Child Apprehension: Taking the Indian Out of the Child[1]

Introduction

As children experience the daily realities of their own burgeoning personalities, parents can often struggle with how to help their children feel "encouraged to find and explore their own identities."[2] For an Aboriginal child who is at risk of being apprehended by provincial child welfare authorities, a balancing occurs between several factors in deciding what is in the best interest of the child; this should include the importance of supporting cultural ties between the child and its family. While each case is undoubtedly context-specific, there continues to be an increasing amount of allegations from Aboriginal nations and advocacy groups that the importance of these cultural ties are being overlooked and dismissed when the government is considering apprehending and placing Aboriginal children into families which do not share any of the cultural values or teachings from that child's Aboriginal nation.

The nature of these apprehensions has been known to stir up anti-colonial sentiment in the aftermath of Indian Residential Schools and has been framed, at times, as a continuation of a thinly veiled assimilationist policy laid out by the government. These apprehensions have been critiqued as the latest attempts by state officials to erase Aboriginal culture in Canada. First Nations advocate Mary Ellen Turpel has emphasized this in her writing, where she states that "…family structures have been systemically undermined by the Canadian State in every way imaginable – forced education at denominational residential schools, imposed male-dominated political structures, gender discrimination in determining who is to be recognized as an "Indian",

[1] Original paper submitted to Professor Renee Cochard for UBC LAW 359, April 8, 2015; Modified April 19, 2016; Modified October 25, 2018.
[2] *Complicating Culture in Child Placement Decisions*, Bunting. Canadian Journal of Women and the Law, 2004, Volume 16, Issue 1, 161.

and the ongoing removal of First Nations Children by child welfare authorities."[3] If the State and its agents appreciate[4] that forcibly removing thousands of Aboriginal children from their communities and putting them into Indian Residential Schools resulted in catastrophic intergenerational trauma, suffering, and loss of culture, it may seem obvious that continuing to remove children without giving reasonable weight to cultural considerations should not be a contemporary answer to the question of what is in the best interest of an Aboriginal child.

What is in the best interest of an Aboriginal child? It is not in his or her interest to live in poverty, in sub-standard housing with a parent who has a substance abuse problem, and yet, this is statistically the circumstance in which Aboriginal children are apprehended.[5] Who should be accountable for these dire circumstances; the parents, community, the government? While parties continue to pass the hot potato of accountability, Aboriginal children continue to be separated from their families due to apprehension, death, and suicide at an alarming rate.

At the outset, it is important to acknowledge that each Nation faces specific challenges and there is no one-size-fits-all approach to Aboriginal child welfare. It is tragically predictable that depriving Aboriginal children and communities of essential services in the wake of colonization would lead to the kind of family and community breakdown that has happened across Canada, but the nature of the rhetoric that Aboriginal people face continues to blame them for the dire circumstances into which they were born. This paper seeks to identify and analyze

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[3] Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1991) 6 Canadian Journal of Women and the Law, 181.

[4] Statement of Apology, Aboriginal Affairs and Northern Development Canada, <online> https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649

[5] Gove Inquiry into Child Protection, *Report of the Gove Inquiry into Child Protection in British Columbia: Matthew's Legacy, Volume 1*. 1995, Vancouver, British Columbia: The Inquiry.

the root causes of Aboriginal child apprehension and consider what is in the best interests of the Aboriginal child and how to achieve it. This paper also attempts to identify critical reflections on the nature of Aboriginal child apprehensions and how the test for the best interests of the child, when viewed through a Western lens, is not culturally appropriate when advocating for Aboriginal children.

Legal Structures

There is a range of legal structures that can play into apprehensions in child welfare and determining what is in the best interests of a child, notably s.35 Aboriginal rights within the Constitution, Provincial and Federal jurisdiction, Aboriginal Self Government, Treaties or other inter-governmental agreements, as well as international instruments and case law.[6] Across Canada Aboriginal people have employed these structures to varying extents in an attempt to gain some control over child welfare services. One example of strong but flexible state funding comes from Washington State and the Port Gamble S'Klallam tribe (PGST) that has been federally recognized since 1998 to receive "Title IV" funding for 4 programs that involve child welfare supports.[7] A report by the Lakota Law Project notes that one of the key features of their success seems to lie in the flexibility of grants that are given to achieve goals which help families be supported to stay together in their homes or in the homes of their relatives.[8] Title IV funding has also given power to tribes to remedy inadequate state funding formulas, which saw an

[6] Walkem, Ardith. *Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Services Act,* ShchEma-mee.tkt Project, Nlaka 'pamus Nation Tribal Council, 2015 <online> http://www.nntc.ca/docs/aboriginalcommunitiesandthecfcsaguidebook.pdf , 13-23.

[7] The Total Title IV Solution; Sovereignty and Self-Governance in the Provision of Child and Family Services. Prepared by the Lakota People's Law Project, 2013. <online> http://lakotalaw.org/special-reports/2013-10-01-00-10-35. 4.

[8] The Total Title IV Solution, 4.

increase of $517 dollars per month for a three person family.[9] Other features of the Title IV tailor themselves to the specific needs of the community, including $3000 per year for foster children "aging-out" of the system, to help them pursue educational goals, and an innovative foster home licensing program that has resulted in many "new foster homes on the reservation...by establishing control over foster home licensing, the PGST has been able to prevent the complete separation of their children from the tribe."[10] As child welfare apprehensions continue to face allegations of intentional cultural erosion, the American government recognizes that it is timely to support community-based programs that emphasize children staying in communities. As the Lakota Law Project observes, "this is an extremely important step in furthering our sovereignty and autonomy, solidifying a direct relationship with the federal government, and eliminating the last vestiges of subordination to states."[11] On March 31st, 2015 a ruling came down in South Dakota that confirmed what Aboriginal advocacy groups and families had been saying for decades, that "the state of South Dakota had been systemically and comprehensively violating the rights of Indian families with regard to the state's removing Indian children and placing them in white foster care setting and ordered them to stop."[12] As the Lakota themselves are waiting for their Title-IV funding to be processed, this decision will hopefully force child welfare authorities and the judiciary to respect due process, the Indian Child Welfare Act, and the 14th Amendment – all areas that the judge used to reprimand the South Dakota authorities, concluding that "state officials cannot be trusted to keep their word without judicial supervision by the federal court."[13]

[9] The Total Title IV Solution, supra, 5.
[10] The Total Title IV Solution, supra, 5.
[11] The Total Title IV Solution, supra, 6.
[12] Lakota Peoples' Law Project, *March 31st 2015: Landmark Legal Victory Confirms South Dakota Systemically Violates Indian Child Welfare Act* <online> http://lakotalaw.org/march-31st
[13] *Landmark Legal Victory*, supra.

In Canada, several Aboriginal agencies and organizations have called for a national, comprehensive plan for child welfare services in First Nations communities that would be similar to some systems used in America, but nothing of this nature has arisen.[14] However, "reforms to contemporary Canadian child welfare legislation [have been] characterised by recognition of qualified principles of self-determination with Aboriginal peoples included in decision making with respect to their children."[15] This can be seen in many pieces of legislation across the country, including BC's own Child, Family and Community Service Act.[16] In section 4 it highlights relevant factors to be considered; 4(1)(e) the child's cultural, racial, linguistic and religious heritage, and s.4(2) which states that "if the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interest."[17] While this wording in the legislation seems promising, its application by various actors is dubious.

Culturally appropriate legislation is a step in the right direction, however the interpretation of such legislation by social workers and judges across Canada is often where issues arise because child apprehension can be a very discretionary decision. The 'best interests of the child' test, which is supposed to weigh many factors including Aboriginal heritage, has been used to "justify the removal of many Aboriginal children from their homes, making the operation of child welfare law appear natural, necessary, and legitimate, rather than coercive and

[14] Terry Libesman, "Decolonising Indigenous Child Welfare – Comparative Perspectives", Abingdon, Oxon : Routledge (2014). 116.
[15] Libesman, supra. 116.

[16] Child, Family and Community Service Act: [RSBC 1996] CHAPTER 46 <online> http://www.bclaws.ca/Recon/document/ID/freeside/00_96046_01

[17] Child, Family and Community Service Act: [RSBC 1996] CHAPTER 46 <online> http://www.bclaws.ca/Recon/document/ID/freeside/00_96046_01

destructive."[18] In light of the inadequacy of the legislation and sub-standard funding to fully protect Aboriginal children in their communities, some argue that there needs to be more input and control from Aboriginal communities, which are often in a better position to assess the needs of the child, as well as the resources and capabilities of the community. As legal scholar Annie Bunting argues, "given their histories of colonialism and racism, Aboriginal communities ought to be supported in the efforts to take over child welfare services in their communities,"[19] instead of "non-Aboriginal decision-makers in child welfare agencies and courts [deciding] the fate of Aboriginal children and their future connection to their families and communities."[20] For scholars such as the late Marlee Kline, this means "First Nations communities, both urban and reserve-based, should be provided full financial, institutional, and legislative support to facilitate meeting this challenge."[21] In response to legislation dictating to what extent Aboriginal communities and individuals can be considered and involved in state action to remove Aboriginal children, many Aboriginal communities themselves have attempted to work with on-reserve child welfare agencies to incorporate culturally appropriate measures. Unfortunately, these efforts have been hampered by a "legal straight jacket" fastened by the federal government, [leaving] little opportunity for First Nations to implement their own child safety solutions."[22]

Perhaps unsurprisingly, Aboriginal communities' involvement and direction is stifled because they are still under the thumb of the provincial and federal governments for the delivery and funding of these services. While communities continue to attempt to act in concert with

[18] Wrapping Our Ways Around Them, supra, 30.
[19] Bunting, supra, 162.
[20] Bunting, supra, 161.
[21] Kline, M. "Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women", (1993) 18 Queen's Law Journal 306, 342.
[22] Blackstock, *Residential Schools*, supra, 72.

existing legislation with the ultimate goal of curbing the startling overrepresentation of Aboriginal children in care, the numbers are not encouraging."[23]

Province	Aboriginal Children as a % of the total child population	Aboriginal children as a % of children in care
Ontario	3	21
Manitoba	23	85
Saskatchewan	25	80
Alberta	9	59
British Columbia	8	52

[24]

In the current decentralized child welfare system, there are over 300 provincial and territorial child welfare agencies operating under the Provincial and Territorial authority,[25] and yet there are still significant gaps that restrain the agencies from achieving their full potential. At the outset, it appears that one of the main contributing factors limiting their success is that the agencies themselves are only one piece of the larger picture. Many agencies are attempting to deal with people and communities that continue to struggle emotionally, physically, and financially because of intergenerational trauma. Without supports in place to facilitate positive change and growth in these communities, the child welfare agencies, no matter how culturally appropriate, will continue to face an uphill battle to provide safe and appropriate homes for children. First Nations children's advocate Dr. Cindy Blackstock has argued that on-reserve Aboriginal child welfare agencies are not only forced into a jurisdictional framework that suffocates them financially, but also that members of the community who are working for on-reserve child welfare agencies are attempting to

[23] Vandna Sinha, *The Structure of Aboriginal Child Welfare in Canada*, International Indigenous Policy Journal (2013), Centre for Research on Children and Families, Mcgill University, 1.
[24] Sinha, *The Structure of Aboriginal Child Welfare in Canada*, supra, 5.
[25] Sinha, *The Structure of Aboriginal Child Welfare in Canada*, supra, 4.

> "operate according to provincial child welfare legislation, but are funded by the federal government for services provided on reserves. The problem is that the federal government funding formula is not adequate to ensure equitable child welfare on reserve, nor does it support meaningful advancements in the development of culturally based child welfare standards, policies or programs. The inequity is magnified by the fact that provincial governments rarely step in to top up inadequate child welfare funding levels, resulting in First Nations children receiving less child welfare service than their non-Aboriginal peers."[26]

Human Rights Complaint: Dr. Blackstock Has Had Enough

In her 2007 Article, *Residential Schools : Did They Really Close or Just Morph Into Child Welfare?"*[27] Blackstock looks at the circumstances leading up to the First Nation Child and Family Caring Society's (FNCFCS) filing of a human rights complaint against the federal government for "Canada's inequitable funding policy that contributes to more First Nations children being in state care than at the height of residential schools by a factor of three."[28] Despite "efforts to address the needs of Aboriginal families, [they] are complicated by a legislative framework...[showing] multiple evaluations [that] point to persistent federal underfunding of on-reserve child welfare services, especially those provided by Aboriginal child welfare agencies."[29] This complex network of funding and service providers has, at time, left Aboriginal children out in the cold. The FNCFCS has articulated this problem by stating that

> "…payment disputes within and between Federal and Provincial governments over services for First Nations children are not uncommon. Jordan's Principle calls on the government of first contact to pay for the services and seek reimbursement later so that child does not get tragically caught in the middle of government red tape."[30]

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[26] Blackstock, *Residential Schools*, supra, 74-75
[27] Blackstock, *Residential Schools*, supra, 71.
[28] Assembly of First Nations, *Leadership Action Plan on First Nations Child Welfare* (Ottawa: Assembly of First Nations, 2006); Blackstock, supra note 6)
[29] Sinha, *The Structure of Aboriginal Child Welfare in Canada*, supra supra, 2.
[30] First Nations Child and Family Caring Society of Canada : *Joint Declaration for support of Jordan's Principle* <online> http://www.fncaringsociety.com/jordans-principle

Jordan's Principle is an important marker to demonstrate how federal and provincial governments continue to brush off responsibility for Aboriginal children they have assumed jurisdiction over, which can lead to sub-standard essential services on reserves. Perversely, evidence of these sub-standard services are often used against First Nations communities to justify removing their children. If parents and communities are not supported by governments in their efforts to create stable and relevant essential services for Aboriginal children, what is the likelihood of their success in being able to provide what is the best interests of a child who is living on reserve?

When the federal government does not meet its financial obligations, the provinces normally do not make up the difference in the lack of funding, which results in "a two tiered child welfare system where First Nations children get inequitable services."[31] After 10 years of attempting to rectify this disparity by working collectively with the federal government, the FNCFCS filed a complaint with the Canadian Human Rights Commission, alleging that by failing to provide equal funding for child welfare benefit on reserves the federal government was racially discriminating against First Nations children, which supports the Gove Inquiry's assertion that the government was participating in systemic child neglect by underfunding services on-reserve.[32] The Assembly of First Nations has noted that, far from acting in good faith in a fiduciary capacity, "Canada has spent over $3 million in legal fees in numerous attempts to

[31] First Nations Child and Family Caring Society of Canada: *I am a witness: Canadian Human Rights Tribunal Hearing Campaign* <*online*> http://www.fncaringsociety.ca/i-am-witness-first-nations-child-and-family-services-funding

[32] Gove Inquiry into Child Protection (1995), *Report of the Gove Inquiry into Child Protection in British Columbia: Matthew's Legacy, Volume 1*. Vancouver, British Columbia: The Inquiry, 24-5.

have the case dismissed on legal technicalities."[33] The decision from the Human Rights Tribunal is expected to be released in Spring 2015.

All of this has been acknowledged in the Canadian Human Rights Commission's 2014 Annual Report. The FNCFCS Human Rights Complaint,[34] which included more than 25 witnesses and 500 documents entered, [35] has been refuted by the government of Canada, alleging that "providing funding is not a federal "service" as defined by the Canadian Human Rights Act, and that discrimination has not been established."[36] Contrary to this assertion, two reports from the Auditor General in 2008 and 2011 reveal that "the on-reserve funding formula did not take into account the disproportionate rate at which First Nations children on reserves are taken into care, [and] that the delivery of services to First Nations was limited due to structural impediments in the funding system."

As the First Nations Child and Family Caring Society (FNCFCS) has pointed out, "with the exception of self-governing First Nations and Spallumcheen First Nation [in British Columbia], provincial and territorial child welfare laws apply both on and off reserves but the provinces and territories expect the federal government to pay for services on reserves."[37]An anomaly in Canada, the Spallumcheen or Splatsin nation has an agreement with the province which allows them to engage Bylaw #3-1980 which "gives to the Band exclusive jurisdiction over any proceeding involving the removal of a child from their family, notwithstanding the residency of the child...It is the only child welfare bylaw that has been allowed under s. 81 of the

[33] Child Welfare Fact Sheet (2013) Assembly of First Nations, *supra,* 3. See also, Appendix 1.
[34] See appendix 1
[35] *Landmark decision could affect on-reserve programs,* supra.
[36] *Landmark decision could affect on-reserve programs,* supra.
[37] First Nations Child and Family Caring Society of Canada: *I am a witness,* supra.

Indian Act."[38] One of the ways in which this is achieved is because the bylaw makes the chief and council "guardians of the first instance for a child deemed in need of protection."[39] The Splatsin model is one way that a native band in Canada could approach child welfare, but because it is the only agreement of its kind and it is specific to the Province of British Columbia, it is difficult to say how easily transferrable it would be to another nation.

Numbers

If Aboriginal agencies were financially equipped to ensure the delivery of high quality child welfare services, what would that look like? What if they weren't so equipped? Despite federal funding for Aboriginal Child Welfare agencies tripling from 1997 ($193 million) – 2011 ($618 million), and an additional $374 million in enhanced prevention focused funding, the government had still not met the same level of provincial funding afforded to off-reserve children, according to several First Nations and the federal auditor general.[40] This figure breaks down to $516 per month, per child, when calculated in light of a statistic which states that "there are over 100 First Nations agencies serving a population of approximately 160,000 children and youth in 447 of 634 First Nations communities.[41] Although, the government did hope the increase would "result in more culturally appropriate programs, and reduce the apprehensions of children...that hasn't happened."[42] For example, in Alberta, "only nine per cent of Alberta children are aboriginal, yet they account for a staggering 78 percent of children who have died in

[38] *Wrapping Our Ways Around Them*, supra, 19.
[39] *Wrapping Our Ways Around Them*, supra, 20.
[40] *Deaths of Alberta Children in Care No 'Fluke of Statistics'; More Likely to Die of Accidents, Suicide, and Homicide; Children Also More At Risk if Under Care of Federally Funded On-Reserve Agencies, Darcy Henton, Calgary Herald, January 8, 2014. <online> http://www.edmontonjournal.com/life/Deaths+Alberta+aboriginal+children+care+fluke+statistics/9212384/story.html* supra.
[41] Fact Sheet – Child Welfare, October 2013 <online> http://www.afn.ca/uploads/files/13-02-23_fact_sheet_-_child_welfare_updated_fe.pdf
[42] *Deaths of Alberta Children in Care*, supra.

foster care since 1999." [43] Tragically, almost half of these deaths were children working with on-reserve Delegated First Nations agencies (DFNA), making a child more likely to die in foster care on-reserve in the care of a DFNA home than anywhere else in the foster care system in Alberta. This is a "statistic that starkly highlights the federal/provincial funding disparity that gives off-reserve aboriginal children more services and more support."[44] Additionally, between 1999-2013 "at least 476 children died while receiving services from the ministry, more than triple the 149 who died in foster care over the same time period."[45] The Edmonton Journal revealed that "details on the deaths of the children were only released to the Edmonton Journal after a four-year legal battle with the province."[46] Furthermore, "First Nation social workers in many regions have higher caseloads than their provincial counterparts,"[47] making them work more hours with fewer resources. Aboriginal on-reserve social workers have $516 per month, per child to help a demographic who is more likely to experience suicide,[48] prison,[49] substance abuse,[50] dropping out of high school,[51] homicide and becoming the victims of violent crimes[52] at

[43] *Deaths of Alberta Children in Care,* supra.
[44] *Deaths of Alberta Children in Care*, supra. Note: "45 aboriginal children died in the care of a provincially funded Children and Family Services Agency (CFSA) while 29 died in the care of an on-reserve Delegated First Nations Agencies (DFNA). However, DFNAs care for a fraction of the children that CFSAs do — in 2012-2013, 73 per cent of aboriginal children were in the care of a CFSA, 27 per cent in a DFNA. Therefore, since 1999, proportionately more children died in the care of a DFNA than a CFSA."
[45] *Fatal Care: Hundreds known to Alberta child welfare authorities died in the care of their parents. Why?* Karen Kleiss, Edmonton Journal, January 2014 <online> http://www.edmontonjournal.com/life/Fatal+Care+Hundreds+known+Alberta+child+welfare+authorities+died+care+their+parents/9428253/story.html

[46] *Fatal Care, supra.*
[47] *Child Welfare Fact Sheet*, supra.
[48] Centre for Suicide Prevention: Suicide Prevention Resource Toolkit <online> http://suicideinfo.ca/LinkClick.aspx?fileticket=MVIyGo2V4YY%3D&tabid=563
[49] Native Lives Matter, Lakota Law Project Report February 2015 <online> http://www.docs.lakotalaw.org/reports/Native%20Lives%20Matter%20PDF.pdf, 4-7.
[50] *Drug Abuse Major Concern Among First Nations and Inuit,* June 27, 2011, National Aboriginal Health Organization <online> http://www.naho.ca/blog/2011/06/27/drug-abuse-major-concern-among-first-nations-and-inuit/
[51] *First Nations Dropout Rate Falls, but Less So on Reserves*, May 2, 2014, Josh Dehass for Maclean's <online> http://www.macleans.ca/education/high-school/little-progress-in-on-reserve-dropout-rate-report/
[52] *Native Lives Matter*, supra, 8.

higher rates than any other group in North America. What kind of services can $516 per month allow an on-reserve social worker to offer a child facing those prospects? The problem is exacerbated because statistically this child is also living in poverty, in sub-standard housing, with a parent who has substance abuse issues.[53] One program that has received praise for enhancing the quality of life of children on reserve was a pilot literacy program that was launched in Ontario in 2010 and ran until 2014. Interestingly, the $1.5 million dollar program was funded by private organizations and brought the provincial reading levels of grade 3 students up from 33% to 91%,[54] demonstrating that First Nations children who participated in the program were reading at levels that were 20% above the national average of a 70% reading level. [55] The chief from one of the reserves observed that "[First Nations have been] set back because of underfunding, not because we're ignorant and we're dumb and uneducated and incapable of learning, but because of the circumstances."[56]

An Abstraction From Aboriginality: Taking the Indian Out of the Child

To understand why judges and social workers may not be placing appropriate weight on maintaining cultural ties, an examination of how the State and Courts have historically abstracted Aboriginal children from their *aboriginality* is relevant to this inquiry. In her article "Child Welfare Law, "Best Interests of the Child" Ideology and First Nations"[57], Kline argues that

> "…the reasoning used by courts to justify First Nations child welfare decisions relies upon a construction of a child's interests as separate from, and abstracted out of, her familial and cultural context. The best interests of the child standard serves in practice to

[53] Blackstock, *Residential Schools,* supra, 75.
[54] *First Nation Literacy Pilot Improves Education, Feb 2015.* The Canadian Press, <online> http://www.cbc.ca/news/canada/thunder-bay/first-nations-literacy-pilot-improves-education-paul-martin-1.2969680

[55] *First Nation Literacy Pilot Improves Education*, supra.
[56] *First Nation Literacy Pilot Improves Education,* supra.
[57] Kline, *Child Welfare Law*, supra, note at 394.

> privilege an understanding of children as *decontextualized individuals* whose interests are separate and distinct from those of their families, communities, and cultures."[58]

This ideology reflects the values and life experiences between some Aboriginal and non-Aboriginal people who may have no interest in placing any weight on cultural factors, simply because it has not been their belief that such considerations were warranted. If the non-Aboriginal decision-maker has decided that they themselves do not place any significant weight on cultural factors, the Aboriginal nation, who *does* find it highly important, then finds themselves on the wrong side of the dichotomy of interests and is accused of being selfish for wanting the court to consider the child's Aboriginal heritage. Kline has openly critiqued *Racine v. Woods*[59] in this regard, where she observed that "according to Wilson J, there is a natural self-interest of parents which renders them incapable of distinguishing their own selfish desires from their child's best interests.[60] In this way, the court polarizes the interests of the child from the interests of the family and community. By giving a higher value to "individualistic structure of the best interests ideology" they inherently tend to "support a presumption that the collective interests of First Nations are "inevitably antagonistic" to the individual interests of the child in question...[as] a consequence, court cases have tended to presume that, if the interests of the First Nations community are met, that the child's interests must necessarily be forgone." [61] It may be argued that this dichotomy plays out in the interpretation of the legislation by social workers and government agents who follow procedure wearing lenses that may be colored with bias, racism or different cultural values that ultimately undermine the Aboriginal nation's participation and a furtherance of community goals.

[58] Kline, Child Welfare Law, supra, 395-396.
[59] Racine v. Woods, [1983] 2 S.C.R. 173
[60] Kline, *Child Welfare Law,* 408.
[61] Kline, *Child Welfare Law,* 411.

In *Racine,* situating the legislature in a neutral and humbling light, Wilson J states "[the] legislature in its wisdom has protected the child against this human frailty in a case where others have stepped into the breach and provided a happy and secure home for the child."[62] While Mrs. Woods, the Aboriginal mother, was accused of being selfishly motivated for seeking to reunite with her daughter, we see this attitude juxtaposed with the Racines', the foster parents, whose actions were presumed to be "well motivated though they put roadblocks in the path of what Mrs. Woods might have been able to accomplish."[63] However well-motivated their intentions may have been, it has been said that the "road to hell was paved with good intentions and the child welfare system was the paving contractor."[64] These remarks were made by Chief Judge Edwin C. Kimelman, who was appointed to head a public inquiry due to inflated adoptions of Aboriginal children in Manitoba, and made several recommendations which included "recognizing a child's connection to their Aboriginal culture as in the best interests of that child."[65]

The judge in *Racine* also called into question whether Mrs. Woods "concern was for the child as a person or as a political issue,"[66] negating the very political nature of on-reserve child apprehension, not to mention that it is often colored with racism and poverty, both issues that frequently intersect in the political arena. Others have noted that political performance itself is also an important cultural act.[67] In the case of *Racine*, it was the mother's defiant political

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[62] *Racine*, 185.
[63] *Racine*, 181.
[64] E. Kimelman (1985),*Manitoba Review Committee on Indian and Métis Adoptions and Placements, No Quiet Place, The Final Report to the Hon. Muriel Smith, Minister of Community Services*, Winnipeg: Manitoba Community Services, 276., in Harris-Short, ACW, supra, at 21.
[65] First Nations Child Welfare in Manitoba (2011) Canadian Child Welfare Research Portal <online> http://cwrp.ca/infosheets/first-nations-child-welfare-manitoba
[66] Kline, *Child Welfare Law*, supra, 409.
[67] *Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints.* Canadian Journal of Political Science, Vol 44, Issue 2, June 2011 <online>

ideology which the judges seemed to take issue with, that it was not "in this child's best interest to have what they viewed as a political First Nations mother, one who acknowledged, confronted, and attempted to resist what she perceived as harsh treatment of herself and her people by the child welfare system."[68] It has been through the persistence and strength of voices like Mrs. Woods and other Aboriginal voices that have been key to the cultural and political survival despite living in a state that has attempted to colonize them. Aboriginal people, such as Mrs. Woods, have continued to critique the forces of oppression that govern their lives and cultures from cradle to grave, and it may be argued according to contemporary standards of reconciliation that it was unacceptable for her to be reprimanded by a judge about her political and cultural resistance to assimilation.

Constitutional Rights

Being that Aboriginal rights are recognized and affirmed in s.35 of the Constitution, it seems reasonable to argue that determining child welfare policies and their implementation ought to be an Aboriginal right recognized by s. 35(1) of the *Constitution Act 1982* where it states that "existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed." It would be reasonable to assume that having rights enshrined in the Constitution would be enough to use them, however, in reality

> "without a prior declaration of an Aboriginal right to self-government in the area of child welfare, child welfare cases are a poor forum to try to establish a s.35 right…cases where Aboriginal groups have sought to establish a s.35 right to self-government in Aboriginal child-welfare have not succeeded due to (1) insufficient evidence (2) the lateness of

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http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8314366&fileId=S000842391100014X, 267.

[68] Kline, *Child Welfare Law*, supra, 409.

> Aboriginal community involvement, or (3) where courts have suggested that the concerns of the communities are political rather than directed toward the interests of the child."[69]

Even though s.35 claims have not always been successful in this area, it should not be indicative that Aboriginal rights do not exist in this area, but rather that approaching them from this angle creates multiple barriers, including evidence, timeliness, expense, and misapprehension of politics.[70] In Hamilton Health Sciences v. DH et al.,[71] Justice Edward, in deciding if the parents could assert their Aboriginal right to choose traditional medicine for their sick children, he first considered the application of the *Constitution Act*, where he found that choosing traditional medicine was an Aboriginal right after considering the tests set out in R. v. Van der Peet[72]and R. v. Sparrow.[73] Fundamentally, he considered why Aboriginal rights existed at all:

> "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status...further, such a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm...to do so would be to leave open the opportunity to perpetually erode aboriginal rights."[74]

Justice Edwards illuminates one of the key tensions around the contemporary application of traditional Aboriginal rights, that rights cannot be qualified as a right only if it stands up when scrutinized according to Western values. Quite rightfully, he emphasizes that taking this approach would lead to the erosion of Aboriginal rights over time. While that particular case had

[69] *Wrapping Our Ways Around Them*, supra, 30.
[70] *Wrapping Our Ways Around Them*, supra, 14-15.
[71] Hamilton Health Sciences Corp. v. D.H., 2014 ONCJ 603, 10.
[72] R. v. Van der Peet 109 CCC (3d) 1.
[73] R. v. Sparrow, [1990] 1 S.C.R. 1075.
[74] *Hamilton Health Sciences*, supra.

to do with the Aboriginal right to use traditional medicine, there is a similar argument in looking at what is in the best interest of the child and it deserves to have the same reasoning applied to it. In regards to Aboriginal child welfare, the Western paradigm is attempting to inform the best interests question by giving more weight to individualized notions of decontextualized children than to the presumption that supports the collective interests of First Nations, as identified by Kline.[75]

What Could Success Look Like?

Distraught by the continuing removal of their children, the Wabaseemoong First Nation in Ontario took a stand in the 1990s when they "stood at the reserve line on tractors with shotguns saying "you aren't coming into our community and taking any more of our children" to the Children's Aid Society.[76] While the number has now dropped to around 100, during the 1990s there were almost 300 children in care, which is shocking considering the entire population on reserve in 2006 was 785.[77] It is worth noting how prevalent the devastating legacy of colonialism is in the statistics for this nation, where the population between the ages of 0-64 is 845, while for those age 65 and over, there were a mere 20 persons.[78] This is a grim statistic that speaks to the limited ability of Elders to transmit traditional knowledge and provide guidance to younger generations. When looking at how this Nation manages child protection, their guiding principles include a "recognition of the inherent rights of First Nations to exercise their customs,

[75] Kline, *Child Welfare Law*, supra, 395-396.
[76] Adrian Humphreys, *A Lost Tribe: Child Welfare Accused of Repeating Residential Schools History*, National Post, 2014, <online> http://news.nationalpost.com/2014/12/15/a-lost-tribe-child-welfare-system-accused-of-repeating-residential-school-history-sapping-aboriginal-kids-from-their-homes/
[77] Wabaseemoong Independent Nations – Connectivity Profile. Aboriginal Affairs and Northern Development Canada <online> http://www.aadnc-aandc.gc.ca/eng/1357840942146/1360164925820
[78] Population Characteristics: Wabaseemoong Independent Nations. Aboriginal Affairs and Northern Development Canada <online> http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/FNPopulation.aspx?BAND_NUMBER=150&lang=eng

to protect children and provide for their best interests and their well being."[79] One of the key features of the Anishinaabe [Wabaseemoong] Family Services is the incorporation of the Customary Care provision which acknowledges that the harm done by forced and often unnecessary removals of native children by state agents to non-native homes has resulted in

> "Split Feather Syndrome, an emotional state characterized by a profound sense of not knowing whom one is or where one fits in. The emotional trauma of identity confusion and a concurrent sense of not belonging underlie the majority of difficulties our people have in every aspect of their lives. Unfortunately the trauma created by the residential school experience of forced integration into a foreign culture and belief system is still felt today as parents grapple with lost identity."[80]

To combat this destructive colonial force, the Customary Care program was put in place in order to ensure that removal of children from their home was a last resort, with a sequence of priority focusing on extended family members and then members of the community on a voluntary basis. If a placement outside of the community had to happen, it would be on a temporary basis "while the family has the opportunity and support to resolve their problems."[81] Critically, the support of Elders is available to guide the facilitation of these services through

> "a full range of cultural services but not limited to Sharing Circles, Sweats, Shake Tent, Ceremonies, Naming Ceremonies, coordinating Feasts, smudging, individual consultations for healing or counseling and assistance with community consultations."[82]

Having cultural support is a key to healing wounds from the past. To be able to celebrate and rejoice in their culture openly with people from one's family and community can be a truly therapeutic exercise that focuses on the strength of the individual, as they are situated within the larger community.

<u>Why Are Native Children Being Taken?</u>

[79] Child Protection: Anishinaabe Abinoojii Family Services <online> http://www.aafs.ca/child-protection
[80] Custody Care: Anishinaabe Abinoojii Family Services <online>http://www.aafs.ca/customary-care
[81] Child Protection: Anishinaabe Abinoojii Family Services <online> http://www.aafs.ca/child-protection
[82] Cultural Services,Anishinaabe Abinoojii Family Services <online>http://www.aafs.ca/cultural-services

The Gove Inquiry into Child Protection concluded in their 1995 report that "poverty is a child welfare issue and when [the] government allows children to live in poverty, they are, in effect, committing systemic child neglect."[83] Societal perceptions of poverty may vary between cultures, however, author Kathleen Earle Fox found that "when it comes to neglect, Native American families did not believe that poverty was a reason to remove a child...instead, it was a signal to society to redistribute resources in such a way that families had the resources they needed to safely care for their children."[84] Her report also noted a finding from Hogan and Siu (1998) which states that "current treatment of minority children continues to reflect racial bias: the system responds more slowly to crises in minority families; such families have less access to support services such as day care and homemaker services...; and parents of color have been viewed as less able to profit from support services...[finally], families and persons of color are more likely to be punished (foster care, juvenile court) and Caucasian families helped when crises arise."[85] While this study is from America, it is echoed north of the border where "recent data demonstrate that provincial child welfare authorities have tended to rely upon court orders to apprehend First Nations children rather than on the provision of supportive or foster care services to families on a *voluntary* basis."[86] In the note provided to this quote, Kline states

> I place *voluntary* in italics to indicate that parents, and in most cases, mothers or female extended family members may be pressured by child welfare authorities into accepting often culturally inappropriate support services by an unspoken threat that court proceedings will be initiated and their children apprehended if they refuse to co-operate."[87]

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[83] Gove Inquiry into Child Protection, supra 24-5.
[84] Kathleen Earle Fox, *Are They Really Neglected? A Look at Social Workers Perceptions of Neglect through the Eyes of the National Data System* (2004) 1: 1 First Peoples Child and Family Review, 73.
[85] *Are They Really Neglected?* supra, 80.
[86] Kline, *Child Welfare Law, supra*. 381
[87] Kline, *Child Welfare Law, supra*. Note 18, 381

Frequently, Aboriginal people are blamed for the perpetuation of their own dysfunctional circumstances, which places child welfare agencies in a normative and neutral position that is merely responding to the continuing problems of Aboriginal people both on and off reserve, as opposed to being an ongoing contributing factor.[88] Kline has argued that beyond poverty, the reason for the high numbers of Aboriginal children in care has to do with the ethnocentricity in which the child welfare system is rooted in. She argues that "by applying apparently neutral, universal and objective legal standards such as 'neglect', 'harm' and 'best interests' to Aboriginal children and families, the inherent colonialism within the system and the assumption of cultural superiority which lies behind it, has become legitimized and entrenched, [therefore hiding] behind the façade of neutrality."[89]

'Neglect' is a significant term in the context of Aboriginal child welfare. Data from the 1998 Canadian Incidence Study on Reported Child Abuse and Neglect (CIS) found that regarding "child maltreatment...Aboriginal children were less likely than non-Aboriginal to be reported to child welfare authorities for physical, sexual, emotional abuse and domestic violence, but were twice as likely to be reported for neglect."[90] What does 'neglect' mean? Researchers from this study who unpacked 'neglect' found that the factors noted were caregiver poverty, poor housing, and substance misuse. Sonia Harris-Short, author of "Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children,"[91] has argued that poverty and poor housing are very difficult for parents to change, and that reducing barriers to service access is essential to

[88] Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children,* University of Birmingham, Ashgate Press, United Kingdom, 2012. 50.
[89] Kline, *Best Interests of the Child*, supra, note 6.
[90] Blackstock, *Residential Schools,* supra, 75.
[91] Harris-Short, *Aboriginal Child Welfare*, supra.

eradicating poverty.[92] As we have seen previously with jurisdictional disputes affecting the quality and delivery of services on reserves, barriers to accessing services continue to be a contemporary issue for First Nations communities, which seems to be a key feature prolonging the perpetuation of disparity in areas of housing, poverty, substance abuse rehabilitation, and by extension, child apprehension.

What the CIS findings seem to suggest is that "First Nations children were not being removed because their families are putting them at greater risk, but rather because their families are at greater risk due to social exclusion, poverty, and poor housing."[93] If the government wanted to demonstrate it was truly committed to what is in the best interest of the Aboriginal child, they may want to act on their own reports[94] which show how child welfare and apprehension is connected to these overarching issues, and that these "repeated reports documenting the inequitable levels of federal funding [show] how this underinvestment translates into higher numbers of First Nations children in child welfare care,"[95] which tragically become mortality statistics on a regular basis.

Conclusions: An Investment in Assimilation?

The effects of inadequate funding that are passed along to on-reserve children and individuals have been repeatedly identified with virtually no change in tone from the federal government to eradicate the discrepancy of funding between the two levels of government. Their simultaneous acknowledgment of the disparity and its effects coupled with a lack of action

[92] Harris-Short, *Aboriginal Child Welfare,* supra, 75-76.
[93] Harris-Short, *Aboriginal Child Welfare,* 76.
[94] Indian and Northern Affairs Canada, *Fact Sheet: First Nations Child and Family Services* (October 2006), <online> http://www.ainc-inac.gc.ca/pr/info/fnsocec/fncfs_e.html
[95]Blackstock, *Residential Schools*, supra, 74.

translates into what was identified as "systemic child neglect"[96] by the Gove Inquiry in 1995. In 2015, its persistence is troubling and creates a pause to wonder if this could be a continuation of many previous federal government acts aimed at the assimilation of Aboriginal peoples into the dominant hegemony. Where governments, legislations, and courts have failed, some First Nations have turned to creative solutions to halt unjustified child apprehensions. In announcing the hiring of a special child advocate, Grand Chief Derek Nepinak of the Assembly of Manitoba Chiefs has labelled the situation with Aboriginal children being apprehended in Manitoba as having reached an epidemic level so large that it has made Manitoba "the epicentre of child apprehension in the industrialized world." [97] After attempting to engage with the province, the federal government and the courts but facing nothing but barriers, the child advocate position will be trying to address what he calls "a $500-million dollar industry of child apprehension."[98]

By apprehending their children because of poverty and substance misuse, the federal government effectively vilifies Aboriginal parents and justifies the removal simultaneously. All the while, the federal government has been chronically underfunding First Nations 'child welfare services' including residential schools, for decades, as well being responsible for a large disparity in the delivery of on-reserve services. Determining the best interests of an Aboriginal child is not something that can be exacted with scientific precision. It is remarkably similar to determining the best interests of any child, by looking at the particular circumstances of the child and family and finding a safe, stable and happy place for a child to grow up. The Aboriginal caveat is that because of systemic government under-funding of essential services to families on-reserve in the aftermath of residential schools, many families are living in poverty with poor

[96] *Gove Inquiry into Child Protection*, supra, 24-5
[97] *Assembly of Manitoba Chief Hiring Its Own Advocate to Address Child Welfare Issues*, April 2, 2015. CBC News <online>http://www.cbc.ca/news/canada/manitoba/assembly-of-manitoba-chiefs-hiring-its-own-advocate-to-address-child-welfare-issues-1.3019884
[98] *Assembly of Manitoba Chief Hiring Its Own Advocate,* supra.

access to services. Compounding this is the legacy of colonialism that has left some Aboriginal people with inter-generational addiction and health issues that continue to plague Nations across Canada.

Aboriginal people should be supported in their efforts to live their lives with dignity, celebrating their unique culture with their community and family. Addressing issues identified here, such as culturally biased viewpoints on the 'best interests' test coupled with chronic under-funding, would respond to the key points that legally justify the apprehension of Aboriginal children. Connecting the dots on these issues highlights the array of knowledge available to governments as a basis from which to form their fiscal and policy decisions. And yet, there continues to be a disconnect by governments from approaching this issue through an evidence-based lens. Until remedied, government inaction will continue to create discrepancies that predictably produce results marked with the apprehension, suffering, and death of Aboriginal children.

Delaine Margaret Friedrich

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