



Proposal for a First Nations Child and Family Caring Act

Discussion Paper

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One aspect of any reform of the child welfare system for the indigenous peoples of Canada should be the enactment of federal legislation. Like the U.S. Indian Child Welfare Act (“ICWA”) and Canada’s Mi’kmaq Education Act, such legislation would empower indigenous communities throughout the country to set up their own child welfare systems. Moreover, it would respond to the recent decision of the Canadian Human Rights Tribunal and to the calls for action of the Truth and Reconciliation Commission by guaranteeing that those systems would be adequately resourced and that, when provincial legislation applies, it is subject to certain minimal standards. It would also contain provision mandating compliance with Jordan’s Principle.

The following outline of such legislation was presented by Sébastien Grammond at Osgoode Hall Law School’s Re-Imagining Child Welfare symposium on 21 October 2016. A more complete discussion of the proposal will appear in the *Journal of Law and Social Policy*.

Purpose

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

- To enable First Nations to care for their children;
- To prevent, as far as practicable, the removal of First Nations children from their communities;
- To ensure that First Nations children are entitled to receive child and family caring services that are comparable in quality to those offered to other Canadian children;

- To ensure that the child and family caring services offered to First Nations children take into account the legacy of the Indian residential schools and the specific intergenerational harms caused by those schools, as well as the legacy of the sixties’ scoop;
- To ensure that the child and family caring services offered to First Nations children take into account First Nations laws, traditions, cultures and world views;
- To ensure that First Nations exercising their jurisdiction or delegated authority have adequate resources to provide child and family caring services that are comparable in quality to those offered to other Canadian children while taking into account the specific needs of First Nations children and the costs of providing those services in First Nations communities.

First Nations Jurisdiction

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

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

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

The Act will provide that First Nations laws may



confer decision-making authority on independent First Nations decision-makers or on judges empowered to decide similar matters by provincial legislation.

Delegated First Nations Agencies

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

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

Application of Provincial Laws

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

- If a First Nations child must be placed outside his or her family, every effort should be made to place him or her, by order of priority, (a) within the extended family; (b) within the same community; (c) within the same nation; (d) in another indigenous family; (e) in a non-indigenous family.
- Any assessment of a First Nation child's best interest or decision concerning such a child must take into account the desirability of maintaining the child's connection with his or her culture and community, as well as the legacy of the Indian residential schools.
- The assessment of a First Nation child's best interest must not be based on poverty or the socio-economic conditions of the relevant First Nation.
- The child's First Nation must be notified and a representative of the First Nation must be allowed to make representations to the judge as

to what is in the best interest of the child.

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

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

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

Funding and Dispute Resolution

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

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

- Core funding;
- Funding of preventative and first-line services;
- Funding of intake, investigation and maintenance services, including legal costs;
- Capital funding;
- Adjustments for remoteness;

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- Yearly adjustment for inflation;
- Funding to support the development of First Nations laws and child and family caring systems.

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

Jordan's Principle

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

government.

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

Statistics, Awareness and Training

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

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

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

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