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(Editorial) Indigenous Child Welfare Legislation: A Historical Change or Another Paper Tiger?

Cindy Blackstock

Ph.D., Professor, McGill University, School of Social Work, Quebec, Canada

Corresponding author: reception@fncaringsociety.com

For millennia before colonization, First Nations laws regarding children flourished across what is now known as Canada. These laws were ignored by colonial forces who imposed their own version of child welfare on First Nations families. This resulted in what the 2015 final report of the Truth and Reconciliation Commission of Canada (2015) called "cultural genocide." The reassertion of First Nations laws that are derived through community consultation processes presents a promising alternative to the reliance on provincial or territorial laws that apply today.

On November 30, 2018, Minister Philpott of Indigenous Services Canada, accompanied by leaders from the Assembly of First Nations, Métis National Council, and Inuit Tapiriit Kanatami announced that the federal government would table historic "Indigenous" child welfare legislation in the House of Commons, early in 2019 (Indigenous Services Canada, 2018). It seems like good news but will it really build healthy families and, over time, reduce the over-representation of First Nations children in care or is it another colonial paper tiger? The answer is – it depends. But red flags are already flying, such as the pan-Indigenous approach, the lack of a clear funding base, and a lack of attention to the child welfare needs among and between First Nations, Métis, and Inuit.

On its face, the proposed legislation seems to respond to calls by First Nations to recognize their child welfare laws (Royal Commission on Aboriginal Peoples, 1996; McDonald & Ladd, 2000) but the federal proposal is for "Indigenous" legislation not "First Nations" legislation. The problems with this approach are not just nomenclature, there are vast differences in the way First Nations, Métis, and Inuit child welfare are structured, legislated, and funded. Creating one piece of legislation to cover this broad landscape presents the real risk that the legislation will be so watered-down that it does not meet anyone's needs.

There are over 100 First Nations child and family service agencies in Canada delivering services on- and, in some cases, off-reserve (First Nations Child and Family Caring Society of Canada, n.d.). As a funding condition to deliver services on-reserve, the federal government requires First Nations agencies to operate under provincial or territorial child welfare laws. Where First Nations agencies serve off-

reserve populations, funding comes from the respective province or territory. First Nations not served by a First Nations child and family service agency receive child welfare services from the respective province or territory (Blackstock, 2017).

Meanwhile, Inuit and Métis child welfare is delivered differently. For Inuit living in Nunavut, child welfare services are delivered by the territorial government, whereas provincial child welfare authorities deliver services to Inuit living in other areas of Canada. Other than the Nunavut government, there are no Inuit agencies that provide the full range of child welfare services. Métis agencies exist in some parts of the country. These agencies provide a range of child welfare services and operate pursuant to provincial or territorial laws and funding regimes. There are no direct federal child welfare programs for Inuit and Métis.

The pan-Indigenous nature of the proposed legislation raises concerns that it will not adequately reflect Canada's funding obligations to First Nations or the significant expertise and experience that First Nations child and family service agencies have developed over the past 40 years. Take, for example, the need for federal legislation to preserve the hard-won equitable funding arrangements the Canadian Human Rights Tribunal (F*irst Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada*, 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14, 2018 CHRT 4) ordered Canada to provide to First Nations child and family service agencies. The legal proceedings leading up to the Tribunal's landmark 2016 decision were preceded by over a decade of research documenting the inequities and proposing the solutions and a further nine years of litigation (Royal Commission on Aboriginal Peoples, 1996; MacDonald & Ladd, 2000; Tromcé et al., 2005; Blackstock, Prakash, Loxley, & Wien, 2005; Loxley et al., 2005; Office of the Auditor General of Canada, 2008/2011; Truth and Reconciliation Commission of Canada, 2015). New legislation that shifts the child and family services model to First Nations jurisdiction absent the substantive equity funding guarantees of the Tribunal decisions could result in a reversion back to the failed approach of "case-by-case" negotiations that gave rise to significant inequalities.

Proponents of First Nations child welfare laws cite the failure of provincial and territorial laws to address the chronic over-representation of First Nations children in child welfare. Research by Chandler and Lalonde (1998) showed that higher degrees of self-determination among First Nations in British Columbia are correlated with lower youth suicide rates. Pro-First Nations jurisdiction arguments are often buttressed within broader claims of treaty rights, sovereignty, and self-determination (Metallic, 2018). These are legitimate claims which invoke sensitivity to the range of child welfare models First Nations may choose to implement. Some First Nations have already invested significant energy in creating effective child welfare laws (Anishnabek, 2016), others are just beginning the process, and others are choosing alternate service delivery models. All of these options will need to be enabled by federal legislation, including resources to develop, implement, and evaluate child welfare and ancillary laws and mechanisms, such as First Nations courts.

The second series of arguments set out in Minister Philpott's speech announcing the proposed Indigenous child welfare legislation is less convincing. She argued that all measures should be exhausted before considering child removal and that poverty and medical need should not be the basis for removals (Indigenous Services Canada, 2018). I agree with this but it is redundant. Provincial and territorial child welfare laws already require social workers to exhaust all least disruptive measures and poverty is not

listed as a reason to remove a child. The problem with the Minister's proposition is not the legislation per se but rather the lack of culturally-based responses to address persistent poverty, addictions, and housing issues. The federal government's ongoing under-funding of critical public services on-reserve and refusal to adopt the *Spirit Bear Plan* (First Nations Child and Family Caring Society of Canada, 2017) to address the inequities compounds this problem. Put simply, the solution Minister Philpott called for is already on the books and layering it with federal legislation will not help. What is needed is the money to make the previously offered solutions a reality.

While the content of the proposed legislation is still unknown, so too, disturbingly, is the expertise that went into writing it. Despite urging by the First Nations Child & Family Caring Society and others, Canada has chosen to write this legislation without the aid of Elders, First Nations child and family service experts, youth in care, and others. Instead, Canada is relying on officials at Indigenous Services Canada and the Department of Justice, who have no expertise in First Nations child welfare, to jointly hold the drafting pen and control the release of information. The process smacks of government hubris that got First Nations children into this mess in the first place and contradicts the very purpose the proposed legislation is intended to achieve: self-determination rather than Canada-determination.

Given the problems outlined above and Canada's promise of finally affirming First Nations jurisdiction, the question becomes: to what extent should First Nations children and families compromise in order to "get something passed?" This is a tough question, with arguments on both sides, but the only answer that makes sense to me is that First Nations children, youth, and families deserve the best. If this proposed legislation affirms First Nations jurisdiction, respects diversity among First Nations, protects the safety and wellbeing of First Nations children and families, and embeds a statutory funding base, then it has a foundation for success. If it is deficient on one or more of these fronts or tries to kick these foundational items into a forum for future discussion, then we must press for a better deal. After the residential schools, 60's scoop, and Canada's discrimination as per the Canadian Human Rights Tribunal decisions, it is well past the hour for Canada to stop asking First Nations children to be patient and to applaud government "first steps" that fall far short of meeting their needs and respecting their rights.

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