutions to child welfare problems; 51 that is they can design programs for the community that take into account the ‘unique language, culture, traditions and current life

48 Bryan Watt, supra note 42.

49 Ibid.

50 Current Trends and Issues, supra note 3 at 43.

51 MJI, supra note 2 at 532.
situation of aboriginal clients.” Of particular importance is the reliance on the tradition of the extended family for providing substitute care, by which First Nations controlled child welfare agencies have been able to drastically reduce the number of Aboriginal children who are removed from their community for residential placements. Usma is able to find a home for most younger children in their own family or within the community; Spallumcheen can place two thirds of its children in care with relatives on the reserve, whilst Xolhmi:lh also makes extensive use of the extended family and consequently has a good resource of general foster care homes. Xolhmi:lh also makes extensive use of cultural heritage and traditional practices, such as sweats, in helping to promote stability in the lives of troubled youth within the community. All the agencies try and employ

52 Current Trends and Issues, supra note 3 at 40. See especially on the unique ability of community controlled child welfare agencies to provide culturally sensitive services, Xolhmi:lh’s recent submissions to the federal and provincial governments on their “preferred position” to assume jurisdiction for both on and off-reserve Sto:Lo children, Sto:Lo Nation, Xolhmi:lh Sto:Lo Child and Family Services. Target Population, Delegation Classification and Jurisdiction, by Dan Ludeman (Sto:Lo Nation, March 18, 1997). Xolhmi:lh, Usma, and Spallumcheen all endorse the objective of delivering culturally sensitive services, although Usma and Spallumcheen report difficulties in determining the content of those programs. See below, at chapter five pp. 391 - 399.

53 MJI, supra note 2 at 532; Gathering Strength, supra note 3 at 31 - 32. For further discussion on the importance of the tradition of the extended family see especially, No Quiet Place, supra note 3 at 163 - 164; Literature Review, supra note 3 at 8 - 9; Liberating Our Children, supra note 3 at 9 - 10 and 13 - 14; S. Bull, “The Special Case of the Native Indian Child” (1989) Advocate 523 at 527. For a more critical analysis of the continuing tradition of the extended family in contemporary aboriginal communities see Desjarlais Inquiry, supra note 1 at 23 - 25.

54 Marika Czink, supra note 41.

55 Bryan Watt, supra note 42.

56 Kelowa Edel, supra note 27.

57 Ibid.
members of the community to promote cultural sensitivity in the delivery of services.\textsuperscript{58} It is argued that the delivery of culturally appropriate services, quite often by aboriginal staff, helps develop greater trust between the child protection worker and the parents than is often possible with a non-native social worker.\textsuperscript{59} The presence of aboriginal staff is obviously important to the effectiveness of the work of the agency.\textsuperscript{60} It is suggested by Hylton that self-governing agencies help attract and retain aboriginal staff, which has the knock on effect of improving the general economic conditions of the community by generating jobs.\textsuperscript{61} Again the objective of Xolhmi:lh, Spallumcheen, and Usma, is to be fully staffed by qualified members of the community, or at least members of other First Nations,

“It is the expectation and the goal of the agency that it will be staffed by native workers, preferably from the community. Aboriginal workers are encouraged to take courses in social work to gain the necessary qualifications. The agency tries to initiate projects to include aboriginal staff.” (Marika Czink, Usma)\textsuperscript{62}

The three agencies try to make extensive use of members of the community in positions such as family support workers, cultural workers, and the staffing of group homes. They also encourage their native staff to gain the necessary qualifications to progress to the next

\textsuperscript{58} For further discussion on the incorporation of traditional cultural practices into the work of these three native controlled child welfare agencies and their efforts to secure the delivery of child protection services is culturally sensitive, see below at chapter 5 pp. 391 - 399.

\textsuperscript{59} Current Trends and Issues, supra note 3 at 40.

\textsuperscript{60} See e.g. British Columbia, Royal Commission on Family and Children's Law, Native Families and the Law: Tenth Report of the Royal Commission on Family and Children's Law by Thomas R. Berger, ed. (Vancouver, B.C.: Queen's Printer for British Columbia, 1992) at 49 and 66 - 76; No Quiet Place, supra note 3 at 131 - 176; Liberating Our Children, supra note 3 at 52 - 53.

\textsuperscript{61} Current Trends and Issues, supra note 3 at 43.

\textsuperscript{62} Marika Czink, supra note 41.
level of responsibility. It is also claimed that despite these initiatives, the services provided are costing no more and often less, than the non-aboriginal programs. For example, Spallumcheen estimate that because they do not use the provincial court the band saves millions of dollars,

"By not going to the provincial courts it is estimated that the band saves millions of dollars. For example a recent case in which the agency was involved (a fairly complex case) was estimated to have cost somewhere around $75 000." (Bryan Watt)

At the same time there is argued to have been no drop in the level or quality of professional service which is provided in the communities. Hylton argues that the aboriginal communities are 'providing levels of service that approach or equal levels of service available to non-aboriginal communities.' Bryan Watt of Spallumcheen argues that the level of service and decision making has actually improved. Spallumcheen are now able to provide some preventive services to the band, and moreover, decisions on apprehension and placement are better than they were under the provincial system,

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63 For a detailed discussion of these initiatives, see below at chapter five pp. 391 - 399. It should be noted however that all three agencies whilst endorsing employing aboriginal staff to deliver child protection services to First Nations communities found there was a particular shortage of aboriginal social workers working in the field of child protection. Generally it would seem aboriginal social workers prefer to work in other areas of the profession, finding child protection particularly stressful. The agencies also reported that they had experienced problems with aboriginal people delivering child welfare services to their own communities due to intense emotional pressure and constant pressure from the community. The agencies all suggested that to avoid the enormous stress this can cause, aboriginal social workers should not be employed to work within their home communities.

64 Current Trends and Issues, supra note 3 at 43.

65 MJI, supra note 2 at 532. The Manitoba Justice Inquiry in fact suggests that the services offered are far superior to those offered by non-native agencies. The certainty of this conclusion will be questioned in light of the discussion below.

66 Current Trends and Issues, supra note 2 at 43.

67 See above at chapter one pp. 18 - 26 for a discussion of the jurisdictional dispute between the federal and provincial governments which has meant child welfare services on First Nations reserves are
“The Chief and the Council operate on a much broader basis of information. The Chief and Council impose no boundaries on the information they will hear. The quality of decision making is thus superior to that of a court of judge because of the availability of information and the knowledge of the implications of their decision for the family. The Chief and Council will sometimes take days agonising over a decision. They will usually make a sensible decision. That can never be counted on in court.” (Bryan Watt)⁶⁸

Undoubtedly many of the First Nations communities who are currently preparing to assume self-governing powers are already feeling the benefits from once again being in control over their own communities. Native controlled child welfare agencies are making an important contribution to this process of regeneration and rebuilding,

“Child welfare brought the nation together - consolidated it. Establishing child welfare jurisdiction is a forerunner to the treaty negotiations. Outlining the jurisdiction of the Nation’s services and authority is central to the whole process of self-government.” (Kelowa Edel, Xolhmi:lh)⁶⁹

Not only does control over child welfare help the community in general, but most importantly, on the above evidence, it would seem to help the children. A strong argument is made that there has been a clear improvement in child welfare services in many communities since native controlled agencies assumed jurisdiction, and they are now providing better, more effective services. This provides strong evidence that self-government will help keep children safer, and importantly, safer within their communities.

fragmented and often limited, with many reserve communities across Canada receiving no preventive services.

⁶⁸ Bryan Watt, supra note 42.

⁶⁹ Kelowa Edel, supra note 27.
2. The Potential Risks of Self-Government - the Desjarlais Inquiry

Given such positive assessments of the benefits being felt by the movement towards self-government, it would be natural to conclude that self-government is the clear answer to the problems of abuse and violence faced by many communities. One might conclude that it should therefore be fully implemented as expeditiously as possible. However the issue is not this simple. It cannot be denied that many communities are still facing enormous internal problems, and these problems continue to pose a strong challenge to the community achieving successful self-government. Most importantly they continue to threaten the safety and well-being of First Nations children. The Inquiry into the death of Lester Desjarlais stands as the most shocking indictment of community control over child welfare, but it does not stand alone in questioning the implications of self-government for the safety and protection of vulnerable groups within the First Nations communities. The voices of many First Nations women would echo the concerns of Justice Giesbrecht concerning self-government and the ability of many First Nations communities to govern themselves responsibly and effectively. The Desjarlais Inquiry reveals not only concerns about DOCFS and its staff, but wider concerns about the ability of the Sandy Bay community, and First Nations communities in general, to assume governmental control. More than once it is emphasised that there was sufficient evidence

70 For the internal problems in the communities stemming from economic collapse and cultural disintegration see, supra notes 12, 13, and 19. For an excellent discussion of the challenges facing First Nations communities with particular reference to disintegration in family and community life and the prevalence of violence and abuse in many communities see, Gathering Strength, supra note 3 at 33 - 85; Desjarlais Inquiry, supra note 233 - 258; and “Dancing With a Gorilla,” supra note 12.

71 Supra note 12.
before the Inquiry to conclude that the problems identified were not limited to the Sandy Bay reserve but stretched across the aboriginal communities in the province,

'The evidence convinced me that the Sandy bay Reserve situation described in detail, was typical in most ways of the situations existing on other reserves in this province.'

Whilst Lester's death was one incident, concerning one agency, and thus it would be clearly inappropriate to indict all communities on the evidence before the Inquiry; there is enough consistent evidence from other communities to suggest that there are very real risks in proceeding towards self-government without appropriate safeguards being in place, and without these questions and concerns having been satisfactorily addressed.

2.1 General Problems in the Communities

2.1(i) The Legacy of Colonialism

The Desjarlais Inquiry paints a picture of a community experiencing very severe problems. The Inquiry revealed a community that was suffering and simply unable to effectively implement its own child welfare program. The problems in the community extended from the families, to the staff at the agency, to the Chief and Council. Violence, substance abuse, and the sexual abuse of children were rampant. The Inquiry raises several concerns about the appalling conditions which prevailed in Sandy Bay and in First Nations communities in general, and the effect of such conditions on the phenomena of abuse and violence. The problems with abuse and violence are undoubtedly closely

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72 Desjarlais Inquiry, supra note 1 at 108.

73 Ibid. at 14, 58, 60, 105, 234, 236, and 237.

74 Ibid. at 233 - 258.
related to the serious socio-economic conditions which prevail in many First Nations communities. That is, the poverty across aboriginal communities as revealed in the Desjarlais Inquiry, and the destruction of Indian cultures, has contributed enormously to the current problems. Poverty is certainly a huge problem with many aboriginal people living well below the poverty line. However the poverty of the First Nations people must be placed within the larger context of the effects of colonialism to appreciate its full effect on community life. The arrival of the colonial forces from Europe resulted in the widespread dispossession of aboriginal people from their land and massive forced relocation. One of the most debilitating consequences of this process was the loss of the traditional economic base of the communities. Whilst many communities lost their traditional lifestyles and economies, they were not equal beneficiaries with non-native society of the ‘advance’ of industrialisation and development. The isolation of many

75 See above at chapter one fn 122 for literature supporting the connection between child neglect and poverty.

76 Desjarlais Inquiry, supra note 1 at 234 - 235 (citing A New Justice for Indian Children: Final report of the Child Advocacy Project, prepared by S. Longstaffe and B. Hamilton (Winnipeg, Manitoba, Child Protection Centre, Children’s Hospital, Health Sciences Centre, 1987).

77 For the available statistics on First Nations poverty, social welfare dependency, and prevalent standards of living within reserve communities, see above at chapter one, fn 111, 112, and 113.

78 For the colonial context in which these problems of poverty and social disorganisation have arisen see supra note 13. For an excellent and comprehensive summary of problems within reserve communities placed within the colonial context see C. LaPrairie, "The Young Offenders Act and Aboriginal Youth" in Joe Hudson, Joseph Hornick and Barbara Burrows, eds. Justice and the Young Offender in Canada (Toronto: Wall and Thompson, 1988) 159 [hereinafter “Aboriginal youth”]. See also Locking Up Natives in Canada, supra note 13.


80 See especially, Surviving As Indians, supra note 13 at 170 - 174 and 223 - 230 for a brief overview of this phenomena and its effects.

81 The MacKenzie Valley Pipeline Inquiry in the 1970s attracted enormous attention to the consequences for native people of large scale industrial development. The Report of the MacKenzie Valley Pipeline
aboriginal communities has compounded their economic crisis.\textsuperscript{82} Many communities are too geographically isolated to become economically self-sufficient, whilst many communities are situated on land that is generally unsuitable for sustained economic development.\textsuperscript{83} There has consequently been a lack of development that could create economic independence for First Nations communities. Mass unemployment and welfare dependence on a colonial government is the result. It is poverty and the creation of a 'dependency culture' which is perhaps the single biggest factor in causing such problems with abusive behaviour.\textsuperscript{84} The connection between poverty and child abuse is now well recognised,

'\textquote{Dr. Ferguson gave his opinion that poverty, and its associated dysfunctionalism, breeds problems like the sexual abuse of children.}'\textsuperscript{85}

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Inquiry concludes, "...the incidence of these disorders is closely bound up with the rapid expansion of the industrial system and its persistent intrusion into every part of the native people's lives. The process affects the complex links between native people and their past, their culturally preferred economic life and their individual, familial and political self-respect. We should not be surprised to learn that the economic forces that have broken these vital links, and that are unresponsive to the distress of those who have been hurt should lead to serious disorders. Crimes of violence can, to some extent be seen as expressions of frustration, confusion and indignation..." \textit{Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry}, Vol. 1 (Vancouver: Douglas and MacIntyre, 1988) at 152 (Originally published as \textit{The Report of the Mackenzie Valley Pipeline Inquiry}, 1977).

\textsuperscript{82} "Aboriginal Youth," \textit{supra} note 78 at 161.

\textsuperscript{83} \textit{Ibid.}

\textsuperscript{84} LaPrairie argues that, '[c]ommunities are often either: (a) too isolated to become economically self-sufficient in the modern sense, attached to hinterland primary-resource towns where the values of hard living and hard drinking spill over and/or reinforce activities in the aboriginal community; or (b) ghettos within urban cores. The very nature of much of economically deprived and marginal community life suggests the potential to adopt deviant or delinquent values." \textit{Ibid.} at 162. Boldt comes to a similar powerful conclusion: 'To sum up, the massive forces of forced assimilation, loss of traditional means of subsistence, and isolation have reduced Indian cultures into patchworks of remnants and voids. The result is a cultural crisis manifested by a breakdown of social order in Indian communities." \textit{Surviving As Indians, supra} note 13 at 176.

\textsuperscript{85} Evidence before the \textit{Desjarlais Inquiry}, \textit{supra} note 1 at 236.
Poverty is not however the only destructive legacy of colonialism and 'modernisation'. One of the suggested reasons for disintegration in First Nations communities is the weakening of community institutions which traditionally maintained social control.\footnote{For a discussion on the disintegration in traditional institutions of social control and its effects see especially, C. LaPrairie, "Aboriginal Crime and Justice. Explaining the Present, Exploring the Future" (1992) 34 Can. J. of Crim. 281; "Community Participation in Socio-Legal Control," \textit{supra} note 13.} The destabilising loss of the First Nations traditional way of life is exacerbated by the imposition of a foreign system of governance.\footnote{The imposition of the Indian Act system of governance on First Nations communities is extensively documented but for the most recent overview see \textit{Looking Forward. Looking Back}, \textit{supra} note 13 at 255 - 332.} First Nations social institutions which stabilised the community and formed the foundation of social cohesion, such as the potlach and sun dance were criminalised.\footnote{\textit{Locking up Natives}, \textit{supra} note 13 at 6.} On the local level the traditional leadership of the First Nations was replaced by the colonial instrument of elected band councils introduced under the Indian Act. The loss of traditional social structures and institutions, exacerbated by the loss of traditional economies, has led to the weakening of community ties, values, and societal standards of behaviour, across First Nations communities.\footnote{S. Clark, "Crime and Community Issues and Directions in Aboriginal Justice" (1992) Can. J. of Crim. 513 at 514 - 515.} McCaskill argues that in communities which are functioning well there will exist strong social pressures to obey the values and standards of one's group.\footnote{\textit{Patterns of Criminality and Correction}, \textit{supra} note 13. See further C. LaPrairie, "Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice" (1995) 6 Crim. Law Forum 576.} These pressures are exerted through interaction with the community and the positive influence of
leaders and role models. Affiliation with the community is encouraged and a sense of identity and belonging is nurtured. On the other hand when these community ties do not exist 'frustration, alienation, and confusion’ are the product. Resulting disintegration is manifested in violence, sexual abuse, and alcoholism. The sense of belonging and responsibility to the group has been lost. Family instability is a strong manifestation of this disintegration in community life.

Caution is necessary in not stereotyping or generalising about prevailing conditions experienced by aboriginal people. First Nations communities across Canada have suffered the effects of colonialism to varying degrees of severity, and many communities, as discussed above, have begun the process of ‘healing’ and cultural regeneration to re-establish their traditional values and social institutions, and rebuild their devastated communities. However, as the death of Lester Desjarlais makes very clear, the effects of colonialism are not easily forgotten. It is still true to say that in many communities suffering from this breakdown in social relations, ‘modern aboriginal life is characterised by feelings of hopelessness, despair, inferiority and dependency.” To establish effective

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91 Patterns of Criminality and Correction, ibid.
92 Ibid.
93 Ibid.
94 See above pp. 185 to 186.
95 “Aboriginal Youth,” supra note 78 at 160. The Report of the Community Panel on Legislative Reform in British Columbia remarked that the most tragic evidence of these problems is the high rate of suicide within First Nations communities. Liberating Our Children, supra note 2 at 22 - 23. For a comprehensive discussion on this devastating phenomena see, Royal Commission on Aboriginal Peoples, Choosing Life, Special Report on Suicide Among Aboriginal People (Ottawa Supply and Services, 1995).
self-government under these conditions is a mammoth challenge, and the difficulties facing the communities should not be underestimated.

2.1 (ii) Denial and Complacency

The disintegration in community life was clearly evident in Sandy Bay where there would appear to have been a complete collapse in any kind of community norms or standards. This collapse was most clearly seen in the rampant sexual abuse to which children on the reserve were subjected.\footnote{Supra note 73.} However, perhaps, the most worrying aspect of the prevalent conditions on the reserve was the refusal to admit there was even a problem. The band members appeared to have been in complete denial that sexual abuse even existed within the community.\footnote{Desjarlais Inquiry, supra note 178 at 57 - 61 and 233 - 274.} It was the opinion of professionals who were working on the reserve, that the community, and particularly the male leadership, would not confront the issue of sexual abuse,

"It is Marion Glover's belief that aboriginal people generally have a difficult time confronting unpleasant issues. When ugliness like violence, alcohol abuse and suicide by their fellow aboriginals is raised the tendency is to 'pull the covers up over your head.' Dr. Ferguson make similar comments about denial in the aboriginal community, and particularly an inability by male Indian leaders to face those difficult problems and acknowledge responsibility for them."\footnote{Ibid. at 43 - 44.}

Those who did admit there was a problem, engaged their energies in trying to hide the fact from the outside world, rather than protect the children at risk and deal with the offenders,

"The response of the Sandy Bay reserve community in general seemed to be to work against having even the most serious sexual incidents exposed outside of
the community. The pressure came from people within the community to keep these matters in the community. The overwhelming majority of the sexual abuse disclosures that were made did not even make it to the starting line of the legal system's gauntlet."\(^{99}\)

The response of the Sandy Bay community to the revelations of sexual abuse uncovered by Marion Glover, was an obsessive determination to deny and cover up the allegations. The community looked for someone else to blame. Marion Glover became the prime target. She was victimised as being obsessed with sexual abuse and the root cause of the problems.\(^{100}\) In the absence of a convenient individual to blame, the non-native child welfare system stood accused.\(^{101}\) No one can deny the complicity of the non-native system in this whole tragedy, and to recognise its failures and inadequacies is important. However, as Justice Giesbrecht comments, "to blame the white agencies for the devastation of Indian communities [without addressing their own complicity] is an excuse for not facing problems and dealing with them now. It is classic denial."\(^{102}\) The most shocking evidence concerning denial in the community is that it even affected the child protection workers at DOCFS. They publicly defended known abusers,\(^{103}\) and openly agreed with the community's assessment of Marion Glover,

"Senior members of DOCFS defended [Joe Desjarlais]. Generally DOCFS refused to take the allegations seriously, preferring to believe that Marion Glover was imagining these things, or at the least was overly concerned with sexual abuse."\(^{104}\)

\(^{99}\) Ibid. at 58.

\(^{100}\) Ibid. at 61 - 62.

\(^{101}\) Ibid. at 241 - 242.

\(^{102}\) Ibid. at 242.

\(^{103}\) Ibid. at 104.

\(^{104}\) Ibid.
It is of the greatest concern that professionals employed to protect children from abuse were insisting that it wasn’t a problem in a community such as Sandy Bay.\textsuperscript{105}

There was also strong complacency within the community concerning sexual abuse. It had reached a stage where sexual abuse was becoming an accepted phenomena in the community, an accepted part of daily life. The Inquiry provides two quite striking examples of the community’s lack of concern over sexual abuse.\textsuperscript{106} James Waddell, a teacher at the school on the reserve was discovered to have a conviction for child molestation, and that as a result his teaching certificate had been revoked.\textsuperscript{107} Lester had also complained to Marion Glover that he was being sexually abused by Waddell. However, when Glover approached the school board they took the position that as the best teacher they had ever had they did not want to lose him. There was no concern over either his past record or the new allegations by Lester. Waddell was later convicted of sexually assaulting boys whilst at Sandy Bay.\textsuperscript{108} This whole episode caused no outrage in the Sandy Bay community. Similarly Joe Desjarlais, a convicted pedophile and sex-offender, was appointed to the Sandy Bay Youth Justice Committee.\textsuperscript{109} There was no objection by either the Committee or the community. There was even a suggestion that he

\begin{footnotes}
\item[105] \textit{Ibid.} In the words of Justice Giesbrecht: “The attitude of the senior child care agency officials to a person who is obviously a dangerous sexual offender is utterly astounding.”
\item[106] \textit{Ibid.} at 96 - 105. Justice Giesbrecht describes the prevalent attitude towards sexual abuse at Sandy Bay as “unusual.”
\item[107] \textit{Ibid.} at 96 - 101.
\item[108] It is revealing that when the RCMP became involved at Glovers request, the Board agreed to ‘fire’ him but then re-employed him as a consultant.
\item[109] \textit{Ibid.} at 101 - 103.
\end{footnotes}
should be given money to start a house for troubled youth. Again it was only the insistence of the Dakota Ojibway Tribal Council police that led to him stepping down. As Justice Giesbrecht comments, "it is inconceivable that a convicted child molester with a history like that of Joe Desjarlais would be able to sit on a Youth Justice Committee in a healthy community." The response of the community to these events was simply "silence" and "denial". Denial of the very problem of abuse permeated every bad decision that was made with regard to Lester Desjarlais.

The problem is not restricted to Sandy Bay. The inquiry was unequivocal that the evidence "strongly suggests that the problem of sexual abuse on reserves is simply enormous", it is a problem of "epidemic proportions." Justice Giesbrecht's conclusions are more than born out by similar reported experiences across reserve communities in Canada. Robert Kiyoshk, the manager of the spousal assault program at the Squamish Nation, believes that the majority of First Nations communities are fragmented, have no cohesiveness, and are torn apart by factionalism,

"Out there a video or representation in the media of one community that is doing well somehow creates the impression that 99% of the communities are doing well, when that is not the case at all. Of the six hundred and some reserves in

110 Ibid. at 103.
111 Ibid. at 104.
112 Ibid. at 61.
113 Ibid. at 60.
114 Ibid. at 105.
115 For a strong account of the problems of violence and sexual abuse stretching across First Nations communities see especially "Dancing With a Gorilla," supra note 12. See generally supra note 12 for the perspective of First Nations women. For the most recent and comprehensive account of the issues and the various concerns raised by First Nations people on family violence and denial see Gathering Strength, ibid. at 54 - 97.
Canada, maybe twenty of those, if that, are doing well. The rest are out of sight. In my experience, I see that there is a tendency to gloss over situations with a few success stories when there are a lot more non-success stories.”

Nahanee claims that there is an “almost total victimisation of women and children in Aboriginal communities,” and agrees with Justice Giesbrecht that violence in aboriginal communities has reached “epidemic proportions.” She claims that “sexual and physical violence affects over 80% of aboriginal infants and young children.” It is estimated that up to 80% of aboriginal girls in the North West territories have been sexually molested by the age of eight, and up to fifty percent of boys suffer similar abuse. Another incident that drew the phenomena of sexual abuse and violence on reserve communities into the national spotlight was a series of reports on the South Island justice initiative in British Columbia. Violence and abuse was revealed to be rampant on the South Island reserves.

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116 Robert Kiyoshk, supra note 29.


118 “Dancing with a Gorilla,” ibid, at 15.

119 “Dancing with a Gorilla,” ibid, at 15. These statistics are supported by those presented to the Manitoba Justice Inquiry by the Native Council of Canada which suggested that seven out of ten First Nations girls are sexually abused by the age of sixteen (Literature Review, supra note 2 at 49). See further a report published by Pauktuuit, the Inuit Women's Association, in 1991, No More Secrets: Acknowledging the Problem of Child Sexual Abuse in Inuit Communities. The huge statistics on child sexual abuse are supported by those on violence against women. Nahanee claims that eight out of ten native women have been sexually abused. A study of MicMac women, for example, revealed that 100% had suffered mental abuse and 80% physical abuse. In northern Ontario between 75 to 95% reported being physically abused. A study conducted by Ontario's Native Women's Association found that 8 out of ten Aboriginal women had experienced violence; 57% had been sexually abused. Gathering Strength, supra note 3 at 58.

120 An initial two part report by Holly Nathan on the South Island community justice initiative and the vulnerability of aboriginal women on the reserves, sparked a furious debate in The Victoria Times on the extent and causes of violence and abuse within the South island reserves. The reports raise difficult questions concerning the implications of community controlled initiatives such as justice projects which are heralded as the first step towards self-government. See Holly Nathan, “Nightmare of the Shadow People” Victoria Times-Colonist (July 26, 1992); Holly Nathan, “Nightmare of the Shadow People: Part II” Victoria Times-Colonist (July 27, 1992) [hereinafter “Nightmare of the Shadow People”].
Exacerbating the problem was the founding of the South Island Justice Committee which made it difficult for women to seek help outside the reserve community. It was claimed that women seeking to take action against an abuser were persecuted and 'intimidated into using a council of elders and the bighouse rather than to pursue charges and reveal family secrets in the Canadian legal system.'\textsuperscript{121} The problem of abuse was clearly extensive. It was observed that in some communities there was not one person who had not been touched by sexual abuse.\textsuperscript{122} One former member of the Tsartlip Band claimed,

> "There are 40 women on one reserve alone who could lay sexual assault charges. There is almost a pathology of enslavement. The life support system is the Band, the reserve, the family, the extended family. They are dependent for their housing, their food, their utilities even their clothing. If you break the code of silence there is a price to pay." (‘Dorothy’ - former Tsartlip Band member)\textsuperscript{123}

There was also evidence of the same complacency towards violence that was evident in Sandy Bay. Mavis Henry, a native social worker (now at the British Columbia Ministry for Children and Families) commented on the change of attitude that had occurred within the communities, from one of abhorrence towards sexual abuse, to the acceptance of abuse and violence as a 'normal' part of daily life, even something to be proud of;

> "And where once sexual assault on the Saanich reserves was viewed as a crime worthy of castration and exile for life - even death - it is now bragged about like a Sunday football game." (Mavis Henry - social worker)\textsuperscript{124}

\textsuperscript{121} "Nightmare of the Shadow People," \textit{ibid.}

\textsuperscript{122} Judith Lavoie, ‘Ex-Wife Differs with Band-Head on Abuse Issue” Victoria Times-Colonist (July 29, 1992) [hereinafter “Ex-Wife Differs With Band-Head”].

\textsuperscript{123} “Nightmare of the Shadow People,” \textit{supra} note 120.

\textsuperscript{124} \textit{Ibid.}
Complacency towards violence would again appear to be a common experience of aboriginal communities,

"In too many aboriginal communities, or among subgroups within aboriginal communities, violence has become so pervasive that there is a danger of it coming to be seen as normal."\textsuperscript{125}

Similarly the denial of abuse and violence is widespread.\textsuperscript{126} The Desjarlais Inquiry concluded that, "the problem of denial is a formidable problem within the Indian community and is certainly not confined to Sandy Bay."\textsuperscript{127} Robert Kiyoshk argues,

"Things have been so dysfunctional. I don’t like that word, but I think things have been in that state for so long that people are afraid of change. There is a denial that something is even wrong, that things have to change, and then there is a sense of despair when suicide and violence occurs. And when some awareness starts happening. Because whole scale change is a pretty scary thought to some communities, like taking away people’s livelihood."\textsuperscript{128}

Communities have preferred to keep silent on the issue, and this has proved to be the greatest barrier to community healing,

"[T]here is a lot of denial and fear out there. Communities are saying : “No we don’t have sexual abuse. We don’t have an alcohol problem. We don’t have child neglect here.” But yet there are tragic stories to be told in our communities."(Maria Mirasty - Health Promotion Co-Ordinator Health and Social Development - Meadow Lake Tribal Council.)\textsuperscript{129}

\textsuperscript{125} Gathering Strength, supra note 3 at 75.
\textsuperscript{126} Ibid. at 64 - 67 for a discussion of denial generally in First Nations communities.
\textsuperscript{127} Desjarlais Inquiry, supra note 1 at 61.
\textsuperscript{128} Robert Kiyoshk, supra note 29 at 3.
\textsuperscript{129} Restructuring the Relationship, supra note 3 at 64.
Marika Czink, Usma Nuu-chah-nulth, observed similar problems of denial within the Nuu-chah-nulth communities, although she made the important point that such problems are in no way unique to aboriginal communities,

"Denial of the problems of family violence and sexual abuse is very strong, particularly if the family is a powerful one. It is good that the social workers are not aboriginal for they are not subject to these pressures. The community will often demand hard evidence that abuse has occurred before they are willing to accept that it exists. That denial is enhanced in aboriginal families but is in no way unique to them."130

Usma clearly does not consider itself to be dealing with "healthy communities," or "healthy leaders." 131 The response of the South Island community leaders to the South Island reports can also be interpreted as exhibiting classic signs of denial. As one probation officer commented, people do not want to start to address the problem because it is simply so enormous. 132 David Hunt, band manager of the Kwakuitl band in Port Hardy and Chairman of the Kwakuitl district council, claimed that he, 'had never heard of any sexual abuse on his reserve. It is not a problem that we are aware of. It has not been reported to anyone I know.' 133 Another common response was to attack the behaviour of the women. Bill Wilson, a B.C. Indian leader suggested,

"Native Indian women worried about Indian self-government should go home to their communities and stop listening to white Toronto feminists. A lot of this is driven by the white women's movement. Instead of romping around with non-

130 Marika Czink, supra note 41.

131 Ibid. This evidence of continuing denial in First Nations communities should be countered by the remarks of Kelowa Edel at Xolhmi:lh where the Sto:Lo Nation is dealing with the problems of violence and abuse through a process of healing. It is admitted that "denial is there to some degree" but Kelowa Edel was of the opinion that the problem is no greater than in non-native communities. Kelowa Edel, supra note 27.

132 "Ex-Wife Differs with Band Head," supra note 122.

133 Reported in "Ex-wife differs with Band Head on Abuse Issue," ibid.
Indian women in Toronto, maybe they should be in their communities working with their people to make the changes they know have to be made.” (Bill Wilson)\textsuperscript{134}

Another suggested explanation by one community leader for the concerns over the justice initiative and the resulting vulnerability of women, was that women simply didn’t understand the true traditions of the community,

‘I would feel intimidated too. That’s because these women don’t understand the native process.”\textsuperscript{135}

These comments have the unfortunate effect of denigrating the very real concerns of aboriginal women and suggesting that the reports of violence and abuse in aboriginal communities are exaggerated and based on misunderstanding rather than fact. The refusal of community leaders to take the women’s allegations seriously and acknowledge the seriousness of the abuse does not instill confidence in the capacity of the current leadership to govern responsibly under self-government. Community leaders and those with influence in the community have a critical role to play in addressing these issues.\textsuperscript{136}

There needs to be leadership from influential community members by giving a clear message to the community that violence and abuse is unacceptable,

‘The unwillingness of chiefs and council to address the plight of women and children suffering abuse at the hand of husband and father is quite alarming. We

\textsuperscript{134} Reported by Richard Watts, “Whites Behind Woes” \textit{Victoria Times Colonist} (July 30, 1992). It should also be noted that the rejection of NWAC’s claim before the Supreme Court of Canada for recognition of the right of First Nations women’s organisations to representation at the constitutional negotiations, signals a similar denial of the abuse of First Nations women and children at the hands of a male dominated First Nations leadership by non-native society. See \textit{Native Women’s Association of Canada v Canada} [1994] 3 S.C.R. 627 (S.C.C.).

\textsuperscript{135} Gerald Young, ‘Let Native Victims and Offenders Deal With Own Cases - Peninsula Leader” \textit{Victoria Times Colonist} (August 1, 1992).

\textsuperscript{136} See the comments of the Manitoba Justice Inquiry on the responsibility falling on aboriginal men to deal with the problem of violence and abuse, \textit{MJI}, supra note 2 at 485, and \textit{Gathering Strength}, supra note 3 at 65-67.
are concerned enough about it to state that we believe that the failure of Aboriginal government leaders to deal at all with the problem of domestic abuse is unconscionable. We believe that there is a heavy responsibility on aboriginal leaders to recognise the significance of the problem within their own communities. They must begin to recognise as well, how much their silence and failure to act actually contribute to the problem.”

By doing nothing and refusing to speak out against violence, it is thereby condoned. Unfortunately it would appear that it is the predominantly male leadership, from the band level to the national level, that continue to compound rather than help solve the problems,

“Although denial is rampant concerning Aboriginal male abusiveness, it is primarily men who have almost total power and control in aboriginal communities e.g. Band Councils and Chiefs, male police, etc. These Aboriginal male leaders have protected each other and have collectively or collusively contributed to the violence against Aboriginal women and children through their inaction, ineptness, ineffectiveness or neglect.”

2.1 (iii) **Internal Colonialism: Community Leaders**

The problems which surround the male dominated band leadership in many communities has been explained by a concept of internal colonialism. The starting point...

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137 *MJI, ibid.* (cited by the Royal Commission, *Gathering Strength, ibid.* at 66).


139 Internal colonialism refers to a process by which some leaders of First Nations communities have become ‘allies’ of the dominant system because of the privileges they have enjoyed by cooperating with the existing regime. For example government officials followed a practice of political and economic favouritism towards selected families who were willing to ally with the government. Thus government officials could subvert the traditional leadership systems by channelling essential goods and services through compliant reserve families, thereby placing the family in a position of power and enabling them to benefit at the expense of other members of the community. Consequently this colonial structure caused to come into existence a small Indian ruling-elite who have used their positions of power and control to exploit their own communities. Critics argue that the colonial structures within which Indian leaders have performed their responsibilities have had a profound effect on traditional norms of aboriginal leadership. As Boldt concludes, ‘Indian self-government may serve to cloak or to legitimate an indigenous tyranny that harms the mass of band/tribal members.” For an excellent discussion of the problems and challenges raised by “internal colonialism” and an explanation for the development of this privileged ruling-elite see *Surviving As Indians,* *supra* note 13 at 117 - 166. For strong criticisms of the current leadership operating under the Indian Act system of band and council see, “Dancing With a Gorilla,” *supra* note 12,
for an appreciation of the current difficulties surrounding the First Nations male leadership must be recognition that many of these men have been victims of abuse by the white system and have been indoctrinated with a patriarchal understanding of dominance and power,

"It was noted that many of these men are the products of residential schools. They have unresolved problems, and their anger and denial interfere with their ability to deal with the gigantic social problems plaguing their communities."\(^{140}\)

It is acknowledged that the problems in band leadership are largely the responsibility of the non-native system, not only for the abuses to which they subjected these men as children, but for the colonial system of government that was imposed at the community level,

"One has to deal with the fact that political interference is actually the legacy of a governing structure which dates back to the administration of Indian people by DIAND. The band, chief, and council is a system imposed by Indian Affairs."\(^{141}\)

Hammersmith has argued that the leaders in the communities are now paid agents of the colonial government.\(^{142}\) She argues that instead of a sense of responsibility characteristic of traditional Indian leadership, money has become the bigger issue: "the result is nepotism which our political leaders have learned very well from the wider government."\(^{143}\)

"The reality is that [our native politicians] are employed by DIAND. They have become the Indian elite, delivering the Government's message that aboriginal people won't be able to change things. Many of the aboriginal leaders have not

\(^{140}\) Desjarlais Inquiry, supra, note 1 at 14 - 15; Gathering Strength, supra, note 3 at 64 - 67.


\(^{142}\) "Aboriginal Women and Self-Government," supra note 12 at 55 - 56

\(^{143}\) Ibid. at 56.
gone beyond the abuses they suffered as children and have instead become the abusers in their positions of authority...I for one would rather that the abuser was different from me than that it hire my own brother to abuse me."[144]

Clearly the colonial origin of these problems does not change the fact that women and children are being abused and silenced, and the current leadership is ignoring their plight,

"The male Indian leaders are not only by and large uninterested in the horrific social problems that are paralyzing their communities, but they are, in too many cases part of the problem themselves."[145]

It is consistently aboriginal women who have fought to bring the problems of violence and abuse into the open so they can be dealt with,

"Do you hear our men talking of violence against our women? Do you hear our men talking about incest? What is being done in our community about gang rapes? We are suffering in silence." (Sharon McIvor)[146]

The local government structures on reserves have come under particularly harsh criticism not only for their silence on issues of abuse, but for their active participation as perpetrators and for protecting other known abusers. The members of the band councils have clearly used their position to protect their own family from investigation and abuse

"There are in families and out families. There is room for corruption."(Mavis Henry)[147]

This criticism is applied not only to the Chief and Council, but elders who hold important positions of respect and influence,
"Political structures in reserves have been riddled by men who are abusers. Some of the elders I know are abusers - some are on the Elder's Council [providing advice on criminal offenses] and some are in positions of power." (‘Dorothy’ former member of Tsartlip band)\(^{148}\)

Nahanee agrees with this accusation,

"The role of male elders as perpetrators of violence, and arbitrators needs serious examination. Aboriginal elders today abuse women and children within the community. Some Aboriginal women have been subjected to sexual, physical, emotional and psychological abuse in the form of ‘teaching. An aboriginal elder is a person in a trust position with children and women, particularly when the elder is a grand-parent to the child s/he abuses, or a spiritual advisor to women within the community. If elders are to have a role in ending sexual, physical, emotional and psychological abuse within aboriginal communities they must speak out and take a leadership role."\(^{149}\)

The problem of corrupt and abusive band councils is often intensified by the domination of the band council by powerful reserve families. Victims argue that on some small isolated reserves children and women are at the mercy of one or two powerful men. The situation on one reserve was described as follows,

"This man controls a vast area with hundreds of people and if he can deny it from the top, all these women and children are in big trouble. They are a big powerful family. He hires and fires the social workers and tells the government who to use as health workers and nurses. This is the whole story of reserves in Canada in a nutshell. This is nationwide and if it is denied now we will never get help."\(^{150}\)

The control of certain powerful families is exacerbated by the Indian Act’s imposed system of elections,\(^{151}\)

\(^{148}\) Ibid.

\(^{149}\) “Dancing With a Gorilla,” supra note 12 at 14.

\(^{150}\) “Ex-Wife Differs with Band Head,” supra note 122.

\(^{151}\) Beginning with the 1869 Act for Gradual Enfranchisement of Indians, the Canadian government introduced provisions for the election of chiefs in accordance with the Canadian electoral regime. In 1884 the Indian Advancement Act which was later incorporated into the Indian Act 1906, provided for the election of six councillors who in turn elected a chief. Resistance to the elective system caused the department to allow bands to follow traditional methods so long as the chief complied with the
"Control is never threatened by the election of chiefs and councilors, which in some cases is no better than a hereditary system. If there are 80 voting members and 65 are from the same family, who do you think is going to get in?"\textsuperscript{152}

For these reasons First Nations women would appear to have very little, if any, trust or faith in their political leaders and governments. Some women clearly fear handing over more control and power to these men,

"She has spoken out against a native justice pilot project on southern Vancouver Island reserves which she says give more power to men who abuse while removing any hope for the victims of assault to be heard by an independent judiciary."\textsuperscript{153}

Not surprisingly the revelations of abuse have been used by non-native politicians to oppose self-government or at least try to impose limits and controls. However, the problems of violence and abuse have also led some First Nations women, although clearly not all, to oppose self-government out of fear that it would hand the abusers more power.\textsuperscript{154} Sharon McIvor, a B.C. lawyer and former speaker for NWAC, is reported as saying that the nightmare of the abused women on Vancouver Island proves native Indian government's wishes. If the band resisted the Indian agent would appoint his own choice of chief and councillors and channel benefits through them. In 1951 the Indian Act was amended to provide for election of a chief and council. It is claimed this allows large powerful families to dominate band politics as it is relatively easy for a candidate from a large clan group to secure election by majority vote. The Sto:Lo submitted to the Royal Commission that "it is relatively easy under the plurality system for one large family or interest group to dominate council and monopolise power." The Indian Act system of governance largely replaced the traditional methods of selecting leaders, for example, by community consensus or election by the clan mothers depending on the particular culture. See Surviving As Indians, supra note 13 at 120 - 124; Restructuring the Relationship, supra note 12 at 130 - 137.

\textsuperscript{152} Gerald Young, 'Sex-traded for Welfare” says Native Consultant” Victoria Times Colonist (July 31, 1992).

\textsuperscript{153} “Nightmare of the Shadow People,” supra note 120.

\textsuperscript{154} For a good summary of the different positions taken by First Nations women leaders and the respective aboriginal womens organisations on self-government, see Current Trends and Issues supra note 3 at 187 - 193.
men are not ready for self-government. She is also reported as saying that NWAC has been "begging politicians of all colours not to abandon Canada's native women [and children] to the mercy of the men who govern band councils." Nahanees has also expressed fears over self-government given the current circumstances, 'Many Aboriginal women both fear and oppose aboriginal self-government. The women do not want to live under brown patriarchs who abuse power.'

Again, the problems of abusive band councils differ in severity from community to community. In some communities women have achieved leadership roles and increasingly play an important role in band level and national politics. Other communities have managed to retain more traditional forms of leadership. However, whilst allowing for this caveat, corrupt and abusive band councils would appear to be a widespread problem.

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155 Times Colonist Staff, "Abuse Tales Prove Self-Rule Untimely" *Victoria Times Colonist* (July 28, 1992) [hereinafter "Self-Rule Untimely"].

156 Ibid.


158 For example, Wendy Grant-John of the Musqueam Nation has served as vice-chief of the Musqueam and was recently narrowly defeated in elections for Grand-Chief of the AFN.

159 For example not all First Nations communities were subjected to the system of elected chief and band councils. Although the Indian Act applied throughout Canada, the bands of the west were excluded from many provisions because they were deemed insufficiently 'advanced'. Therefore where a western tribe was not officially under the Indian Act or where a treaty had been entered into, the Indian affairs department allowed Indians to hold elections under the supervision of the Indian agent. In British Columbia the department of Indian Affairs would often follow customary or traditional practice, whilst in the prairies elections were virtually identical to appointments by the Indian Agent since it was he who would usually initiate and control the process. *Looking Forward, Looking Back, supra* note 13 at 279 - 280. The 1951 amendments to the Indian Act gave bands the option of following a 'customary regime' instead of the 'Indian Act regime' of band council selection. Under the 'customary' option, bands are permitted some discretion in leadership selection procedures. However very few Indian bands have exercised their discretionary power to introduce traditional or original systems of leadership selection. As Boldt concludes, 'with a few isolated exceptions the customary process adopted by bands is simply a variation of the Indian Act regime." *Surviving As Indians, supra* note 13 at 121 - 122.
and pose a serious threat to the effective protection of children. For this reason the issue and its implications for self-government must be addressed,

“Often the offenders are those in power. A lot of those kids who have been victims are sent to the perpetrators for counselling.” (North Island Probation Officer)\(^{160}\)

The problems with the current leadership are not restricted to the local level. The regional and national leadership has been equally unconcerned with issues of sexual abuse and violence against aboriginal children and women,

“The track record of the Assembly of Manitoba Chiefs on these issues is very poor and too often the response of the chiefs has been to play politics instead of addressing the problems, or to simply condemn governments for past injustices and then blame the absence of action on the problems of a “lack of resources.”\(^{161}\)

Many aboriginal women feel that even the national leadership denigrate their concerns. Ovide Mercredi, the former leader of the Assembly of First Nations is criticised for pressuring Indian women to keep quiet.\(^{162}\) Mercredi takes the position that the concerns of aboriginal women will be answered when self government is in place and the colonial structures are dismantled.\(^{163}\) Critics argue however that the opposition to the women’s movement is founded on a belief that by raising concerns of abuse and violence they are betraying their people and undermining the fight for self-government. More cynically it is suggested that it finds its basis in the fear of the male leadership that they will lose their privileged positions of power,

\(^{160}\) “Ex-Wife Differs with Band-Head,” supra note 122.

\(^{161}\) Desjarlais Inquiry, supra note 1 at 258.

\(^{162}\) “Self-Rule Untimely,” supra note 155.

\(^{163}\) Ibid.
"Our initiatives for whatever reasons, are found to be intimidating and threatening to the male dominated organisations that claim to represent us. In many situations, these organisations have come to oppose the initiatives of the community-based Metis women. They are in the process of negotiating self-government while they actively try to exclude their female counterparts." (Melanie Omeniho - Women of the Metis Nation)¹⁶⁴

2.2 A Return To Tradition: The Answer or the Problem?

Mercredi believes, and is supported by many aboriginal women,¹⁶⁵ that the way in which these issues of violence and sexual abuse can be addressed, is through a return to self-government which is informed by the traditional values and practices of the various cultures. Whilst acknowledging the problems, self-government is seen as the answer, not a cause for concern. This places a great deal of faith in the ability of self-government and a return to ‘tradition’ to free the First Nations from a legacy of colonialism that has taken a deep hold within their communities. An important part of the decolonisation movement has been a desire to find a ‘pure’ identity that is free from contaminating colonial

¹⁶⁴ Gathering Strength, supra note 3 at 78.

¹⁶⁵ See e.g. the comments of Mary Ellen Turpel reported in “Reform Attacks Native Self-Rule” The Globe and Mail (October 5th, 1992); Wendy Grant-John has expressed concern that NWAC’s insistence on entrenchment of the Charter would ‘jeopardise key elements of traditional Native government, law and society.” Current Trends and Issues, supra note 3 at 188; Teressa Nahance agrees that, “There needs to be a return to traditional ways, healing circles, and a sharing of power between men and women.” “Dancing with a Gorilla,” supra note 12 at 9; Patricia Monture-Okanee is a strong proponent of the need for a return to traditional values to inform contemporary aboriginal government, see for example, “A Vicious Circle: Child Welfare and the First Nations” (1989) 3 C.J.W.L. 1; and Marilyn Fontaine of the Aboriginal Women’s Unity Coalition, submitted to the Royal Commission, “We believe that true Aboriginal governments must reflect the values which our pre-contact governments were based upon.” Restructuring the Relationship, supra note 12 at 125. For a discussion of NWAC’s rhetoric of a return to traditional notions of Indian Motherhood see Sexual Equality As An Aboriginal Right, supra note 12 at 120 - 145. Krosenbrink argues that central to the fight of First Nations against dominant society has been the creation of an oppositional ideology which depends on a concept of ethnicity. The return to tradition is used to substantiate and legitimate the ethnicity which stands opposed to non-native Canada. In her words, “[t]raditional aboriginal culture is used as both means and end in the perpetual reconstitution of the structural relationship between aboriginal peoples and Canadian society at large.” Sexual Equality As an Aboriginal Right, ibid. at 125.
influence.\textsuperscript{166} The recovered identity often takes the form of a ‘cultural myth’ discovered in the history of pre-contact society.\textsuperscript{167} This pure cultural origin is secured by raising uncontaminated tradition to a place of unquestionable pre-eminence. Tradition and pre-contact culture have consequently come to play a prominent role in providing meaning and substance to the concept of self-government.\textsuperscript{168} However the desire to inform their contemporary demands by the cultural practices and traditions of the past is not without its problems.\textsuperscript{169} Whilst some members of the First Nations communities give to tradition an unquestionable place of pre-eminence, others are more skeptical. The rhetoric of a return to tradition and the exact implications of this demand, has therefore been an important site of conflict within the communities.

\textsuperscript{166} Helen Tiffin, “Post-Colonial Literature and Counter-Discourse” in Bill Ashcroft, Gareth Griffiths and Helen Tiffin, eds., \textit{The Post-Colonial Studies Reader}, supra note 14. See also \textit{Surviving As Indians}, supra note 14 at 195 - 203 for a critical account of the ‘false hope’ of many First Nations to ‘return to their past world.’

\textsuperscript{167} For an excellent critique of the creation of a ‘cultural myth’ see D. Brydon, “The White Inuit Speaks - Contamination as Literary strategy” in \textit{The Post-Colonial Studies Reader}, ibid. at 136. The rhetoric of returning to tradition through self-government has been controversial both within the communities and in relations with the Canadian government. Notions of ‘tradition’ are problematic because many communities have suffered such disintegration in their communal values and way of life that the community’s traditions have been neglected or lost. Whilst this, of itself, is no reason against employing tradition, and there is nothing inherently wrong in ‘inventing’ tradition, it raises difficult questions about who is defining what tradition is. In the hands of patriarchal band councils, this return to tradition can be difficult for women who see it as a potential weapon of abuse. Similarly a return to traditions that, for example, support the subordination of women may no longer be acceptable to some First Nations women. The rhetoric of a return to tradition also has the danger of precluding the evolution and development of aboriginal culture into a form in which it can take its place in twentieth century aboriginal society. That is, it has the potential of freezing First Nations communities in pre-contact form.

\textsuperscript{168} A good example of this is the concern of the Royal Commission with First Nations traditional systems of governance, see \textit{Restructuring the Relationship}, supra note 12 at 115 - 139.

\textsuperscript{169} See especially, \textit{Surviving As Indians}, supra note 13 at 176 - 180 and 195 - 203.
2.2 (i) The Rise of Factionalism

Within the rhetoric on self-government a great deal of emphasis is placed on the notion of a return to traditional values and practices. However this is not a principle on which a consensus exists, and it is a principle which clearly reveals the divisions within First Nations communities as to their future as self-governing political entities in Canada. There is significant internal conflict within the communities about the appropriate path to autonomy.\(^\text{170}\) The need to secure self-government is not itself questioned, the problem lies in the means employed to reach that end.\(^\text{171}\) Placing a blind faith in self-government to provide the magic solution also ignores the reality that there are entrenched differences on the eventual form self-government should take. Therefore rather than providing a unifying force within the community, self-government has the potential to compound the problems. The place of tradition is central to these debates. Factionalism is clearly a growing problem in many First Nations communities,\(^\text{172}\)

‘I don’t know if it will make sense to anyone but what I fear most about self-government is that once the oppressor is removed we will turn on one another... How the government deals with native people in the future should be the least of our concerns. How we deal with one another is crucial’\(^\text{173}\)


\(^{171}\) “Resurrecting the Peace,” *ibid.* at 261.

\(^{172}\) “Factionalism” is defined by Siegel and Beells as “involving unresolved overt (unresolved) unregulated conflict which interferes with the achievement of the goals of the group.” Cited in “Resurrecting the Peace,” *ibid.* at 261.

\(^{173}\) “A Two-Edged Sword,” *supra* note 170.
Dickson-Gilmore argues that whilst there is a common enemy and threat, the group can override its differences to preserve group unity and cohesiveness. However, if you remove the “external threat” there is no longer anything to prevent the eruption of internal conflict and disagreement. Some aboriginal people see self-government as the opportunity to address abuses in the community, not only by dismantling external colonial structures, but by pulling down the internal structures of colonialism. Others who benefit from the imposed form of Indian Act government are fighting this return to tradition. They want to build a future based on existing structures. Whilst this is a common starting point for decolonisation, it is suggested that the real motivation behind this position is a concern to protect their current positions of power and privilege,

“There are the haves and the have-nots in native communities, and the haves are not going to want to let go of the status they have, the income they have, the special ways they are able to do things differently than anyone else.”

This issue is responsible for a destructive growth in factionalism that does not bode well for the stability and viability of many communities under self-government,

“For a community to work in a co-ordinated fashion people have to have a common vision and perspective and there has to be a real willingness to work

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174 Ibid.; and “Resurrecting the Peace,” supra note 170 at 261.

175 Ibid. at 262. For a similar discussion on the demand for ethnic group unity to fight a common oppressor which suppresses differences within the group see Sexual Equality As An Aboriginal Right, supra note 12 at 120 - 145. Kroesnick-Gelissen sets her discussion within the theoretical framework of ethnicity which forms an oppositional ideology to the dominant system and thereby excludes differentiation within the ethnic group on the basis of gender. Kroesnick draws on Cohen to argue that “ethnic boundaries serve to represent the group’s public face, thereby masking internal differences. At the same time these boundaries enclose and incorporate internal differences.” Again once political autonomy is secured the danger is that ethnic allegiance will weaken and internal differences erupt.

176 Supra note 165. See e.g. the comments of Gail Stacey-Moore, in First Peoples and the Constitution, supra note 13: “The time has come to break down the mentality forced upon as Aboriginal people by the Indian Act.”

177 Robert Kiyoshk, supra note 29 at 4.
along those lines. I sense that factionalism often stands in the way. There are elements on the reserve or in the community that are totally against the imposed form of government that is utilised on reserves and see it as merely a tool for mainstream society to maintain control of native communities. I see young people who are very dissatisfied with some of the activities of the band councils and the so-called elders in their communities.”

The Oka Crisis can be interpreted as one sign of the instability in aboriginal communities resulting from conflicting visions of self-government. Dickson-Gilmore argues that the Oka crisis clearly exposed the divisions between the traditional longhouse, and the current Mohawk band council running the reserve under the imposed Indian Act system. The division focused particularly on the proposals for giving greater control over the justice system to the community. The traditionalists wanted an independent traditional justice system which respected Mohawk institutions, and was founded on the basis of their nation status. In opposition to these reform proposals, the existing governmental bodies of Kahnawake wanted to maintain the existing justice initiatives established under the auspices of the band council and the Indian Act. These structures were rejected by the traditionalists as “alien institutions imposed upon the community by an outside government which has no right or relevance to the Mohawk people.” Conversely, those within the community who supported the Indian Act court system did not share the respect of the traditionalists for ‘tradition’. Some members of the community clearly question the continuing relevance of ‘tradition’ to the future of the Mohawk Nation and

178 Ibid.

179 See especially, “A Two-Edged Sword,” supra note 170; and ‘Resurrecting the Peace,” supra note 170 for an account of the Oka Crisis and the underlying dispute between the community concerning the place of tradition in their future. The following account draws heavily on the account by Dickson-Gilmore in “Resurrecting the Peace”.

180 “Resurrecting the Peace,” ibid. at 260.
its government. At the core of this dispute lies a conflicting vision of self-government. “For the band council at Kahnawake, which is currently negotiating a self-government package with the federal government, it would seem that federal government policies [on self-government] are viewed as an acceptable means of transition towards a ‘real’ independence which must by its very nature exist outside Canadian and Quebec politics and policies.”¹⁸¹ In antithesis the traditionalists argue that ‘Kahnawake is sovereign land which was never ceded to, or won in battle, by the French, British, or Canadians, and that only Mohawk laws and institutions have any place there.”¹⁸² They insist that there is no need to negotiate their independence and autonomy from Canada.¹⁸³ It already exists as of right. This conflict between ‘westernised’ Mohawk and traditional Mohawk over the future of self-government, ‘drastically curtails the potential for a resurrection of the Peace in Kahnawake.”¹⁸⁴ Replace the dispute over justice with child welfare practices and the risks for children caught in the conflict are clear. Obviously an unstable community torn apart by factionalism and infighting is not conducive to protecting a child from abuse. Inevitably issues of child welfare will be dragged into the political arena and there is a strong risk that the interests of the child would be lost in the wider struggle.

Another group who may question the continuing relevance of tradition to contemporary aboriginal communities are women and children. The past importance of a tradition may be fully acknowledged but it is rejected as an acceptable feature of

¹⁸¹ Ibid. at 273.
¹⁸² Ibid.
¹⁸³ Ibid.
¹⁸⁴ Ibid. at 271.
contemporary life. Many aboriginal women, for example, would be opposed to the restoration of traditions that deny them equality as they understand equality today.\textsuperscript{185} In the context of child welfare, the tradition of using the extended family for alternative care may have been obvious in pre-contact society, but is no longer so obvious if the extended family are also facing difficulties of abuse and violence. The argument is simply that whilst some practices were acceptable and worked well two hundred years ago, they do not meet contemporary demands and expectations, or may no longer be effective.\textsuperscript{186} As some aboriginal women argue, the question of whether women were equal in pre-contact aboriginal cultures is irrelevant. The important point is their expectations of equality today.\textsuperscript{187} By this view self-government should stop looking backwards and look forward to what is needed to meet the demands and desires of the aboriginal people in the twenty-first century.

2.2 (ii) The Potential For Abuse

The position of the traditionalists may seem to be more consistent with the ideals of decolonisation by trying to address the power structures of internal colonialism and preserve what is distinctive about First Nations societies. However, that does not mean it


\textsuperscript{186} See generally Surviving As Indians, supra note 13 at 167 - 221.

\textsuperscript{187} Sexual Equality As An Aboriginal Right, supra note 12 at 118. See also “Contemporary Traditional Equality,” supra note 185.
is without its problems. Even if agreement can be found on the appropriate path to decolonisation, a decision to return to ‘tradition’ is not a panacea for the community. Whilst some women may agree that a return to traditional ways will help remedy the present abusive conditions, extremely difficult questions must still be faced as to who will have the authority to define traditional practices and values. Tradition defined and implemented within the current colonial framework will be vulnerable to distortion. In particular there is concern that if the people who determine ‘tradition’ are the very people who are now the abusers, ‘tradition’ may be used as a justification for the perpetuation of abusive practices and as a mask for oppression. \(^{188}\) In fighting that oppression victims will face a strong opponent: the ideology of a restored and ‘glorious’ past,

“Tradition is invoked by most politicians in defence of certain choices. Women must always act - whose tradition? Is ‘tradition’ beyond critique? How often is tradition cited to advance or deny our women’s positions?...Some Aboriginal men put forward the proposition that a return to traditional government would remedy the abusive and inequitable conditions of women’s lives. We have no reason to put our trust in a return to ‘tradition’, especially tradition is defined, structured and implemented by the same men who now routinely marginalise and victimise us for political activism.” \(^{189}\)

The potential for the abuse of tradition in the context of child welfare is clear. One example of where tradition was invoked to defend unacceptable behaviour was the case of \textit{R v Cherry}, 1996.\(^{190}\) Whilst this case is by no means typical it does demonstrate how respect for tradition can be abused. Mr. Cherry argued that he should be exempt from criminal charges for child pedophilia on the basis that it was a cultural practice of the First

\(^{188}\) \textit{Restructuring the Relationship, supra} note 12 at 125; \textit{Surviving As Indians, supra} note 118.

\(^{189}\) \textit{Restructuring the Relationship, ibid.} at 135.

\(^{190}\) [1996] O.J. No. 267 (QL) (Ont. Ct. (Gen. Div.)).
Nations people. His argument was dismissed by the court. Similarly, in circumstances constituting equally culpable behaviour DOCFS tried to use the defence of ‘tradition’ to explain away its basic incompetence and complicity in the death of Lester. Evidence was even given to the Inquiry that protecting children from abuse was not a duty of an aboriginal child welfare agency,

‘Joyce Wasicuna was constantly told that thoroughly investigating child abuse complaints was wrong and contrary to the ‘Indian way.” In other words these things should simply be left alone.”191

The agency also argued that the Inquiry was culturally insensitive in criticising the agency’s decision not to remove Lester’s sister from his mother’s care.192 DOCFS argued that native communities deal with sexual and physical abuse by methods that do not necessitate removing the child from the home of the abuser.193 Justice Giesbrecht, however, thought the agency was simply negligent, and traditional practices were being misused as a shield to ward off legitimate criticism,

‘It is not reasonable to suggest that the child should simply have been left at Donald’s home after these serious allegations of sexual abuse came to light. Sexual abuse of children is not tolerated within aboriginal communities any more than it is tolerated by non-aboriginal society. Taking no action in the face of the evidence in the case of Donna Desjarlais would be negligence whether the child care agency was aboriginal or not.”194

191 Desjarlais Inquiry, supra note 1 at 216.
192 Ibid. at 134.
193 Ibid.
194 Ibid.
The chaos in which DOCFS files were found was also explained on the basis that First Nations societies are characterised by an oral tradition. Consequently writing things down in files was contrary to traditional practices.\textsuperscript{195} Again Justice Giesbrecht disagreed,

"When working on the file system of DOCFS, the Director should not let himself be diverted from his task by vague references to aboriginal tradition being oral and not written, and other weak arguments. These are excuses only...A child welfare agency that cannot keep proper files must not be allowed to continue operating."\textsuperscript{196}

Justice Giesbrecht may be right that the oral tradition justification was simply an excuse for inadequacy, rather than a truly held belief in a traditional way, but even so, he is undoubtedly right that to operate a modern child welfare agency, handling numerous complicated cases of abuse and neglect, keeping accurate written files is essential,

"Good file keeping is just as necessary for an aboriginal agency as for a non-aboriginal agency. Aboriginal workers are every bit as able to keep good notes and running records as other workers."\textsuperscript{197}

Consequently there is evidence that the rhetoric of tradition has been misused to attempt to cloak the basic culpability of a service delivery agency, and to shield abusive practices from criminal prosecution.

The Royal Commission raises similar concerns over the strong emphasis currently being placed on the tradition of the extended family as the basic governing structure of many aboriginal communities.\textsuperscript{198} To strengthen and protect the extended family group may well exacerbate the problem of the denial of abuse. Particularly in small communities

\textsuperscript{195} Ibid. at 90 - 94.

\textsuperscript{196} Ibid. at 90.

\textsuperscript{197} Ibid. at 90 - 91.

\textsuperscript{198} Gathering Strength, supra note 3 at 68 - 69.
where reserve members are closely related, the restoration of the kinship network may mean there is even greater resistance to acknowledging that a member of an older generation has been involved in abusive behaviour.\textsuperscript{199} If the children are reluctant to confront a family member or go outside the family network, the abuse can continue unabated.\textsuperscript{200} A combination of the shame associated with sexual abuse, opposition from the family, and the lack of external help mechanisms, will place enormous pressure on the victim to remain silent.\textsuperscript{201} Another cultural practice which has received great attention as central to the process of healing and addressing abuse within communities, is native spirituality.\textsuperscript{202} Again however the Royal Commission argues that rather than help resolve abuse, spirituality could compound the problems.\textsuperscript{203} It is emphasised that the resurgence of traditional practices and spiritual ceremonies involves a potentially abusive power relationship,\textsuperscript{204}

"With the renewal of confidence in traditional wisdom and the recognition of elders and their special gifts, a new threat has emerged for vulnerable women and children. Many women cautioned us that ‘traditions’ and ‘traditional healers’ must not be accepted uncritically, because not all traditions are respectful of women and not all who present themselves as healers are healthy."\textsuperscript{205}

\textsuperscript{199} Ibid.

\textsuperscript{200} Ibid.

\textsuperscript{201} Ibid.

\textsuperscript{202} Ibid. at 69 - 72.

\textsuperscript{203} Ibid. at 71.

\textsuperscript{204} Ibid.

\textsuperscript{205} Ibid. Lillian Sanderson of the Aboriginal Women’s Council told the Commission that, "[w]e have also some across many self-proclaimed healers who have abused and exploited traditional spirituality in their own aboriginal people." A similar experience was recounted by Holly Nathan in her reports on the South Island justice initiative, see “Nightmare of the Shadow People,” supra note 120 and subsequent article, “Ex-Wife Differs with Band-Head,” supra note 122.
Where a ‘traditional’ initiative is introduced in the community, such as healing circles or community justice projects, with the intention of restoring peace and harmony, it is claimed that victims often feel uneasy and fearful about confronting their abusers.\(^{206}\) One has to question the effect on a young child of facing a family member guilty of sexual abuse in a circle. At the same time, however, community members feel pressured into going along with the traditional practice out of a concern not to ‘rock the boat’ in the moves towards autonomy and self-government,

“They do not wish to appear to be violating traditional norms of peacemaking and they feel the added pressure of having to consider the consequences of disrupting these initiatives, whose goal is to regain control of important dimensions of community life.”\(^ {207}\)

There are clear problems in relying on concepts of tradition within a scheme of self-government when there is no consensus on what these traditions are. Whilst the restoration of tradition in healthy decolonised communities which have sought to base their self-governing initiatives more thoroughly on First Nations traditions may not raise these concerns, that is not the current reality. With the current power structures as they exist there is a strong foundation for abuse.

\[2.2 \text{ (iii) A Tradition Lost in Time}\]

Relying on ‘tradition’ as central to building the structures of self-government is problematic not only because of the difficulties in determining what those traditional

\[^{206}\text{Gathering Strength, supra note 2 at 72.}\]

\[^{207}\text{Ibid.}\]
practices are, but because of the danger that communities will blindly rely on the existence of certain traditions in order to effectively govern and provide programs and services. In many communities, because of the breakdown in traditional practices and those traditional practices no longer exist. To reintroduce traditional practices in a ‘modernised’, partly assimilated community, is very difficult. It certainly should not be assumed that traditions will be readily restored. In fact some traditions may meet with active resistance from community members to whom such practices are completely foreign.  

Inevitably, aboriginal communities have changed under the influence of the West and have adopted both aspects of non-native practice and thinking. It is argued that to rely on a return to pristine tradition is unrealistic given the inevitable evolution and changes in aboriginal culture over time. For self-governing child welfare agencies to rely on those traditional practices can therefore leave members of the community vulnerable.

The danger in seeking to introduce self-government on the basis of the restoration of traditional practices is evidenced by the findings of the Desjarlais Inquiry. The Dakota Ojibway Agency placed great emphasis on their reliance upon the tradition of the extended

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208 See for example the discussion of the Oka crisis in “Resurrecting the Peace,” supra note 170.

209 For an introductory discussion to the hybridity of post-colonial cultures see H. Tiffin, “Post-Colonial Literature and Counter-Discourse,” in The Post-colonial Studies Reader, supra note 13 at 95; D. Brydon, “The White Inuit Speaks - Contamination as Literary Strategy” in The Post Colonial Studies Reader, ibid. at 136; and S. Suleri, “The rhetoric of English India” in The Post-Colonial Studies Reader, ibid. at 111. Tiffin, for example, argues that the decolonisation school search in vain for pre-colonial purity, for pre-contact cultures can never be fully restored.

210 “Post-Colonial Literature and Counter-Discourse,” ibid. at 95. After a strong critique of First Nations desire to return to tradition rooted in pre-contact society, Boldt concludes, “The challenge [First Nations] face is to adapt and develop their traditional cultures for living and surviving in the contemporary economic, political, and social world in which they find themselves. This is a daunting task, but not an impossible one. It is impossible only if they never undertake it. However it will not be accomplished as long as Indian aspirations for their cultural survival remain at the level of sentiment.” Surviving As Indians, supra note 13 at 195 - 198 and 218.
family when making decisions concerning children. The agency’s reliance on this practice, to their mind, justified their actions leading up to the death of Lester. It also founded their defence to charges of incompetence and negligence, supported by the claim that criticisms were inappropriate because they were based on non-native society’s ignorance and misunderstanding,

‘DOCFS incorporate this concept [of the extended family] into the way DOCFS do their jobs. What might appear to the non-aboriginal community to be disorganised or chaotic methods of child care, may be perfectly acceptable to the aboriginal community when the concept of the extended family is taken into account.”

The simple problem was that the extended family tradition had not survived the pressures of colonisation in that particular community. Both the concept of extended family care and the notion of communal responsibility for children were completely missing from Sandy Bay. Thus by relying on the tradition, DOCFS had effectively left Lester abandoned. Justice Giesbrecht concludes that in Lester’s case,

‘In general the Sandy Bay community did not give him much support. Lester was described by Marion Glover as being like a “stray animal” in the sandy Bay community. For the most part he wandered about without any supervision.”

As Justice Giesbrecht argues the tradition of extended family care assumes two key things: first that members of the family always have the welfare of the child as their paramount

\[\text{Desjarlais Inquiry, supra note 1 at 24. Discussion of the extended family tradition in Sandy bay is found at pp. 23 - 25.}\]
\[\text{Ibid. at 24.}\]
\[\text{Ibid.}\]
\[\text{Ibid. at 25.}\]
\[\text{Ibid. at 21.}\]
consideration; and second that the mother knows who has responsibility for the child and that he or she is looked after.\textsuperscript{216} This simply wasn’t true in Lester’s case, and the inquiry would suggest the same in many other cases. For Lester there were long periods of time when no one was looking after him and ‘he was truly on his own.’\textsuperscript{217} His mother was overwhelmed by her own problems and the placements with other family members always broke down.\textsuperscript{218} Consequently, ‘there was no one family person that took primary responsibility for Lester.’\textsuperscript{219} The DOCFS, for its part, only intervened in a crisis situation when there was no other alternative.\textsuperscript{220}

Native controlled child welfare agencies in British Columbia have also experienced some difficulties in the use of tradition in their work. Usma, Nuu-chah-nulth are committed to using the traditional practices and values of the communities they serve to inform the way in which they protect their children.\textsuperscript{221} However, apart from the use of the extended family, Marika Czink suggests that they have found it very hard to ascertain exactly what ‘culturally appropriate services’ would mean,

“The agency has found it difficult to come up with culturally appropriate programs not because of the limitations of the provincial legislation or mandate but because no one seems to know what they are.” (Marika Czink)\textsuperscript{222}

\textsuperscript{216} \textit{Ibid.} at 25.
\textsuperscript{217} \textit{Ibid.}
\textsuperscript{218} \textit{Ibid.}
\textsuperscript{219} \textit{Ibid.}
\textsuperscript{220} \textit{Ibid.} at 22.
\textsuperscript{221} Marika Czink, \textit{supra} note 41.
\textsuperscript{222} \textit{Ibid.}
Bryan Watt of the Spallumcheen child welfare program also suggests that there are some problems in relying upon native culture given the extremely ‘good’ job of non-native society in destroying it.\(^{223}\) He argues that tradition is extremely important in instilling pride in the community, but to some extent the community must reconstruct those traditional values and practices,

"The agency can incorporate regional cultural elements that have survived. To incorporate such cultural elements can be very valuable. But there is a real lack of cultural values that can be identified and thus incorporated." (Bryan Watt)\(^{224}\)

The ‘return to tradition’ is clearly a sensitive issue within First Nations communities and raises several difficult questions that the communities will need to address. Central to the debate is ensuring that the concerns of vulnerable community members are given an equal voice.\(^{225}\) For First Nations children, it can be problematic for the community to place too much dependence on ‘tradition’, especially if it affects the ability of a child welfare agency to fulfill its mandate and protect the children within its care. Particularly problematic is where the traditional values and practices have been lost and the community is seeking to reintroduce them to a community that is unreceptive. If the tradition is no longer living within a community to rely on it may well place children at

\(^{223}\) Bryan Watt, *supra* note 42.

\(^{224}\) *Ibid.*

\(^{225}\) In particular there is a strong concern to ensure that First Nations women are given an equal voice in structuring self-government and the philosophies and traditions which will inform that process. See especially, *Gathering Strength, supra* note at 77 - 88; Gail Stacey-Moore, *First Peoples and the Constitution, supra* note 12 at 31; *Sexual Equality as an Aboriginal Right, supra* note 12. The role of elders in restructuring First Nations governance and in providing traditional guidance is also given central importance, see *Restructuring the Relationship, supra* note 12 at 126 - 127, and *Perspectives and Realities, supra* note 12 at 107 - 146. The importance of giving a voice to aboriginal youth in the process is also addressed, see *Perspectives and Realities, ibid.* at 147 - 151 and 180 - 184.
risk. There is also of course still the risk that some community members will pervert tradition to their own ends. Clearly a great deal of work still has to be done in the process of rebuilding those traditional practices and values that were almost destroyed by the forces of colonisation, and in educating the communities about them. Developing practices and principles that are consistent with traditional values, and are at the same time acceptable to all the members of the community will not be easy. However, Kelowa Edel of Xolhmi:lh suggests that it is not impossible,

“What does culture mean? It means getting back to traditional values. It is impossible to go back two hundred years but it is possible to restore traditional values. Culture may change but the core values of the community can remain the same. The Sto:Lo Nation is getting back to the traditional values and structure of the community but inevitably its culture has evolved. The contemporary circumstances mean that the community must be bicultural to some degree. We are looking to the twentieth century and the community has modernised to some extent. However that does not mean that traditional values and social structures are no longer relevant. They can be restored. It is these values that form the identity of the community and it is these values that the First Nations people have been robbed of. Therefore the loss of ‘traditional culture’ is not an insurmountable hurdle. There is an attempt to reconcile tradition and contemporary life. There will be problems - there are problems wherever people are concerned. However the goal of the community is to mould their own evolved, but still distinctive culture with traditional core values. The Sto:Lo have experienced only 200 years of contact - less than many First Nations communities and therefore have been able to hold on to much more of their culture. For example, the Potlach was only illegalised 50/70 years ago. Therefore the Sto:Lo have retained much of their culture.” (Kelowa Edel) 226

2.3 The Problems With the Child Welfare Agency

Problems in the communities raise concerns about the future stability of self-governing communities, but they also create difficulties for agencies within the communities with mandates to deliver programs and services. Undoubtedly the general

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226 Kelowa Edel, supra note 27.
problems in Sandy Bay were having a profound effect on the ability of the agency to do its job. Violence, oppression, abuse, denial, factionalism and a corrupt leadership are inevitably going to penetrate through to every aspect of community life and the child welfare agency operating in Sandy Bay was no exception. The disintegration in the community was manifested in the incompetence and complete inability of the agency to do its job. The agency was rendered impotent by political interference and the domination of the agency staff by the chief, council, and other powerful reserve figures, whose actions leading up to and after the death of Lester defy reason. The moral corruption of the chief and council was compounded by the inexperience and basic incompetence of the child welfare agency who complied with the demands of the community rather than fulfill their mandate of protecting children. Whilst all this was going on the province and the federal government simply looked away. 227

2.3 (i) Political Interference

One of the most debilitating problems the agency had to deal with was interference and manipulation by the chief, band council, and powerful reserve members. 228 Political interference clearly prevented DOCFS from doing its job. The Inquiry concluded that "political interference has contributed greatly to the failure of DOCFS." 229 Community

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227 Again whilst the inadequacies the Inquiry identified with Dakota Ojibway Child and Family Services cannot be taken to be indicative of all self-governing agencies, the problems should be taken seriously as a warning of the kind of difficulties a First Nations child welfare agency may encounter under self-government.

228 Issues of political interference are raised throughout the Inquiry but see especially, Desjarlais Inquiry, supra note 1 at 210 - 232.

229 Ibid. at 210.
control over the delivery of services can clearly be beneficial, as can the active participation of the community in the design and delivery of the program.\textsuperscript{230} However there is a fine and difficult line between community involvement in a service and inappropriate interference in professional decisions by local politicians and others.\textsuperscript{231} The line in Lester's case was very clearly crossed,

"The involvement of chiefs and councilors and other reserve officials cannot be justified. They are not examples of elected officials responding properly to concerns of their constituencies. They are all examples of improper interference and meddling by people who were abusing their offices."\textsuperscript{232}

Throughout Lester's time in care members of his extended family, who were powerful men on the reserve, were using their power to dictate to the agency if Lester should be taken, and if taken where he should be placed.\textsuperscript{233} If they disagreed with a decision of the agency on for example placement, they would simply go and remove him.\textsuperscript{234} They would not allow him to receive treatment or be medically assessed, presumably fearing that evidence of sexual abuse would be revealed.\textsuperscript{235} Of particular concern is that the agency and its employees either could not or did not want to prevent this happening. Some of the child protection workers at the agency simply surrendered to the domination of these

\textsuperscript{230} See above at pp. 185 to 194.

\textsuperscript{231} Desjarlaís Inquiry, supra note 1 at 211 - 212.

\textsuperscript{232} Ibid. at 213.

\textsuperscript{233} Ibid. at 29 - 41.

\textsuperscript{234} Ibid. at 35.

\textsuperscript{235} Both times that Lester was taken to the Brandon Mental Health Centre he was removed "prematurely" before he could be treated. Ibid. at 33.
powerful men, and became allies in trying to prevent the sexual abuse of Lester from getting out,

‘Bill Richard, who was a child care worker supposedly answerable to Marion Glover, was sabotaging placements while Marion Glover was arranging them. Clear that Cecil Desjarlais was either instructing or encouraging Bill Richard to do this. Glover would place Lester. Richard would pick Lester up and place him elsewhere. This would have been farcical if it had not involved the life of a child."²³⁶

The motives of the chief and council were clearly not to protect the child’s best interest. There concern was to prevent the sexual abuse from being discovered, and protect family members from incrimination,

‘It is clear that not only was there a serious problem of sexual abuse in Sandy Bay, but even more disturbing, there was a tendency by some powerful reserve members to prevent these cases from being fully investigated and prosecuted. Marion Glover was rocking the boat and many people did not like it.”²³⁷

The Inquiry recounts another clear example of a powerful family being able to prevent the agency taking the necessary action to protect an abused child.²³⁸ The agency had decided to apprehend Donna Desjarlais from her family on the basis of suspected sexual abuse. However the family enlisted powerful figures on the reserves, and by basic intimidation managed to get the DOCFS workers, except Glover, to cave in and return the child.²³⁹ As Justice Giesbrecht comments,

‘The Desjarlais family could have pursued the proper remedies to challenge the decision: contest the apprehension in court, bring the matter to the attention of the local child and family services committee or the Board of DOCFS for review; but instead the family “over-ruled the DOCFS decision by force, and DOCFS

²³⁶ Ibid. at 40.
²³⁷ Ibid. at 57.
²³⁸ Ibid. at 120 - 146.
²³⁹ Ibid. at 126 - 127.
allowed them to get away with it. The whole episode shows a child care worker much more concerned with the political fall out from his actions than the welfare of Donna.\textsuperscript{240}

It is argued that an agency that cannot protect the interests of certain children because of the political power of their parents and extended family, is clearly not fulfilling its mandate. Such an agency should not have the mandate to deliver child welfare services,

"An agency cannot carry out its mandate if some families on a reserve are off limits. That is what the case of Donna clearly demonstrates. Donna, the grandchild of Donald, who was the chief's brother and Cecil Desjarlais' uncle was declared off limits. DOCFS meekly gave in to this declaration."\textsuperscript{241}

Examples of where children from powerful families were forcefully prevented from being apprehended were relatively few, but the bigger problem is the limitation felt by the agency workers in acting according to the child's best interests in these cases.\textsuperscript{242} They simply do not have the necessary freedom to exercise their professional judgment.\textsuperscript{243} Another incident of local politicians interfering with the agency was the destruction of child welfare files.\textsuperscript{244} There was evidence to suggest similar occurrences, at least once before, in the course of previous investigations. The files appeared to have been destroyed at the instigation of Cecil Desjarlais. Again DOCFS rather than protest at the actions of this powerful man defended him.\textsuperscript{245} DOCFS argued that it was perfectly proper for the

\textsuperscript{240}Ibid. at 127 and 129.

\textsuperscript{241}Ibid. at 127.

\textsuperscript{242}Ibid. at 133, 215, and 228.

\textsuperscript{243}Ibid.

\textsuperscript{244}Ibid. at 71 - 80.

\textsuperscript{245}Ibid. at 73 - 74.
reserve band council to destroy child protection files, even files concerning the sexual abuse of a family member.  

There were clearly significant obstacles created by some members of the community to an agency worker following through with the investigation and prosecution of sexual abuse cases from the reserve. These problems had been concealed by the silence of the community and DOCFS. However two senior staff from DOCFS broke the previous ‘code of silence’ that had prevailed to describe to the Inquiry, “an agency that was hopelessly confused, dominated by politics and unable to protect children.”

2.3 (ii) Confusion Between the Agency and Community

The problems with political intervention were exacerbated by the obvious confusion that existed within DOCFS about the lines of authority between the agency and the community. In particular it was not clear to either the staff or the community who held the ultimate decision making power. The Inquiry found great confusion about the role of the local child welfare committee and the band council. Some DOCFS staff thought the child welfare committee was an advisory body: ‘the committee would give advice to a

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246 Ibid.

247 Ibid. at 60.

248 It is suggested for example that one reason behind the stark contrast in conclusions drawn by the Manitoba Justice Inquiry and Justice Giesbrecht on the performance of DOCFS is that DOCFS strongly controlled who would speak to the Inquiry and what they would say. Ibid. at 214.

249 Ibid. at 56 - 57.

250 Again the community’s and agency’s confusion as to respective roles and responsibilities is evident throughout the Inquiry but see especially, ibid. at 112 - 182.

251 Ibid. at 117.
worker about a case, but the ultimate decision to apprehend or not would be made by the worker in consultation with the supervisor. 252 Other DOCFS workers thought that the committee actually made the decision and they only implemented it. Other workers simply didn’t know. There was equal confusion about the role of the chief and the council in child welfare matters. 253 Cecil Desjarlais, a band councillor, who held the child welfare portfolio for the Sandy Bay Indian Band gave evidence to the Inquiry that he had interfered and overruled decisions made by DOCFS on more than one occasion, and that he was justified in doing so. 254 He argued that as an elected representative of the community, if a constituent asked him to intervene he had a duty to do so. He believed intervention could include giving orders to DOCFS to follow a procedure that he had just made up. Some workers within DOCFS also believed that it was legitimate for Cecil Desjarlais to overrule decisions made by DOCFS, and to formulate procedure that DOCFS was to follow. 255

The original vision behind the child welfare agency was for the reserve communities to join together under the Dakota Ojibway Tribal Council and operate services for their communities. 256 The services would include child welfare. Fundamental to the vision of the tribal council was the local child welfare committee. 257 Each community would participate in child welfare through the operation of the committee.

252 Ibid.
253 Ibid. at 117 - 118.
254 Ibid. at 118.
255 Ibid.
256 Ibid. at 159 - 160.
257 Ibid. at 160 - 167.
committee would be composed of concerned people from the community, and would meet regularly to consider child welfare cases. Child welfare workers and sometimes supervisors, would meet with the Committee. The Committee would provide information about specific families and their needs and resources, and they would try and reach consensus on an appropriate plan. The idea was that the meetings would be beneficial to the members of the community, who were able to make an important contribution to child welfare on the reserve, and to the workers, who would gather valuable information to assist them in doing their jobs more effectively. But it was clear by all those involved in the creation of the community committee that it was to be an advisory body. It was the worker in consultation with the supervisor who made the final decision in child welfare matters.

It was clear to the head office at DOCFS that although the local child welfare committee was a very important component of their child welfare structure, the workers made the final decision. This may have been clear to the DOCFS head office, it was not however clear to the reserves. There was considerable confusion among reserve residents and the staff of DOCFS about the purpose and role of the Committee.

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258 Ibid. at 160.

259 Ibid.

260 This structure reflects the role of the community child welfare committees as envisaged by both Usma and Xolhmi:lh. For a detailed discussion of the structure of these agencies see above at chapter five pp. 450 - 477.

261 Ibid. at 161.

262 Ibid. at 162.
politicians.\textsuperscript{263} Cecil Desjarlais, for instance, thought that he had the right as a band
councilor not only to sit on the committee but act as social worker as well.\textsuperscript{264} The other
members of the Committee could not do anything about the actions of Cecil Desjarlais,
not only because he was a powerful politician, but because of the confusion over what
exactly they should be doing.\textsuperscript{265} As Justice Giesbrecht concludes,

‘There was a clear failure on the part of DOCFS to educate people in the
communities they served about the role of the committee, and this contributed to
many of the problems in this case.’\textsuperscript{266}

The political domination by band councilors of the Dakota Ojibway child welfare system
was exacerbated when in 1991 it was decided that the DOCFS Board at the regional level
would be henceforth composed of representatives from the band councils instead of from
the local child welfare committee.\textsuperscript{267} Originally the Board was intended to be composed of
representatives from each of the eight local child welfare committees, but after it was
disbanded for a time the chiefs simply took on the Board function themselves. Thus
instead of local community control the agency was controlled by the chiefs at head office.
The chiefs were then superseded by band council representation. With this, added to the
problems of the political domination of the local child welfare committee, politicians and
politics was “now controlling the bottom, top and middle of the organisation.”\textsuperscript{268}

\textsuperscript{263} Ibid. at 166 - 167.
\textsuperscript{264} Ibid. at 162.
\textsuperscript{265} Ibid.
\textsuperscript{266} Ibid.
\textsuperscript{267} Ibid. at 167- 169.
\textsuperscript{268} Ibid. at 168.
The question is what went wrong. The idea was good. It responded to community needs and the desire for local control, and it set out to ensure that the professionals would be protected against political dictation,

“They designed a system that would allow aboriginal communities to control their own child welfare system. Communities would participate at a grass roots level by means of the local child welfare committees. The agency would receive direction from a Board consisting of representatives from each of the Committees. In the middle would be the workers, supervisors and other staff personnel who would be every bit as competent as their non-aboriginal counterparts, and just as able to concentrate on the paramount and fundamental goal of the agency, namely to protect children.”

In the conclusion of Justice Giesbrecht this carefully designed system went wrong because,

“The chiefs and councilors insisted on injecting politics into the system at all levels, and meddling in the daily operation at the agency, out of the misguided notion that this would result in more community control. In fact exactly the opposite has happened. Workers have to worry about so many other things that they are not able to properly do their jobs. Lines of authority have been completely mangled. Anarchy and confusion prevail. This vision has been lost.”

Political interference and manipulation was clearly an issue of fundamental concern in Lester’s case. Unfortunately the problem of political interference does not appear to be limited to the particular circumstances of Sandy Bay. The Inquiry concluded,

‘I am convinced that political interference is not a problem peculiar to the Sandy Bay reserve, or to the DOTC reserves. It is a problem that exists in all of Manitoba’s reserve communities.”

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269 Ibid. at 174.
270 Ibid.
271 Ibid. at 219.
The Awasis Agency, for example, was also suffering from the same pressures. A teacher in Easterville gave evidence to the Inquiry regarding a sexual abuse case within their community. The alleged abuser was the grandfather of a powerful family on the reserve.

"The child care worker was so afraid to call the family and do an investigation that her knees were visibly shaking. The worker believed that her job would be in jeopardy if she made the call. The point is not whether or not the worker lost her job but the true fear that the worker had that if she reported this incident involving a powerful family her job would be placed in jeopardy." 272

Xolhmi:lh has in the past encountered some difficulties with the political maneuverings of the chiefs and band councils but the restructuring of the political bodies of the Sto:Lo Nation has dealt with the problem,

"In the past the Agency encountered some difficulties with the political maneuverings of the chiefs and band councils. We have had one experience of a chief interfering with the work of the agency, but such interference has now been guarded against. In the last two years those difficulties have been assuaged as the Nation has matured politically." (Kelowa Edel) 273

The problems with some of the current political leadership at the community and band level may pose a difficult challenge for a community proceeding to self-government. Quite clearly if the aboriginal leadership acts in the way revealed by the Desjarlais Inquiry, not only will children’s lives be put at risk, but the potential benefits of securing self-government could be substantially undermined.

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272 Ibid. at 212.

273 Kelowa Edel, supra note 27. Neither Usma, Nuu-chah-nulth or the Spallumcheen program report experiencing difficulties with political interference.
2.3 (iii) The Incompetence of the Child Care Professionals

The ease with which the local politicians manipulated the professional staff at DOCFS reveals another serious problem with the agency. One reason for the inability to effectively confront these political pressures was that many of the staff were seriously under qualified.\(^{274}\) Their lack of professional expertise and inexperience in child protection work made them vulnerable to the ‘power politics’ of Band members. In following the orders of the chief and council members, many of the staff were acting out of the best intentions and believed they were doing the right thing. However with proper training and experience they may have seen that their actions were putting the lives of the children in their care at risk. Basic incompetence and negligence within the agency would seem to lie behind every mistake that was made with regard to Lester.

The way in which Lester’s case was handled by DOCFS was criticised throughout the Inquiry. Without the added complication of political interference, the agency was not doing a very good job of taking care of Lester’s interests. For example, the agency appeared to have no permanent plan of care for Lester.\(^{275}\) They would only intervene in a crisis situation and then implement short term care measures.\(^{276}\) The chosen placement would inevitably seem to disintegrate and the pattern would be repeated.\(^{277}\) The lack of permanent planning was contrary to the current understanding within the profession on the

\(^{274}\) Desjarlais Inquiry, supra note 1 at 183 - 209.

\(^{275}\) Ibid. at 22 -23.

\(^{276}\) Ibid.

\(^{277}\) Ibid.
need for consistency and stability in the care of a child whose parents are incapable of providing for him or her,

"He was careening crazily from one temporary home to another, with virtually no direction or supervision from anyone. DOCFS planning was ad hoc and slapdash. There was no long term plan." 

One of the placements decided upon by the agency was SevenOaks - a home for troubled young persons. This placement was described by Justice Giesbrecht as “inappropriate” and “unprofessional.” The efforts of the agency on behalf of Lester were indicted as “half-hearted and ineffectual”, “a joke”, “almost beyond belief”. The central reason behind the catalogue of mistakes made in Lester’s care was the serious lack of training and professional qualifications of the staff involved,

"The lack of training for all DOCFS personnel was painfully evident throughout...The qualifications and training of DOCFS child care workers, and particularly supervisors, is far too low."

Whereas the norm in non-aboriginal child caring agencies is to hire university graduates, that is not the norm at DOCFS. Child caring agencies within Canada generally look for a person with a BSW and related experience for child protection positions. DOCFS

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278 Ibid. at 23.
279 Ibid. at 34 - 36.
280 Ibid. at 35.
281 Ibid. at 26.
282 Ibid. at 47. The lack of adequate training extends throughout the child care system in the community. The foster parents looking after Lester are also criticised in the Inquiry for their lack of skill. It would seem that aboriginality was also sufficient qualification to provide alternative care, with no specialised training or even basic guidance provided. Ibid. at 43, and 45 - 47.
283 Ibid. at 184.
looked for someone of native blood with 'life experience.' A clear example of the problems of using unqualified staff is given by an incident concerning Bill Richards, a child care worker. He made 'terrible mistakes' in the things he said to Lester in the days leading up to his death. Promises were made about Lester returning home which when they were not followed through is suggested to have initiated the suicide. Justice Giesbrecht gives the following analysis of Bill Richards,

'Bill Richard is a pleasant fellow but he is completely unqualified to be a child care worker. He does not know the first thing about social work and he relies completely on his knowledge of Sandy Bay, his aboriginal background, his life experience, and his good intentions.'

When so many of the staff are not professionally qualified it becomes imperative that the supervisor is properly trained,

'The combination of inexperienced child care workers and supervisors in an area of difficult socio-economic problems is a 'recipe for disaster.'

Again however that was not the case with DOCFS. Marion Glover was hired as the reserve's supervisor and was regarded as a 'catch' by DOCFS. This is despite the fact that she did not hold a degree of any kind, or a college diploma, and that her previous employment with the Child and Family Services of W. Manitoba had been terminated.

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284 Ibid. at 189. Most of the child care workers had New Career’s training. This training is designed to help people who have been disadvantaged enter the workforce: 'One of its main goals is to build self-esteem in the individual. A New Careers course could be used as a first step towards community college or university. It is a beginning only. It does not complete an education.' Ibid. at 187.

285 Ibid. at 50 - 52.

286 Ibid. at 50.

287 Ibid. at 186.

288 Ibid. at 55.
because she had misrepresented her qualifications. Her only training consisted of experience obtained ‘on the job’, and private practice work with sexual abuse victims. Glover was not qualified according to provincial standards to be a child care worker, and certainly not a supervisor. She may have been eligible for a position as an aid or assistant, and only if she then upgraded her qualifications would she be eligible for child care position. Generally a supervisor would be expected to have at the very least a BSW and related experience. The norm however is for a supervisor to hold a MSW with considerable experience as a child care worker. Even so, Glover was better trained than most other people working at the agency. At DOCFS supervisors were usually child care workers who had stayed with the agency for a time, but had not necessarily upgraded their qualifications. The problem of ill-qualified staff was acute,

‘DOCFS does not employ one person with a Masters of Social Work degree. this is a child care agency with a budget in the millions of dollars. It appears that DOCFS employs only three people with BSW degrees. Most of the child care workers and supervisors have training that consists mainly of their New Careers training. DOCFS workers at the field level and at the supervisor level are under-educated.’

However, despite the mistakes and confusion that existed among staff at DOCFS, there was no recognition from DOCFS that inexperience and the lack of professionally qualified

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staff was the problem. The prevalent attitude at DOCFS was exemplified by the opinion of
Ron Mosseau, a former supervisor,

"Mr Mosseau does not feel that a university degree in social work would assist
him in his work. As with all of the DOCFS workers questioned on this matter, he
gives the example of a university graduate fresh out of school coming to a
reserve, as the reason why social work training through the university is of little
value. He believes that "life experience" is what is required for child care work,
and formal training in social work is unnecessary." 295

The reverence of "life experience" was a common theme, and it was a view shared by the
Executive Director of DOCFS. 296 It was not shared by Justice Giesbrecht,

"Life experience" and the worthlessness of formal education appeared to be
preachings of a strange new gospel." 297

Another "nebulous" common theme that emerged in the Inquiry was that of the overriding
importance of aboriginality when employing child protection workers for aboriginal
agencies,

"It was the almost mystical belief that simply by virtue of being aboriginal a
person somehow became competent to work with aboriginal children...Training
and basic competence were far down on the list and aboriginal heritage was at
the top...DOCFS was too concerned about a worker's colour and not enough
about her education and training." 298

Clearly both life experience and aboriginality are important factors in being able to provide
an effective protection service to aboriginal children. 299 However when treated as more

295 Ibid. at 187 - 188.
296 Ibid. at 189.
297 Ibid. at 188.
298 Ibid. at 189.
299 For further discussion on appropriate qualifications and skills of child protection staff see above at
chapter five pp. 434 - 450. It should be noted that the faith DOCFS placed in aboriginality was not
without support from other child welfare experts. For example, recommendations on amending required
qualifications and training for child protection positions to account for the fact that 'aboriginality' may be
important than proper qualifications and training, the Desjarlais Inquiry would suggest that it can create substantial problems. Most importantly it can put the lives of the children in their care at risk.

The problems of inexperience were also compounded by the great confusion over the child worker’s roles and the lines of authority within the agency. There was clear confusion among the staff as to the role of the supervisor. This was exacerbated by the fact that the turnover among staff was so high that when Marion Glover became supervisor at Sandy Bay,

`the Sandy Bay child care workers had simply had no supervisor or no effective supervision for so long that they were not used to working under supervision. They were taking their direction not from a supervisor, but from local politicians on the reserve."

Some workers believed that if the worker and the supervisor disagreed about the plan the supervisor would have the final say. Other’s believed that if a worker disagreed with the opinion of the supervisor, the worker could carry on with his or her plan in spite of the supervisor. Some workers thought that the local child welfare committee could overrule

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300 Desjarlais Inquiry, supra note 1 at 117 and 147.

301 Ibid. at 185 - 186.

302 Ibid. at 117.

303 Ibid.
the supervisor, and some thought that if the Committee and the supervisor disagreed they could make up their own mind.\(^{304}\)

"Hopeless confusion exists within DOCFS at the present time. Lines of authority are not clear. The purpose of fundamentally important components of the system such as the local child welfare committees, are murky in the extreme. The agency's responsibility to band councils is understood by the different people in different ways. Anarchy prevails and confusion is the order of the day."\(^{305}\)

This confusion was not helped by the fact that DOCFS did not have a policy and procedures manual.\(^{306}\) The development of a policy and procedures manual to help direct their decision making and actions is standard practice for child protection agencies.\(^{307}\) A policy manual outlining the lines of authority within DOCFS would have greatly assisted DOCFS to resolve their huge organisational problems.\(^{308}\) However, most importantly, as Justice Giesbrecht concludes,

"Until the problem of education is addressed, DOCFS will remain a third rate agency."\(^{309}\)

The problem of employing staff who are inexperienced and lack proper qualifications is one that will be faced by any community which in implementing self-government takes over the control and delivery of its own child welfare services.\(^{310}\) There

\(^{304}\) Ibid. at 118.

\(^{305}\) Ibid. at 147.

\(^{306}\) Ibid. at 169 - 172.

\(^{307}\) Ibid. at 170.

\(^{308}\) Ibid. at 171.

\(^{309}\) Ibid. at 183.

\(^{310}\) Similar problems over inexperienced and ill-qualified staff were raised by the South Island justice reports. It was argued that the people who were sentencing on the justice committee were not qualified to deal with difficult cases of serious offenders: 'We need professionals involved who have gone to school,
simply are not enough formally educated and properly trained aboriginal professionals who can fill the many positions that will be created by self-governing regimes. However the basic incompetence and culpable behaviour of the child protection staff at Sandy Bay indicates that unless this issue is properly addressed self-government could be a disaster for First Nations children.

2.3 (iv) *An Abdication of Responsibility by the Province*

Dakota Ojibway was not however a self-governing child welfare agency. It was a native controlled child welfare agency that was operating under provincial mandate. It should have benefited from a pre-existing provincial support structure, from the pool of expertise on which it could draw, and from the help and guidance of a more experienced system. However, the Desjarlais Inquiry was extremely critical of the actions of the province which provided none of the above to DOCFS, and rather than help a smooth transition to aboriginal control, abandoned the agency to its own devices,

"There was a virtual absence of the Director from matters having to do with aboriginal children and aboriginal child welfare agencies."  

Throughout the whole episode Justice Giesbrecht was of the opinion that the province had displayed,

"a weakness and a lack of commitment to the protection of aboriginal children."  

who are educated to deal with offenders involved in serious crimes," "Nightmare of the Shadow People. Part II," *supra* note 120. The problems a self-governing community will face because of the current lack of a skilled aboriginal human resource base will be discussed in detail above at chapter five pp. 434 - 450. See especially, *Restructuring the Relationship, supra* note 12 at 335 - 345.

311 Desjarlais Inquiry, *supra* note 1 at 259 - 274.

312 Ibid. at 89.
A cynic could take the view that the province was delighted to be able to 'wash its hands' of aboriginal child welfare. Having fought so long to resist jurisdiction over on-reserve First Nations children, it is hardly surprising that the province withdrew from the arena as soon as another governmental body wanted to assume jurisdiction,

"He withdrew as soon as he could, and did almost nothing to correct a situation that was seriously out of kilter."314

Justice Giesbrecht argues that the decision to adopt a stance of non-intervention despite the very grave and serious difficulties that were developing within the agency amounted to an "abdication of responsibility" by the province.315 The result in the conclusion of the Desjarlais Inquiry, was three way neglect of aboriginal children by the provincial, federal and Indian leadership.316

The reason for the complete absence of the provincial Director of Child Welfare cannot be attributed to the skill of DOCFS in hiding the problems from the province. The province clearly knew about the difficulties but chose not to intervene.317 For example the province was fully aware of the problems with political interference on the reserves. The Director knew in 1988 that political interference was preventing DOCFS from properly investigating child abuse cases but he did nothing about it.318 Rather than condemn the

313 Ibid. at 88.
314 Ibid. at 247.
315 Ibid. at 272.
316 Ibid. at 181 - 182.
317 Ibid. at 265.
318 Ibid. at 221 - 222.
actions and intervene to help the beleaguered staff, the Director took the view that if the agency didn’t mind it was none of his business.

"When given an opportunity to condemn political interference he seemed to say that it was all right with him, as long as the aboriginal agencies did not complain about it. It was all right if aboriginal child care agencies let local politicians dictate policy to them, no matter how this impacted on the children they were supposed to be protecting. In a nutshell he implied that this was none of the Director’s business."\(^{319}\)

At the Inquiry the Director maintained his view that the operations of an aboriginal child welfare agency, even though operating under his mandate, were not his concern.\(^{320}\) The province’s reluctance to intervene in the affairs of DOCFS was described by one witness as ‘pathological benevolence.’\(^ {321}\) It has been observed by one critic that the non-native community lives in fear of not being “politically correct,” and of being accused of being racist if they challenge what happens on the reserves.\(^ {322}\) However, their “political correctness” is “at the expense of native women [and children] and that is reverse discrimination.”\(^ {323}\) It was clearly the view of Justice Giesbrecht that politic considerations

\(^{319}\) *Ibid.*

\(^{320}\) *Ibid.* The actions of the Province can be explained. The Director could take the position with some justification that aboriginal people have always resented the province’s involvement with aboriginal child welfare and regarded it as an “intrusion” into their affairs. His stance of non-intervention could be claimed to be motivated by respect for the wishes and the autonomy of the community. The same reasoning for not getting involved in self-governing aboriginal projects was suggested by British Columbia concerning problems with the South Island justice initiatives. The 1988 Hughes Commission report on the justice system in B.C. found that the solution to the justice problem had to come from within the community: ‘The worst thing for us to do is impose our solution on them.” Consequently the province thought it was inappropriate to interfere with the membership of the aboriginal justice committee: “It’s true the First Nations of South Island is controlling who is appointed to the elder’s council. I could have said everybody has to be security cleared and be of a certain standard. But if I do that I’m a white man using our standards.” “Nightmare of the Shadow People,” *supra* note 120.

\(^{321}\) *Desjarlais Inquiry, supra* note 1 at 268.

\(^{322}\) Gerald Young, “Intimidation Trail Leads to Court” *Victoria Times-Colonist* (July 30, 1992).

\(^{323}\) *Ibid.*
must come second to the welfare of children in First Nations communities, and if children were being put at risk the provincial government had a duty to intervene regardless of causing offense.\(^\text{324}\)

"I Conclude that the Director did not properly carry out his duties. He was far too worried about offending DOCFS and the Indian leadership. He was far too concerned about the political fall out of his actions. He was not concerned enough about what should have been his paramount concern - the safety and welfare of the children at Sandy Bay."\(^\text{325}\)

Clearly what Justice Giesbrecht expected from the province was a commitment to give to the inexperienced DOCFS extensive guidance, help, and support, at least in the first few years of its operation.\(^\text{326}\) DOCFS was a new agency under the auspices of a political organisation that had absolutely no experience in child protection. Yet it was left to cope alone with the problems of some of the most dysfunctional communities in the province.\(^\text{327}\)

The government did not give much-needed support,

'It is my reading of the evidence that the aboriginal community did not have the expertise necessary to suddenly assume responsibility for child welfare. The Indian leadership had no idea of the magnitude of the child welfare related problems on reserves, and the government acted in unseemly haste in turning matters over to the aboriginal community without the necessary funds, training and other essentials. It is true that the Indian leadership was demanding the

\(^{324}\) There is a similar fear among some aboriginal women that the provinces are "abandoning" them to an Indian justice system and government that "will be run by the very band councilors responsible for abuse, violence and cover ups." Sharon McIvor reported in Times Colonist Staff, "Abuse Tales Prove Self-Rule Untimely" *Victoria Times-Colonist* (July 28, 1992). A constant theme in the complaints of the South Island women was that the Province and other external agencies were not doing enough to protect and help them even when aware of abuses: "Everybody I spoke to said 'we are aware of the problems.' They said 'we can't do anything. It has to come from within the reserve.'" Gerald Young, "BC Aware of Native Justice Plan Abuse" *Victoria Times Colonist* (July 29, 1992).

\(^{325}\) *Desjarlais Inquiry, supra* note 1 at 267 - 268.

\(^{326}\) *Ibid.* at 271 - 274.

\(^{327}\) This distant relationship with the provincial Director of the Child Welfare is not restricted to Manitoba. Marika Czink of Usma comments that the Director at the Ministry for Children and Families is "removed from the picture," and "not really involved." Marika Czink, *supra* note 41.
immediate transfer of child welfare responsibility with no strings attached. However it is my opinion from the evidence that the government of the day acted irresponsibly in giving in to these demands without making sure that the newly created agencies were able to function properly.”

Whilst one may not agree with the strong paternalistic solution to these problems propounded by Justice Giesbrecht, the fact remains very clear: the provincial government’s withdrawal from the field leaving DOCFS to struggle on in isolation was a major contributory factor to Lester Desjarlais’ death.

2.3 (v) Did Anyone Care About Lester?

The combination of all the problems identified in the Desjarlais Inquiry, and supported by the experiences of many aboriginal women, amounts to one fundamental potential problem with self-governing child welfare agencies: the poor socio-economic conditions; the disintegration in community standards and values; the poor quality of both local and national aboriginal leadership; the vacuum in experienced professionally qualified aboriginal staff; the highly volatile and sensitive political context in which the move to self-government is being made; the disinterest of the province in aboriginal children; and the very difficult questions surrounding the place of tradition; means that in many cases neither the aboriginal child welfare agency, the community leaders, the First Nations national leaders, the provincial government, or the federal government are putting the child and his or her safety and interests first. The Desjarlais Inquiry shows the very last thing on anyone’s mind was Lester. The people involved were so concerned with other irrelevant considerations such as protecting family members, making a political assertion

328 Desjarlais Inquiry, supra note 1 at 271.
of authority and control, managing alone, not 'rocking the boat', and even government elections, that they all lost sight of the most important thing: protecting Lester from abuse.\textsuperscript{329} As Justice Giesbrecht concludes,

"All three actors in this sad equation have shown themselves to be quite prepared \[on a matter of principle\] to grind up a few generations of Indian children rather than resolve this dispute."\textsuperscript{330}

The case of \textit{Jane Doe v Awasis Agency of Northern Manitoba}\textsuperscript{331} provides just one final but striking example of how political concerns and agendas have been allowed to override the best interests of an individual child. The child involved in this case was removed from her foster parents at the demand of the Awasis Agency\textsuperscript{332} pursuant to their repatriation policy for all First Nations children who had been fostered out of the reserve. ‘Jane’ had lived with her foster parents for thirteen years since her birth. She was returned to the care and custody of her natural parents on an isolated reserve in Northern Manitoba. She remained there for six months until being admitted to hospital. Whilst in hospital she was made a ward of the court to prevent Awasis removing her, and she was subsequently returned to her foster parents. When ‘Jane’ was returned to the reserve she could not speak the native Dene language and her immediate family could not speak English. Communication was consequently extremely difficult. The reserve was

\begin{itemize}
\item \textsuperscript{329} \textit{Ibid.} at 277.
\item \textsuperscript{330} \textit{Ibid.} at 182.
\item \textsuperscript{331} \textit{Jane Doe v Awasis Agency of Northern Manitoba}, (1989) 72 D.L.R. (4th) 739 (Man. C.A.) [hereinafter \textit{Jane Doe}].
\item \textsuperscript{332} Awasis Agency like DOCFS is a native controlled child welfare agency operating under provincial mandate in Manitoba.
\end{itemize}
completely foreign to her and she mourned the loss of her foster family. For those six months her life was unbearable,

"She was in no way accepted into the community and led the life of an outcast. On numerous occasions during the six months that the complainant was on the reserve, she was forcibly confined, sexually assaulted and raped by a number of the male residents of the reserve. She contracted venereal disease as a result of the sexual assaults and rapes." 333

What is most shocking about the case is that when this was brought to the attention of the Awasis Agency they did nothing to help her. The Agency supposedly protecting 'Jane' could see no grounds on which to intervene. It was their view that the best interests of Jane were secured by keeping her on the reserve to help protect the survival of the community as a whole. It was therefore a fly in doctor who finally removed her. Even when 'Jane' was hospitalised, Awasis maintained the position that she should be returned to the reserve. 334 Clearly the agency was not putting the individual interests of Jane at the heart of their decisions; the only explanation for their stance, as for the actions of Dakota Ojibway, is that they were pursuing some other irrelevant agenda.

3. The Potential Risks of Self-Government - A Reason Not to Proceed?

Self-government is consistently supported as the answer to the abuses of aboriginal children, at the hands of the Canadian government. It should of course be remembered that the care provided to First Nations children by non-native child welfare agencies and the federal government, has often been no better, and in many cases worse than that

333 Jane Doe, supra note 331 at 740.

334 A settlement was reached by which the Awasis agency paid general damages to the child of $75000 for the physical and emotional injury that had been caused to her.
provided to Lester Desjarlais. The potential benefits of self-government for First Nations communities, as exemplified by the experiences of those already moving towards autonomy, provide hope for healthy prosperous communities in the future. Children will be the ultimate beneficiaries of this rebuilding. There is further evidence of the specific benefits of First Nations control over child welfare. However, there are clearly problems. The above analysis of the circumstances surrounding the tragic death of Lester Desjarlais is not intended to found the basis for an argument that self-government should be resisted. Self-government is an inherent right of the First Nations people that cannot be negated because its implementation carries certain risks. However, the above analysis does show that there are very serious problems in proceeding to self-government which should not be underestimated, or pushed aside with the claim that the problems will be magically solved by ‘returning control to the community’. Lester Desjarlais’ death provides strong evidence, standing alone, of the need for minimum standards and safeguards to be guaranteed in the transfer of control over child welfare under self-government. One cannot generalise from Lester’s case that all communities will suffer these problems. However, there is sufficient evidence of the existence of similar conditions in other communities to suggest that the problems and the risks are widespread. This makes safeguards imperative. Issues such as the disintegration in community standards, morally corrupt band level leadership, and the political manipulation of professional child welfare agencies need urgently to be addressed if the safety of First Nations children is not to be compromised. Justice Giesbrecht provides a striking synopsis of the current reality for many First Nations families,
"What all of this means for people living on reserves the great majority of whom are decent, respectable people, is that they are forced to raise their families in a third world environment of dangerous and degrading social problems, overseen by an Indian leadership that in too many cases is more concerned with allegiance to family and friends and the pursuit of political goals than with the welfare of the community. And all of this meets with benign neglect from the government."

The dysfunctionalism on the reserves clearly has to be dealt with before the community can effectively discharge any governmental responsibilities. Changes have to be made. A constitutionally protected right to self-government will mean nothing if the communities cannot effectively perform fundamental governmental functions such as protecting their children from abuse.

In the next two chapters I will consider two approaches to dealing with the potential risks of self-government. The approach of the federal government and the Royal Commission will first be considered. Their arguments will be rejected on the basis that whilst they seek to maintain certain basic standards across Canada, they do so through perpetuating the ethos of colonialism, and at the expense of the inherent right of the First Nations to self-government. An alternative approach will then be suggested that seeks to respect the inherent autonomy and self-governing powers of the First Nations in a manner consistent with the process of decolonisation, whilst ensuring that all three governments in Canada can work together to guarantee appropriate safeguards and common minimum standards of care for First Nations children and non-native children across Canada.

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335 Desjarlais Inquiry, supra note 1 at 237.
Chapter Four
Basic Minimum Standards - Government Initiatives and the Charter

"I think that the Charter represents one of the great watershed events in the political and legal life of our country. For me a Constitution should do more than simply create the various branches of government and assign powers to them. It must also reflect the fundamental values and aspirations of a society." (Chief Justice Dickson)

The experience of native controlled child welfare agencies indicates that whilst there are clear benefits in recognising and implementing the First Nations right to self-government, there are also potential risks for vulnerable groups within the community, especially children. That does not mean that self-government should be resisted. It does mean however that we need to address the ways in which the risks to those vulnerable groups can be mitigated. In particular the future role of the federal/provincial government in securing the basic rights and safety of First Nation individuals living within self-governing communities has to be considered.

The question of protecting individual First Nations citizens, whilst not undermining the basic autonomy and self-governing powers of the community, is difficult and controversial. It can be argued that if the First Nations have an inherent right to self-government, they must possess sovereign authority within their core sphere of jurisdiction; that is, in those matters identified as integral to their culture and essential to their survival as a community they must be free to exercise their authority without intervention or control from the Canadian government. ¹ Certainly in core areas such as child welfare, it

¹ See above at chapter two pp. 100 - 109, and pp. 142 - 146, for a discussion of the inherent sovereignty of First Nations within their self-governing jurisdiction. See especially, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol. 2 (Ottawa: Minister of Supply and Services, 1996) at 168, and 240 - 244 [hereinafter Restructuring the Relationship]; Royal Commission on Aboriginal Peoples, The Right of Aboriginal Self-Government and
can be argued that the governments of Canada have no legal, political, or moral basis on which to intervene or continue to exert controls and limits on the exercise of First Nations self-governing powers. By this view the federal and provincial governments would have no legitimate grounds on which to intervene should a situation similar to that which occurred in Desjarlais happen again. Such a conclusion may well leave First Nations children in a very vulnerable position. Whilst this view is more consistent with respecting the autonomy of the First Nations people, it places Canada in a very difficult position.

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should serious problems develop within an aboriginal child welfare system. This raises very complex questions as to the ability of the existing provincial and federal governments to impose on First Nations governments certain fundamental principles which underlie the Canadian democratic state. Central to such demands will be measures to protect the basic human rights and freedoms of First Nations citizens. It is the view of the federal government and the Royal Commission that status as a third order of government in Canada brings with it certain duties and responsibilities for First Nations governments. The federal government has always made it clear that the right to self-government must be exercised within the framework of the Canadian constitution. If the right to autonomy is exercised within Canadian confederation, limitations and restrictions are immediately placed upon it. It is necessarily circumscribed. The basic argument suggests that, as part of the Canadian confederation, there are certain fundamental principles of Canadian

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4 See e.g. Joe Clark, ibid. and Kim Campbell, ibid.

5 A Commentary, supra note 3 at 12. The commentary states, “The right should be described in such a way that it is circumscribed rather than uncircumscribed in its extent; as such it recognises Aboriginal governments as coexisting under the Constitution with Federal and Provincial governments; which also hold limited powers.” See also Restructuring the Relationship, supra note 1 at 214; Federal Policy Guide, supra note 3 at 3 -4.
society which must be observed by First Nations governments and which therefore limit their inherent right. This applies even within the core jurisdiction of First Nations self-government. The Royal Commission also insists on circumscribing the right to self-government by attributing overriding importance to the fundamental values and principles of the Canadian State. The Commission emphasises the fact that self-government is a right which must be exercised within the framework of the Canadian constitution, and justifies this position on the basis that it is the constitution which recognises the right. The Commission concludes that if the right is exercised within the Canadian constitutional framework then it cannot found a claim to unlimited governmental powers. The right must be circumscribed,

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6 The Federal Policy Guide is clear on this point: "The inherent right of self-government does not include a right of sovereignty in the international law sense and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society." Federal Policy Guide, ibid, at 4.

7 The Royal Commission adopts the test in R v Sparrow 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (S.C.C.) [hereinafter Sparrow] as the appropriate standard for overriding First Nations jurisdiction: "By way of exception, in certain cases a federal law may take precedence over an Aboriginal law where they conflict. However for this to happen, the federal law has to meet the strict standard laid down by the Supreme Court of Canada in Sparrow. Under this standard, the federal law has to serve a compelling and substantial need and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples." Restructuring the Relationship, supra note 1 at 224. See above at pp. 283 to 288 for a detailed discussion on the Royal Commission's approach.

8 This argument makes the fundamental mistake of treating the constitution as creating or devolving the right to self-government, rather than simply recognising a right which has an independent external source. A position the Royal Commission clearly endorses: "The right is inherent in that it originates from the collective lives and traditions of these peoples themselves rather than from the Crown or Parliament." Restructuring the Relationship, ibid. at 192.

9 The Royal Commission acknowledges that First Nations claims to self-government are not necessarily based on recognition of their existing right to self-government under sec. 35. However the Commission decides that it will not address the implications of this broader claim, which exists outside of and independent of the Canadian constitution: "We are not referring to the broad right of self-government that is asserted by many aboriginal peoples on the basis of their treaties or on other historical and political grounds...We think this matter is best addressed by each Aboriginal people in negotiations with the
The Aboriginal right of self-government is recognised by the Canadian legal system under the constitutional common law of Canada and also under sec. 35 (1). So, while the section 35 (1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal people have the inherent legal right to govern themselves under sec. 35(1), this constitutional right is exerciseable only within the framework of Canada. Sec. 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short the Aboriginal right of self-government in section 35 (1) involves circumscribed rather than unlimited powers."¹⁰

However, the First Nations communities would be justified in responding to the demands of the federal government and the Royal Commission with the assertion that these values, rights, and principles, which the existing governments insist will be met, do not reflect the values and principles of the First Nations.¹¹ Clearly not all communities would take this
position. Many First Nations agree with the fundamental values embodied by the Canadian state, including the importance of human rights. The cultures of many First Nations have changed to incorporate these principles. However, there are also other communities who take the strong view that these are western values and to insist that First Nations governments meet the standards demanded is to perpetuate a colonial philosophy.


latter position seemingly brings us into an irresolvable dilemma. Decolonisation demands that First Nations be given the liberty to handle such core matters as child protection as a self-governing entity within Canada free from the Canadian state making demands as to how that jurisdiction is exercised. The Canadian state however is bound in international law, by the Charter of human rights and freedoms, and by its own political morality to ensure that the fundamental human rights of all Canadian children are protected.

(Assembly of First Nations, Constitutional Secretariat, 1992) at 3 [hereinafter “Sharing Canada’s Future”].

See above at chapter two pp. 100 - 109 for a detailed discussion of the inherent right of the First Nations to self-government recognised by the Canadian constitution and underpinned by the principle of self-determination and prior occupation/sovereignty. See especially, “Normative Dimensions,” supra note 2; and Restructuring the Relationship, supra note 1 at 163 - 213. If Canada signs the Draft United Nations Declaration on the Rights of Indigenous Peoples [reproduced (1996) 9 St. Thomas Law Rev. 212] which is now before the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, it will also be bound under international law to recognise the right of First Nations to self-determination: “Recognising also that indigenous peoples have the right freely to determine their relationships with the states in which they live, in a spirit of coexistence, mutual benefit and full respect...Part I, Art.3, Indigenous peoples have the right to self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.” The Draft Declaration also specifically guarantees the right of indigenous peoples to control their own social and welfare programs: Part V Art. 23, “Indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and as far as possible, to administer such programmes through their own institutions.” For an excellent summation of the current status of the Draft Declaration and its provisions see J. Burger, “The United Nations Draft Declaration on the Rights of Indigenous Peoples” (1996) St Thomas Law Review, 209. See further on the right of the First Nations to self-determination and self-government under international law, Maureen Davies, “Aspects of Aboriginal Rights in International Law” in Brad Morse, ed., Aboriginal Peoples and the Law: Indian, Metis, and Inuit Rights in Canada (Ottawa: Carleton University Press, 1989) at 16 - 46; R. Barsh, “Indigenous Peoples and the Right to Self-Determination in International Law” in Barbara Hocking, ed., International Law and Aboriginal Human Rights (Toronto: Carswell, 1988) at 68 - 80.

government is exercised within Canada, the First Nations will remain Canadian citizens and are entitled to the benefits of that citizenship. Essentially a duty remains on the federal and provincial governments to ensure that they are guaranteed the same protection and respect for their fundamental human rights and freedoms as all other Canadians. The consequences flowing from Canadian citizenship are made clear in the Nisga’a agreement and the Yukon self-government agreements, all of which explicitly state that nothing in the agreements will detract from their rights as citizens of Canada,

"Nisga’a citizens who are Canadian citizens or permanent residents of Canada will continue to be entitled to all of the rights and benefits of all other Canadian citizens or permanent residents of Canada applicable from time to time.”

"Settlement Agreements shall not affect the rights of Yukon Indian people as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time.”

The Teslin Tlingit self-government agreement also states that it will not ‘affect the rights of Teslin citizens as Canadian citizens.” For the federal, provincial, and territorial

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17 See especially, Restructuring the Relationship, supra note 1 at 237.

18 Nisga’a Agreement, supra note 12 at General Provisions para. 6.

19 Canada, Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, Umbrella Final Agreement Implementation Plan (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) at Chapter 2 para. 2.2.5 [hereinafter Umbrella Final Agreement].

20 Canada, Teslin Tlingit Council, Yukon Territory, The Teslin Tlingit Council Self-Government Agreement Among the Teslin Tlingit Council and the Government of the Yukon (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) at General Provisions para 3.6.1 [hereinafter Teslin Tlingit Agreement]. The agreement continues at para 3.6.2, "Unless otherwise provided pursuant to this Agreement or in a law enacted by the Teslin Tlingit Council, [this agreement shall not] affect the
governments to allow continuing breaches of the fundamental rights of First Nations children would be an abdication of their responsibility as governments of Canada. As Justice Giesbrecht argues,

"I believe that the Director's "marching orders" from the government, essentially a hands-off policy with respect to aboriginal child welfare agencies, has compromised the lives of aboriginal children living on reserves, and continues to this day to deprive too many aboriginal children in this province of their birthright as Canadians: the right to true childhoods."  

On the one hand, if the provincial and federal governments refuse to recognize self-government as an inherent right which can be exercised unilaterally by the First Nations, and which protects sovereign spheres of jurisdiction, they violate the fundamental rights of the aboriginal people as secured by the Canadian Constitution and international law, including the right to self-determination. On the other hand if they simply recognize self-government and walk away, they run the risk that the individual human rights of Canadian citizens can be breached with impunity.

entitlement of citizens to all the benefits, services, and protections of other Canadian citizens applicable from time to time."

It is interesting that both the Nisga'a Agreement and the Yukon Agreements contain a clause which could exclude the federal and provincial governments from liability for claims arising from the exercise of self-governing powers. That is, a child whose rights were violated by a First Nations government would be prevented from bringing a claim of liability against the federal or provincial governments for a breach of their duties towards him or her. For example the Teslin Tlingit Self Government Agreement states: "Unless otherwise agreed, the exercise of powers by the Teslin Tlingit Council pursuant to this Agreement shall not confer any duties, obligations, or responsibilities on Government." Teslin Tlingit Agreement, ibid. at para 8.5. Although less clear there is a similar paragraph in the Nisga'a Agreement; see Nisga'a Agreement, supra note 12 at General Provisions, para 19.

Manitoba, Office of the Chief Medical Examiner, The Fatalities Inquiries Act: Respecting the Death of Lester Norman Desjarlais Inquiry (Brandon: Ministry of Social Services and Housing, 1992) (Associate Chief Judge Brian Dale Giesbrecht) at 259 [hereinafter Desjarlais Inquiry].

Supra note 15.

Supra note 16. It should be emphasised that I am not suggesting that First Nations communities are going to blatantly violate the rights of their children as soon as self-government is implemented. My
1. External Limits on Self-Government

The Canadian governments could potentially justify a right to intervene in the exercise of First Nations self-governing powers on a number of grounds.\(^{25}\) They could justify interference on the basis that they are protecting the rights of other third party Canadian citizens who are adversely affected by First Nations self-government.\(^{26}\) Whilst this is the least controversial ground for intervention, it does not help vulnerable individuals within the First Nations group. A second possible justification for limiting First

\(^{25}\) The following analysis of possible justifications for federal and provincial governments to intervene in First Nations self-governing jurisdiction, draws heavily on the arguments of John D. Whyte, who has served as the director of the Constitutional Law Branch of the Saskatchewan Department of the Attorney General. See J. Whyte, “Indian Self-Government: A Legal Analysis” in *Pathways to Self-Determination*, supra note at 9 at 101 - 112 [hereinafter Whyte].

\(^{26}\) *Ibid.* at 109. The Royal Commission and the Federal Government were both unequivocal about the need to protect third party interests in the transition to self-government. The Federal Policy Guide states that it is only those matters which are wholly integral to aboriginal communities that will form the core of self-governing powers. Any powers that affect interests outside of the community are strictly curtailed. The federal government states that it is prepared to negotiate “some measure of Aboriginal jurisdiction or authority”, but fundamentally, “primary law making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws.” *Federal Policy Guide*, supra note 3 at 6. The Royal Commission takes an equally clear position on powers that affect third party interests. It too states that these powers can only be assumed through negotiation and agreement, and the federal government will retain overriding jurisdiction in accordance with the *Sparrow* standard. (For a detailed discussion of the implications of the *Sparrow* test as a basis for government intervention see above at pp. 283 - 288). The Royal Commission gives a striking example of the limits on First Nations powers when third party interests are involved: “An Aboriginal nation would not be entitled as part of its core powers to authorise activities on its territories that potentially pose risks to the health and welfare of people in adjacent jurisdictions, such as the storage of hazardous waste or the pollution of the environment. Such activities would potentially have a major impact on adjacent jurisdictions and so would require intergovernmental agreements.” *Restructuring the Relationship*, supra note 1 at 219, and see generally at 213 - 224.
Nations political autonomy would be to protect the general human rights of members of the First Nations political community who cannot protect themselves by opting out of the community, such as children. Whyte suggests that this is a convincing argument,

"An Indian child on a reservation will have no say in Indian education policy and no opportunity to leave the reservation if he does not like it. Yet he knows he will suffer the most if his schooling is inadequate. The State would have the moral right to intervene to ensure adequate education for all Indians."^27

However the duty to protect the basic rights and interests of individual First Nations citizens should fall on the First Nations governments, not non-native government.^28 Almost without doubt this responsibility will fall under First Nations jurisdiction in the self-government agreements. Any attempt by the Canadian state to 'rescue' aboriginal children from their communities pursuant to an overriding supervisory responsibility, is to fall into the same paternalistic thinking of colonialism: that the First Nations governments are incapable of doing their jobs properly therefore necessitating non-native governments intervene to keep First Nations children safe from their 'savage' leaders. This is not equality but an assertion of moral superiority by the existing Canadian governments. The same reasoning applies to justifications which focus on limiting aboriginal rights to protect other aboriginal rights from being violated.^29 Interventions on this basis are justified

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^27 Whyte, supra note 25 at 109 - 110.

^28 See e.g. B. Slattery, "First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261. Slattery argues that it is a basic fundamental premise of government that powers will be exercised for the protection and benefit of its citizens.

^29 This potential ground for intervening in First Nations self-governing jurisdiction is found in Sparrow, supra note 7 at 1113, where the Supreme Court states: "[Interference] aimed at preserving sec. 35 (1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of sec. 35 (1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial."
because they promote the welfare and safety of First Nations citizens. All these grounds for limiting First Nations sovereign autonomy suggest paternalism and the inability of the First Nations governments to look after their own people. It justifies intervention on the basis that the First Nations own welfare, as determined by the federal or provincial government, is more important than their collective freedom of choice. None of these arguments are likely to be acceptable to the First Nations people and none of them sit easily with the goal of decolonisation. Certainly any assertion by the non-native government that they know better than the First Nations themselves is to enter turbulent waters. However it is the position which the federal government would generally seem to have taken.

1.1 Attempts at Control - the Federal Government and the Royal Commission

1.1 (i) Prerequisites to Self-Government

The federal government has realised the potential conflict between self-government and the individual rights of First Nations citizens, and sought to address that conflict by a variety of methods. One alternative pursued has been to make the recognition of certain

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30 Whyte, supra note 25 at 110.

31 Ibid.

32 Ibid.

fundamental human rights, and basic standards of good democratic government, a precondition of recognising First Nations self-government.\textsuperscript{34} By insisting that self-government under sec. 35 proceed by agreement and negotiation, the federal government hopes to retain the power to demand from the First Nations that certain conditions will be met.\textsuperscript{35} The federal government’s position that before self-government is recognised the proposed First Nations government satisfy the Crown that basic requirements have been met, can be traced back to the self-government initiatives in the early 1980s. The Penner report recommended that the federal government introduce an Indian First Nations Recognition Act, which would establish criteria to be met by any First Nations government wishing to be recognised as self-governing.\textsuperscript{36} The Committee suggested the following criteria:

“(a) demonstrated support for the new governmental structure by a significant majority of all the people involved in a way that left no doubt as to their desires; (b) some system of accountability; and (c) a membership code; a procedure for decision-making and appeals, in accordance with international standards.”\textsuperscript{37}

\textit{Charlottetown Accord}; Federal Policy Guide, supra note 3; Umbrella Final Agreement, supra note 19; Teslin Tlingit Agreement, supra note 20; Nisga’a Agreement, supra note 12.

\textsuperscript{34} See Penner Report, ibid. at 57 - 58; Bill C-52, ibid. at cls. 6 - 8; Federal Policy Guide, ibid. at 12 - 14, Nisga’a Agreement, ibid. at Nisga’a Government paras. 10 - 12; Umbrella Final Agreement, ibid. at Chapter 24.

\textsuperscript{35} Federal Policy Guide, ibid. at 3 and 11. The Policy Guide states, “Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government... Prior to the conclusion of self-government agreements, federal and provincial laws would continue to apply to the extent that they do currently.” Any agreement-in-principle or final agreement must be approved by the Cabinet, and Parliamentary approval is needed for self-government treaties. This provides a final level of control for the federal government to ensure that the provisions are acceptable. Federal Policy Guide, ibid. at 25.

\textsuperscript{36} Penner Report, supra note 33 at 57.

\textsuperscript{37} Ibid.
It was thus fundamental to Penner's vision of self-government that the federal government specify minimum criteria, such as popular support and accountability, in order for the right of the First Nations to be recognised. Bill C-52 echoed these requirements. The Bill contains a section setting out the conditions that a First Nations government will have to meet in order to be recognised by the federal government as a self-governing entity. Unless the community meet these requirements they will not be eligible for recognition. The criteria include the development of a written constitution that is consistent with democratic principles and the Charter; provisions for the accountability of the First Nations government officials; provisions for the protection of the individual and collective rights of its citizens; and provisions for the removal of the existing government of the Indian Nation by members on grounds of abuse of power. The Bill also contains a clause to the effect that the First Nations government will be prohibited from passing a law which conflicts with Canada's human rights obligations.

38 The Committee also recommended that a small panel be appointed jointly by the Minister of State for Indian First Nations Relations and designated representatives of Indian First Nations to review requests for recognition and consider whether they meet the agreed criteria. Ibid. at 61.

39 Bill C-52, supra note 33 cls. 6-8.

40 Bill C - 52, Ibid. Cl. 6: "An Indian Nation shall not be recognised unless the following conditions are met: (i) that there shall exist a written constitution for the Indian nation that provides for a government with executive and legislative functions that are consistent with democratic principles and with the Charter; (iii) provide for the accountability of the government of the Indian Nation to the members of the Indian Nation; (iv) provide for clear processes to be followed in the exercise by the government of the Indian Nations of its powers; (vi) provide for the protection of individual and collective rights, (vii) identify or provide for an independent system for reviewing executive decisions of the government of the Indian Nation on grounds that they are illegal, unreasonable, or unfair; (x) provide for a mechanism for the removal of the existing government of the Indian Nation on grounds that they are illegal, unreasonable, or unfair."
"Cl. 28, No law may be made by the government of an Indian Nation that is recognized that conflicts with the Charter or any international covenant relating to human rights, signed by the government of Canada." 41

The idea that the federal government can establish criteria to determine who is ready to govern and who isn't, suggests paternalism and superiority on the part of the federal government, and it was one of the reasons presented to the Penner Committee for the rejection of the federal government's first legislative proposals.42 The federal government in its 1995 policy statement similarly insists that before the federal government will enter into an agreement with a First Nations community they must have developed adequate systems of accountability to be enshrined in their constitutions.43 Accountability is to be principally to their own citizens, but they can also be accountable to the federal parliament for expenditure.44 The federal policy is reflected in both the Nisga'a and the Yukon agreements. The agreements set down detailed provisions as to what must be included in their respective Constitutions.45 In both the protection of individual rights and freedoms is guaranteed. The Teslin Tlingit Self-Government Agreement states,

41 Ibid.

42 Penner Report, supra note 33 at 24. The Report comments, "Witnesses criticised the reference to whether bands were ready to govern, a suggestion that reinforces the colonial attitude that Indians must be taught to manage their own affairs."

43 Federal Policy Guide, supra note 3 at 12 - 14. The guide states e.g.: "Mechanisms to ensure political accountability must be developed and ratified by the Aboriginal group concerned, and set out in an internal constitution, so that they are transparent to all members, and to others who deal with the Aboriginal governments or institutions." Federal Policy Guide, ibid. at 13.

44 Ibid. at 13 - 14. The guide states: "Aboriginal governments and institutions must also must also be accountable to Parliament for funding provided by the federal government as a result of self-government agreements.”

45 See Nisga'a Agreement, supra note 12 at Nisga'a Government, para 10; Umbrella Final Agreement, supra note 19 at 24.5. (Note that the Yukon agreement uses "may include" rather than "must").
"CI. 10.1 The Teslin Tlingit Council Constitution shall: 10.1.1 contain the Teslin Tlingit Council citizenship code; 10.1.2 establish governing bodies and provide for their powers, duties, composition, membership, and procedures; 10.1.3 provide for a system of reporting, which may include audits, through which the Teslin Tlingit Council government shall be financially accountable to its citizens; 10.1.4. recognise and protect the rights and freedoms of citizens; 10.1.5 provide for the challenging of the validity of laws enacted by the Teslin Tlingit Council and for the quashing of invalid laws; 10.1.6 provide for amending the Constitution by the citizens; and 10.1.7 be consistent with this agreement."

Similar requirements of 'good democratic government' are set down in the Nisga’a Agreement. For example,

"Nisga’a Constitution: The Nisga’a Nation will adopt a constitution which, among other things will (g) require that Nisga’a Government institutions be democratically accountable to Nisga’a citizens; (h) require a system of financial administration that is comparable to standards generally accepted for governments in Canada through which Nisga’a government will be financially accountable to Nisga’a citizens; (i) require conflict of interest rules that are comparable to standards generally accepted for governments in Canada; and k) recognise and protect the rights and freedoms of Nisga’a citizens.”

Nisga’a Government will provide for appropriate mechanisms to enable persons to appeal or seek review of administrative decisions of Nisga’a government institutions which affect their interests.”

The Royal Commission tries to avoid the paternalism which is inherent in the demands of the federal government that certain fundamental principles of good democratic government, as determined by them, are included in self-government agreements. The Royal Commission recognises that it is inappropriate for the federal government to set down conditions and criteria that a First Nations community must meet before its right to self-government can be realised,

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46 Teslin Tlingit Agreement, supra note 20.

47 Nisga’a Agreement, supra note 12 at Nisga’a Government, para 10.

48 Restructuring the Relationship, supra note 1 at 182 - 184 and 314 - 320.
"For a group to hold the right of self-determination, it is not necessary for it to be recognised by the federal or provincial governments. This conclusion flows from the basic rationale of self-determination, which relates to a nation's power to control its own political destiny and establish its own governmental arrangements."\(^{49}\)

Thus in the Commission's view it is inconsistent to recognise the inherent right whilst placing conditions on the recognition of that right. However it continues that this reasoning needs to be tempered by the practical consideration that, "unless the federal and provincial governments are prepared to acknowledge the existence of a certain Aboriginal nation and to co-operate in establishing a process for implementing the nation’s right of self-determination, it will be difficult for that nation to exercise its rights in a full and effective manner."\(^{50}\)

\(^{49}\) Ibid. at 182.

\(^{50}\) Ibid. at 182 - 183. In fact the Commission goes on to set down quite detailed provisions for an Aboriginal Nations Recognition and Government Act, which in substance does not seem to differ greatly from the 'paternal' recommendations of Penner and Bill C-52. The recommendations contain detailed requirements for First Nations constitutions, including citizenship codes with appropriate appeal mechanisms, administrative review mechanisms, mechanisms for removing elected and appointed officials, and protections for individual rights principally through the application of the Canadian Charter. Once the constitution is established and approved by the First Nation, "the third stage would be an application for recognition." The application will be decided by a neutral recognition panel. The panel would be made up of a majority of aboriginal representatives but its mandate would be to investigate whether the proposed constitution meets the established criteria under the Recognition Act. A recommendation will be made to the Governor in council on whether the First Nation's government should be recognised. These recommendations do not really advance on Penner a decade before, except for majority aboriginal representation on the recognition panel. However the Royal Commission is sensitive to the point that logically the decision of the panel could not be imposed on the First Nation to undermine its right to self-determination: "Although the government would not be obliged to accept the panel's recommendation, it would have to have compelling reasons not to do so and should be required to state those reasons publicly." Restructuring the Relationship, ibid. at 314 - 320.
1.1 (ii) Consistency with Federal or Provincial Standards

Another important mechanism which has been used by the federal government to try and secure certain standards are met is to insist that when a First Nations government is exercising jurisdiction, it is exercised according to federal or provincial standards. The Nisga’a agreement, for example, states that whilst the Nisga’a have jurisdiction over the delivery of child welfare services, including legislative powers, a precondition of exercising that jurisdiction is that they provide child protection and welfare services equivalent to those provided by the province,

“Nisga’a Government may make laws in respect of Child and Family services on Nisga’a Lands, including the protection of children, provided that, (a) it establishes standards comparable to provincial standards intended to ensure the safety and well-being of children and families.”

A similar precondition is placed on Nisga’a jurisdiction over adoption. The Agreement establishes that Nisga’a government will be able to make laws in respect of the adoption of Nisga’a children provided it expressly states that the province’s standard of the best interests of the child is the paramount consideration in determining if the adoption of the child should take place. The Yukon Umbrella Agreement also provides that existing standards prevalent in the territory should be met, particularly where the community is responsible for delivering services. However, the language in the individual agreements is

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51 Nisga’a Agreement, supra note 12 at Nisga’a Government para 49 (a).

52 Ibid. Nisga’a Government, para 46 (a): “Nisga’a Government may make laws in respect of the adoption of Nisga’a children, provided that: a. Nisga’a law will expressly provide that the best interests of the child be the paramount consideration in determining whether an adoption will take place.”

53 Umbrella Final Agreement, supra note 19 para 24.6.1.2. : “Financial Transfer Arrangements specify obligations of all parties, including minimum program delivery standards for programs to be delivered by the Yukon First Nation.” For a brief commentary on the funding of self-government under the Yukon agreements see “Implementing Self-Government,” supra note 1 at 210.
not as strong as the Nisga’a agreement in making it a precondition of the exercise of jurisdiction, or the Umbrella agreement in making it a precondition of funding. The language in the Teslin Tlingit Agreement suggests that securing equivalent minimum standards is a common objective of both sides. The Agreement states,

‘2.2 - The parties are committed to promoting opportunities for the well-being of citizens equal to those of other Canadians, and providing essential public services of reasonable quality to all citizens.”

The desire to ensure that services are provided to the same standards that prevail in the province is reflected in the funding arrangements. The funding is to be provided unconditionally, but with the objective of ensuring that the Teslin Tlingit Council can “provide public services at levels reasonably comparable to those generally prevailing in the Yukon.” The provisions for the delivery of services state,

“Negotiations pursuant to sec. 17.1 [the transfer of the delivery of programs and services] shall have the following objectives, 17.3.1., to provide resources adequate to ensure that the program or service to be offered by the Teslin Tlingit Council is of a level and quality equivalent to the Government program or service, and existing program or service quality is not diminished.”

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54 Teslin Tlingit Agreement, supra note 20 at para 2.2.

55 Ibid. para. 16.6, “Payments pursuant to the self-government financial transfer agreement shall be provided on an unconditional basis except where criteria or conditions are attached to the provision of funding for similar programs or services in other jurisdictions of Canada.” However this seems to contradict the provision in the Umbrella Agreement which states that financial transfer agreements may “specify the obligations of all parties, including minimum program delivery standards for programs to be delivered by the Yukon First Nations.” (Sec. 24.6.1.2, supra note 53).

56 Teslin Tlingit Agreement, ibid. at para. 16.1.

57 Ibid. at para 17. A similar provision on financial transfer is found in the Charlottetown Accord, Charlottetown Accord, supra note 33. Cl. 50 provides that Aboriginal governments had to be capable of “providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.” See “Implementing Self-Government,” supra note 1 at 209 - 210. Hogg and Turpel argue that Charlottetown accepted the principle that transfer payments to Aboriginal governments should be sufficient to enable those governments to provide public services of similar quality to those provided by
However, what is perhaps the most striking feature of the agreement is that, unlike the Nisga’a agreement, the territory’s standards are not imposed. The jurisdictional provisions are silent on the need to meet territorial standards and whilst the funding requirements reflect the desire to provide services of equal quality, the standards to be met are to be negotiated, not dictated.

“17.3 Negotiations pursuant to 17.1 shall have the following objectives: 17.3.5, to provide mechanisms for negotiating basic common standards between government and Teslin Tlingit Council programs and services.”

To guarantee common standards acceptable to both the territory and the self-governing community through negotiation and agreement, rather than demanding territorial standards are met as a precondition of jurisdiction, is more consistent with the inherent right policy and the sovereign autonomy of First Nations communities to establish their own child welfare practices and standards.

1.1 (iii) Retention of Paramount Federal Jurisdiction

In conjunction with the government’s demands that provincial/federal standards be met, they have also tried to retain jurisdiction to override First Nations legislation or service/program delivery by reserving their paramount authority in matters of fundamental other levels of government, and that this principle should be reflected in any new self-government agreements.

58 Teslin Tlingit Agreement, ibid.

59 This theme of negotiating common standards which are acceptable to both the federal and provincial governments and First Nations, rather than simply imposing the federal government’s view, will be explored in the context of child welfare in chapter five.
importance. This may well provide them with the legal basis to usurp First Nations jurisdiction if they consider that the fundamental rights and freedoms of First Nations children are being violated by their government. It was earlier noted that one of the major reasons why the Charlottetown Accord was rejected by aboriginal communities was because of the attempt by the federal government to retain a general overriding authority,

'35.4 (1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.
(2) No aboriginal law or any other exercise of the inherent right of self-government under sec. 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.'

The precedent for the government retaining general overriding authority is found in Bill C-52. Bill C-52 provided that the federal government would have power to take control of a self-governing community if it abused its powers or found itself in financial difficulties. The community would then be administered by the federal government who would appoint an administrator to carry out the essential functions of government. During this time the First Nations government would be prohibited from exercising any self-

60 Charlottetown Accord, supra note 33 para 29, suggested amendment to the Constitution Act, 1982, sec. 35.4. For commentary see “Implementing Self-Government,” supra note 1 at 203. Hogg and Turpel suggest that First Nations fears over this clause were ungrounded. They argue that the “peace, order and good government” clause would have been given a narrow scope by the courts, covering only emergency laws and laws designed to prevent harm to non-aboriginal people or land. They thus conclude that, “[i]t is reasonable that laws of this category should apply to Aboriginal peoples, and should not be subject to displacement by Aboriginal laws...these kinds of limits on Aboriginal government jurisdiction would not be major issues from a pragmatic perspective.” For further discussion see A. Bissonette, “Analyse posthume d’un accord mis ‘à mort” (1993) Recherches Amerindiennes au Quebec 80 at 83 - 84; and P.W. Hogg, Constitutional Law of Canada, 4d ed. (Toronto: Carswell, 1996).

61 There does not appear to be any provision for overriding federal jurisdiction in the Penner Report, supra note 33.
governing powers.\textsuperscript{62} The self-government proposals of the Royal Commission and the federal government, in terms of the retention of federal jurisdiction, are no improvement on the rejected text of the Charlottetown Accord. The federal policy statement, 1995, states in very similar terms to Charlottetown,

"The government takes the position that negotiated rules of priority may provide for the paramountcy of Aboriginal laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws. Prior to the conclusion of self-government agreements, federal and provincial laws would continue to apply to the extent that they do currently." (my emphasis)\textsuperscript{63}

The government divides potential self-governing powers into three categories: the first is constituted by the core jurisdictional areas,\textsuperscript{64} the second by the powers on which the federal government is willing to negotiate,\textsuperscript{65} and the third category contains the powers on which the federal government has declared it will not negotiate jurisdiction and authority.\textsuperscript{66} The subject matters in this third category fall into two groups: (i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national

\textsuperscript{62} Bill C-52, supra note 33, cl. 26 (1) Where the Minister is of the opinion that the government of an Indian Nation that is recognised has abused its powers, is in serious financial difficulty, or is unable to perform its functions, he may give written notice to that government of his intention to appoint an administrator to carry out the essential functions of the government, setting out his reasons for doing so."

\textsuperscript{63} Federal Policy Guide, supra note 3 at 11.

\textsuperscript{64} Ibid. at 5. The guide states: "Broadly stated, the Government views the scope of Aboriginal jurisdiction or authority, as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."

\textsuperscript{65} Ibid. at 6. The guide states, "[t]here are a number of other areas that may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. To the extent that the federal government has jurisdiction in these areas, it is prepared to negotiate some measure of Aboriginal jurisdiction or authority."

\textsuperscript{66} Ibid. at 6-8.
interest powers. The policy statement asserts that in these areas it is essential that the federal government retain its law-making authority. The only subject which could impinge on autonomous child welfare jurisdiction falls under the "national interest powers": the retention of federal paramountcy to secure the "protection of the health and safety of all Canadians." The policy statement contains no guidelines on what will happen if powers under category one and powers under category three come into conflict. However given the insistence on continuing federal paramountcy in areas of overriding national interest it is almost certain that category three powers will prevail. It is therefore quite possible that the federal government could override First Nations child welfare legislation and agency practices exercised pursuant to the inherent jurisdiction of category one powers, on the basis that it conflicts with provincial child welfare laws or breaches the fundamental human rights of the child. Certainly a strong case could be made that laws which protect children from abuse are laws concerned with the "health and safety of Canadian citizens" and are of "overriding national or provincial importance." The

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67 Ibid. at 7.
68 Ibid.
69 Ibid.
70 Ibid. at 11.
71 Ibid. at 7. This argument should be balanced by the arguments of Hogg and Turpel which suggest that the retention of overriding jurisdiction will be of limited practical significance. Supra note 60; "Implementing Self-Government," supra note 1 at 203. The Nisga'a Agreement does not appear to provide for the retention of federal jurisdiction. In fact it provides, "Nisga'a government has primary responsibility to make laws in respect of the following matters. In the event of an inconsistency between Nisga'a laws pursuant to paras. 28 to 31 and federal or provincial laws of general application, Nisga'a law will prevail to the extent of the inconsistency." Nisga'a Agreement, supra note 12 at Nisga'a Government, para. 27.
Yukon agreement, for example, clearly anticipates that federal powers may override First Nations government in some areas of jurisdiction,

"13.5.1 Unless otherwise provided in this Agreement, all laws of General Application shall continue to apply to the Teslin Tlingit Council, its citizens, and settlement land. 13.5.2. Canada and the Teslin Tlingit Council shall enter into negotiations with a view to concluding as soon as is practicable, a separate agreement or an amendment of this Agreement which will identify the areas in which laws of the Teslin Tlingit Council shall prevail over federal laws of General Application to the extent of any inconsistency or conflict."72

No agreement has been entered into. Clearly if you are in the federation there are certain standards and principles over which the province and federal government may well insist on having the last word.

The Royal Commission similarly argues that although within the core sphere of First Nations jurisdiction the authority of the government is protected, in the sense that it will not be subject to 'indiscriminate federal or provincial interference,'73 the federal government retains the authority to pass laws which take precedence over aboriginal laws, "in matters of overriding importance to the federal government."74 The exact meaning of "matters of overriding importance" is not explored, but the Commission suggests that this federal power of paramountcy will operate as federal paramountcy was envisaged in

72 Teslin Tlingit Agreement, supra note 20. See commentary of Hogg and Turpel, "Implementing Self-Government," ibid. at 204. Although the Yukon agreement does not conclude the position on overriding federal laws, the Sechelt Self-Government legislation gives some indication of the government's position. The legislation provides that in the event of an inconsistency between a provincial law and a band law, the band law is paramount. However in the event of an inconsistency between a federal law and a band law, the federal law is paramount. See Sechelt Indian Band Self-Government Act, S.C. 1986, c. 93 ss. 37 and 38.

73 Restructuring the Relationship, supra note 1 at 214.

74 Ibid.
Sparrow. Thus aboriginal and treaty rights will be immune except where a high constitutional standard can be satisfied,

"This conclusion flows from the Sparrow decision, where Aboriginal rights and treaty rights were treated as immune to legislative inroads, except where a high constitutional standard could be satisfied. According to this view, Aboriginal governments are not subordinate to the actions of other governments, but neither are they entirely supreme. They occupy an intermediate position. In cases where an Aboriginal law conflicts with a federal law, the Aboriginal law will prevail except where the federal law can be justified under the Sparrow doctrine."  

If we adopt the Sparrow standard as appropriate for monitoring federal intervention the autonomy and authority of First Nations governments may well be significantly undermined. The problem particularly lies in the subsequent interpretation that has been given to the Sparrow test. As applied in subsequent case law the Sparrow test may amount to little more than a public interest justification. In Sparrow the Court held that infringement of constitutionally protected aboriginal rights could not be justified on the basis of the 'public interest.' The court held the 'public interest justification' to be "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights." The 'reasonableness' standard

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75 Ibid. See Sparrow, supra note 7.

76 Restructuring the Relationship, ibid.


79 Sparrow, supra note 7 at 1113.

80 Ibid.
was rejected for similar reasons. The test as laid down in \textit{Sparrow} is twofold: the government must first show substantial and compelling reasons for the legislative intervention, and second, it must show that its actions are consistent with its fiduciary duty towards the First Nations people. This justificatory standard was considered again in \textit{R v Gladstone}. McNeil argues that in \textit{Gladstone} the Supreme court took a “significantly different approach than that taken in \textit{Sparrow}.” Lamer C.J. giving judgment held that the objectives behind the infringement of aboriginal rights would have to be “compelling and substantial.” He went on to say, however, that the purposes underlying sec. 35 were relevant to the justification standard for limitations placed on those rights. Lamer L.J. set down the purposes underlying sec. 35 in \textit{Van der Peet},

‘First, it is the means by which the constitution recognises the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.”

It is the second aspect of this test which has the potential to be extremely damaging to aboriginal autonomy. In effect it encapsulates the principle that if the First Nations

\textit{Ibid.}

\textit{Ibid.} at 1110.


\textit{Ibid.} note 78 at 34.

\textit{Ibid.} at 35. Citing \textit{Gladstone}, \textit{supra} note 83 at para 70.


community is to operate within the context of Canadian confederation it must accept that their right will be subject to such limitations as are necessary to preserve the fundamental values and interests of Canadian society,

"Because...distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of the community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation between aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation." 88

Whereas in Sparrow Dickson's examples of "compelling and substantial" reasons were limited to conserving the resources which are necessary for the exercise of the aboriginal right in the future, or to ensure the rights are not exercised in a dangerous way, or to resolve a conflict between the constitutional rights of native and non-native Canadians, 89 in Gladstone, as criticised by Justice McLachlin, the interpretation of the Sparrow test extended the meaning of "compelling and substantial" purpose, "to any goal which can be justified for the good of the community as a whole, aboriginal and non-aboriginal." 90 The decision in Gladstone was concerned particularly with fishing rights and the distribution of the resource. Lamer C.J. held that after conservation goals had been met, "objectives such as the pursuit of economic and regional fairness, and the recognition of the historical

88 Ibid. Citing Lamer C.J. in Gladstone, ibid. at para 73.

89 Ibid.

90 Ibid. at 36 (citing McLachlin in R v Van der Peet).
reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard.\textsuperscript{91} These broader considerations of fairness, recognition of non-native interests, and the good of the community as a whole, are clearly not the stringent test \textit{Sparrow} envisaged, but a much more general concept of the public interest. In the specific context of \textit{Gladstone} the question concerned the reconciliation of the interests of the native and non-native fisheries. However a weakened \textit{Sparrow} test will undoubtedly have effects when government intervention is scrutinised in other areas. It could certainly be argued that federal intervention for the purpose of protecting aboriginal children from abuse would fall within the scope of a public interest type justification.\textsuperscript{92} Thus the federal government could potentially override a child welfare law or practice of a self-governing First Nations community on the basis that the safety and protection of aboriginal children, Canadian citizens, is a matter of fundamental public interest. The \textit{Sparrow} test still remains in place and the justificatory standard it sets down must still be met. There is thus still hope that the court will demand “substantial and compelling reasons” that are consistent with a high fiduciary standard when aboriginal rights are infringed. However, as McNeil concludes,

\textsuperscript{91} \textit{Ibid.} at 35 (citing \textit{Gladstone, supra} note 83 at para 75).

\textsuperscript{92} It is also possible that this falls within the \textit{Sparrow} test in any case. As Justice McLachlin interprets \textit{Sparrow}, compelling and substantial objectives include “conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves.” McNeil, \textit{ibid.} at 36 (citing McLachlin in \textit{R. v Van der Peet}). See \textit{Sparrow, supra} note 7 at 1113. The latter part of this statement is blatant paternalism on the part of the federal government. \textit{Supra} note 29.
the "deferential attitude to government policy which I detect in Gladstone is disappointing to say the least, and does not augur well for the future."\textsuperscript{93}

One therefore has to question whether real autonomy is being secured for First Nations self-governing communities when the Canadian government and the Royal Commission insists on subjecting their exercise of powers to provincial or federal standards, and on reserving substantial overriding controls. Clearly an important practical change will be secured by transferring day to day control over matters such as child welfare to the community. However by failing to challenge the Canadian government's assertion of sovereignty, and the overriding importance given to the existing values of the Canadian state, it is certainly questionable whether the inherent right policy of the government makes any significant inroads on the colonial paternalism of the Canadian government. The use of federal regulation and overriding law making powers has the potential to be used in a paternalistic supervisory manner to 'protect the aboriginal people from themselves,' and to protect the 'values' of Canadian society as a whole. This hardly amounts to successful decolonisation. It also denies the First Nations a role in defining those 'values' and standards which should be protected by an overriding authority. They may well agree with the federal government on the standards and values to be observed in a child welfare system. Crucially however to this point their views have not been heard. The justification for federal paramountcy over core jurisdiction areas is basically two-fold: it springs from a basic assertion of British sovereignty over the aboriginal people, and is supported by the apparent submission of the aboriginal people to that sovereignty by

\textsuperscript{93} McNeil, \textit{ibid.} at 39.
Thus the current inherent policy makes no real attempt to challenge the colonial power structures of the Canadian government, particularly its claim to sovereignty, and fails to recognise that the First Nations have never been able to negotiate their way into confederation on fair and equal terms. Consequently, at this point the supposed autonomy of the First Nations people is beginning to look less than stable and the colonial structures of the Canadian government as strong as ever.

1.2 The Application of the Canadian Charter of Rights and Freedoms

The attack on First Nations autonomy is not however complete. Without doubt the federal government’s most important weapon of control in ensuring that the fundamental human rights of First Nations children are guaranteed under self-government, and conversely that First Nations governments are bound by the fundamental principles of the Canadian state, is its insistence that First Nations governments will be bound by the Canadian Charter of Human Rights and Freedoms,

"The Government is committed to the principle that the Canadian Charter should bind all governments in Canada, so that Aboriginal peoples and non-aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-Government agreements including treaties, will therefore have to provide that the Canadian Charter applies to aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities."  

94 See above at chapter two pp. 100 - 109 for a detailed discussion of these issues. See especially, Restructuring the Relationship, supra note 1 at 193 - 213. For literature on the assertion of British sovereignty over Canada see supra note 2.

The Royal Commission takes the same view,

"In our view the Canadian Charter applies to aboriginal governments and regulates relations with individuals within their jurisdiction...First all people in Canada are entitled to enjoy the protection of the Charter's general provisions no matter where in Canada the people are located or which governments are involved. On this ground alone, the general provisions of the Charter apply to Aboriginal governments and section 32 (1) of the Charter should be read in this light." 96

To support this position it is simply argued that as a matter of basic constitutional principle, it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada except for First Nations governments. 97 The provisions of the Charter ensure that there is a uniform level of protection for the basic rights and freedoms of individuals across Canada. 98 It is argued that these basic freedoms should exist whether a person is living in an aboriginal community or elsewhere, and they should be enforceable against all types and levels of

96 Restructuring the Relationship, ibid. at 230.

97 Ibid. at 227.

98 Ibid.; see also Kim Campbell, supra note 3 at 22.
governments, whether First Nations, federal, provincial, or territorial. The Charter is clearly seen to embody the fundamental norms and values of Canadian society, and thus its uniform application across all of Canada has vital symbolic significance for the unity and solidarity of the country.

In terms of ensuring that First Nations governments are accountable for any actions they take which adversely affect the basic human rights of First Nations children, the application of the Charter would be extremely important. In addition to the general guarantees that basic standards of good government will be met, important protections for

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99 Restructuring the Relationship, ibid. at 227.

100 See e.g. the comments of Brian Dickson, supra note 97.

individual First Nations children could be provided by sec. 7 of the Charter: the right to life, liberty and security of the person. Subject to secs. 1 and 25, this provision could protect an individual against 'traditional' child welfare practices or child welfare legislation adopted by a First Nations government which arguably violates the child's individual human rights by placing his or her health and safety at risk. Sec. 7 could also protect the child against the possible demand of the group that overriding importance be given to their collective right to cultural survival, even if the individual rights of the child must be sacrificed. For example, were the government to legislate or adopt a policy that all

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102 Sec. 7 states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A useful indication of the court's attitude towards the overriding importance of the child's individual right to life and security of the person is afforded by the case law dealing with conflict between parent's rights to freedom of religion and the child's rights under sec. 7, represented by the State's intervention on the child's behalf. The Supreme Court of Canada in R.B. v Children's Aid Society of Metropolitan Toronto [1995] 1 S.C.R. at 315 held that "children undeniably benefit from the Charter, most notably in its protection of their rights to life and to the security of their person." The court depicts the role of the State as 'protecting children whose lives are in jeopardy and to promote their well-being." It goes on to state that, "the protection of a child's right to life and health is a basic tenet of our legal system." Justices Cory, Iacobucci and Major state that "there is no room within sec. 7 for parents to override the child's right to life and security of the person. To hold otherwise would be to risk undermining the ability of the State to exercise its legitimate parens patriae jurisdiction and jeopardise the Charter's goal of protecting the most vulnerable members of society." It can be argued that any action of a First Nations government which violated such a 'basic tenet of our legal system" would be almost certainly struck down under the Charter. To argue that a First Nations government would be sanctioned in overriding the protections afforded by section 7 would be simply antithetical to the Supreme Court's reasoning. For further discussion on the protection of a child under the Charter and the expected role of government in that process see, S. (M.K. v Nova Scotia (Minister of Community Services) [1988] N.S.J. No. 302 (QL); Re T and Catholic Children's aid Society of Metropolitan Toronto, 1984, 46 O.R. (2d) 347; Re K et al. and Children's Aid Society of Hamilton-Wentworth v. K (L.), 1989, 70 O.R. (2d) 466. For general commentary on importance of the Canadian Charter to children see D.A.R. Thompson, "The Charter and Child Protection: the Need for a Strategy" (1986) 5 Can. J. Fam. L. 55; N. Bala and J.D. Redfearn, 'Family Law and the 'Liberty Interest": Sec. 7 of the Canadian Charter of Rights" (1983) 15 Ottawa L. Rev. 274; J. Wilson, "Children and Equality Rights" in A. Bayefsky, and M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 293 - 322.

103 For a detailed discussion of the capacity of these provisions to protect aboriginal cultures and traditions from erosion due to the protection of individual rights under the charter see above pp. 308 - 316.

104 For a detailed discussion on the protection of the individual under the Charter and how such protection can be reconciled with collective and group concerns, see above pp. 316 - 325.
First Nations children were to be found alternative care within the community even if the homes did not meet minimum standards of safety, a sec. 7 claim could be made that this violated the child’s right to security of the person. A possible claim could also be made that forcing children to remain in the community for the survival of the cultural collective violates the child’s right to freedom of association under sec. 2 (d) of the Charter.105 This could be of particular importance in the case of an older child where his or her wishes are ascertainable. This was the case in Jane Doe v Awasis Agency106 where it was clear that the child did not want to return to her community but her wishes were ignored. However, these arguments only hold strength if it is prima facie legitimate to insist that the First Nations governments should be bound to guarantee these ‘western democratic rights’ and meet the imposed standards of non-native society.

The insistence of the federal government that the Charter will apply to self-governing First Nations communities has been one of the most controversial issues in self-government negotiations.107 The AFN has always taken the position that no Canadian

105 Sec. 2 of the Charter states, “Everyone has the following fundamental freedoms: (d) freedom of association.”


107 It is interesting to note that there has been some discussion on whether the Charter will apply automatically to aboriginal communities regardless of whether they agree to this or not. This argument turns upon the language of sec. 32 (1) of the Charter which identifies those main government bodies which are to be subjected to the Charter. First Nations governments are not identified. The Royal Commission argues that sec. 32 (1) does not state that the Charter applies exclusively to those bodies or provide a complete list of government bodies affected. Therefore the section leaves open the possibility that there are other government bodies, not mentioned in the section that are subject to the Charter’s provisions. According to this argument if a First Nations government becomes a third order of government in Canada it will be automatically bound. However the opposite position can also be taken: that an Aboriginal government cannot be held accountable in Canadian Courts for alleged violations of the Charter as sec. 32 does not stipulate that the Charter will apply to them. Consequently unless the Aboriginal nation in question has previously consented to the application of the Charter in a binding
constitutional provisions may undermine or limit the aboriginal peoples right to self-government. Underlying this position is the fundamental argument that for the federal government to insist on the application of the Canadian Charter of Rights and Freedoms to self-governing communities is to impose on the First Nations an ethnocentric instrument of colonialism. It is argued that the individual rights embodied in the Charter are foreign to traditional First Nations cultures and to insist they comply with such rights under self-government is just another tool of assimilation.

"The Charter expresses the values of a liberal democracy in the European model. It favours individualism and assumes a highly organised and impersonal industrial society. To apply those values to Native societies is to destroy them." (Lyon)

constitutional instrument, such as a self-government treaty, it will not apply. This argument draws support from the fact that section 35 of the Constitution Act is located outside of the Charter and that this deliberate separation of aboriginal rights from the Charter provisions indicates that Aboriginal and treaty rights are not to be balanced against other rights within the context of the Charter. See Restructuring the Relationship, supra note 1 at 228. The federal policy states that the application of the Charter will be provided for in each self-government agreement. Federal Policy Guide, supra note 3 at 4.

108 Sexual Equality as an Aboriginal Right, supra note 12 at 111. See also “Sharing Canada’s Future,” supra note 14 at 2 - 3; and “Getting Together on Native Claims,” supra note 95. The First Nations leadership did however make a huge concession by agreeing in the Charlottetown Accord that the Charter would apply as of right to aboriginal governments. That concession was balanced by a strengthening of sec. 25 to ensure that nothing in the Charter would abrogate or derogate from aboriginal or other rights and in particular rights or freedoms relating to the exercise or protection of aboriginal languages, cultures, or traditions. Moreover the First Nations were secured access to sec. 33 of the Constitution Act, 1982 under conditions similar to federal and provincial governments. Charlottetown Accord, supra note 33. See Menno Boldt, Surviving As Indians: The Challenge of Self-Government (University of Toronto Press, 1993) at 101.

109 For strong accounts of this view see especially, “Interpretive Monopolies,” supra note 14; “Contradictions and Challenges,” supra note 11; “Tribal Philosophies,” supra note 11; “Sharing Canada’s Future,” supra note 14 at 2-3. See also I. Barkin, “Aboriginal Rights: A Shell Without A Filling” (1990) 15 Queen’s L.J. 307 [hereinafter “A Shell Without a Filling”]. The view of Mary Ellen Turpel on the Canadian Charter as expressed in the former two articles seems to have modified slightly in her later writings; that is, she accepts the Charter will apply to self-government. However her concerns over its cultural legitimacy remain strong and clear. See especially, “Implementing Self-Government,” supra note 1 at 213 and her views at the time of the Charlottetown Accord as reported in “Reform Attacks Native Self-Rule,” supra note 95. For an excellent commentary on First Nations concerns concerning the application of the Canadian Charter and recommendations as to resolve the dispute see “Implementing Self-Government,” ibid. at 213 - 216.

110 “A Shell Without the Filling” ibid. at 311.
To apply this hypothesis to the protection of a First Nations child under sec. 7 of the Charter: if a broad definition is given to "liberty" under sec. 7 which wholly vindicates the individual rights of the child, as opposed to the collective interests of the group, this can be argued to simply impose the foreign individualistic philosophy of non-native society on First Nations culture and traditions. If First Nations communities believe that the right of the collective to survival is more important than the best interests of one individual child and thus legislate that no child is to be removed from the community in any circumstances, then for the court to override that legislation on the basis that it compromises the life, liberty, and security of the individual child, is to negate the distinctive insight of First Nations culture on communal and collective values.\textsuperscript{111} It could be argued therefore that the individual rights of sec. 7 are completely inconsistent with First Nations philosophy and culture.

\textsuperscript{111} For a discussion on the collective values of First Nations communities in the context of child welfare see e.g. British Columbia, Community Panel Family and Children’s Services Legislation Review in British Columbia, \textit{Liberating Our Children, Report of the Aboriginal Committee}. \textit{Liberating Our Children, Liberating Our Nations}, by Lavinia White and Eva Jacobs (Victoria, B.C.: Queen’s Printer for British Columbia, 1992) at 9 - 10; Manitoba, Review Committee on Indian and Metis Adoptions and Placements, \textit{No Quiet Place, The Final Report to the Hon. Muriel Smith, Minister of Community Services}, by Edwin. C. Kimelman (Winnipeg, Manitoba Community Services) at 163 - 166; Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 CJWL 1 at 6. Note however the comments of Mary Ellen Turpel in "Interpretive Monopolies," supra note 14 at 16 - 17 where she argues, "I would take issue with some scholars on their projection of 'society' as an either - or [individualistic or collectivist], and caution against an attempt to typify, for example, an Aboriginal society in such a fashion."
1.2 (i) *The Philosophical Foundations of the Charter*

The liberal philosophy of the West on which the Charter is founded is distinctive for its emphasis on democracy, individualism, and protection from State power.\(^{112}\) The individualistic concept of rights can trace its foundations back to the naturalist school and the philosophy of the social contract.\(^{113}\) Locke's theory of natural rights is founded on the idea that every human possesses a right to private property.\(^{114}\) Locke argues that the central reason why humans emerged from an isolated independent existence in a state of nature was to protect their property rights against attack.\(^{115}\) This consensual act forms the legitimate source of governmental authority whilst it "expresses and preserves the idea of individual autonomy and self-rule."\(^{116}\) Mill advances on these foundations by emphasising the importance of private autonomy and the need to protect the individual from the will of the majority.\(^{117}\) The liberalism of Mill emphasises the idea of "an autonomous zone of absolute individual right"\(^{118}\) within which the individual is protected from outside control.

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\(^{113}\) Locke is credited with the pre-eminent theory of natural rights, and along with Hobbes provides the foundation for the Anglo-American concept of rights.

\(^{114}\) "Contradictions and Challenges," *supra* note 11 at 242.

\(^{115}\) *Ibid.*

\(^{116}\) *Making All the Difference*, supra note 101 at 149.


\(^{118}\) "Contradictions and Challenges," *supra* note 11 at 243.
This notion of a society constituted of autonomous individuals forms the philosophical underpinning for the dominant western school of liberalism.\footnote{119} Against this individualistic tradition of rights the critical legal school argue that despite its claims to be "inclusive, participatory and egalitarian", it actually "replicates a process of exclusion and subordination."\footnote{120} Liberalism claims to have found a truly universal theory of rights based on the universality of human nature and the unique worth of each individual.\footnote{121} Every individual when stripped of their cultural and social contextualisation is deemed to be the holder of intrinsic inalienable rights. This 'sameness' now usually rooted in human rationality, secures equality.\footnote{122} However, despite these claims to universalism it would seem incontrovertible that the Western school of liberalism is rooted in a particular cultural tradition.\footnote{123} The claims to universalism by non-

\footnote{119} This vision of liberalism was recently expounded and confirmed, particularly by Madam Justice Wilson, in \emph{R v Morgentaler} (1988) 1 S.C.R. 30 (S.C.C): "Thus the rights guaranteed in the Charter erect around each individual, metaphorically speaking an invisible fence over which the state will not be allowed to trespass....Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does however require the state to respect them."

\footnote{120} \emph{Making All the Difference}, supra note 101 at 149.


\footnote{122} \emph{Making All the Difference}, \emph{ibid.} at 149.

\footnote{123} \emph{Ibid.} at 154. See also \emph{A Quest for Consensus}, supra note 121 and \emph{Universalism v's Cultural Relativism}, \emph{supra} note 121. Both An’Naim and Renteln present a strong case for the ethnocentricity of liberal discourse, particularly as manifested in universal human rights. For further discussion on this point see E. Darian-Smith and P. Fitzpatrick, "Laws of Post-Colonialism: An Insistent Introduction" in Eve Darian-Smith and Peter Fitzpatrick, ed., \emph{Laws of the Post-Colonial} (Madison: University of Michigan Press, forthcoming).
native society can be justifiably characterised as ethnocentric and imperialistic. Rights ideology certainly seems to exclude from its ambit the societal understanding of many of the native and minority groups living under its ‘universal’ ethos.

Particularly problematic is that the social contract ‘presumes to address only autonomous, independent individuals who can separate themselves from others and enter freely, unencumbered into an agreement about how to conduct private and public affairs.” For example, the Rawlsian social contract is founded on the abstract individual divorced from any attachment to others. This not only has worrying connotations as to who is deemed to have this rational autonomy, perhaps excluding children, but also

124 Making All the Difference, ibid.

125 See e.g. B. Ashcroft, G. Griffiths, and H. Tiffin, “Commentary” in The Post Colonial Studies Reader, supra note 13 at 55. The authors argue that it is universalism’s concept of a unitary and homogenous human nature which marginalises and excludes the distinctive characteristics and differences of post-colonial societies. The post-colonial school have identified some of the destructive effects that the imposition of Western individualistic and capitalist ideology had on traditional communities to which such concepts were foreign and inappropriate. In the context of child welfare practices see especially, R. Rwaza, “The Concept of the Child’s Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa” in P. Alston, ed., The Best Interests of the Child, Reconciling Culture and Human Rights (Clarendon Press, Oxford, 1992) 82.

126 Making All the Difference, supra note 101 at 150.

127 A Theory of Justice, supra note at 112.

128 The utility of invoking rights to protect the interests of children has been the subject of limited academic debate. O’Neill argues that the rhetoric of rights is mainly useful to powerless agents who can employ the discourse of rights to advance their struggle. The ‘will theory’ of rights advances that in order to be a holder of rights the individual must be capable of agency, that is determining their own interests and having the ability to both assert and waive their rights. According to this view anyone lacking the capacity to negotiate their own interests, such as children, cannot have the capacity to hold individual interests. See O. O’Neill, “Children’s Rights and Children’s Lives,” supra note 16. Opposed to O’Neill’s argument however is the ‘interest’ theory of rights which asserts that rights derive from the holding of certain interests, for example to health, food and protection from abuse, which do not depend on the ability of the rights holder to act as agent in asserting those rights. They can be adequately enforced by others. See, T. Campbell, “The Rights of the Minor,” supra note 16; and A. Freeman, “Taking Children’s Rights More Seriously,” supra note 16.
excludes any who would identify themselves as members of groups first, rather than as autonomous individuals. The traditional liberal view is that the individual is in no way deemed to be dependent on his or her social, and cultural group. This logically will exclude any disadvantaged or minority groups who are engaging in a 'class' struggle against oppression and who seek to put the cause of the group before their own individual interests. It also excludes those groups whose traditions are based on principles of community rather than individual competition and advancement.

The charge of the rights critics that the liberal concept excludes those very groups who now face having its product: the Charter enforced upon them, seems well founded when applied to the First Nations. Their philosophy, culture and perception of the world arguably excludes them from engaging with the individualistic concept of rights. It is

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129 Making All the Difference, supra note 101 at 151. See further supra note 109.


131 Supra note 11 and 109.

132 Ibid. In particular see “Contradictions and Challenges,” supra note 11; and “Tribal Philosophies,” supra note 11. These short essays provide an excellent introduction to the arguments concerning the cultural differences between the norms of the Canadian Charter and the First Nations. The following discussion will draw heavily on their arguments although some of the dichotomies they discuss between native and non-native cultures should not be unquestioningly assumed given the contemporary diversity of aboriginal cultures. For a contrasting view of the usefulness of rights discourse in the struggle of First Nations for recognition, and a cautious argument as to the cultural legitimacy of the Charter for some First Nations see J. Borrows, "Traditional Contemporary Equality," supra note 95.
suggested that the notion of rights based on individual ownership is antithetical to the understanding of many First Nations cultures concerning creation and their responsibility of ‘stewardship’ to the land. Boldt and Long argue that ‘[s]ociety is conceived of as cosmocentric rather than homocentric.” Turpel similarly argues that the First Nations do not share the idea of people living in community only to protect their private individual property interests. Essentially there is no concept of the private ownership of property on which such a philosophy could be built: “[t]he collective or communal base of Aboriginal life does not have a parallel in individual rights.” These critics argue that on one hand we have the Western tradition of “individualism, competition and self-interest” standing opposed to the First Nations philosophy of “spiritual unity, consensus, co-operation, and self-denial. Again such dichotomies between the cultures must be treated with caution given the contemporary hybridity of First Nations cultures. However, it is argued by both Turpel and Boldt and Long that the Western liberal tradition incorporated in the Canadian Charter of Rights and Freedoms which conceives of human rights in terms of individual empowerment poses a ‘serious threat’ to the cultural identity and survival of the

133 “Contradictions and Challenges,” supra note 11 at 243.
134 “Tribal Philosophies,” supra note 11 at 247.
135 “Contradictions and Challenges,” supra note 11 at 243.
136 Mary Ellen Turpel herself cautions against making such dichotomies, see supra note 111. For literature on the hybridity of post-colonial cultures see supra note 13.
First Nations people. They argue that First Nations believe that their future security lies in the protection of their collective rights.

However, not all aboriginal people agree with the argument that individual rights are a foreign concept alien to aboriginal cultures. For some aboriginal people individual rights in the form of respect for the individual are intrinsic to their cultures, and further, they argue that those rights must be protected by the Canadian Charter. Consequently as well as a major hurdle in intergovernmental negotiations, the application of the Charter has been an extremely divisive issue within First Nations communities themselves. Many aboriginal women, although clearly not all, see the Charter as their most effective guarantee against potential violations of their rights by a powerful male dominated leadership. Thus, whilst supporting self-government they insist that a precondition of self-government must be the entrenching of Charter guarantees. The position of many

137 "Tribal Philosophies," supra note 11 at 247. See also supra note 109.

138 Ibid. at 251.

139 The debate concerning the application of the Charter to First Nations self-government has centred particularly upon women’s equality rights and sec. 15. The arguments are however equally valid for aboriginal child welfare where there is the same potential conflict between the individual rights of the child, for example under sec. 7, and the group right to override those individual rights for the sake of the survival of the collective. The main problem facing both vulnerable groups is how to overcome the apparent paradox between claiming aboriginal self-government whilst demanding an external legal guarantee of their individual rights which have the potential to undermine the right to self-government.

140 NWAC has been the chief advocate of women’s rights in the context of aboriginal self-government and has also been strongly in favour of the Charter being applied to aboriginal governments. NWAC recognise self-government as a legitimate goal and political priority, but places upon that the fundamental condition that the “principle of sexual equality for aboriginal men and women must unambiguously and constitutionally stand above aboriginal self government.” Sexual Equality As An Aboriginal Right, supra note 12 at 117. For a detailed analysis of NWAC’s position on the rights of aboriginal women see Sexual Equality as An Aboriginal Rights, ibid. For others who argue that the Canadian Charter as a mechanism for protecting First Nations women’s individual rights must be a precondition of self-government see Gail Stacey-Moore, First peoples and the Constitution, supra note 1 at 31; Sharon McIvor, reported in “Native Women Fear Loss of Rights” The Globe and Mail (July 13, 1992); T. Nahane, “Dancing With a Gorilla,” supra note 12. Donna Greschner also argues that the Canadian Charter should apply to self-
aboriginal women on the Charter is founded on their commitment to the principle that women have individual rights, independent from those of their rights as members of the aboriginal group, and that those individual rights must be protected,

"People have rights, women have rights, children have rights...when it comes to abuse of women and children we feel that the law should be fairly firm and it should apply." (Chief Jean-Guy Whiteduck)\(^{141}\)

There is a fear among aboriginal women that the individual rights of community members will be ignored by First Nations governments,

"Basic human rights, as recognised in international law and made enforceable in Canada under the Canadian Charter of Rights and Freedoms must be guaranteed to every citizen of our First Nations. Citizens of our First Nations are no less deserving of a guarantee of their basic human rights than are any other people. This is why we say that the Canadian Charter must apply to a First Nations government when they exercise rights and powers under self-government. Citizens of our First Nations have the right to live in their communities free of the dark shadow of fear and abuse." (Gail Stacey-Moore)\(^{142}\)

Nahanee similarly argues that whilst the collective rights of aboriginal peoples must be recognised and secured, it should also be remembered that each collective is constituted by individuals whose rights must be protected from abuse,

"The legal theoreticians say the Canadian Charter does not belong in Indian communities because their concern for the collective overrides concern for individual rights. In my view they forget that the collective is made up of 'little Indians' and they should take time to remember the history of sexual oppression of Aboriginal women. Each and every individual comprises the collective; there is no collective without them. If Aboriginals do not protect the individual, the government, but her position is more cautious. She argues that the liberal discourse of non-native society must be responsive to the different values and traditions of aboriginal cultures, perspectives which to this point have been excluded. However she does not reject the capacity of the Charter to incorporate First Nations perspectives on equality in a way which respects their cultural diversity given a purposive interpretation. "Aboriginal Women and Criminal Justice," supra note 12.


\(^{142}\) First Peoples and the Constitution, supra note 1 at 32.
nation will vanish... There is a duty to protect each and every Indian.\textsuperscript{(Teressa Nahanee)}\textsuperscript{143}

A similar argument can be made in the context of child welfare. Protecting the right of the collective to self-government and thereby protection of its culture and traditional practices will be of no benefit to the next generation if they are abused and ‘sacrificed’ to this cause in childhood. In order to enjoy the benefits of self-government the child must first survive.\textsuperscript{144} His or her individual rights must be protected. However, whilst many aboriginal women would agree with the contention that women and children have individual rights which require protection from abuse, they disagree with the means employed. Many members of the First Nations argue that the way to deal with these abuses is not to keep running to the federal government and its foreign principles, but by working within the communities to promote a return to traditional values and systems of government which treated women and children with respect and honour,

\begin{quote}
"The opportunity for NWAC to make a place for themselves is not at the constitutional negotiation table but back in their own nations, no matter how evil they think the situations may be. It is only by dealing with real concerns at the local level that we will get back to the original values of our nations... The appropriate response to the problem NWAC has identified is not to run to the federal government for protection." (Bernice Hammersmith)\textsuperscript{145}
\end{quote}

\textsuperscript{143} "Dancing With a Gorilla," supra note 12 at 32.

\textsuperscript{144} Justice Giesbrecht made this point very strongly at the Inquiry into the death of Lester Desjarlais, 'The Child and Family Services Act recognises aboriginal heritage. Culture is important, but as Dr. Charles Ferguson succinctly put it, in order for a person to appreciate her culture and traditions, that person has first to first survive childhood. The primary right of a child to a true childhood come before racial, ethnic or religious considerations." Desjarlais Inquiry, supra note 22 at 158.

\textsuperscript{145} "Aboriginal Women and Self-Government," supra note 12 at 56. It should be noted that both Nahanee and NWAC support the need for a return to the traditional values of First Nations within the communities as the ultimate solution to the problem of abuse, but do not see this as necessarily incompatible with the application of the Charter. See e.g. "Dancing With a Gorilla," supra note 12 at 9. For a brief summary of the diversity of the position taken on these issues by First Nations women, see J. Hylton, \textit{Aboriginal Self-Government in Canada: Current Trends and Issues} (Saskatoon: Purich Publishing, 1994) at 180 - 199.
From this perspective by continuing to rely on the protection provided by the principles of a foreign colonial government the problems in the communities are only exacerbated.\(^\text{146}\)

The position of the AFN has always been that the protection of vulnerable groups within First Nations communities is not a Canadian constitutional issue but a matter to be dealt with internally by the bands or nations once self-government was operational.\(^\text{147}\) There have been various proposals as to how the rights of individuals within their communities can be secured against abuse, particularly abuse by the community government. Among those suggestions have been community codes, leadership codes, constitutional guarantees and a First Nations charter.\(^\text{148}\) An Aboriginal charter would allow the First Nations to develop their own balance of collective and individual rights

\(^{146}\) For a discussion on the way in which changes in discriminatory provisions of the Indian Act achieved with the help of the Charter, facilitated a review of internal attitudes towards Indian Act status and externally imposed definitions of who is Indian among the members of the Chippewas band of the Nawash, Southern Ontario, see J. Borrows, “Contemporary Traditional Equality,” supra note 95 at 32 - 40. Borrows argues that whilst caution is required in invoking rights discourse to aid the restructuring of power relations in Canada between First Nations and non-native society, using rights is ‘not as fatal as some have predicted” and can have substantial benefits for First Nations people.

\(^{147}\) Sexual Equality As An Aboriginal Right, supra note 12 at 118. See also supra note 108.

\(^{148}\) Krosenbrink argues that all these suggestions have weaknesses. For example any provisions in an Indian constitution could be easily removed, whereas a Constitutional Charter sets certain rights beyond the powers of Parliaments and the legislature. Sexual Equality As An Aboriginal Right, ibid. at 118 - 119. Contra see the arguments of Bruce Miller who suggests that tribal codes have been extremely effective in dealing with issues of violence against women in the United States. B. Miller, “Contemporary Tribal Codes and Gender Issues” (1994) 18:2 American Indian Culture and Research Journal 43. For further discussion on initiatives within the communities to deal with problems of potentially abusive political leaders see above at chapter five pp. 486 - 502. For recommendations on the development of an Aboriginal Charter see Restructuring the Relationship, supra note 1 at 233 - 234; “Implementing Self-Government,” supra note 1 at 215 - 216; Renewed Canada, supra note 95 at 31. In particular see the Recommendations of the Aboriginal Constitutional Process from the Constituent Assemblies which stated that the Canadian Charter of Rights and Freedoms shall not override First Nations law, but that rights such as gender equality should be established in formal Aboriginal Charters of Rights and Freedoms. Surviving As Indians, supra note 13 at Appendix 14 pp. 316 - 319.
which would be more attuned to their particular traditions. The community would
decide the acceptable balance between the risk to the child of remaining within the
community (protecting the collective interest), and the importance of the child’s individual
right to a safe environment or protection from contact with an abusive parent (protecting
the individual interest). Whilst Hogg and Turpel do not argue that the Canadian Charter
should not apply to aboriginal governments, they recommend the development of
Aboriginal constitutions which include an Aboriginal Charter of Rights. Their position is
that both would apply and the aboriginal Charter would be used as an interpretative
mechanism. The Royal Commission also supports the development of an Aboriginal
Charter as a supplement to the Canadian charter and not as an alternative,

"Where an Aboriginal Nation enacts its own charter of rights and responsibilities,
private individuals will benefit from its provisions in addition to those of the
Canadian Charter. An Aboriginal charter will supplement the Canadian Charter
but not displace it. A person subject to the authority of the Aboriginal
government will still have direct access to the Canadian Charter. However in
construing the Canadian Charter in the light of section 25, a court may well find
the provisions of the Aboriginal charter a useful interpretative guide."

The proposal for a First Nations charter is attractive but as yet there is no evidence of it
becoming a reality, and with continuing differences between the communities, finding
agreement on the content of a Charter is likely to be extremely difficult. However
NWAC has been prepared to compromise its views on the applicability of the Charter, by

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149 Renewed Canada, ibid. at 31.

150 "Implementing Aboriginal Self-Government," supra note 1 at 215 - 216.

151 Restructuring the Relationship, supra note 1 at 233.

152 "Implementing Self-Government," supra note 1 at 216.
declaring that they will only support the Canadian Charter as an interim measure until an Aboriginal Charter is operational.\textsuperscript{153} However NWAC does not seem at all confident that an Aboriginal Charter will be implemented in the immediate future,

"Some would say that an Aboriginal Charter of rights should apply rather than the Canadian Charter. We have heard much talk of an Aboriginal Charter over the last ten years, but we have seen very little action." (Gail Stacey-Moore)\textsuperscript{154}

Moreover the acceptability of an aboriginal Charter to the federal government depends on its compatibility with the Canadian Charter. An aboriginal Charter that was not developed in cooperation with the federal and provincial governments would not necessarily guarantee the same common standards. It therefore does not help the federal government in trying to secure basic protections and standards which represent the fundamental values of the State and apply across Canada. The federal government and the Royal Commission do not seem confident that an Aboriginal Charter would guarantee the same basic human rights and standards as are protected by the Canadian Charter.

The Royal Commission attempted to find a resolution of this dispute by finding that the Charter will apply automatically to aboriginal governments but will only be applicable in a manner that is consistent with the culture and traditions of First Nations.\textsuperscript{155}

\textsuperscript{153} Jeanette Lavell reported in "Native Leaders Pleased with Support" \textit{Vancouver Sun} (4th October 1992).

\textsuperscript{154} \textit{First Peoples and the Constitution}, supra note 1 at 33.

\textsuperscript{155} The Commission finds that the Charter will apply automatically to aboriginal self-governments on the basis that the drafters of the Constitution Act did not provide explicitly for aboriginal governments in any of the relevant sections. However as sec. 35 and sec. 25 are interpreted broadly to incorporate recognition of the right to self-government, so should secs 32, and 33. They argue if sec. 32 does not include aboriginal governments there would be a "serious imbalance" in the Charter and this can be avoided by interpreting sec. 35 on the basis of the centrality of the Charter in Canada\textquotesingle s constitutional scheme. Thus they argue that the wording of sec. 32 (1) is not exhaustive, it was intended only to indicate that governments rather than private individuals were subject to the Charter, and this allows for the possibility
Central to this position is the argument that the collective rights of First Nations are already given constitutional protection and thus will not be undermined by the guarantee of individual rights.\textsuperscript{156} The Commission’s proposals rest on two key sections of the Charter: sec. 25\textsuperscript{157} and sec. 33.\textsuperscript{158} The Royal Commission argues,

"Aboriginal governments occupy the same basic position relative to the Charter as the federal and provincial governments. Aboriginal governments should thus have recourse to notwithstanding clauses under section 33 to the same extent as the federal and provincial governments. In its application to Aboriginal governments, the Charter should be interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions. This interpretative rule is found in section 25 of the Charter."\textsuperscript{159}

This places two fundamental limitations on the effectiveness of the Charter. If sec. 33 is to be available to aboriginal governments they can simply pass the relevant legislation once self-governing to remove the application of the Charter from certain spheres of governance.\textsuperscript{160} It could, for example, pass child welfare legislation sanctioning certain

\textsuperscript{156} Contra see especially, Joel Bakan and David Schneiderman, *Social Justice and the Constitution. Perspectives on Social Union for Canada*, supra note 101; and A. Hunt, *Explorations in Law and Society*, supra note 101.

\textsuperscript{157} Sec. 25 of the Charter states, “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: (a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. *Supra* note 16.

\textsuperscript{158} Sec. 33 of the Charter states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." *Ibid.*

\textsuperscript{159} *Restructuring the Relationship*, supra note 1 at 230.

\textsuperscript{160} The Commission argue that if aboriginal governments are included within sec., 32 even though not specifically mentioned, the same approach should be taken to sec. 33. Sec. 33 “operates in tandem” with sec. 32 (1) and whilst sec. 32(1) makes the Charter applicable to governments, sec. 33 allows the government to shield themselves from certain Charter provisions for a while. The Royal Commission
practices that will be immune to challenge on the basis of a valid 'notwithstanding' clause. Unlike sec. 1 there are no limits placed upon the use of sec. 33 so a First Nations government can effectively insulate itself from challenge and has the ready moral justification that the Charter is a culturally inappropriate limit to their inherent sovereignty. Although the notwithstanding clause has to date virtually been a dead letter, its use in Quebec in the context of language rights being the exception,\textsuperscript{161} there is no reason why First Nations governments should not use the section to their advantage. One important limitation on the insulating effect of sec. 33 is that it arguably only applies to attempts to introduce inappropriate standards in legislation. The language of sec. 33 can be interpreted to the effect that a law can be made exempt from Charter scrutiny, such as a legislative provision that the collective rights of the group will override the rights of the child, but not negligent or inappropriate administration of a law. Abuses in the administration of a child welfare agency as identified in the Desjarlais inquiry would be governmental acts which remain subject to Charter review.\textsuperscript{162} However to make child welfare legislation which establishes the guiding principles and standards of a child welfare system immune to challenge on the basis that it compromises the safety of an individual argues that the availability of the notwithstanding clause will be tempered by the fact that the power to pass such clauses will belong only to an Aboriginal nation and, in the absence of self-government treaties, can be exercised only in relation to matters falling within the core areas of Aboriginal jurisdiction (thus including child welfare). \textit{Restructuring the Relationship}, \textit{ibid.} at 231. The federal government policy statement does not mention section 33. It is therefore unclear whether they envisage that First Nations governments will be able to take advantage of it. The Nisga'a will not be able to invoke sec. 33 which suggests that this is the government's position on the 'notwithstanding' clause. Lecture delivered by Jim Aldridge, treaty negotiator for the Nisga'a Nation, U.B.C. Faculty of Law, February, 1997).
child under for example sec. 7, is a significant inroad on the protection of First Nations children afforded by the Charter. A Charter which is hailed as the answer to the potential risks of self-government and yet can be so easily disregarded with impunity, is in my view, no real solution at all. 163

The second reason suggested by the Royal Commission, and supported by the federal government policy statement, as to why the Charter can be applied to self-government without challenging the cultural integrity of the First Nations people, rests upon section 25. Section 25 lays down a basic rule of interpretation in applying the Charter to the First Nations: that the Charter ‘shall not be construed so as to abrogate or derogate” from aboriginal and treaty rights. 164 The federal government believes that this secures the cultural sensitivity of the Charter in dealing with the First Nations,

“The Charter itself, already contains a provision (sec. 25) directing that it must be interpreted in a manner that respects Aboriginal and treaty rights, which would include, under the federal approach, the inherent right. The Charter is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.”165

At one extreme it can be argued that the effect of sec. 25 is to completely exclude the exercise of self-government from Charter scrutiny. 166 It is argued that the purpose of sec.
25 is to ensure that the Charter is interpreted consistently with constitutionally protected aboriginal rights.\textsuperscript{167} One such aboriginal right is the inherent right to self-government. Since any limitation on Aboriginal governmental powers, such as child welfare jurisdiction, would amount to a derogation from the inherent right to self-government, section 25 effectively prevents Aboriginal governments from being held accountable for Charter violations.\textsuperscript{168} The Royal Commission admits that this interpretation of sec. 25, can be supported on policy grounds.\textsuperscript{169} It argues that one of the main purposes of sec. 25 is to ensure that Aboriginal peoples can exercise their distinctive rights in a manner consistent with their philosophical outlooks, cultures, and traditions.\textsuperscript{170} As some Charter provisions reflect individualistic values that are 'foreign' to many aboriginal cultures and traditions, applying the Charter to Aboriginal governments could undermine the efforts of the First Nations to revive and strengthen their culture and traditions.\textsuperscript{171} The AFN agree,

'Subjecting the right of self-government to the Charter clearly goes against one of the primary tenets of aboriginal culture: collective rights are more important

\textsuperscript{167} Restructuring the Relationship, ibid. at 229.

\textsuperscript{168} Ibid. Kroesenbrink argues similarly that section 25 creates an exemption for aboriginal rights from being subjected to Charter rights. She argues that sec. 25 ensures that sec. 15 [for example] will not be used to strike down any traditionally recognised collective rights of the aboriginal peoples, presumably including self-government. Sexual Equality as an Aboriginal Right, supra note 12 at 109.

\textsuperscript{169} Restructuring the Relationship, ibid. at 230.

\textsuperscript{170} Ibid.

\textsuperscript{171} Ibid.
than individual rights. The Charter is aimed primarily at individual rights. This is why sec. 25 was added to the Charter to protect aboriginal and treaty rights from erosion."  

Thus there is a clear danger that the Charter will become yet another tool of assimilation, particularly because it would place the interpretation of aboriginal rights and aboriginal culture and traditions in the hands of an ill-qualified judiciary. Whilst the reasoning behind this argument is convincing, the Commission rejected this conclusion in favour of a more moderate interpretation of sec. 25.

The commission acknowledges that sec. 25 rules out any interpretation of the Charter that would “attack the existence of Aboriginal governments or undermine their basic powers.” In their opinion sec. 25 guarantees that the Charter will be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of aboriginal self-government. Greschner similarly argues that the aboriginal rights contained in the Charter are a promise of constitutional space for aboriginal peoples to be aboriginal,

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172 “Sharing Canada’s Future,” supra note 14 at 2-3.


174 The Royal Commission appear to take this view on the recommendation of Hogg and Turpel that the Courts would not uphold a blanket immunity, “Implementing Self-Government,” supra note 1 at 215. Hogg and Turpel argue, “[w]e believe it is unlikely that a court would regard section 25 as providing a blanket immunity from the Charter to Aboriginal governments, even though the governments were exercising powers of self-government derived from a treaty or from an aboriginal right (the inherent right).”

175 Restructuring the Relationship, supra note 1 at 232.

176 Ibid.
“The simple but revolutionary purpose for the provisions is to ensure the flourishing of aboriginal peoples. And, the collective identities and futures of aboriginal peoples will be and should be determined by them.”

According to this view the objective of sec. 25 is to protect aboriginal culture and traditions from further erosion. However, this interpretation of sec. 25 does not mean that First Nations governments will be immune from attack when exercising self-governing powers. If an aboriginal government is challenged it must justify its particular action on the basis that certain governmental rules or practices which may not be consistent with general Canadian standards are consistent with the particular culture, philosophical outlook, and traditions of the Aboriginal nation in question and as such can be justified. This must be shown to the court’s satisfaction in every individual case. Any child welfare practice that was not consistent with non-native values and standards would have to be shown to be consistent with First Nations culture or tradition in every case where it was challenged. Essentially however sec. 25 would provide room for that tradition to be recognised and the cultural diversity respected. The Royal Commission depends heavily on the arguments of Hogg and Turpel. Turpel who has been a consistent opponent of the Charter submitted to the Commission that although sec. 32 is silent on aboriginal governments, the courts would be likely to find that Aboriginal governments are bound under this provision. Further the court is highly unlikely to find that sec. 25 provides blanket immunity from the Charter. Consequently Hogg and Turpel conclude that “the

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177 “Aboriginal Women and Criminal Justice,” supra note 12 at 342.
178 Restructuring the Relationship, supra note 1 at 232.
probable effect of sec. 25 will be to exempt certain actions of Aboriginal governments from Charter scrutiny and to ensure that the Charter will be interpreted in a manner deferential to and consistent with Aboriginal culture and traditions.”¹⁸⁰ Hogg and Turpel appear optimistic that the courts will draw a suitable line between respecting aboriginal traditions and protecting the rights of the individual.¹⁸¹ They argue,

“Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would probably be found when the court is faced with a situation where different standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, sec. 25 would shield such practices from attack based on the values expressed in the legal rights provisions of the Charter.”¹⁸²

It is argued that if the individualistic rights in the Charter are given their best interpretation, and in light of the Charter’s commitment to and promotion of diversity, the understanding of individual rights such as a child’s rights under section 7 will acknowledge

¹⁸⁰ Ibid. at 215.

¹⁸¹ It can be argued on this interpretation of sec. 25 that the Charter would protect First Nations children whilst also respecting the cultural practices and traditions of the community. In the context of child welfare there is simply no conflict between the two. It is suggested that the individual rights of the child would not be overridden by group rights under section 25 because of the enormous respect and importance which is attributed to children in many aboriginal cultures. See Gathering Strength, supra note 141 at 23 - 24. Thus any claim under sec. 25 which sought to insulate governments from actions that had had a detrimental impact on the health and well-being of an Indian child would be ‘un-Indian” and would not be protected from liability. This same argument is made by NWAC in the context of womens’ equality rights by drawing on concepts of traditional Indian motherhood. NWAC argues that any governing institutions that did not provide for sexuality equality would be ‘un-Indian” and thus would not be shielded by sec. 25. Sexual Equality as an Aboriginal Right, supra note 12 at 120-143. See also “Aboriginal women and Criminal Justice,” supra note 12 at 344 - 350.

¹⁸² “Implementing Aboriginal Self-Government,” supra note 1 at 215. Cited by the Royal Commission, Restructuring the Relationship, supra note 1 at 233. The essence of these arguments is that sec. 25 will operate to protect the true and valuable traditions of the First Nations, but not ‘tradition’ which is simply being used as a shield for abuse. For the difficulties in leaving these cultural distinctions to be made by the non-native judiciary see above at p. 324.
that different meanings of those rights will be given by different communities. The equality provisions are perhaps the best example,

"The conventional legal understanding of equality as sameness is being displaced by a more sophisticated appreciation of equality as the respect and promotion of differences and the elimination of subordination." \(^{183}\)

The commitment to aboriginal peoples in the Constitution arguably makes such a flexible interpretation of the individualistic rights clauses incumbent on the Canadian government and judiciary. \(^{184}\)

To support this interpretation of sec. 25 it is argued that the flexibility it provides is further enhanced by the application of sec. 1 of the Charter which enables governments to enact reasonable limits on Charter rights so long as these "can be demonstrably justified in a free and democratic society." \(^{185}\) Again the argument would be available to the First Nations that to limit individual rights, for example, by refusing to remove children from abusive communities, would be justifiable to protect the survival of the culture and traditions of the community; in fact to protect the survival of the community per se. The arguments of Kymlicka and Taylor \(^{186}\) on the recognition that can be given to cultural

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\(^{183}\) "Aboriginal Women and Criminal Justice," \textit{supra} note 12 at 343.

\(^{184}\) \textit{Ibid.} at 341 and 343.

\(^{185}\) Sec. 1 of the Charter states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For a brief commentary on section one and protecting aboriginal cultural values, see \textit{Restructuring the Relationship, supra} note 1 at 232.

\(^{186}\) \textit{Supra} note 130. Charles Taylor argues that a "crucial feature of human life is its dialogical character." He recognises that we are all unique individuals, but that we are only able to express and develop that individual 'persona' through community with others. The search for individual identity can thus be reconciled with cultural identity by recognising that it is through the sense of belonging to a community that we are able to achieve self-realisation. Cultural identity is fundamental to human flourishing and consequently recognition of distinct cultural communities should be endorsed, even within the liberal
diversity within a liberal framework could be invoked to support such actions as justified within a liberal “free and democratic” society in order to protect the cultural framework necessary for human flourishing.¹⁸⁷

It is the view of the Royal Commission and the federal government that sec. 25 and sec. 1 should satisfy most of the concerns of the First Nations communities about being subjected to this ‘ethnocentric’ Charter. They obviously believe that sec. 25 will strike the appropriate compromise between the protection of individual rights and the rights of the First Nations as a group. However First Nations would be justifiably sceptical framework. Taylor suggests that within a liberal model it is possible to create a “neutral” state which endorses no particular culturally rooted vision of the good life, and thus allows cultural integrity and autonomy within its domain, intervening only to protect certain fundamental interests. “The Politics of Recognition,” supra note 130. Will Kymlicka attempts a reconciliation between recognition of the cultural identity of a collective and the ethos of liberalism in similar terms to Charles Taylor. Kymlicka begins from the position that people are owed respect both as citizens and as members of cultural communities. Following from this it is argued that membership in a cultural community may be a relevant criterion for distributing the benefits and burdens of a liberal theory of justice. Based on the concept of a liberal theory of justice developed by Rawls and Dworkin, Kymlicka argues that liberals should be concerned with the fate of cultural structures because it is only through the existence of these structures that individuals can secure their self-respect. In order to exercise their right to liberty effectively, a secure cultural framework is necessary within which they can evaluate options and make choices. Rawls never includes cultural membership as a primary good but Kymlicka argues that this is because Rawls assumes that the political community is culturally homogeneous. However, Kymlicka contends that cultural membership is a primary good that would have been recognised by those in the original position. This argument does not contend that the community is more important than the individuals who compose it. The argument is simply that cultural membership is important in pursuing our essential interest in leading a good life, and so consideration of that membership is an important part of having equal consideration for the interests of each member of the community. It is argued that one of the special rights required, in order to secure the cultural framework for human flourishing, is self-government. There is nothing within liberal theory which is abhorrent to this position and thus the Charter can secure respect for the cultural diversity of self-governing communities. Liberalism, Community and State, supra note 130. For a critique of Kymlicka see “Liberalism, Aboriginal Rights and Cultural Minorities,” supra note 130. For an alternative approach to reconciling aboriginal rights with liberalism see “First Principles, Second Thoughts,” supra note 130.

¹⁸⁷ Nahanee argues for example that the Oakes test which delineates what is meant by sec. one and a “free and democratic society” in terms of “respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society” has achieved a balance between individual rights and group identity which demonstrates that the protection of both is not contradictory. Thus the Charter is a workable legal instrument for aboriginal communities. “Dancing With a Gorilla,” supra note 12 at 37 - 38 (citing Mary Eberts).
about the capacity of liberal rights discourse to adequately protect their collective cultural rights, or the willingness of the judiciary to override any of the fundamental individual rights entrenched in the Charter on the basis of respect for aboriginal culture and traditions. The judiciary are not exactly famed for their sympathy with group rights or the rights of disadvantaged minorities such as the First Nations.\footnote{188} Certainly the idea of group rights has always been controversial within the liberal tradition. The critical legal school argue that rights are not only ineffective in advancing the cause of groups, but can be positively harmful.\footnote{189} The need for cultural recognition and collective autonomy clearly does not fit easily within the traditional liberalism of the West.\footnote{190} Inevitably questions of paramountcy will arise. The predominant civil libertarian concept of rights is of individual rights which protect the individual from the group. In contrast collective goals may require restrictions on the behaviour and rights of individuals.\footnote{191} Problems can be anticipated if it is claimed that the rights of the First Nations group to cultural autonomy should take priority over the individual rights of members of the community, particularly children.\footnote{192} This would reverse the traditional liberal understanding of the power of rights.

\footnote{188}{See especially, “Constitutional Interpretation and Social Change,” supra note 101 at 318 - 323.}


\footnote{190}{“Politics of Recognition,” supra note 130 at 55.}

\footnote{191}{Ibid.}

\footnote{192}{Both Boldt and Long, and Turpel recognise the potential conflict between individual and collective rights and argue that for priority to be given to individual rights is inconsistent with their cultural understanding. Supra note 11.}
1.2 (ii) · Judicial Recognition of Group Rights

The criticisms made against the deficiencies of rights to address the claims of the group are somewhat weaker when seen in light of the post-liberal jurisprudence of the court. Despite the origin of the liberal theory in notions of individual ownership of property, rights discourse has advanced considerably from that original position and would no longer appear to support such a stringent individualised approach. The Charter litigation of the last decade is open to the interpretation that the courts are very much concerned with collective rights and protecting and supporting minority and disadvantaged groups. On the face of the Charter it may appear to have retained the formal individualistic concept of rights, fully true to its Lockian origins. However, significant inroads on those individual rights have been made. For example, the Court would seem to have no difficulty when applying the equality provisions of section 15 in using the group and the individual interchangeably. In particular the courts have manipulated section one

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194 For a cautious argument supporting this view in the context of First Nations see “Contemporary Traditional Equality,” supra note 95.

195 The wording of sec. 15 explicitly contemplates the amelioration of group disadvantage. Sec. 15 (2) states: “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Supra note 16. See the judgments of the Supreme court of Canada in R v Morgentaler 1988 1 S.C.R. 30 (S.C.C.) and Andrews v Law of Society of Canada (1989) 36 C.R.R. 193 (S.C.C.) for an interpretation of sec. 15 which is consistent with a concern for disadvantaged and minority groups.
to such an extent that fundamental rights such as freedom of speech have arguably been demoted to simply one factor to be thrown into an indeterminate balance, out of a concern to protect minority groups. To use the example of freedom of speech, Keegstra, Butler, and Ross arguably provide a strong example of where the fundamental individual right to freedom of speech has been reconceived out of a 'majoritarian' concern for the popular causes of minority and disadvantaged groups. Thus instead of focusing on the importance of section 2 (b) to the individual concerned, the analysis shifts under the application of section 1, to the value of the expression from the perspective of the targeted group. Giving judgment in Ross La Forest J dismissed the value of the expression of Mr Ross, one of the grounds being that it ‘muzzles the voice of truth’, silencing the views of those in the target group. Further, he acknowledges that expression which incites contempt for the target group undermines the groups ability to develop a sense of self-identity and hinders their participation in the political process. It is certainly not too far-fetched to claim that we are witnessing a period in which the concern with the individual is


199 See especially, “Feminist Reinterpretation,” supra note 193; and “Freedom of Expression,” supra note 193 at 7 - 8 which draws heavily on Moon’s post-liberal interpretation of these judgements. The decisions in Keegstra, Butler, and Ross should be contrasted with judgement in R. v Zundel (1992) 1 S.C.R. 381 (S.C.C.), another freedom of expression case, where the majority did not take account of group equality interests when applying section 1.

200 Ross v New Brunswick School District No. 15, supra note 198 at 36.

201 Ibid.
being superseded by a concern with the group.\textsuperscript{202} The Royal Commission thus takes an optimistic view of rights discourse by pointing out that the respect for protecting the group cultural rights of the First Nations is 'consistent with the contextual approach that the Supreme Court has adopted more generally in applying the Charter.'\textsuperscript{203} It is confidently asserted that the Charter has found a unique balance between individual and collective rights.\textsuperscript{204}

1.2 (iii) Reconciling the Group With the Individual

Given that the law now is increasingly prepared to recognise the rights of a collective, rights discourse must face the difficulty that flows naturally from that recognition: how can the legal system address the difficulty that the rights of an individual within the group may not be consistent with the rights of the collective as a whole. Hunt identifies at the core of the critique of liberalism, the contention that 'the claim made by liberalism to resolve the persistent and systematic conflict between individual and social interests through the mechanism of objective rules within a framework of procedural justice is inherently flawed.'\textsuperscript{205} It is argued that the mediation between the conflicting interests can offer at best only a pragmatic and piecemeal response.\textsuperscript{206} In essence rights

\textsuperscript{202} Contra, see the critical legal school supra note 101 for a more pessimistic view about the ability of liberal legal rights discourse to incorporate group rights and cultural diversity.

\textsuperscript{203} Restructuring the Relationship, supra note 1 at 232.

\textsuperscript{204} Renewed Canada, supra note 95 at 71.

\textsuperscript{205} Explorations in Law and Society, supra note 101 at 143.

\textsuperscript{206} Ibid.
discourse provides no convincing way in which to reconcile the interests of the self with the interests of the group.

The need to protect the individual against the forces and excesses of their group can be argued to be a vital aspect of the rule of law.\textsuperscript{207} The concern of liberalism with the individual and the need to protect the individual against the oppressive power of a majority is obviously not without merit. It would therefore be unacceptable for the law to abandon the individual to the "overriding rights" of the collective. However the case of \textit{Thomas v Norris}\textsuperscript{208} provides a clear example of the problems presented when the collective cultural rights of a First Nations group come into conflict with the individual rights of one of its members. It can be argued that this case exemplifies the impossibility of the law ever releasing its hold on the notion of the primacy of individual rights. The case concerned a civil action for damages against members of the Cowichan Indian Band No. 642 for assault, battery, and false imprisonment arising out of an incident whereby they forcibly initiated the claimant into the Coast Salish Big House Tradition called the Spirit Dance. The defendants claimed the constitutional defence that they had the legal right to initiate the plaintiff into the Coast Salish Big House Tradition pursuant to their constitutionally protected right to exercise an existing Aboriginal right within the meaning of sec. 35 of the Constitution Act, 1982. Justice Hood held that those aspects of the aboriginal right which contravened the 'supreme' laws of England, either the civil or

\textsuperscript{207} See especially, "On Liberty," \textit{supra} note 117.

criminal law, were extinguished upon the assertion of British sovereignty and the imposition of the English legal system to the exclusion of all others.209 Aboriginal rights as protected under sec. 35 provide no immunity to assault, battery, or false imprisonment.210 Justice Hood places this conclusion within the contest between the group and the individual.211 Even if the collective rights of the defendants had not been extinguished, it is made absolutely clear that the rights of an individual, as protected by the English common or civil law, are absolutely supreme.212 They will not be 'surrendered' to the collective,

"I see no reason why there should be any onus on the plaintiff to justify the paramountcy of the common law to the alleged Aboriginal right or to justify his enjoyment of his civil rights to be free from assault and wrongful imprisonment."213

According to Justice Hood, if the right of an individual is involved, it takes precedence. It is certainly not incumbent on the individual to go through the Sparrow justification test,

"Further, if some justification inquiry or reconciling process were necessary, the protection of the rights of the individual plaintiff from these wrongs would prevail and for obvious reasons."214

This renders the protection of collective rights under sec. 35 extremely weak. Self-government under sec. 35, would only be recognised to the extent that it is not inconsistent with the civil rights of individuals. 'Individual civil rights' is susceptible to an
extremely broad interpretation. For example, self-government would be no defence against a tortious action by a child claiming damages for trauma caused by, for example, a refusal to remove her from an abusive situation within the community: the situation in Jane Doe v Awasis Agency. A defence to such a claim made on the basis of an aboriginal right would be held to have been extinguished under the reasoning in Thomas v Norris. Underlying the whole decision is a concern with the individual and the paramountcy of his rights and freedoms,

‘Placing the Aboriginal right at its highest level it does not include civil immunity for coercion, force, assault, unlawful confinement, or any other unlawful tortious conduct on the part of the defendants, in forcing the plaintiff to participate in their tradition. While the plaintiff may have special rights and status in Canada as an Indian, the “original” rights and freedoms he enjoys can no less than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practice, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing do. His freedoms and rights are not “subject to the collective rights of the Aboriginal nation to which he belongs.” (My emphasis)

The devaluing of collective rights in Thomas v Norris is clear and would apply equally to sec, 25 as well as sec. 35. The problem with the decision, whilst perhaps justified on the facts, is that Justice Hood can only see the individualistic understanding of his own culture. He is blind to any other perspective. The scope for aboriginal difference is extremely limited by the judgment. First Nations cultural practices, and their collective perception of the individual in relation to his community, are given absolutely no consideration. The supremacy of English law and its ideology of individual rights is

215 Jane Doe, supra note 106.
216 Supra note 208.
assumed to be ‘obvious’. This is arguably always going to be the problem whilst aboriginal group rights must be filtered through the individualistic western lenses of the judiciary.\textsuperscript{217} Mary Ellen Turpel is a strong proponent of the view that rights discourse will never be able to adequately accommodate cultural difference.\textsuperscript{218} The judiciary faced with rights conflicts, and particularly a clash between individual and collective rights, will have to make choices and value judgments. These value judgments will be rooted in the culture and understanding of the West.\textsuperscript{219} The issue will be interpreted through the judge’s subjective way of looking at things.\textsuperscript{220} The culturally subjective judgments of the judiciary will inevitably devalue anything that is foreign or ‘different’ from their own culture. Consequently, in the non-native court system the individual will remain pre-eminent, the rights of the collective a secondary subordinate issue,

‘If value choices can be seen to be culturally located then decisions can be seen to be especially loaded politically, and judging to require, of necessity, an analysis of the cultural predisposition of the judge before anything else. Otherwise the legitimacy of judging (the knowing and reasoning part) is nothing more than the

\textsuperscript{217} Supra note 173. A number of scholars have focused their attack on rights discourse on the dangers of handing over the cause of disadvantaged groups to the judiciary. Bakan, one of the leading proponents of this view, argues that ‘judges will normally unquestionably and uncritically rely upon dominant ideologies in the process of characterising disputes and interpreting legal texts.” “Constitutional Interpretation and Social Change,” \textit{ibid.} at 318. It is simply questioned whether this elite institution is capable of questioning the status quo and dominant ideology to promote the cause of cultural difference and support a challenge to fundamental assumptions in western legal rights discourse. Many scholars argue that the answer is simply ‘no’. See also “After Criticism,” \textit{ibid.} at 93. For the application of these arguments in the context of First Nations and child welfare see M. Kline, “The Color of Law,” \textit{ibid.}

\textsuperscript{218} See especially, “Interpretive Monopolies,” \textit{supra} note 14.

\textsuperscript{219} \textit{Ibid.} at 43. For further discussion on the ethnocentricity of value judgements and the process of enculturation by which the dominant society will always assume that its values are the only adequate reflection of appropriate behaviour, see A. Renteln, \textit{International Human Rights - Universalism v's Cultural Relativism} (Newbury park: Sage Publications, 1990).

\textsuperscript{220} \textit{Ibid.}
power of the dominant culture to impose its knowledge, structure, and cultural system upon an artificial totality like Canadian "society". 221

However, even if the courts were to overcome these difficulties and take a sympathetic view towards aboriginal group rights and cultural difference, thus mitigating the criticism that the Charter’s individualistic ethos is inappropriate, an additional complication is raised by the fact that the use of sec. 25 to protect aboriginal cultures and traditions hands over to the non-native judiciary the role of interpreting and defining what exactly is a true aboriginal tradition, and thus should be protected, and what is simply abusive behaviour. Anthropological theory would assert that it is completely inappropriate for the judiciary of another culture to be defining and ruling on First Nations culture. Mary Ellen Turpel criticises the judiciary for trying to perform what she considers to be an impossible task. 222 She argues that in other disciplines, cultural differences have not been "interpreted" as gaps in one’s knowledge which are waiting to be filled through a means of bridging the distance between the cultures, but rather as "irreconcilable or irreducible elements of human relations." 223

"Necessarily we cannot "decide" the substance of cultural differences from a position of a particular institutional and conceptual cultural framework" 224

Turpel argues that true sensitivity to cultural difference would be the realisation by the dominant society of its limited capacity to know. 225 Dominant society has to start asking

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221 Ibid. at 51.
222 Ibid. at 50.
223 Ibid. at 44.
224 Ibid. at 45.
the question whether it really has the proficiency to 'judge'. The realisation that cultural difference raises a challenge to the ability to 'know' has not yet found its place in judicial thinking. Certainly Justice McEachern had no comprehension that his ability to 'know' what constituted pre-contact aboriginal culture was in any way limited or proved impossible by his own subjective positioning in western society. If the answer to this is that the First Nations must be allowed the definitive voice on what constitutes native traditions and culture, sec. 25 is rendered futile for a First Nations government could justify any abusive behaviour on the grounds of 'tradition'. The court may be faced with difficult questions about who within the community should be defining tradition and culture - who speaks for the community. Will women, for example, be given a voice on what are appropriate child welfare practices. Again the court is ill-equipped to resolve these kinds of community disputes.

2. Conclusion

The Charter of Rights and Freedoms as an effective tool for protecting the individual rights of First Nations individuals should clearly not be dismissed, without

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225 Ibid. at 50.

226 Ibid.

227 See judgment in Delgamuuk v British Columbia (Attorney-General) (1991) 79 D.L.R. (4th) 185 (B.C.S.C.) where even the anthropological evidence at trial which supported the claims of the Gitskan was dismissed by Justice McEachern as inferior to his own knowledge as to what was integral to aboriginal culture as revealed by pre-contact societies. For commentary on this aspect of Justice McEachern’s judgment see Robin Riddington, 'Fieldwork in Courtroom 53: A witness to Delgamuukw” in Frank Cassidy (ed.) Aboriginal Title in British Columbia: Delgamuukv The Queen (Lantzville: Oolichan Books, 1992) at 206 - 220.
consideration, on the basis of its incompatibility with aboriginal traditions and philosophies. Many aboriginal people, especially women, endorse the individualistic ethos that the Charter embodies. Whether individualistic human rights ideology is ‘traditional’, or a contemporary expression of aboriginal culture that has evolved through their interaction with western society, is irrelevant. The important question is whether the First Nations freely embrace that philosophy today. If they do and they wish the Charter to apply, then as an exercise of their self-governing powers they should be able to agree that their governments will be bound by its principles. This is the position that the Nisga’a have adopted by agreeing that the Charter will apply to their government and entrenching that in the Agreement in Principle.

“The Canadian Charter of Rights and Freedoms will apply to Nisga’a government and its institutions in relation to all matters within its jurisdiction and authority bearing in mind the free and democratic nature of Nisga’a government.”

However, this situation is very different from the one proposed by the Royal Commission. The Royal Commission and the federal government envisage that the Charter will apply to self-government as of right, whether the community agree or not. Thus the Canadian State is again forcing its values and principles on communities who may not share that philosophy and the values it purports, and at the very least have had no voice in their formulation.

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228 E.g. John Borrows argues that the First Nations “cannot ignore the world [they] live in” and that the language of rights has meaning to many First Nations. Rights discourse is thus important and valuable if it is useful to the First Nations in their contemporary struggle and they wish to engage its rhetoric. “Contemporary Traditional Equality,” supra note 95 at 23.

229 Nisga’a Agreement, supra note 12 at General Provisions, para 9.
"The practical reality of subjecting aboriginal self-government to the Charter and to federal and provincial laws of general application, without qualification, is a continuation of the Indian Act mentality of subordination and control."

The Charter is clearly problematic as a tool for protecting vulnerable individuals. The availability of sec. 33 means that it can be disregarded at will, whilst sec. 25 and sec. 1 find themselves vulnerable from attack on both sides. On one hand they could be used to shield what some regard as 'abuse' rather than 'culture' from challenge whilst on the other hand they may be ineffective in preventing the judiciary from simply overriding the group rights of the community in favour of the individual rights of its citizens, regardless of the appeal to culture and tradition. The problem with sec. 25 is essentially uncertainty in how it will be used in practice. This uncertainty is fundamentally problematic because the people charged with resolving it are the non-native judiciary. Sec. 25 opens a hornets nest by giving to the non-native judiciary the right to define what is aboriginal culture and when that culture should be respected. However the most telling criticism of the Charter as a means of protecting aboriginal children is simply that if the Charter is forced on aboriginal communities without their endorsement, and especially if sec. 33 is available to them, the likelihood of the governments accepting that they are bound by those values and standards is extremely low. It is prima facie the case that there is a much better chance of First Nations governments accepting certain standards of behaviour if they have been involved on an equal basis with their formulation and have freely accepted that those standards are consistent with their community's philosophy and cultural beliefs. A Charter can have practical importance in the protection it provides against the abuses of governments and in

230 "Sharing Canada's Future," supra note 14 at 3.
protecting the interests of individuals within communities, but it can also have importance by virtue of its status as representing the fundamental values and beliefs of any society. In making a case for the application of the Charter to aboriginal self-government, the former Chief Justice Dickson explained this symbolism of the Charter,

"Speaking for myself I think that the Charter represents one of the great watershed events in the political and legal life of our country. For me a constitution should do more than simply create the various branches of government and assign powers to them. It must also reflect the fundamental values and aspirations of a society. In Canada, I have no hesitation saying the fundamental value is a deep respect for basic human rights. It therefore makes perfect sense, in my opinion to give powerful expression to that value in the basic law of the land, the Constitution."

The fundamental point which Chief Justice Dickson misses is that "the fundamental values and aspirations" he talks about are those of non-native society; the First Nations were never given the opportunity to express their view. The Charter expresses the fundamental values and aspiration of a Canadian society that excludes the native voice. Mary Simon opened the Conference on the First Peoples and the Constitution with the words,

"There is widespread consensus among Aboriginal Peoples that they want to be a part of a new Canada. However this partnership must be worked out through direct political discussions and through a relationship of mutual respect and cooperation."

To demand that the Charter apply to First Nations self-government without their endorsement is simply antithetical to the goal of working towards a 'new' Canada founded on a basis of 'mutual respect and cooperation'.

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231 Brian Dickson, First Peoples and the Constitution, supra note 1 at 60.

232 Mary Simon, First Peoples and the Constitution, ibid. at 26.
In conclusion, for many aboriginal communities the Charter will remain an imposed and ‘foreign’ tool of colonialism. It will not be accepted as a true reflection of their fundamental traditional values. As with the federal government’s and Royal Commission’s other attempts to impose its standards on the First Nations, by simply insisting the Charter will apply, no attempt is made to challenge the power structures of colonialism. There is therefore no reason why the First Nations should comply. For this reason alone, as a mechanism for protecting First Nations children, the Charter and the imposition of federal standards are inappropriate and ineffective tools.
Chapter Five
Working Together - A Children's Charter in Canada

"I believe that there is a future for native and non-native people to work together because of the fundamental fact that we share the same future with the land we live on. If the actions are based on understanding you have the beginnings of a cross-cultural dialogue." (Potts)

In looking at the implications of self-government for First Nations children and in particular the relationship between the First Nations child welfare system and other child welfare systems in Canada, the discussion to this point suggests a number of fundamental principles which should be respected. The first and perhaps most important is that the process of decolonisation must be moved forward, and First Nations governments secured the autonomy necessary to enable them to rebuild their communities, their culture and traditions, and thereby their unique identities as the First Peoples of Canada. This means that the communities must be able to develop child welfare services according to their own cultural and traditional practices. The second principle insists that the safety of First Nations children is not compromised by this process. First Nations children are entitled to expect that they will receive competent child welfare services which protect their fundamental interests. A tragedy such as the death of Lester Desjarlais must not be allowed to happen again. To this end it is desirable that common standards of care and protection, which allow for cultural diversity, are recognised by all child welfare agencies across Canada. This is the only position which is consistent with Canada’s international obligations under the United Nations Convention on the Rights of the Child.¹ However,

¹ United Nations Convention on the Rights of the Child, 12 December 1989, A Res./44/25, printed (1989) 28, I.L.M. 1448 [hereinafter UNCRC]. The UNCRC was drafted over a period of ten years and adopted by the UN General Assembly in 1989. The Convention has enjoyed near universal ratification. By July of 1995, 176 States had ratified including Canada. The UN claims that it is the most culturally
the federal government’s attempts to secure these minimum standards, principally by insisting that the Canadian Charter applies to self-governing First Nations communities, are rejected on the basis that they amount to a negation of decolonisation and continue to impose on First Nations people the standards and values of a foreign colonial government. The federal government’s policy simply does not recognise that the First Nations have sovereign inherent powers to self-government that they exercise within confederation as an equal third order of government.

Is it possible to reconcile these demands in a post-colonial Canada? Can we recognise and protect cultural diversity and autonomy whilst also continuing to demand that basic minimum standards of child care and protection are met? Post-colonial theory suggests that respect for cultural diversity does not demand isolation, exclusivity, and abandoning the search for fundamental ‘universal’ principles which can protect all legitimate UN Convention to date. Under the Convention Canada is bound to guarantee the fundamental human rights and freedoms of Canadian children. The Convention contains a comprehensive mix of civil and political rights, and social and economic rights. For a general commentary on the UNCRC and the obligations it imposes on State members see R. Barsh, “The Convention on the Rights of the Child: A Reassessment of the Final Text” (1989/90) 7 New York Journal of Human Rights 142 [hereinafter “A Reassessment”; Lung-chu-Chen, “The United Nations Convention on the Rights of the Child: A Policy Orientated Overview” (1989) 7 Journal of Human Rights 16 [hereinafter “Policy Orientated Overview”]; C. Cohen, “UN Convention on the Rights of the Child: Introductory Note” (1989) 28 I.L.M.; D. McGoldrick, “The United Nations Convention on the Rights of the Child” (1991) Int. Journal of Law and Family 132; P. Alston, ed., The Best Interests of the Child. Reconciling Culture and Human Rights (Oxford: Clarendon Press, 1992) [hereinafter Reconciling Culture and Human Rights]. As well as protecting the child from abuse and other such violations of his or her rights the Charter secures the child’s right to its cultural heritage. Art. 30 specifically protects the cultural rights of indigenous children: “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 practise his or her own religion, or to use his or her own language.” For an analysis of this aspect of the UNCRC see C. Cohen, “Development of the Rights of the Indigenous Child Under International Law” (1996) 9 St. Thomas Law Review 231 at 234 - 244.
Canadian children. The major difficulty with the concept of common universal values in a post-colonial state is the apparent fundamental incompatibility of universalism with post-colonialism's respect for cultural identity and diversity. On the one hand the goal of universalism would seem to be to destroy the cultural distinctions between societies. On the other hand the ethos of post-colonialism is to celebrate those distinctions. Certainly, having accepted the importance of cultural identity to human flourishing it is difficult to


accept the concept of universal standards which transcend culture or particularistic contexts. Further, post-colonial discourse warns that it is universalism’s concept of a unitary and homogeneous human nature which marginalises and excludes the distinctive characteristics and differences of post-colonial societies. It is argued that the myth of universality has been a primary strategy of imperial control: the ‘universal’ features of humanity are the characteristics of those who occupy positions of political dominance.

“It is those in power who are human; who know the human condition; and if one’s perception of the world does not concur then it must be suppressed in favour of that which is simply ‘obvious’.”

As considered in chapter one, Marlee Kline argues that the inherent colonialism and ethnocentricity of the child welfare system has been cloaked by its facade of ‘universality’ and ‘neutrality’. Without doubt the ‘imperial’ history of ‘universalism’ and its strong links with liberalism make any argument in favour of universalism in a post-colonial world problematic. It can be argued that the more natural conclusion to draw from post-colonialism’s respect for cultural diversity would be to abandon the search for transcendent universal values and accept the different standards and values which are inherent to different cultures; that is accept the position of cultural relativism. However post-colonial theory provides space for a different conclusion.

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5 “Commentary” in Post Colonial Studies Reader, supra note 2 at 55.

6 Ibid.

7 “Best Interests Ideology,” supra note 3 at 389. See above chapter one at pp. 32 - 92.

1. Rejuvenated Universalism

Whilst we must acknowledge the importance of cultural diversity and cultural heritage, particularly in a post-colonial state, this does not entail abandoning any attempt at finding universal values and norms to which all cultures can agree. Rather than precluding universalism, post-colonial discourse provides space for a rejuvenated concept of universalism which is firmly separated from the ethnocentric imperial universalism of the past. The foundation for this rejuvenated universalism is found in a body of post-colonial literature which emphasises the vulnerability of cultural boundaries in the context of what has been termed "cultural exchange". Rather than remain fixated on a rigid binary division between the self and the other; the included and the excluded, in this literature colonial relations are complicated by questioning the fierce division between the

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9 "The White Inuit Speaks," supra note 2 at 141.

10 "Rhetoric of English India," supra note 2 at 111. See further on the mutual process of exchange and evolution in post-colonial cultures see "The White Inuit Speaks, ibid.; "Counter Discourse," supra note 2 at 95; "Commentary," supra note 2 at 85 - 86; J. Kincaid, "A Small Place," supra note 2 at 93; J. Sharpe, "Figures of Colonial Resistance," supra note 2 at 99. For an excellent evaluation of the hybridity of First Nations culture and the process of cultural change in Canada see Menno Boldt, Surviving As Indians. The Challenge of Self-Government (University of Toronto Press, 1993) at 167 - 221. Unfortunately Boldt largely focuses on the negative aspects of those changes on First Nations without considering how this evolution in First Nations cultures can be utilised to the benefit of the communities.

11 For an analysis of colonial relations which centres on the self and the other see generally. P. Fitzpatrick, The Mythology of Modern Law (London, New York: Routledge, 1992); "Constitution of the Excluded," supra note 3; "An Insistent Introduction," supra note 3; E. Said, Orientalism (New York: Vintage Press, 1979) (for an extract from Said’s work see Post Colonial Studies Reader, supra note 2 at 87); C. Achebe, "Colonialist Criticism," supra note 2 at 57. Whilst this analysis is valuable in understanding the power relations of colonialism it tends to over simplify the complexity of the colonial experience of First Nations in Canada and thereby precludes ways of trying to accommodate differences on the basis of equality in a post-colonial state. Central to this argument is the exclusion of consideration of the hybridity of colonised cultures and the capacity for resistance within the dominant framework.
dominator and the dominated and exploring the interactive relationship between the two.\textsuperscript{12} It is argued that the concept of cultural exchange has been precluded by giving to the power of the coloniser an unjustified absolutism.\textsuperscript{13} Conversely there needs to be recognition of the complexity of the disempowerment of the colonised, particularly questioning its paralysing effects.\textsuperscript{14} It is suggested that this process of active cultural exchange between the coloniser and colonised created a counter-culture that is not adequately explained by the opposition of 'self-hood' to 'otherness';\textsuperscript{15} that is post-colonial cultures are inevitably 'hybridised' and the focus should be on the strength of that 'contamination' rather than denigrating it as a weakness.\textsuperscript{16} It is on this concept of 'cultural exchange' that post-colonial universalism can be developed.

Appiah suggests that accepting this process of cultural exchange between the cultures, post colonialism is characterised by a concern with delegitimisation rather than a celebration of the purified pre-colonial culture.\textsuperscript{17} The ethnocentricity and imperialism of the West is firmly rejected, but so is the nationalist project of decolonisation.\textsuperscript{18} Appiah continues that the basis for this project of delegitimisation is an appeal to an ethical

\begin{itemize}
\item \textsuperscript{12}“Commentary,” in Post Colonial Studies Reader, supra note 2 at 86. See further, supra note 10.
\item \textsuperscript{13}“Rhetoric of English India,” supra note 2 at 111.
\item \textsuperscript{14}Ibid.
\item \textsuperscript{15}“Commentary,” in Post-Colonial Studies Reader, supra note 2 at 86.
\item \textsuperscript{16}“Commentary,” in Post-Colonial Studies Reader, supra note 2 at 183.
\item \textsuperscript{17}“The Post-Colonial and the Post-Modern,” supra note 2 at 122.
\item \textsuperscript{18}Ibid.
\end{itemize}
universal; a response to oppression and human suffering.\textsuperscript{19} Allied with post-nativist politics, the emphasis changes from national solidarity to the transnational.\textsuperscript{20} It challenges the call to ‘pure’ tradition in the name of humanism; that is a concept of humanism which transcends an obligation to religion, culture, and nation.\textsuperscript{21} Thus the universalism of the post-colonial project is one that continues to assert local independence and autonomy whilst recognising global interdependencies.\textsuperscript{22} It seeks a way to “cooperate without coercion”; a way to “define difference that does not depend on a myth of purity or authenticity”, whilst it actively promotes a constructive dialogue and interaction to be established between the cultures.\textsuperscript{23} The concern now is to avoid the damaging replication of the exclusive cultural categories of the past and to move forward by developing a new and stronger model of cultural exchange and growth; the product of which may well be the elucidation of common ground across the cultures.

\hfill

1.1 Universalism and Cross-Cultural Dialogue

The challenge in adopting a concept of rejuvenated universalism is finding a way in which common values can be developed and agreed upon which does not simply replicate the power imbalances of the colonial age. The answer to finding universal values lies in a

\textsuperscript{19} Ibid. at 123.

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.

\textsuperscript{22} “The White Inuit Speaks,” supra note 2 at 141.

\textsuperscript{23} Ibid.
process of dialogue and exchange. The search for universal standards which are consistent with cultural diversity has been undertaken by many commentators. Most focus on the need for inclusive cross-cultural dialogue. In arguing for this form of reconciliation there is recognition that we are able to discern common values between diverse cultures which reflect and protect core human values. However, non-native society is not accepted as holding a monopoly of knowledge on the content of those values. In its simplest form if we are to continue the quest for universal norms in Canada, the various communities must be given a voice in their formation to ensure respect and consideration for their cultural heritage and distinctive perspective.

One of the most convincing attempts to develop a theory of cross-cultural dialogue has been made by An’Naim. He characterises the aim of cross-cultural dialogue as


25 See especially, “Towards a Cross-Cultural Approach,” supra note 3 at 19; and “Cultural Transformation and Normative Consensus,” supra note 1 at 62 - 71. For an excellent critique of An’Naim’s arguments see “Communitarian Revision” supra note 8.
broadening and deepening international consensus. He observes that since people are more likely to adhere to normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards. An’Naim believes not only that universal cultural legitimacy is necessary but also that it can be “developed retrospectively” in relation to existing human rights standards through “enlightened interpretations” of cultural norms. He identifies as one of the paradoxes of culture, the way in which it combines stability with dynamic continuous change, and he argues alongside deepening international consensus, for the reformation of cultures from within. Any kind of change must be incremental and justified through culturally approved mechanisms in order to ensure that the community does not lose the coherence and stability which is vital for its communities continuing viability. The key to universalism,

26 “Cultural Transformation and Normative Consensus,” ibid. at 67. Although An’Naim’s theory of cross-cultural dialogue is developed in the context of international relations and the work of the United Nations, his arguments can be equally applied in a domestic context where a nation state contains within its borders several distinct cultural groups with a claim to autonomy and shared sovereignty. His theory is simply based on the need to give equal respect to all diverse cultures, and give all an equal voice in the development of the norms with which they must comply.


28 Ibid. at 20 -21. An’Naim makes a similar point in the context of the UNCRC. He rejects using the standards of the communities as the basis for the legitimacy of international norms because “[f]rom this point of view, the standards of the Convention should be defined in terms of folk models [the cultural norms of the community] rather than the reverse.” He comments that if this were the case the very utility of an international treaty on any human rights subject would be questionable, “if all it can do is to conform with existing folk models.” An’Naim therefore accepts the UNCRC as a suitable norm setting model from which cross-cultural dialogue can begin and with which internal cultural evolution will strive to reach consensus. “Cultural transformation and Normative Consensus,” supra note 1 at 70.


30 “Towards a Cross-Cultural Consensus,” ibid.
according to this view, is the gradual evolution of various cultures through internal criticism of their practices.\textsuperscript{31} Through this process it is argued that the culture may reconstruct itself and develop the most appropriate norms to realise human dignity and values. Whilst admitting that change must come from within An’Naim, would sanction external criticism and pressure to aid and inform the internal reconstruction.\textsuperscript{32}

The problem with this vision of cross-culturalism is that it can be interpreted as endorsing existing liberal standards with their Western bias and using those norms as a body of ideals that cultures should seek internal evolution to meet, or at least against which to re-evaluate their own standards.\textsuperscript{33} This attributes no more respect to the traditional cultural norms of previously excluded cultures than before.\textsuperscript{34} In the Canadian context, to base the search for cross-cultural consensus on existing norms and standards, principally the Charter of Rights and Freedoms, which was developed as an expression of the fundamental values held by non-native Canadians, seems completely antithetical to the goals of cross-cultural legitimacy.\textsuperscript{35}

\textsuperscript{31} Ibid.

\textsuperscript{32} "Communitarian Revision," \textit{supra} note 8 at 687.

\textsuperscript{33} Ibid. at 690. See \textit{supra} note 28.

\textsuperscript{34} Ibid.

\textsuperscript{35} Ibid. at 690. An’Naim is aware of the “tension” in his position but endorses the validity of existing international norms on the basis that if the process of cross-cultural dialogue were to be given the freedom to define its own purpose, “it is conceivable that these processes may lead to conclusions at variance with international concepts and norms of the rights of the child in general, or the best interests principle in particular.” This is a conclusion which An’Naim is not prepared to accept. One has to wonder what he sees as the purpose of cross-cultural dialogue if the only legitimate end is to accept the already existing ‘ethnocentric’ principles of international human rights law. Its purpose would be limited to persuading the rest of the world to accept the human rights norms of the West. "Cultural Transformation and Normative Consensus," \textit{supra} note 1 at 70.
The notion of cross cultural dialogue between cultures to seek out the common ground and encourage internal re-examination must be applicable to all cultural groups whether historically dominant or marginalised. We need a completely fresh approach to finding universal consensus. If true agreement on universal norms is ever to be a reality we must be suspicious of any normative standards and principles developed in a period of clear Euro-Canadian ethnocentrism. They simply do not provide a suitably inclusive and representative consensus on which cross-cultural dialogue can be developed.

An alternative argument by Renteln that cross cultural universals are possible if formed by empirical research identifying the common values across cultures, is also an invaluable insight, but again only goes half the way.\textsuperscript{36} Renteln's search for cross cultural universals gives greater respect to the existing values of diverse cultures than An'Naïms would seem to do, but it would also appear to allow for the stagnation of those cultures, and makes no provisions for evolution and progressive reform of cultural values when informed by the insights of others. This latter aspect of cross-cultural dialogue is essential if we are to pursue the development of a dynamic and useful body of cross-cultural universals. Adopting a theory of culturally legitimated universals does not mean endorsing those principles on which everyone is agreed and abandoning the rest as a lost cause. The search for agreement is to continue through dialogue and evaluation.

\textsuperscript{36} Universalism v's Relativism, supra note 3. Renteln argues that we should be concentrating not on the differences between people but on the similarities, and using empirical research to uncover existing cross-cultural universals. She argues that by seeking out specific moral principles held in common by all communities, through some form of comparative method, it is still possible to validate universal moral standards. See further, A. Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 Human Rights Quarterly 514 - 540; A Renteln, "A Cross-Cultural Approach to Validating International Human Rights: The Case of Retribution tied to Proportionality" in D.L. Cingranelli Human Rights Theory and Measurements (Basingstoke, Hampshire and London: Macmillan, 1988).
Charles Taylor has developed the argument on seeking internal review and reevaluation of cultural practices. He argues that there should be a presumption that we owe equal respect to all cultures,

“As a presumption, the claim is made that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.”

This is not however an irrebuttable presumption. The validity of the claim has to be demonstrated in the actual study of the culture. Taylor justifies rejecting an absolute presumption of accepting the truth or worth of a cultural practice on the basis that proper respect for equality requires more than a presumption that all cultures no matter what they propound are valuable. This demotes the notion of “respecting” to no more than a mechanical exercise. Cultural respect also entails a process of criticism and evaluation. This is an important aspect of cross-cultural dialogue as An’Naim recognises, albeit it is sometimes presented in a one-sided manner. By immersing oneself within the culture,

37 “Politics of Recognition,” supra note 4. See also Philosophy and Human Science, supra note 24 at 116 - 133. For the application of Taylor’s arguments in the context of First Nations see ‘First Nations Perspective,” supra note 24 at 1 - 10.

38 “Politics of Recognition,” ibid. at 66.

39 Ibid. See also, Philosophy and Human Science, supra note 24 at 122 - 123.

40 “Politics of Recognition,” ibid.

41 Ibid.

42 Ibid.

43 “Cultural Transformation and Normative Consensus,” supra note 1 at 67 - 71. In the context of the best interests of the child An’Naim argues, “this approach would emphasise criteria and procedural safeguards for the process by which the best interests of the child are specified, challenged and changed or refined within a specific culture or between different cultures at a certain point in time.” Ibid. at 68.
history, and tradition of the First Nations communities it is possible to gain some insight into their perspective on the world, their cultural practices, and why they endorse or reject certain actions.\textsuperscript{44} With this limited appreciation one can stand back and assess those attitudes from one's own cultural tradition and attempt to recognise from one's own perspective, those practices and views which can be endorsed and those which cannot. This process does not necessitate that a critic's views are correct or must be accepted. Any purportedly objective assessment of another's culture, practices, and views is inevitably determined by one's own cultural heritage and the unconsciously acquired standards of one's community.\textsuperscript{45} On the other hand this does not mean that an external observer should simply accept the cultural values of another community without consideration of their value from his or her own understanding. To blindly accept their worth can lead to stagnation and the sanctioning of inappropriate practices. However, by analysing another's culture and traditions from one's own perspective, it is possible to begin to promote some form of cross-cultural dialogue.\textsuperscript{46} This process is mutual, whereby a critic not only comments on another culture's understanding, but can evaluate his or her

\textsuperscript{44} Borrows refers to this process as gaining awareness of the "other society's self-understanding." He argues that once we have gained this understanding of the other society we can place it beside our own traditional perception of the issue to contrast the differing approaches. Through this process it becomes possible to develop a language of "perspicuous contrast" and thereby achieve a "fusion of horizons" between the cultures (application of Taylor). "First Nations Perspective," \textit{supra} note 24 at 9.

\textsuperscript{45} A. Renteln refers to this as the process of encultration. Renteln argues that people unconsciously acquire the categories and standards of their culture; it is automatically built into our perceptions. Individuals however are largely oblivious to the fact that their judgments are predetermined by cultural contextualisation. See generally, \textit{Universalism v's Cultural Relativism, supra} note 3.

\textsuperscript{46} Charles Taylor refers to this process as developing a language of "perspicuous contrast" which is neither the language of the dominant group or the oppressed. This new language of comparison allows for a process of contrast and evaluation: a "testing of each other's perspective," which allows for the "critique and incorporation of conceptions from diverse cultural understandings." "First Nations Perspective," \textit{supra} note 24 at 6.
own tradition and culture by the insights he or she has gained, and that are provided by a critic from a different culture.\(^{47}\) In this way a critic simultaneously challenges his or her own, and the other’s perspective.\(^{48}\) At the moment this process is admittedly one-sided, with very little challenge of western jurisprudence and culture from the First Nations perspective. However it is hoped that eventually the insights of the First Nations people can be used to illuminate and inform the valuable, and deleterious, aspects of Euro-Canadian culture. Borrows, for example, emphasises the importance that could be played in this process by the literary character ‘the Trickster’.\(^{49}\) The ‘Trickster’ is used to ‘teach people about principles and behaviour that are unfamiliar and unknown...and is used to convey what it might be like to think and behave as someone or something that you are not.’\(^{50}\)

2. A Children’s Charter in Canada

If future relations between native and non-native cultures in Canada are based on principles of mutual respect and equality, beginning with recognition of the First Nations as constituting an equal third order of government in Canada, this process of cross-

\(^{47}\) “First Nations Perspective,” *ibid.* at 9.


\(^{50}\) “First Nations Perspective,” *ibid.* at 7.
cultural dialogue becomes possible on child welfare issues in Canada. The aim of this cross-cultural discourse should be the development of a Children’s Charter which will establish the fundamental principles and standards to be applied to child welfare agencies across Canada, whether native or non-native. Overarching principles of child welfare which stretch across the boundaries of First Nations and non-native cultures, that is a “fusion of horizons”, is possible. Those principles and values can be formed by a process which is inclusive of all relevant groups. The common principles and standards embodied by the Charter will reflect the values and fundamental norms of all cultural communities, not just the dictated standards of non-native society. Whether framed in terms of rights or responsibilities a Children’s Charter will guarantee that basic standards of care and

51 I am aware of the difficulties that will be faced in any negotiation of the standards enshrined in a Children’s Charter firstly because of the great disparity in power and influence between the provinces and the federal government on one hand, and First Nations on the other, and also because of the great number and diversity of First Nations communities. Although First Nations are represented on a national level by national organisations, particularly the AFN, there are considerable problems in ensuring that the voices of the many diverse First Nations communities are fairly and adequately represented. For example, the defeat of the Charlottetown Accord is a striking testimony to the gap which often exists between the communities views and opinions, and the views of their leaders on the national political stage. However, the AFN has taken steps to ensure the communities are better represented in the organisation by giving direct representation to band/tribal councils through their respective chiefs. Negotiation of a Children’s Charter will require political efforts on a national scale and thus will remove some direct control over child welfare from the grass-roots community. However, there is no reason why a Children’s Charter would not have to be agreed to by referendum of First Nations communities, and the manner in which the general standards are met will remain a purely internal matter to individual bands. The introduction of self-government on the basis of ‘nations’ as recommended by the Royal Commission would also help overcome these problems by alleviating the power disparity, and enabling the head of each Nation to conduct negotiations directly with the representatives of the federal and provincial governments. For a discussion of the success and problems of the pan-Indian movement in Canada see “Introduction,” in Leroy Little Bear, Menno Boldt and J. Anthony Long, eds., Pathways to Self-Determination - Canadian Indians and the Canadian State (University of Toronto Press, 1984) at xvii - xix [hereinafter Pathways to Self-Determination]; Menno Boldt, Surviving as Indians. The Challenge of Self-Government (University of Toronto Press, 1993) at 85 - 88 [hereinafter Surviving As Indians]. Ponting and Gibbons, “Thorns in the Bed of Roses: A Socio-Political View of Indian Government” in Pathways to Self-Determination, ibid. at 122 - 138; M. Boldt, “Canadian Native Indian Leadership: Context and Composition” in Canadian Ethnic Studies (Vancouver, B.C. Department of Educational Foundations, University of British Columbia, 1980) [hereinafter “Context and Composition”].
protection are maintained across Canada. It will provide a means for the external review of all child welfare systems, whereby if problems develop there is a forum, external and independent of the community, which provides appropriate redress. The process of cross-cultural dialogue facilitated by the Charter would also promote the internal evaluation of child welfare practices endorsed by a community, according to their own accepted values and principles. Perhaps most importantly a Children’s Charter would guarantee that the various cultures, whilst recognising and respecting the other’s sphere of ‘sovereign’ autonomy and control, continue to work together. Child welfare in Canada will be based on a commitment to cooperate, not division and cultural chauvinism. Post-colonial Canada will be characterised by a sharing of knowledge, authority, and power. Through their implementation, the standards embodied in a Children’s Charter will secure an ongoing dialogue of co-operation between the various systems of governance. By working together all governments in Canada will be positively engaged to the end of protecting Canadian children against abuse and neglect. The deaths of Richard Cardinal, Lester Desjarlais, and Matthew Vaudriel are testimony to the need for such a mechanism in Canada.

2.1 How Would A Children’s Charter Work?

A culturally legitimated Canadian Children’s Charter would be developed through a fully-inclusive discourse of both native and non-native community representatives. The First Nations would be guaranteed an equal voice in the formulation of Charter standards,
with an equal number of representatives on a drafting committee as non-native Canada, to try and address the present power imbalance.\textsuperscript{52} Through these negotiations First Nations and non-native leaders would attempt to forge agreement on basic common standards of child protection and child welfare services, and on the fundamental rights which should be guaranteed to all Canadian children. To ensure the Charter was acceptable to the particular cultures of all First Nations communities a process of consultation could be facilitated and ultimately the Charter could be subject to a process of ratification by all Nations, tribes, or bands. Ideally the Charter would be accepted by all levels of government, including self-governments, as binding. Once the Charter is established therefore it would bind all bodies holding executive and legislative powers over children in Canada, and thereby would bind all child welfare agencies whether native or non-native, who are delivering child welfare services under governmental mandate.

2.2 Enforcement

There are a variety of ways in which the Charter could be enforced. A number of possible models are provided by both domestic law and international law. For example, the

\textsuperscript{52} The drafting Committee of the UNCRC purported to ensure a fully inclusive process of negotiation with representatives from all the five major regions of the world. See A. Loptaka, "Importance of the Convention on the Rights of the Child" (1992) 91/2 Bulletin of Human Rights. However the power imbalance between the West and the rest of the state members was still a contentious issue. The frustration of some states with the continuing exclusion of their perspective is evident in the reports of the drafting committee. I have argued elsewhere on the basis of a review of the debates that the voice of the Western states was clearly dominant. See e.g. Special Submission by Bangladesh, Appendix IV E/CN.4/1986/39; and the concerns of Senegal in para 251 E/CN.4/1988/28. For these reasons to try and address the prevailing power imbalance it is necessary that First Nations be given more than proportional representation on a drafting Committee.
implementation of the UNCRC is monitored through a process of State reporting. Every five years the State is required to submit a report to the UN Committee on the rights of the child outlining the steps they have taken to meet their obligations.\textsuperscript{53} The reports are evaluated and discussed, and recommendations made on further measures that the State is required to take.\textsuperscript{54} The process of reporting is common for UN human rights bodies and provides an effective way to monitor the compliance of states with conventions which place positive obligations on the State to secure the rights of its citizens, particularly in the form of social and economic reform.\textsuperscript{55} However, this model would be inadequate for monitoring compliance with the Children’s Charter because the Committee on the Rights of the Child is unable to respond to individual complaints concerning an alleged breach of a child’s rights, or comment upon particular situations or incidents that detrimentally affect the interests of children within a State as they arise.\textsuperscript{56} If the Charter was to be effective in dealing with child welfare agencies who have run into difficulties, and address complaints from individuals, it must be able to respond more immediately when these situations arise.

\textsuperscript{53} UNCRC, \textit{supra} note 1 Art. 44. The State party must report within two years of the entry into force of the Convention for the State party concerned and thereafter every five years. The report must indicate difficulties the State has encountered in meeting its obligations and provide sufficient information to enable a comprehensive understanding by the Committee of the current status of the Convention in the State party.

\textsuperscript{54} UNCRC, \textit{ibid.} para 45 (d). The Committee on the Rights of the Child must also make a general report every two years to the General Assembly through the Economic and Social Council (para 44 (5)).

\textsuperscript{55} For a similar procedure see the UN Covenant on Social, Economic and Cultural Rights, 1966.

\textsuperscript{56} For similar criticisms of the UNCRC see “Policy Orientated Overview,” \textit{supra} note 1 at 25. Chen argues that the implementation of the Draft Convention is weak because it relies on the reporting system and does not contain the state-to-state complaint and individual petition systems which are characteristic of many international human rights instruments. See also D. Gomien, “Whose Rights (and Whose Duty) is it? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child” (1989) 7 Journal of Human Rights 161 at 171 - 174; “A Reassessment,” \textit{supra} note 1 at 151 - 154.
In essence the Children's Charter requires more directly enforceable rights and a
monitoring committee which can provide an immediate response to particular situations.
An alternative would be to follow the example of the Canadian Charter of Rights and
 Freedoms. The rights/responsibilities contained in the Children's Charter could be
justiciable against governments and enforceable through litigation. By this model the rights
of the child under the Charter would be given their final determination by the Supreme
Court of Canada.  

This is problematic for the simple reason that it again depends on
subjecting the rights of the First Nations people to judicial determination in the non-native
system.  

Various proposals have been made regarding the better representation of
aboriginal people at the Supreme Court, but whilst such initiatives are important for the
First Nations people who must fight for their rights within the dominant system, whilst the
forum remains that of the tradition of Euro-Canada the First Nations people will continue


57 This would be necessitated by the fact that the Charter would have to be given a uniform interpretation
with one body holding the ultimate authority as to the legal meaning and effect of the provisions. There
has to be a single body with authority. See e.g. the comments of Kim Campbell on the need for the
Supreme Court to continue to bind First Nations communities in matters such as the interpretation of the
Constitution: "[i]n our view its is essential to harmonious relations among different levels of government
that that be one ultimate judicial authority, one arbiter of legal disputes." Kim Campbell, Minister of
1992) 5 (9) Canadian Speeches, at 18. These comments would seem to be equally applicable to a
Children's Charter aimed at securing uniform standards across the country. Also many First Nations
communities will be in a position to control their own child welfare but will not have an established
system for the administration of justice. These communities would then be forced to use the provincial
system to litigate the Children's Charter and ultimately the Supreme Court.

58 See e.g., Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies,
Monopolies"]; P. Kulchyski, "Introduction" in P. Kulchyski, ed., Unjust Relations: Aboriginal Rights in
Canadian Courts (Toronto: Oxford University Press, 1994); Sally Engle Merry, "Law and Colonialism"
(1991) 25 Law and Society Review 889; J. Bakan, "Getting to the Bottom of Meech Lake: A Discussion
to be subjected to the assimilating force of non-native ideology and law.\textsuperscript{59} A judicial forum is also inappropriate for enforcing the Charter because the rights/responsibilities enforceable will inevitably be enforceable in tribal courts, where available, or the provincial courts, which means that the actions being challenged are not being reviewed by a cross-cultural external review body. The court room does not therefore provide a suitable forum where the two systems can work together to find better ways to protect children. The Charter would be limited to challenging specific actions rather than providing a broader ranging basis for investigation, evaluation, and critique of particular child welfare systems. These are not functions for which the court is a suitable forum. For example, the standards and values envisaged as appropriate for the Charter include the imposition of positive duties on the governments involved, i.e. to provide appropriate training for social workers, and these kinds of duties have traditionally not been readily justiciable in court.\textsuperscript{60}

A better alternative is to keep the enforcement of the Charter out of the courts altogether. The implementation of the Charter should be achieved through a mechanism

\textsuperscript{59} Such recommendations have included developing a process for consulting representatives of aboriginal peoples of Canada in the preparation of lists of candidates to fill vacancies on the Supreme Court; and the federal government to examine in consultation with aboriginal groups, the proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers aboriginal issues. See Recommendations of the AFN following the First Nations Constitutional Consultations at the time of the Charlottetown Accord, \textit{Surviving as Indians, supra} note 51 at 98.

\textsuperscript{60} The Charter would probably contain for example a mixture of civil and political, and social and economic rights. Whilst the former are typically enforced through the court, the latter are generally considered to be inappropriate for the judiciary, dependent as they are on public policy decisions on matters such as national budgets. These are traditionally considered the domain of the executive and parliament. For the problems concerning judicial enforcement of social and economic rights see especially, J. Bakan and D. Schneiderman, \textit{Social Justice and the Constitution. Perspectives on Social Union for Canada} (Ottawa: Carleton University Press, 1992).
that secures equal representation from native and non-native communities allowing the communities to work together, and it should have a broader sweeping mandate including powers of determination in cases of alleged breaches of a child’s individual rights, final determination over complaints, general evaluation of agency performance, investigation of abuses, and the authority to recommend changes and improvements to the agency’s practices and policy including legislative change where necessary. The typically western adversarial procedure of judge and advocate is not conducive to achieving these objectives. A body more akin to a tribunal or commission would be more appropriate to the spirit of cooperation, cross-cultural dialogue, and overarching review that the Charter envisages.61 I would suggest that a model akin to that of the recently established Children’s Commission in British Columbia would provide a suitable forum in which the rights of the child under the Charter could be comprehensively and effectively secured.62

61 Wendy Moss has suggested a similar model for a general human rights act developed between the aboriginal and non-aboriginal community and enforced through a human rights panel which would be composed of both aboriginal and non-aboriginal representatives. Moss applies the cross-cultural dialogue propounded by An’Naim and suggests that a dispute concerning human rights violation could be taken at first instance to an adjudicative panel composed of lay persons and lawyers who would make a decision on an application of the Canadian Human Rights Act. This Act would eventually be replaced by a separate Human Rights Act developed in consultation with the Aboriginal organisations and to be applied to reserve communities expressing their endorsement of it. The decisions of adjudicative panels under either Act would be subject to judicial review. Moss’ recommendations rely heavily on the Euro-Canadian legal framework both in the Act itself and the enforcement procedure, although some “concession” may be made to aboriginal traditions. The Canadian Charter of Rights and Freedoms will apply to any dispute mechanism. Thus although similar to the proposal for the Children’s Charter I would argue that it does not fundamentally challenge the current existing power structures. See W. Moss, “First Nations Women and Sexual Discrimination in the Indian Act” (1990) 15 Queens L.J. at 299 - 302.

The office of Children’s Commission in B.C. was established pursuant to the recommendations of Justice Gove following his damning indictment of the B.C. child welfare system and its failures in the death of Matthew Vaudreil. The Children’s Commissioner has stated her function in the following terms,

“The Children’s Commission’s mandate includes ensuring rights are understood, acknowledged and upheld by service providers. We will accomplish this by monitoring the child serving system, as well as intervening in individual cases when necessary.”

The office of Children’s Commissioner will review the deaths of all children in B.C. and investigate all those which are found to be suspicious or unusual. All deaths will be

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63 Matthew’s Legacy, ibid. at 125 - 149. The Gove Inquiry resulted in 118 recommendations for change to British Columbia’s child protection system. The Gove Report recommended the establishment of a Children’s Commissioner who would report to the Cabinet and would “ensure the Ministry establish fair and adequate processes for receiving and investigating and responding to complaints; conduct independent investigation of complaints where warranted; conduct an annual review of continuing care orders, and review children’s deaths and critical injuries and investigate those found to be suspicious or unusual, who are ‘known to or in the care of the Ministry of Social Services’.” See Recommendations for Change, ibid. at 1.

64 The First Three Months, supra note 62 at 1.

65 Recommendations for Change, supra note 62 at “Executive Summary” 1. See Bill 23, supra note 62 cl. 4 (1), “The Commission may do any or all of the following: (a) collect information about the deaths of all children and investigate the death of any child if the Commission considers an investigation is necessary to determine the adequacy of services to the child or to examine public health and policy matters; (b) collect information about critical injuries sustained by children while they are receiving designated services and investigate those injuries; (c) make recommendations concerning any deaths or critical injuries investigated under paragraph (a) or (b) if the Commission considers this will enhance the safety and protection of other children.”
reported to the one office and suspicious deaths investigated. A death is likely be found suspicious and automatically investigated if sexual abuse, or neglect, is suspected, or there were prior reports of the child, or other children in the home or residence, being in need of protection. The death of a child whilst in care or 'if known to the Ministry' will always be investigated. If the death is to be investigated, the Children’s Commissioner will appoint an investigator. The investigator will submit his/her report to the multidisciplinary team which can then order follow up inquiries. Once all the information is gathered a “draft report is prepared and brought to the multidisciplinary team for discussion, analysis, identification of problem areas and formulation of recommendations.” For the purposes of investigation the Children’s Commissioner will have direct access to all the files of any agency or ministry, and have the power to conduct interviews. A final summary report will be completed assessing the information, making recommendations, and identifying key issues. A copy of the report will be sent to the Agency involved and the child’s family. Recommendations emerging from this process

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66 Recommendations for Change, ibid. at 3.

67 Ibid. at 5.

68 Ibid.

69 Ibid.

70 Ibid. See Bill 23, supra note 62 cl. 6, “The Commission has the right to any information that (a) is in the custody or control of a director or of a public body as defined in the Freedom of Information and Protection of Privacy Act, and (b) is necessary to enable the commission to perform its duties or exercise its powers under this Act, except information that could reasonably be expected to reveal the identity of a person who has made a report under this Act.”

71 Recommendations for Change, ibid.

72 Bill 23, supra note 62 cl. 8, “After completing an investigation into a child’s death or critical injuries, the Commission may report its findings and recommendations to the following: (a) the parent; (b) the
throughout the year will be summarised and delivered through an annual report ‘for the benefit of all communities and government,” 73

“Our purpose in this report and in the individual child fatality reviews is to identify systemic issues and make recommendations that will improve services to children, protect children better and reduce the number of children’s death. Our case reviews have revealed patterns of weakness in service delivery which must be addressed and to improve the quality of services to children. These recommendations are the subject of this report.” 74

Central to the report is ensuring that the objectives of quality standards are being met, and that needed changes to practice and policy, to prevent a similar tragedy, are identified. 75

To the same end, the Commission will also review all cases involving a critical injury to a child. 76 The commissioner will monitor adoption of recommendations contained in a death or serious injury review report and will comment publicly if the child welfare system does not respond in a manner which it considers to be adequate. 77 The Commission’s next report will contain an analysis of the progress of the Ministry and the other agencies in implementing the recommendations. 78

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73 Recommendations for Change, supra note 62 at 2.
74 The First Three Months, supra note 62 at 1.
75 Recommendation for Change, supra note 62 at 3.
76 Ibid. at 1.
77 First Three Months, supra note 62 at 3.
78 Bill 23, supra note 62 cl. 9(1) ‘The Children’s Commissioner must present the following to the minister: (a) an annual report of the work of the Commission; (b) reports or summaries of reports made by the commission on (i) the commission’s findings and recommendations under sec. 4 (1)(a) to (c) concerning the children’s death or critical injuries, and (ii) any responses made by ministries or agencies;
The Commission will also review and monitor all the complaint and adjudicative functions internal to government ministries as they relate to children. The Gove Inquiry recommended that when the services offered, and the subsequent internal complaint procedures of a ministry were felt to be unsatisfactory by a child, parent or caregiver, they should be given access to an external independent complaints mechanism through the Commission. The Children’s Commissioner’s mandate will include ensuring that complaints are properly investigated, dealt with fairly, and result in appropriate changes to practice standards and design. Where complaints cannot be resolved between the service provider and client, access to the Children’s Commission will ensure an independent, external review of the complaint. The Children’s Commissioner will chair a Child Welfare Review Board, to be established, which will have the mandate to hear complaints and investigations concerning an important administrative child welfare decision respecting entitlement to service or quality of service, and can review any complaint contending that there has been a breach of a child’s statutory rights under any relevant legislation.

(c) any report made by ministries or agencies; (2) In addition, the Children’s Commissioner may present a special report to the minister or comment publicly about a matter relating generally to the work of the commission, if the Children’s Commissioner considers it necessary to do so.

79 Recommendations for Change, supra note 62 at 6. See Bill 23, ibid. cl. 4 (d), "[The Commission] may set standards to be applied by prescribed ministries or agencies of the government to help ensure that their internal review processes are responsive to complaints about decisions concerning the provision of designated services to children; (e) [the Commission] may monitor whether ministries and agencies referred to in paragraph (d) are meeting the standards set under that paragraph."

80 Recommendations for Change, ibid.

81 Ibid.

82 The First Three Months, supra note 62 at 1.
particularly sec. 70 of the B.C. Child and Family Services Act. The complaint may be made by the child; the child’s parents; any others person representing the child; or the Child, Youth, and Family Advocate. The Commission will review each complaint and attempt to settle it. If that is not possible, it will either refer the complaint to the tribunal division, or dismiss it. On determination of the complaint the panel may make orders and recommendations to redress the problem. Again the findings of the panel may be made public if appropriate steps are not taken in response to the panel’s order.

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83 Recommendations for Change, supra note 62 at 6. See Bill 23, supra note 62 cl. 4 (f) “[The Commission] may review and resolve complaints made under sec. 10 about (i) breaches of the rights of children in care, and (ii) decisions concerning the provision of designated services to children.” Sec. 70 of the Child, Family and Community Service Act, 1996 guarantees the rights of a child who is in the care of the B.C. ministry: “Sec. 70 (1) Children in care have the following rights: (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement; (b) to be informed about their plans of care; (c) to be consulted and to express their views according to their abilities, about significant decisions affecting them; (d) to reasonable privacy and to possession of their personal belongings; (e) to be free from corporal punishment; (f) to be informed of the standard of behaviour expected by their caregivers and of the consequences of not meeting their caregivers expectations; (g) to receive medical and dental care when required; (h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests; (i) to receive the religious instruction and to participate in the religious activities of their choice; (j) to receive guidance and encouragement to maintain their cultural heritage; (k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care; (l) to privacy during discussions with members of their families, subject to subsec. (2); (m) to privacy during discussions with a lawyer, the Child, Youth and Family Advocate, the Ombudsman, a member of the Legislative Assembly or a member of Parliament; (n) to be informed about and to be assisted in contacting the Child, Youth and Family Advocate; (o) to be informed of their rights under this Act and the procedures available for enforcing their rights.” Child, Family and Community Service Act, S.B.C. 1996, c. 27 [hereinafter B.C. Community Service Act].

84 This is left undefined but may allow a ‘public interest’ type action in the interests of a particular child by a concerned member of the public.

85 Bill 23, supra note 62 cl. 10.

86 Ibid. cl. 13.

87 Ibid. cl. 16(1), “If a panel determines after reviewing a complaint made under sec. 10 (a) that the rights of a child in care have been breached, the panel may do one or more of the following: (a) order the director caring for the child to ensure that the breach does not continue; (b) make recommendations to the director about the steps that director might take to achieve that result; (c) request the director to (i) notify the Children’s Commissioner of the steps taken by the director to comply with the order under paragraph (a) and (ii) give reasons if that director decides not to take any steps or not to follow the panel’s
The goal of the Commission is to provide a comprehensive "one window of access into a comprehensive external investigation, and adjudication of complaints process, for child, youth and family services offered by government." It is to be completely independent of any child-serving ministry, and will be accountable to Cabinet rather than the legislature. The Children's Advocate's mandate is to be extended and his or her role strengthened to provide support for the work of the Commission.

The model of the B.C. Commissioner has been considered in some detail because it provides an example of a comprehensive review procedure for ensuring that children are provided with the best available care and protection, and that their rights are being guaranteed by those mandated to protect them. The complaint procedures of the

recommendations; (3) If a panel determines after reviewing a complaint made under sec. 10 (1) (b) that the complaint is justified, the panel may do one or more of the following: (a) order the person in charge of administering the designated service to reconsider the decision that was the subject of the complaint; (b) make recommendations about the steps that might be taken to resolve the complaint; (c) request the person referred to in paragraph (a) to notify the Children's Commissioner of any steps taken to resolve the complaint, and (ii) give reasons if that person decides not to take any steps or decides not to follow the panels recommendations."

88 Ibid. cl. 17(1), "After considering any reasons given in response to a request under sec. 16 (1)(c) or (3) (c), the Children's Commissioner may take action under this section if (a) no steps are taken in response to the order made under sec. 16(1)(a) or (3)(a) or (b) the steps taken are not, in the Children's Commissioner's opinion, adequate or appropriate; (2) In the circumstances set out in subsec. 1, the Children's Commissioner may (a) present a report of the matter to the appropriate minister, and (b) make the report public within 30 days after it was presented to this Minister."

89 Recommendations for Change, supra note 62 at 6.

90 Ibid. at 1.

91 Ibid. at 7 and 10. See Recommendation 36 of the Gove Inquiry for strengthening the Office of Child Advocate, British Columbia, Report of the Gove Inquiry into Child Protection in British Columbia: Executive Summary, vol. 3 (Vancouver B.C., 1995) (Commissioner: Thomas J. Gove). For example Justice Gove recommends that there be a public declaration that the Advocate's mandate encompasses all child-related services provided or funded by the Province and these services be designated in a schedule to the Child Youth and Family Advocate Act; and that the Child Youth and Family Advocate Act be amended to give the Advocate explicit authority to appoint legal counsel to represent children and youth individually or collectively, in appropriate circumstances.
Commission allow individual breaches of rights to be reviewed and appropriate orders made, whilst monitoring internal complaint mechanisms and reviewing the deaths or critical injury of children, allows for a more broad ranging review of the practices and policies of child welfare services. In all of these reviews the objective is to assess whether the agency is providing effective services, and if not, recommending improvements that can be made. By ensuring all deaths and serious injuries are reported to the Commission, and when combined with the facility for individual complaints, any serious problems with an agency’s work will be drawn to the Commission’s attention. Providing the Children’s Advocate with a stronger mandate, and allowing “public interest” type actions would further ensure that problems are discovered and dealt with. The B.C. model does not provide a culturally sensitive forum for dealing with issues of native child welfare and can be criticised on this basis.\textsuperscript{92} However the model can be modified to deal with this problem.

The Commission under the Children’s Charter could be constituted by an equal number of representatives from native and non-native communities, and to ensure cultural sensitivity to particular First Nations communities, the community to which a specific case relates should have the right to send a community representative to participate as an ex-officio member of the enforcement body. If a process such as this were established under the Children’s Charter, any major problems with an agency whether native or non-native, and any breaches of the fundamental rights of children in need of care, would almost certainly

\textsuperscript{92} The various panels established under the auspices of the Children’s Commission including the multidisciplinary review board and the Child and Family Review Board currently have one or two aboriginal representatives out of a membership of about eight. Aboriginal representation within the office of Children’s Advocate is also a matter of concern.
be discovered and appropriate recommendations and orders from a cross-cultural review panel, could be made. The arguable weakness in the Commissioner’s model is the strength of its enforcement mechanisms, relying as it does on the willingness of the agency to respond to recommendations, and the power of public pressure. However, the office of Commissioner is closely suited to the cross-cultural ethos of ‘cooperation and working together in good faith’ which is to mark the Children’s Charter. The emphasis is on “cooperation not confrontation,” making more formal legal powers of enforcement inconsistent with the Charter’s purpose. However, besides this compatibility, the political offices of Ombudsman and Commissioner have proved to be extremely effective in the investigation of complaints and in forcing governments to take appropriate remedial action in all spheres of political life. The idea of a Children’s Ombudsman is certainly not new, and has been recommended or established, albeit in a less effective form, in many Canadian provinces. Manitoba, for example, has the office of Children’s Advocate which

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93. This is the phrase used by Lung-chu Chen to describe the purposes of the cross-cultural UN Committee on the Rights of the Child and the state reporting procedure it uses. “Policy-Orientated Overview,” supra note 1 at 25.


95. See e.g. recommendations in Manitoba, Review Committee on Indian and Metis Adoptions and Placements, No Quiet Place, The Final Report to the Hon. Muriel Smith, Minister of Community Services, by Edwin C. Kimelman (Winnipeg, Manitoba Community Services, 1985) at 26 - 71 [hereinafter No Quiet Place]; Manitoba, Office of the Chief Medical Examiner, The Fatalities Inquiries Act: Respecting the death of Lester Norman Desjarlais (Brandon: Ministry of Social Services and Housing, 1992) (Associate Chief Judge Brian Dale Giesbrecht) at 275 - 279 [hereinafter Desjarlais Inquiry]; Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba. The Justice System and Aboriginal People, vol. 1 (Winnipeg, Manitoba: Queen’s Printer, 1991) (Commissioners: Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.M. Sinclair) [hereinafter MJI] at 527; Matthew’s Legacy, supra note 62 at 125 - 149.
Justice Giesbrecht recommended in the Desjarlais Inquiry, be given the same political independence and powers as the Ombudsman, and that he or she reports directly to the Legislature,

"The Director demonstrated clearly that politics, fear of offending the Indian leadership, and other extraneous considerations were the priorities. Child welfare appeared to be well back on the list. This must be contrasted with the Ombudsman. The Ombudsman enjoys an independence akin to that of a judge. That is it is expected that he should not worry too much about when he offends. His job is to bulldoze his way through to the matter under investigation. And that is the way it should be. Fear of offending the Indian leadership, or protection of superiors were not on his mind."\(^96\)

Providing such an office with a tool like a Children’s Charter could create a powerful culturally sensitive force in securing all child welfare agencies in Canada are meeting fundamental common standards, and that the rights of children receiving, or in need of, child protection services are being upheld.

3. Nice Theory But a Practical Impossibility?

A process of cross-cultural dialogue which results in consensus and agreement on a Canadian Children’s Charter embodying fundamental principles and standards to be enforced in a spirit of cooperation may be a great theory. After all, nobody will seriously contend with the assertion that children should be protected from neglect and abuse as effectively, and with as fewer risks, as possible. The crucial question, however, is whether,

\(^96\) Desjarlais Inquiry, ibid. at 277. At the time of the report the Office of Child Advocate was in the process of being established and the relevant Bill was before the Legislature. It would seem that this Bill failed to implement the recommendations of the Aboriginal Justice Inquiry and the Desjarlais Inquiry that the Manitoba government create an independent child protector. The Child Advocate Office as established in Manitoba does not have the independence that Justice Giesbrecht demanded. It is instead under the political control of the Minister of Social services which seriously reduces its independence from government and thus its effectiveness.
given the very difficult history of First Nations child welfare in Canada, and the legacy of
distrust of the non-native system that colonisation has inevitably left behind, cooperation
and compromise between the systems will ever be possible. Moreover, the cultural
differences between First Nations and non-native child welfare practices which are
constantly asserted raise questions as to whether agreement on common standards could
ever realistically be forged. I would contend that neither of these difficulties presents an
insurmountable obstacle to the development of a Children’s Charter. There would appear
to be a commitment by many First Nations communities to finding a way to work together
with the non-native system. There is no reason why that commitment should not extend

97 See above at chapter one pp. 11 - 32 for a discussion of the historical context in which these issues must
be viewed and the tragic legacy of colonialism that remains today.

98 See above at chapter one pp. 36 - 45. See especially on the cultural differences between native and non-
native child welfare practices, MJL, supra note 95 at 524 - 525; British Columbia, Community Panel

to child welfare. In the space of the last six months I have visited three native controlled child welfare agencies in British Columbia and spoken with their managers. As a result

The Agencies I visited were Usma, Nuu-chah-nulth; Xolhmi:lh Child and Family Services, Sto:Lo Nation; Spallumcheen Child Welfare Program, Spallumcheen Band. I am especially grateful to Marika Czink, Case Work Supervisor, Usma; Kelowa Edel, Manager of Child Welfare, Xolhmi:lh; and Bryan Watt, Director of Child Welfare, Spallumcheen, for discussing the work of their respective agencies and their experiences of working within an autonomous native controlled child welfare system. I would like to emphasise that the views and opinions they expressed were theirs alone and they do not necessarily represent the view of the band, tribe, or Nation for which they work.

Xolhmi:lh: Xolhmi:lh was created in 1994 (the Tripartite agreement between the province, the federal and Sto:Lo governments was signed in November 1993) to replace the Ministry of Social Services in the Sto:Lo Nation. In April 1995 it received full delegated powers including powers to receive and investigate reports of child abuse and neglect, develop child care resources, apprehension, and supervision of placement of children in care, from the Ministry. The agency is funded by the federal government. The Sto:Lo Nation’s traditional territory stretches from Yale to Port Langley. The Nation is constituted by 24 communities living on reserve. There were originally two tribal councils covering roughly 10 communities each. To establish the current governing structure of the Sto:Lo Nation the two tribal councils were unified. About half of the members of the Nation live on reserve. The Sto:Lo Nation is currently at stage two (Preparations for Negotiations) of treaty negotiations with the B.C. and federal governments. Xolhmi:lh has delegated authority from the Superintendent of Child Welfare at the provincial Ministry to provide protection for 23 of the 24 bands in the Nation. One band remains independent. Xolhmi:lh continues to seeks greater autonomy from the Province. It hopes that within the next three years they will reach an agreement that will enable them to have complete directorship over child and family services completely independent of the provincial system. Negotiations are currently ongoing with the federal and provincial governments to assume jurisdiction for off-reserve as well as on-reserve Sto:Lo children. An agreement is expected soon.

Usma: Usma, Nuu-chah-nulth Family and Child Services provides child welfare and family support services for the Nuu-chah-nulth Tribal council located at Port Alberni on Vancouver Island. The Nuu-chah-nulth Tribal Council is comprised of 14 bands situated on the West Coast of Vancouver Island and has 6,700 citizens. They are at stage 4 (Negotiation of an Agreement in Principle) of the treaty negotiation process. The agency operates under the delegated authority of the province and receives federal funding. The agreement extends not only to children living on Nuu-chah-nulth reserves but also to all Nuu-chah-nulth children coming into the care of the Superintendent. The tribal council was the first Native organisation in B.C. to deliver child welfare services under agreement with the federal and provincial ministry. In 1985 the Tribal Council signed an agreement with the Superintendent of Family and Child Services to provide delegated authority to selected staff under the Family and Child Services Act. In February 1987 a funding agreement for five years was signed with the Minister of Indian and Northern Affairs. During 1987 and 1988 the Usma Program was developed and the delegated authorities and services were phased in. Transfer of all Ministry of Social Services programs was completed in June 1988.

Spallumcheen: The Spallumcheen band are a small community of 419 members situated in Enderby in the Okanagan Valley. Their child welfare program initiative was prompted by the devastating removal of the community’s children during the 1970s which had left the reserves with few residents under the age of 16. The Spallumcheen child welfare program is completely autonomous from the province and therefore provides a unique model of First Nations control over child welfare. The Spallumcheen passed a band by-law under sec. 81 of the Indian Act in 1980 to provide the legal basis for assumption of jurisdiction over
of those visits I believe there exists the basis for consensus on a number of fundamental principles of child welfare that should be respected and secured across Canada.

3.1 A Commitment to Partnership

The principle of self-determination and the inherent right policy if taken to their logical conclusion, would form a legitimate basis for the First Nations to claim that particularly in their core sovereign spheres of jurisdiction, such as child welfare, there is no legal or even moral basis on which they should continue to cooperate with the non-native system. Exclusive ‘sovereign’ authority over their sphere of jurisdiction is perfectly justified. However isolation and exclusivity does not appear to be the desire of many First Nations communities in restructuring their relationship with Canada. In many areas they

the band’s child welfare. The band by-law assigns to the band exclusive jurisdiction over any custody proceeding involving a Spallumcheen child, whether located on or off reserve. The Minister of Indian affairs, following intensive lobbying was persuaded not to exercise his powers of disallowance. With this acceptance albeit reluctant from the federal government the band proceeded to organise a political campaign to persuade the provincial Ministry of Human Resources to respect the authority of the band as conferred by the by-law. After a highly publicised protest march the Minister of Human Resources signed an agreement stating: "The Minister of Human Resources agrees to respect the authority of the Spallumcheen Band Council to assume responsibility and control of their children. The Minister of Human Resources agrees to the desirability of returning Indian children of the Spallumcheen band presently in the care of the Minister....to the authority of the Spallumcheen band and both parties agree to work out an appropriate plan in the best interests of each child presently in care, assuming that the Spallumcheen band will develop necessary resources in negotiation with the federal government." The by-law power of sec. 81 does not explicitly give bands the power to make by-laws regarding child welfare and the federal government has subsequently disallowed attempts by other band’s to follow the Spallumcheen example.


102 In research carried out by J. W. Berry and M. Wells to ascertain attitudes towards self-government, in all nine aboriginal communities they studied (the James Bay Cree, Ojibway, Dene, and Tsimshian), the
have asserted their commitment to working together with Canadian governments in a spirit of cooperation.

Ovide Mecredi, the leader of the AFN, has stated that, “Natives want Canada to remain whole.”103 Certainly not all communities take such a clear position. The Mohawk, for example, adopt a more autonomous stance.104 They draw a clear distinction between co-operating with Canada on a ‘nation to nation’ basis at an administrative level and surrendering sovereignty.105 They argue that the first does not necessarily mean a surrender of the second,

“We see self-determination and governance as discrete concepts. But by believing that our Nation constitutes a sovereign power, we are not precluding political or economic co-operation with Canada. Self-determination is a right we have and which must be respected, but we recognise that it is a right which operates within the context of a political and economic reality. From our perspective, our right to self-determination is not detrimentally affected by the arrangements and agreements we reach with Canada for the mutual benefit of our peoples. Our position with respect to any agreement must be based upon our assessment of our current capabilities to govern and administer, it in no way derogates from the unlimited right to change those arrangements in the future upon reflection.”106

clear preference was to develop as Aboriginal people whilst integrating with and within the larger Canadian society. For Cree and Ojibway communities, separation was the second preferred alternative, followed by assimilation. Marginalisation was the least acceptable alternative. For the Dene and Tsimshian assimilation and separation were reversed in order. J. W. Berry and M. Wells, “Attitudes Toward Aboriginal Peoples and Aboriginal Self-Government in Canada” in Current Trends and Issues, supra note 99 at 215 - 232. Note - the research was conducted by W. Berry in the 1970s before the constitutional debates of the 1980s. As these developments may well have altered peoples attitudes, the conclusions drawn from the research should be treated with caution.

103 Ovide Mecredi reported in “Mecredi Denies Grab for Power” The Globe and Mail (1st July, 1991)

104 Restructuring the Relationship, supra note 99 at 111 - 112. See also E.J. Dickson-Gilmore, “Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation” in Robert A. Silvermann and Marianne O’Neilson, eds., Aboriginal Peoples and Canadian Criminal Justice System (Toronto: Butterworths, 1992) 259 [hereinafter “Resurrecting the Peace”].

105 Restructuring the Relationship, ibid. at 112.

106 Joint statement by the Mohawk Council of Akwesane, Kahnawake and Kanestake, ibid. at 112.
Whilst seeking partnership and cooperation with Canada this view would seem to negate the Mohawk people’s status as part of the Canadian Nation. Other communities, however, have taken a position that more clearly affirms their place in partnership with the federal and provincial governments as part of Canada. Either out of economic and practical necessity, or a political commitment to the unity of Canada as a nation, many First Nations pledge to remain as self-governing communities within the Canadian State but on terms of equal partnership,

‘I believe that there is a future for native and non-native people to work together because of the fundamental fact that we share the same future with the land that we live on...If the actions are based on understanding you have the beginnings of a cross-cultural dialogue. In some areas there are wide gaps between the cultures, but in some areas the differences are not great. In a spirit of understanding we will find ways to grow together from the earth, like the birch and spruce trees.”

The language of ‘limited sovereignty,’ ‘joint jurisdiction’ and ‘power sharing’ is commonly used. The Yukon Indians for example have committed themselves to a concept of ‘power-sharing.’

‘My purpose is to outline various options for power-sharing by First Nations governments and other Canadian governmental structures.’ (David Joe, Land Claims Negotiator, Council for Yukon Indians)

Treaty Nations often talk of ‘shared sovereignty,’ and maintain that their treaties created a confederal relationship with the Crown. The Royal Commission argues that the Treaty

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107 Gary Potts, “Growing Together from the Earth” in Nation to Nation, supra note 99 at 199 - 200.


109 Restructuring the Relationship, supra note 99 at 112.
Nations base their view of their relations with provincial and federal governments on principles of 'co-existence and equality.' The Federation of Saskatchewan Indian Nations outlined to the Royal Commission a vision of shared but equal sovereignties which is encapsulated and affirmed by the treaty relationship between First Nations and the Crown. The Inuit have also taken a more conciliatory view. Whilst strongly asserting their right to self-determination; a right which in their view has both international and domestic aspects, they also indicate that they wish to exercise their right to self-determination within the framework of the Canadian state through constitutional reform and the negotiation of self-government agreements.

"The implementation of our right to self-determination will be pursued in a cooperative and practical manner with all Arctic States including Canada, but the Inuit Agenda is first and foremost premised upon our recognition of our collective identity as a people and in violation of our right to self-determination under international law. This must be rectified by several initiatives: the negotiation of regional self-government agreements, constitutional entrenchment of the inherent right of self-government, and full recognition of the right of indigenous peoples to self-determination, under international human rights standards. (Rosemarie Kuptana, former President of Inuit Tapirisat)"

Rosemarie Kuptana insists that the goal of the Inuit through constitutional reform is to allow them to become equal partners in Canada. This view is echoed by Roger Gruben the Chairman of Inuvialuit Regional Corporation.

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110 Ibid.

111 Ibid.

112 Ibid. at 113.

113 Ibid.

114 Rosemarie Kuptana, in First Peoples and the Constitution, supra note 99 at 28.
“As a distinct people within Canada, Inuit will continue to play a positive role to establish a unified Canada for the benefit of all Canadians. Inuit view ourselves as Canadians, and Inuit believe that survival of a distinct Inuit society also means the survival as an integral part of Canadian identity.”

Relations between the ‘three orders of government’ will be based on cooperation and negotiation, with First Nations governments fitting into the ‘sharing of jurisdiction’ that already exists in Canada between the federal and provincial governments. Clearly many First Nations are prepared to accept that as nations within the Canadian state their inherent sovereignty will be limited and there will be restrictions on the exercise of their right to self government. Such restrictions are inherent to cooperation and power sharing,

“No country has the power to rule its people and territory free from controls exerted by other sovereign Nations. To varying degrees, compromises are made. These affect all those powers of any sovereign Nation that are necessary for self-government. Through such compromises, a Nation can act in a sovereign way to give up part of its sovereignty and enjoy the protection of another power. That does not make its sovereignty any less real.” (Dan Bellegarde, First Vice-Chief, Federation of Saskatchewan Indian Nations)

By this vision, the three orders of government can clearly continue to work together. Non-native society has also at times asserted a similar commitment to ‘power-sharing’ and working together with the First Nations communities on the basis of “mutual recognition”,

“The first building block is mutual recognition. The old colonial paternalistic ways and institutions must be swept away, replaced by new institutions built on the recognition of inherent rights. The renewed Canada can be built only through partnership shared by all peoples of Canada. partnership implies the acceptance of the basic values of sharing, honesty and kindness.”

115 Roger Gruben, ibid. at 66.
116 Wendy Grant-John, ibid. at 52 - 53.
117 Dan Bellegarde in Aboriginal Self-Determination, supra note 99 at 70.
118 Report of the Special Joint Committee for a Renewed Canada (Ottawa: Supply and Services, Feb. 28, 1992) (Joint Chair: Hon. A. Beaudoin and Dorothy Dobbie) at 27 - 34 and 107 - 109 [hereinafter Renewed Canada].
In some areas the need for cooperation and limits on the powers of all three
governments are relatively uncontroversial. For example, where the issue is the sharing of
land and resources, conservation of resources, or ensuring all Canadians have access to
highly specialised medical treatment, the need for cooperation between the various
governments is obvious. The issue becomes how that reconciliation of interests is worked
out on a fair and equal basis.\(^{119}\) Other areas however are more controversial. Child welfare
falls within the core of First Nations jurisdiction.\(^{120}\) As a matter integral to their
communities and culture and having no effect on the interests of non-native Canadians, a
strong argument can be made that there is no need for any scheme of cooperation, or
common standards, that place limits on First Nations sovereignty. How they protect their
children, and the standards of child welfare observed are their own concern. These are
matters entirely integral to the First Nations communities. Apart from the problems that
this could create concerning Canada’s international obligations,\(^{121}\) the First Nations may

\(^{119}\) The current “reconciliation” attempted by the courts in the decisions following \textit{Sparrow} is not
reconciliation, but the imposition of federal policy on First Nations communities. Compromises have to be
worked out by a process of negotiation whereby First Nations are given an equal voice in the development
and implementation of, for example, co-management schemes. Imposed judicial solutions are simply not
recognising the full right of First Nations to equal status in determining future arrangements. See \textit{R v
S.C.R. 733 (S.C.C.); \textit{R v Pamajewon (H.) et. al} (1996) 92 O.A.C. 241 (S.C.C.). For commentary on these
cases see J. Borrows, “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 Constitutional Forum
27.

\(^{120}\) See above at chapter two pp. 166 - 175. See especially, \textit{Restructuring the Relationship}, \textit{supra} note 99
at 213 - 219; Canada, Dept. of Indian Affairs and Northern Development, \textit{Federal Policy Guide for
Aboriginal Self-Government. the Government of Canada’s Approach to Implementation of the Inherent
Right and the Negotiation of Aboriginal Self-Government} (Ottawa: 1995) at 5[hereinafter \textit{Federal Policy
Guide}].

\(^{121}\) See above at chapter four pp. 260 - 268, and \textit{supra} note 1.
well be justified, given their past experiences with the non-native child welfare system, to take this position. I would contend however that the safety and protection of children is a fundamental concern of both native and non-native communities and it would be in the interests of all communities in Canada for the spirit of compromise and cooperation expressed by the First Nations to extend into these core areas of jurisdiction. This cooperation would not of course be mandatory and the First Nations would not be forced to compromise their views. It is a fully consensual process. However, the ideal in an area of such importance would be to positively engage all three orders of government in working towards the better welfare of aboriginal children,

"The best interests of Aboriginal children will be served only by determined and sustained efforts on the part of Aboriginal and non-Aboriginal government’s, institutions and people to recognise and support each other’s contributions to the common goal."\(^{122}\)

A cross-cultural Children’s Commission which enforces the standards of native and non-native cultures, and has guaranteed equal representation from native and non-native communities both in formulating standards and enforcement, may well increase the willingness of the First Nations to cooperate with non-native society on child welfare. A completely new approach which is clearly distinct from the previous interventionist mechanisms of the federal and provincial governments may help alleviate some of the existing distrust. The comments of the three native child welfare agencies in British Columbia all seemed to suggest that a vision of the systems working together in a spirit of

cooperation is not an unrealistic ideal. In particular, they all agreed that the elucidation of common values and standards across Canada, was an important and realistic objective. Marika Czink of Usma referred back to the proposal of the AFN to introduce national aboriginal child welfare legislation.\footnote{Interview with Marika Czink, Case Work Supervisor, Usma Family and Child Services, Nuu-chah-nulth (April 21st, 1997) Nuu-chah-nulth Tribal Council offices, Port Alberni.} One of the reasons that that legislation had been dismissed was out of fear that it would only secure the very minimum standard. However, in her opinion,

"Whilst overriding legislation [containing common standards] would set only the minimum general standard, it would ensure that the current patchwork of provisions did not exist, and that those communities which were not meeting the very minimum standard were forced to do so."\footnote{Interview with Kelowa Edel, Manager of Child Welfare, Xolhmi:lh Child and Family Services, Sto:Lo Nation (April 17th, 1997) Sto:Lo Nation.} (Marika Czink)

Consequently she concluded that national legislation of some form should be reconsidered. Although her comments were limited to pan-aboriginal standards, there is no reason why her reasoning on the need to prevent a patchwork of provisions and basic minimum standards would not apply to pan-Canadian standards aimed at securing uniformity across both native and non-native child welfare agencies. Kelowa Edel, Xolhmi:lh, thought that protections such as those contained in a Children's Charter would be useful.\footnote{Interview with Marika Czink, Case Work Supervisor, Usma Family and Child Services, Nuu-chah-nulth (April 21st, 1997) Nuu-chah-nulth Tribal Council offices, Port Alberni.} She considered that it would be possible for all communities in Canada to agree upon some basic standards of care for children. For example, she argued that no culture sees violence and abuse as acceptable. Just as non-native society denounces abuse, the Sto:Lo people would never, according to traditional teachings, have hit a child,
“If the First Nations people were together to create a Charter of Rights for First Nations children, it would not be that different from a non-native Charter. There are basic standards of care that all could agree upon.” (Kelowa Edel)

Bryan Watt of Spallumcheen agreed that there was a need for recognition of common basic minimum standards across Canada, particularly if self-government is to be introduced.¹²⁵

“If self-government, in whatever form, is to be introduced somebody has to impose a basic standard of practice and care. This levelling of standards across Canada was the philosophy behind the Canada Assistance Plan: there should be a base line of services across the country...I do not trust the Provinces to ensure certain minimum standards are observed. Self-Government is a good idea as long as there are basic standards which must be observed. There must be some fundamental non-negotiable standards that apply across the board to all Canadian child welfare services, whether native or non-native. Given that these fundamental standards are secured self-government is a good idea.” (Bryan Watt)

A commitment in principle to post-colonialism’s ‘rejuvenated universalism’ would seem to exist, the difficult part of the process will be working out the practicalities of compromise, cooperation, and power sharing in the context of a Children’s Charter.

3.2 A Children’s Charter - Formulating the Standards

If the various sides are committed, in principle, to the elucidation of shared minimum standards of child protection in Canada, and to the development of a mechanism for the external review of the way in which their systems purport to meet those standards, the crucial issue is whether the successful formulation of common ‘universal’ principles of child welfare, worked out through cross-cultural dialogue, is possible.

The criticisms made of the current provincial child welfare system in chapter one and in particular the cultural insensitivity of the provincial system to the different cultural practices and traditions of the First Nations, might suggest that developing 'universal' principles between the two systems is going to be extremely difficult. The various cultures and within that their traditional child welfare practices, are often presented by the literature as entrenched at opposite ends of a pole. The search for pre-colonial purity in tradition exacerbates this gulf. However, as argued above post-colonial literature suggests that post-colonial cultures are inevitably hybridised and may in fact share a great deal in common with the colonising culture. In contrasting aboriginal cultures with non-native practices, it should be noted that the cultures of both native and non-native people are often presented in a 'pure' form that may reflect the unadulterated theory, but not the living reality. Further the practices of the cultures, both First Nations and non-native, are often presented in an essentialist form which polarises the cultures in opposition. There are

126 See supra note 98 for literature on the asserted differences between native and non-native child welfare practices. The following passage from an article by Samuel Bull is a good example of the polarisation of native and non-native cultures, "In the context of Indian child rearing methods, for example, non-interference in the activities of children is common. Parents will not interrupt or interfere while a child is engaged in some activity of his own, they will wait until he has completed what he was doing. This practise shows respect for the child's autonomy and does not interrupt his concentrated interest or any creative thinking that may be in process...Parents instruct their children about right and wrong, but allow them the decision. Non-Indian parents tend to believe that it is the parent's responsibility to direct and control children until they have internalised the values of the parents, and have been prepared for their superior role in the scheme of things." S. Bull, "The Special Case of the Native Child," supra note 98 at 527 - 528.

127 For a brief discussion of the search of the decolonisation school for pre-colonial purity and the raising of uncontaminated 'tradition' to a place of pre-eminence, see above at chapter three pp 217 - 218. See especially, "Counter Discourse," supra note 2 at 95; S. During, "Postmodernism or Post-Colonialism Today" in The Post-Colonial Studies Reader, supra note 2 at 125. Surviving As Indians, supra note 51 at 195 - 203. For an excellent critique of the creation of a 'cultural myth' in aboriginal societies see "White Inuit Speaks," supra note 2 at 136.

of course substantial differences between the many First Nations cultures; some will be very different to non-native cultures whereas others will be very similar. However as a general proposition it would seem that the various cultures, native and non-native, share substantial common ground on the issue of child welfare. All three child welfare agencies have been happy to adopt similar standards to those embodied in provincial child welfare legislation, even when this was not demanded from them. The Spallumcheen, who already have their own child welfare legislation through the enactment of By-law no. 3 under sec. 81 of the Indian Act, have essentially replicated the standards of the provincial legislation. For example, the best interests of the child is the primary consideration, and the criteria for determining whether a child is in need of protection is practically identical, if less detailed. They also follow the same aboriginal placement principle that was later incorporated into B.C. provincial legislation. One reason for this has been the concern of the band not to attract criticism and push the province into challenging their

129 Spallumcheen Indian Band By-Law No. 3, A Band By-Law For the Care of Our Indian Children, 1980 [hereinafter, By-Law].

130 By-Law, ibid. sec. 10, “Before Deciding where the Indian child should be placed, Chief and Council should consider and be guided by Indian customs and the following preferences; (iv) in all cases, the best interests of the child should be the deciding consideration. Compare Community Service Act, supra note 83 sec. 41.

131 By-Law, ibid. sec. 7, “An Indian child is in need of protection when (a) a parent, extended family member, or Indian guardian asks the Indian Band to take care of the child; (b) the child is in a condition of abuse or neglect endangering the child’s health or well-being, or (c) the child is abandoned, or (d) the child is deprived of necessary care because of death, imprisonment or disability of the parents.” Compare Community Service Act, ibid. sec. 13 (1).

132 By-Law, ibid. sec. 10 (iii) In the absence of placement with the family, a preference for placement shall be given to: (1) a parent, (2) a member of the extended family living on reserve, (3) a member of the extended family living on another reserve, although not a reserve to the Indian Band, (4) a member of the extended family living off the reserve, (5) an Indian living on a reserve, (6) an Indian living off a reserve, (7) only as a last resort shall the child be placed in the home of a non-Indian living off reserve.” These provisions closely parallel those that were later adopted by B.C.s provincial legislation. Compare Community Service Act, ibid. sec. 71(3).
jurisdiction. More importantly, however, Bryan Watt believes that they would not want to follow widely different standards. The band may modify the standards expected, for example they use a slightly lower threshold for determining if a child is in need of protection than that used by provincial child welfare agencies, but despite these differences, the Spallumcheen basically agree with current provincial child welfare philosophy. Xolhmi:lh who are in the process of moving towards greater autonomy are also happy to utilise the principles and standards contained in B.C.'s legislation, with some modifications to reflect their particular cultural practices,

"The agency want their own legislation and legal structure. The legislation will be similar in form and content to that of the provincial legislation but with their own particular views and practices of internal review and dispute resolution incorporated." (Kelowa Edel)

The Sto:Lo are currently negotiating complete autonomy from the province. They hope within the next few years to reach an agreement that secures their complete Directorship over child and family services, aside from and completely independent of the Province.

133 Bryan Watt, supra note 125.

134 Kelowa Edel, supra note 124. The current legal position is that Xolhmi:lh who operate under delegated provincial powers must meet the principles and standards contained in provincial legislation. The Sto:Lo recognise this duty in all their child welfare negotiations. This premise underlies the Seabird Island and Xolhmi:lh Child, Family, and Community Service Protocol Agreement (Sto:Lo Nation, December 1996) [hereinafter Seabird Island Agreement]. Sec. 1 states, "The parties agree to abide by Xolhmi:lh's guiding principles and service delivery principles as well as all provincial and federal legislation which regulates the delivery of Child, Family and Community Services including but not restricted to the Child Family and Community Service Act, RSCB." Similarly in its recent proposals to the federal and provincial government on assuming jurisdiction for off-reserve Sto:Lo children Xolhmi:lh state, "The Xolhmi:lh program shall provide services to the children they are responsible to pursuant to this delegation agreement that meets the standards of the Child, Family and Community Services Act, the Child and Family Review Board, the Child, Youth and Advocacy Act, the Adoption Act and the Public Guardian and Trustees Act." Sto:Lo Nation, Xolhmi:lh Sto:Lo Child and Family Services. Target Population, Delegation Classification and Jurisdiction, by Dan Ludeman (Sto:Lo Nation, March 18, 1997) [hereinafter Target Population).
They will then enact their own legislation to provide the legal mandate for the agency. Xolhmi:lh are also compiling their own policy and procedures manual. However, very few large changes are foreseen in how the agency will operate. The policy manual and the legislation will be based on the existing provincial models.

The common base that now exists between the various cultures is exemplified further by questioning the common contrasts and differences that are often drawn. The objective of all three agencies has been to deliver child welfare services according to the cultural practices and traditions of the community. However, both Spallumcheen and Usma Nuu-chah-nulth, found it made very little difference in practice. Apart from the important and extensive use of the tradition of the extended family, which was common to all three agencies, both Nuu-chah-nulth and Spallumcheen have found it difficult to incorporate the community’s traditional child welfare practices into their work,

"The agency has found it difficult to come up with culturally appropriate programs not because of the limitations of the provincial legislation or mandate but because no one seems to know what they are." (Marika Czink)

Bryan Watt similarly questioned the contemporary existence of substantial differences in cultural child welfare practices between native controlled agencies and the provincial ministry. He argued that non-native society had done such a ‘good job’ of destroying native cultures that members of the Spallumcheen band, particularly the younger members, find it difficult to identify distinctive aspects of their native culture. Consequently he comments,

"In trying to deal with social problems one effective way is to instil pride in the bands distinct culture. Certain cultural elements have survived, like smudging."

135 Bryan Watt, supra note 125; Marika Czink, supra note 123.
and are practiced today - but they are not as substantial as often suggested. The agency can incorporate regional cultural elements that have survived. But there is a real lack of traditional cultural values that can be identified and thus incorporated.” (Bryan Watt)

One of the most common suggested differences between native and non-native cultures is between a collective and individual understanding of rights. However many First Nations cultures have changed to incorporate a commitment to individual rights, whilst non-native society has also changed and is not as starkly individualistic and authoritarian as is sometimes presented. For example, the notion of extended family care and collective responsibility for a nation’s children is certainly not foreign in Western society; in fact the latter forms the justification for the court’s overriding common law jurisdiction of parens patriae. Nuu-chah-nulth is clear on the principle that the individual child has to come before the group. The Nuu-chah-nulth Nation endorses the principle that the collective has rights and that the community is harmed every time a child is removed from them, but whilst recognising the concern of the community, the child welfare agency takes the firm position that it has to put the individual interests of the child first,


138 Marika Czink, supra note 123.
"The child has the right to be free from abuse - that is the paramount concern. Therefore that individual right of the child takes precedence. However the agency does try to recognise and take notice of the collective rights of the community and the family through family meetings to discuss appropriate placements of the child and support services. The strength of the family or collective can be very positive but the child has individual rights which need to be recognised as taking priority over the collective rights of the group. The community position is that it harms the community every time a child is removed from them. If a child is removed the agency recognises that position by looking to the community first - but the agency will not be flexible at all on the protection of the child." (Marika Czink)

The Spallumcheen also endorse the position that the individual interests of a child must override the collective concerns of the group; in fact Bryan Watt argued that the concept of the collective overriding the individual rights of a tribe member was an anathema to the Shuswap Nation,

"The Collective v’s Individual Interests debate is essentially a West Coast tradition. The same issue does not arise in the interior of B.C.. An argument that the collective interests of the band must override the individual interests of the child would not get off the ground with the Chief and Council. The sense of the collective simply isn’t strong enough. Their sense of culture is not strong enough. The argument that the collective is prior to the individual is more rhetoric than anything else." (Bryan Watt)

Whilst maintaining the position that the Sto:Lo has retained a strong sense of collective responsibility, and that the collective interest may take priority over the individual interests of one person, Kelowa Edel argued that the collective interest was not in conflict with the individual interest of the child. It was argued that anything that hurt the child, hurt the collective interest, and thus no action would be taken that was not in the individual child’s best interests. It was suggested that the best interests of the child would generally be met

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139 Bryan Watt, supra note 125.
140 Kelowa Edel, supra note 124.
by the child remaining within the community, which is also consistent with the community’s position,

‘The agency will always be guided by the method of care that will be least disruptive for the child. Thus the agency will seek to place the child first with their immediate family, then with the extended family, and then with the child’s community. These principles are exactly the same as those which will guard the future of the community as a whole: to protect the child within their family and if this is not possible within their community. There is therefore no conflict between the individual interests of the child and the interests of the community.” (Kelowa Edel)

The differences and distinctions that are often drawn between the various cultures, whilst remaining important, would not therefore seem to preclude finding substantial common ground on which a consensus about ‘universal’ child welfare practices can be developed.

Differences will of course still exist between the various groups. Particularly among communities who have remained relatively untouched by the forces of colonialism the differences between their cultures and non-native society on some of the issues discussed above will be more pronounced. A process of cross-cultural dialogue is essential in identifying the existing differences and providing, for the first time, the opportunity for the First Nations perspective to be heard. Where entrenched differences do exist between the cultures the purpose of a process of cross-cultural dialogue is to respect and recognise those differences, whilst attempting to break down barriers between the cultures. Cross-cultural dialogue encourages a process whereby the cultural chauvinism of all cultures is challenged. For example, in seeking to find common standards and applying them, Dakota Ojibway would be encouraged to question whether relying on the extended family was an appropriate method of protecting Lester given that the extended family showed absolutely
no concern for his welfare; the B.C. ministry would be encouraged to question whether their reluctance to intervene in the relationship between Matthew and his mother, and focusing on her needs instead of Matthew, was an appropriate method of protecting Matthew. In both cases the cultural assumptions of the community in question need to be re-examined. In the case of Dakota Ojibway, that of the extended family system; in the case of the B.C. ministry, the belief in protecting the private sphere of the nuclear family. At times all traditions need to be brought into the spotlight and re-examined. A process of cross-cultural dialogue makes such a re-examination imperative when the interests and basic rights of children are violated. Under a Children’s Charter this process of re-examining our cultural biases and assumptions will be ongoing. It will be undertaken in the attempt to establish common values, and will continue through the interpretation and enforcement of the Children’s Charter.

There is consequently no reason to reject out of hand the contention that common standards and principles across the various cultures will be successfully agreed. From my perspective as a white English woman I have formed views and opinions, based on my research in this area, on the most appropriate ways in which a native or non-native controlled child welfare system should protect the fundamental interests of the children within its jurisdiction. I have also talked with people who deliver child welfare services to

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141 Desjarlais Inquiry, supra note 95 at 23 - 26.


the First Nations communities and heard their views on how they can best perform their jobs. Between us we have begun the process of a cross cultural dialogue.\textsuperscript{144} By no means did I agree with all their views, similarly they do not have to agree with mine. Neither view is necessarily right or wrong, but both can be valuable. Nevertheless, there was a significant amount on which we did agree. The following principles, I believe, are necessary for any child welfare system to adequately protect the children in its care, and they represent some of the standards which could be incorporated in a Children's Charter. They include both substantive principles of child welfare: that the best interests of the child should be the first consideration, and that the child's cultural heritage should be central to child protection decisions; and standards relating to the delivery of child protection services: staff must be properly qualified and trained, professional staff must be protected against political interference and manipulation in decision making, and there must be effective internal review and appeal mechanisms. Those principles will be discussed in the light of the views, traditions, and practices explained to me by the three native child welfare agencies, and will be supplemented by other literature discussing the First Nations perspective on these issues. The result I hope demonstrates that agreement can be reached on fundamental common values and standards which protect the basic rights and interests of all Canadian children, whilst respecting the differences and diversity in the cultural practices that obviously exist. I also hope it shows that the issues and concerns raised in this thesis about the future of First Nations child welfare under a system of self-

\textsuperscript{144} It should be noted that whilst the three people I talked with were all working for a native community and were therefore working within and representing an agency that incorporates the community's policies and objectives, both Bryan Watt and Marika Czink are non-native.
government in Canada, can be discussed and examined in a public forum on a basis of equality and respect.

The principles discussed have been informed particularly by the observations of Justice Giesbrecht in the Desjarlais Inquiry, the Royal Commission on Aboriginal Peoples, and to the best of my ability, the views of the First Nations people. However all the principles are consistent with the UN Convention on the Rights of the Child which under international law binds all governments in Canada. The UNCRC is claimed by the

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145 Desjarlais Inquiry, supra note 95.

146 Gathering Strength, supra note 122 at 9 - 106.

147 See especially, Liberating Our Children, supra note 98.

148 Supra note 1. See especially the following provisions of the UNCRC,

Article 3: (1)"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; (2) State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures; (3) State parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision;

Article 5 State Parties shall respect the responsibilities and duties of parents or, where applicable the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention;

Article 9 (1) State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence;

Article 19 (1) State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child; (2) Such protective measures should,
UN to be a culturally legitimate statement of universal values on the rights of the child. The process of consultation preceding the formulation of standards tried extremely hard to address the power imbalance in the UN and be fully inclusive. The monitoring Committee on the rights of the child is similarly concerned with cultural sensitivity and inclusivity. Whilst there are still problems as appropriate, include effective measures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore and, as appropriate, for judicial involvement;

Article 20 (1) A child temporarily or permanently deprived of his or her family environment, shall be entitled to special protection and assistance provided by the State; (2) State parties shall in accordance with their national laws ensure alternative care for such a child; (3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background;

Article 24 (3) State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children;

Article 27 (1) State Parties recognize the right of every child to a standard of living adequate for the child's physical mental, spiritual, moral and social development;

Article 30 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 culture, to profess and practice his or her own religion or to use his or her own language.” (my emphasis)

149 P. Alston, “The Best interests of the Child: Towards a Reconciliation of Culture and Human Rights” in Reconciling Culture and Human Rights, supra note 1 1 at 1 - 2. Contra, “A Reassessment,” supra note 1 at 146 - 149. See further supra note 1 for commentary on the UNCRC.


with the UNCRC as a model of culturally legitimate universal standards, it is an important start in the process of cross-cultural dialogue. The rights it enshrines in my opinion are a useful starting point in the development of a Canadian Children’s Charter.

3.2 (i) The Best Interests of the Child Must be the Primary Consideration

The first principle which should guide any child welfare system in providing child protection and welfare services, is that the best interests of the child should always be the primary consideration. A child has the right to the best available care and protection to prevent him or her being subjected to mental, physical, or sexual abuse, and no other considerations should be allowed to override that principle to the child’s detriment. The provincial courts and child welfare systems have often been criticised for cultural insensitivity towards First Nations people by removing a child from the extended family or community in the name of his or her ‘best interests’. However I would contend that the actions of the judiciary may be defensible if the court was motivated by a commitment to placing the welfare and safety of the individual child above any cultural or ‘racial’ affiliation. It is obviously unacceptable for any child welfare system to blindly adopt the position that non-native upbringing is superior to native upbringing. It is also unacceptable for the court to ignore the importance of the ‘indigenous factor’ and the

152 See above at chapter one, pp. 57 - 78. See especially, M. Kline, “Best Interests Ideology,” supra note 3; Carasco, supra note 98; “A Vicious Circle” supra note 98.

153 Justice Giesbrecht expressed a similar view in the Desjarlais Inquiry, “The Child and family Services Act recognises aboriginal heritage. Culture is important, but as D. Charles Ferguson succinctly put it in order for a person to appreciate her culture and traditions, that person has to first survive her childhood. The primary right of a child to a true childhood comes before racial, ethnic or cultural affiliations.” Desjarlais Inquiry, supra note 95 at 158.
right of the child to be brought up within its own culture. However, is it also unacceptable for the court to say that the safety and welfare of the child must take precedence over all other considerations? Whilst the indigenous factor is clearly of fundamental importance, other factors are also of importance, including long-standing emotional ties with a non-native foster or adoptive family and the need for a child to be secured a stable and safe environment.\(^{154}\) In many of the cases discussed in chapter one, and particularly cases such as Simenoff v J.A.,\(^{155}\) and Jane Doe v Awasis Agency\(^{156}\) there is a strong argument that the best interests of the child in all the circumstances, including the importance of being brought up within its own culture and people, nevertheless demanded that the child remain with a non-native family. For example, in Simenoff the claim of the tribe to custody over a tribe member to prevent her from being adopted into a non-native family, was never going to be viewed favourably when the natural mother was completely opposed to their actions, and the tribe would appear to have been placing their own political interests above the

\(^{154}\) I acknowledge the point made by Marlee Kline that a child’s cultural heritage is fundamental to his or her long term security and stability and that the courts have tended to ignore this factor: "The problem is that this concern [with the stability of the child’s environment and corresponding emotional security] is understood as severable from the maintenance of the child’s First Nations identity and heritage, again reflecting the individualistic and abstract focus of the best interests standard.” “Best Interests Ideology,” \textit{supra} note 3 at 403. However cultural heritage is not the only relevant factor. To remove a child from a home where he or she has been settled for a number of years can have equally traumatic effects. It should also be clearly recognised that cultural heritage and identity does not in any way compensate for the trauma caused by abuses such as those suffered by Lester Desjarlais. The “indigenous factor” must not be allowed to override a legitimate concern with ensuring the child has a safe and stable environment.

\(^{155}\) Reported as \textit{S (S.M.) v A (J.P.)} (1992) 64 B.C.L.R. (2d) 344 (B.C.C.A.) [hereinafter Simenoff].

welfare and happiness of the individual child.\textsuperscript{157} Jane Doe v Awasis Agency cannot be put in any other way than the child welfare agency in implementing what appears to be a policy of ‘repatriation’ completely disregarded the safety, protection, and welfare of ‘Jane’ and the trauma they were inflicting on her.\textsuperscript{158} Whilst their motives may be well-intentioned, the law whether native or non-native cannot allow an individual child to be sacrificed to the interests of the group in this way. It is not always a bad thing to protect an individual as an individual rather than reducing them to an unidentified face in the group. In cases such as Awasis Agency there was a legitimate fear that the community’s concern was with their own political position and the needs of the collective to cultural survival, even at the expense of the welfare of the individual child.\textsuperscript{159} Often whilst the rationale of the bigger picture is clear and supportable, it is much harder to follow through when it is considered that an individual child within the system may be being placed in immediate danger of further abuse or neglect.

The best interests principle seeks to ensure that individual children are not ‘sacrificed’ to the will and abuses of the group within which they live. When a child’s protection and safety is involved that is the only justifiable position to take. The best

\textsuperscript{157} In Simenoff the Akhiok Indian tribe were trying to prevent the adoption of a member of their community by non-native parents against the firm wishes of the child’s mother who wanted nothing to do with the Akhiok community.

\textsuperscript{158} In Jane Doe the child was removed from her foster parents where she had lived for thirteen years, against her wishes, and repatriated to her community. Despite the horrendous abuse that was inflicted on her, both emotional and physical, the Awasis Agency remained adamant that First Nations children belonged in their communities and she should not be returned to her non-native home.

\textsuperscript{159} Justice Gove noted in the Gove Inquiry that concern had been expressed by Ministry social workers over the politicisation of First Nations child welfare at the expense of the child’s interests. Matthew’s Story, supra note 142 at 246.
interests principle has however come under fierce attack as a tool of colonialism, and has certainly been used that way by the Canadian child welfare system.\textsuperscript{160} However, the best interests principle is not necessarily a western tool of colonialism. In contrast it can be argued that it is an effective, flexible tool of cultural legitimacy and cross-cultural dialogue, and that the best interests principle can be an important means of securing cultural diversity.\textsuperscript{161} The concept of the best interests is subject to a number of interpretations, and allows significant fluidity and subjectivity in the way in which it is applied by a particular community.\textsuperscript{162} Clearly it is a principle that could be given a variety of meanings depending on the context in which it is being applied. A Sto:Lo father may well have a very different view of what the principle of the best interests of the child demands than a mother in Quebec. The principle thus has the potential to be used as an important tool of cultural legitimacy, with each community’s child welfare agencies and

\textsuperscript{160} See especially, “Best Interests Ideology,” supra note 3. Kline argues that the child welfare system has provided a “new modality of colonialist regulation” principally through its application of the best interests test. See also “A Vicious Circle,” supra note 136; and “Colonisation of Native People,” supra note 98.

\textsuperscript{161} For an excellent discussion of the best interests principle as a tool of cultural diversity see “Reconciliation of Culture and Human Rights,” in Reconciling Culture and Human Rights, supra note 1 at 1 - 25; S. Parker, “The Best Interests of the Child - Principles and Problems” in Reconciling Culture and Human Rights, supra note 1 at 26 - 41 [hereinafter “Principles and Problems”]; J. Eekelar, “The interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism” in Reconciling Culture and Human Rights, supra note 1 at 42 - 61; “Cultural Transformation and Normative Consensus” in Reconciling Culture and Human Rights, supra note 1 at 62. This collection of essays is concerned with the best interests principle as enshrined in Art. 3 (1) of the UNCRC. They apply in the international context many of the arguments concerning cross-cultural dialogue and reconciling respect for cultural diversity with culturally legitimate universal protections for the child, that were considered above. Although developed in this international context I would argue that their exposition of the best interests principle is equally applicable in post-colonial Canada and can provide a means to secure respect for the differing cultures of First Nations and non-native society, whilst retaining universal principles of protection.

\textsuperscript{162} “Principles and Problems,” supra note 1 at 26; “Reconciliation of Culture and Human Rights,” ibid. at 18.
decision makers determining for themselves what they consider to be in the child's best interests. The problems identified by Kline are not problems with the best interests test itself, but a problem with the decision makers who have been applying the principle. In determining the content to be given to the principle the choices of any particular community will inevitably be informed by its own culture and understanding. Acknowledging that a diversity of values and traditions will be employed to give content to the principle allows for recognition of culturally determined standards. In the context of a Children's Charter in Canada it does not allow for cultural domination by non-native Canada in the form of traditional universalism, for it insists upon the local cultural context giving substance to the principle and removes the power of the non-native court to define and impose its meaning. Thus it can be argued that in proposing a universal norm that is given content by each cultural community we can achieve a successful reconciliation of cultural diversity and universal principles.

Traditional universalists would be unhappy with such a conclusion as it would seem to abandon the search for universal values to substantialize the principle, and without such substantive universalism the principle is inherently flawed as a standard setting norm.

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163 Parker cites a High Court Judge of Australia who said in 1992, “it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power.” “Principles and Problems” ibid.

164 Ibid. “Reconciliation of Culture and Human Rights,” supra note 1 at 20.

165 Alston argues that, “[the best interests principle] will in practice depend quite heavily upon the relevant cultural assumptions and practices that prevail within a given society.” “Reconciliation of Culture and Human Rights” ibid.

166 “Reconciliation of Culture and Human Rights,” ibid. at 23.
"He [the decision maker] must have some way of deciding what counts as good and what counts as bad." (Mnookin)\textsuperscript{167}

Philip Alston has responded to defend the universality of the best interests principle against the attack that communities will be applying localised value-systems when interpreting the principle, by arguing that a universal substantive content to the principle is provided by a document such as the Charter.\textsuperscript{168} That is the principle can be given a much more substantive content by 'universal' accepted values and practices, determined through a process of cross-cultural dialogue and embodied in a Children's Charter. It is argued that a Charter can go a considerable way towards providing the "broad ethical or value framework" that can provide a greater degree of certainty in the content of the best interests principle.\textsuperscript{169} It would at least limit the potential for widely variant subjective cultural interpretations,

"It provides a carefully formulated and balanced statement of values to which the parties have formally subscribed."\textsuperscript{170}

Alston admits that the best interests principle is inevitably relativist in that the principle will vary from one community to the next depending on its cultural, social and other

\begin{itemize}
\item\textsuperscript{167} Cited by P. Alston, \textit{ibid.} at 19.
\item\textsuperscript{168} \textit{Ibid.} at 23.
\item\textsuperscript{169} \textit{Ibid.} For example, the Children's Charter will provide that cultural identity and heritage should be seen as central in any decision concerning a child in care. The best interests principle will be informed by this principle and thus would suggest that in determining the child's best interests the importance of maintaining the child's links to its culture and community is of particular importance. This in turn would suggest that a placement within the child's cultural community wherever possible will serve his or her best interests. For further discussion see below. It is also likely that an interpretation of the best interests of the child which left the child at risk from sexual or physical abuse would not be consistent with the Children's Charter.
\end{itemize}
values and realities.\textsuperscript{171} He takes it as a reality of the world that an identical norm can lead to different results in the light of prevailing cultural and other circumstances.\textsuperscript{172} But, the significance of the principle, and hence the Charter, is that its flexibility can ensure that agreement on the common principle is forged, whilst a process can be established to develop more precise guidelines on how communities can best substantiate that principle in specific contexts. Differing cultural interpretations will gradually become informed and perhaps re-evaluated in the light of sharing the perspective and insight of others.\textsuperscript{173} Parker similarly does not abandon the search for universal values, and he sees the contextualisation of the best interests principle as of direct value in helping to develop universal understanding.\textsuperscript{174} He advocates that by looking at the many divergent interpretations communities give to the principle, the debate can centre on each of the variables and preferable interpretations endorsed.\textsuperscript{175}

Both of these arguments approach the position of An’Naim.\textsuperscript{176} In applying his vision of cross-cultural dialogue An’Naim argues that substantive universal content can be given to the best interests principle if there is a forum which enables alternative perspectives and interpretations of cultural norms to be discussed and evaluated.\textsuperscript{177} This

\begin{itemize}
\item \textsuperscript{171} Ibid.
\item \textsuperscript{172} Ibid.
\item \textsuperscript{173} Ibid.
\item \textsuperscript{174}“Principles and Problems,” \textit{supra} note 1 at 39.
\item \textsuperscript{175} Ibid. at 39 - 40.
\item \textsuperscript{176} See “Cultural Transformation and Normative Consensus,” \textit{supra} note 1 at 61 - 81.
\item \textsuperscript{177} Ibid. at 76 - 79.
\end{itemize}
forum could be provided by the proposed Children’s Commission. The Commission in evaluating the interpretation given to the best interests principle by particular communities provides a culturally sensitive forum which avoids the ethnocentrism evident in the application of the principle in the past. The views of all the various communities can be heard and evaluated, making a truly normative consensus on universal principles on the rights of the child, in the long term, a reality. The B.C. model of the Children’s Commissioner currently provides for an annual report summarising the recommendations and decisions of the Committee. A similar process could be used to provide a written record of the discussions and recommendations of the Charter Commission on the substantial content and interpretation being given to the best interests principle by particular communities. The report could indicate areas of agreement and remaining differences. This process would track the gradual refinement of the best interests test in light of the ongoing cross-cultural dialogue. Such general abstract concepts as the best interests of the child therefore provide a means to obtain universal consensus whilst

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178 For the proposed cross-cultural composition of the Committee see above at p. 27. Essentially I argue that there should be equal representation from native and non-native communities, with a member of the particular community in question sitting as an ex-officio member.

179 An’Naim also believes in the context of the international rights of the child that through a process of dialogue, evaluation and internal evolution of cultural values, substantive consensus on universal norms will be achieved. An’Naim concludes, “[i]n due course, these processes of discourse and dialogue will promote genuine international consensus on the meaning and implications of the principles of the best interests of the child. Thus, the rigorous implementation of agreed procedures and processes for defining this clause in various contexts will lead to a substantive common standard or level of achievement in relation to the best interests of the child without violating the integrity of local cultures or encroaching upon the sovereignty of the various peoples of the world” (his emphasis). “Cultural Transformation and Normative Consensus” supra note 1 at 64.

180 Recommendations for Change, supra note 62 at 5. A similar report summarising the Committee’s activities is made by the UN Committee on the Rights of the Child every two years to the General Assembly. UNCRC, supra note 1 Art. 44 (5).
encouraging the gradual evolution of substantialising principles through cross-cultural discourse.\textsuperscript{181} They do not entail imposing the dominant ideology as the definitive content.\textsuperscript{182} The best interests principle is consequently the best example we have of how inclusive cross-cultural universalism could work.

The three child welfare agencies were all in agreement that the best interests of the child should be a primary consideration and that their decisions should always be informed by the principle.\textsuperscript{183} However, as discussed above in the context of the conflict between individual and collective rights, the best interests standard allows for different cultural interpretations to be placed on the content of that principle. To take the decision whether to remove the child from the community as an example. The Sto:Lo may well argue that if we take a broad approach to the principle, any weakening of the community by removing the child will, in the long term, have a detrimental affect on the child, for whom the strength of his or her community and culture is vital to his or her well-being and happiness.\textsuperscript{184} Thus the agency may be very reluctant, except in clear cases where there is

\textsuperscript{181} "Towards a Cross-Cultural Approach," in \textit{Quest For Consensus}, \textit{supra} note 3 at 21.

\textsuperscript{182} Another interesting way to promote cultural reconstruction or internal dialogue and thus progress towards reform and acceptance of core universal values as sought by An'Naim is suggested by John Eekelar. He argues that the principle of self-determinism can act as a buffer to the inevitable 'objectivisation' of the best interest of the child which will be strongly rooted in individual cultural contexts. To prevent the danger of the best interests of the child being subjected to the imposition of the values of the present adult generation, Eekelar sees the principle of self-determinism as a way to promote internal dialogue in the culture about the best interests of the individual child. An appeal is made directly to each individual child within each culture and demands that such a child, as it develops, be allowed space within the culture to find its own mode of fulfilment. See, "The Role of Dynamic Self-Determinism," \textit{supra} note 1 at 42 - 61.

\textsuperscript{183} Kelowa Edel, \textit{supra} note 124; Marika Czink, \textit{supra} note 123; Bryan Watt, \textit{supra} note 125.

\textsuperscript{184} Kelowa Edel, \textit{ibid}. This argument is similar to the one made by Marlee Kline as to the centrality of culture to the child's long term stability and happiness, see "Best Interests Ideology," \textit{supra} note 3 at 403.
no other alternative, to remove the child from the community for the sake of the child's best interests. In contrast, a social worker in West Vancouver would probably place much less emphasis on trying to keep the child within its immediate community and would not regard it as a vital factor in his or her long term interests. The specifics of the principle are clearly going to differ from community to community, but by both native and non-native communities agreeing that the child's interests must be protected as the primary consideration, and by submitting their interpretation of that principle to external review and discussion, it is contended that the worst abuses such as occurred in the cases of Lester Desjarlais and Matthew Vaudreil could be avoided. It is highly unlikely that any of the agencies would argue that the best interests of the child were served in either of those cases.

I would thus suggest that consensus on the best interests principle as a fundamental common standard to be met by all child welfare agencies in Canada, could be forged. Moreover this 'universal' standard would also secure respect for cultural diversity in its application.

3.2 (ii) The Cultural Heritage of the Child Should be Central to Child Protection Services and the Child Must be Secured the Right to Enjoy his or her Culture and Traditions in Community with Others.

The second principle suggested is central to any child welfare agency, whether native or non-native, which provides child welfare services to First Nations children. Particularly in the context of First Nations children, the right of the child whenever
possible to be cared for within its cultural community is now widely recognised as central to the security and happiness of the child, as well as to the long term survival of the community.\textsuperscript{185} As discussed at length in chapter one, the lack of importance attributed to this principle by non-native child welfare agencies and non-native courts in the last forty years, has been a major factor in the "cultural genocide" that has resulted.\textsuperscript{186} A second demand of this principle is that the services provided to the child are consistent with the child's community's cultural traditions.

Not surprisingly this principle forms the central philosophy of all the three native controlled child welfare agencies I visited. The Spallumcheen Indian Band by-law begins with the statement,

"The Spallumcheen Indian Band finds:
(a) that there is no resource that is more vital to the continued existence and integrity of the Indian Band than our children;
(b) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-band agencies;
(c) that the removal of our children by non-band agencies and the treatment of the children while under the authority of non-band agencies has too often hurt our children emotionally and serves to fracture the strength of our community, thereby contributing to social breakdown and disorder within our reserve."\textsuperscript{187}

Similarly the goals of the Usma program are stated to be:

"a) to recognise and strengthen Nuu-chah-nulth culture and identity; b) to strengthen and maintain the extended family system in turn the tribe; c) to ensure

\textsuperscript{185} See generally, "Best Interests Ideology," supra note 3; Carasco, supra note 98; "A Vicious Circle," supra note 136; "A Special Case," supra note 98; "Colonisation of Native Peoples," supra note 98; MJI, supra note 95; Liberating Our Children, supra note 98. See also UNCRC, supra note 1 Art. 30, "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 religion or to use his or her own language."

\textsuperscript{186} See above at chapter one pp. 32 - 78.

\textsuperscript{187} By- Law, supra note 129 at sec. 1(v)(2).
the healthy growth and development of all children within Nuu-chah-nulth families and communities; d) to develop community support systems and programs that prevent child abuse and neglect."^{188}

Notwithstanding the problems Marika Czink and Bryan Watt identified in trying to incorporate cultural traditions into their child protection services, the child’s culture is undoubtedly central to all of the agencies. All of the agencies employ native staff to ensure cultural sensitivity in the design and delivery of services, and to enhance their ability to deal with particular problems in a way that utilises and strengthens the traditions of the community.^{189} The importance of culture to the work of the agency is most clearly represented by the use of the tradition of the extended family for alternative care.^{190} The extended family is the central care resource for all three of the agencies. By endorsing an aboriginal placement principle in conjunction with the tradition of the extended family a double objective can be met.^{191} The importance of the child’s culture to his or her security and stability, and the importance of the child remaining within his or her community, is

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^{188} Usma, Nuu-chah-nulth, “the most precious ones of the Nuu-chah-nulth,” Information Pamphlet, at 3 [hereinafter Usma pamphlet].

^{189} For further discussion on the delivery of culturally sensitive services by these agencies see above at chapter three pp. 190 - 193.

^{190} On the extended family tradition in First Nations communities generally see MJII, supra note 95 at 253; Gathering Strength, supra note 122 at 31 - 32; No Quiet Place, supra note 95 at 163 - 164; Literature Review, supra note 98 at 8 - 9; Liberating Our Children, supra note 98 at 9 - 10 and 13 - 14; “A special Case,” supra note 98 at 527. For a more critical analysis of the use of the extended family tradition in contemporary aboriginal communities see, Desjarlais Inquiry, supra note 95 at 23 -25.

^{191} The aboriginal placement principle seeks to recognise the centrality of the child’s family, community and culture to his/her future happiness and security by placing the child in alternative care in an order of preference: 1) with the child’s family; 2) the child’s extended family; 3) another family in the child’s community; 4) another aboriginal family in another aboriginal community; 5) and only as a last resort with a non-native family. By placing children in this order of preference communities hope they can stop the process of “cultural genocide”.
recognised as central to the child’s best interests, and is achieved through invoking a tradition of the First Nations community.

The Spallumcheen clearly recognise the centrality of culture to the child’s happiness and security and seek to keep all their children within the community. They rely on the tradition of the extended family to achieve this goal.

“The extended family is the key cultural practice identified with regard to child welfare. It is an important cultural practice that has survived and continues to work. The band has 25 - 30 children in care at any one time. Two thirds of those children will be with relatives of one kind or another on reserve.” (Bryan Watt)

The use of the extended family is supported by the ‘aboriginal placement principle’ which seeks to keep the child within the community even if a suitable home cannot be found with the immediate or extended family. One of the major problems raised by the province in using the extended family is that there are not enough suitable homes within the extended family or the community that can be used. The Spallumcheen are prepared to

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192 Bryan Watt, supra note 125.

193 By-Law, supra note 129 sec. 10 (iii), “In the absence of placement with the family, a preference for placement shall be given in this order to: 1) a parent; 2) a member of the extended family living on the reserve; 3) a member of the extended family living on another reserve, although not a reserve to the Indian Band; 4) a member of the extended family living off reserve; 5) an Indian living on a reserve; 6) an Indian living off a reserve; 7) only as a last resort shall the child be placed in the home of a non-Indian living off the reserve.”

194 This problem stems in part from the ethnocentric standards for foster homes that are used by the province, and in part from a reluctance by the aboriginal community to subject themselves to the province’s scrutiny. Poverty is also a major, if not the major factor in the lack of available aboriginal homes. For further discussion on these issues see above at chapter one pp. 50 - 54. See especially B. W. Morse, “Indian and Inuit Family Law and the Canadian Legal System” (1980) 8 American Indian Law Review 199 at 204 - 206 [hereinafter Morse]; British Columbia, Royal Commission on family and Children’s Law, Native Families and the Law: Tenth Report of the Royal Commission on Family and Children’s Law, by Thomas R. Berger, ed., (Vancouver, B.C. Royal Commission on Family and Children’s Law, 1975) at 20 - 43 [hereinafter Native Families and the Law]; No Quiet Place, supra note 95 at 217 - 264; Matthew’s Story, supra note 142 at 247. See generally, E. Sommerlad, “Aboriginal Children in the Aboriginal Community: Changing Practices in Adoption” (1977) 12 Australian Journal of Social Issues 167 [hereinafter “Changing Practices in Adoption”].
compromise with the standards expected from foster parents in order to successfully place the child,

"The reality of conditions means that sometimes we will have to put the child in a home that we are not entirely happy with." (Bryan Watt)

However the compromise on standards is not such that they would ever put a child in a home where there would be any risk of harm or abuse. The band also acknowledges that this is a weak point in the program and is working to improve the standards of their foster homes,

"The band is bringing in a consultant to raise the standards of the foster homes that are available on the reserve...The standards of foster homes is a weak point in the program. There are never enough good native homes. Only about 3/4 of the children can be placed in suitable native foster homes. Many native homes already have five or six children." (Bryan Watt)

The Band also takes the position that whilst keeping the child within its community is very important, the best interests of the child will always be the primary consideration and thus if a suitable home cannot be found within the community they will use a non-native resource that agrees to ensure that the child will remain in contact with his or her community or culture,

"If all avenues have been exhausted the staff would take a potential good non-native foster home to the Chief and Council. If a good non-native foster home is available and the foster parents agree that the child will remain in contact with the community and participate in community events, the Chief and Council will nearly always approve the placement." (Bryan Watt)

The Spallumcheen have thus drawn a balance between recognition that the child’s cultural heritage is of central importance, and the requirement that cultural heritage and community survival is not placed above the safety and protection of the child. A similar
balance is struck by Nuu-chah-nulth.195 The extended family is the basis for their philosophy on alternative care,

"The extended family is the primary resource for caring for children. Placements are designed on an individual basis to address the needs of specified children for: 1) safety and security; 2) guidance; 3) nurturing; 4) cultural identity."196

They have also adopted an ‘aboriginal placement principle’ and will try to find a home for every child within their extended family,

"The Extended Family Home Program is designed to provide specialised care for children who are in the care of the Usma Program. Extended family homes are recruited for each identified child as the need for placement arises. Mainly relatives of the child may provide substitute care under this program."197

"Placement of children is made in the following order of priority: (a) with one of the child’s parents; (b) with a number of the child’s extended family; (c) with an unrelated Native Indian family; (c) as a last resort, with a non-Indian family."198

Again in order to facilitate this policy the agency is more flexible in looking at homes where children are placed. All the demands and criteria of the Ministry may not be met. However, the agency must still operate within the provincial guidelines. The extended family members must go through the same tests and process as non-native foster homes.199 The inappropriateness of some of these standards to aboriginal people is noted,200 but

195 Marika Czink, supra note 123.


197 Usma Pamphlet, supra note 188 at 10.

198 Ibid.

199 Supra note 194. See especially, Morse, ibid. at 205; Native Families and the Law, ibid. at 20 -22; “Changing Practices in Adoption,” ibid. at 170. Although Sommerlad is commenting on the Australian experience, the problems she identifies accord with the literature on the Canadian experience.

200 The Usma Policy and Procedures Manual suggests that Band Family Protection Committees in consultation with Usma develop their own safety standards for foster homes in their own communities “which support and complement the policy guidelines.” Usma Policy Manual, supra note 196.
again the interests of the child are reasserted as overriding all other factors including

cultural attachment,

"The agency is also more flexible in looking at homes where children are placed -
all the demands and criteria of the Ministry may not be met. However extended
family members must go through the same tests and process as non-native foster
homes. Some of the suggested standards, for example, that there be no alcohol
related offences are completely unrealistic in native communities. We consider
the aboriginal factor to be very important but the child has needs which have to
be met. If you can meet those needs and the aboriginal factor at the same time it
is ideal, but if not, the child’s protection must come first and they may have to go
outside the community." (Marika Czink)

Consequently although the agency tries to keep children within the community and is
flexible in its standards to attain this end, if the child’s interests demand it they are
prepared to use a non-native home. The agency is in fact able to place most younger
children in their family or in the community. The difficulties arise with teenagers and
those with special needs, particularly children with FSA. In these cases very often they will
have to be placed outside the community. The lack of specialised, trained foster parents
within the community is a substantial obstacle to keeping all children within their band.

Xolhmi:lh have a very similar policy. They particularly emphasise the importance
of the child’s cultural heritage to his or her best interests and the benefits of helping the
child by culturally informed practices. In Xolhmi:lh’s recent submissions to the federal and

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201 Extended family homes are recruited as the need arises by the Usma family care worker in consultation
with the Usma social worker. All foster homes must be approved by Usma.

202 Given the high number of aboriginal children born with FSA or some other related disorder, this lack
of skilled foster care homes is a significant problem for First Nations communities. Justice Gove reports
that one in five aboriginal children are born with foetal alcohol syndrome, Matthew’s Story, supra note
142 at 32.

203 Kelowa Edel, supra note 124.
provincial governments they emphasise that they are the appropriate agency to deliver services to all aboriginal children because they can provide ‘distinctively Sto:Lo based and aboriginally based services including: a) healing circles; b) sweats and prayers; c) a process that actually and effectively incorporates family members in decision making; d) the use of established protocol involving the community in decision making; and e) the participation of Elders in an aboriginal context that will enhance their input in decision making.’ For example they run a specialised home for runaway girls between the ages of 12 and 19 and attribute the success of the program in keeping the girls settled there to the emphasis that is placed on cultural identity and cultural activities,

"The girls are receiving cultural training. Teachers go in daily and help the girls to understand their cultural heritage and start to build and enhance their self-identity - to help them understand who they are and where they have come from. The care givers in the home work with the Sto:Lo culture and encourage the girls to participate in cultural activities even though they themselves are not aboriginal. For example the home has encouraged the development of a Sto:Lo dance group. Another group home has recently opened in Silverton in the mountains. It is a high risk home and again the emphasis is on cultural activities. Daily sweats and circles are held. The boys are in the process of healing and learning their cultural heritage is a major part of the process.” (Kelowa Edel)

Again keeping children within the community to preserve their cultural identity is central to Xolhmi:lh’s policy. The tradition of the extended family is used extensively to try and realise that goal. As with Usma those homes must be assessed according to the same provincial standards although they have taken measures to make the process less intimidating for aboriginal families. The bureaucratic process is now not so long. The

\[204 \text{Target Population, supra note 134 at 7.}\]
homes are levelled according to provincial practice and again it is the level homes requiring skilled, specialised care which are scarce within the community,

"There are quite a few restricted, regular and level one homes within the communities but there is only one level two home and no level three." (Kelowa Edel)

If a suitable home cannot be found in the community which is consistent with the child’s best interests, and there is no other alternative the agency will place the child in a non-native family with the condition that the child’s contacts with his or her community and culture are maintained,

"If a suitable placement cannot be found in the immediate community a home close to the reserve will be sought. If the child has to be fostered outside of the Sto:Lo Nation because a suitable home cannot be found, a home will be sought locally. It is a prerequisite of all foster care agreements that the child’s contact with its family, community and their culture will be actively preserved and encouraged. This is so for all agreements unless there has been severe sexual or physical abuse. Even in these cases the eventual goal remains to encourage contact with the parents.” (Kelowa Edel)

The agency also hopes in the near future to receive delegated authority over adoption which will allow them to implement traditional adoption practices within the Sto:Lo Nation.205

There is obvious consensus on the importance of culture between these agencies. The question now is whether the non-native child welfare system also recognises the importance of cultural identity to the child’s best interests, and the importance of cultural

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205 For the current position on recognition of custom adoption in Canadian law see especially, Morse, supra note 194; N. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” (1984) 4 C.N.L.R. 1 [hereinafter Zlotkin]; Carasco, supra note 98 at 129 - 130; Gathering Strength, supra note 122 at 86 - 90. For further discussion on customary adoption see especially, Native Families and the Law, supra note 194 at 26 - 43; No Quiet Place, supra note 95 at 162 - 166; “Changing Practices in Adoption” supra note 194.
sensitivity in the way they deliver their services. The criticisms of the provincial system discussed in chapter one would suggest that the non-native child welfare system places little emphasis on these principles. The insensitivity of the system to the cultural needs of First Nations children, particularly by their apparent lack of recognition of the indigenous factor, is arguably a testimony to their negation of the centrality of culture in First Nations child welfare. However the criticisms of the current system as discussed in chapter one are not a fair reflection of the provinces' attitude towards the importance of cultural heritage. The efforts of the child welfare system to try and address the criticisms that have been levelled against it have been acknowledged by its chief critics. Carasco concludes after consideration of the case law in 1986 that there is a growing awareness of the importance of the "indigenous" factor by the judiciary, causing a slight but discernible

206 See above at chapter one, pp. 32 - 92.

207 For literature on the lack of recognition given to the 'indigenous factor', see especially, "Best Interests Ideology" supra note 3; "A Vicious Circle, supra note 136; Carasco, supra note 98; "A Special Case" supra note 98.

208 It was suggested in chapter one that the literature on the provincial child welfare system has focused on the "colonialism" of child welfare law without giving adequate consideration to the recent attempts by the provincial child welfare system to sensitise its services and decision making to adequately meet the needs of aboriginal children and families. One suggested reason for this is their reliance on a colonial framework of analysis which can tend to polarise cultural differences; exclude consideration of cultural hybridity and commonalities; lead to a rejection of the potential for the dominant system to respond adequately to aboriginal difference; and minimise the future prospects of the cultures working together on child welfare issues. The post-colonial framework adopted in this thesis has sought to complicate some of the assumptions made and address the potential for decolonisation through cooperation and working together. The indigenisation of the current system is a central component of that analysis. Another significant factor in the paucity in literature on attempts at 'indigenisation' is that many of the reforms are very recent. However, the literature does not wholly neglect the attempts by the dominant system to respond to First Nations demands. Kline, Carasco and Monture all briefly reflect on these reform efforts. See generally "Best Interests Ideology," supra note 3; Carasco, supra note 98; "A Vicious Circle," supra note 136 at 15 - 17.

difference in the attitude of the courts to a native child’s right of heritage. She also asserts that Ontario’s Child and Family Services Act has signalled a new era in child welfare protection. There have clearly been important changes in some provincial legislative provisions in recent years. Kline also acknowledges in her analysis of the case law that there are important examples of sensitivity, and recognition by the judiciary of the importance of the ‘indigenous factor’ and the effect the child welfare system has had on the First Nations communities. I would suggest that provincial child welfare law and practices are at the point of reconstruction whereby the government, social workers, and the judiciary, are gradually and somewhat haphazardly, beginning to accept that First Nations children should remain, when possible, with their communities, to ensure security

210 Carasco, ibid. at 126.

211 Ibid. at 138.

212 The following analysis of provincial legislation draws on: B.C. Community Service Act, supra note 83; Ontario, Child and Family Services Act, R.S.O., 1990, c.11 [hereinafter Ontario Statute]; Saskatchewan, Child and Family Services Act, S.S. 1989-90 c. 7.2 [hereinafter Saskatchewan Statute]; Manitoba, Child and Family Services Act, S.M 1985 - 86 c.8 [hereinafter Manitoba Statute]; Alberta, Child Welfare Act, S.A., 1984, c. 8.1 [hereinafter Alberta Statute]; Nova Scotia, An Act Respecting services to Children and their Families, the Protection of Children and Adoption, S.N.S. 1990 c.5 [hereinafter Nova Scotia Statute]; New Brunswick, Child and Family Services and Family Relations Act, S.N.B. 1980 c. 2.1; Yukon, Children’s Act, 1984, c.2. All of these statutes deal with child protection and the delivery of child welfare services. Some, but not all, dealt with adoption. I was unable to obtain the relevant legislation for Newfoundland, the North West Territories and Quebec. The B.C. Community Service Act, 1996, and the Ontario Statute, 1990, are the most progressive legislative attempts at indigenisation to date.

213 “Best interests Ideology,” supra note 3 at 394. Kline recognises the argument that, “the interpretive framework established by the best interests ideology is not so rigid as to preclude occasional acceptance of oppositional interpretations and justifications which do accord with the interests of First Nations. This interplay is illustrated by some of the cases considered below which reveal space within the liberal legal framework of child welfare for judicial decisions that give priority to the maintenance of connections between a First Nations child, her extended family and her First Nation.” It is interesting that this analysis of the scope for reforming the dominant ideology through presentation of oppositional interpretations of a flexible standard such as the best interests is very similar to An’Naim’s arguments on cross-cultural dialogue and the potential for reaching cross-cultural consensus. “Towards a Cross-Cultural Approach” in Quest for Consensus, supra note 3 at 27.
in their own identity, to enable them to learn and benefit from their distinct cultural
eritage, and to enable them to be a part of the regeneration of First Nations cultural
values and traditions which is taking place across Canada. This is not to suggest that the
problems identified by Kline and others and discussed in chapter one are now historical
and have been satisfactorily remedied. This is clearly not the case and serious problems
remain in the treatment of First Nations children by the dominant system. Fundamentally,
First Nations children remain subject to the laws of a foreign colonial system and the
decisions of prejudiced and ethnocentric decision makers. However, there is some
evidence of important efforts to change and these efforts at indigenisation of the provincial
child welfare system should not be dismissed. Effective indigenisation of the dominant
system, whilst never going to be a perfect answer to colonisation, is not a completely
hopeless goal. The reforms must be examined and encouraged out of recognition of the
reality that the provincial system will retain jurisdiction over many First Nations children
for the foreseeable future.\footnote{214} Self-government is simply not a viable or preferred option of
decolonisation for all communities. The efforts to sensitise the provincial systems does not
undermine the strength of the call for self-government or alter in any way the basic right of
the First Nations to self-government over child welfare. Their liberty to exercise that right
as the most effective means of decolonisation remains regardless. However the efforts of

\footnote{214 It needs to be recognised that autonomous child welfare systems which are completely independent of
the current provincial framework are neither a realistic or a desirable objective for many First Nations
communities in the immediate future. For these communities and the large majority of urban First Nations
who do not come under the jurisdiction, or do not want to be under the jurisdiction, of a self-governing
child welfare agency the indigenisation of the current system remains a matter of vital concern.}
the dominant system to reform remains a matter of vital importance to many First Nations children for whom self-government is still a very distant prospect.

Statutory Reform

The reform of provincial statutes to give a legislative basis to the need to give recognition to the indigenous factor as fundamental to the best interests of the child, to better incorporate the traditions and culture of the First Nations people, and to secure the involvement of the community in the decision making process, has been piecemeal and inconsistent. Some provinces have made no legislative changes whereas other provinces, notably Ontario and British Columbia, the most recent pieces of provincial legislation, have made an important effort to address the widespread condemnation of child welfare law in its application to the First Nations communities. There are a number of ways in which the existing child welfare regime could be reformed to make it more responsive to the First Nations communities. These measures include explicitly

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216 Kelowa Edel of Xolhmi:lh was complimentary of the new B.C. legislation: “It is a great improvement on the previous legislation. It is good. It allows the agency to incorporate traditional practices and recognises the importance of the child’s cultural heritage. Aboriginal input is certainly better than it was.” Marika Czink was less complimentary. She felt that the new legislation made very little difference because aboriginal culture is defined very broadly in the act and can be met very easily: “The new provincial legislation has made no difference at all in the way the agency operates and make decisions. There is no difference at all in how appropriate action is taken on the ground. Aboriginal culture is defined very broadly in the Act. The requirement can be met very easily. It is in no way more culturally sensitive than the previous act.” Kelowa Edel, supra note 124; Marika Czink, supra note 123.

217 For an excellent analysis of First Nations perspectives on ways to sensitize the current provincial child welfare system see generally Liberating Our Children, supra note 98. See also “Aboriginal Child Welfare,” supra note 215 at 22 - 39.
incorporating the ‘indigenous factor’ within the definition of the child’s best interests, particularly by specifying the importance of the First Nations cultural heritage. Less specifically the best interests test could incorporate recognition of the importance of any child’s cultural heritage. Recognition of specific cultural practices could be given legislative status, particularly the tradition of the extended family providing alternative care and customary adoption. An ‘aboriginal placement’ principle could be given legislative status and implemented through consultation with the community. To ensure community involvement the statute could require notification to the community if a child is apprehended or needs to be placed in either a foster or adoption home. This notification could be followed by consultation with the child’s community at every decision-making stage, both before and after placement. The provisions to ensure that a First Nations child who is adopted by a non-native child remains fully aware of its heritage and in close contact with its community could be significantly improved. Finally the statute could include specific provisions which facilitate the development of First Nations controlled child welfare agencies which can deliver services to First Nations communities. The provincial statutes vary significantly in the extent to which they incorporate these measures.

Some of the recent legislative reforms illustrate the improvements that have been made on the less sensitive pieces of legislation which remain.218 The lack of recognition of the indigenous factor in apprehension and disposition decisions has been one of the most emotive issues in the debates surrounding First Nations child welfare and thus provides a

218 Supra note 212.
good illustration of the advances made. Many provincial legislatures include within their
general guiding principles either recognition of the importance of the child's cultural
heritage, or even more significantly, that the application of the act is to be guided at all
times by recognition of the distinct cultural values and needs of the First Nations people.

For example the Child Welfare Act of Alberta, 1984, states,

"Sec. 2, In exercising any authority or making any decision pursuant to this Act,
a court and all persons shall consider:
(f) any decision concerning the removal of a child from the child’s family should
take into account,
(i) the benefits to the child of maintaining, wherever possible the child’s familial,
culture, social and religious heritage
(h) any decision concerning the placement of a child outside the child’s family
should take into account
(i) the benefits to the child of a placement that respects the child’s familial,
cultural, social and religious heritage,
(iii) the benefits to the child of a placement within or as close as possible to the
child’s home community
(l) a person who assumes responsibility for the care of a child under this Act
should endeavour to make the child aware of the child’s familial, cultural, social
and religious heritage."

More specifically the declaration of principles in the Child and Family Services Act of
Ontario, 1990 gives strong explicit endorsement to the special position of First Nations
children,

"Sec. 1, The purposes of this Act include
(f) to recognise that Indian and native people should be entitled to provide
wherever possible, their own child and family services, and that all services to
Indian and native children should be provided in a manner that recognises their
culture, heritage and traditions and the concept of the extended family."

219 Alberta Statute supra note 212 sec. 2.

220 Ontario Statute, supra note 212 sec. 1.
The Child, Family and Community Services Act of British Columbia, 1996 contains a similar provision in its guiding principles.\textsuperscript{221} The definition of best interests which has been so convincingly criticised by Kline also illustrates well the response of some provinces to these criticisms. Most of the provinces incorporate as part of the statutorily defined best interests test, if they use that standard, the need to have regard to the child’s cultural heritage. Only Newfoundland and the Northwest territories have failed to recognise this principle. The Child and Family Services Act of Saskatchewan, 1989, for example provides,

"Sec. 4, Where a person or court is required by any provision of this Act, other than subsec. 49 (2) to determine the best interests of a child, the person or court shall take into account, (c) the child’s emotional, cultural, physical, psychological and spiritual needs."\textsuperscript{222}

The Child, Family and Community Service Act of British Columbia, 1996 also contains this general recognition of the importance of cultural heritage within its best interests principle,\textsuperscript{223} as does the provincial statutes of Nova Scotia,\textsuperscript{224} Ontario,\textsuperscript{225} Manitoba,\textsuperscript{226} and New Brunswick.\textsuperscript{227} The B.C. statute, and Ontario’s Child and Family Services Act, 1990,

\begin{footnotesize}
\textsuperscript{221} B.C. Community Service Act, supra note 83 sec.2, “This Act is to be administered and interpreted in accordance with the following principles: (e) kinship ties and a child’s attachment to the extended family should be preserved if possible;(f) the cultural identity of aboriginal children should be preserved.”

\textsuperscript{222} Saskatchewan Statute, supra note 212 sec. 4.

\textsuperscript{223} B.C. Community Service Act, supra note 83 sec. 4.

\textsuperscript{224} Nova Scotia Statute, supra note 212 sec. 2 (g).

\textsuperscript{225} Ontario statute, supra note 212 sec. 37 (3).

\textsuperscript{226} Manitoba Statute, supra note 212 sec. 2 (1)(h).

\textsuperscript{227} New Brunswick Statue, supra note 212 sec. 2 (g).
\end{footnotesize}
go further to include within the best interests test the particular importance of the First Nations child remaining within its distinct cultural heritage. The Ontario statute states,

'Sec. 37 (4), Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural heritage.'

Several of the provinces have also attempted to introduce culturally sensitive placement principles and recognise traditional aboriginal practices either through explicit recognition of the importance of the extended family tradition or through adopting an 'aboriginal placement principle'. The B.C. statute contains as one of its guiding principles the importance of kin and extended family relationships. It also contains an 'aboriginal placement principle' which aims to ensure that should a First Nations child need to be apprehended the child will remain within its family and community and thus in contact with its roots and cultural heritage. Only as a last resort will the child be placed with a non-native family. The Ontario statute also gives legislative status to the aboriginal placement principle. Saskatchewan similarly incorporates recognition of the favorability

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228 Ontario Statute, supra note 212 sec. 37 (4).

229 B.C. Community Service Act, supra note 83 sec. 71 (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 cultural community; (b) with another aboriginal family, if the child cannot be safely placed under paragraph (a); (c) in accordance with para (2), if the child cannot be placed under para (a) or (b) of this subsection."

230 Ontario Statute, supra note 212 sec. 57(4), "Where the court decides that it is necessary to remove the child from the care of the person who had charge of him or her immediately before intervention under this Part, the court shall, before making an order for society or crown wardship under para 2 or 3 of subsec. 1 consider whether it is possible to place the child with a relative, neighbour, or other member of the child's community or extended family under para 1 of subsec. 1 with the consent of the relative or other person; (5) Where the child referred to in subsec. (4) is an Indian or a native person, unless there is substantial reason for placing the child elsewhere, the court shall place the child with, (a) a member of the child's..."
of placing the child with a member of the extended family and if that is not possible in a residential placement consistent with his or her cultural background, the Alberta statute incorporates within its guiding principles the importance of making a placement close to the child’s community and which is consistent with its cultural heritage; the Nova Scotia statute incorporates a general placement principle for temporary and wardship care that the home should be consistent with the child’s cultural heritage; and the Yukon also gives recognition to the importance of placing the child “with a family of his own cultural background and lifestyle preferably in his home community.” (sec. 109 (1)).

Finally there have also been considerable advances made in the provincial legislature to try and secure more effective involvement by First Nations communities in the delivery of child welfare services and at every stage of the decision making process. Several of the provincial statutes have adopted as a matter of policy the principle that child welfare services to First Nations children should be provided by First Nations communities. The B.C. statute of 1996 contains a comprehensive set of service delivery principles,

extended family; (b) a member of the child’s band or native community; or (c) another Indian or native family.”

Sec. 61(2), “The Society having care of a child shall choose a residential placement for the child that, (c) where possible respects the child’s linguistic or cultural heritage; (d) where the child is an Indian or a native person, with a member of the child’s band or native community or another Indian or native family, if possible.”

231 Saskatchewan Statute, supra note 212 sec. 53.

232 Alberta Statute, supra note 212 sec. 2.

233 Nova Scotia Statute, supra note 212 ss. 39(8), 44(3), and 47(5).

234 Yukon Statute, supra note 212 sec. 109(1).
"Sec. 3, The following principles apply to the provision of services under this Act:
(b) aboriginal people should be involved in the planning and delivery if 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 the services;
(d) the community should be involved, if possible and appropriate, in the planning and delivery of services to families and children."

The Ontario Child and Family Service Act contains a similar declaration of principles.

The Act goes on to provide the legislative framework to enable First Nations communities to establish their own services. Part X of the Act sets down comprehensive facilitative provisions for developing First Nations community child and welfare services,

Sec. 210, "The Minister may make agreements with bands and native communities, and any other parties whom the bands or native communities, and any other parties whom the bands or native communities choose to involve, for the provision of services."

Sec. 211, "(1) A band or native community may designate a body as an Indian or native child and family service authority,
(2) Where a band or native community has designated an Indian or native child and family service authority; the Minister,
(a) shall, at the band's or native communities request, enter into negotiations for the provision of services by the child and family services authority;
(b) may enter into agreements with the child and family service authority and, if the band and native community agrees, any other person, for the provision of services; and
(c) may designate the child and family services authority, with its consent and if it is an approved agent, as a society under subsec. 15 (2)."

235 B.C. Community Service Act, supra note 83 sec. 3.

236 Ontario Statute, supra note 212 sec. 1, "The purposes of this Act include, (e) to recognise that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious, and regional differences; and (f) to recognise that Indian and native people should be entitled to provide wherever possible, their own child and family services...". For example, sec. 13(3) stipulates that an approved agency which has within its jurisdiction Indian or native children and families must have a prescribed number of band or native community members on its board of directors.

237 Ontario Statute, ibid. ss. 210, and 211.
The Saskatchewan Child and Family Service Act contains a more general provision for the establishment of native child welfare agencies,

"Sec. 61, The minister may, having regard to the aspirations of people of Indian ancestry to provide services to their communities, enter into agreements with any legal entity for the provision of services or the administration of all or any part of this Act by that legal entity."

Manitoba’s statute contains a similar provision, as does the Yukon Children’s Act which provides for delegation of the Director’s powers and responsibilities to an approved ‘community group.’ Nova Scotia provides for the replacement of a non-native child welfare agency, where the child is an Indian, with the Micmac Family and Children’s Services. Where the services are not delivered by a native child welfare agency many of the statutes incorporate the principle that the services must be delivered sensitively and in accordance with First Nations culture. The Ontario, Nova Scotia, and B.C statutes all contain this as a guiding principle, as does Manitoba’s Child and family Services Act.

The provincial legislation also contains extensive provisions to facilitate consultation with First Nations communities from initial apprehension to final adoption placement. Most provinces provide for the community of a First Nations child to be a

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238 Manitoba Statute, supra note 212 sec. 6(14).
239 Yukon Statute, supra note 212.
240 Nova Scotia Statute, supra note 212.
241 Ibid. sec. 9 (1).
242 Manitoba Statute, supra note 212, Declaration of Principles: 11, “Indian bands are entitled to the provision of child and family services in a manner which respects their unique status as aboriginal peoples.”
party to the proceedings either on request or as of right. The B.C. statute provides that when a child is presented to the court following apprehension the child welfare agency must inform a designated aboriginal organisation; for the protection hearing the designated aboriginal organisation must be given 10 days notice. Ontario’s statute provides for aboriginal representation on the Review Committee for Residential placements, for a native representative to receive notice and be a party to the court to any proceeding under the Act, and for a native representative to be able to apply to the court for a variation in access orders and a review of the child’s status. The Ontario statute also makes particular reference to the need for the child welfare agency to consult with the local community in the provision of services,

Sec. 213, “A society or agency that provides services or exercises powers under this Act with respect to Indian or native children shall regularly consult with their bands or native communities about the provision of the services or the exercise of the powers and about matters affecting the children, including,
(a) the apprehension of children and the placement of children in residential care;
(b) the placement of homemakers and the provision of other family support services;
(c) the preparation of plans for the care of children;
(d) status reviews under Part III (Child protection)
(e) temporary care and special needs agreements under Part II (Voluntary Access to Services)
(f) adoption placements;
(g) the establishment of emergency houses; and
(h) any other matter that is prescribed.”

243 B.C. Community Service Act, supra note 83 sec. 34.
244 Ontario Statute, supra note 212 ss 34 and 35.
245 Ibid. sec. 39.
246 Ibid. sec. 213.
The Saskatchewan Child and Family Services Act provides that where the child committed to the Minister is a status Indian the chief of the child’s band must be notified.\textsuperscript{247} Manitoba likewise provides for notification of protection proceedings to the child’s band if they have reason to believe that the child is an Indian or entitled to be registered as an Indian.\textsuperscript{248} Alberta also draws a distinction between status on reserve Indians and off-reserve Indians in the requirements as to notification of proceedings,\textsuperscript{249}

Sec. 2, ‘If a director has reason to believe that a child is an Indian, a member of the band and a resident of the reserve, the director shall consult with a chief of the council of the band or the designate of either of them before entering into a permanent guardianship agreement or applying for a supervision order or a temporary or permanent guardianship order in respect of the child
(3) If a director has reason to believe that a child is an Indian and a member of a band but is not a resident of the reserve, the director shall,
(a) ask the guardian of the child to consent to the director’s consulting with a chief of the council or the council of the band, and
(b) if the guardian consents, consult with a chief of the council or the council of the band or the designate of either of them before entering into a permanent guardianship agreement or applying for a supervision order or a temporary or permanent guardianship order.”\textsuperscript{249}

Several of the provinces also provide for a copy of the adoption certificate to be sent to the Indian registrar and the child’s band to enable First Nations communities to keep a trace of where children from their community are being cared for.

These legislative changes certainly aren’t perfect and can be criticised on numerous grounds, not least the lack of uniformity in reforms and the patchwork provisions for First

\textsuperscript{247} Saskatchewan Statute, supra note 212, “Where a child committed to the Minister by an order pursuant to subsec. (2) is a status Indian (a) whose name is included in a Band list; or (b) who is entitled to have his or her name included in a Band list; the director shall, as soon as is practicable give written notice of the order to the chief of the band in question or the chief’s designate.”

\textsuperscript{248} Manitoba Statute, supra note 212 sec. 30 (1).

\textsuperscript{249} Alberta Statute, supra note 212.
Nations children that now exist across Canada. The Ontario legislation sets out the "most complete provincial legislative scheme for the protection of aboriginal children," with B.C. similarly comprehensive. To take an overview of the Ontario legislation it gives explicit recognition to the indigenous factor; it incorporates preservation of cultural heritage as part of the best interests test; it allows band and native communities more involvement in the administration of child welfare programs; provision is made for an agency to be designated by a band or a native community as a native child and family service provider; where a non-native agency retains jurisdiction the agency must regularly consult with the First Nations community about services provided; the court is required to give notification of all proceedings to the child's community and it is entitled to participate in the proceedings; and recognition is given to the traditional practices of the extended family and consolidated through the inclusion of the aboriginal placement principle.

New Brunswick on the other hand contains very limited recognition of the special needs of aboriginal children. Further, even the Ontario legislation which has been generally welcomed as progressive has problems. Carasco has commented, for example, that legislative recognition of custom adoption would have been important and would have greatly assisted in reducing the numbers of native children placed for adoption by facilitating acceptance of this traditional practice. It would also have constituted

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252 Carasco, *ibid.* at 136.
concrete recognition of one particularly important aspect of native culture. Carasco thus argues that it is unfortunate that only the Northwest Territories, B.C., and Quebec officially recognise and sanction adoption by custom. Another weakness in the provincial legislation is the adequacy of provisions for preservation of cultural heritage after adoption, both in terms of the child’s status and contact with its culture. Provincial legislative reforms do not go as far as the various government reports have suggested. For example the Report of the Aboriginal Committee recommends that all legislation must be removed that would allow a judicial body to place a child permanently outside the care of his or her extended family. Clearly the provinces are reluctant to go that far, although B.C. has introduced a moratorium on the adoption of native children by non-native adoptive parents without the Band’s written consent.

The legislative reforms have also been criticised for the discretion which remains in the judiciary as to how they apply the newly entrenched principles. The indigenous factor is not given priority over other considerations such as bonding and security. The judge is given the discretion to apply what he or she considers to be the appropriate weight to the child’s cultural heritage and membership of the First Nations. It is therefore open for the

253 Ibid.
254 Ibid.
255 Ibid.
256 Liberating Our Children, supra note 98 at 76.
257 The moratorium has been in place since 1992. The Gove inquiry raised concerns about this policy because the lack of suitable native adoption homes has resulted in an increase in the number of aboriginal children living on a permanent basis in group homes. Matthew’s Story, supra note 142 at 247.
258 Carasco, supra note 98 at 134. Kline is a strong proponent of this view. She argues that whilst such discretion remains in the judiciary the indigenous factor will continue to be devalued in comparison to
judge to conclude that the indigenous factor is of no import in the particular case at hand which does not protect First Nation’s children from the ethnocentric standards that are otherwise contained within the legislation. It may well have been preferable for the “Indigenous factor” to be given precedence over other factors in all cases to ensure that it was given the appropriate weight by the judiciary, although as Carasco points out the Ontario legislation does isolate the ‘indigenous factor’ within a separate provision which arguably gives it added value and weight.\textsuperscript{259} However it is certainly open for the court to be selective in who they apply the full force of the indigenous factor to and the weight to be given to it. For example, they can clearly interpret the indigenous factor as only important when applied to ‘real Indians’, that is children who belong to a community that is seeking to restore a traditional way of life.\textsuperscript{260} Otherwise the judiciary are free to downgrade the importance of culture if they consider the child’s family to be already alienated from their roots, particularly if they are living off reserve. This problem is explicitly perpetuated by the actual legislative provisions contained in some of the provincial legislatures. The Saskatchewan, Manitoba, Alberta, and Nova Scotia statutes all draw a distinction between status and non-status Indian, on and off-reserve Indians and

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other factors such as bonding with foster parents, and the ‘stability’ of the non-native home. “Best Interests Ideology,” supra note 3 at 403 - 406.
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\textsuperscript{259} Carasco, \textit{ibid.} at 133.

\textsuperscript{260} See above chapter one pp. 68 - 70 for the courts tendency to downgrade the importance of the indigenous factor when the family appear to be living a ‘modern’ assimilated lifestyle, especially in the urban context. The judiciary’s demand for the claimant to prove that there is something distinctly aboriginal about the family’s lifestyle to justify special treatment, is similar to the reasoning found in \textsc{R v Van der Peet} (1996) 2 S.C.R. 507 (S.C.C.) and the “integral to a distinctive culture” test which was established by the Supreme Court. For a discussion of the links between the reasoning in \textsc{Van der Peet} and the traditional ‘romanticised’ identity of aboriginality the courts are demanding in order to give effect to the indigenous factor, see above at p. 69 fn. 282.
other native people. For example, the provisions for notification in Saskatchewan only apply to an “Indian” child registered under the Indian Act as a member of a band;\textsuperscript{261} Manitoba restricts its special provisions for Indians to “Indian bands” and “children entitled to be registered under the Indian act;”\textsuperscript{262} and the Alberta provisions on consultation explicitly draw a distinction according to whether the child is a registered Indian living on or off reserve with the implication being that the child’s culture and connection to the First Nations community is not so important in the latter case, thus justifying a weaker consultation process.\textsuperscript{263} The effect of these distinctions are in the words of Patricia Monture to “divide and conquer”\textsuperscript{264} and also to perpetuate the position that some Indians are “more Indian” than others and thus more at risk from colonial regulation. Ironically these distinctions are based on categories created by the most prominent piece of colonial regulation on Canada’s statute books: the Indian Act.\textsuperscript{265} The Ontario legislation appears to have been changed in the drafting stage to include “Indian and native people” to address these criticisms but there are still problems. As Carasco argues the stated policy of recognition of the indigenous factor is promoted by requiring the court in child protection proceedings to invite representatives of the child’s band or native community to participate as a party in the proceedings.\textsuperscript{266} However whilst these

\begin{footnotes}
\footnote{261 Saskatchewan Statute, supra note 212 sec. 37.}
\footnote{262 Manitoba Statute, supra note 212 sec. 30.}
\footnote{263 Alberta Statute, supra note 212 ss 73 (1) and 73 (2).}
\footnote{264 “A Vicious Circle,” supra note 136 at 16.}
\footnote{265 Indian Act, R.S.C. 1985, c. I - 5.}
\footnote{266 Carasco, supra note 98 at 134.}
\end{footnotes}
provisions provide for some community involvement in those situations where communities are organised for such a response, they fall short of providing for native involvement and expertise in all cases involving native children.\textsuperscript{267} To address both the distinctions drawn in much of the provincial legislation and the practical problems in applying the more inclusive provisions, it would perhaps be better as Carasco suggests and as the Berger Commission in 1975 recommended, to implement the introduction of aboriginal lay panels to sit with judges hearing child protection cases and thus assure aboriginal representation and input on all cases concerning native children.\textsuperscript{268}

It is clear that the legislation is not without its problems, but it is still a legitimate conclusion to draw that the changes in the most recent pieces of legislation throughout the 1980s and early 1990s, are substantial enough to represent an important change in commitment and thinking by the provincial governments. However, more could clearly be done, and many First Nations communities justifiably demand stronger provisions and greater uniformity across the provinces in the changes that have been made. Whilst perhaps agreeing with the principle of the importance of cultural identity a Children's charter would ensure the principle was universally recognised across Canada and that all provinces were constantly working, under the review and evaluation of a cross-cultural committee, to improve their legislative provisions.

\textsuperscript{267} Ibid.

\textsuperscript{268} Ibid. at 134; Native Families and the Law, supra note 194 at 17.
New Sensitivity in the Court Room

Legislative reforms which allow wide discretion in the way the principles are applied will require the co-operation of the judiciary if their intent of recognising the importance of cultural heritage is to be fully realised. Legislative reforms are insufficient by themselves. There thus needs to be a corresponding significant change in the way the judiciary approach First Nations child welfare cases. Monture argues that this corresponding change is not likely to happen.\(^{269}\) She cites, Re Catholic Children's Aid Society of Metro-Toronto v M, 1986\(^{270}\) as an example of the judiciary relying on old standards and preserving the status quo rather than taking up the reforming legislative intent.\(^{271}\) At first instance the judge read sections 53 (4) and 53 (5) of the legislation together in order to emphasise the alternative of wardship over adoption in the case of First Nations children. Monture argues that this effectively shifted the emphasis in the best interests test from bonding and forced it directly onto the importance of preserving cultural heritage.\(^{272}\) However on appeal the district court rejected this wide reading of the child protection provisions and reaffirmed the old approach.\(^{273}\) Adoption severing the child’s bonds with its community was granted. The judiciary’s approach to First Nations child welfare has clearly been the subject of considerable criticism. However, despite the

\(^{269}\) “A Vicious Circle,” supra note 136 at 16-17.

\(^{270}\) Re Catholic Children's Aid Society (1986) 57 O.R. (2d) 551 (Ont. Prov. Ct.).

\(^{271}\) “A Vicious Circle,” supra note 136 at 16-17.

\(^{272}\) Ibid.

\(^{273}\) Ibid.
concerns of Monture it is contended that, as with provincial legislation, there is evidence in the case law of sensitivity to the importance of the “indigenous factor” and community involvement in First Nations child welfare cases. The criticisms of the judiciary, discussed in detail in chapter one, have focused on four vital factors: their negation of the importance of the indigenous factor; the ethnocentric standards imposed on First Nations families in deciding if the child is in need of protection or can safely remain within its community; the exclusion of First Nations child welfare laws, traditions and practices; and the silencing of the community’s voice in decisions regarding children from their communities. For each of these strong criticisms evidence can be presented of at least a shift in judicial understanding to address First Nations concerns. I would argue that building on the important legislative reforms in recent years, there is now substantial support for the contention that the judiciary are not as insensitive and racist as the criticisms of Monture and Kline would suggest.

The Indigenous Factor

The courts are now beginning to attribute significant weight to the ‘indigenous factor’ and the child’s right to his or her culture and heritage. There is now virtually no case concerning a First Nations child in which the question of the child’s cultural heritage is not discussed at length and given principal consideration.\(^2^7^4\) Certainly the courts are not

allowing the ‘indigenous factor’ to be played as a trump card by natural parents. Other factors and concerns will override the indigenous factor in individual cases if the safety and welfare of the child demands it. However there is really no doubt that the child’s right to its cultural heritage and to remain within its family and community is seen as a fundamental factor in the decision. Kenora Patricia v M (m) (Ont. Prov. Ct.), 1989, provides a complete vindication of the importance of cultural heritage. Justice King in the Ontario provincial court gives explicit recognition to the importance of cultural heritage to ensuring the long term security and stability of the child,

"The Society says the children need permanency, a stable placement...Although permanency is important, cultural heritage is also important. In fact there is good reason to infer that without cultural heritage being recognised as integral to human growth, permanency will never succeed. One cannot deny what one is; we cannot deny what these children are. They are Ojibway, and unless that is an integral part of our decision making, there is little hope that permanency planning will succeed."

Cultural heritage is given paramount importance,

"If Ms K adopts the younger two children, none of the tenants of the Act concerning cultural identity will be respected. These are not just bald, technical

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words but finally recognised as being of eminent importance to a child's healthy
development. Without full respect and recognition of these children's past and
cultural heritage their future will be precarious."

Accordingly the judge refused an application for crown wardship and the children were
placed with members of their extended family, who were also members of their band.

Similarly in Shagoness v Kinniweiss (Sask. Q.B.), 1991, the judge was faced with a
difficult choice between placing the children with their grandparents in very poor housing
conditions, that is in a home without sewer or running water, or with their foster mother.

Despite the obvious material advantages of the children being placed in the foster home,
the court held that their contact with their cultural heritage and extended family was more
important,

"If the yardstick for measuring the quality if care these girls should continue to
receive is the physical care and education they are now receiving from the
Department of Social Services, then the balance is weighed in favour of keeping
them in the city. There are, however, other considerations which must in my
opinion count in the determination of the welfare of these children...In my
judgement their welfare is better served by the Native community, even if the
progress designed to serve them [efforts to restore their traditional values] are
still in a stage of infancy."

The judge was clearly impressed by the efforts the community was making to develop a
child welfare system consistent with their culture, traditions, and values as part of a wider
regeneration of community standards. He perceived the children being able to grow and
develop within the community as integral to that regeneration of culture and traditional


278 The community involved was the Yellow Quill Band (formally Nut Lake) residing on the Yellow Quill
reserve. The court was shown a video which explained the initiatives the Band were taking. These
initiatives included the provision of school facilities, kindergarten, the employment of a community health
worker, an alcohol and drug counsellor, a social worker, and a welfare administrator. Poverty was
identified by the community as a key problem to be addressed, particularly housing standards.
values and thus concluded that it is in the “best interests of the children that they should be part of this adventure.” The importance of cultural heritage has also been a determinative factor in custody disputes between parents. In *Leichnitz v Corbiere* (Ont. Ct. of Justice), 1995, the court granted an order of joint custody in order to secure the children’s contact with their culture. The mother was considered to be appropriate as the primary care giver based on the traditional western criteria of stability and material advantage. However the judge gives equal recognition to the importance of access with the father because of his native heritage and the access he can provide for the child to his native culture and identity,

“It is my view that [the father] cannot provide the sensitive training, care and delicate guidance, that a loving mother is able to give to her young daughters. Hygiene, nutritional foods, discipline, regular hours and school work assignments will be better taken care of by the mother. On the other hand the father is able to provide and make available those things from their native culture that are so positive and important to these young girls. They should attend and participate in feasts and festivals as well as after school clubs and activities organised by the West Bay band...because of the two cultures that must be respected for the children’s sake, I believe [a joint custody order] can work.”

The importance of contact with the child's cultural heritage and more significantly its vital importance to the healthy growth of the child has clearly been recognised by the judiciary. Some of the judiciary have even addressed Kline’s criticism concerning the judicial

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280 The importance given to the father facilitating access to the children’s heritage is particularly significant as the mother was also native but does not appear to be from the same community as the father. Thus there seems to have been judicial recognition given to the importance of contact with the specific culture of a First Nations community; that is, contact with aboriginal culture in any form is not sufficient. In this case both the native culture of the mother and father were held to be important to the children and access was to be facilitated to both. Access to one did not meet the children’s needs and it was held to be particularly important that links with the father’s reserve community were not lost.
attitude that contact with any aboriginal culture, regardless of whether it is the culture of the child, will suffice.\textsuperscript{281} In some decisions the court has acknowledged that some contact with any First Nations culture is not adequate. The right to cultural heritage means meaningful contact with the particular culture and tradition of the child’s community. Non-native foster parents taking the child to museums will not suffice; even native foster parents who do not share a common heritage with the child will only be suitable if there is no other alternative within the child’s community. Thus in \textit{J.T.K. v Kenora Patricia Child and Family Services}, (Ont. Prov. Ct.), 1985,\textsuperscript{282} an application to terminate crown wardship in order to carry out the natural parents plan to place the girls in the same Grassy Narrows community that they were raised in and with a proposed adoptive mother who was a blood relative, was allowed,

"The children are of the same language, culture and tradition as other members of the Grassy Narrow Band. Testimony indicated that this is an important consideration; and as children grow older it increases in importance; that children who are removed from the language, culture and traditions of their birth tend to be drawn back to their roots; that such may provide a richness to their lives otherwise unobtainable...It was strongly pointed out that the Mohawk language, culture and tradition is substantially different from that of Ojibway."

\textit{The Imposition of Ethnocentric Standards}

As the decision in \textit{Shagoness}\textsuperscript{283} emphasised the courts are also making a determined effort not to allow middle class judgements as to the suitability of the home

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\textsuperscript{281} "Best Interests Ideology," \textit{supra} note 3 at 401 - 402.

\textsuperscript{282} \textit{JTK v Kenora Patricia Child and Family Services} [1985] O.J. No. 710 (QL) (Ont. Prov. Ct.).

\textsuperscript{283} \textit{Supra} note 277.
environment dictate their decision and allow poverty and different cultural norms of ‘housekeeping’ cloud the importance of respecting cultural heritage. They have thus tried to accommodate both the effects of poverty and the First Nations different value system in their judgements as to whether the child is in need of protection and whether the parents or native foster parents can provide a suitable home environment. The difficulty of a ‘white’ judge making judgments as to whether a native child from a different culture is being neglected or is in need of protection was expressly acknowledged by Justice Faulkner in Re T (C), (Yukon Territorial Ct.), 1990. He was clearly uncomfortable in making such a decision which encroached on differences between cultures in child rearing methods.

‘Extensive evidence was led with family visits and observations of the interaction between Mary and Edna, particularly and those persons with the children to show that discipline was lax, and the children rarely behaved, parenting skills were poor and so forth. I find it very difficult to interpret evidence of this kind. It falls perilously close to being a cultural question. Children are not disciplined equally in all cultures. It is probably fair to say that in native cultures children are given a much freer reign than is usual in white society. There is less direction and decision making by the parents, and the situation may appear somewhat aimless and chaotic to outside observers. In any event, evidence of this kind is of little use in determining whether the children are in need of protection...It is extremely difficult and undoubtedly presumptuous for the court or Child welfare authorities to say that one lifestyle, one method of child rearing is better than another.”

The court then went on to grant a permanent custody order on the grounds that there was nothing cultural about the effects of the mothers alcohol abuse on the welfare of the

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285 Re T (C) [1990] Y.J. No. 162 (Yukon Territorial Ct.).
children. Judicial awareness of not imposing western middle class standards of parenting and living conditions can be traced as far back as to the late 1970s. In Mooswa et. al v Minister of Social services for the Province of Saskatchewan, (Sask. Q.B.),1976, the court held that the relevant standard of care was to be judged according to the standards which prevailed among her particular class or group. The vital factor was whether her standard of care fell below that community average,

"Although the standard of living provided by the child may not be considered acceptable by others, nevertheless if those standards conform to those considered average in the particular class or group to which the parent(s) belong, the court ought not to interfere. The child should be given the opportunity to be raised by her natural mother amongst people of her own race and culture. If the Minister still fails to maintain a reasonable average standard of care, then the child may be taken into care again by the department."

The same reasoning was adopted in Re E.C.D.M. (Sask. Prov. Ct.), 1980

"The expected standard of care will depend on the parent’s age and the standards of the community. The court will consider the degree of departure from the standard and the likelihood of improvement."

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286 Mooswa v Minister of Social Services for the Province of Saskatchewan (1976) 30 R.F.L. 101 (Sask. QB) [hereinafter Mooswa]. For commentary see “Complicating the Ideology,” supra note 284 at 132; Carasco, supra note 98 at 131.

287 This of course can be problematic if the community is one where alcohol abuse and violence is prevalent and the parents in question are acting according to these general standards of the community, but in so doing the children are being placed at risk. There is also the problem that in accepting the general community standards as a guide, poor housing and living conditions become accepted as the norm and the provincial and federal governments become complacent about improving living standards for the First Nations people. There is a danger in creating ghetto-like enclaves which are treated as acceptable by the wider community at the expense of taking important measures to improve the environment in which many First Nations children live.

288 Mooswa, supra note 286 at 101.


290 Ibid. at 275.
More recently the decision in Mooswa\textsuperscript{291} was vindicated with regard to on-reserve standards. In Re H (A.M.), (B.C. Prov. Ct.), 1989,\textsuperscript{292} the court emphasised that the parents must be judged according to the standards prevalent on their home reserve. The court recognised that there is a standard below which the parents cannot fall but a reserve is a distinct separate community with its own distinct values and should not have to comply with the standards of the dominant community.\textsuperscript{293} Clearly the courts are aware that they must not interfere with parental custody merely because the non-native society can offer, in their opinion, a better chance in life.\textsuperscript{294}

\textit{Aboriginal Child Welfare Laws, Traditions and Practices}

The judiciary have also started to recognise the distinct cultural child care practices of the First Nations people and utilise those traditional practices in its dispositions and in determining placement.\textsuperscript{295} Legal recognition and force has been given to both the tradition of the extended family providing alternative care and custom adoption. Important recognition of the role of the extended family and their traditional care giving role was given in Re C (E.J.), (Alta Prov. Ct.), 1987.\textsuperscript{296} The case was concerned with the

\begin{footnotes}
\item[291] \textit{Supra} note 286.
\item[293] "Complicating the Ideology," \textit{ibid.} at 128.
\item[295] See "Complicating the Ideology," \textit{supra} note 284 at 133. For literature on the current status of recognising aboriginal laws and traditions within the dominant legal system see \textit{supra} note 205.
\end{footnotes}
willingness of the child's grandmother to assume care and custody of the child as opposed to the application of the foster mother who wished to adopt the child. Both applicants were deemed suitable, particularly the grandmother because she was a member of the child's extended family. The court decided to grant a 4 month temporary order to allow the grandmother's application to be properly considered, but most important is the fact that the case sets the important precedent that the term "family" as used in the Alberta legislation should include people outside of the western 'nuclear' family,

"There is no doubt in my mind that the term "family" could and should be interpreted in this case to include the grandmother. The nature of the extended family described in the evidence, the cultural practices in the Cree community of grandparents raising grandchildren, the responsibility and willingness the grandmother has shown in the pasty to care for this child could lead to no other conclusion."

Thus the cultural tradition of the extended family is fully endorsed by the court. In Sandy v Nootchai, (Ont. Prov. Ct.), 1989, the child's aunt was successful in preventing a custody application by a native foster parent on the basis that the child should be cared for by a blood relative within its extended family and with the support of the child's whole community. The court was presented with strong evidence of the network of care that was available within the child's extended family,

"Gordon Nootchai has numerous siblings who reside nearby, including two siblings; a grandfather, four aunts, two uncles, cousins and others. Gert Nootchai, a relative by marriage and native child prevention worker for the reserve is available to ensure that the child's emotional needs are adequately met."

The court went on to hold that this extended family network "ought to have a meaningful role in the child's upbringing unless circumstances dictate otherwise." Thus despite the advantages of maintaining the status quo and the problems on the reserve in terms of alcohol abuse and other social problems, the court find in favour of the aunt,

"Donna Nootchai would ensure that the child would experience and be raised as best she is able in the proud tradition of a noble past with support of relatives and extended family. His past will become part of self. That past struggles in the ferment of the present but then do we not all? In answer to counsel's submission for [the foster parent], is it necessary to disturb the status quo and remove Gordon Nootchai from the psychological parent, I can only answer "yes.""

The courts have also, albeit cautiously, begun to acknowledge the legal validity of custom adoption. The B.C. Court of Appeal in Casimel v Insurance Corp. of B.C., (1993) gave legal effect to the customary adoption for the purposes of death benefits under the Insurance (Motor Vehicle) Act. The court concludes,

"In my opinion, by the customs of the Stellaquo Band of the Carrier People, Earnest Casimel became the son of Louise Casimel and Francis Casimal. Such a customary adoption was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People, and as such gave rise to aboriginal status rights that became recognised, affirmed and protected by the common law and under sec. 35 of the Constitution Act, 1982."

The status of customary adoption is not beyond doubt in B.C. given that Casimel relied heavily on the first instance decision in Delgamuukw which was subsequently overruled by the Court of Appeal. However the legal effect of customary adoption continues to be recognised in the North West Territories and the fact of its legal status there was prominent in the judgment of Justice Lambert in Casimel. Customary adoption has had legal effect in the North West Territories since the decision of Justice Sissons in Re

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Katie’s Adoption, 1961. Its legal status is now beyond doubt. For example in C.A.D. v V.G., (N.W.T.S.C.), 1992, the issue was not whether such an adoption had legal effect; that was simply assumed. The decision turned on whether according to the Inuit tradition the adoption had been carried out.

Hearing the Voice of the Community

A key factor in facilitating better understanding and sensitivity to the importance of cultural heritage and the indigenous factor is the active participation of First Nations communities in decisions which concern children from their band. In many proceedings in which the future of a First Nations child is in issue, the child’s community will be represented. The band may appear as an intervenor or through the auspices of a native controlled child welfare agency. In either case the communities views and traditions are able to remain prominent and accurately represented throughout the proceedings. For example in Family and Children’s Services of Waterloo v B.Y. (Ont. Ct. of Justice - Prov.

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299 Re Katie’s Adoption (1962) 38 W.W.R. 100 (N.W.T.).


302 It should be noted however that the band on which notice is served is not always appropriate. For example, in B.C. a child living in Vancouver may have notice served on their home community in the far North instead of Vancouver Aboriginal Child and Family services, and the band doesn’t send representation, or the child’s family do not want it to.
a representative of the child’s Band who attended the proceedings was given extensive scope to participate and make the position of the Band clear. The judge was eager for the Band to call evidence as to their plans for the child and to make concrete suggestions as to the most appropriate disposition. The judge clearly allowed the Band representative extensive leeway,

“Throughout the trial I invited the band representative to ask questions of all the witnesses. Two counsel indicated that Mrs. General’s questions in the form of statements from the floor are not evidence. Indeed they are not.”

One of the most important changes to facilitate the active involvement of the community is the role of the native controlled child welfare agency. In those cases over which they have jurisdiction their cultural perspective is secured throughout the proceedings. In both Awasis Agency of N. Manitoba v W (W) (Man. Prov. Ct.), 1990, and Re C.L.T.F. (Alta Prov. Ct.) the agency performed its role effectively but with clear sensitivity to the customs and cultural practices of the community they served. Justice Kimelman applauded the work of the Awasis Agency for their provision of protective services to the community,

“I make a final comment with respect to the evidence of the workers of the Awasis Agency. The evidence of Verna Saulteaux and the other workers’ indicated a sensitivity for the issues before the court. They testified in a most professional and sympathetic manner and the court was impressed by their evidence.”

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305 78 D.L.R. (4th) 729 (Alta Prov. Ct.).
The important contribution and insight that can be brought to the proceedings by these agencies has been secured, even in cases where they do not have jurisdiction over the child, by granting the agency intervenor status. Intervenor status was granted in Pitzel and Pitzel v Children's Aid Society (Man. Q.B.), 1984,\textsuperscript{306} to the Anishinaabe Agency because it was the native agency for the band to which the child belonged. The agency's knowledge of the community, its traditions, and as to the suitability of the maternal aunt, were recognised as being of great benefit to the court.

The racist ethnocentric ideology of the judiciary would therefore seem to have been tempered in recent years by increasing recognition of the concerns of the First Nations and particularly by recognition of the indigenous factor and the importance of the community to the child. Again however there remain problems with the way in which the judiciary continue to apply even the more culturally sensitive provisions of child welfare law. The "common sense" acceptance of the importance of cultural heritage, the indigenous factor and community involvement at all stages of the process would seem to have been limited by the judiciary's new construction of the "good Indian" or "real Indian" whereby recognition of First Nations claims are limited to those cases where the First Nations child belongs to a reserve community which is in the process of rebuilding and regenerating its cultural values to prepare for retaking control over their own community. The judiciary are prepared to accept that being involved in this process of regeneration is a positive experience for the child. However where the case concerns off-reserve, urban First Nations who are not actively involved in the on-reserve 'regeneration' and participation in

traditional cultural activities, then the importance of culture is once again devalued and assimilation remains the expected norm.\textsuperscript{307} Thus the ideology of the judiciary has certainly shifted, but the reconstruction of that ideology is arbitrarily restricted to geographical boundaries and consequently has the danger of excluding the majority of native children. Any optimism about the capacity of provincial child welfare law to meet the needs of First Nations children must certainly be tempered with caution. Again a Children’s Charter, even if not justiciable, would provide an interpretative tool against which the judiciary must make their decision in every case. It should at least ensure that they address the issue of the cultural heritage of every native child that comes before them.

\textit{Delivery of Child Welfare Services By First Nations Communities}

Without doubt one of the most important changes in recent years aimed at indigenising the current system and recognising the importance of culturally sensitive child welfare services that can incorporate the practices and traditions of the community served, is the development of native controlled child welfare agencies, such as Xolhmi:lh and Usma.\textsuperscript{308} The emphasis in child welfare policy in the last fifteen years has been on


\textsuperscript{308} For a discussion of the development of native controlled child welfare agencies in Canada see MJI, supra note 95 at 527 - 533 and 544 - 546; Gathering Strength, supra note 122 at 29 - 33; Literature Review, supra note 98 at 19 - 51; British Columbia Family and Children’s services and Ministry of Social Services and Housing, Protecting Our Children, Supporting our Families: A Review of Child Protection Issues in British Columbia (Victoria, B.C. Ministry of Social Services) at 56 - 60; No Quiet Place, supra note 95 at 102 - 130; Liberating Our Children, supra note 98 at 32 - 36; Bala, Hornick, and Vogl, supra note 250 at 186 - 192; B. Wharf, Towards First Nations Control of Child Welfare: A Review of Emerging Developments in British Columbia (Victoria: Uni. of Victoria, 1989).
supporting increased First Nations control of the development, design and delivery of child and family services.\textsuperscript{309} Some of the many benefits flowing from this policy were considered in chapter three.\textsuperscript{310} The founding of native controlled community based agencies to deliver provincial child welfare services to the First Nations communities is provided for in several of the provincial legislatures but has been structured in a variety of ways. Generally the First Nations community has entered into an agreement with the provincial and federal government to exercise the child welfare jurisdiction vested in the Minister either on a contractual basis or through a delegation of the Ministers powers to the agency. The objective of all these arrangements is to ensure that the agencies delivering services to the First Nations communities are doing so in a culturally sensitive manner, are able to apply traditional values and practices, will not be vulnerable to making ethnocentric, colonial judgments or bad decisions based on a misunderstanding of cultural practices, will be able to secure that the First Nations perspective on these issues is retained throughout the whole child welfare process, and that thereby they will help keep the community values alive and First Nations children safe but safe within their community. However, whilst these arrangements allow for a great degree of autonomy in how services are provided to First Nations communities, the agency is mandated by the provincial government, applies provincial laws and standards and is ultimately responsible to the provincial government. The federal government in fact insisted that it was a condition of the agreements establishing the child welfare agencies that they adhere to provincial regulations and

\textsuperscript{309} Gathering Strength, ibid. at 29.

\textsuperscript{310} See above chapter three pp. 182 - 196.
standards.\footnote{Gathering Strength, \textit{ibid.} at 39.} For example, in the B.C. model of delegating child protection powers, the delegation of authority is not made to the agency, but is vested in the individual social workers who are employed by the agency.\footnote{Liberating Our Children, \textit{supra} note 98 at 35.} As a result, ministerial policies, based on Anglo-Canadian cultural values and policies continue to dictate the practices of the employees of even native controlled agencies.\footnote{\textit{Ibid.}} The only ultimate answer to this is self-government. However, at this point in time the provincial child welfare system does at least appear to be trying to provide for recognition of the centrality of cultural heritage to child protection services, and secure recognition of the right of the child to enjoy his or her culture and traditions in community with others.

3.2 (iii) \textit{Child Protection Services Must be Provided By Competent Staff and Meet Basic Minimum Standards of Expertise}

The third principle which I contend is essential for the protection of children in any child welfare system is that the people who are making the immediate decisions on apprehension and placement are professionally qualified and properly trained. In order to have an effective child protection system in any culture it is necessary to have people in charge who know what they are doing; that is, child protection is a profession which requires knowledge and practical skills that can only be gained through training and
experience.314 One of the major problems identified by Justice Giesbrecht in the Desjarlais Inquiry was the lack of professionally qualified and experienced staff.315 He found that they made serious mistakes in relation to their care of Lester, and because of their lack of training were more vulnerable to manipulation and domination by powerful men on the reserves. Having fully qualified workers would not make them immune to these pressures, but it may have helped. However, the fact that comments made by one of the unqualified child protection workers was linked directly to Letter's suicide clearly, "demonstrates how important it is to have professional social workers dealing with these complex problems."316 The child has a right to expect that the agency which is mandated to protect him or her will operate in a competent manner, and employ qualified staff who will act properly and professionally in performing their duties,317

"Aboriginal communities have just as much of a right to expect quality child care as other communities. Children living on reserves are entitled to expect the same standard of care as other children. They are entitled to protection by a qualified, professional child care worker who will not let them down."318

314 Justice Giesbrecht presents a strong convincing case for the need to have properly trained professional social workers delivering child protection services in First Nations communities. See generally Desjarlais Inquiry, supra note 95. For a discussion of the problems that can arise from having inexperienced unqualified staff providing child protection services see above chapter three at pp. 244 - 251. See also on the need for aboriginal staff working within self-governing aboriginal agencies to be properly trained, M. Cameron, "A Prototypical Economic Development Corporation for American Indian Tribes" in Stephen Cornell and Joseph Kalt, eds., What can Tribes Do? Strategies and Institutions in American Indian Economic Development (California: American Indian Studies Centre, 1992) 62 [hereinafter What Can Tribes Do?]; Restructuring the Relationship, supra note 99 at 335 - 344.

315 Desjarlais Inquiry, ibid. at 50 - 51, 55, 60, 183 - 209.

316 Ibid. at 60.

317 Ibid. at 110.

318 Ibid. at 196.
It was suggested by the Tenth Report of the Royal commission on Family and Children’s Law in 1975, that ‘aboriginality’ was the most important qualification for protecting aboriginal children,

“Indian expertise” alone i.e. familiarity with native customs and tradition, should provide for eligibility as a beginning social worker. Recommend that the qualifications for some social work positions as set out by the public service commission should be re-examined with a view to recognising the importance of “Indian expertise”, aptitude, and life experience, in lieu of academic education.”

Similar arguments as to the sufficiency of “life-experience” and “aboriginality” as qualifications for aboriginal child protection work were raised by DOCFS to the Desjarlais Inquiry. It is suggested that this view should be reconsidered. The prevailing view in Canada is that child care workers are professionals, just as doctors and lawyers are professionals. It is acknowledged in aboriginal communities that doctors must be equally qualified and experienced if working in First Nations communities as they are if working in non-aboriginal communities; the same professional respect should be accorded to child protection work. Professional child protection is equally as “vital” to the well-being of the community. ‘Life experience” does not qualify a person for making complicated judgements on whether a child is being abused and if so how that situation should be addressed. ‘Child protection is a skilled profession.”

\[319\] Native Families and the Law, supra note 194 at 68.

\[320\] Desjarlais Inquiry, supra note at 187 - 191.

\[321\] Ibid. at 189.

\[322\] Ibid. at 195.

\[323\] Ibid. at 194.
difficult cases properly a combination of education, training and experience is necessary.\textsuperscript{324} Having one of these skills does not compensate for the absence of the others. This is not to negate the importance of aboriginality in protecting aboriginal children. Knowledge of the culture and the community are both extremely important in delivering services in a culturally sensitive manner.\textsuperscript{325} First Nations social workers are better able to communicate with the family and provide services in a way which respects the cultures and traditions of the community. By being sensitive to the family’s traditions the actions of the social worker will seem less intrusive and interventionist. This helps foster trust and cooperation between the parties. There are many different ways of approaching a problem and a broader basis of knowledge about the particular culture of the community can make a particular approach to a problem with a family within the community more effective. There is also the basic fact that being aboriginal and having experienced the discrimination and prejudice suffered by First Nations people will give an aboriginal social worker a unique insight into the problems which are experienced by families in First Nations communities and the devastating effects of colonialism that lie behind those difficulties. However, such insight into First Nations cultures cannot compensate for expertise in child protection. The ideal is for both to be employed. If professional standards are not secured

\textsuperscript{324} Ibid. at 197 - 198.

\textsuperscript{325} For a detailed discussion of the importance of ‘aboriginality’ in delivering sensitive child welfare services see above chapter three at pp. 191 - 193. See especially, \textit{Native Families and the Law}, supra note 194 at 49 and 66 - 76; \textit{No Quiet Place}, supra note 95 at 131 - 176; \textit{Liberating Our Children}, supra note 98 at 52 - 53. See also, \textit{Current Trends and Issues}, supra note 99 at 40 - 44. These reports all contain recommendations on the importance of employing aboriginal workers to deliver child welfare services in aboriginal communities, and suggest various initiatives for increasing the number of aboriginal social workers and support staff.
in First Nations communities, aboriginal children will be receiving a lower standard of care than other children in Canada, inevitably at their expense.\(^{326}\)

"One can only excuse inadequacy in a child care worker by doing so at the expense of the children residing in that worker's area."\(^{327}\)

The need for adequate training and education extends to all aspects of governance and the delivery of services if self-governing communities are to operate effectively. As the Royal Commission argues, to be effective a government must have three basic attributes: legitimacy, power, and resources.\(^{328}\) Resources include not just financial and economic, but human resources in the form of skilled and healthy people.\(^{329}\)

Despite the protestations of DOCFS at the Desjarlais Inquiry, there is wide support among many aboriginal communities for the proposition that there needs to be skilled trained staff working in such areas as child protection. A clear example of the importance attributed to acquiring the sufficient skills to be able to govern effectively are the Yukon Self-Government Agreements,

"We worry about taking over government powers without being given sufficient opportunities to acquire the skills to exercise these powers or sufficient funds to operate effective self-government in perpetuity. We will need a comprehensive

\(^{326}\) It should be noted that the problem of ill-qualified and inexperienced staff is not restricted to native communities. The inexperience and inadequate qualifications of the child welfare workers who handled Matthew Vaudreuil's case led Justice Gove to recommend that the education and training of Ministry social workers be urgently reviewed and reformed. He recommended that all child protection staff should have at least a BSW, and supervisors a MSW. *Matthew's Legacy, supra* note 62 recommendation 56. This recommendation has now been adopted by the Ministry for Children and Families in British Columbia.

\(^{327}\) *Desjarlais inquiry, supra* note 95 at 196.

\(^{328}\) *Restructuring the Relationship, supra* note 99 at 163.

\(^{329}\) *Ibid.* at 164. For example, the Commission recommends that the federal government and the national aboriginal leadership establish an Aboriginal government transition centre with the mandate to, "develop and deliver training and skills development programs for community leaders and facilitators, and field workers." *Ibid.* at 331.
and sustained training program to prevent the perpetuation of a situation in which we are forced to hire much of our personnel and expertise from outside of our communities.\textsuperscript{330}

The Yukon self-government agreements consequently contain extensive arrangements for the funding and development of aboriginal training programs.\textsuperscript{331} There is certainly no reason why aboriginal people cannot be equally as skilled in the theory and practice of child protection if given the time and the resources. However, the reality is that there are not, and will not in the immediate future, be enough professionally qualified aboriginal social workers and child protection workers to fill the positions at self-governing child welfare agencies.\textsuperscript{332} The aboriginal communities have been extremely disadvantaged by the government’s policies in the spheres of education and training, and although a greater number of aboriginal students are now remaining at school and attending university or colleges of higher education, there is still a significant gap between the numbers of qualified aboriginal graduates and the demands of self-government.\textsuperscript{333}

\textsuperscript{330} Victor Mitander, Chief Negotiator, Council for Yukon Indians, in \textit{Aboriginal Self-Determination}, supra note 99 at 119.

\textsuperscript{331} The Yukon agreements make extensive arrangements for training boards to be established with representation from First Nations communities, the Council of Yukon Indians, and government training experts. The boards will identify training priorities and implement appropriate programs. See Canada. Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, \textit{Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians, and the Government of the Yukon Indians, and the Government of the Yukon} (Ottawa: Ministry of Indian and Northern Affairs) Chapter 28, pp. 283 - 292; and Canada. Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, \textit{Umbrella Final Agreement Implementation Plan} (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) at Appendix A and B, and Annex E.

\textsuperscript{332} \textit{Desjarlais Inquiry}, supra note 95 at 201. See also \textit{What Can Tribes Do?} supra note 314 at 64.

\textsuperscript{333} For a selection of the various recommendations which focus on education and training initiatives aimed at increasing the number of aboriginal social workers see \textit{Native Families and the Law}, supra note 194 at 50 - 56 and 66 - 76; \textit{No Quiet Place}, supra note 95 at 169 - 176; \textit{Gathering Strength}, supra note 122 at 540 - 584; \textit{Liberating Our Children}, supra note 98 at 52 - 53; \textit{MJI}, supra note 95 at 536; \textit{Desjarlais Inquiry}, ibid. at 201 - 209; \textit{Native Families and the Law}, supra note 194 at 66 - 76.
The anxiety of aboriginal communities concerning the need for aboriginal workers to be providing child welfare services is understandable. Aboriginal social workers should rightly be preferred for available positions. However in the absence of qualified aboriginal staff there are alternatives.\(^{334}\) Child welfare agencies, can utilise outside expertise without removing community involvement and influence. It is argued that where there is no qualified aboriginal protection worker to fill a vacant position, it should be filled by a suitably qualified non-native worker.\(^{335}\) As the Desjarlais Inquiry concluded,

"DOCFS should not allow the understandable preference for aboriginal employees to prevent them from hiring the best people they can find, particularly in the next few years, until DOCFS can find more aboriginal people with the necessary expertise. They should hire the best people possible, including non-aboriginal people."\(^{336}\)

Cameron makes a similar argue in the sphere of tribal economic development.\(^{337}\) Recognising that there is a lack of sufficient managerial expertise, he argues that,

generally on the issues of education and training for self-government, \textit{Current Trends and Issues, supra} note 99 at 90 - 107, and 130 - 144. A further problem identified by all three agencies was that professionally qualified aboriginal social workers are not attracted to child protection work and will tend to choose jobs in other social work fields. Members of the First Nations communities find the work very stressful and invariably prefer to pursue other interests. This problem is particularly bad when a child protection worker is working in their own community. All of the agencies were of the view that First Nations social workers should work in communities other than their own to try and limit the personal demands on the worker and to try and maintain professional respect and distance between the community and the staff. Kelowa Edel, \textit{supra} note 124; Marika Czink, \textit{supra} note 123; Bryan Watt, \textit{supra} note 125.

\(^{334}\) See especially \textit{Desjarlais Inquiry, supra} note 95 at 202 - 209, for an excellent summary of the various alternatives that are available to ensure a professionally qualified protection team, whilst working towards building the community's aboriginal human resource base. For example, Justice Giesbrecht recommends that some type of sponsorship program could be introduced whereby aboriginal high school graduates, or current DOCFS employees could be sponsored through university with the promise that they would return to the agency for a guaranteed minimum term. \textit{Ibid.} at 202 - 203.

\(^{335}\) \textit{Desjarlais Inquiry, ibid.} at 203.

\(^{336}\) \textit{Ibid.}

\(^{337}\) \textit{What Can Tribes Do? supra} note 314.
“The successful operation of tribal enterprises may require an infusion of outside i.e. non-tribal and perhaps non-Indian business expertise, until tribes can build up sufficient skills and expertise without yielding too much influence to individuals from outside the reservation.”

Cameron goes on to argue that if the development corporation is well designed, then outside expertise can be used without removing too much influence from the community. This argument can be equally applied to self-governing child welfare agencies. For example, non-native social workers can be assisted by a team of support workers who may not have the required social work qualifications but do have other relevant skills and training. Aboriginal employees, and particularly if members of the community served, can provide an invaluable source of knowledge on the cultural practices of the community and its families. They can operate as intermediaries between the family and the social worker. They can advise the protection workers on cultural norms and standards in the communities and the decision which will be most consistent with their traditional practices, and they can provide essential support services to the family. Whilst gaining this experience in the field, they can continue to upgrade their skills and qualifications to enable them to take on more responsibilities within the agency.

I would contend that Aboriginal children have a right to a safe and healthy environment. They have the right to expect their interests will be protected by professionally trained staff who will not make basic mistakes, and will have the professional confidence to resist political manipulation. Are not aboriginal children entitled

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338 Ibid. at 65 - 66.
339 Ibid. at 66.
to expect the same standard of skill from those responsible for their care and protection as other children in Canada?

The three agencies were not in complete agreement with this second principle, although there was consensus on the need for appropriate training in child protection work. Usma were in close agreement with the argument that child protection work must be performed by professionally qualified staff.340

'It is very important to be properly qualified both academically and in terms of experience. Half of the social workers do not have a BSW, but they do have a degree in a related field. Preferably the social worker will have some experience with the Ministry or another agency. A social worker needs to be analytical and grounded in what constitutes child abuse. Child abuse, that is drawing the line between what is appropriate and what is inappropriate is not a cultural question. The community has the best interests of the child at heart, but there is often a lot of pressure on the children from the adults to remain silent. We therefore need skilled, well-qualified, and well-trained workers to ascertain whether a child is being abused or is at risk.” (Marika Czink)

It was however emphasised that educational qualifications are not enough, and that other personal factors such as ethnicity, knowledge of the community, and specific experience with aboriginal child protection work are also important. The essential point made was that social workers need effective qualifications, and Marika Czink, is not satisfied that the BSW, as currently endorsed by the Ministry, is the most effective qualification for child protection work in aboriginal communities,

“Academic qualifications and knowing the hand book inside out is not enough to be an effective child protection worker. The social worker must be able to operate effectively in an aboriginal community which requires special personal skills beyond a BSW.” (Marika Czink)

340 Marika Czink, supra note 123.
It was therefore suggested that the non-native professional courses must be re-examined in terms of their own standards, and re-evaluate the education they are providing for aboriginal social workers and those who intend to work in the communities.\(^{341}\) Moreover she thought it would be valuable for the community to develop their own standards and expectations as regards the necessary qualifications and training for child protection staff. The community could certainly help identify the relevant skills for child welfare work in aboriginal communities. Clearly a two-fold approach is endorsed. Child protection workers must have the necessary skills and qualifications provided by a formal education, but the relevance of the professional courses currently provided to social work in native communities must be examined and more appropriate courses and training programs developed. Academic courses must be relevant to work in aboriginal communities if they are to be valuable. The insights of aboriginal cultures should be integral to those professional academic qualifications.\(^{342}\) Moreover in the selection of child protection workers, skills other than the grades achieved in their academic degree must be considered. Nuu-chah-nulth have structured the staffing of the agency in such a way as to utilise the skills of both the professional social workers and the knowledge and skills of

\(^{341}\) Justice Giesbrecht made a similar comment in the Desjarlais Inquiry. He noted that there are "deficiencies" with the university programs: "In this case more than one witness, including Dr. Charles Ferguson, pointed to what they view as very serious deficiencies at the University of Manitoba School of Social Work in the field of child abuse education." Justice Giesbrecht goes on to make recommendations to the government that these deficiencies be explored with the school of social work: 'Perhaps the School of Social Work could include components dealing with the aboriginal aspects of child welfare as well. In this way excellent people, such as Bev Flett and Ella McKay might be given the benefit of university social work training in a practical way." Desjarlais Inquiry, supra note 95 at 200 - 202.

\(^{342}\) For a general discussion of the need to introduce education for self-government which is controlled by aboriginal people in order to ensure it is relevant to First Nations communities and is informed by their culture, traditions and philosophies see, Current Trends and Issues, supra note 99 at 90 - 107, and 130 - 144. See also Restructuring the Relationship, supra note 99 at 335 - 344; and Gathering Strength, supra note 122 at 540 - 584.
members of the community. The mandated child protection work is carried out by fully qualified social workers according to provincial standards, the majority of whom are non-native. They are responsible for delivering child protection services to the specific Bands. The need for cultural sensitivity is however by no means ignored. The Elders Advisory Committee, which is comprised of elders from all Nuu-chah-nulth bands, meets as requested by the Usma program to train staff in Nuu-chah-nulth traditions and cultural values. There is also a comprehensive aboriginal support staff who have particular community knowledge, and who can deliver support services to the family, liaise between the community and the agency, and educate Usma social workers on the communities cultural and traditional practices to ensure cultural sensitivity. Each Band is funded through Usma to hire a Band Family Care Worker. They are responsible for delivering Usma services at the Band level by working closely with other Band Human Service staff, community members and the Band Family Protection Committee. The Band Family Care Workers are answerable to the Chief and Council of their respective bands, but they consult with Usma and take their directions from Usma in any matter which relates to delegated authority. Usma intends to request emergency delegated apprehension powers for Band Family Care Workers as they become suitably trained in protection work and are

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343 Usma Pamphlet, supra note 188 at 7.
344 Ibid. at 8.
345 Ibid. at 7.
346 Ibid.
347 Ibid.
capable of exercising the authority.\(^{348}\) It remains the clear expectation and the goal of the agency that it will be staffed by native child protection workers, preferably from the community, but, this will not be implemented until they have the professional qualifications. To that end the native support staff are encouraged to take courses in social work to gain the necessary qualifications. The agency also tries to initiate community-based projects which are run by members of the community. They are currently proposing to establish a group home which would be staffed by reserve members and would include training to upgrade their skills. Usma is thus slowly building the communities resource base, whilst securing that Nuu-chah-nulth children are receiving the protection of fully qualified and skilled social workers in the interim. These social workers are educated and supported by community members to ensure cultural sensitivity in the delivery of services. This is a fully supportable balance.

Spallumcheen have a very similar view.\(^{349}\) The program is currently staffed by non-native social workers, with the support of native child care workers. They have tried to achieve a balance between qualified social workers and professionally unqualified staff who have other important skills such as indigenous knowledge. Thus the Director of the program has a MSW, the other social workers either a BA or BSW. These employees will do the difficult apprehension work. The native support staff are given more restricted responsibilities,

"There is one staff member who has been here 17 years and who probably has a very low level education. She wouldn’t be sent out on an apprehension but she

\(^{348}\) Ibid.

\(^{349}\) Bryan Watt, supra note 125.
provides invaluable information, knowledge and support in making decisions on particular cases.” (Bryan Watt)

Again, however, the BSW was strongly criticised as an inadequate qualification for social work, particularly in aboriginal communities,

“The BSW is not a great degree. Large numbers are being conferred each year but the graduates are not going into child protection work. They have tried to create such a fail safe system that it has become dysfunctional. The BSW does not prepare graduates for social work in the field. They are not allowed to argue with or question the proscribed formula for successful work. They are indoctrinated with a certain way of doing things and consequently are not turning out good social workers.” (Bryan Watt)

The Spallumcheen child welfare program would thus appear committed to the principle that decisions on apprehension and placement should be made by impartial professionally qualified staff. However the band by-law also delegates initial powers of apprehension and placement to the Chief and Council.350 There would thus seem to be a tension between giving this power to members of the band council, whilst asserting that the child welfare staff must be suitably qualified to make apprehension decisions. I would suggest that the Spallumcheen should reconsider allowing Chief and Council, who do not have sufficient skills or training, to enter into band member’s homes and remove their children. That decision should be taken by skilled workers complying with professional standards of impartiality and good faith, not politicians who may be guided by a different agenda.

Out of fifty staff at Xolhmi:lh approximately 2/3 are aboriginal.351 This would appear to be a higher proportion of aboriginal staff than employed by the other two

350 By-Law, supra note 129 sec. 6, “The Chief and Council and every person authorized by the Chief and Council may remove an Indian child from the home where the child is living and bring the child into the care of the Indian Band, when the child is in need of protection.”

351 Kelowa Edel, supra note 124.
agencies. The explanation for this may be the more flexible attitude towards professional qualification requirements for child protection work that was indicated by Kelowa Edel. She tended more towards the position that was taken in the 1975 Royal Commission report, than did Marika Czink or Bryan Watt. She argued that aboriginal social workers did not have to be qualified to the same level as non-native workers to work in the native communities. In her opinion being aboriginal and having an insight into the communities is much more important. That is, relevant practical skills are considered to be more important than academic qualifications such as the BSW,

"You do not have to be qualified to the same level as non-native workers to work in the community. A BSW does not necessarily guarantee that you have the necessary skills to do the job. Academically it provides a letter of approval but a BSW by itself does not secure a full understanding of child protection. Being aboriginal and having an insight into the communities is more important. Less qualified applicants but with the relevant skills may well be more effective." (Kelowa Edel)

Whilst the comments regarding the relevance of the BSW to social work in native communities is supported by other workers in the field, the seeming negation of the importance of an academic and professional grounding is more questionable. It would seem to be academic grounding, rather than practical training in child protection, that Xolhmi:lh question for its relevance. Xolhmi:lh gives high priority to training for all its staff. For example its recent proposals to the Canadian government stated that the provincial Director should make available to the staff, and designated persons, professional development ordinarily available to the Ministry's employees. Throughout

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352 Supra note 319.

353 Target Population, supra note 134 at 13.
the Protocol Agreement establishing a community care committee on the Seabird Island reserve the necessity for the training of everyone involved was constantly emphasised.\textsuperscript{354} Again it should be emphasised that both education and practical training and skills are important, but I would argue that a culturally informed theoretical grounding in child protection is an essential prerequisite to practical experience and training in the field if the worker is to progress to positions of greater responsibility. This does not undermine the importance of encouraging members of the community to begin training in the field of child protection so the Sto:Lo can gradually staff the agency with members of their own community. Xolhmi:lh generally have similar policies towards training community members in child welfare work as Nuu-chah-nulth. Each protection social worker is supported by family support workers, a cultural worker, and a resource worker. These support positions are preferably filled by members of the Nation. Aboriginal workers are encouraged to enter the agency at the lower levels and gain the relevant job training to enable them to proceed to the next level of responsibility by developing their skills and experience. At these levels a degree in social work is unnecessary and other factors such as aboriginality may well be more important. Career building for members of the Nation is central to Xolhmi:lh's philosophy. For example, earlier in 1997 they opened a staffed group home on Seabird Island, one of the Sto:Lo communities. The home is staffed only by members of the Sto:Lo Nation. It is hoped that by using members of the community in these facilities the employees can get a foot on the ladder of social work and child protection. The staffed home workers will be trained in areas such as family support

\textsuperscript{354} See generally, \textit{Seabird Island Agreement}, supra note 134.
systems, communications training, counselling and first aid to the level of family support worker, and will hopefully take on more responsibilities as their skills develop. Xolhmi:lh also encourage and support aboriginal workers who wish to take time off to gain their academic qualifications. They recently supported one supervisor financially whilst studying for her BSW. However whilst all these initiatives are important I would contend that the apparent lack of commitment to social workers having a solid educational base is a potential weakness in the agency and should be reconsidered. It is essential that those staff carrying out apprehensions and making placement decisions are professionally qualified both academically and through practical skills training.\(^{355}\) The alternative is that problems such as those which developed in Sandy Bay could repeat themselves in other communities: staff submitting to the demands of local powerful families; inappropriate placements being made; not apprehending when there are clear grounds to suspect abuse; protection workers saying the wrong thing to vulnerable children; protection workers in a state of confusion as to their responsibilities; and basic incompetences such as an inability to keep good files undermining the whole system.\(^{356}\) Presently those Xolhmi:lh social workers carrying delegated provincial authority must meet provincial professional standards, but this will no longer be the case if the Sto:Lo Nation achieve their desired autonomy. The recent proposals submitted to the federal and provincial government state quite clearly the aims of Xolhmi:lh,

\(^{355}\) It was suggested that one reason why the agency does not employ highly academically qualified staff is because they do not have sufficient funding to meet the higher levels of remuneration expected by these professionals. (Kelowa Edel, \textit{supra} note 124).

\(^{356}\) See generally, \textit{Desjarlais Inquiry}, \textit{supra} note 95.
‘It is the goal of the Xolhmi:lh program that a good proportion of the staff hired by the Xolhmi:lh program be aboriginal. The Xolhmi:lh program shall have autonomy in setting standards for the hiring of staff and the provision of programs to the population it serves.’

It is submitted that in forming those standards Xolhmi:lh should have regard to the problems that developed in DOCFS as a result of staff having insufficient academic and theoretical grounding in child protection.

3.2 (iv) Child Welfare Systems must be Structured in such a way as to Ensure Child Protection Experts Are Secured Professional Integrity and Protected Against Political Interference and Manipulation in Decision Making.

A child welfare system can only be effective if its internal structure and its policies of operation are conducive to protecting the child’s interests. Fundamental to the decision-making process within a child welfare agency should be recognition that child protection is a skilled profession, and those with the relevant skills should be making the difficult decisions on issues such as apprehension. Professional social workers must be allowed to exercise their professional judgment on the appropriate action to take, without interference, or the need for sanction from the community and its leadership. There needs to be independent decision making powers in the professional workers and further they must be allowed to exercise that judgment at arms length from the community.

If Target Population, supra note 134 at 12.

Again a strong case for the need for child protection workers to operate at arms length from the community is made by Justice Giesbrecht at the Desjarlais Inquiry. He argues, “although examples of cases where workers were specifically prevented from apprehending children from powerful families were relatively few, the much greater problem is the fact that workers do not have the freedom to act according to their perception of the best interests of children in cases where the children come from powerful families. Two standards of care exist.” Desjarlais Inquiry, supra note 95 at 215. For the problems which
professional distance is not guaranteed, the initial decision over apprehension becomes vulnerable to political interference and manipulation by powerful community members.\textsuperscript{359}

In the non-native system the social worker will make the initial decision over apprehension and placement in accordance with the policies established by the government ministry.\textsuperscript{360}

That decision will then be subject to review by the court which will apply the relevant legal criteria to determine if apprehension was warranted. Although the decision will subsequently be subject to review, the social worker is secured autonomy both from the government, in the form of the Minister, and the judiciary when exercising their professional judgment as to the appropriate action to take in any particular case. The community itself has very limited, and often no involvement at all, in child welfare decisions. It is not clear that the same distance and autonomy is being secured in native child welfare systems where inevitably the social workers, the community, and the community leaders work much closer together. This is not to suggest that an aboriginal child welfare system should simply replicate the way in which the non-native system has divided authority and responsibilities. However the death of Lester Desjarlais exemplifies the problems that can arise should the same body of people be making the decisions on policy, practice, apprehension, and placement.\textsuperscript{361} The Inquiry suggests that because the

can develop if professional distance is not maintained, in particular the vulnerability of protection staff to political interference and pressure from powerful reserve families, see above at chapter three pp. 234 - 243. See especially, \textit{Desjarlais Inquiry, ibid.} at 215 and 229.

\textsuperscript{359} \textit{Desjarlais Inquiry, ibid.} at 210 - 232.

\textsuperscript{360} For a basic overview of the decision-making procedure in child protection cases in the non-native system see generally, Bala, Hornick, and Vogl, \textit{supra} note 250.

\textsuperscript{361} To take one example from the Desjarlais Inquiry, Cecil Desjarlais, a power reserve politician and holder of the band council’s child welfare portfolio, involved himself in the placement decisions for Lester
independence of the professional decision makers was compromised, the individuals at risk within the community became extremely vulnerable to the power of a small group of influential leaders. It is thus argued that securing the professional independence of protection workers is crucial to preventing the problems of political interference and the manipulation of decision-makers that occurred in Sandy Bay.

The way in which First Nations child welfare systems will be structured and the decision making processes that they employ will differ greatly across the communities. However one common theme is the need to involve the community in decision making processes and the delivery of child welfare services. It is hoped that community involvement will ensure decisions are culturally appropriate, more effective, and have greater consistency with traditional decision making processes, will be based on greater knowledge of the parties involved, and will therefore be more effective. Some communities may prefer the band council to make decisions, others may envisage a more

Desjarlais, overruled social workers decisions, launched a campaign against the social worker’s supervisor, destroyed files relating to Lester’s death, intervened to protect his brother Joe Desjarlais who was accused by Lester of sexual abuse, and both the staff at DOCFS and the local child welfare committee, either did not want to, or could not stop him. See especially Desjarlais Inquiry, ibid. at 40 - 41, 117 - 119, and 74.

See e.g., Desjarlais Inquiry, ibid. at 212. As a further example of the vulnerability of the community to powerful reserve families and politicians see the series of reports concerning the South Island Justice initiative, Holly Nathan, “Nightmare of the Shadow People” Victoria Times Colonist (July 29, 1992); Judith Lavoie, “Ex-Wife Differs with band Head on Abuse Issues” Victoria-Times Colonist (July 29, 1992); Gerald Young, “Intimidation Trail Leads to Court” Victoria Times Colonist (July 29, 1992); Gerald Young, “Native Women Oppose Diversion of Sexual assault Cases” Victoria Times Colonist (July 31, 1992).

All three child welfare agencies were agreed upon the need for community involvement, Marika Czink, supra note 123; Kelowa Edel, supra note 124; Bryan Watt, supra note 125. See further on the benefits of community involvement, Liberating Our Children, supra note 98 at 9 - 10 and 65 - 66; Current Trends and Issues, supra note 99 at 34 - 48; MJI, supra note 95 at 531 - 533. See also in general, B. Wharf, Toward First Nations Control of Child Welfare: A Review of Emerging Developments in British Columbia, 2d ed. (Victoria: Uni. of Victoria, 1989).
community representative body. However, whilst community involvement in child welfare is important and can be extremely valuable, it is submitted that the decision making power over such actions as apprehension should remain with the professionals not the community.\(^{364}\) The obvious problem with the community, or their representatives, making the actual decision, apart from their lack of professional expertise, is the danger of ‘localitus,’ whereby in small communities the decision makers can be related to the victim or perpetrator and their ability to make a fair and impartial decision is undermined. Moreover if the community is to be represented through band councils, objections can be raised that many band councils may be corrupt and abusers themselves.\(^{365}\) It is obviously completely inappropriate to be handing decision making powers over child protection to the people doing the abusing. There is also the further difficulty that if child protection decisions lie in the hands of politicians, then politics rather than the child’s best interests, may become the determining factor.\(^{366}\)

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\(^{364}\) Desjarlais Inquiry, supra note 95 at 162 - 167. Justice Giesbrecht makes a similar recommendation, “I recommend that the Committees do what they were originally intended to do, namely provide useful information to the child care worker, but at the end of the day, the child care worker, in consultation with her supervisor will make the decision.” Ibid. at 165.


\(^{366}\) The Gove Inquiry noted concern over the politicisation of First Nations child welfare. See Matthew’s Story, supra note 142 at 246. For possible examples of this problem see Jane Doe, supra note 156; and Simenoff, supra note 155.
It would therefore seem imperative that a child welfare agency is able to operate within its sphere of professional competence without the constant intervention of community and political leaders. The issue of how to protect native-controlled institutions from political interference has arisen in other areas. For example, tribe owned businesses have suffered significant problems with political interference. This interference is argued to have a detrimental effect on their profits and productability.

"The structure of many tribal governments allows elected officials access to the daily operations of tribally owned businesses. In addition the short terms of elective office prescribed by most tribal constitutions politicise nearly all official decision making, including business decisions, as tribal leaders understandably act to preserve their elected positions. Successful management of businesses requires some degree of insulation from the often short-term orientation and rapid changes of tribal politics."

Economic development schemes have thus faced the same question of how to ensure businesses have the freedom to maximise their profitability whilst continuing to serve the long term strategic interests of the tribal community. The solution proposed in that context can be equally applied in the sphere of child welfare,

"One solution is to place tribal enterprises under the overall direction of a semi-independent corporation. This mode of organisation keeps long term strategic decision-making in the hands of elected tribal leadership. Day-to-day decisions however, are firmly in the hands of managers or boards of directors who are protected by the corporate structure from inappropriate political interference in non-strategic, short term business matters."

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367 See e.g. What can Tribes Do? supra note 314.

368 Ibid. at 64.

369 Ibid. at 63 - 64.

370 Ibid. at 62.

371 Ibid.
The corporation guarantees that the tribe has a major role in setting long term business goals and strategy, but gives the business managers freedom in the day to day operation of business activities.\textsuperscript{372} The Tribal Council’s role is strictly limited to setting policy goals and conducting annual reviews of both the implementation of policy objectives, and budget requirements.\textsuperscript{373} The members of the corporation are chosen for their business skill and knowledge and thus provide an effective evaluation and monitoring body for the institutions operating under them.\textsuperscript{374} Members of the Board would only be removable for clear and objective evidence of poor performance.\textsuperscript{375} However, in the context of economic development it is concluded that,

“One of the most important conditions for the success of a tribal economic development corporation lies in other governmental institutions, and in particular in the presence of a strong and independent judicial mechanism within the tribe. It is a mistake to assume that the tribal council - any more than any other governing body, in Indian country or elsewhere, can consistently rule fairly in disputes in which it is an interested party.”\textsuperscript{376}

The corporation envisaged by the Economic development scheme would be the equivalent of a child welfare agency board which could be staffed by experts in the field and representatives of the tribal communities. This board would operate as a “crucial buffer” between tribal politics and the political structures of governance, and the professional child protection staff. Local community involvement is secured in policy planning by tribal

\textsuperscript{372} Ibid. at 66, and 68 - 70.
\textsuperscript{373} Ibid. at 68.
\textsuperscript{374} Ibid. at 75.
\textsuperscript{375} Ibid.
\textsuperscript{376} Ibid. at 85.
council representation on the Board; whilst a local child welfare committee advise the professional staff on appropriate solutions in day to day individual cases, and be closely involved in the design and delivery of programs at the community level. This structure closely reflects the original vision for Dakota Ojibway and it was an excellent theory. It sought to ensure community involvement in the decision making process and policy making through a local advisory committee and by direct representation on the management board of the agency. Justice Giesbrecht gave strong support to this original vision,

Each community would be able to participate in child welfare, a matter that vitally affected their community through the operation of the local child welfare committee. The Committee would be composed of concerned people from the community, and would meet regularly to consider child welfare cases. Child welfare workers would ask the committee about specific families and their needs and resources, and generally there would be consensus reached by the end of the meeting. The meetings would be beneficial to the members of the community, who were able to participate in this important way, and to the workers, who would gather valuable information to assist them in doing their jobs. Clear that the Committee was to be advisory. I recommend that the committees do what they were originally intended to do, namely provide useful information to the child care worker, but at the end of the day, the child care worker, in consultation with her supervisor will make the decision. The decision must not be made by the committee, band councillors, or anyone else not trained in social work.”

Justice Giesbrecht gave similar support to the initial idea that DOCFS would be headed by an executive Board on which the local child welfare committees would be represented,

“There was also to be a Board for DOCFS that would set policy for the agency, much in the same way that non-aboriginal child caring agencies have Boards. The Board was to consist of representatives from each of the local child welfare committees.

377 For the structure of DOCFS, see Desjarlais Inquiry, supra note 95 at 159 - 169; and 112 - 115.
378 Ibid. at 174.
379 Ibid. at 160.
committees. The Board would not interfere in the day to day operation of the agency, just as the local child welfare committees would not dictate to child care workers what they should do.\textsuperscript{380}

Regardless of the capacity in which a child welfare committee operates: as advisor, decision-maker, or service provider, there need to be safeguards which attempt to ensure that their decisions are as effective, impartial, and fair as possible. Central to achieving this goal will be the composition of the Committees.\textsuperscript{381} Justice Giesbrecht made a number of recommendations on how to avoid the problems of nepotism and political manipulation of community child welfare services. He suggested that the provincial legislation in place in Manitoba be amended to the affect that Chief and Councillors are prohibited from sitting as participating members on local child welfare committees and play a liaison role only; that the Chief and Band councillors are prohibited from sitting on child welfare agency boards; and that child welfare agencies are required to have policy and procedures manuals that are judged to be acceptable to the Director of the Ministry.\textsuperscript{382} Justice Giesbrecht also recommends that the Indian leadership develop a non-intervention policy with respect to agencies operating in their communities under tribal councils.\textsuperscript{383} By these measures the value of community involvement will hopefully not be undermined by the political agenda of local powerful families who dominate band councils,

"The other change I strongly recommend in relation to the committees is that band councillors should be ex-officio members only. They must not be

\textsuperscript{380} Ibid. at 113.

\textsuperscript{381} For the problems arising from political domination of child welfare committees and agency boards, see above at chapter three pp. 238 - 243. See especially, ibid. at 114 - 116, 162 - 168, and 174.

\textsuperscript{382} Ibid. at 166 - 167, and 169 - 172.

\textsuperscript{383} Ibid. at 231.
participating members. They must not be eligible to act as chairpersons of the committees and above all they must not be eligible to be selected to sit on the DOCFS Board. I am convinced that having council members actively participate on the committees and on the DOCFS Board is one of the reasons why child care on the DOTC reserves is so poor. The original idea, namely, that the local child welfare committees would be made up of reserve residents concerned about the welfare of their children and that each committee would elect their own chairperson, and hence their own DOCFS Board representative, was the right idea.  

The original structure of DOCFS, before politics intervened, would therefore seem to have been in broad agreement with my suggested principle: that the professional staff of the agency be secured the decision making powers over apprehension and placement with community staffed committees providing only support and advice to the protection workers. The community, through the local committees, would then be represented on the board of the child welfare agency which would be responsible for policy direction and management of the agency. The tribe, band, or Nation would be responsible for general policy objectives and long term goals. The three native controlled child welfare agencies gave strong support to involving the local community and its leaders in child welfare decisions and the provision of services to the community. However their views on the degree of authority and decision-making power which should be vested in these bodies differed quite strongly.

Again Usma Nuu-chah-nulth seemed to be in the closest agreement with the suggested principle.  

The agency has tried to involve the community in decision making,

384 ibid. at 166.

385 Marika Czink, supra note 123.
for example, as to decisions regarding the placement of the child and plans for the child whilst in care,\textsuperscript{386}

"Community/family involvement is secured by using family meetings to try and resolve conflicts rather than simply apprehending\textsuperscript{387}... The agency has tried to involve the community in planning. There is a much closer relationship between the social workers and the community than when the Ministry was serving the community. The community provide a great deal of background information for the workers. A community based service means that they are much happier to provide the agency with information voluntarily." (Marika Czink)

Usma will consult with the community on the development of community-based programs and services, and is directed to assist the Bands to develop and maintain child welfare committees.\textsuperscript{388} Each community has a Band Family Protection Committee. The structure and membership of the Committee is determined by the Band.\textsuperscript{389} The committees are responsible for identifying community service requirements, approving programs made available with Usma funding, recommending potential child care resources\textsuperscript{390} and encouraging community awareness on child abuse and neglect issues.\textsuperscript{391} They do not make

\textsuperscript{386} The Usma Policy Manual states, “During the process of developing the plan, the Usma social worker must consult with the child’s parents, extended family, and/or the Family Care Worker of the child’s tribe to ensure their involvement. Where necessary family meetings will be held to ensure that every effort is made to include the child’s parents and/or relatives in formulating the service plan.” \textit{Usma Policy Manual, supra} note 196.

\textsuperscript{387} This is stipulated in the Usma Policy Manual, “If the Usma social worker determines that there are protection concerns then a plan of service must be developed. The service plan should be evaluated with the family and with the Usma coordinator.” \textit{Ibid.}

\textsuperscript{388} \textit{Usma pamphlet, supra} note 188 at 5.

\textsuperscript{389} \textit{Ibid.} at 7.

\textsuperscript{390} The committee can recommend appropriate foster homes but all resource homes must be assessed by the Usma social worker with assistance from the Usma family care worker to ensure that the standards of the province and Usma are met. \textit{Usma Policy Manual, supra} note 196.

\textsuperscript{391} \textit{Usma Pamphlet, supra} note 188 at 7. Community programs administered by the tribe include child care, community awareness, counselling, crisis intervention, life skills, prevention, and volunteering. The community controlled programs are intended to be preventative in nature. The \textit{Community Services
decisions on individual cases.\textsuperscript{392} The Band's family care worker provides an essential link between the committee and the agency. There is also an Usma board which provides program direction and is responsible for reporting accountability to the Nuu-chah-nulth Tribal Council.\textsuperscript{393} The Board consists of five tribal members as community representations, one executive member of the Tribal Council, and one elder.\textsuperscript{394} This structure is very similar to the one outlined above in the context of tribal businesses. The Usma Policy and Procedures Manual very clearly and comprehensively sets down the limits of each party's authority, their responsibilities, and to whom they are accountable.\textsuperscript{395}

Whilst the agency clearly supports the principle of a closer relationship between the community and the agency, Marika Czink was adamant that the professional distance of the agency to make the final decisions must be protected, and that they must not be subjected to the direct control of the community. She raised the important point that in order to minimise the influence of local powerful families and politicians over the agency

\textit{Contribution Agreement}, a contract between the Tribal Council Usma program and each tribe, is agreed upon to provide the funding for the Band's Community Programs. A single amount will be granted to the tribe which will administer the funding, providing community programs as the community committee decides appropriate. \textit{Usma Policy Manual, supra} note 196.

\textsuperscript{392} For example, the Usma Policy Manual states very clearly that in making a short term custody and special agreement provided for under provincial legislation, "only Usma social workers with delegated authority from the Superintendent of Family and Child Services may enter into these agreements on behalf of Usma program." There are similar provisions with regard to the foster care provided. Although suitable homes may be recommended by the community the manual states, "The Usma co-ordinator is the sole authority for approving resource homes. Only homes that meet the standards of the Usma program as determined by the Usma coordinator will be approved as Resource Homes." \textit{Usma Policy Manual, ibid.}

\textsuperscript{393} \textit{Usma Pamphlet, supra} note 188 at 8.

\textsuperscript{394} \textit{Ibid.}

\textsuperscript{395} \textit{Usma Policy Manual, supra} note 196.
staff they must not be accountable to the community. In her view if authority over the agency and its staff were to be placed directly into the hands of the local communities and its political leaders the performance of their professional duties would become impossible. They would have lost their professional independence and the necessary distance from the community they serve,

“...It is the clear professional distance between the agency and the community which perhaps ensures the community does not try to interfere with their work. Within the communities there are very powerful families living on the reserves and the potential danger that where there is family involvement these families will try and influence the process. It is therefore of vital importance that the social workers are accountable to the Ministry and not to the Chief and Band Council. If the Chief and Council has power over their employment and the worker was accountable to them for decisions it would make their job impossible. Being accountable to the Ministry which is removed from the community gives the workers protection. They are backed up by a centralised process that is not undermined or influenced by community power politics.” (Marika Czink)

Under the present structure the Usma manager is responsible for the overall management of the Usma program and is answerable to the Tribal Council through the Executive director. The Supervisor is responsible for the social workers. There would appear to be clear concern among the staff at Usma that they will lose their independence from the community under self-government. They did not oppose self-government in principle, but were concerned that authority should not be diffused among the reserves,

“It is the centralised structure that supports the agency which is so important. Such a centralised structure and control is possible under a system of self-government. But it needs to be done carefully. The agency could not work effectively if the authority was diffused among the community.” (Marika Czink)

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396 Usma Pamphlet, supra note 188 at 6.
It was suggested that self-government should be introduced in such a way that it maintained a centralised structure to which the agency staff were responsible, thus ensuring that they were not directly accountable to the local band council or Chief that they are serving. Accountability is secured at one step removed from the people who are affected by their decisions and this minimises the possibility of community pressure on the social workers,

“If child protection is going closer to grass roots and thus more community control there needs to be effective accountability and checks and balances. We are not dealing with healthy communities or healthy leaders at this point. The temptation for the workers to succumb to community pressures to keep their jobs would be much greater. Accountability to the community makes them vulnerable if making unpopular decisions. Individual children’s safety will be jeopardised because the family structure is so strong and powerful. To keep the necessary distance from the community would be very difficult.” (Marika Czink)

The very concerns which are raised by Marika Czink actually reflect the current structure at Spallumcheen. The decision making process is entirely in the hands of the Chief and Council. Any decision concerning the welfare of the child including placement, apprehension, long term care, and appropriate intervention are made by the Band council, albeit with the support and advice of the child welfare staff,

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397 This centralised structure is made easier if self-government were to proceed on a ‘Nation’ basis, as recommended by the Royal Commission, and thus incorporated several bands or communities within the one structure. See Restructuring the Relationship, supra note 99 at 177 - 184.

398 Bryan Watt, supra note 125.

"The decisions are made by the Chief and Council with the support and advise of the child welfare staff. Usually the recommendations of the staff are endorsed but not always. The Chief and Council are elected by the band and are accountable to them. It is an extremely close to home program." (Bryan Watt)

It is acknowledged by Bryan Watt that band level government is often criticised for being too close to the community and therefore susceptible to corruption and abuses. However, the Spallumcheen organisation has not experienced anything like the Desjarlais tragedy, and in fact the Spallumcheen model appears to work very well. Spallumcheen have had good continuity in their band council membership and it is consequently very stable. The success of the agency, despite being very close to the community, is attributed to the fact they have been operating for 17 years and are now securely established. However, despite the apparent success of the model, its weaknesses are recognised. It is acknowledged that the tribal council model as employed at Nuu-chah-nulth is more secure from the point of view of the children and is probably in their best interests,

"A tribal council model is one step removed from the band controlled model. The child welfare agency is accountable to the tribal council. They operate more at arms length from the community which means the agency is less likely to experience pressure from powerful families...The tribal council model is more secure from the point of view of the children. The problem with the band level model is that it is only as strong as the Chief and Council." (Bryan Watt)

The closeness of the agency to the community clearly has benefits as well as the suggested weaknesses. The Band has accepted the child welfare program as an integral part of their community life and it is strongly supported by the community,

"There is a strong sense of ownership of the program." (Bryan Watt)

The social workers, despite being non-native, are not regarded as 'invading outsiders.' Bryan Watt suggests that this is because when the decisions are being made by the Chief and Council of the community, not the child welfare staff, the cultural origin of the social
workers is not so important. This consequently lessens the pressure for the program to be staffed by aboriginal social workers.\textsuperscript{400} This contrasts with the relationship between Usma Nuu-chah-nulth and the community. Whilst they have retained their professional distance from the community, which is of great benefit in shielding them from attempts at political interference, this appears to have been, to some degree, at the expense of the community's acceptance of the program. In fact, it is suggested that some community members find it very hard to distinguish the agency from the Ministry which existed before, and that the agency is still sometimes perceived as an outsider coming into the community,

"The agency is viewed as a separate entity from the community. It is viewed not much differently from the Ministry." (Marika Czink)

The remoter organisational structure of the Nuu-chah-nulth Tribal Council is not unanimously supported by the community and it was suggested that one of the effects of self-government may be the devolution of control back to the band in matters of child welfare. The agency would then operate much closer to the Spallumcheen model,

"We do not foresee any changes at this point but there are rumblings of change from time to time that once the self-government treaty is complete the bands will take over their own child welfare and will not need the tribal council any more. Some bands see the tribal council as just another level of government." (Marika Czink)

Whilst there is a much closer relationship between the agency and the communities than when the Ministry held jurisdiction, there would not appear to be the same strength in the sense of ownership of the child welfare program in Nuu-chah-nulth reserve communities

\textsuperscript{400} Other important advantages are identified, including the fact that the Chief and Council can operate on a much broader basis of information in decision making because of their personal knowledge of the family and because they exclude no information or knowledge from the decision making forum. For further discussion see above chapter three at pp. 182 - 194.
as there is in Spallumcheen. However, whilst this is acknowledged, the tribal council model, by maintaining a crucial professional distance between the decision makers/service providers and the community, would seem to be the most effective in terms of mitigating the dangers of political interference and manipulation of the program, and should therefore be preferred if the interests of the child are to be the primary consideration. This was the view of both Marika Czink and Bryan Watt.

Xolhmi:lh is currently in a state of transition, in the sense that it continues to push for greater autonomy and control, and as it does is restructuring the agency accordingly. However, the vision that the Sto:Lo have for the agency would appear to be very similar to the structure at Nuu-chah-nulth. Clearly there is a strong emphasis on community participation. At present the agency’s staff are accountable to their supervisor and through the Manager of Child Welfare to the Tribal Council and the Ministry. The links with the community are thus limited to representation on the tribal council and the liaison work performed by family support workers and cultural workers. However, the Sto:Lo intend to devolve more control over child welfare to the communities. They intend to develop Community Care Committees similar to those in place at Nuu-chah-nulth. The Sto:Lo

\[401\] For further discussion of the advantages that flow from the community’s sense of ownership of the child welfare program see above chapter three, at pp 182 - 194. See especially, *Current Trends and Issues*, supra note 99 at 34 - 48 ; and *MJI*, supra note 95 at 532.

\[402\] *Kelowa Edel*, supra note 124.

\[403\] The Sto:Lo have developed a protocol agreement between Xolhmi:lh and one of the reserve communities, establishing a community care committee which they intend to use as a model for other communities. The following discussion will be based on the Protocol agreement signed in December 1996 to establish a local child welfare committee on the Seabird Island reserve. *Seabird Island Agreement*, supra note 134.
Nation will retain responsibility, through the tribal council, for exercising its broad governmental jurisdiction and establishing policy objectives. These broad policy objectives will be channelled through an independent Management Committee which will provide advice on all administrative, financial, and program policy decisions concerning the agency. This structure is thus broadly similar to the model suggested above. However, in terms of avoiding interference in the work of the professional social workers, it is the plans for increased community participation which constitute the most interesting aspect of the structural changes being made. The clear intention is to make Xolhmi:lh more of a community based service, and inevitably this will mean some of the distance between the agency and the communities will be removed,

'The new service delivery model will feature a decentralisation of services by regions and mechanisms for the active participation of Seabird Island band professionals in the planning, delivery and evaluation of those services. The goal of Xolhmi:lh decentralisation of services is to make all services more accessible to Seabird Island membership. Xolhmi:lh will be part of Seabird Island community as opposed to being a bureaucratic structure. Xolhmi:lh staff members want to be seen as part of the Seabird Island community, not as employees of an outside organisation without community accountability.'

The cultural workers team are currently developing a program to develop community care committees,

'The community care committee is intended to act as a buffer between the agency and the family. The care committee will be the hearing place for the concerns of the family and the community. The object of the Committee is to provide advice to the agency representatives. The agency representatives are to

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404 *Seabird Island Agreement, ibid. sec. 12. 2.*

405 *Ibid. sec. 12. 3.*

406 *Ibid. ss. 3.1, and 4.2.*
act as the impartial representatives of the children and their families.” (Kelowa Edel)

The Committees are intended as a source of support and advice to the child protection staff, and like Usma community care committees will not be making decisions on individual cases concerning care orders and placements. The Seabird Island reserve has recently signed a protocol agreement with Xolhmi:lh to develop a community care committee which the Sto:Lo hope to use as a model for other communities. The clear purpose of this agreement is to involve the community more closely,

"The parties agree to develop a model of service delivery that will allow Seabird Island Band to actively participate in the planning, development, and implementation and evaluation of preventative, statutory and remedial services offered by Xolhmi:lh."

The protocol agreement establishes a three tier system with a Community Care Committee, a Regional Child Welfare Committee, and a Management Committee. The mandate of the Community Committee includes providing community based advice to the professionals; participating in the planning, implementation and monitoring of programs; and representing the best interests of the band’s children and families. It is emphasised

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407 Ibid. sec. 4.1.

408 Ibid. sec. 2.1.

409 Ibid. Appendix B, "The Seabird Island Community Care Committee is mandated to 1) provide sound, community-based advice to Xolhmi:lh professionals regarding Child, Family, and Community Service matters; 2) provide input to Xolhmi:lh representatives in the planning, implementation and monitoring of Child, Family and Community Service programs; 3) represent, as impartially as possible, the best interest of Seabird Island children, families, and community; 4) assist in the resolution of family and /or community conflicts arising from Child, Family and Community Service interventions as per the limitations spelled under Appendix E of this Protocol Agreement; 5) act as the first level of administrative appeal on Seabird Island Child, Family and Community service matters; 6) select a representative to sit au Xolhmi:lh Regional Child and Family Services Committee; 7) provide input as requested to Xolhmi:lh Regional Child and Family Services Committee in matters pertaining to policy development, financial administration, and delivery of services."
that the Community Care Committee is advisory only with no power to make decisions within the ambit of Xolhmi:lh’s professional responsibilities,

"The Seabird Island Community Care Committee shall have no decision making authority as Child and Family Services professional decisions are the responsibility of Xolhmi:lh. The functions of this Committee shall be considered as advisory and voluntary in nature. However, input, suggestions, ideas and contributions from this committee shall form the basis for Xolhmi:lh programming and service delivery decisions." 410

The Committee is also to "participate actively in the monitoring and evaluation of Xolhmi:lh staff and programs." 411 Community involvement with child welfare will also be promoted by the more active involvement of the band council and its staff. 412 It is provided that there shall be quarterly meetings between the Seabird Island Chief and Council and Xolhmi:lh representatives. Xolhmi:lh staff members will also sit on the monthly Seabird Island staff meetings. 413 The Band is also to "participate on annual reviews and planning sessions with the purpose of evaluating existing services; planning new programs and services; and setting new goals and objectives." 414 It is anticipated that mechanisms will be established to allow the Band "an active participation in the decision making processes which leads to the allocation of human and material resources within Xolhmi:lh Child and Family services, as well as services to the eastern region." 415 The focus of the communities

410 Ibid. at Appendix B.
411 Ibid.
412 Ibid. ss. 2, 3, 4, 7, 8, 9.
413 Ibid. ss. 2.2(i) and 3.2.
414 Ibid. sec. 3.2 (f).
415 Ibid. sec. 7.1.
responsibilities, as with Nuu-chah-nulth, will be to develop preventative services for the reserve community and take the lead in establishing appropriate community standards in, for example, parenting skills,

Sec. 8.3 "Specifically, Seabird Island through its staff members will:
(a) develop preventative social services in partnership with community members and Xolhmi:lh;
(b) assume leadership for the development of Seabird Island Band's child rearing standards;
(c) allocate human and material resources to the development and implementation of preventative social services."

Notably, in addition to accountability to the local child welfare committee, the agreement also establishes provisions for the increased accountability of Xolhmi:lh staff to the Seabird Island band,

Sec. 7.2, "Xolhmi:lh agree to increase its accountability to Seabird Island Band for the administration and delivery of services by
(a) inviting Seabird Island Band to participate in the hiring of Xolhmi:lh staff members who will serve the eastern region;
(b) inviting Seabird Island Band to participate in the evaluation processes of Xolhmi:lh staff serving the eastern region."

Sec. 9.2, "The Parties agree to develop an ongoing evaluation framework that will allow Xolhmi:lh and Seabird Island to monitor the quantity and quality of services being delivered to Band members. This will include, but not limited to, an open invitation for Seabird Island Band to participate in the evaluation of all programs and services, as well as an invitation to participate in hiring committees, evaluation committees and other planning and development bodies."

This is exactly the kind of accountability to the community served to which Marika Czink was so strongly opposed. In her view any individual accountability of staff to the community they serve, makes them vulnerable to manipulation by powerful reserve families. This potential problem may well be exacerbated by the fact that the agreement is

\[416\] Ibid. sec. 8.3.
ambiguous as to exactly who will be performing these functions. The language of "Seabird Island Band" is used, which is defined in the Agreement as, "a band as defined in the Indian Act and includes a band council."\textsuperscript{417} This along with reference to "staff members responsibilities"\textsuperscript{418} would suggest that it is the Band council and its staff, rather than the community care committee which will be performing these functions of service delivery planning, and the hiring and evaluation of staff. However these responsibilities are also listed under the jurisdiction of the local child welfare committee.\textsuperscript{419} It is consequently not clear as to how the responsibilities between the band and the Committee are to be divided. There is some ambiguity in the agreement which could cause problematic confusion as to roles and responsibilities, one of the major problems identified in the Desjarlais inquiry.\textsuperscript{420} The confusion that could result is exacerbated by the fact that there would seem to be room for band council members to be represented on both bodies. Under the provisions for the composition of the Community Care Committee the band can select Chief and Council members to serve on the Committee and it is left open how these members will be appointed: "elected or selected."\textsuperscript{421} Domination of the local child care committee by band

\textsuperscript{417} Ibid. Appendix A.

\textsuperscript{418} See e.g. ibid. sec. 8.3.

\textsuperscript{419} Ibid. Appendix B.

\textsuperscript{420} See above chapter three at pp. 238 - 243 for a detailed discussion of the problems that arose from confusion within the agency and between the agency and the community as to respective roles and responsibilities. See especially, Desjarlais Inquiry, supra note 95 at 112 - 182.

\textsuperscript{421} Seabird Island Agreement, supra note 134 Appendix B. The agreement sets down that band members appointed to the Committee will include "a) community members which (i) include heads of families as selected by extended families and/or clans, foster parents, and Elders; (ii) those members may be called upon to assist in the evaluation of Xolhmi:lh personnel and programs; (b) band selected members (i) including Elders and youth, Seabird Island staff members, community members and Chief and Council
council members was a major problem with DOCFS in terms of increasing the problem of political interference and manipulation of agency staff by powerful reserve families. The Xolhmi:lh agreement seems to leave scope for the same situation to develop. In fact, the Seabird Island Community Care Committee is currently constituted by the band council members, although Kelowa Edel explained that this is intended only as an interim measure. The future goal is to return to the traditional structure of using family heads. The reserve has 23 main families and traditionally they would all be represented in community decisions. The family head would act as the spokesperson of the family, and the family would be responsible for choosing the member of their family they respect the most to represent their views. However, the protocol agreement does not seem to reflect this position and whilst it does provide for community representatives as selected by clans or the extended family, it also provides for band council membership, and no provision is made as to the proportion of each or even if either will be guaranteed. The extensive involvement of the band council both on the Committee and otherwise, in the provision of child welfare may be problematic unless there are sufficient checks and balances in place. It is still very clear under this model that the agency is not the tool of the community and is not subject to their control and authority in exercising its decision making powers in the

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422 Desjarlais Inquiry, supra note 95 at 162 and 168. Justice Giesbrecht comments, ‘Cecil Desjarlais thought that he had the right as a band councillor to not only sit on the committee, but play social worker as well. The other members of the committee were not able to do anything about it, not only because Cecil Desjarlais was a powerful local politician, but also because they didn’t understand themselves what they were to be doing...In 1991, for reasons that I do not understand, it was decided that the DOCFS Board would be henceforth composed of representatives from the band councils instead of from the local child welfare committees. This was a very poor decision and made a bad situation even worse. What it effectively meant is that politics would control the bottom, top, and middle of the organisation.’
crucial areas of apprehension and placement.\textsuperscript{423} Where Xolhmi:lh has jurisdiction over a child it is very clear that it does not act on behalf of the Indian Band. The individual child is its client.\textsuperscript{424} However, it is submitted that the authority and participation of the Band council can be interpreted widely to give them extensive involvement in every aspect of the agency’s work, albeit in an ‘advisory capacity’, and extends beyond that which is allowed, for example by Nuu-chah-nulth. Particularly problematic is the involvement of the community in the evaluation of staff. The increasing community control whilst supportable in principle may well be a matter of concern. The agreement is such that it could be interpreted in a number of ways, allowing scope for its objectives to be undermined by a few powerful reserve politicians. The lines of authority as to whom the professional staff are responsible and accountable, the exact responsibilities of the band council and community committee, the composition and possible overlap between these bodies, and the limits on their respective authority, are beginning to blur. This situation is only likely to worsen if the clear accountability of Xolhmi:lh to the province for legally mandated services, which currently exists, is removed.

The Sto:Lo do intend to maintain a centralised structure which may help alleviate some of the suggested difficulties. The Protocol Agreement also provides for a Regional Child and Family Services Committee which will have more direct involvement in advising

\textsuperscript{423} Seabird Island Agreement, supra note 134 Appendix B, “The Seabird Island Community Care Committee shall have no decision making authority as Child and Family Services professional decisions are the responsibility of Xolhmi:lh.”

\textsuperscript{424} Target population, supra note 134 at 14.
Xolhmi:lh staff, administrators and the Xolhmi:lh Management Committee members.\textsuperscript{425} Marika Czink suggested that this sort of centralised authority would prevent the authority and control over child welfare professionals falling into the hands of a small group of powerful families.\textsuperscript{426} Each local community care committee will select one representative to sit on the Regional Committee.\textsuperscript{427} The Regional committee has a similar mandate to that of the local community committees, but in addition will provide input, upon request, to the Xolhmi:lh Management Committee on policy development, financial administration and planning, delivery, and evaluation of services and programs.\textsuperscript{428} Again it will play an active part in monitoring and evaluating Xolhmi:lh staff and programs.\textsuperscript{429} The Regional Committees will again have no direct decision making powers or authority over Xolhmi:lh and its staff members,

"Xolhmi:lh Regional Child and Family Services Committees advise Xolhmi:lh management Committee and Xolhmi:lh Executive Director on the development and/or discontinuation of programs and services. These committees also provide

\textsuperscript{425} Seabird Island Agreement, supra note 134 s. 2.1; and Appendices C and D.
\textsuperscript{426} Marika Czink, supra note 123.
\textsuperscript{427} Seabird Island Agreement, supra note 134 Appendix B.
\textsuperscript{428} Ibid. Appendix C.
\textsuperscript{429} Ibid., “Xolhmi:lh Regional Child and Family Services Committees are mandated to: 1) provide sound, community based, advice to Xolhmi:lh professionals regarding child and family services matters; 2) participate actively in the planning, implementation and monitoring of Xolhmi:lh Child and Family Community Services and programs; 3) represent as impartially as possible the best interest of children, families, communities, and region; 4) mediate when needed and requested, between community members and Xolhmi:lh; 5) act as the second level of administrative appeal on child and family services matters within the region; 6) select a representative to sit at Xolhmi:lh Management Committee; 7) provide input, as requested, to Xolhmi:lh Management Committees in matters pertaining to policy development, financial administration and planning, delivery and evaluation of services and programs; 8) participate, actively in the monitoring and evaluation of Xolhmi:lh staff and programs.”
advise as requested, to Xolhmi:lh Executive Director on decisions related to the hiring and dismissal of staff members."\(^{430}\)

The functions of the Committee are considered to be supervisory with substantial input on programming, staffing and service delivery decisions.\(^ {431}\) Their contribution will form the basis of the policy, financial, and administrative decisions of the Management of Xolhmi:lh.\(^ {432}\) As this Committee is one step removed from the communities it does not present the same problems of interference in the daily decision making of the agency. Its concerns will be more general and policy orientated than having any direct involvement in the grass roots delivery of services and decisions. This level of community involvement and operation with the agency is valuable and ensures the objectives and policy concerns of the communities are voiced to the Management of the agency that serves them. The Committee will consist of fifteen to twenty-five members consisting of band members selected by Community Care Committees and appointed by Chiefs and Council, and a maximum of two Xolhmi:lh staff appointed by the Executive Director.\(^ {433}\) The only potential problem with this arrangement could arise if the local child welfare committee becomes dominated by the band council and chief, who then select the representatives to...

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\(^ {430}\) *Ibid.*

\(^ {431}\) *Ibid.*

\(^ {432}\) *Ibid.*. "The functions of these committees shall be considered as supervisory in nature with clear input over programming, staffing and service delivery decisions. Furthermore, input, suggestions, ideas and contributions from these committees shall form the basis for policy, financial, and administrative decisions of Xolhmi:lh Management Committee and Xolhmi:lh Executive Director."

\(^ {433}\) *Ibid.*
sit on the regional committee, and this next stage thus becomes dominated by band politicians. Again this was the very problem which developed with DOCFS. 

The final level of community involvement is the Xolhmi:lh management Committee who will hold responsibility for managing programme policy, and administrative affairs of Xolhmi:lh. The management committee will provide advise to the Executive Director of Xolhmi:lh regarding the administrative affairs of the organisation; provide input as requested to the Sto:Lo Nation in matters pertaining to governmental Child, Family, and Community service matters; and to develop and approve Xolhmi:lh policies and procedures. The Management Committees responsibilities will include policy development, financial management and broad programming. It is managerial with advisory authority over programming, budgeting and policy decisions. Again it has absolutely no authority over the daily professional decisions of Xolhmi:lh child protection workers in terms of apprehension, placement and plans of care. The Committee will

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434 Supra note 422.

435 Seabird Island Agreement, supra note 134 Appendix D.

436 Ibid., “Xolhmi:lh Management Committee is mandated to 1) provide sound, community-based advice to Xolhmi:lh Executive Director regarding the administrative affairs of the organisation; 2) administer the financial affairs of Xolhmi:lh; 3) represent and protect as decisively as possible the best interests of children, families and communities from the Sto:Lo Nation; 4) mediate when needed and requested, between community members and Xolhmi:lh; 5) act as the third and final level of appeal in child and family service matters within the Sto:Lo Nation; 7) provide input, as requested, to Sto:LO Nation in matters pertaining to governmental Child, Family and Community Service matters; 8) develop and approve Xolhmi:lh polices and procedures.”

437 Ibid.

438 Ibid.

439 Ibid., “Xolhmi:lh Management Committee concern itself with policy development, financial administration of Xolhmi:lh, and broad programming matters. The functions of this committee shall be considered as managerial in nature with clear advisory authority over programming, budgeting and policy development decisions.”
consist of band members and/or employees who are selected by Regional Child and Family Services Committees or appointed by Chiefs and Councils; the Executive Director of Xolhmi:lh; and a Sto:Lo elder who is selected by the Sto:Lo Nation Elders’ Council. Members will serve for no more than 3 years, except for the Executive Director who will have lifetime membership.\textsuperscript{440}

This three tier model thus reflects the centralised structure and division of authority and decision-making powers that is supported by Cameron and others as securing community involvement, whilst protecting the professional body from interference in its daily operation and professional sphere of decision making.\textsuperscript{441} The cause for concern is at the band level where staff may find themselves under great pressure by powerful reserve families ‘not to rock the boat’ in their decisions, and may feel vulnerable to making enemies of powerful reserve members who have been given a direct say in their evaluation and accountability. It is also unclear exactly what role in the delivery of services, programming, and accountability will be played by community members sitting on a community committee as opposed to the band council. It would seem possible, despite the centralised structure, that band council members could dominate every stage of the Committees, the result being the domination of child welfare by politics at the bottom, middle and top.\textsuperscript{442} These concerns may however be tempered by the fact that at every stage of the process training is provided for the committee members and Xolhmi:lh staff.

\textsuperscript{440}Ibid.

\textsuperscript{441}What Can Tribes Do? supra note 314; Desjarlais Inquiry, supra note 95 at 173 - 174.

\textsuperscript{442}Desjarlais Inquiry, ibid. at 168.
will sit on the Committee to provide expert guidance. The Committees would perhaps benefit from a guaranteed representation of community members and multidisciplinary professionals working on the reserves including perhaps teachers, nurses and police whose perspectives and insight into the issue of child abuse and neglect could be of great value to the community members. Guaranteed representation from these groups would ensure that chief and council are not able to constitute the entire membership of the committee. I would also suggest that the band council’s involvement be greatly reduced, if not removed, in favour of these responsibilities being clearly exercised by the local care committee.

3.2 (v) A Child Welfare System Must have Effective Internal Appeal and Review

Mechanisms

In any institution that delivers a service in which difficult decisions that affect peoples lives have to be made, there have to be appropriate checks and balances within the system to ensure that a fair and appropriate decision has been made. In decisions which concern vital questions such as the provision of essential support services to children, whether they should be removed from their families, and the adequacy of alternative care facilities, the individuals or community involved should be able to demand a review of the decision. The structure of a non-aboriginal agency is such that the initial decision of a child protection worker to apprehend a child and place the child in care must be sanctioned by a court order.\textsuperscript{443} To obtain the order the social worker must persuade the court that certain

\textsuperscript{443} Again for an overview of the non-native child protection system see Bala, Hornick and Vogl, \textit{supra} note 250.
conditions and criteria have been met. The decision of that court can be appealed to another court and so on until the final court of appeal. Child protection decisions which are not subject to the court’s jurisdiction, such as placement, or the suitability of a foster home will also be internally reviewable within the agency or ministry. There will be an internal mechanism for complaints about decisions and individual workers. Decisions of the ministry or agency, as a public body, may also be subject to judicial review for error of law, acting outside of jurisdiction, or for breach of natural justice. The federal government policy statement insists that these standards of review and appeal are met under self-government. Aboriginal institutions exercising authority must ensure that their information on administration policies and standards is readily obtainable by clients, and establish procedures for administrative review, including appeal mechanisms.

Mechanisms to ensure political accountability must be developed and ratified by the Aboriginal group concerned, and set out in an internal constitution so that they are transparent to all members, and to others who deal with the Aboriginal governments or institutions. Aboriginal institutions exercising authorities must:

- ensure that the decision-making processes central to the core functions of those institutions are open and transparent;
- ensure that information on administrative policies and standards is readily obtainable by clients; and
- establish procedures, where appropriate, for administrative review, including appeal mechanisms.

Mechanisms to ensure administrative and financial accountability to members and to clients must also be established, and should be no less stringent than those existing for other governments and institutions of comparable size. Such mechanisms should respect the principles of transparency, disclosure, and redress.


Various means of reviewing decisions within the system have been suggested. Some communities may envisage protection decisions being sanctioned by a justice committee or tribal court with appeals or reviews through judicial appeal courts. In the US, for example, following the transfer of child welfare jurisdiction to the reserves a number of tribal courts were developed in order to provide a suitable adjudication mechanism and there is therefore a tribal court on nearly every reserve. The US tribal court system has internal appeal mechanisms but constitutes a parallel system to that of the non-native courts. A decision cannot be appealed out of the system unless there is a federal constitutional issue.

The Nisga’a Agreement in Principle also envisages establishing a tribal court which unlike the US tribal courts will be integrated into the general court system and thus decisions will be appealable out of the Nisga’a into the mainstream system.

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447 D. Sanders, ibid.

448 The Nisga’a Agreement in Principle provides that, “Nisga’a central government may make laws to provide for the constitution, maintenance, and organisation of a Nisga’a Court for the better administration of Nisga’a laws; para. 32, the Nisga’a court may exercise all of the powers and perform all of the duties conferred or imposed on it by or under an enactment of Nisga’a central government, B.C., or Canada, and in particular, may adjudicate in respect of: a) the review of administrative decisions of any institution of Nisga’a government; b) violations of Nisga’a laws; and e) disputes arising under Nisga’a laws between Nisga’a citizens on Nisga’a lands which would be within the jurisdiction of the provincial court of B.C. if the disputes arose under provincial law; para. 38, an appeal from a final decision of the
communities also anticipate establishing a justice system which will be able to incorporate traditional values and principles into its decision making. Currently the decisions of Xolhmi:lh and Usma protection workers are mandated by provincial legislation and therefore where relevant must be sanctioned by a court order and will be judicially reviewable. Internal review mechanisms also follow provincial models whereby decisions can be appealed to the supervisor and manager as in any non-aboriginal agency,

"The agency still follows the decision making process of provincial legislation and their review and appeal processes." (Kelowa Edel)

Usma has also developed an internal review process to include the local community, but the agency staff retain the final decision. The provincial appeal and review process is otherwise followed,

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449 See e.g. the Teslin Tlingit Self-Government Agreement, sec. 13.6.2., "Negotiations respecting the administration of justice shall deal with such matters as adjudication, civil remedies, punitive sanctions including fine, penalty and imprisonment for enforcing any law of the Teslin Tlingit Council, prosecution, corrections, law enforcement, the relation of any Teslin Tlingit Council courts to other courts and any other matter related to aboriginal justice to which the parties agree." Canada. Teslin Tlingit Council, Yukon Territory, The Teslin Tlingit Council Self-Government Agreement Among the Teslin Tlingit Council and the Government of Canada and the Government of Yukon (Ottawa: Ministry of Indian Affairs and Northern Development, 1993) [hereinafter Teslin Tlingit Agreement].

450 Marika Czink, supra note 123; Kelowa Edel, supra note 124.

451 The Policy Manual states, "Care givers may appeal decisions with which they do not agree by, 1) requesting that the Usma Coordinator as a delegate of the Superintendent of Family and Child Service conduct a review, or 2) requesting that the Band Family Protection Committee conduct a review and if necessary refer the matter to the Tribal Council Family Protection Committee. While it is understood that the final review authority is the Tribal Council itself, in matters relating to the provision of services under the Family and Child Services Act, the Usma coordinator as a delegated authority is not bound by the decision of any Committee or the Tribal Council. Appeals that reach the Tribal Council stage should be forwarded to the Superintendent of Family and Child Services for review if they fall under the jurisdiction of the FCSA." Usma Policy Manual, supra note 196.
There is an internal review process involving the community but it is never used. Appeals can be made to the agency and the family can request that the band council take up the case, but the agency will make the final decision. The normal review and appeal process of the provincial legislation is otherwise followed.” (Marika Czink)

Usma foresees no changes to this position, but again the Sto:Lo are seeking to secure greater autonomy from the provincial system, enabling them to introduce procedures which are more consistent with their own traditions and cultures. However, they do not question the need for independent decision making bodies and review processes,

‘It is the goal of the Xolhmi:lh program...that the decision making process be consistent as much as possible with an aboriginal decision making process and that if a party is aggrieved by a decision or a staff member of the Program that an aboriginal review process be available to the party who feels aggrieved.”

They do not seem to envisage moving away from the adjudication model that currently exists, albeit that model will be consistent with their own traditions and culture, not the adversarial court system of the province. A decision making system relating to children in need of protection will be established that is less adversarial and more consistent with the use of the circle,

‘If a person receiving services from Xolhmi:lh is aggrieved with the actions of the Xolhmi:lh program, one of its staff or one of its programs, the aggrieved party and Xolhmi:lh shall have the option of referring the issue that has caused the grievance to the Sto:Lo Nation’s House of Justice or such intended administrative review process available through Xolhmi:lh or the Sto:Lo Nation and the decision of the House of Justice or administrative review shall be final and binding upon the aggrieved party, Xolhmi:lh program, and the director.”

452 Target Population, supra note 134 at 11.

453 Ibid. at 12.
At the moment this traditional method of resolving a dispute is optional but there is no reason why it should not be the single decision making process under self-government. In the interim the Sto:Lo propose that the decisions making process be used to determine the need for protection and the resulting orders within a circle that shall be available upon agreement and shall be attended by the parties, their lawyers, the extended family and the community, and elders. The process and the decision will be overseen by a provincial court judge. The provincial court is not a suitable body to be making decisions on internal matters to the Sto:Lo once self-government is operational, unless of course the community wishes to use its services. The Sto:Lo is also seeking to establish an internal review process for those administrative decisions not subject to the courts jurisdiction and could include such things as the individual grievances about Xolhmi:lh staff, the development of resources, and preventative programming. The structure of review is similar to the internal review process in place at Nuu-chah-nulth, except the final review body’s decision is binding, not the decision of the agency. In certain decision-making areas it will therefore be the community, not the agency, that has the determining voice. The decisions which fall within that sphere should be carefully delineated to avoid the professional decisions of the social workers being undermined. If a conflict develops between Xolhmi:lh, and a community member or band staff member, and the dispute

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454 Ibid. at 13.

455 Ibid.

cannot be resolved through the staff supervisors or managers, it can be referred to the Community Care Committee and then appealed to the Regional Committee, and finally to the Management Committee whose decision will bind all parties,

“If no resolution is achieved, the Supervisors may either direct the matter to the Community Care Committee or refer the issue to the attention of Seabird Island Band Manager and Xolhmi:lh’s Executive Director. The Executive Director and Band Manager may, after meeting to attempt to resolve the matter, decide to refer the grievance to Xolhmi:lh Regional Committee or to the Management Committee. A decision made by the Management should be considered final and binding unless the affected party decides to seek legal advise.”\(^{457}\)

Disputes may arise, for example, out of family case conferences, team conferences, or the provision of support services. Again there is perhaps some cause for concern that the Community Care Committee will not be sufficiently impartial because of its own involvement in these decision-making processes, particularly if it will be vulnerable to domination by powerful reserve families. This charge can of course equally be levelled at the internal review processes of the non-native system.\(^{458}\) However fears over impartiality are assuaged by the fact that the decisions of the local community care committee will be appealable to a more centralised body and so on, thus limiting the potential power and

\(^{457}\) *Ibid.*

\(^{458}\) It is for this reason that whilst it is essential to ensure effective internal review and appeal mechanisms, it is also imperative that there is available an overriding external review body to which the clients of the system can bring complaints and concerns. This external review body needs to be completely independent of the service delivery model and the community it serves in order to guarantee its impartiality, immunity from community pressures, and its absolute freedom to investigate potential problems and abuses in the internal system. On the basis of such an investigation the review body can take appropriate remedial action. Thus whilst child welfare agencies must have effective internal systems, this does not negate the importance of establishing an overriding external review body. Justice Gove was clear on the need for such a body that was independent from the Ministry in the sphere of child welfare in British Columbia. It is his recommendations that led to the development of the Children’s Commissioner. *Matthew’s Legacy*, supra note 62 125 - 149; *Recommendations for Change*, supra note 62; *The First Three Months*, supra note 62.
control of reserve families and Band members.\textsuperscript{459} Moreover, the Agreement is very clear on the limits of this internal review and appeal mechanism. The appeal process is limited to those matters outside the scope of legally mandated decisions, including most importantly apprehension and placement. The appropriate appeal process for these decisions is not through the community but through an independent body such as the House of Justice,

"This model of Community Conflict Resolution does not apply to legally mandated decisions and actions leading to or resulting in the removal of a child or children from a parent or guardian. These decisions should be appealed through the existing B.C. Court system and/or the Sto:Lo Nation House of Justice."

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The Spallumcheen also provides a mechanism for the appeal and review of decisions made by the Chief and Council.\textsuperscript{461} The appeal is made to the entire membership of the Band, who will decide the issue by majority vote,

"If, for example, the parents disagree with the Council's decision to apprehend the child they can call a meeting of the entire Band, and the Council will present its reasons for apprehension. The family will then present their reasons as to why they think the decision is wrong, and the band will then vote on the appeal." (Bran Watt)

However in seventeen years the appeal process has never been used. Either it must be completely ineffective and thus should be reviewed to ensure the parties have an effective

\textsuperscript{459} \textit{Seabird Island Agreement}, supra note 134 Appendix E.

\textsuperscript{460} \textit{Ibid.}

\textsuperscript{461} Bryan Watt, \textit{supra} note 125. By-Law, \textit{supra} note 129 sec. 12, "Any Band member or any parent or member of the Indian Child's extended family or Indian guardian may review the decision made by the Band Council to remove the Indian child from his or her home or to the placement of the Child by Band Council; sec. 13, The person seeking a review shall notify in writing Band Council at least 14 days before the next General band meeting; sec. 14, Upon receiving the written notice to review, Band Council shall put the question before the Indian Band at the next general meeting; sec. 15, The Indian Band by majority vote of the Band members attending at the General Band meeting shall decide on the placement of the Indian child. The decision of the Indian Band shall be governed by the considerations stated in sec. 10 of the by-law."
means of redress for grievances, or the decisions of the Chief and council must be so good that no one ever disagrees with them. Bryan Watt suggests it is a combination of these factors,

"The whole process is extremely intimidating and therefore it is not surprising that the mechanism has never been used. There is also the fact that the family know that if they are experiencing problems it cannot be hidden from the community and thus it is pointless to appeal. The lack of appeals is also probably helped by the greater involvement of the parents in the whole process from the start. A meeting to make a decision on the future of the child will be held within a week of the apprehension. The parents can have as many meetings and discussions with the child welfare staff as they like within that time. They are afforded a great deal of opportunity to make their case." (Bryan Watt)

Whilst acknowledging the factors which suggest a better level of decision making by the Council than the courts; given that the decision making process in Spallumcheen is vulnerable to abuse by powerful reserve members, it is all the more essential that there is a means of appeal and review that is both independent and accessible. The Spallumcheen model does not appear to meet those objectives.

In conclusion both Xolhmi:lh and Usma agreed on the need for professional independence and autonomy from direct community control, and have sought to structure the agency in such a manner that this demand is reconciled with the important objective of increasing the involvement of the community. I have raised some concerns over the Seabird Island Agreement regarding the extent of involvement of the band council and community care committee, the division of responsibility between the band council and the community care committee, the composition of these bodies and the potential for duplication, the accountability of staff to members of the community they serve, and the independence and sphere of jurisdiction of the internal review body. All of these problems
may well be adequately addressed by clarifying the relevant provisions of the agreement, but I would argue that they should be considered in light of Justice Giesbrecht's comments in the Desjarlais Inquiry. The Spallumcheen model is somewhat unique and whilst it works well in that community would not appear to be a very satisfactory model for other communities. All three agencies agreed on the need for review and appeal mechanisms, although the Spallumcheen model is again distinctive to the community and its effectiveness as a general model must be questioned. However, despite these clear differences of opinion on the best internal structure of a child welfare agency, on the two broad principles suggested: that child protection experts must be secured professional space and integrity in decision-making, and that an agency must have in place effective review and appeal mechanisms, we did seem to be in broad agreement.

3.2 (vi) Officials of Government who are Involved in Providing Child Protection Services Must Be Accountable for their Actions

Perhaps the strongest finding to emerge from the Desjarlais Inquiry was that the members of the community who were involved in providing child protection services, and some who in theory were not, must take responsibility for many of the problems that developed because of the way in which they abused their powers and positions of responsibility.\textsuperscript{462} It should be emphasised that the original vision of DOCFS was very

\textsuperscript{462} Justice Giesbrecht applied his damning criticism against all levels of Indian leadership including the regional and national levels. His criticisms extended from local politicians such as Cecil Desjarlais for their abuses of power to protect themselves and family members from incrimination, to the regional chiefs who have ignored the plight of aboriginal women and children. For a detailed discussion of the abuses of the Indian leadership identified in the Desjarlais Inquiry see above at chapter 3 pp. 234 - 238. Examples of abuse by community politicians and leaders are raised throughout the Inquiry but see especially at 210 -
similar to that now envisaged by the Sto:Lo Nation and Nuu-chah-nulth with appropriate checks and balances in place, professional integrity secured to the staff, and community involvement restricted to advice and support. However, because of the centralisation of power in the Chief and Council, which was dominated by certain powerful families, they were able to completely undermine this structure and subvert the agency to its own ends. It would seem that in whatever way the agency is structured, the key to its success will be in securing the observance of certain standards of conduct by the community leaders involved. This principle would not necessarily be included as a specific provision within a Children’s Charter because the accountability of officials is a broader matter that affects all aspects of native and non-native government. However, its centrality to providing an effective child welfare system justifies its inclusion in the present

232. Justice Giesbrecht’s thoughts on the current Indian leadership are, however, encapsulated by the following comment: “The male Indian leaders are not only by and large uninterested in the horrific social problems that are paralysing their communities, but they are, in too many cases part of the problem themselves.” Desjarlais Inquiry, ibid. at 181. For further literature on the problems caused by internal colonialism and abuses by band level government see supra note 365.

463 Supra note 377.

464 Desjarlais Inquiry, supra note 95 at 174.

discussion. Non-native public officials are subject to a number of controls on their powers and actions, including public tort remedies such as misfeasance in public office, breach of statutory duty, negligence, and overriding everything the Canadian Charter of Rights and Freedoms. Native communities are free to develop their own means of accountability, but politicians and government officials of whatever culture, would seem to require some controls on the way in which they exercise their power. The Royal Commission agrees that leaders and agencies involved in child welfare services of this nature should operate under community initiated and enforced standards of behaviour,

"Aboriginal leaders and agencies serving vulnerable people encourage communities, with the full participation of women, to formulate, promote and enforce community codes of conduct that reflect ethical standards endorsed by the community and that state and reinforce the responsibility of all citizens to create and maintain safe communities and neighbourhoods." Penner also agreed that it was essential for each Indian First Nation to develop systems of accountability that they might adopt and entrench in their governmental structures. In the view of Penner the implementation of an adequate accountability system was a prerequisite for recognition of each Indian government. Penner suggests that these systems of accountability might include, "a system through which officials might be

Equality As An Aboriginal Right]; Gail Stacey-Moore, President, NWAC, in First Peoples and the Constitution, supra note 100 at 31.


467 Gathering Strength, supra note 122 at 83, Recommendation 3.2.9.

468 Penner Report, supra note 465 at 57.

469 Ibid.
removed from office; a system through which decisions that are felt to be unjust or improper could be appealed; and the protection of individual and collective rights.”

The Committee claims that the need for accountability systems was widely supported by Indian witnesses. They insisted however that each Indian First Nations should develop their own system,

“...the Indian nations of the country would want nothing more than accountability under their own terms to their own people. We must have that accountability to them. Right now we do not. We do not have the right to account to our constituents...The Minister has all the authority.” (Assembly of First Nations)

The federal government statement of 1995 is equally adamant on the necessity of aboriginal government’s being fully accountable for all the decisions that they take in the exercise of their jurisdiction or authority. The government argues that the accountability system must be set out in an internal constitution so that is open to both community members and outsiders to view. Further the accountability system must be “no less stringent than those existing for other governments and institutions of comparable size.”

The federal government goes on to insist that the mechanism of accountability must secure “transparency”, “disclosure” and “redress”. There must also be adequate rules

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470 Ibid. at 58.
471 Ibid.
472 Ibid.
474 Ibid. at 13.
475 Ibid.
476 Ibid.
governing conflict of interest for both elected and appointed officials. The view of non-native government on these issues is thus absolutely unequivocal. Their concern however has focused on how to impose these conditions on First Nations communities.

It would seem, however, that the federal government does not need to worry about imposing its views on self-governing communities. The need for internal limits, providing for checks and balances on Aboriginal governments is clearly supported by members of the First Nations. Many communities agree on the need for accountability principles which cover financial control, standards governing conflict of interests, and the ethics of public officials. It is argued that while these formal internal limits may be "foreign" to traditional aboriginal cultures, the values of public duty and responsibility are recognised as integral to good government.

477 Ibid. at 14.

478 For a detailed discussion of the attempts by the federal government to impose accountability mechanisms and principles of good government on First Nations self-government see above at chapter four, especially pp. 271 - 276.

479 The Royal Commission states that, "Intervenors before the Commission recognised that systems for accountable and responsible government must be deeply imbedded in the fundamental structures of Aboriginal governments and must be consonant with the cultural norms of the people." Restructuring the Relationship, supra note 99 at 346. Further, the Constituent Assemblies of the Aboriginal Constitutional Process recommended that, "The First Nations governments and leaders carry out their duties honestly, fairly, and responsibly, keeping in mind the principles and values inherited from our ancestors," in Surviving As Indians, supra note 51 at Appendix 14 pp. 318 - 319. See also First Nations submissions to the Penner Committee, The Penner report, supra note 465 at 58; Victor Mitander, Chief Negotiator, Council for the Yukon Indians, in Aboriginal Self-Determination, supra note 99 at 118; Union of Ontario Indians, Anishinabek Traditional Governing, A New Era for the Anishinabek: Understanding the Past for the Challenges of Tomorrow (brief submitted to the Royal Commission on Aboriginal Peoples, 1993). These claims have been particularly strong from First Nations women, see especially, Royal Commission on Aboriginal Peoples, Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance, by Mary Ellen Turpel (Research paper, prepared for the Royal Commission on Aboriginal Peoples, 1995); "Dancing With a Gorilla," supra note 365; "Sexual Discrimination in the Indian Act," supra note 365; Sexual Equality As An Aboriginal Right, supra note 465; Gail Stacey-Moore, in First Peoples and the Constitution, supra note 99 at 31.
"In a contemporary government context, measures to deal with financial accountability and conflicts of interest are cornerstones of responsible and accountable government." 480

Many aboriginal leaders take the view that one way to deal with these problems within decision making/governmental bodies is by developing principles of accountability, conflict of interest rules, and codes of conduct. 481 For example, Paukatuuit, the Inuit women's association, has proposed establishing community standards on these issues by formulating a set of expectations for Inuit leaders. 482 The "code of conduct" was adopted at the associations annual general meeting in 1996. The code called for the full participation of women in decision making and the removal of barriers to their participation. 483 It also listed the particular responsibilities of the community leaders,

"Inuit leaders have additional responsibilities as public figures and role models. These include not engaging in conduct which hurts other people, breaking laws or is harmful to Inuit society...Acts of violence against women and children, including sexual assault, child abuse, child sexual abuse, and wife battering, are absolutely unacceptable, and any leader who engages in such conduct should immediately step aside." 484

480 "Implementing Self-Government," supra note 465 at 213.

481 See e.g. "Interpretive Monopolies," supra note 58 at 60 - 62; Sexual Equality As An Aboriginal Right, supra note 465 at 118; "Sexual Discrimination in the Indian Act," supra note 465 at 299 - 302; Restructuring the Relationship, supra note 99 at 345 - 349. For a particularly good assessment of the use of tribal codes to address violence against women and children in Indian communities in the US, see B. Miller, "Contemporary Tribal Codes and Gender Issues" (1994) 18:2 American Indian Culture and Research Journal 43 [hereinafter "Tribal Codes"]. Miller gives a positive assessment of these codes which he claims have demonstrated strong regulation of "those issues thought to be generally of concern to women, including violence towards women and children." "Tribal Codes, ibid. at 46. Contra, see the comments of Krosenbrink-Gelissen who argues that all these recommendations suffer from weaknesses. For example, she argues that any codes or conflict of interests principles that do not have the status of Constitutional law could be easily ignored or removed at the will of the band council. Sexuality Equality As An Aboriginal Right, ibid. at 118 - 119.

482 Gathering Strength, supra note 122 at 82.

483 Ibid.

484 Ibid.
The Pauktuutit code of conduct currently has moral rather than legal authority, although the Royal Commission observes that where codes of conduct have been adopted by a community they have tended to carry the "moral force of law". Under self-government such codes of conduct could easily be entrenched in the Constitution of the community or given legislative status. Such codes would then have the actual force of law, binding on its community leaders. Mary Ellen Turpel argues,

"that the development of community codes is the best available interim solution to the most pressing problems within communities and to the threat of the (further) imposition of the human rights paradigm on aboriginal communities."

Other proposals to ensure that governing bodies in the communities serve their people, rather than abuse them, include human right codes and the adoption of aboriginal charters which would be legally binding on aboriginal self-governing communities. Doris Ronnenberg, Past President of the Native Council of Canada has argued for the introduction of an Aboriginal Bill of Rights which is based on aboriginal traditions and is designed by aboriginal communities. Again Ronnenberg insists that all governments must be accountable, and that it is an inherent part of aboriginal cultures and traditions

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485 Ibid.
486 "Interpretive Monopolies," supra note 58 at 61.
487 Supra note 481. For a brief discussion on the calls for the development of an aboriginal Charter see above at chapter 4 pp. 304 - 306. See especially, Restructuring the Relationship, supra note 99 at 233 - 234; "Implementing Self-Government," supra note 465 at 215 - 216; Renewed Canada, supra note 118 at 31. In particular see the recommendations of The Aboriginal Constitutional Process from the Constituent Assemblies which stated that the Canadian Charter of Rights and Freedoms shall not override First Nations law, but that rights such as gender equality should be established in a formal Aboriginal Charter of Rights and Freedoms, in Surviving As Indians, supra note 51 at Appendix 14 pp. 316 - 319.
488 Doris Ronnenberg, Past President, Native Council of Canada, in Aboriginal Self-Determination, supra note 99 at 39.
that leaders will be held responsible to their people. In 1986 NWAC began to develop a human rights and responsibilities law. The purpose of the law was to discourage members of aboriginal communities from pursuing internal challenges against their governments in the mainstream system. The human rights provisions envisaged are loosely worded and correspond to four groups of rights and responsibilities that derive from the teachings of the Four Directions. By affirming traditional teachings on responsibility corresponding rights in individual citizens are identified. The four responsibilities of strength; kindness; sharing; and trust thus guarantee corresponding cultural; social; economic; and political and civil rights respectively. In support of such codes for responsible government aboriginal leaders, as NWAC have done, often invoke traditional notions of leadership in aboriginal communities. Victor Mitander, the chief negotiator for the Yukon Indians argues that the Yukon First Nations have always operated on a base of knowledge as to what governments should and should not do, and

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489 Ibid.

490 "Interpretive Monopolies," supra note 58 at 61.

491 Ibid.

492 Ibid.

493 Ibid.

thus the manner in which self-governing leaders conduct themselves can be based on the traditions and cultures of the Yukon Indians.\textsuperscript{495} It is argued that traditional notions of leadership in many aboriginal cultures emphasised responsibility and duty to serve, rather than power and authority,

"For the Mohawk as for many other Aboriginal peoples, sovereignty does not mean establishing an all-powerful government over a nation or people. It means that the people take care of themselves and the lands for which they are responsible. It means using political power to express the people's will."\textsuperscript{496}

It is argued that in most aboriginal societies an individual would be imbued with a strong sense of personal autonomy and an equally strong sense of responsibility to the community.\textsuperscript{497} Individual rights and responsibilities would be viewed as serving rather than opposing collective interests.\textsuperscript{498} Political power in many communities was mitigated by these principles of individual autonomy and responsibility. Leaders were viewed as servants of the people and were expected to uphold the values inherent in the community.\textsuperscript{499} Relying on the writings of Oren Lyons, Slattery argues that the idea that political power is essentially a matter of trust is prominent in traditional First Nations philosophies.\textsuperscript{500} He emphasises that government is a mandate carrying with it the

\textsuperscript{495} Victor Mitander, Chief Negotiator, Council for the Yukon Indians in \textit{Aboriginal Self-Determination}, \textit{supra} note 99 at 118.

\textsuperscript{496} \textit{Restructuring the Relationship}, \textit{supra} note 99 at 111 - 112.

\textsuperscript{497} \textit{Ibid.} at 119.

\textsuperscript{498} \textit{Ibid.}

\textsuperscript{499} \textit{Ibid.} at 130.

\textsuperscript{500} "A Question of Trust," \textit{supra} note 494 at 265.
responsibility to govern for the welfare of the people, and particularly for the good of future generations. The Iroquois notion of the essential spirituality of government, and their teaching that government must be conducted for the benefit of both the people of the day and the next generation, are claimed by Slattery to constitute clear internal limits to governmental power.

"The primary law of Indian Government is the spiritual law. Spirituality is the highest form of politics, and our spirituality is directly involved in government. As chiefs we are told that our first and most important duty is to see that the spiritual ceremonies are carried out. Without the ceremonies, one does not have a basis on which to conduct government for the welfare of the people." (Professor Oren Lyons)

Similar ideas on the responsibility of governing with a mind to the future generations were expressed at a meeting for American elders held in Navajo,

"The faces of our future generations are looking up to us from the earth; and we step with great care not to disturb our grandchildren..."

Slattery thus draws from these philosophies the fundamental idea that governments do not possess unlimited powers but are constrained by their intrinsic mandate. This mandate imposes upon them a trust like duty in the way in which they exercise governmental powers.

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501 Ibid. at 266.

502 Ibid.


504 Statement from the Native American Elders, cited in "A Question of Trust," ibid. at 266.

505 Ibid. at 266.
authority. Accountability is integral to this notion of exercising power for the good of the people,

"To become a leader was a great honour. The role of the chief was not one of power, rather it was a responsibility to fulfil the needs of the people." 507

If a leader within this traditional understanding abused his or her authority or neglected his or her duties they would risk losing the respect of the people they served and ultimately would suffer an erosion of their influence and authority. 508 In speaking of their traditions of governance, many aboriginal people emphasise that their leaders were originally chosen and supported by the entire community. 509 If that support was withdrawn the leader would lose his position of respect,

"Leadership was reactive of the people's faith and confidence in that particular individual's capabilities as a Chief. If for some reason these duties as leader were not fulfilled or met satisfactorily by the people then they could 'quietly withdraw support." 510

Obviously a number of these traditional values have been lost or neglected in many communities. 511 The traditional method of enforcement of these responsibilities, by community consensus and withdrawal of support, would not be effective in fragmented and partly assimilated communities,

506 Ibid. at 268.
507 Restructuring the Relationship, supra note 99 at 130.
508 Ibid. at 133.
509 Ibid.
510 Ibid.
511 See especially Surviving As Indians, supra note at 117 - 166 for the effects of the imposition of a colonial system of governance on traditional leadership systems.
"Many First Nations intervenors spoke of how the Indian Act system of government had eroded traditional systems of accountability, fostered divisions within their communities, and encouraged what amounted to popularity contests."\textsuperscript{512}

The important point however is that the traditional values of community leadership that First Nations people are seeking to rediscover can be used to found modern codes of conduct for their leadership; codes that guarantee certain standards of behaviour will be met by First Nations leaders,

"The first step is to make sure that the new leaders are different. We have to create in each of our communities an environment in which the leaders listen to us and are held accountable by restoring the atmosphere of respect and dignity that once flourished in our circles."\textsuperscript{513}

A contemporary survey of the attributes of Indian leadership reveals that these qualities of service and responsibility are still considered of key importance by aboriginal people, more so than characteristics such as strong leadership skills,

"In contrast to white society, where leadership commonly implies innate qualities of a more universal nature, for Indians the criterion of leadership is "service", that is the ability and willingness to do a specific and essential job for their people."\textsuperscript{514}

\textsuperscript{512} Restructuring the Relationship, supra note 99 at 133.

\textsuperscript{513} "Aboriginal Women and Self-Government," supra note 365 at 57. For further discussion on the potential of using traditional values and systems to inform contemporary institutions of government see Restructuring the Relationship, supra note 99 at 116 - 117. Surviving As Indians, supra note 51 at 167 - 221. Boldt makes the strong point that, 'Indians must defend their cultures, not with 'sacred' fences, but by opening their cultures to new ideas. However in advocating 'cultural liberalism' that is removing the fence of sacredness, I emphasise the need to first establish a foundation and framework of traditional fundamental philosophies and principles" Surviving As Indians, ibid. at 198. See also the striking comment of Kelowa Edel above chapter three p. 233. For an analysis of how traditional leadership values can be used to inform modern leadership norms in very diverse ways, see 'Contemporary Tribal Codes," supra note 481.

\textsuperscript{514} "Context and Composition," supra note 51 at 45.
In summary First Nations communities, in the same way as non-native society, demand that their leadership are accountable for their actions and community politicians or people in positions of power do not abuse or violate the rights of individuals for illegitimate gains. As Wendy Moss argues,

'It cannot be fairly assumed that Aboriginal people resident on reserve do not wish the application of any human rights code, however conceived, that is protection of their individual rights and I think it can be fairly assumed that Aboriginal people, like other peoples wish to have leaders or governments that are accountable to them in some manner and who would be expected to make decisions fairly.'

The three child welfare agencies all agreed that accountability for public officials was essential in attempting to ensure that they always act in good faith when involved with child welfare services. Xolhmi:lh has in the past encountered some difficulties with the political manoeuvrings of the chiefs and band councils. The merger between two tribal councils with little respect for each other was initially very difficult with a great deal of role confusion and conflicts. There was one particularly serious incident of a chief trying to interfere with the work of the agency. However the Sto:Lo Nation has now structured itself in such a way as to guard against a repetition of this incident. The problems between the two tribal councils have been resolved and the political situation has been stabilised. The governing bodies of the Nation have been organised in such a way as to prevent a conflict of interests arising and client confidentiality being breached. At the head of the


516 Kelowa Edel, supra note 124. At one point the two tribal councils were in conflict over fishing and one council pulled out altogether making the position of the agency very difficult. Political disputes such as this were seriously affecting the work of the agency.
Nation there are two bodies: Lalems Ye Sto:Lo Si:Ya:M, the House of Chiefs and First Nations representatives, and Council Ye Si:Ya:M, the Special Council of Chiefs. The Ye Si:Ya:M are appointed as representatives of various interests. There is thus only one chief who deals directly with the agency and represents Xolhmi:lh at the level of the chiefs, (the analogy is drawn with a Minister in the non-native system). The House of Chiefs has no direct contact with the agency thus securing that there is no political interference in its daily work. It is very clear to all chiefs that the daily operation of the agency is not their concern and Ye Si:Ya:M has the responsibility of making sure that the community chiefs are acting appropriately. Xolhmi:lh has also begun the process of educating the community chiefs about what child protection is, and why and how the community is dealing with it. This process of education will hopefully discourage chiefs from acting inappropriately because they basically do not understand the actions that have been taken and why. This process of education is extremely important and should be encouraged in other self-governing communities. The agency recognises that there is a difference between interference, and a chief making enquiries about a band member. The agency will willingly talk to chiefs about particular cases and listen to suggestions and advice on appropriate services and care, but it is clear to both parties that the agency has the final word. This political structure has stabilised the political situation in the Sto:Lo Nation and the agency have experienced very few problems in the last couple of years. I would suggest that, if not already planned, a code of personal conduct is imposed on the Chiefs and Council members as a useful support to the formal governing structures that have been introduced.

Nuu-chah-nulth similarly operates under a carefully structured governing body to minimise the risk of political interference or misconduct by individual officials in the work
of the agency.\textsuperscript{517} Sometimes the work of the agency has become ‘political’, but there has been no problem with a community chief or band councillor directly challenging the agency and trying to take control of a case by dictating to the agency the action it should take,

“The agency has had no case where a chief or band councillor has tried to take control of a case and dictate to the agency what it should do. There has been no incident where a chief or councillor has actively gone against the decision of the agency.” (Marika Czink)

Again the agency draws a distinction between legitimate interest and interference. There is often an expectation by the family in question that their reserve’s political leaders will become involved in their cause, and take up the case with the agency. This kind of intervention on behalf of a family is considered legitimate by the agency and they are prepared to discuss the issues with the chief. As with Xolhmi:lh, the stable political structures of Nuu-chah-nulth would seem to shield Usma from attempts at manipulation by individual chiefs and council members. However, a leadership code to prevent individual misfeasance of Chief and Council would again be a valuable additional protection against potential abuses of power by politicians.

The Spallumcheen child welfare program, because it is so close to the community, and because the decision making powers are in the hands of Chief and council, is the most vulnerable to abuses of power, political manipulation and nepotism. Bryan Watt agreed that it was necessary to have controls on the Chief and Council but at present they have no formal principles in place.\textsuperscript{518} Within the Spallumcheen community there are approximately

\textsuperscript{517} Marika Czink, \textit{supra} note 123.

\textsuperscript{518} Bryan Watt, \textit{supra} note 125.
six dominant clans and it is essential to address whether the child welfare staff and other
decision makers could be vulnerable to pressures from these powerful families if they held
an interest in the particular case. Bryan Watt considered this would be a potential problem
in any new self-governing agency, and the development of conflict of interest rules would
be necessary. At present Spallumcheen operates on a basis of good faith and trust, with a
member of council stepping aside if the case involves a family member or close friend,

“Any new child welfare agency clearly has to deal with this potential problem. It
is essential to develop conflict of interest rules. At Spallumcheen the problem has
not arisen. The Chief and Council have naturally avoided getting involved in a
case in which they have an interest. A councillor automatically step out of the
picture if there is a conflict of interest, for example if the case involves a close
friend or family member. If the councillor did not voluntarily remove himself
from the decision process then a member of the child welfare staff would
recommend that they leave. Spallumcheen have not found the issue of conflict of
interest and inappropriate interference to be the problem it is often perceived to
be.” (Bryan Watt)

However, it is recognised that a model based on good faith is only as strong as the Chief
and Council and more formal rules need to be in place to provide strong protection against
the clear potential danger of inappropriate behaviour.

In summary all three child welfare agencies agreed upon the necessity of having
some form of control on community leaders, whether structural or through personal codes
of conduct, to prevent inappropriate interference with the work of the agency or attempts
to subvert the political structures to their own ends. It is suggested that the structural
protections in place at Nuu-chah-nulth and Sto:Lo be supported by formal measures of
personal accountability enforced through community codes or constitutionalised principles
of conduct. A personal code of conduct is especially urgent in the case of Spallumcheen
where there is no centralised political structure to guard against abuses.
3.3 Universal Standards? A Summary

The above discussion shows there was considerable agreement on the six principles I have suggested, although there is clearly diversity in the way in which they are interpreted and implemented in practice. However, recognition of First Nations autonomy and cultural diversity did not prevent consensus emerging on some fundamental ‘universal’ standards. There are admittedly notable dissents on some of the principles. That does not defeat the process of cross-cultural dialogue. Once a starting point is found, the dialogue can continue, and the insights of both cultures continue to be shared. It would be unrealistic to deny that there will be great problems in attempting to persuade any of the three orders of government that they have a responsibility to work together through a Children’s Charter on issues of child welfare. Forging agreement on the basic standards and rights recognised will be difficult enough, seeking acceptance by any of the provinces, or First Nations governments, that their child welfare systems must be subject to pan-Canadian external review is likely to be verging on the impossible. The fact the Commission would be making recommendations, and not issuing legally binding judgments, may assuage some government objections to an external review body. The government in question is effectively free, as in international law, to ignore the Commissions recommendations. This always helps to facilitate agreement although there is a clear danger that the Children’s Charter as a result would be relegated to a lower level on the legal hierarchy. An added incentive for First Nations governments to agree to such a Charter is that the Commission may help to constrain the federal and provincial
governments efforts to intrude into First Nations child welfare through less culturally legitimate mechanisms. I would also suggest to all the various governments that by binding themselves to work together in the sphere of child welfare they will be providing a better service to all the children in their care, and thereby more convincingly meeting their international obligations under the UNCRC. The most important conclusion which can be drawn from the above dialogue, however, is that given the political will, a culturally legitimated Children’s Charter, embracing ‘universal’ common standards is a realistic goal in Canada.

4. A Children’s Charter - How will it Help Mitigate the Risks?

Given the centrality of gaining control over First Nations child welfare to rebuilding First Nations communities on the path to self-government, many aboriginal communities will be anxious to assume jurisdiction as quickly as possible. However with the problems which currently exist in many communities, it cannot be denied that the transition may well be difficult and many problems will arise. The Children’s Charter is one way in which it is hoped that those dangers can be mitigated in a way acceptable to

519 For a detailed discussion of the governments attempts to assert control over self-governing First Nations communities see above at chapter 4 pp. 260 - 329.

520 See above at chapter one for an analysis of the calls for self-government over First Nations child welfare to enable communities to begin to reverse the tragic effects of colonialism. See especially, Liberating Our Children, supra note 98. See also above at chapter two pp. 166 - 177 for the consensus on the centrality of child welfare to self-governing jurisdiction. See especially, Restructuring the Relationship, supra note 99 at 213 - 223.

521 See above at chapter three pp. 195 - 259. See especially, Desjarlais Inquiry, supra note 95.
both native and non-native communities.\textsuperscript{522} The question is how. I would argue that the best way to protect children in Canada is to ensure that all Canadian governments are actively engaged to that end.\textsuperscript{523} The Children's Charter will bind all three orders of government and will place positive obligations on all of them to ensure that First Nations children are not only safe under self-government, but are being provided with the best possible care that the three governments working together can provide. More particularly, a Children's Charter will secure an essential external mechanism to safeguard First Nations children against the repetition of a tragedy like that of Lester Desjarlais, and thereby will provide an important and effective means of mitigating the risks of the transition to self-government. A Children's Charter places the responsibility on all three orders of Government in Canada to ensure that the 'circle of abuse' is broken.\textsuperscript{524}

4.1 The Provincial Government: The Transition to Self-Government

The goal of self-government is to successfully transfer jurisdiction over such areas as child welfare from the provincial governments to the First Nations communities. Once that transition is complete, apart from its participation in the enforcement of a Children's Charter, the legal basis for any provincial involvement in aboriginal child welfare is removed. Any other conclusion is incompatible with respect for the inherent sovereignty

\textsuperscript{522} For an analysis of the Government's attempts to 'mitigate the risks' of self-government by the imposition of current provincial and federal standards see above at chapter four.

\textsuperscript{523} Gathering Strength,, supra note 122 at 105.

\textsuperscript{524} For the sake of discussion I will assume that the standards and principles that would be enshrined in the Children's Charter will be similar to those in the UNCRC.
of First Nations self-government and the dismantling of colonial structures and thinking in Canada.\textsuperscript{525} The province’s role in ensuring a smooth and safe transition to self-government is however vital. The implementation of a Children’s Charter provides a legitimate basis on which the province’s responsibility to First Nations children can be founded, and defined according to standards which are acceptable both to the province and the First Nations. For the province to be bound by these standards in the transition process, is an essential means of mitigating the immediate dangers of First Nations control.\textsuperscript{526}

As was argued in chapter three the need to take over self-governing responsibilities by way of an evolutionary process is the much safer option from the perspective of First Nations children.\textsuperscript{527} The need to transfer control gradually is a view shared by the

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\textsuperscript{526} The focus of this thesis has been self-government among reserve based communities. I have not attempted to address the issue of off-reserve, particularly urban Indians, who may not be covered by self-government agreements. Some off-reserve Indians may ‘opt-out’ of their Nations self-government agreements. For these native people the province will continue to be the government with jurisdiction. For this reason the Children’s Charter will continue to be instrumental in securing the provincial government is meeting its responsibilities with regard to native children, particularly in relation to ensuring cultural sensitivity.

\textsuperscript{527} See above at chapter three pp. 251 - 255. Justice Giesbrecht again provides a convincing case for the need for a gradual transition of control over First Nations child welfare. He argues, “For the government to have insisted that a transfer would have to be done in an orderly way in stages, and that the Director would insist on remaining actively involved with the emerging aboriginal child welfare agencies, would have been neither ‘paternalistic” nor ‘racist.” It would have been the responsible thing to do. It would have been common sense...the important point for the government, at least at this time is to recognise that the aboriginal child welfare agencies need help, guidance and vigorous assistance. Unless and until the present constitutional arrangement is altered, the help, guidance and assistance can only come from the provincial government.” \textit{Desjarlais Inquiry}, \textit{supra} note at 272 - 274, and 179 - 182.
provincial and federal governments and many First Nations communities. Many First Nations leaders have asserted their intention to proceed to self-government by way of negotiation and agreement rather than unilateral declarations. Vice Chief Wendy Grant, Musqueam Nation, has expressed her vision of the move towards self-government in the following way,

'I see the constitutional recognition of our inherent right to self-government as a living tree that will grow over time as First Nations choose to exercise the various components of modern self-government for the benefit of their people. The technical means of accomplishing this smooth transfer of formal authority can be left to our officials to work out through ongoing negotiations. When we look at the transfer of jurisdiction as being a process that will occur over time on a piecemeal basis, then we can see that the problems of transfer are easily managed; indeed, we already know how to do it.'

The Royal Commission reached a similar conclusion concerning the necessity for progressive transferral of control,

'It would generally be preferable for Aboriginal peoples to implement their inherent right of self-government by way of agreements with federal and provincial authorities, in the spirit of co-operative federalism, so that such important matters as jurisdiction, financing and transitional arrangements can be handled in an orderly and amicable matter.'

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528 For further discussion on the need for a gradual transition to First Nations self-government see e.g. Desjarlais Inquiry, ibid.; Restructuring the Relationship, supra note 99 at 310 - 382; Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution (Ottawa: Minister of Supply and Services, Canada, 1993) at 25 - 36 [hereinafter Partners in Confederation]. For comprehensive implementation arrangements which require the cooperation of federal, provincial, and First Nations governments over a number of years see, Canada, Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians, and the Government of the Yukon (Ottawa: Ministry of Indian and Northern Affairs, 1993) Chapter 28 [hereinafter Umbrella Final Agreement]; Canada, Council for Yukon Indians, Yukon Territory, Canada, Department of Indian and Northern Affairs, Umbrella Final Agreement Implementation Plan (Ottawa: Ministry of Indian Affairs and Northern Development, 1993); Nisga’a Agreement, supra note 448 at 123.

529 Vice-Chief Wendy Grant, in First Peoples and the Constitution, supra note 99 at 49 - 53.

530 Partners in Confederation, supra note 528 at 34 - 35. See also recommendation 3.2.12. of the Royal Commission, Gathering Strength, supra note 122 at 95: “Aboriginal nations or organisations consult with federal, provincial and territorial governments on areas of family law with a view to (a) making possible
The need for gradual change and the continuing involvement of the province is not a negation of self-government. As the Royal Commission concludes child welfare lies within the core of aboriginal self-government jurisdiction. The First Nations have an actual immediate right to exercise jurisdiction without the need for legislative or judicial sanction, or political concurrence. The right to autonomous self-government free from non-native intervention remains untouched. However, a progressive and orderly transition simply recognises the reality that to expect First Nations to provide an effective child protection service overnight is unfair and unrealistic. They will require the time to establish their own systems, legal and procedural frameworks, and to acquire the training and skills necessary to run those systems. The death of Lester Desjarlais is a testimony to that fact.

The provincial government and the current child welfare system can play a central part in aiding the transition of the First Nations to control over their own child welfare. During the transition period they should have a continuing responsibility to help provide

legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps; (b) working out appropriate mechanisms of transition to Aboriginal control under self-government, and (c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies."

531 Restructuring the Relationship, supra note 99 at 218.

532 Ibid. at 215.

533 The Desjarlais Inquiry makes this point strongly. The community simply didn’t have the skills, resources or experience to run a child welfare agency without guidance or support: “It is my reading of the evidence that the aboriginal community did not have the expertise necessary to suddenly assume responsibility for child welfare. The Indian leadership had no idea of the magnitude of the child welfare related problems on reserves, and the government acted in unseemly haste in turning matters over to the aboriginal community without the necessary funds, training, and other essentials.” Desjarlais Inquiry, supra note 95 at 271.
effective protection and services to First Nations children. This was the clear conclusion of
the Desjarlais Inquiry,

"Because of the many problems that exist in the agency it is absolutely necessary
for the Director to become involved and stay involved until these problems are
solved." 534

The Nisga’a Tribal Council and the B.C. Provincial government recently announced their
plans for transferring control over Nisga’a child welfare services to the Nisga’a
government. 535 The four stage transition process envisaged by the Nisga’a provides a
commendable model for the assumption of control and authority over child welfare to self-
governing communities. Central to that process is cooperation with the B.C. government,

"Under the first phase of the agreement, the Nisga’a Child and family Service
Agency will provide preventive and support services while it builds expertise and
develops resources, such as foster homes. In the second phase, the agency will
assume control of child protection services for Nisga’a people, including
apprehensions. The final phase, which will be the subject of a further agreement
will see the appointment of a Nisga’a director with powers and responsibilities
parallel to those of the ministry’s director of child, family and community service.
Eventually, the Nisga’a intend to establish their own child welfare legislation as
they move forward with the treaty process and closer to self-government." 536

The procedure envisaged by the Nisga’a provides an effective legal structure for
transferring control and for the province’s continuing responsibility to protect and
safeguard aboriginal children. In the first stage of the process the Nisga’a will establish a
native controlled child welfare agency operating under provincial mandate. Under the

534 Ibid. at 172.


536 Nisga’a New Release, ibid.
current law a clear case can be made that whilst under provincial mandate the provincial government remains responsible for ensuring that Nisga’a children are receiving the same standard of child welfare services as other children in the province.\textsuperscript{537} For example in B.C. the province would be bound to protect the rights of a child in care under sec. 70 of the 1996 legislation, regardless of whether the child was under the care of a native or non-native child welfare agency.\textsuperscript{538} The imposition of a duty on the province to ensure native children are receiving care to provincial standards reflects the reasoning of Justice Giesbrecht in the Desjarlais Inquiry regarding the relationship between the province and mandated native child welfare agencies,

"Government policy should acknowledge that the provincial government is responsible for the welfare of aboriginal children in the same way that the government is responsible in the case of non-aboriginal children."\textsuperscript{539}

However whilst the imposition of this duty is important to guarantee minimum standards of care are provided, the current substance of that duty demands that the native controlled

\textsuperscript{537} See especially, \textit{Desjarlais Inquiry, supra} note 95 at 259. Justice Giesbrecht comments, “I believe that the Director’s “marching orders” from the government, essentially a “hands-off” policy with respect to aboriginal child welfare agencies, has compromised the lives of aboriginal children living on reserves and continues to this day to deprive too many aboriginal children in this province of their birthrights as Canadians - namely the right to true childhoods.” Whilst acknowledging the ongoing jurisdictional debate between the federal and provincial governments as to who is responsible for First Nations child welfare, as a matter of legal principle it seems clear that if the province has assumed jurisdiction it is responsible for the services provided and ensuring that its obligations under provincial legislation are adequately met. In essence it is responsible for its delegates whether native or non-native.

\textsuperscript{538} \textit{BC Community Service Act, supra} note 83 sec. 70 (1), “Children in care have the following rights: (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;... (e) to be free from corporal punishment; (f) to be informed of the standard of behaviour expected by their caregivers and of the consequences and of the consequences of not meeting their caregiver’s expectations...”. There is no reason why an aboriginal child is not equally entitled to these rights whilst in care and there is no indication from the B.C. government that it would take any other approach.

\textsuperscript{539} \textit{Desjarlais Inquiry, supra} note 95 at 273.
child welfare agencies meet the standards of the province rather than their own culturally accepted standards as would be enshrined in a Children’s Charter. If the responsibility of the province was based on the Charter rather than provincial legislation, a more interventionist stance by the province in the transitionary period to ensure that basic minimum standards were being met, would be more acceptable to the Community. They would not be being forced to comply with ‘foreign’ non-native provincial standards, but their own. Contrary to the practice in Manitoba in the cases of Lester Desjarlais\textsuperscript{540} and Jane Doe\textsuperscript{541} the province should remain actively involved with native controlled agencies to ensure that vulnerable individuals within the community are being adequately protected. If children within the jurisdiction of the province are not being cared for properly the province’s legal duty under a Charter would be clear; it must intervene.\textsuperscript{542} Practices such as those in Sandy Bay would not be tolerated in a non-native community, they should not be tolerated in native communities. The issue here is not a difference in decision making processes or varying cultural norms on parenting skills; in the case of Lester Desjarlais and ‘Jane Doe’ fundamental basic human rights of the children involved were being violated, and being violated whilst supposedly under the province’s protection. For example, if an agency does not have a fully qualified supervisor, the province must insist that it does or remove the agency’s mandate on the basis that such a practice violates the Charter. It is

\textsuperscript{540} \textit{Ibid.}

\textsuperscript{541} \textit{Jane Doe, supra} note 156.

\textsuperscript{542} Again in the context of the Desjarlais Inquiry and the inability of the agency to keep comprehensive files, Justice Giesbrecht was very clear on the responsibility of the province: “A child care agency that cannot keep proper files must not be allowed to continue operating.” \textit{Desjarlais Inquiry, supra} note 95 at 94.
essential, especially in the short term, that whilst the province secures the maximum amount of autonomy possible to native agencies, this also being a potential duty under the Charter, basic minimum standards of child protection are maintained and if for any reason they are not, under a Children’s Charter, the province has the mandate and a culturally legitimate legal basis on which to intervene.\textsuperscript{543} Lester Desjarlais and Jane Doe were still within the province’s care and yet the province did nothing to help them. That is an abdication of the province’s responsibility and a fundamental breach of the rights of First Nations children.

The Children’s Charter could also place a number of more positive duties on the province aimed at helping the First Nations communities provide an effective protection system. For example, in this first stage of transition the province will be under a legal duty to ensure that the agency is staffed by suitably experienced and skilled staff, has sufficient resources, and has an effective administrative infrastructure. The provinces’ support can be provided in many ways without imposing its own structures and procedures on the community in a paternalistic fashion.\textsuperscript{544} For example, basic administrative skills and internal organisation are not culturally based; they are essential for the effective operation

\textsuperscript{543} Should the provincial government intervene in the affairs of a child welfare agency its actions could be appealed to the Children’s Commissioner and the basis for their actions reviewed.

\textsuperscript{544} The government’s role can take a variety of forms but essentially the process is one of cooperation and working together to identify needs and priorities. The province’s role is to help and guide not dictate. This ethos is very clear in the Royal Commission Report and is very strong in the Yukon agreements, particularly with regard to training needs. See especially, \textit{Umbrella Final Agreement}, supra note 528 at Chapter 28; \textit{Umbrella Implementation Plan}, supra note 528. For example the emphasis in establishing training boards is on cross-cultural training and equal if not majority representation from the Yukon First Nations communities.
of a modern child welfare agency, and in these areas the experience of the non-native system can be invaluable,

"The Director must not be intimidated by claims that DOCFS is being forced to operate like a "typical children’s aid society" or other similar excuses. Clear lines of authority are just as necessary for an aboriginal agency as for any other agency." 545

Social workers from the provincial system could be seconded for a limited time to help establish and train aboriginal workers in using these basic administrative systems, as well as provide essential support to native social workers in the community. Similarly, suitably trained non-native social workers can be employed on a permanent basis within the system without compromising the cultural sensitivity of the agencies work. 546 Ensuring the availability of skilled human resources will help bridge the gap in the next few years between the demand for aboriginal social workers and the actual number available. Native controlled child welfare agencies have successfully employed non-native social workers, who work in conjunction with native child care workers who ensure cultural sensitivity in the design and delivery of child protection services. One key area for co-operation will be

545 Desjarlais Inquiry, supra note 95 at 172. It should be noted however that a contra view is taken by some First Nations child welfare agencies. For example, Charles Morris, the Director of Tikinagan Child and Family services declared his frustration at the continuing assimilating forces the agency is forced to work under, "We became for all intents and purposes, a children’s aid society which was indistinguishable from other white operated children’s aid societies, and to this date we continue to emulate the practices of those traditional children’s aid societies. We adopted a system without question, we became incorporated to this system, and today we perpetuate the practices of such a system. This is despite our best efforts not to do so...". (Gathering Strength, supra note 122 at 39).

546 See above for a detailed discussion of this argument. See especially the successful policies at Usma, Spallumcheen, and Xolhmi:lh, of combining professionally qualified non-native social workers with aboriginal support workers who are encouraged to upgrade their qualifications and training to gradually enable them to take over more responsibility. Thus children can be protected by qualified protection workers whilst the community continues to build its own resource base. For literature on the various initiatives to increase the number of aboriginal child care workers and social workers, whilst maintaining professional standards see supra note 333.
that of training and education. The province can here provide less direct but equally crucial support. The province can be instrumental in helping to ensure that aboriginal child care workers have access to proper education and training. There must certainly be a sustained effort to encourage aboriginal students to stay on at school and complete their professional degrees. There are however significant obstacles which still prevent aboriginal students from ‘doing well’ within the ‘white’ system of education. Further, the ‘non-native’ schools of social work do not necessarily provide the tools to equip an aboriginal student for child protection work within the First Nations communities. The principles and policies to be applied may well be very different, as may be the skills which are necessary to work in the field. The danger in relying on the non-native education system is that it continues to assimilate the First Nations people, whilst providing an inadequate education for the challenges they face. The Royal commission noted the cultural inapplicability of some of the mainstream thinking aboriginal students would be taught,

'Social workers typically are trained to function within mainstream agencies which often assume the role of assessing and controlling individual and family

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547 For a selection of literature on recent education and training initiatives to prepare aboriginal communities for self-government see supra note 342. Such initiatives include, for example, the Winnipeg Education Centre which provides a number of degree programs for aboriginal people seeking a career in social work (MJIL supra note at 95 at 536); the Brandon University Northern Teacher Education Program which provides training in northern communities, establishing “pods” to train people from a given settlement over a number of years (MJIL, ibid.); New Careers Training (Desjarlais Inquiry, supra note 95, discussed throughout); and tribal and regional colleges such as Red Crow Community College, the Nicola Valley Institute of Technology, and Yellow Quill College (Current Trends and Issues, supra note 99 at 94).

548 See above for the remarks of Kelowa Edel, Marika Czink, and Bryan Watt on the inadequacy of the BSW for social work in aboriginal communities. See also the remarks of Justice Giesbrecht in the Desjarlais Inquiry, supra note 95 at 198 - 202. Clearly there is a need to re-evaluate the existing social work courses to address the needs of both aboriginal communities and aboriginal students. First Nations involvement in the design of culturally sensitive and practically relevant courses is essential.
behaviour, rather than facilitating the healing of our kin networks and whole communities.” 549

There is now widespread acceptance that the needs of aboriginal students are not being met in the current higher education system and that this problem is only likely to grow as the demand for skilled aboriginal workers grows. 550 As Hylton argues there is a difference between "education for assimilation and education for self-determination." 551 There are four basic models of higher education currently employed in Canada: the assimilationist model which assumes that the non-native, Euro-centric university is a universal institution and limits the impact of ‘racism’ to denial of access to these institutions for aboriginal students; the integrated model which provides courses and units for aboriginal students which are wholly administered by the non-native institution; the independent model, which consists of tribal and regional colleges that are controlled by Aboriginal communities; and finally the federated model which provides educational services for indigenous people administered by an indigenous run institution under the academic purview and accreditation of a non-native institution. 552 The first of these models which tends to be the common focus of providing better education for aboriginal students is essentially ethnocentric and assimilationist in ethos and thus an inappropriate model to provide education for self-government. 553 It is argued that a federated model is the suitable way in

549 Gathering Strength, supra note 122 at 51.
550 Current Trends and Issues, supra note 99 at 99.
551 Ibid. at 91.
552 Ibid. at 92 - 95.
553 Ibid. at 93 - 94.
which to improve the current situation, for it allows aboriginal control over the design and delivery of courses, but enables the institution to work with the non-native system.\textsuperscript{554} The two institutions can thereby run common courses where applicable, provide access to relevant courses run by the other institution, and share in resources and research.\textsuperscript{555} Another suggestion has been for the creation of a national aboriginal university which will incorporate within its overarching structure several local tribal and federated colleges.\textsuperscript{556} Again an aboriginal university could have formal relations with non-aboriginal universities to enable cooperative courses and a sharing of resources. This is the development supported by Hylton,

"We believe the creation of a national institution would provide the infrastructure to effectively support aboriginal post-secondary education at all levels. Not only would it represent a high level of achievement in Aboriginally controlled education, it would provide aboriginal people with an opportunity to pursue advanced courses of studies in areas, and in a manner, that otherwise would not be available to them."\textsuperscript{557}

The issues surrounding the training and education of aboriginal people must be addressed by the First Nations, federal, and provincial governments working together if aboriginal children are to receive the same standards of protection from a qualified work force as other children within Canada.\textsuperscript{558} There have been several initiatives in the last few

\textsuperscript{554} \textit{Ibid.} at 95 - 99. Hylton gives a detailed description of one initiative under the federated model: The Saskatchewan Indian Federated College which Hylton argues exemplifies the potential for the federated model to grow into an independent post-secondary educational system.

\textsuperscript{555} \textit{Ibid.} at 99.

\textsuperscript{556} \textit{Ibid.} at 103 - 106.

\textsuperscript{557} \textit{Ibid.} at 105.

\textsuperscript{558} Labour and training is placed in the second category of aboriginal jurisdiction by the Federal Government Policy Guide: areas that go beyond matters that are integral to Aboriginal culture or that are
years worked out between the First Nations and the provincial and federal governments which seek to address the problems of education and training.\textsuperscript{559} Clearly in the sphere of education there needs to be a change from reliance on an exclusive Euro-centred system to one that includes First Nations institutions which are designed and controlled by aboriginal people to meet the needs of self-government.\textsuperscript{560} In the sphere of training, Employment and Immigration Canada announced one initiative in 1991 which was aimed at facilitating the development of a skilled aboriginal work force: \textit{Pathways to Success: Aboriginal Employment and Training Strategy - A Policy and implementation Paper}. The preamble to the Paper states,

'It is the objective of Aboriginal people and EIC to establish an effective partnership to invest in and develop a trained aboriginal labour force for participation in unique Aboriginal labour markets and the broader Canadian market.'\textsuperscript{561}

The initiative is based on partnership, with local First Nations control over programs and decision making.\textsuperscript{562} It calls for national, regional and local consultation/management boards to ensure that the needs and priorities of the Aboriginal community are addressed and are reflected in the design and development of EIC programs.\textsuperscript{563}

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\textsuperscript{559} In the sphere of training see especially Canada and Immigration Canada (Dept.) Public Affairs Branch, \textit{Pathways to Success: Aboriginal Employment and training Strategy - A Policy and Implementation Paper} (Ottawa: Employment and Immigration Canada, 1991) [hereinafter \textit{Pathways to Success}]. For commentary and evaluation of this initiative see \textit{Current Trends and Issues, supra} note 99 at 130 - 144.

\textsuperscript{560} \textit{Current Trends and Issues, ibid.} at 106.

\textsuperscript{561} \textit{Pathways to Success, supra} note 559 at 6.

\textsuperscript{562} \textit{Ibid.}

\textsuperscript{563} \textit{Ibid.}
training programs are to be delivered through aboriginal infrastructures.\textsuperscript{564} It is argued that although these aboriginal controlled institutions are essentially replications of mainstream programs, "a more sensitised and responsive environment can be provided through institutions under Aboriginal control."\textsuperscript{565} The First Nations in charge of the program will also be given the discretion to determine a person's eligibility for the program, with the emphasis being on personal factors rather than strict eligibility criteria such as school grades.\textsuperscript{566} However, this initiative whilst important in helping to identify aboriginal training needs, is not the solution to the lack of training for aboriginal people. The Pathways program does not alter the structure of EIC and has only moved decision making from the government to the community for limited parts of service delivery.\textsuperscript{567} There is still a greater need for aboriginal people to be involved in the design, delivery, and evaluation of programs.\textsuperscript{568} Under the Children's Charter the province would be under a duty to provide the needed support for aboriginal education and training. If it fails to provide 'competent' native child protection staff for children under its jurisdiction it may find itself in breach of the Charter. 'Competent' means the staff are provided with an effective education, not simply what the province currently offers.

\textsuperscript{564} Ibid.

\textsuperscript{565} Current Trends and Issues, supra note 99 at 134.

\textsuperscript{566} Pathways to Success, supra note 559 at 7.

\textsuperscript{567} Current Trends and Issues, supra note 99 at 141.

\textsuperscript{568} Ibid. at 142.
Clearly during this transition period the province has a crucial role in advising First Nations communities and providing the practical resource support to enable the new agency to operate efficiently and effectively. If the two child welfare systems work together under a Children’s Charter, which they have both endorsed, the First Nations community will be able to accept these sources of help without feeling that its cultural autonomy and distinctive character are under threat.

The responsibility of the province towards First Nations children extends beyond simply ‘keeping an eyes on things’ and providing assistance and resources to ensure that children within their care are being cared for according to the accepted standards enshrined in the Children’s Charter. The most important duty laid upon the province in this time of transition is to ensure that its own legislative framework and the judicial process are sufficiently sensitive to First Nations cultural needs to ensure that the rights of an aboriginal child to its culture and heritage are being met whilst under provincial jurisdiction. It is inevitable that non-aboriginal institutions of child welfare will continue to have a role in delivering services to aboriginal people during the transition to control, and even when self-government is fully operational, for example, in many urban communities. However, a further benefit of successfully indigenising the system is that it will allow First Nations communities who are ready to operate free from provincial mandate and under their own systems of government, to adopt the system’s legislation, and policy and procedure guidelines as their own, at least in the interim. For many communities the introduction of their own child welfare legislation will take time and

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569 See above for an evaluation of provincial attempts to indigenise the current child welfare regimes.
resources they simply do not have at the moment but they will be ready to assume a
greater degree of responsibility than possible whilst working within the provincial system,

"It is not reasonable to expect that each Indian First Nations government would
be prepared to enact immediately a complete set of complex laws covering all
areas of jurisdiction. In a transitional phase, as each First Nations develop a body
of law, elements of the current non-Indian law will continue to apply in certain
ways."^570

Effective provincial legislation will allow them to simply adopt those provisions as their
own. It is also possible that a self-governing community will wish to enter into an
agreement with the provincial government to continue the existing services and
programs.^571 Consequently First Nations communities will continue to rely on provincial
legislation, policy guides, and the provincial court system for quite a considerable time in
the future.^572 The cultural legitimacy of provincial legislation will enable the aboriginal
agency to work within the system without compromising its future, and if provincial child
welfare law is successfully indigenised the community will be under less urgent pressure to

^570 Penner Report, supra note 465 at 66.
^571 Ibid, at 59.
^572 See above for the comments of Kelowa Edel on Xolhmi:lh's continued reliance on the provincial child
welfare regime as they move towards greater autonomy. Both the Yukon Self-Government Agreements
and the Nisga'a Agreement in Principle also display this continued reliance. They both specify that until
the community is able to pass its own child welfare legislation, provincial legislation will continue to
apply. Both agreements also envisage that the provincial court system will remain available for child
protection litigation until alternative systems are in place. Nisga'a Agreement, supra note 448 at General
Provisions, paras. 10, and 11, and Administration of Justice, para. 27; Teslin Tlingit Agreement, supra
note 449 para 13.5., and para 13.6. This was also the position taken by the Charlottetown Accord; the
Federal Policy Guide, supra note 120 at 10 - 11; and the Royal Commission, Restructuring the
Relationship, supra note 99 at 224. For example, para. 29 (amending sec. 35.4 (1) of the Constitution
Act) of Charlottetown Accord states, "Except as otherwise provided by the Constitution of Canada, the
laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of
Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal
peoples according to their authority." Draft Legal Text of the Charlottetown Accord (October 9, 1992).
free itself from the ‘colonial’ doctrines of the system. A Children’s Charter places a duty on the provincial system to ensure that the rights of aboriginal children, particular with regard to his or her cultural heritage, are secured by the provincial legal framework. Initiatives to sensitisise the dominant system are not a substitute for self-government. However, it remains an essential support system to the First Nations communities as self-governing agencies are developed, and the need to keep working to indigenise the current provincial systems is thus a fundamental premise of this thesis. Such ‘indigenisation’ would also be demanded by the introduction of a Children’s Charter.

4.2 The Fiduciary Duty of the Federal Government

The provincial government, under a Children’s Charter, will have a key role in helping the transition to self-government and in providing a sensitive child welfare service to those communities who do not have self-governing services in place. The role of the federal government is also of vital importance in working with First Nations communities to mitigate the immediate risks of self-government. Again the responsibilities of the federal government could be based on the standards and principles contained in a Children’s Charter. The federal government has always been reluctant to accept jurisdiction over First Nations child welfare despite having an adequate legal basis in Canadian law under

573 See, Current Trends and Issues, supra note 99 at 252 - 253. Hylton briefly discusses the tendency of the government to ‘tinker’ with the current system to avoid comprehensive structural change. He argues that where sensitising the system is proposed as the solution to aboriginal problems the policy should be seen as a manifestation of resistance to change. “Tinkering” with the system is here not proposed as the solution but a necessary component in finding the more fundamental answer.
However, the federal government has accepted financial responsibility for on-reserve First Nations children. The government has also been held to have a special fiduciary relationship with the First Nations people based on their historic relations with the Crown. The Supreme Court held in Guerin v the Queen that the Crown’s responsibility for First Nations whilst not falling precisely within existing legal categories is enforceable and trust-like. The case dealt specifically with land, but the fiduciary duty


The federal government is responsible for funding Xolhmi:lh, Usma, and Spallumcheen. Funding is based on a per diem rate for every child in care.

The fiduciary relationship is argued to be grounded in historical practices that emerged from dealings between the British Crown and the First Nations. The principles underlying these practices were formed into basic constitutional law and reflected in the Royal Proclamation issued by the Crown in 1763, “And whereas it is just and reasonable and essential to Our interest and the Security of Our Colonies that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their hunting grounds.” “A Question of Trust” supra note 494 at 271 - 272.


on the Crown as regards its dealings with the First Nations people has been more generally applied,

"Because of the Crown's relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada."

This position was clearly set down in Sparrow,

"...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

It is contended that the fiduciary duty between the Crown and the First Nations places a responsibility on the federal government to secure the successful transition to self-government. Slattery, for example, argues that the Crown's fiduciary relationship with the First Nations "entails a duty to respect and protect native powers of self-government." More particularly, a duty remains on the Crown to ensure that the First Nations people have sufficient resources and a financial base to develop and run their own child welfare programs. The financial responsibility previously admitted by the federal government for on-reserve First Nations children must now be transferred to the native controlled child welfare agencies,

"The federal government should bear in mind that the programs and services a First Nations will take on in perpetuity are constitutionally, legitimately, and by long-standing practices the responsibility of the Minister of Indian Affairs. The

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579  Restructuring the Relationship, supra note 99 at 242.


581  "A Question of Trust," supra note 494 at 275.
The minister has a continuing role to ensure that sufficient resources are provided in perpetuity, to enable those programs to be carried out properly.\textsuperscript{582}

The fiduciary relationship which makes this incumbent on the federal government should prevail beyond recognition of the right to self-government. There have been some suggestions that once self-government is recognised and implemented the Crowns fiduciary relationship will be extinguished. The federal policy guide of 1995 in which it recognises the inherent right to self-government, questions the survival of this special relationship,

"Aboriginal self-government may change the nature of this relationship. As aboriginal governments and institutions exercise jurisdiction or authority and assume control over decision making that affects their communities, they will also assume greater responsibilities for the exercise of those powers. As a result, Crown responsibilities will lessen. In this sense, the historic relationship between Aboriginal peoples and the Crown will not disappear, but rather will evolve as a natural consequence both of Aboriginal people’s changing role in shaping their own lives and communities and of the Crown’s diminished control and authority in relation to them."\textsuperscript{583}

The Federal policy statement goes on to argue that there is no justifiable basis for the continuance of the federal government’s fiduciary obligations in relation to the areas of jurisdiction over which an Aboriginal government has assumed authority and control.\textsuperscript{584}

However, the Report does recognise that the federal government retains ‘primary but not exclusive responsibility for on-reserve Indians and Inuit” in terms of financial provision.\textsuperscript{585}

\textsuperscript{582} Victor Mitander, Chief Negotiator, Council for Yukon Indians, in \textit{Aboriginal Self-Determination}, supra note 99 at 118.

\textsuperscript{583} \textit{Federal Policy guide}, supra note 120 at 12.

\textsuperscript{584} \textit{Ibid}.

\textsuperscript{585} \textit{Ibid}. at 14.
The Beaudoin-Dobbie Report also suggests that self-government will change the nature of the fiduciary relationship between the Crown and the First Nations. The report argues that the relationship will evolve into one similar to that which exists between the federal and provincial government.\(^{586}\) Both Penner and the Royal Commission take a counter position on the question of the continuing fiduciary relationship between the First Nations and the federal government,

"The Committee asserts that the special relationship between the federal government and Indian First Nations must be renewed and enhanced by recognising the right of the First Nations to self-government and by providing the resources to make this goal realisable."\(^{587}\)

"The government of Canada should acknowledge a fiduciary responsibility to support Aboriginal nations and their communities in restoring Aboriginal families to a state of health and wholeness."\(^{588}\)

This view is obviously to be preferred for the better protection of First Nations children. It would also seem to be the preferred view of the First Nations communities. At the time of the Charlottetown Accord the band leadership was very concerned that their special relationship with the federal government was being undermined. This was one of the chief reasons for its defeat.\(^{589}\) There is no reason why the fiduciary relationship between the Crown and the First Nations should cease upon the implementation of self-government. It is argued by Slattery that the trust relationship is enduring.\(^{590}\) He suggests that the

\(^{586}\) *Renewed Canada*, supra note 118 at 32.

\(^{587}\) *Penner Report*, supra note 465 at 122.

\(^{588}\) *Gathering Strength*, supra note 122, Recommendation 3.2.1 at 53.


\(^{590}\) See generally, "A Question of Trust," *supra* note 494.
fiduciary duty is simply one aspect of the Crown’s overall trust responsibilities to the peoples of Canada. A similar relationship, albeit different in substance, exists between the Crown and the provinces. The trust takes the form it does with aboriginal people because of the special historical relations between the Crown and the First Nations. The content of the Crown’s duty may certainly change over time with changing circumstances, but the basic fiduciary duty remains. Continuing recognition of the fiduciary relationship between the Crown and the First Nations is important, for the obligations of the federal government in the process of decolonisation extend beyond simply transferring existing child welfare program payments. It also requires the federal government to provide an adequate economic and resource base to self-governing communities to address the current high levels of unemployment and poverty. Until these economic problems are addressed child neglect and abuse is likely to remain a serious problem, regardless of who delivers child protection services. The federal government therefore has a key responsibility in helping to address the basic underlying cause for the misery of many First Nations children; it must make a substantial commitment to helping rebuild First Nations communities.

591 Ibid. at 270.
592 Ibid. at 270.
593 Ibid. at 275 - 277.
594 See e.g. The Penner Report, supra note 465 at 121.
595 For the links between poverty and child neglect see above at chapter one fn. 122.
There is therefore a duty imposed on the federal government to provide an adequate financial basis for self-government, and particularly for managing native controlled child welfare agencies. This duty, as directly related to the protection of children in Canada, should be subject to review under the Children's Charter. A substantial amount of investment over a long period of time will be required in First Nations communities if they are to make self-government a reality. For example, in the sphere of child welfare there will need to be substantial expenditure on training and education if there is going to be an adequate aboriginal human resource base to staff these agencies effectively. The fiduciary obligation on the federal government places them under a duty to ensure these funds are available.\textsuperscript{596} The various reports on aboriginal self-government have all recognised the problem of the inadequate aboriginal human resource base and called for sufficient financial support to ensure aboriginal controlled training initiatives can be put in place. The Penner Committee, for example, argued that it would be essential in the early years to ensure that training requirements were taken into account in determining the financial needs of First Nations governments.\textsuperscript{597} Unfortunately the Royal Commission comments that there are no plans or resources currently earmarked to train new aboriginal child protection workers or care workers once the new native-controlled agencies have been established.\textsuperscript{598} DIAND informed the Commission that an unspecified part of the agencies budget for administration could be used for workshops and training, and that

\textsuperscript{596} Victor Mitander, Chief Negotiator, Council for the Yukon Indians in \textit{Aboriginal Self-Determination}, \textit{supra} note 99 at 119.

\textsuperscript{597} \textit{The Penner Report}, \textit{supra} note 465 at 99.

\textsuperscript{598} \textit{Gathering Strength}, \textit{supra} note 122 at 51.
resources for staff training were built into the global budget for establishing a new agency.\textsuperscript{599} However the native controlled agencies reported that budget constraints do not allow them to sponsor training for new staff, or orientations for volunteer committees and the governing bodies.\textsuperscript{600} A Children’s Charter would mean that the way in which the government fulfils its fiduciary duty, and particularly decisions such as revealed by the Royal Commission on training expenditure, are subject to external review and criticism on the basis that it deprives aboriginal children of a fully trained and competent child protection service.

4.3 First Nations Governments

Under the current law it is not clear what action the provincial or federal government could take if a First Nations community unilaterally declared itself to be self-governing and was taking control over its own child welfare. When the Spallumcheen in B.C. took similar action under a band by-law, the provincial and federal governments did nothing.\textsuperscript{601} The legitimacy with which it could intervene seventeen years later is even weaker. According to the Royal Commission’s analysis of self-government, and the logical conclusion to be drawn from the principle of self-determination and the inherent right policy, a First Nations community does not have to accept the option of a gradual

\textsuperscript{599} Ibid.

\textsuperscript{600} Ibid.

\textsuperscript{601} Bryan Watt suggests that this was to avoid a difficult constitutional dispute. Bryan Watt, supra note 125.
transition to full autonomy and control as supported above. It could simply announce that it was assuming jurisdiction over its own child welfare. Moreover, under the current law once a community is fully self-governing and operating a child welfare system within the sphere of its inherent sovereignty, regardless of how it proceeded to that state, the legal basis for provincial or federal intervention should serious problems develop would seem to disappear. The child welfare agency is arguably no longer anyone's concern except the community it serves. A Children's Charter, on the other hand, would guarantee that the First Nations agency is bound to meet some fundamental minimum standards of care and that the basic rights of the children in its care are guaranteed. Moreover it will provide a cross-cultural external review body whereby the actions of the agency can be evaluated and critiqued, and recommendations made for ways in which it can improve its services.

5. The Hope for the Future

There is clearly a need to ensure that both the federal and provincial governments recognise their continuing obligations to support the First Nations people in the transition to self-government. By ensuring that the First Nations have this financial, administrative, and sensitive legal framework which addresses the needs of aboriginal children, the

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602 See above at chapter two pp. 100 - 108.

603 Restructuring the Relationship, supra note 99 at 215.

604 If federal or provincial jurisdiction is removed or transferred the government has no legal basis under the Canadian constitution on which to take action. It has no source of authority. This is of course unless there has been an agreement such as the Nisga'a have made whereby provincial standards will apply, the federal government has overriding legislative powers, and the Charter applies.
Immediate risks of transition to aboriginal control over child welfare will hopefully be assuaged. However, without any doubt the only way to ensure that First Nations children are adequately protected within the system is for the communities themselves to address the challenges they will face. Developing a child welfare system is a matter internal to the First Nations communities. The responsibility falls upon the First Nations leadership and the communities to find a system that respects their traditions and values whilst keeping their children safe. A Children’s Charter does not alter this basic premise. What it does provide, however, is for a way in which the actions and effectiveness of a First Nations controlled child welfare agency can be evaluated according to their own accepted standards. It will also provide an essential external mechanism by which any serious problems that develop with the system, and which violate the fundamental rights of First Nations children in its care, can be identified and addressed. Finally, it is hoped that the long term importance of a Children’s Charter in Canada will be that it secures a process by which the three orders of government can work together on a basis of mutual respect and equality and in a spirit of cooperation, to constantly review and evaluate their child welfare practices. By sharing power and sharing authority, and listening to each others perspectives and insights, they can work towards finding the most effective mechanisms of child protection for their communities that the pooling of the insights of these rich and diverse cultures can provide,

"There is much to be gained from members of these two communities entering into a shared discourse for the purpose of learning from each other, and about themselves as part of the human community. Such a discourse can be achieved only in a climate of open and free communication..."Obviously an ‘outsider’ cannot apprehend the Indian experience of their culture or the way they have suffered, but an ‘outsider’ [and this applies to both native and non-native
communities] may be able to see things and interpret events to which an 'insider' may be blind. 605

605 Surviving as Indians, supra note 51 at xvii.
Conclusion

“The Iroquois analogy for the institutional arrangement created by the Albany Treaty places each nation in a separate canoe or ship and envisions them moving side by side down the river of life, together, but independent of each other. Each nation keeps distinct in its boats all laws, traditions and cultures, and anyone preferring the institutions and way of life offered by the other boats is free to leap to it, but not to return to their original craft. A choice must be made and adhered to, as a person straddling the water with a foot in each craft can never truly belong in either canoe or in their cultures.”

The First Nations people of Canada have the inherent right to self-government. It has been a fundamental premise of this thesis that the First Nations people have been subjected to the gravest violations of their human rights and freedoms by a foreign colonial government. Moreover it is their families, and particularly their children, that have suffered most. The status quo whereby the independence and autonomy of the First Nations people is denied by the Canadian state cannot continue. The process of decolonisation must be moved forward. On the international political scene Canada likes to portray itself as a great ambassador of human rights. It must now live up to its own rhetoric. The inherent right to self-government demands recognition of the First Nations people as an equal ‘third order of government’ in Canada, with the right to exercise exclusive sovereign powers within their sphere of jurisdiction. Integral to the right to self-government is control over their own child welfare systems. The First Nations must be secured the space and autonomy to decolonise their children. They have the right to protect their children

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according to their own cultural practices, traditions, and laws. They must be allowed to break the ‘circle of abuse.’

Self-government is not however a panacea. The death of Lester Desjarlais necessitates that the implications of self-government for First Nations children, both its advantages and disadvantages, be given serious consideration. The reality of life in many First Nations communities is one of poverty, social problems and a ‘culture of dependency.’ The result is abuse. Autonomous native controlled child welfare systems bring with them significant advantages for First Nations children. They provide the opportunity for First Nations children to rediscover pride in their identity, to live and grow within their cultures and traditions, and to thereby take the central role in rebuilding their communities. However the current problems in many communities means that there are also risks. The dilemma this raises is whether it is possible to reconcile recognition of the autonomy and inherent sovereignty of the First Nations with ensuring that children like Lester Desjarlais receive competent and effective child protection services. Is it possible to employ an external mechanism to ensure basic standards of care and protection are being maintained? The federal government’s attempts to impose external limits, to be determined by them, on the right to self-government do not mark a new beginning for Canada, but a perpetuation of colonial ideology. The First Nations do not have to accept these limits. In post-colonial Canada it is possible to aim towards a new relationship which rejects the colonial tools of the past and begins from a position of mutual recognition and respect. Respect for cultural diversity and difference does not mean that common basic standards and values will be lost. However these common views and values must be developed by a
fully inclusive process that gives equal respect to both the native and non-native voice. It is contended that it is through this process that all three governments can be positively engaged in ensuring that self-government is not recognised at the expense of First Nations children.

The focus of this thesis has been to suggest one way in which the risks of self-government for First Nations children can be mitigated by ensuring some form of external review of child welfare, outside of First Nations communities, and without undermining their inherent right to self-government. However it is also a fundamental premise of this thesis that non-native child welfare systems in Canada are equally vulnerable to failing the children in their care. This thesis could have been written on the inherent dangers of non-native Canada being self-governing. The essential point is that child welfare is one key area where nobody seems to have the perfect answer.

The argument has thus been made for the development of a Children’s Charter in Canada, which will be developed through fully inclusive cross-cultural dialogue, and entrench fundamental ‘universal’ values and principles concerning the way we treat our children. The Charter will bind all orders of government in Canada and thus will bind all child welfare agencies whether native or non-native, and will provide a mechanism for the protection of the rights of both native and non-native children. The Charter would be enforceable through a cross-cultural Children’s Commission with powers of review, investigation, and to make recommendations for reform. A Charter which has been developed through fully inclusive cross-cultural dialogue, and which thus reflects the values of all the various cultures in Canada, will provide a means for the external
evaluation and review of child welfare agencies in Canada, whether native or non-native, according to their own values and principles. It will also provide an independent forum in which individual breaches of a child’s rights can be redressed. Moreover it will provide a culturally sensitive forum for non-native and native communities in Canada to cooperate and work together to find more effective methods of protecting all Canadian children. The communities share the common goal of keeping their children healthy and safe. Post-colonial Canada is in the privileged position where it can draw on the perspectives and insights of a wide variety of diverse and rich cultural traditions. It should take advantage of that privilege for the benefit of its children.

Richard Cardinal, Lester Desjarlais, and Matthew Vaudreil died because the systems that were supposed to keep them safe let them down. If the communities had worked together, maybe their deaths could have been avoided. The Iroquois Nation demand that the nation to nation relationship enshrined in the Wampum belt be respected and recognised. However, this thesis has argued that when the waters get difficult the two boats should work together to safely navigate their way towards the common goal,

“The Contour of the land and rivers that lie before us may not always be easy. We will travel these rivers as equals. We must all help one another along the way. Canada needs Aboriginal Peoples in this most uncertain and critical time.” (Mary Simon – President of the Inuit Circumpolar Conference)²

Select Bibliography

Books:


**Government Publications:**

Manitoba, Review Committee on Indian and Metis Adoptions and Placements, *No Quiet Place. The Final Report to the Hon. Muriel Smith, Minister of Community Services*, by Edwin C. Kimelman (Winnipeg, Manitoba Community Services, 1985).

Manitoba, Office of the Chief Medical Examiner, The Fatality Inquiries Act: Respecting the Death of Lester Norman Desjarlais (Brandon: Ministry of Social Services and Housing, 1992) (Associate Chief Judge Brian Dale Giesbrecht).


Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution (Ottawa: Minister of Supply and Services, Canada, 1993).


*Report of the Special Joint Committee for a Renewed Canada* (Ottawa: Supply and Services, Feb. 28, 1992) (Joint Chair: Hon. Gerald A. Beaudoin and Dorothy Dobbie).


*Draft Legal Text of the Charlottetown Accord* (October 9, 1992).


Canada, Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians, and the Government of the Yukon* (Ottawa: Ministry of Indian and Northern Affairs Canada, 1993).

Canada, Council for Yukon Indians, Yukon Territory, Canada Department of Indian and Northern Affairs, *Umbrella Final Agreement Implementation Plan* (Ottawa: Ministry of Indian Affairs and Northern Development, 1993).


Sto:Lo Nation, *Xolhmi:lh Proposals Concerning Off-reserve Program for Sto:Lo Children*.


**International Materials:**


State Report to the Committee on the Rights of the Child, *Canada*, UNCRC/C/11/Add.3.

*Draft Universal Declaration on the Rights of Indigenous Peoples* (as agreed upon by the members of the working group at its eleventh session) reproduced (1996) 9 St. Thomas Law Review 212.
Research Papers:


Articles:


D. Herman, "Beyond the Rights Debate" (1993) 2 Social and Legal Studies 25.


W. Kymlicka, "Liberalism, Ethnicity and the Law" (1988) Legal Theory Workshop Series (Faculty of Law, Toronto University).


C. LaPrairie, "The Young Offenders Act and Aboriginal Youth" in Joe Hudson, Joseph Hornick, and Barbara Burrows, eds., Justice and the Young Offender in Canada (Toronto: Wall and Thompson, 1988) 159.


B. Miller, "Contemporary Tribal Codes and Gender Issues" (1994) 18:2 American Indian Culture and Research Journal 43.

W. B. Miller, "Two Concepts of Authority" (1955) 57 American Anthropologist 271.


B. W. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980) 8 American Indian Law Review 199.


D. Sanders, "Indian Self-Government" (Faculty of Law, University of British Columbia, 1996) [unpublished].
D. Sanders, “Self-Government - A Summary” (Faculty of Law, University Of British Columbia, 1996) [unpublished].

D. Sanders, “The Penner Committee” (Faculty of Law, University of British Columbia, 1996) [unpublished].

D. Sanders, “Breaking From Uniformity: The James Bay Agreement, Bill C-52 and the Sechelt Self-Government Act” (Faculty of Law, University of British Columbia, 1996) [unpublished].


**Statute**

*Child, Family and Community Service Act*, S.B.C. 1996, c. 27.


*Child and Family Services Act*, S.S. 1989 - 90, c. 7.2.


*An Act Respecting Services to Children and their Families, the Protection of Children and Adoption*, S.N.S. 1990, c. 5.


*Children’s Act*, S.Y. 1984, c. 2.


Sechelt Indian Government District Enabling Act, S.B.C. 1987, c. 16.


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

Indian Act, R.S.C. 1985, c. I - 5.


Case Law:


Re C.J.W.S. (1987) 1 C.N.L.R.


Re T (C) [1990] Y.J. No. 162 (QL) (Yukon Terr. Ct.).


Re Katie's Adoption Petition (1962) 38 W.W.R. 100 (N.W.T.).


Newspaper Articles:

Justine Hanson, “Workers Reject Blame for Addict Mom” The Vancouver Sun (Saturday July 5, 1997).


Miles Morrisseau, "Native Self-Government a Two-Edged Sword" *The Toronto Star* (Thursday, August 20, 1992).


Judith Lavoie, "Ex-wife differs with Band Head on Abuse Issue" *Victoria Times-Colonist* (July 29, 1992).

Gerald Young, "Wilson Urges Native Abuse Probe" *Victoria Times Colonist* (Thursday July 30, 1992).

Gerald Young, "Intimidation Trail Leads to Court" *Victoria Times Colonist* (July 30, 1992).


Gerald Young, "Native Women Oppose Diversion of Sexual Assault Cases" *Victoria Times-Colonist* (Friday July 31, 1992).

Gerald Young, “Let Native Victims and Offenders Deal with own Cases - Peninsula Leader” Victoria Times Colonist (August 1, 1992).


Press Release:


Videos:

Richard Cardinal - Cry From the Diary of a Metis Child, Canadian Film Board, 1986.

Interviews:


Interview with Marika Czink, Case work Supervisor, Usma Family and Child Services, Nuu-chah-nulth (April 21st, 1997) Nuu-chah-nulth Tribal Council offices, Port Alberni.