UNCRC Day of General Discussion: Children without Parental Care

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The Chance to Make a Difference for this Generation of Indigenous Children: Learning from the Lived Experience of First Nations Children in the Child Welfare System in Canada

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Separated First Nations Children: The Role of the State

As one of the earliest countries to ratify the United Nations Convention on the Rights of the Child (UNCRC), Canada is in an optimal position to ensure that the rights of First Nations[1] children under the UNCRC are upheld. It has a surplus budget in the billions of dollars, stable government and a strong value for human rights and yet as this paper will show these advantages do not always result in the full implementation of the Convention with regard to separated First Nations children even when the problem is known to the federal government, within its immediate jurisdiction and promising policy solutions have been jointly developed with First Nations. The following summary of the issues impacting separated First Nations children in Canada suggests that inequitable funding, lack of respect for Indigenous laws and ways of caring for children, jurisdictional wrangling and Canada's reliance on the Indian Act[2] to define rights to Aboriginal peoples, including children, have significant and negative impacts on First Nations children and their families. The creation of independent monitoring bodies, operated by Indigenous peoples, to oversee state policies respecting children in state care are required in order to ensure that equitable, culturally based and effective, care are provided to these children and their families. To be most effective these monitoring bodies should have authority to mandate the state to implement progressive policy and practice solutions at both the systemic and case levels. Independent state level monitoring should also be coupled with far greater invigilation by international NGOs and UN bodies such as UNICEF which currently pay little attention to monitoring the safety and well being of Indigenous children in developed countries.

In contrast to the lives experienced by other Canadian children and youth, First Nations children are more likely to be born into poverty, to suffer health problems, maltreatment, incarceration, and placement in the child welfare system (Blackstock, Clarke, Cullen, D'Hondt and Formsma, 2004). Although provincial data collection systems vary, best estimates are that there are currently between 22,500 and 28,000 Aboriginal children in the child welfare system – three times the highest enrollment figures of residential school[3] in the 1940s (Blackstock, 2003.) In terms of First Nations children on-reserve, the numbers of children entering into care are tragically rising. Department of Indian Affairs and Northern Development (INAC) data confirms that between the years of 1995 and 2001 the number of Registered Indian[4] children entering into care rose an astonishing 71.5% nationally (McKenzie, 2002). **A recent report noted that one in every ten Registered Indian children was in child welfare care in three provinces as of the**

[1] The term First Nations describes persons identifying as original peoples of the land whose traditional territories typically reside between the 49th and 60th parallels longitude in Canada.
[2] The term Indian Act refers to the federal piece of legislation respecting Indians and lands reserved for Indians.
[3] Residential schools were operated by Christian churches and funded by the federal government under the authority of the Indian Act – their principle aim was to assimilate Indian children using education as a medium for achieving this. Residential schools operated in Canada from the 1870's to 1996.
[4] Registered Indian refers to any person who is eligible to be registered as an Indian pursuant to the Indian Act RSC 1985.

spring of 2005 as compared to one in 200 for other Canadian children (Blackstock, Prakash, Loxley and Wien, 2005.) This gap in life chances has been noted by the UN Committee on the Rights of the Child which specifically references Aboriginal children in approximately one third of its concluding remarks for Canada (UNCRC, 2003).

First Nations peoples are aware of these problems and are actively working to establish and operate First Nations Child and Family Service Agencies (FNCFSA) in Canada to respond to the needs of these children and their families. With the support of the federal and provincial governments there are now over 100 of these agencies across the country, the vast majority of which receive their statutory authority to deliver child welfare programs through the provincial/territorial child welfare statutes. The requirement to use provincial/territorial child welfare statutes poses a significant challenge for First Nations agencies which must try to adapt services that reflect the holistic, interdependent, and communal rights framework of the cultural communities they serve with the individual rights based child welfare statutes. An additional concern is the limited development of off reserve Aboriginal child welfare services in Canada.

Funding regimes for First Nations child welfare services vary depending on whether the agency is serving First Nations clients resident on- or off-reserve. With the exception of Ontario, which operates under a separate agreement, First Nations child and family service agencies servicing on-reserve clients are funded by a national funding formula known as Directive 20-1, Chapter 5. This funding formula was studied in a joint review conducted by the Department of Indian Affairs and Northern Development (INAC) and the Assembly of First Nations in 2000. This review provides some insight into the reasons why there has been such an increase in the numbers of Registered Indian children entering into care (MacDonald & Ladd, 2000.) **The review found that INAC provides 22% less funding <u>per child</u> to First Nations child and family service agencies than the average province (MacDonald & Ladd, 2000). A key area of inadequate funding is a <u>statutory range</u> of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment so that they can remain safely in their homes.** First Nations agencies report that the numbers of children in care could be reduced if adequate and sustained funding for least disruptive measures was provided by the Department of Indian Affairs and Northern Development (Shangreaux, 2004). The National Policy Review also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for First Nations Child and Family Service Agencies since 1995. **Economic analysis indicates that First Nations child and family service agencies should have received an additional $112 million in funding from 1999-2005 alone to simply keep pace with inflation (Blackstock, Prakash, Loxley and Wien, 2005).**

In total, the Joint National Policy Review on First Nations Child and Family Services (MacDonald & Ladd, 2000) included seventeen recommendations to improve the funding formula. **It has been over five years since the completion of NPR and the federal government has failed to implement any of the recommendations which would have directly benefited First Nations children on reserve. They have, to their credit,**

recently undertaken a national research project to inform a new funding authority but have not acted on outstanding recommendations for redress such as clarifying jurisdictional disputes. INAC documents obtained through access to information not only acknowledge that increased funding for least disruptive measures services would reduce the numbers of First Nations children in child welfare care, these documents confirm that the current level of funding provided by INAC is insufficient for FNCFSA to meet their statutory obligations under provincial child welfare laws – particularly with regard to least disruptive measures (INAC, 2002.)

Another key problem impacting the well being of First Nations children in care on reserve is jurisdictional disputes. A recent survey of 12 First Nations child and family service agencies indicated that the **12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident.** The most frequent types of disputes were between federal government departments (36%), between two provincial departments (27%) and between federal and provincial governments (14%). Examples of the most problematic disputes were with regard to children with complex medical and educational needs, reimbursement of maintenance, and lack of recognition of First Nations jurisdiction. Findings further indicated that jurisdictional disputes have significant impacts on the lived experiences of First Nations children – particularly those with special needs. Although both the federal and provincial governments embrace the principle that the safety and well being of the child is a paramount consideration, in practice jurisdictional disputes often supersede the interests of children. **The lived experience of this situation is saliently outlined in the case of Jordan, a young child in Manitoba who remained in hospital for a prolonged period of time due to jurisdictional wrangling between federal government departments as to which department was responsible for paying at home care costs. A sad update is that Jordan passed away before the jurisdictional dispute could be resolved and never had a chance to live in a family environment – the only home he ever knew was a hospital (Lavalee, 2005).** Recommendations have been forwarded to the federal government to implement a child first policy for resolving jurisdictional disputes. Under this principle, the government that first receives a request to pay for services for a status Indian child that are otherwise available to other Canadian children will pay for that service without delay or disruption. The matter can then be referred to a jurisdictional dispute resolution process for consideration. **In honor of Jordan and with the support of his family, we recommend that the child first principle to resolving governmental jurisdictional disputes in child welfare be termed Jordan's principle.**

Although Aboriginal agencies serving off–reserve Aboriginal peoples are funded by the provinces and territories and thus do not experience the disconnection between funding and authority to the same degree as on-reserve based agencies, they too require the vigorous investment in targeted prevention services to keep the growing numbers of Aboriginal children living off reserve at home with their families and connected to their diverse cultures and communities. The Aboriginal Justice Inquiry (2001) model being implemented in Manitoba should serve as a positive model for other jurisdictions in Canada and around the world. Under this model, all residents of Manitoba will be able to choose which culturally based child welfare authority they wish to receive services from:

First Nations Northern Authority, First Nations Southern Authority, Métis Authority or Mainstream authority. This model optimizes respect for the client's cultural identity whilst promoting service quality by allowing clients to choose amongst an array of child welfare providers.

Despite these and other risk factors facing First Nations children and youth, the effort so far has been to address these concerns in a piecemeal fashion that fails to consider the holistic needs of First Nations children and their interdependence with First Nations families, communities, and Nations. As noted in the research of Cornell and Kalt (2002) of Harvard University, the available evidence suggests that sustained social and economic well being in First Nations communities is preceded by self-government, suggesting a call for Canada to commit to the deliberate implementation of the recommendations of the Royal Commission on Aboriginal Peoples. Cornell and Kalt's findings are echoed by the research of Michael Chandler and Christopher Lalonde (1998), of the University of British Columbia, who found that **a decrease in Aboriginal youth suicide rates is correlated with increased evidence of First Nations' self-determination and government.**

Another complication for separated First Nations children and their families experiencing rights violations is the lack of redress systems. Unlike other Canadian children, First Nations children on reserve cannot appeal to provincial child advocates to redress the inequitable funding issues as the provincial advocates do not have jurisdiction over the federal government. They cannot appeal to provincial human rights tribunals as they too have no jurisdiction over the federal government. There is no federal children's commissioner or advocate or ombudsman to invigilate federal government policies respecting children in Canada and the Federal Human Rights Commission specifically excludes any matters relating to the Indian Act. First Nations children and families could theoretically access the courts but as 53% of Aboriginal families live below the poverty line and thus can hardly afford to finance a legal action, the pragmatic availability of this option is limited. **So not only do separated First Nations children face significantly less access to services as a result of federal funding policies – they are also effectively denied access to human rights redress systems under domestic law and regulations.** This means they must rely more heavily on international invigilation – which has been limited by the view by many international NGO's and UN bodies that the rights of Indigenous children in developed nations do not require their specific attention.

As a fundamental issue in human rights, Canada's reliance on the Indian Act to define which children are, or are not, "registered Indians" (also known as "status Indian") children and thus eligible for certain rights is archaic and out of step with national values of human dignity, equality and respect for cultural rights. The Indian Act is the oldest piece of legislation in Canada dating back to confederation. Its impact on the lives of First Nations children has been dramatic in scale and often tragic in consequence. The current version of the Indian Act that measures the eligibility of children to be considered "registered" or "status" Indians and, by process, which children are designated as "non registered" or "non status" Indians was used in the past by Canada to force Indian children to attend residential schools which were designed to assimilate Indian children

into Euro-western society. Many children were abused or died from preventable causes in these schools which operated in Canada until 1996 (Royal Commission on Aboriginal Peoples. 1996). **Various United Nations treaty body monitoring mechanisms have raised concerns that certain provisions of the Indian Act may be out of step with international standards on discrimination. We do not believe one needs to drill down to the contents of the Indian Act to raise concerns about its discriminatory nature – the very fact that this race based piece of legislation exists nearly ten years after the Royal Commission on Aboriginal Peoples tabled recommendations to Canada to set aside the Indian Act whilst preserving the rights of Indigenous peoples in Canada, should be a concern to every Canadian who believes in equality and certainly to international bodies who have as their role to monitor state compliance with international human rights legislation.** Consistent with the recommendations of the Permanent Forum on Indigenous Issues we recommend that state parties recognize the right of individuals to self- identify as Indigenous peoples, including children and young people. The application of the Indian Act to define the status of Indian children effectively separates them from one of the most fundamental and intimate of personal rights – the rights to be who they are and belong to a community.

There are more First Nations children in the care of the state than at any time in the history of this country. More importantly, Canada is in an excellent position to implement the changes needed to maximize the number of First Nations children who can stay safely at home in the care of their families and communities. **With a surplus budget measuring in the billions of dollars, and progressive policy solutions already developed, it is simply a matter of what Canada believes are its priorities. Separated children and young people are amongst the most vulnerable and marginalized in our society. Surely they should place first in the interests of a wealthy nation that has signed so many human rights conventions – including the Convention on the Rights of the Child and the World Fit For Children.**

ANNEX 1: Recommendations

1. State Parties should be required to adequately support the development of independent monitoring bodies to ensure the rights of separated Indigenous children are upheld. Specific attention should be made to ensuring an equitable distribution of state resources, the recognition of the right of Indigenous peoples to make the best decisions for Indigenous children and young people and access to rights redress systems under domestic law or procedure.

2. International NGOs and UN bodies relevant to child rights and Indigenous peoples' rights must step up their roles in monitoring the rights of Indigenous children and young people worldwide, including in developed nations.

3. States must fully recognize the right of Indigenous peoples, including children, to self-identify as Indigenous peoples thus affirming their right to be connected to their cultural, racial and spiritual identity.

4. State Parties should be encouraged to adopt Jordan's principle where the interests of the child come first in the resolution of any inter-governmental jurisdictional disputes.

5. Consistent with the recommendations of the Permanent Forum on Indigenous Issues, State Parties must support Indigenous communities to collect disaggregated data on the diverse cultural groups of Indigenous children at the international, national, regional and community levels to support improved policy and practice responses to separated children and their families.

6. Poverty and inadequate housing are key concerns for Indigenous children. State parties should be required to report specifically on the poverty levels experienced by Indigenous children and young people as well as concordant state programs to redress poverty and inadequate housing.

7. Consistent with recommendations arising from the Day of General Discussion on Indigenous Children, a worldwide study on separated children is encouraged with specific and focused attention to the experience of Indigenous children.

8. Indigenous children continue to be overrepresented in school drop out rates, special education programs and amongst children classified with behavioral

challenges. This calls for focused inclusion of Indigenous history, culture, and language into school curricula giving equal footing to Indigenous ways of knowing and being. This would not only validate the experience of Indigenous children but would also promote greater awareness amongst the population in general creating a better environment for respectful coexistence.

9. There must be greater inclusion of Indigenous peoples, particularly those working directly with children and their families, and Indigenous NGO's in the dialogue, implementation, and measurement of the efficacy of the United Nations' *Convention on the Rights of the Child* and the *World Fit for Children*. The emerging NGO Working Group for the CRC Sub Group on Indigenous children is an encouraging first step in this direction.

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