CALL TO ACTION #4 & CHILDREN'S RIGHTS

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Canadian Coalition for the Rights of Children
Coalition canadienne pour les droits des enfants

PlentyCanada

Design by Dolly Roul, 2022
Research by Tate Chong, 2022

Call to Action #4: We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

This fact sheet will focus on Call to Action 4(i) and Bill C-92 (*An Act respecting First Nations, Inuit and Métis children, youth and families*)

Indigenous Child Welfare in Canada

First Nations, Inuit, and Métis (FNIM) children are disproportionately represented in the child welfare system: according to a 2016 census, FNIM children represent 7.7% of all children under the age of 15 in Canada, but they represent 52.2% of all children in foster care [i]. In Manitoba, 90% of the children in care are Indigenous [ii].

This severe over-representation is a continuation of Canada's colonial practices and assimilationist policies. Since as early as 1880 and until 1996, children were removed from their families and forced into government-sponsored residential schools with the stated intention of "remov[ing] the Indian from the child" [iii] and assimilating them into Canadian society. The "Sixties Scoop," which started in the 1950s, describes the time when Indigenous children were removed from their communities at alarming rates through the child welfare program and placed with non-Indigenous families [iv]. The number of FNIM children that continue to be in the child welfare system today shows that this is an ongoing problem.

The removal of children from their families has serious and long-lasting adverse impacts:

> These include **higher rates of youth homelessness, lower levels of post-secondary education, low income, high unemployment, and increased prevalence of chronic health problems for children.** Compared to youth from the general population, youth from the child welfare system are also at much greater risk for becoming involved with the juvenile criminal justice system, a process referred to as the **"child-welfare-to-prison pipeline."** Because of racial disparities in the child welfare system, Indigenous and Black children may be disproportionately likely to experience these negative effects [v].
>
> [emphasis added, original footnotes removed]

On June 3, 2021, former Inuk Member of Parliament Mumilaaq Qaqqaq described the foster care system as "the new residential school system:

"The residential schools and genocide waged against us has evolved into the foster care system and the suicide epidemic we see today." [vi]

Recommendations from the Final Report of the National Inquiry into Missing and Murdered Indigenous Women

12.1 **We call upon all federal, provincial, and territorial governments to recognize Indigenous self-determination and inherent jurisdiction over child welfare. Indigenous governments and leaders have a positive obligation to assert jurisdiction in this area. We further assert that it is the responsibility of Indigenous governments to take a role in intervening, advocating, and supporting their members impacted by the child welfare system, even when not exercising jurisdiction to provide services through Indigenous agencies.**

12.2 **We call upon on all governments, including Indigenous governments, to transform current child welfare systems fundamentally so that Indigenous communities have control over the design and delivery of services for their families and children. These services must be adequately funded and resourced to ensure better support for families and communities to keep children in their family homes.**

INDIGENOUS CHILD WELFARE

The constitutional separation of powers provides that the federal government has exclusive jurisdiction over “Indians, and lands reserved for Indians,” while the provincial government has exclusive jurisdiction for areas including health and child welfare. As a result, according to the Canadian Constitution, Indigenous child welfare is administered jointly by both the federal and provincial governments. However, the exclusive powers of both governments, on paper, does not reflect the reality of administration; the ambiguity in practice leads to challenges unique to the Indigenous child welfare system, including underfunding and inadequate access.

In 2008, the Auditor General of Canada reported that not only were First Nations child and family services underfunded, but that money was reallocated from other programs, like housing, to make up for the shortcoming. As FNIM children are also often apprehended and separated from their families and communities for longer periods of time due to reasons outside of the parents’ control – including poverty, unstable housing, and substance misuse – this perpetuated the cycle of the over-representation of Indigenous children in care [vii].

CANADA (ATTORNEY GENERAL) V FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, 2021 FC 969

On February 23, 2007, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society (Caring Society) filed a complaint with the Canadian Human Rights Commission alleging that Canada’s underfunding of First Nations child welfare services on reserve constitutes racial discrimination. On January 26, 2016, the Canadian Human Rights Tribunal (CHRT) ruled in favour of the AFN and the Caring Society.

As a result of the underfunding of social and health services on reserves, children are often removed from their homes and placed in care, as there is no other way for them to access the services they need [viii]. The funding formula, and the consequent lack of preventative services, **“provide[d] an incentive to remove children from their homes as a first resort rather than as a last resort.” [ix]**

On January 4, 2022, the Canadian government unveiled a $40-billion agreement in principle for First Nations children and their families who were harmed by the child welfare system and the overly narrow definition of Jordan’s Principle. Half of this will be provided as compensation, while the other half will go towards reforming the First Nations Child and Family Services Program, to be spread out over five years. [x] The settlement approval hearing will occur before the Federal Court in September 2022. [xi]

Bill C-92 (An Act respecting First Nations, Inuit and Métis children, youth and families)

SUMMARY

Bill C-92 (*An Act respecting First Nations, Inuit and Métis children, youth and families*) (the "Act"), which entered into force on January 1, 2020, concerns the provision of FNIM child and family services across Canada [xii].

The Preamble of the Act acknowledges the history and context of Indigenous child welfare in Canada, including:

- **The legacy of residential schools and the harm caused to Indigenous peoples by colonial policies and practices;**
- **The harm experienced by Indigenous women and girls, as well as by Indigenous children who were separated by their families and communities, in the context of the provision of child and family services; and**
- **The overrepresentation of Indigenous children in child and family services systems.**

The Preamble also acknowledges certain principles going forward, such as:

- **Canada's commitment to the United Nations Declaration on the Rights of Indigenous Peoples, and its ratification of the United Nations Convention on the Rights of the Child (the "Convention") and the International Convention on the Elimination of All Forms of Racial Discrimination;**
- **The Truth and Reconciliation Commission of Canada's Calls to Action; and**
- **The self-determination of Indigenous peoples, which includes jurisdiction in relation to child and family services.**

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ANALYSIS

The Act acknowledges both the Convention and the Calls to Action in its Preamble.

This analysis is based, in part, on a discussion paper published by the Canadian Coalition for the Rights of Children on provincial child welfare systems and the Convention on the Rights of the Child (the "Convention"), which can be found here.

Best Interests of the Child (BIOC)

The child's best interests must be "a primary consideration" in all matters where children are affected [xiii]. General Comment 14 [xiv] outlines the factors that should be considered in determining BIOC, including the child's views and right to health. The government must ensure that these standards are properly and uniformly enforced.

The Act is to be interpreted and administered in accordance with the principle of BIOC (s.9(1)).

To determine the "Best Interests of Indigenous Child" (s.10), consideration must be given to factors such as the child's needs (s.10(3)(b)), family violence (s.10(3)(g)), and any civil or criminal proceeding, order, condition, or measure that is relevant to safety, security and well-being of the child ((s.10(3)(h)).

Consideration for BIOC is incorporated in multiple provisions within the Act, including:

- **In the definition of cultural continuity (s.9(2));**
- **In the provision of child and family services (ss.12, 14, 15, 15.1); and**
- **In the placement of the Indigenous child (ss. 16, 17).**

Views of the Child

Once a child can express their viewpoint, the government has an obligation to listen and seriously consider it [xv]. The weight given to a child's viewpoint depends on the child's age and maturity. The Committee on the Rights of the Child (the "Committee") encourages the creation of a legislative framework to evaluate the child's age and maturity on a case-by-case basis [xvi]. They discourage the use of age limits [xvii] because it does not consider the evolving capacities of each child. In proceedings that separate a child from their family, the child should be given the opportunity to participate and make their views known [xviii].

In its review of Canada, the Committee previously recommended that the child's view "be a requirement for all official decision-making processes that relate to children," including child welfare decisions [xix]. This is especially true for young people who are leaving care, and the Committee recommends that they be supported and involved in planning their transition [xx].

The views and preferences of the child are incorporated into the determination of BIOC (s.10(3)(e)) and of cultural continuity (s.9(3)). It is also considered in the event where there is a conflict or inconsistency of law (s.24(1)). The weight given to the child's views depends on their age and maturity.

Service Provision

The Convention recognizes the importance of supporting parents in their responsibilities and providing the protection and assistance necessary for the child to grow up in a family environment. This includes providing social assistance [xxi], material support programs [xxii], and preventative health care programs [xxiii]. Governments have a duty to support parents and legal guardians in their child-rearing responsibilities [xxiv]. These services are especially important to prevent the removal of children from their family and to ensure a safe and supportive environment.

Preventative care is prioritized over other services (s.14(1)), including the provision of a prenatal care that would prevent the apprehension of the child at the time of birth (s.14(2)). Furthermore, the Act explicitly states that a child is not to be apprehended solely on the basis of socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider (s.15). Furthermore, reasonable efforts must have been made to have the child continue residing with their family before apprehension (s.15.1).

Continuing contact with cultural and community connections

The Preamble of the Convention recognizes the “importance of the traditions and cultural values of each people for the protection and harmonious development of the child.” Notably, children who are deprived of their family environment are entitled to special protection, and decisions regarding the child’s placement must consider their ethnic, religious, cultural and linguistic background [xxv]. States must ensure that the child’s economic, social and cultural rights are implemented to the maximum extent of available resources [xxvi]. Moreover, the State must take steps to ensure that the child has access to socially and culturally beneficial information [xxvii]; that the child’s education develops respect for their cultural identity, language, and values [xxviii]; and that the child has the right to participate fully in cultural and artistic life [xxix]. Special attention is accorded to the cultural, religious and linguistic rights of ethnic, religious, and linguistic minorities and persons of Indigenous origin [xxx].

The importance of preserving the child’s cultural identity and connections to their language and territory is incorporated into the determination of BIOC (s.10(3)(a), (d) and (e)). Child and family services must also be provided in a manner that considers the child’s culture and allows the child to know his or her family origins (s.11(c)).

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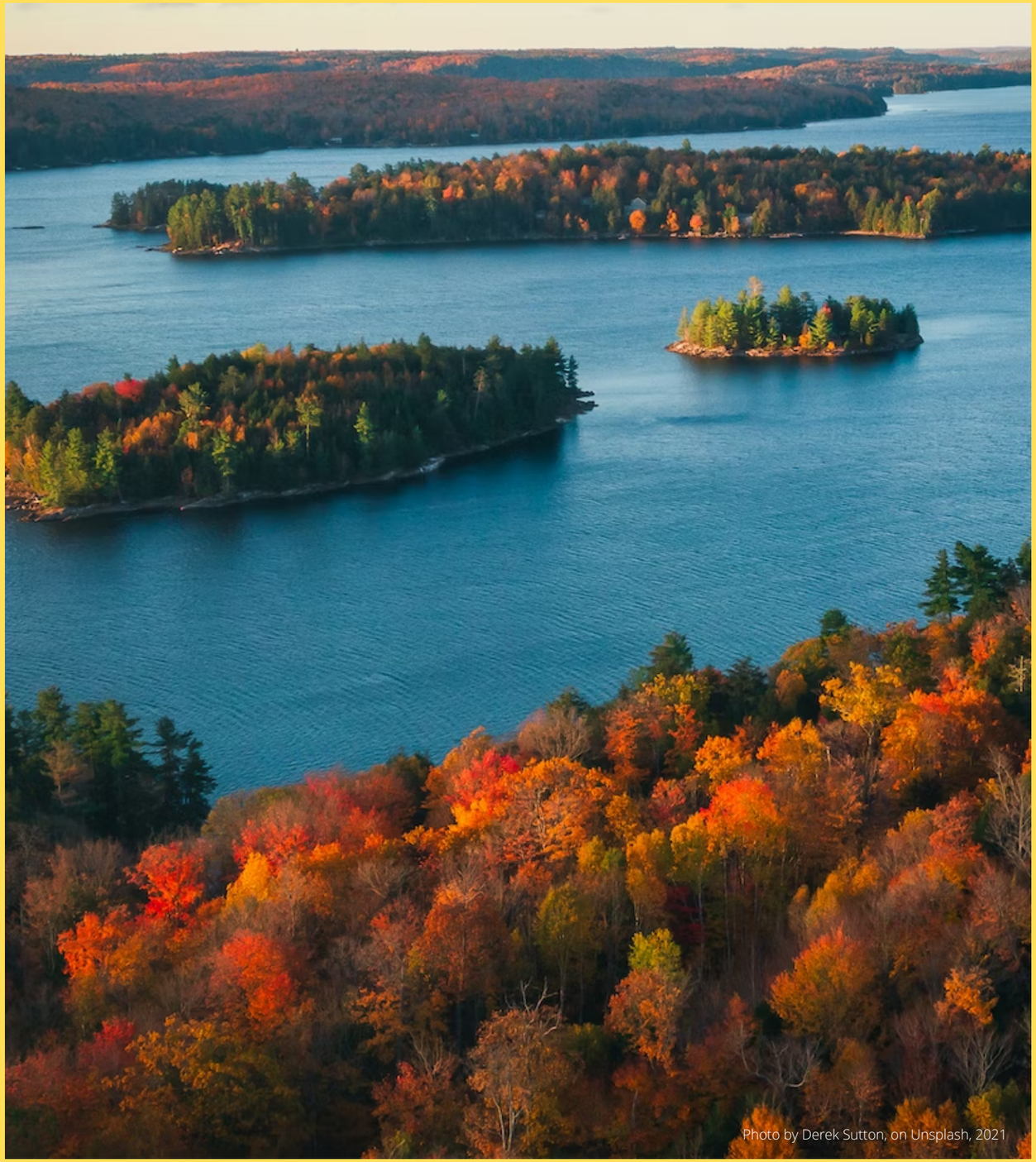

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Consideration for the child's need for permanency, continuity, and stability

According to the Convention, children who are deprived of their family environment are entitled to special protection, and decisions regarding the child's placement must consider the desirability of continuity to a child's upbringing [xxxi]. This aspect ties into the child's right to maintain regular contact with both parents [xxxii].

The child's need for permanency, continuity, and stability is incorporated into the determination of BIOC (s.10(3)(b) and (c)). Regarding the placement of the Indigenous child following apprehension, attempts must first be made to place an Indigenous child with their family and with their community before considering other possibilities (s.16(1)).

CRITICISMS

Although the Act was prepared with an awareness for children's rights, its success must be evaluated based on whether it can fulfill its stated objectives.

The Yellowhead Institute, a First Nation-led research centre based in Ryerson University, identified concerns that could prevent successful implementation, including:

- The absence of a stronger "active efforts" principle requiring workers to help keep the child in their home before apprehension [xxxiii];
- The absence of provision of government support after a child "ages out" of care [xxxiv];
- The continuing lack of clarity regarding the jurisdiction of federal and provincial and who is responsible for funding, as well as the lack of mention of Jordan's Principle [xxxv];
- The absence of a commitment for funding [xxxvi]; and
- The lack of an independent dispute resolution mechanism to ensure accountability, as well as the absence of mandatory data collection [xxxvii].

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Quebec's Constitutional Challenge

The Province of Quebec is challenging the Act on the basis that it is unconstitutional, as it interferes with the province's exclusive jurisdiction over child welfare [xxxviii]. On February 10, 2022, the Court of Appeal of Quebec found that the Act was constitutional, except for section 21 (which provides that the law of the Indigenous group, community or people has the force of federal law) and subsection 22(3) (which provides that in the event of a conflict, the law of the Indigenous group, community or people prevails over provincial law) [xxxix]. The Government of Canada has since appealed this decision to the Supreme Court of Canada [xl].

Recommendations before the Committee

First Nations Child & Family Caring Society of Canada [xli]

Article 18 of the Convention stresses the importance of the central role parents play in the upbringing and development of a child, as well as the importance of assistance that States shall offer to parents to support them in their child-rearing responsibilities.
Therefore, this article calls for preventative measures and support in order to allow First Nations children to remain with their families and communities. **Canada's failure to fund such preventative measures and support to First Nations families is a breach of article 18 of the Convention. While Canada may claim to have taken steps to meet its obligations under article 18 by adopting, An Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92,), this legislation does not guarantee equitable and culturally-appropriate funding.** [*sic*] In the absence of this adequate funding, the law's stated objective of keeping Indigenous children and youth connected to their families, communities, and culture is nothing but an empty promise.

Society for Child and Youth Rights in BC [xlii]

The Federal government has recently passed exciting new child welfare legislation in the form of Bill C-92 […] Unfortunately, the federal government has introduced this legislation with no known associated funding..

Canadian Human Rights Commission (CHRC) [xliii]

The CHRC recognizes that An Act respecting First Nations, Inuit and Metis children, youth and families (the Act), which recently entered into force, provides an opportunity to improve the child welfare system. Among other things, the Act establishes national standards for the provision of child and family services to Indigenous children, and **affirms Indigenous jurisdiction over child and family services.** Many features of this new legislation are encouraging, including its emphasis on substantive equality preventive care and the need for continuity of culture and language. However, the CHRC also shares the concerns of stakeholders that this legislation **does not adequately address the need for reliable funding, which is critical for implementation. The Tribunal, as well as other respected bodies such as the Truth and Reconciliation Commission of Canada and this Committee, have all stressed the need for Canada to provide adequate resources for Indigenous child and family services.**

National Association of Friendship Centres [xliv]

1 Jurisdictional Ambiguity
1. Understanding that jurisdictional ambiguity creates harm for Indigenous children and youth everywhere they live, particularly where child welfare and health care services are concerned, Canada must work actively to address jurisdictional ambiguity in ways that support and affirm Indigenous autonomy and self-determination in urban, rural, northern, remote, and reserve settings.

2 Child Welfare, Health, and Wellness
1. With Bill C-92 now in effect, Canada must clarify jurisdictional uncertainties magnified by the legislation (see recommendation 1) and develop accountability measures to ensure the effectiveness of the new standards.

3 Child Welfare, Health, and Wellness
Governments should provide ongoing and stable funding for Indigenous community- based, accessible, and culturally-appropriate wraparound health services […]

National Women's Association of Canada [xlv]

Despite its positive appearance, a **paucity of information about the legislation on the part of the Federal Government in terms of an implementation plan and funding** have fueled serious concerns about its overall implementation in practice. A recent publication by the First Nations thinktank, the Yellowhead Institute, identified five areas of existing concern in relation to the enacted law, despite improvements to earlier draft versions of the legislation. These concerns relate to the **implementation in practice of the concept of 'best interest of the child' for children in long-term car and the related national standards; a potential lack of jurisdictional clarity; a lack of commitment of funding for child and family services to Indigenous peoples; and the absence of any dispute resolution mechanism and data collection.** In NWAC's view these concern[s] may undermine the potentially positive impact of the law in practice.

Recommended question 11: please provide information to the UN Committee onthe Rights of the Child about how Bill C-92, An Act respecting First Nations, Inuit, and Métis Children, Youth and Families is being implemented in practice by the Federal Government of Canada in the light of persisting concerns about the law?

The Committee's Concluding Observations

In its Concluding Observations on the Combined Fifth and Sixth periodic reports of Canada, dated June 23, 2022, the Committee "welcomed" the coming into force of the Act, but remains "seriously concerned" about persistent problems in the child welfare system:

Children deprived of a family environment

31. The Committee welcomes the coming into force of the Act respecting First Nations, Inuit and Métis children, young people and families, in January 2020, that recognizes indigenous peoples' jurisdiction over child and family services, and takes note of the efforts undertaken by the State party to improve the situation of children in alternative care. However, it remains seriously concerned about the following:

(a) The persistently high number of children in alternative care;

(b) The continuing overrepresentation of indigenous children and children of African descent in alternative care, including foster care, often outside their communities;

(c) That different criteria are being used across jurisdictions for making decisions on child removal and placement in care, on the basis of socioeconomic factors that disproportionately affect indigenous children, children of African descent and other children belonging to minority groups;

(d) That indigenous and children of African descent are at higher risk of abuse, neglect and violence in alternative care than other children.

Photo by Galen Crout, on Unsplash, 2021

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[xiv] Ibid., s 18(2).
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