

To Look and To Play Project Fellow, 2022–23

Reflexive Essay

Project Title: Delivery of on-reserve Indigenous child welfare services: a case study from British Columbia and federal legislation

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September 2023

Research Paper Summary: This research paper examines the cooperative arrangements between the federal government, provincial governments, and Indigenous communities behind the delivery of on-reserve Indigenous child welfare services. It focuses on a specific case study from British Columbia to illustrate the complexity and opacity of these arrangements, which pose challenges to users and creates obstacles for Canada's reconciliation with Indigenous peoples.

Introduction

The Truth and Reconciliation Commission brought to light the intergenerational trauma that Indigenous peoples face as a result of their experiences in Indian residential schools. The discovery of mass graves near former sites of residential schools continues to be a sobering reminder of Canada's checkered past with Indigenous peoples. Few, however, recognize that existing policies and systems perpetuate these harms, further entrenching the inequities between Indigenous and non-Indigenous Canadians. The delivery of child welfare services is a case in point. Highlighting the urgency of addressing Indigenous child welfare issues, the Truth and Reconciliation Commission made them the subject of its first five Calls to Action.

As part of the 2022 summer seminar, *Cooperative Federalism and Intergovernmental Relations*, led by Professor Johanne Poirier, I presented an initial paper that sought to illustrate the cooperative arrangements between different levels of governments and Indigenous communities to facilitate on-reserve child welfare service delivery. What began as an exercise to uncover the technicalities of constitutional law behind this policy area opened my eyes to the devastating impacts that Indigenous communities continue to face in the existing system. I soon realized that this month-long intensive seminar was barely enough to scratch the surface of two very complex policy areas: child welfare broadly and Canada's relationship with Indigenous peoples. The *To Look and To Play* project fellowship allowed me to expand on the research I had conducted by examining more closely Canada's complex jurisprudence on Indigenous issues and by following judicial and legislative developments that have occurred since I first presented the paper in June 2022. The initial research also motivated me to enroll in the course, *Droit de la famille*, in Fall 2022 with Professor Michaël Lessard to better understand the concept of the "best interest of the child" used frequently in child welfare legislation. In this reflexive essay, I first briefly describe the structure of my research paper. I then share two reflections from the research.

Project summary

My research paper sought to elucidate the complex, yet often opaque, intergovernmental relations behind Indigenous child welfare service delivery in its current state. I focus on British Columbia's experience for two reasons. First, the province's long history of child welfare policies and legislation offers an instructive example for understanding this policy area. Second, a patchwork of legal regimes governs Indigenous child welfare delivery across Canada. This landscape means that a description resting on generalities offers few useful insights.

Part 1 of the paper points out Indigenous children’s overrepresentation in Canada’s child welfare system and its chronic underfunding. These issues call for a critical examination of the legal instruments that give existing institutions authority and resources to manage Indigenous child welfare—a first step to addressing inequities. **Part 2** describes the significant methodological challenges faced during the research, which points to the opacity of these cooperative arrangements. **Part 3** provides an overview of the constitutional division of powers between the Canadian federal and provincial orders, introducing a layer of complexity for Indigenous child welfare, which some has described as a “jurisdictional wasteland.” **Part 4** examines British Columbia’s overall funding and administrative arrangement for Indigenous child welfare delivery. Focusing on NIL/TU,O Child and Family Services Society which serves seven First Nations on Vancouver Island, it identifies the specific cooperative techniques and instruments that structure the interactions between the federal and BC governments and Indigenous governing bodies behind the organization. **Part 5** discusses *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, the federal act adopted in 2019 and recent legislative developments in British Columbia to align its Indigenous child welfare legal regime with the federal act. The Quebec government’s challenge to the federal act’s constitutionality is now awaiting a Supreme Court judgment.

Reflection

First, in dissecting the constitutional question of how different orders of governments cooperate within the Canadian federal system, I gained a deep appreciation of the real impact that institutional design and laws have on people’s everyday lives. Often, when we think of harms that Indigenous peoples have suffered, we focus on laws and policies that are expressly and egregiously discriminatory. Indigenous child welfare is a policy area where both provincial and federal governments have used “division of powers” arguments to shirk their responsibilities. Chronic underfunding, disparity of service quality, and systemic discrimination are all cloaked behind a web of seemingly innocuous, mundane legal instruments. “Lifting a veil on federalism” is, therefore, a valuable enterprise from both user and systems perspectives.¹ From a *user perspective*, this analysis is useful for understanding which service provider is responsible for a child protection case and why one is offered different types (or quality) of services from others. From a *systems perspective*, any effective corrective action that meaningfully contributes to Canada’s reconciliation with Indigenous peoples requires an incisive understanding of this complexity.

Second, the 2019 federal act illustrates the challenges of fixing a deeply broken system. How do you fix a train station while keeping the train running? In attempting to give Indigenous communities voice and space to manage child welfare, the federal act is superimposed onto a complex system. Navigating this system requires broad engagement with all the actors involved—provincial governments and Indigenous communities—something that the Quebec Court of Appeal emphasized in its judgment regarding the act’s constitutionality.² Many commentators were skeptical of the federal act, seeing it as an empty gesture that fails to address systemic issues. However, British Columbia’s adoption of a new Indigenous child welfare act that affirmed

¹ See Johanne Poirier, “Intergovernmental Relations in Federal Systems: Ubiquitous, idiosyncratic, Opaque and Essential”, online: *50 Shades of Federalism* <50shadesoffederalism.com/theory/intergovernmental-relations-in-federal-systems-ubiquitous-idiosyncratic-opaque-and-essential> [perma.cc/69KZ-LS2M].

² See *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 at para 562.

Indigenous right to self-government in child welfare gives us reason to be hopeful. While the federal act may be an inadequate response, it could have some symbolic value in ushering change.

Amidst these legislative and judicial developments that add to the complex web of legal instruments behind Indigenous child welfare, the *voice* of the child is strikingly absent. As more Indigenous governing bodies exercise their right to legislate and govern child welfare services through the federal and BC statutes, it may be worth examining whether Indigenous law takes a more holistic approach that considers children's voices in determining their "best interest."

(1,008 words)

Annotated bibliography

Below is a selection of sources that are most relevant to the area of "children and the law." For the full bibliography, please see the research paper.

LEGISLATION

An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, SC 2019, c 24.

- Adopted in 2019, this federal act expressly affirms the right of Indigenous self-government over child and welfare services. Most notably, it allows Indigenous governing bodies to exercise its legislative authority on child welfare services by giving notice of its intention or entering into a coordination agreement with the provincial and federal governments. The Quebec Court of Appeal upheld the constitutionality of the act but struck down the provisions that give Indigenous law the force of law as federal law, prevailing over provincial law through the doctrine of federal paramountcy.

Child, Family and Community Service Act, RSBC 1996, c 46.

- This is the central piece of legislation that governs child welfare services for Indigenous and non-Indigenous residents of British Columbia. It gives the Minister of Children and Family Development statutory authority to enter into "delegation agreements" with Indigenous organizations (known as "Delegated Aboriginal Agencies"). This delegation then provides these agencies with the statutory authority to manage child welfare services. Other non-statutory instruments (e.g., directives, policies, agreements) that interact with this act establish a complex "matrix" that defines different levels of authority that these agencies may have, depending on whether they meet certain criteria.

Indigenous Self-Government in Child and Family Services Amendment Act, SBC 2022, c 40

- Adopted in November 2022, this act is the latest addition to the legal regime that governs child welfare service delivery in British Columbia. Despite the ongoing legal challenges to the federal act, this statute affirms the right to Indigenous self-government on child welfare services in British Columbia. Most importantly, it aligns with the federal act by giving Indigenous law force to prevail over the *Child, Family and Community Service Act* where there is conflict or inconsistency.

JURISPRUDENCE

First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2016 CHRT 2.

- This is a seminal case in which the Canadian Human Rights Tribunal found that the federal government's funding formulas and provincial/territorial agreements regarding Indigenous child welfare services were discriminatory. The federal government claimed that its role in this policy area was "strictly limited to funding." In response, the Tribunal found that the federal government's "programming/funding approach does not diminish [its] constitutional responsibilities" shared with the provinces/territories (para 83).

NIL/TU,O Child and Family Services Society v B.C. Government Services Employees' Union, 2010 SCC 45.

- This case put NIL/TU,O, an Indigenous agency that delivers on-reserve child welfare services to seven First Nations on Vancouver Island, in the spotlight. Although the labor law issue at the heart of the case was not of interest to my research, the way the Court analyzed the issue provided useful insights for understanding the cooperative arrangements behind Indigenous child welfare service delivery.

Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families, 2022 QCCA 185.

- This recent decision provides a useful overview of child welfare services in Canada and how it has evolved over the years. The constitutional division of powers analysis sheds light on the challenges in addressing systemic inequities. It also underlines the importance of engaging *all* actors — provincial governments and Indigenous communities — in forging a path ahead.

SECONDARY MATERIALS: MONOGRAPHS

Foster, Leslie & Brian Wharf, eds, *People, Politics, and Child Welfare in British Columbia* (Vancouver: UBC Press, 2007).

- This edited volume gives a useful overview of how child welfare services developed in British Columbia, set in the context of how the federal government gradually shirked its responsibility in this policy area. It is particularly useful for understanding the many legislative and policy developments in the province over the years. Some chapters are specific to Indigenous children, while others cover child welfare services more broadly.

SECONDARY MATERIALS: ARTICLES

Armitage, Andrew, "Lost Vision: Children and the Ministry for Children and Families" (1998) 118 BC Studies 93.

- This article provides a helpful overview of the legislative and policy changes on child welfare in British Columbia following the *Gove Inquiry into Child Protection* in 1994–5. It traces the events that gave rise to the development and implementation of the *Child, Family, and Community Services Act*. It is helpful for understanding the BC legislature's intention in adopting the act, as well as how the act fell short in addressing the recommendations from the *Gove Inquiry*. It also provides useful context on the current arrangements with Delegated Aboriginal Agencies.

Blackstock, Cindy, "Residential Schools: Did They Really Close or Just Morph Into Child Welfare?" (2007) 6:1 Indigenous LJ 71.

- This article provides the historical context to the case, *First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, mentioned above.

Grammond, Sébastien, “Federal Legislation on Indigenous Child Welfare in Canada” (2018) 28:1 JL & Soc Policy 132.

- This article examines the constitutional division of powers issues with Indigenous child welfare delivery. It also proposes a model federal statute that recognizes Indigenous peoples’ right to govern child welfare services, which is helpful for assessing the 2019 federal act.

Metallic, Naomi Walqwan, “A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case” (2018) 28:2 JL & Soc Policy 4.

- Following the landmark decision from the Canadian Human Rights Tribunal on the federal government’s failure to fulfill its obligations in delivery adequate child welfare services to Indigenous peoples, Metallic examines the design, management, funding mechanisms, and control of child welfare services on reserve. The article provides a rich description for understanding the complex patchwork of policies and legal instruments governing Indigenous child welfare across Canada.

Shewell, Hugh, “Why Jurisdiction Matters: Social Policy, Social Services and First Nations” (2016) 36:1 Canadian J Native 179.

- This article is an in-depth study of the jurisdictional issues of Indigenous child welfare service delivery. It discusses the challenges posed by the overlapping jurisdictions between the federal and provincial governments and offers some solutions to address them.

Sinha, Vandna & Anna Kozlowski, “The Structure of Aboriginal Child Welfare in Canada” (2013) 4:2 International Indigenous Policy J Art 2.

- Sinha & Kozlowski provide a broad overview of the variation in Indigenous child welfare legislation and standards, service delivery models, as well as funding mechanisms across Canada. It suggests areas of research that would help further understand the complexity of this policy area and develop appropriate solutions.

SECONDARY MATERIALS: MANUALS, REPORTS & STUDIES

British Columbia, Ministry of Children and Family Development, *Aboriginal Operational and Practice Standards and Indicators: Operational Standards* (Victoria: Ministry of Children and Family Development, 2009).

- This set of operational standards is critical for understanding how Delegated Aboriginal Agencies (DAAs) work. It sets out the different levels of delegated statutory authority that could be given to DAAs and the corresponding criteria they must meet to reach these levels. It should be read alongside the *Child, Family and Community Service Act*.

British Columbia, Representative for Children and Youth, *At a Crossroads: The Roadmap from Fiscal Discrimination to Equity in Indigenous Child Welfare* (Victoria: Representative for Children and Youth, 2022).

- This report examines one key criticism from the Canadian Human Rights Tribunal case: chronic underfunding of Indigenous child welfare services. It focuses specifically on issues in British Columbia.

British Columbia, Representative for Children & Youth, *When Talk Trumped Service: A Decade of Lost Opportunity for Aboriginal Children and Youth in B.C.: Special Report* (Victoria: Representative for Children & Youth, 2013).

- This is another report from the Representative for Children & Youth that examines issues with Indigenous child welfare services in British Columbia broadly, including funding issues.

British Columbia, Representative for Children & Youth, *Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery* (Victoria: Representative for Children & Youth, 2017).

- This report is useful for understanding how Delegated Aboriginal Agencies work under the existing legal framework. It shares important insights on how the current system perpetuates inequitable and inconsistent funding to DAAs, adversely affecting service delivery to Indigenous families.

Canada, Public Health Agency of Canada, *Provincial and Territorial Child Protection Legislation and Policy 2018* (Ottawa: Public Health Agency of Canada, 2019).

- This report provides an overview of the diverse legal regimes across Canadian provinces and territories that govern child welfare services. It is a useful starting point for conducting similar research (as this one) into other provinces.

John, Grand Chief Ed, *Indigenous Resilience, Connectedness and Reunification — From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia* (Vancouver: First Nations Summit, 2016).

- This report critically examines how the existing child welfare system in British Columbia fails to consider Indigenous values and denies Indigenous peoples of their rights to manage an issue central to their identity.