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Recent Changes to Indigenous Child Welfare in Canada

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Around the World:

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I. INTRODUCTION

Like the United States, Canada has a long and checkered history with Indigenous peoples. Much of this history between the Indigenous peoples and the Canadian government centered around the government's attempt to "civilize" the Indigenous peoples according to European standards. One way in which both nations sought to decimate tribes of Indigenous peoples was by assimilating their children and erasing their languages and cultures. Just as is the case in the United States, the presence of Indigenous children in Canada's foster care system is grossly disproportionate to that of other ethnic groups in Canada. This is especially true for First Nations children, whose ancestors were the first people in Canada to encounter sustained contact, settlement, and trade with Europeans. Between 1989 and 2012, First Nations children spent sixty-seven million nights in foster care, a number that is twelve times the rate of other Canadian children.

The aim of this article is to present recent changes in the Canadian child welfare system related to the care and custody of Aboriginal children. Before addressing these updates, the article will briefly discuss the Canadian child welfare system as it pertains to Indigenous children as a whole and then highlight events that led to the monumental *Daniels* decision and the passage of Bill C-92. Finally, the article will discuss the impact of the *Daniels* decision, which declared that non-status Indians and Métis peoples were "Indians" under section 91(24) of the Canadian Constitution, and Bill C-92, which affirmed the right of self-governance for Indigenous peoples over child welfare services.

II. DIFFERENCES IN CHILD WELFARE FUNDING FOR INDIGENOUS PEOPLES

In Canada, only some Indigenous children involved in the child welfare system receive services from the federal government and their provincial or territorial government. All other Indigenous children receive services that are funded on a provincial or territorial level only. This division is based upon Indigenous group membership and location. Child welfare services for First Nations children who live on their respective reservations in the Yukon Territory are federally funded, and up until recently, all other Indigenous child welfare services were provided on either a provincial or territorial level. According to the National Chief of the Assembly of First Nations (AFN), there is a need to "invest in First Nations children, families, and communities" as the First Nations children "face the worst social and economic conditions" in all of Canada.

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III. THE GROUNDWORK FOR THE *DANIELS* DECISION AND BILL C-92

Since the turn of the millennium, the Aboriginal peoples of Canada have garnered significant attention from both the media and the public on issues related to their child welfare systems. In 2006, a class action settlement designated federal funds for the creation of a "truth and reconciliation" designed to promote knowledge on the long-term impact of residential schooling. In 2007, the Canadian Parliament supported "Jordan's Principle," a legal rule that was intended to ensure that children who are members of the First Nations receive the services they need without delay caused by governmental red-tape. Later that same year, the First Nations Child and Family Caring Society of Canada (FNCFCS) and the AFN filed a human rights complaint charging the Canadian government with "systematically providing less funding for child welfare services to on-reserve First Nations children than is provided for children who are off-reserve." And still later that year, a new First Nations child welfare funding strategy was introduced by the Aboriginal Affairs and Northern Development Canada.

Next, in 2008, the then Prime Minister of Canada, Stephen Harper, issued a formal apology on behalf of the government to those who suffered through the residential schooling system. Finally, in 2012, the Canadian court for judicial review ruled that "failure to ensure comparable funding for on- and off-reserve services can be considered racial or ethnic discrimination," which ended a lengthy appeals process blocking the hearing of the AFN and FNCFCS complaint filed in 2007. Although this article does not further discuss these issues, they are important because they set the foundation for the *Daniels* decision and Bill C-92. Specifically, they demonstrate the Canadian government's commitment to providing child welfare services to Indigenous peoples.

IV. RECENT CHANGES TO THE ABORIGINAL CHILD WELFARE SYSTEM

A. The Daniels *Decision*

Prior to *Daniels*, the Métis and non-status Indians were not classified as "Indians" under section 91(24) of the Constitution of Canada. While the term "Métis" is used to describe communities of mixed Indigenous and European descent who live all over Canada, it is also used to describe a specific community of people—the Métis Nation, which originated in western Canada. With *Daniels*, a change in classification of the Métis people and non-status Indians allowed all Indigenous peoples to be considered "Indians" under the Constitution.

In 1999, the case of *Daniels v. Canada* was originally filed by the President of the Congress of Aboriginal Peoples, Harry Daniels, and a non-status Anishinaabe woman named Leah Gardner. Before the case went to trial in 2011, Daniels died. His son, Gabriel Daniels, and Terry Joudrey, a non-status Mi'kmaq man from Nova Scotia, were added as plaintiffs. The group sought the following declarations from the trial court: (1) that non-status Indians and the Métis people are considered Indians under section 91(24) of the Constitution Act, 1867; (2) that the federal government has a responsibility or fiduciary duty to the non-status Indians and the Métis peoples; and (3) that non-status Indians and

the Métis people collectively have "a right to be consulted and negotiated with in good faith by the federal government through representatives of their choice."

While *Daniels* did not directly pertain to child and family welfare services, the decision affirmed that the federal government of Canada has jurisdiction over legislative interactions with the Métis people. This decision impacts the Indigenous child welfare system because it determined that, while the federal government was not required to provide services and programs to the Métis people and non-status Indians, it could no longer deny services based solely on a lack of jurisdiction. Further, *Daniels* clarified to which level of government Métis and non-status Indians desiring change must lobby. But perhaps the greatest benefit of this decision was that if the Canadian federal government provided different types and levels of services to different Indigenous groups like the Métis, status Indians, and non-status Indians, it would have to justify the need for the distinction.

B. Bill C-92

In 2019, Bill C-92 was passed to affirm "the right and jurisdiction of Indigenous peoples in relation to child and family services and [set] out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children, such as the best interests of the child, cultural continuity and substantive equality." This landmark law went into effect earlier this year and covers all Indigenous groups in Canada, including the First Nations, Inuit, and Métis children and families.

Bill C-92 affirms the rights of Indigenous communities to enforce their own rules on child welfare services. It allows the Indigenous peoples to continue the self-governance of their child welfare systems, only now with the support of the Canadian government. However, this allowance applies only to Indigenous groups that enter into "coordination agreements" with the government of the province they are located in. The bill's passage also shifted the focus of child and family services to preventing the removal of children from their families and communities.

But the aspect of Bill C-92 that will arguably be the most impactful are the provisions that recognize how important a child's ongoing "relationships, community and connections to culture" are as a "primary consideration in the best interests of the child." However, section 23 of Bill C-92 states that the best interests of the child overrides any Indigenous law, which potentially can be used to overrule any Indigenous law that a judge deems to be in conflict with the best interests of the child. While this marks a huge shift in favor of the self-governance of Indigenous peoples and the preservation of Indigenous families, the Canadian federal government still has a responsibility to fund the "exercise of self-government in child welfare [services]," and must find a way to garner the necessary funding.

Bill C-92 is somewhat similar to the United States' Indian Child Welfare Act (ICWA) of 1978. With the implementation of ICWA, Congress recognized Native American tribes' exclusive jurisdiction for child welfare over children who reside or are domiciled on tribal land. Further, it gave tribes and families some protections in state child welfare proceedings involving "Indian children," though state courts still retain primary

control for children outside the tribe's jurisdiction. Specifically, ICWA allows tribes to request that child welfare cases involving "Indian children" be transferred to tribal court and also allows tribes to intervene in state court proceedings involving "Indian children." ICWA also requires higher burdens of proof than in non-ICWA child welfare cases. Additionally, like Bill C-92, ICWA requires placement preferences that favor the tribe and other Native American families. Even though ICWA is over forty years old, to this day, compliance with ICWA has varied widely across jurisdictions, resulting in the continued separation of Native American families. By passing Bill C-92, the Canadian government sought to grant the power of self-governance over Indigenous child welfare to the Indigenous peoples. However, if Bill C-92 is not quickly and fully implemented, it may end up resembling the inconsistent implementation of ICWA.

V. CONCLUSION

There is still much that must be done to improve the Canadian child welfare system for Indigenous peoples. Bill C-92 still needs to be fully funded so that it can be properly implemented. Further, if the Canadian government focuses on the problems that lead to Indigenous children's involvement in the child welfare system, the number of Indigenous children in foster care will likely decline. If the Canadian government works with the Indigenous peoples to improve problems such as poverty and intergenerational trauma—both issues that are central to the heightened presence of Indigenous children in the child welfare system—this may help decrease the removals of Indigenous children from their families.

While the dark history of Canada's relationship with its Indigenous peoples can never be erased, the federal government has been steadily, but slowly taking necessary steps to improve the lives of the Inuit, First Nations, and Métis peoples. The impact of Bill C-92 on the Indigenous peoples' interactions with the Canadian child welfare system is not only beneficial to those of Aboriginal descent. The fewer children that are separated from their families and culture, regardless of race or ethnic background, will make for a better Canada.

SOURCES

An Act respecting First Nations, Inuit and Métis children, youth, and families, S.C. 2019, c 92 (Can.), https://www.parl.ca/DocumentViewer/en/42-1/bill/C-92/royal-assent.

Cindy Blackstock et al., *Indigenous Ontology, International Law and the Application of the Convention to the Over-representation of Indigenous Children in Out of Home Care in Canada and Australia*, 110 CHILD ABUSE & NEGLECT 1, 6 (2020).

Heather Conn, *Daniels Case*, CANADIAN ENCYC. (Jan. 18, 2019), https://www.thecanadianencyclopedia.ca/en/article/daniels-case.

Daniels v. Canada (Indian Affairs and Northern Development), [2016] S.C.R. 425 (Can.).

Minnie Aodla Freeman, *Inuit*, CANADIAN ENCYC. (June 8, 2010), https://thecanadianencyclopedia.ca/en/article/inuit.

René R. Gadacz, *First Nations*, CANADIAN ENCYC. (Feb. 7, 2006), https://thecanadianencyclopedia.ca/en/article/first-nations.

Adam Gaudry, *Métis*, CANADIAN ENCYC. (Sept. 11, 2019), https://www.thecanadianencyclopedia.ca/en/article/metis.

Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2018).

NAIOMI METALLIC ET AL., YELLOWHEAD INST., THE PROMISE AND PITFALLS OF C-92: AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES (2019), https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1134&context=scholarly_works.

Terry Pedwell, *New Indigenous Child-Welfare Law Takes Effect, but Minister Says Change Will Be Slow*, CANADIAN PRESS (July 7, 2020), https://globalnews.ca/news/6359336/indigenous-child-welfare-law/.

Reducing the Number of Indigenous Children in Care, GOV'T OF CANADA, https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851?wbdisable=true (last visited Oct. 15, 2020).

SCC Recognizes Constitutional Rights of Métis, Non-Status Indians, CANADIAN LAW. (Apr. 14, 2016), https://www.canadianlawyermag.com/news/general/scc-recognizes-constitutional-rights-of-metis-non-status-indians/273711.

Raven Sinclair, *The Indigenous Child Removal System in Canada: An Examination of Legal Decision-making and Racial Bias*, 11 FIRST PEOPLES CHILD & FAM. REV. 8 (2016), https://www.researchgate.net/publication/317054752_The_Indigenous_Child_Removal_System_in_Canada_An_examination_of_legal_decision-making_and_racial_bias.

Allyson Stevenson, *Vibrations Across a Continent: The 1978 Indian Child Welfare Act and the Politicization of First Nations Leaders in Saskatchewan*, 37 AM. INDIAN Q. 1-2 (2013), https://www.jstor.org/stable/10.5250/amerindiquar.37.1-2.0218.