

**First Nations Fact Sheet:
A GENERAL PROFILE ON FIRST NATIONS
CHILD WELFARE IN CANADA**

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Introduction

The delivery of child welfare services to First Nations* children, families and communities is as diverse as the Aboriginal peoples within Canada. In addition to its diversity, the field of First Nations Child Welfare is unique in that culture is a significant and key ingredient incorporated into the delivery of child welfare services to First Nations children and families. Child welfare practice in First Nations communities also varies considerably from agency to agency and from region to region depending on how First Nations Child and Family Service Agencies (First Nations CFS Agency) organize themselves. The topics below provide a general profile of factors that distinguish First Nations child welfare agencies from the mainstream child welfare agencies operating in Canada. Currently there are approximately 125+ First Nations Child and Family Service Agencies operating across Canada.

Provincial Laws of General Applicability

Prior to the 1950s, the government of Canada and others, in the absence of legal authority, executed child welfare interventions with First Nations families living on reserve. Up until that time, the Indian Agent intervened on an emergency basis if a child on reserve was abandoned or abused, but without a legal basis for the action. In most cases, the response to suspected abuse of an Aboriginal child was to send the child to a residential school. From the 1950s on, provincial authorities became more involved in child welfare matters on reserve, again without a clear delineation of authority between the two levels of government.

Provincial laws of general applicability were first imposed on First Nations in 1951 when a number of revisions were made to the federal *Indian Act*, which included the addition of Section 88. Section 88 of the *Indian Act* provides that a provincial law of general application, subject to certain restrictions, is applicable to First Nations people living within any province, regardless of the federal government's constitutional responsibilities. According to the *Constitution Act, 1867, 1982*, laws of general application such as provincial child welfare fall under the jurisdiction of provinces, while First Nations peoples and the lands reserved for them, fall under the jurisdiction of the federal *Indian Act*. Although the *Constitution Act* provides Canada with the authority to enact legislation on behalf of First Nations peoples in areas such as child and family services, Canada has never done so. Section 88 essentially provides provinces with the legal capacity to administer provincial child and family services to people outside their constitutional jurisdiction (Bennett, 2001). Section 88 reads as follows:

* "First Nations" refers to those persons identified and registered as "Indians" within the meaning of the federal *Indian Act* legislation. Although the term "First Nations" is used primarily in this fact sheet, no legal definition of it exists. The term "Aboriginal" refers to one three groups of people (First Nations, Inuit and Métis) who have been constitutionally recognized under the *Constitution Act, 1982*.

88. *Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of generally application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.*

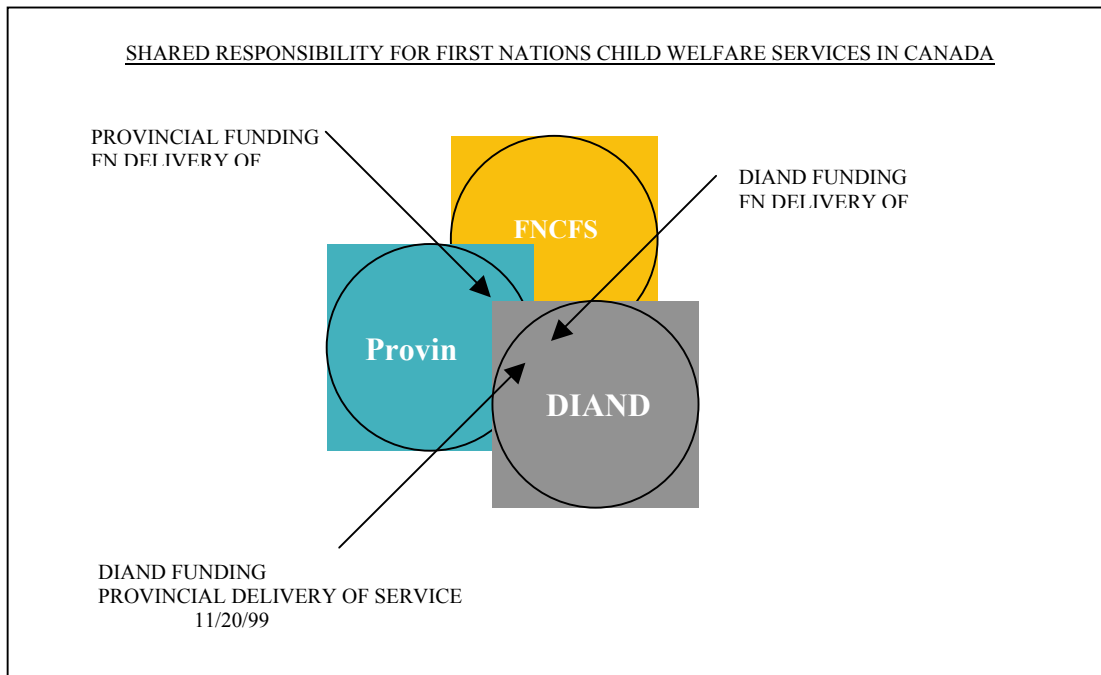
Within the context of child welfare, section 88 of the *Indian Act* relinquishes the federal government from legislatively enacting specific First Nations child welfare laws, even though First Nations peoples are a constitutional responsibility (Little Bear, 1992). The federal government asserts that provinces have legal jurisdiction and responsibility in all matters that are not specifically mentioned in the *Indian Act*. As there is no explicit reference to child welfare in either the *Indian Act* or the *Constitutional Act, 1867, 1982*, it has subsequently been deemed to be the responsibility of the provinces. The Supreme Court of Canada confirmed in 1976 that the legal jurisdiction of the Provinces' ability to extend child welfare services onto reserve, regardless of the provincial incursion into a federal sphere of responsibility (*Natural Parents v. Superintendent of Child Welfare, 1976, 60 D.L.R. 3rd 148 S.C.C.*) was valid. The only First Nation community in Canada that can circumvent the application of provincial child welfare laws or standards is the Spallumcheen First Nations in British Columbia. The Spallumcheen First Nation created a by-law to conduct its own child welfare program within the mandate of the *Indian Act*, which extends to members living on or off reserve. The Spallumcheen by-law has been challenged numerous times before the Canadian courts but in all instances the jurisdiction of the Spallumcheen First Nation has been upheld with the by-law confirmed to be in operation to the exclusion of provincial jurisdiction (Union of BC Indian Chiefs, 2002). Subsequent attempts by other First Nations to enact child welfare by-laws similarly through the *Indian Act* have been unsuccessful (MacDonald, 1985).

Legislative Jurisdiction of First Nations Child and Family Service Agencies

As a result of Section 88 and the general laws of applicability, the legislative jurisdiction exercised by First Nations governments in providing child welfare services on reserve are derived from the delegation of authority from the provinces. First Nations CFS agencies are expected by the Provinces, their communities and DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20-1. The Directive requires that First Nations CFS Agencies enter into agreements with the provinces to arrange for the authority to delivery a range of comparable child and family services on reserve.

To facilitate the provision of child and family services to First Nations children and families, First Nations must enter into essentially two agreements – the first is with the province/territory governments to set out the delegation of authority which the First Nations CFS Agencies will exercise. These agreements allow for transfer of the statutory powers and authority to First Nations or their appropriate governing bodies to administer child and family services according to provincial legislation. The second agreement,

which First Nations must enter into, is with the federal government for funding so that First Nations CFS Agencies can carry out child and family services on reserve. Consequently, there is a complex, three party, relationship between FNCFS agencies, the provinces and DIAND, all of whom are responsible for the funding and delivery of child and family services in Canada. The following chart, reproduced from the National Policy Review conducted in 2000 (McDonald et al, 2000, p. 88), illustrates this relationship:



Funding to First Nations for the Delivery of Child Welfare

Directive 20-1 is a national funding formula administered by the Department of Indian and Northern Development (DIAND), which restricts funding to “eligible children on reserve.” A population threshold (based on children 0-18 years of age) influences how much funding each First Nations CFS Agency receives.

Directive 20-1 came effect April 1, 1991. According to the policies of Directive 20-1, in most provincial jurisdictions, First Nations CFS Agencies are incorporated under the provincial child welfare legislation, which requires that they comply with provincial legislation and standards. Funding to First Nations CFS Agencies to provide child welfare services is provided federally through Directive 20-1 (except in Ontario where the First Nations Child Welfare agencies are funded under a different financial arrangement. Ontario First Nations CFS agencies are not funded directly by DIAND but instead are funded through unique provisions set out under the 1965 Indian Welfare Agreement. Under this agreement, First Nations CFS Agencies situated in Ontario are funded by the Province of Ontario which is in turn, reimbursed by the federal government

based on a major share of the costs for social assistance and child and family services) (Canada and the Province of Ontario, 1965).

The five most common jurisdictional models developed by First Nations CFS Agencies as a result of the imposed legislation and funding procedures are as follows:

1. *The Delegated model*: This is the most common model of jurisdiction in part because the DIAND funding formula known as Directive 20-1 requires First Nations child and family service agencies to operate pursuant to this model in order to receive funding for child welfare service delivery on reserve. In this model, the provincial or territorial provincial child welfare authority delegates Aboriginal child and family service agencies to provide services to Aboriginal peoples either on or off reserve pursuant to the child welfare statute(s). The mechanism for delegation varies from province to province but in all cases the delegation is formalized in either an agreement or by an Order in Council. Delegation can take the form of full delegation (operating with full child protection and prevention authority) also known as fully mandated agencies or partial delegation (operating with partial delegation to provide support and prevention services to families whilst the provincial child welfare authority provides child protection services) (Blackstock, 2003).
2. *Pre-Mandated Child and Family Services*: Aboriginal and First Nations child and family service agencies operating as pre-mandated child and family service organizations provide prevention and family support services pursuant to agreements, including licensing agreements, with the provincial/territorial government. These agencies, which are principally located in Ontario, view this as a capacity building measure pending receiving adequate resources and recognition of jurisdiction, through the delegated model or tribal based authority, to provide a full range of child protection and prevention services. Pre-mandated agencies provide an essential service by ensuring that clients have access to culturally based preventative and foster care resources thus making a significant contribution to supporting Aboriginal and First Nations communities to care for their children, youth and families (Blackstock, 2003).
3. *The Band By-Law Model*: The *Indian Act* allows for Indian Band Chiefs and Counsels to pass band by-laws that apply on reserve. In the 1980's the Spallumcheen First Nation in British Columbia passed a by-law indicating that they would have sole jurisdiction over child and family services on reserve. For all band by-laws the signature of the Minister of Indian Affairs is required in order for them to take effect and the Spallumcheen First Nation, after significant advocacy, receive the support of the Minister of Indian Affairs for the by-law. In addition to receiving the support, and thus the funding, of the federal government the Spallumcheen First Nation sought out the recognition of the provincial government. Again after significant advocacy on the part of the Spallumcheen First Nation, the provincial government recognized the band-by law authority.

Under this model, the Spallumcheen First Nation provides child and family services to on-reserve residence based on its traditional jurisdiction of child and family services (Blackstock, 2003).

4. *The Tri-partite Model:* Under this model of governance, the provincial and federal governments delegate their law making authority to a First Nation. The delegation of this law making authority often requires that the First Nation meet provincial standards. One example of this model is the Sechelt First Nation in British Columbia. Pursuant to the tripartite agreement, the Sechelt First Nation has authority to develop and implement tribal based authority for child and family services. Consultations have begun with community Elders, leadership and members to design the child and family services justice model. Although Sechelt currently operates according to the delegated model, the implementation of the new jurisdictional model is expected within the next couple years. This model does afford a greater degree of recognition of tribal based authority than the traditional delegated jurisdiction model; however, it is still administered within the context of delegation from the province/territory and federal government. Thus some First Nations and Aboriginal groups prefer to pursue models that recognize in full their jurisdictional authority to care for children, youth and families (Blackstock, 2003).
5. *The Self-Government Model:* This model recognizes the jurisdictional authority of Aboriginal peoples in the area of child and family services. This authority is often based on treaties such as in the Nisga'a Treaty, which includes provisions for the development of Nisga'a laws governing child and family services so long as those laws meet provincial standards. Although the Nisga'a are currently operating a delegated child and family service agency as a capacity building measure, plans are underway to draft and implement tribal laws. This model has the benefit of being based on the worldview, cultures and histories of the Aboriginal peoples and affirms, versus competes with, traditional child and family caring processes. The failure of the provincial/territorial child welfare statutes to make a meaningful difference in the safety and well being of Aboriginal children supports the need to explore and support culturally based jurisdictional models. There are many First Nations and Aboriginal groups across Canada that have actively expressed an interest in moving in the direction of establishing self-government models of child welfare and thus this will be a growing area of development in the coming years (Blackstock, 2003).
6. *Aboriginal Peoples and Nations not served by an Aboriginal Child and Family Service Agency:* It is important to acknowledge that despite the expansion of First Nations CFS Agencies in recent years, there continue to be some First Nations and other Aboriginal peoples who are not serviced by Aboriginal or First Nations CFS Agency. Reasons for this range from being small economy of scale resulting in limited financial and human resources to operate an agency to lack of willingness on the part of provincial/territorial governments to support Aboriginal agency development to individual communities feeling satisfied with

services being delivered by the province/territory often in consultation with the Aboriginal community. In these cases the provincial and territorial governments normally provide statutory child and family services to community members so it is essential that provincial/territorial child welfare system administrators, social workers, and social services contractors, are familiar with, and respectful of, the cultures, histories and contexts of Aboriginal communities in their areas. It is strongly suggested that protocols be developed between Aboriginal communities and provincial/territorial child welfare agencies to ensure meaningful community involvement and support in the care and support of children, youth and families from their communities (Blackstock, 2003).

Off reserve, the provinces and territories typically funds service delivery of child welfare to First Nations and other Aboriginal peoples. The nature and extent of services provided to First Nations off reserve and other Aboriginal peoples varies from province to province. The Aboriginal Justice Inquiry - Child Welfare Initiative in Manitoba provides a promising model for funding of off reserve service delivery, which recognizes the right of Aboriginal peoples to care for their children as well as the diversity that exists within the Aboriginal community wherever they may be resident in the province. The Aboriginal Justice Inquiry – Child Welfare Initiative in Manitoba has since seen the creation of four child welfare authorities, two of which will oversee service to the First Nations of Southern and Northern Manitoba, one Métis authority and a remaining authority that will provide child welfare services to the non-Aboriginal population within Manitoba. This initiative importantly involves Aboriginal peoples in the design and decision-making processes with respect to the drafting of child welfare legislation, standards and funding mechanisms (Aboriginal Justice Inquiry – Child Welfare Initiative, July 2001; Blackstock, 2003).

In June 2000, the Assembly of First Nations and the Department of Indian Affairs and Northern Development published a report entitled *Joint National Policy Review on First Nations Child and Family Services* which reviewed Directive 20-1 and provided 17 recommendations for improvements to the current policy including establishing mechanisms to coordinate provincial jurisdiction with federal funding, increase funding for least disruptive measures programs and to recognize First Nations jurisdictional models of delivery. The implementation of these important recommendations are yet to be realized and continued efforts are required in order to ensure that these recommendations are realized in the daily lives of First Nations children, youth and families (Blackstock, 2003).

Conclusion

The extension of provincial child welfare jurisdiction on reserve was viewed as yet another attempt at cultural genocide, which continues to contribute to the destruction of Aboriginal cultures (Giesbrecht, 1992; Hudson and McKenzie, 1985). Many First Nations leaders point out that in the absence of specific federal legislation, it does not give provinces rights over their people. In the meantime, First Nations governments and

their child welfare agencies have reluctantly accepted to implement provincial child welfare legislation. Provincial jurisdiction, for the time being, is accepted as an interim arrangement until such time as specific First Nations legislation is developed and enacted by First Nations through the self-government process. Although traditional familial systems have been disrupted by colonialism, First Nations people have and will continue to exercise responsibility for the welfare of their children within their communities by providing services in a multitude of ways that honor and is reflective of their diverse cultures and worldviews.

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