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Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations

Marlee Kline

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Abstract

Liberalism has structured legal discourse such that racism is most often unintended and rarely explicit. To understand how and why law has an oppressive and discriminatory impact on First Nations and other racialized groups in Canadian society, one must look at some of its more subtle processes and, in particular, its ideological form. The goal of this article is to provide insight into the origins and operation of "best interests of the child" ideology and to illustrate how it structures and constrains judicial decision making in the context of First Nations child welfare. Best interests ideology serves to portray the apprehension and placement of First Nations children away from their families and communities as natural, necessary, and legitimate, rather than coercive and destructive. This is accomplished, in part, through legal processes that appear to be universal and neutral, and to protect children and serve their best interests. As well, the relevance and importance of a First Nations child maintaining her First Nations identity and culture is minimized. After illustrating the difficulty involved in transforming ideology through law reform, the article concludes by suggesting that First Nations must be empowered to develop their own child welfare services outside the framework of existing provincial legislative schemes and in line with more general goals of self-government.

Keywords

Indigenous children—Legal status, laws, etc.; Canada

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CHILD WELFARE LAW, “BEST INTERESTS OF THE CHILD” IDEOLOGY, AND FIRST NATIONS[©]

BY MARLEE KLINE*

Liberalism has structured legal discourse such that racism is most often unintended and rarely explicit. To understand how and why law has an oppressive and discriminatory impact on First Nations and other racialized groups in Canadian society, one must look at some of its more subtle processes and, in particular, its ideological form. The goal of this article is to provide insight into the origins and operation of “best interests of the child” ideology and to illustrate how it structures and constrains judicial decision making in the context of First Nations child welfare. Best interests ideology serves to portray the apprehension and placement of First Nations children away from their families and communities as natural, necessary, and legitimate, rather than coercive and destructive. This is accomplished, in part, through legal processes that appear to be universal and neutral, and to protect children and serve their best interests. As well, the relevance and importance of a First Nations child maintaining her First Nations identity and culture is minimized. After illustrating the difficulty involved in transforming ideology through law reform, the article concludes by suggesting that First Nations must be empowered to develop their own child welfare services outside the framework of existing provincial legislative schemes and in line with more general goals of self-government.

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I. INTRODUCTION

The child welfare system in Canada has had a devastating and tragic impact on First Nations.¹ From the time provincial child welfare schemes were first extended to First Nations on reserves in the late 1950s, large numbers of First Nations children have been removed from their natural parents, their extended families, and their communities.² This has had destructive effects on individual children and their extended families.³ The continuous removal of children has also

¹ I use the term "First Nations" throughout this work to refer to those who are descendants of peoples indigenous to the territory now called Canada, including: First Nations (e.g., Haida, Tlinkit, Mohawk), Métis, and Inuit. The term "Indian" is used in its legal sense to mean a person who falls within the criteria established in the *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

² See statistics discussed *infra*, section II, notes 46-56 and accompanying text.

³ The most serious concern about First Nations children who are apprehended and placed in the care of non-First Nations families is that they tend to lose their "language, identity and culture": S. Bull, "The Special Case of the Native Child" (1989) 47 *Advocate* 523 at 530. However, racism in the dominant society tends to limit the extent to which these children become assimilated. As a result, they are much more likely than other children to experience "negative adjustment outcomes," including a greater susceptibility to serious identity crises upon reaching adolescence:

hindered the transmission of First Nations culture and traditions from elders to younger generations, thus threatening the very survival of First Nations.⁴ Such effects have long been known to First Nations,⁵ and several studies have demonstrated empirically that vastly disproportionate numbers of First Nations children end up in the custody of child welfare authorities.⁶ As well, highly publicized tragedies

see, e.g., P. Hudson & B. McKenzie, "Child Welfare and Native People: The Extension of Colonialism" (1981) 49 Soc. Worker 63 at 64; Ontario Native Women's Association, Ontario Federation of Indian Friendship Centres & Ontario Métis and Non-Status Indian Association, *Remove the Child and the Circle is Broken: A Response to the Proposed Children's Act Consultation Paper* (Toronto: Ontario Native Women's Association, Ontario Federation of Indian Friendship Centres & Ontario Métis and Non-Status Indian Association, 1983) at 18 [hereinafter *Remove the Child*]; T. Sullivan, "Native Children in Treatment: Clinical, Social and Cultural Issues" (1983) 1:4 J. Child Care 75 at 78; S.G. Novosedlik, "Native Children White Law" (1983) 6:3 Perception 27; C. Stuart, "Cross-Cultural Treatment for Native Children: A Point From Which to Begin" (1983) 1:5 J. Child Care 33; and B. Raychaba, *To Be On Our Own With No Direction From Home: A Report on the Special Needs of Youth Leaving the Care of the Child Welfare System* (National Youth in Care Network, 1988). See also W. Warry, *Ontario's First People: Native Children* (Toronto: The Research Policy Nexus: Children, Families, and Public Policy in the 90s, 1989) at 27 (emotional effects on extended family).

⁴ *Remove the Child*, *ibid.* at 17. See also E.F. Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986) 5 Can. J. Fam. L. 111 at 115; and J.A. MacDonald, "The Programme of the Spallumcheen Indian Band in British Columbia as a Model of Indian Child Welfare" in J.S. Ismael & R.J. Thomlison, eds, *Perspectives on Social Services and Social Issues* (Ottawa: Canadian Council on Social Development, 1987) 237 at 238. As a result, the removal of children by the child welfare system has been characterized as genocide by many First Nations commentators and others: see, e.g., British Columbia Native Women's Society as quoted in P. Johnston, *Native Children and the Child Welfare System* (Ottawa: Canadian Council on Social Development and James Lorimer & Company, 1983) at 62; P.A. Monture, "A Vicious Circle: Child Welfare Law and the First Nations" (1989-90) 3 C.J.W.L. 1 at 7; Review Committee on Indian and Métis Adoptions and Placements, *No Quiet Place: Final Report to the Honourable Muriel Smith, Minister of Community Services* (Winnipeg: Manitoba Community Services, 1985) at 272 (Chair: Kimelman A.C.J.) [hereinafter *No Quiet Place*]; and Hudson & McKenzie, *supra*, note 3 at 64.

⁵ See, e.g., *Remove the Child*, *supra*, note 3 at 3.

⁶ H.P. Hepworth, *Foster Care and Adoption in Canada* (Ottawa: Canadian Council on Social Development, 1980); P. Johnston, *supra*, note 4; and Canada, Child and Family Services Task Force, *Indian Child and Family Services in Canada: Final Report* (Ottawa: Indian and Northern Affairs, 1987) [hereinafter *Final Report*]. For a more detailed consideration of this data, see *infra*, notes 48-56 and accompanying text. More recently, various provinces have collected and reported their own data: see, e.g., British Columbia, *An Overview of Family & Children's Services 1990/1991* (Victoria: Ministry of Social Services, 1992).

Prior to these studies, the struggle of First Nations with the child welfare system had not gone entirely unnoticed by the dominant society: see H.B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies* (Ottawa: Indian Affairs Branch, 1966) vol. 1 at 327; D. Sanders, *Family Law and Native People: Background Paper* (Ottawa: Law Reform Commission of Canada, 1975); British Columbia, *The Tenth Report of*

in the last decade involving the death of First Nations children receiving foster care in non-First Nations homes have underlined the impact of the child welfare system on First Nations, and have raised questions about the system's legitimacy.⁷

Different approaches have been taken in analyzing the adverse impact of the child welfare system on First Nations. Some commentators attribute the high proportion of First Nations children in care to inadequate parenting and child neglect which, in turn, are understood as resulting from the difficult socio-economic conditions in which many First Nations people live.⁸ Others blame over-zealous child welfare authorities who apply culturally biased structures and values in

the Royal Commission on Family and Children's Law: Native Families and the Law (Vancouver: Queen's Printer, May 1973) (Chair: T.R. Berger); Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada* (Ottawa: Canadian Council on Children and Youth, 1978); Canada, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983); and *No Quiet Place*, *supra*, note 4.

⁷ For example, *Re: Cameron Kerley* (date of death: 1983), see Monture, *supra*, note 4 at 1, and C. Culhane, "Isn't it time to give this young native a break" (1986) Can. H.R. Advoc. 11. *Re: Richard Cardinal* (date of death: 1984), see Indian Association of Alberta, *Child Welfare Needs: Assessment and Recommendations* (Calgary: Indian Association of Alberta, 1987) at 6 [hereinafter *Child Welfare Needs*], and C. Chartier, *In the Best Interest of the Metis Child* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 67. *Re: Marlon Pippin* (date of death: 1989), see G. York, "Teen-ager's Death Seen As Tragic Proof of Need for Native Social Workers" *The [Toronto] Globe and Mail* (24 April 1989) A1; and "Police Shooting of Indian Sparks Call for Inquiry" *The [Toronto] Globe and Mail* (18 April 1989) A3. See, generally, G. York, *The Dispossessed: Life and Death in Native Canada*, 1st ed. (Toronto: Lester & Orpen Dennys, 1989) c. 8.

⁸ As discussed in Johnston, *supra*, note 4, and Warry, *supra*, note 3. Poverty is certainly an important factor contributing to the high incidence of First Nations children in protective care. Poor people not only have difficulty paying for necessary daycare and babysitting services, but they are subject to much greater public scrutiny because of their dependence on other social services such as social assistance: F. Stairs, *Women and the Child Welfare System* (Osgoode Hall Law School, York University, 1989) [unpublished]; and L. Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960* (New York: Viking, 1988). This model of child abuse and neglect, however, usually emphasizes individual pathology and ignores broader sociological and historical causes of child abuse and neglect: Warry, *supra*, note 3 at 27. The poverty of First Nations, for example, must be understood as itself a product of the colonialist history of white/First Nations relations which has resulted, among other things, in the destruction of traditional First Nation economies. First Nations poverty is also further exacerbated by the lack of adequate preventive and support services in many First Nations communities that results from ongoing jurisdictional disputes between the federal and provincial governments respecting child welfare services for status Indians: K. McNeil, R. Thompson & C. Bell, *Indian Child Welfare: Whose Responsibility?* (Saskatoon: University of Saskatchewan Native Law Centre, 1981, updated 1984); Monture, *supra*, note 4 at 8-11; Johnston, *supra*, note 4; and B.A. Atwood, "Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity" (1989) 36 UCLA L. Rev. 1051 (U.S. context).

their effort to "help" First Nations children.⁹ Still other commentators link the operation of the child welfare system to the continuing processes of colonialization¹⁰ in Canada.¹¹ For these commentators, focusing only

⁹ This is understood to play out, for example, in the determination of suitable child-care practices and providers: see Carasco, *supra*, note 4 at 131; Johnston, *supra*, note 4 at 68; and Novosedlik, *supra*, note 3 at 29. See also Sullivan, *supra*, note 3 at 78.

¹⁰ The term "colonialism" is widely used in the literature discussing the impact of European economic development and settlement on the indigenous peoples of North America, yet it is seldom defined. The situation is further complicated by the extensive conflation of the terms "colonialism" and "colonization": see, e.g., J.S. Frideres, *Native Peoples in Canada: Contemporary Conflicts*, 3d ed. (Scarborough, Ont.: Prentice-Hall, 1988) at 367; G. Kellough, "From Colonialism to Economic Imperialism: The Experience of the Canadian Indian" in J. Harp & J.R. Hopley, eds, *Structured Inequality in Canada* (Scarborough, Ont.: Prentice-Hall, 1980) 343 at 343 n. 1 and at 347; R.F. Berkhofer, *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Alfred A. Knopf, 1978) at 123. An early attempt at a general definition of colonialism can be found in R.J. Horvath, "A Definition of Colonialism" (1972) 13 *Curr. Anthropology* 45. See also the classic consideration of colonizer/colonized relations by A. Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1965). More recent attempts at defining the processes involved in colonialism and/or colonization include: M. Etienne & E. Leacock, "Introduction" in M. Etienne & E. Leacock, eds, *Women and Colonization: Anthropological Perspectives* (New York: Praeger, 1980) at 17 (arguing that each case of colonization is unique depending on the interplay of "the particular mode of colonization, itself determined by the political and economic imperatives of the colonizer and by the nature of the colonized society; the precise strategies of exploitation employed by the colonizer; and the strategies of accommodation or resistance adopted by the colonized."); E.E. Cashmore, *Dictionary of Race and Ethnic Relations* (London: Routledge & Kegan Paul, 1984) at 53-56 (defining colonialism at 53 as "the domination of one group over ... others, culturally unrelated groups which lived in distant territories and had few defences against the conquering powers" and at 55 identifying the process as operating "at many levels, crucially at the level of consciousness." Colonization, in contrast, is defined at 54 as "the process of taking the lands and resources for exploitation."); B.B. Ringer, *We the People" and Others: Duality and America's Treatment of its Racial Minorities* (New York: Tavistock, 1983) at 7-9 (distinguishing colonization and colonialization as two related, yet distinct processes which have resulted in New World societies of a dualistic nature. As colonists, Ringer argues at 7 that "the English created a society whose institutions were molded in their racial, religious, and national image." Colonization, in other words, refers only to the society created by and for whites. As colonialists, on the other hand, "the English subjected the nonwhites with whom they came into contact to violence, force, and fraud; and they subjugated, killed, or drove them off": at 8. The normative environment of the colonialist society, in other words, was racially bifurcated and "defined by a racial creed which stressed the separateness of the races and the inferiority of the nonwhite." *Ibid.* The inter-connections between these two processes are developed in Ringer's subsequent argument at 9 that "America's historic treatment of its racial minorities has been both an expression and product of the dialectical tension and struggle between these two models."); R.E. Bourgeault, "Race and Class Under Mercantilism: Indigenous People in Nineteenth-Century Canada" in B.S. Bolaria & P.S. Li, eds, *Racial Oppression in Canada*, 2d ed. (Toronto: Garamond, 1988) 41 at 56 (arguing that the "intent of British colonial policy [in nineteenth century Canada] was to create a white colony with political power and re-presentation in the hands of whites."); Frideres, *supra* at 366-72 (developing a "theoretical model" of white/First Nations relations in Canada referred to as "colonialism" by sketching the process of colonization as

on socio-economic factors or social work practices provides a limited and incomplete understanding of the problem. They argue that it is necessary to go beyond these factors and situate child welfare policy and practice in the historical context of the domination of First Nations in Canada by European-based political, legal, and economic systems. Important to such analyses is the question of how law operates in the context of the child welfare system as it applies to First Nations.

Emily Carasco and Patricia Monture have recently addressed this question.¹² Carasco examines child welfare cases from across the country and concludes that "the best interests of the Indian child have not been hitherto protected because of a general failure to give appropriate consideration to the 'indigenous factor'."¹³ Monture takes Carasco's analysis further by situating the devaluation of the "indigenous factor" in child welfare cases within the more general context of structures of racism within law. Her analysis focuses on the "*manner* [in] which racism is constituted and implemented within legal structures."¹⁴ She argues that child welfare law is racist in that it applies standards "which are not culturally relevant" to First Nations and that merely

involving seven different aspects).

In this article, I use the terms "colonialism" and "colonialization" to refer to the processes of European domination of the First Nations in Canada following the spirit of the analyses of Kellough, *supra*; E.P. Patterson, *The Canadian Indian: A History Since 1500* (Don Mills, Ont.: Collier-MacMillan, 1972) c. 1; and Frideres, *supra*. To avoid confusion, I refrain from using the term colonization except when referring to the process of the establishment of European colonies in the territory now referred to as Canada.

¹¹ Hudson & McKenzie, *supra*, note 3. See also Native People's Resource Centre, B. Loucks & A. Timothy, *Justice-Related Children and Family Services for Native People in Ontario: A Discussion Paper*, rev'd ed. (Toronto: Ontario Native Council on Justice, 1981); and H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969).

¹² Carasco, *supra*, note 4 at 115; and Monture, *supra*, note 4 at 7-8. Others who consider the operation of law in the context of First Nations child welfare include: A. McGillivray, "Transracial Adoption and the Status Indian Child" (1985) 4 Can. J. Fam. L. 437; Bull, *supra*, note 3; Novosedlik, *supra*, note 3; and Chartier, *supra*, note 7. For those who focus on analyzing federal/provincial jurisdictional disputes, see McNeil *et al*, Monture, Johnston, & Atwood, *supra*, note 8. For an analysis of the various legal mechanisms available for arranging the provision of First Nations child welfare services, see D.R. James, "Legal Structures for Organizing Indian Child Welfare Resources," [1987] 2 C.N.L.R. 1.

¹³ *Supra*, note 3 at 115. Carasco defines the "indigenous factor" as "the disregarded, underemphasized or undervalued factor in child welfare situations involving Indian children." *Ibid.* at 113. For similar analyses, see Bull, *supra*, note 3 at 525 and 530; and Novosedlik, *supra*, note 3.

¹⁴ Monture, *supra*, note 4 at 8 n. 29.

“reinforce the status quo.”¹⁵ In her view, “fundamental[ly] racist notions ... underpin”¹⁶ judicial interpretations of, for example, the “best interests of the child” test.¹⁷

My aim in this article is to deepen and complicate this analysis of racist structures in child welfare law by locating such structures historically and ideologically. I will focus my analysis on the courts because their role in First Nations child welfare matters is substantial. 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.¹⁸ As well, courts have final authority under legislation to determine whether, and in what form and duration, a child should be placed into protective care once apprehended.

I will argue that child welfare law has provided a new modality of colonialist regulation of First Nations in the post-Second World War period. This argument will be developed in two stages. First, I will consider the historical convergence of factors that have led to the extension of child welfare law and services to First Nations on reserves. Second, I will argue that a key to understanding the devastating impact of the child welfare system on First Nations lies in the ideological dimensions of child welfare law.¹⁹ In this article, I will focus on the ideological *form* of child welfare law and, in particular, that of its central legal concept—the “best interests of the child.”²⁰ The historical

¹⁵ *Ibid.* at 12.

¹⁶ *Ibid.* at 8 n. 29.

¹⁷ *Ibid.* at 12. See *infra*, note 57 and accompanying text for further consideration of the centrality of the best interests of the child standard to child welfare law.

¹⁸ *Final Report, supra*, note 6 at 8-9. 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. See Stairs, *supra*, note 8.

¹⁹ See *infra*, notes 58-60, 78-81, and accompanying text for further consideration of the concept of ideology.

²⁰ In a subsequent, as yet unpublished, paper, I will examine another ideological dimension of child welfare law, namely how ideological thought about First Nations that is formally external to law is relied upon by judges in their decision making: see *infra*, note 60. I have separated consideration of these two types of relations between law and ideology for analytic and illustrative purposes. In actual practice, the two processes are interdependent and mutually reinforcing.

development of best interests ideology will be situated in the context of nineteenth century developments in the ideology of childhood and the role of the state in protecting children. I will then consider how best interests ideology is infused with the basic tenets of liberal legality—individualism, abstraction, universalism, and impartiality—and show how this helps to explain judicial reasoning and results in First Nations child welfare cases. Finally, I will examine the impact of best interests ideology on recent legislative reform efforts in the area of First Nations child welfare.

II. THE EXTENSION OF CHILD WELFARE LAW TO FIRST NATIONS: A NEW MODALITY OF COLONIALIST REGULATION

Child welfare services were not extended to reserves until after the Second World War. The latter part of the 1940s marked the beginning of a significant re-examination of government policies relating to First Nations. The aggressive assimilationist policies of earlier eras²¹ came under attack,²² and debates about First Nations policy were

²¹ Beginning around the 1830s in the eastern third of the territory now called Canada, aggressive, assimilationist state policies were developed and instituted which consisted of three main components—reserve systems, political wardship, and residential schools—orchestrated by a complex framework of legislative and administrative structures: see, e.g., A. Tanner, "Introduction: Canadian Indians and the Politics of Dependency" in A. Tanner, ed., *The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada* (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1983) 1; Frideres, *supra*, note 10; J.S. Frideres, "Policies On Indian People in Canada" in P.S. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford University Press, 1990) 98; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989); S.M. Weaver, "Segregation and the Indian Act: The Dialogue of Equality vs. Special Status" in W. Isajiw, ed., *Identities: The Impact of Ethnicity on Canadian Society* (Toronto: Peter Martin Associates, 1977) 154; R. Gibbons & J.R. Ponting, "Historical Overview and Background" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) 18; J.L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in I.A.L. Getty & A.S. Lussier, eds, *As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 39; Kellough, *supra*, note 10; R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977); and C. Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988).

²² By this time, Ottawa bureaucrats and missionary groups alike could no longer ignore the fact that assimilation and economic development on reserves were not taking place as expected.

increasingly informed by emerging liberal democratic ideologies and discourses.²³ The previous treatment of First Nations as separate from, and inferior to, the dominant Anglo-Canadian culture was challenged by a new concern that First Nations be treated as equals, in particular, by integrating them into developing universal social programs.²⁴ In this context, a Special Joint Committee of the Senate and House of Commons was appointed in 1946 to "examine and consider" the *Indian Act* and to suggest amendments thereto, with specific terms of reference to include investigation of "any ... matter or thing pertaining to the social and economic status of Indians and their advancement."²⁵ The Joint Committee sat for three consecutive sessions of Parliament, but only reluctantly began to hear from First Nations constituencies in the middle of the second session after the committee's credibility was called into question over the issue of First Nations representation.²⁶

The committee's most significant recommendation was that financial arrangements be developed to integrate Indians into provincial

The rise of organized political protest on the part of the First Nations during this period was another important factor contributing to this shift in attitude: Tobias, *supra*, note 21 at 48.

²³ See P. Havemann, "Law, State, and Canada's Indigenous People: Pacification by Coercion and Consent" in T. Caputo *et al.*, eds, *Law and Society: A Critical Perspective* (Toronto: Harcourt Brace Javanovich, 1989) 54. Some of this was the result of a "new social awareness" on the part of the Canadian public and policy makers that had its origins in the war experience. See P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 122; Miller, *supra*, note 21 at 220; and Treaties and Historical Research Centre, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Treaties & Historical Research Centre, P.R.E. Group, Indian and Northern Affairs, 1978) at 133.

²⁴ For consideration of the development of universal social programs in Canada during the post-Second World War period, see, e.g., D. Guest, *The Emergence of Social Security in Canada* (Vancouver: University of British Columbia Press, 1980); A. Finkel, "Origins of the Welfare State in Canada" in L. Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977) 344; G. Drover & A. Moscovitch, "Inequality and Social Welfare" in A. Moscovitch & G. Drover, eds, *Inequality: Essays on the Political Economy of Social Welfare* (Toronto: University of Toronto Press, 1981) 1; H. Buchbinder, "Inequality and the Social Services" in Moscovitch & Drover, *supra*, 348; and A.W. Djao, *Inequality and Social Policy: The Sociology of Welfare* (Toronto: John Wiley & Sons, 1983).

²⁵ As set out in Treaties and Historical Research Centre, *supra*, note 23 at 132. See Tobias, *supra*, note 21 at 51-52 for an analysis of the specific factors which gave rise to the appointment of the Special Joint Committee.

²⁶ I.V.B. Johnson, *Helping Indians to Help Themselves—A Committee to Investigate Itself: The 1951 Indian Act Consultation Process* (Ottawa: Treaties and Historical Research Centre and Indian and Northern Affairs Canada, 1984) at 25-26.

health, education, and social service programs.²⁷ As in previous years, assimilation of Indians continued to be an important theme in discussions leading to this recommendation, but assimilation was now presented in terms of granting Indians rights equal to those of other Canadians and doing away with their special status.²⁸ In the end, the committee recommended extension of provincial social services, the goal being "economic assimilation of Indians into the body politic."²⁹ The government responded to the Report of the Joint Committee by tabling amendments to the *Indian Act*.³⁰ To distinguish its new initiatives premised on equal status from earlier state policies of assimilation premised on segregation and inferior status, the government attempted to construct a new official discourse of "integration."³¹

²⁷ Treaties and Historical Research Centre, *supra*, note 23 at 144; and Johnson, *supra*, note 26 at 47. Such extensions of services had been advocated in the submissions of some First Nations organizations, Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence* (Ottawa: King's Printer, 13 May 1946) at 614, 858; and in a joint brief submitted by the Canadian Welfare Council and the Canadian Association of Social Workers: Canada, Canadian Welfare Council and Canadian Association of Social Workers, Joint Submission to the Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, Special Joint Committee Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 1947, app. 30 (Ottawa: King's Printer, 1946-49) at 160-61 [hereinafter *Joint Submission*].

²⁸ D.E. Ginn, *Aboriginal Self-Government* (LL.M. Thesis, Osgoode Hall Law School, York University, 1987) at 19 [unpublished]. This is in contrast to old policies which emphasized segregation as a means to "train" First Nations for assimilation: see, e.g., D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S.M. Beck & I. Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol. 1 (Montreal: Institute for Research on Public Policy, 1983) 225; and Tanner, *supra*, note 21 at 16. For example, anthropologist Diamond Jenness introduced his "Plan for Liquidating Canada's Indian Problem Within 25 Years" with the goal "[t]o abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing": Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, app. 30 (Ottawa: King's Printer, 25 March 1947) at 310-11 [hereinafter *S.J.C. Minutes and Proceedings*].

²⁹ *S.J.C. Minutes and Proceedings*, *ibid.* 1948 at 189 cited in Treaties and Historical Research Centre, *supra*, note 23 at 144. See also Johnson, *supra*, note 26 at 47.

³⁰ *Indian Act*, R.S.C. 1952, c. 149 [hereinafter *Indian Act, 1952*].

³¹ In introducing the amended *Indian Act* (Bill No. 79, *An Act Respecting Indians*, 4th Sess., 21 st. Parl., 1951) for second reading in the House of Commons, for example, W.E. Harris, the Minister of Citizenship and Immigration, attempted to distinguish between the new policy of "integration" and earlier government policies of "assimilation." After reasserting a statement which he had made earlier in the legislative process that "it was hoped that we could eventually provide for the integration of the Indian into our community life," he said that he had "received many protests

The amendments did not represent a significant structural transformation in government policies towards First Nations,³² though they did provide a legislative framework which supported and facilitated new modalities of colonialist regulation of First Nations in the ensuing years, most significantly through the application of child welfare law.³³ A new section was added to the *Indian Act* providing that "all laws of general application ... in force in any province are applicable ... except to the extent that such laws are inconsistent with this *Act*."³⁴ This section was regarded as a necessary precursor to the extension of child welfare services to First Nations. Following the section's enactment, the Indian Affairs Branch and some provincial government officials interpreted it as providing that provincial child welfare laws were applicable to First Nations peoples on reserves.³⁵ At least in theory, then, there were no longer legal impediments to the extension of provincial child welfare services to First Nations.³⁶

In practice, however, the extension of child welfare services to First Nations was not immediately forthcoming. The federal government took the position that it "lacked the authority and capacity to ensure the availability of adequate child welfare services for bands directly" and sought to "arrange for the extension of existing provincial

from Indians with respect to that statement because there were many who thought that integration was equivalent to assimilation." In response, he argued "that ... [was] not the meaning of the word in any way; the word was used to indicate the status of having privileges, duties and responsibilities equal to those of other Canadians, and exercising them in the same manner that we do." *House of Commons Debates* (16 March 1951) at 1350. See also N. Dyck, "The Politics of Special Status: Indian Association and the Administration of Indian Affairs" in J. Dahlie & T. Fernando, eds, *Ethnicity, Power and Politics in Canada* (Toronto: Methuen, 1981) 279.

³² Though fifty sections representing "most provisions regarding aggressive assimilation" were repealed by the new *Indian Act, 1952*, "[t]he main elements of the earliest Dominion legislation ... were preserved intact." Johnson, *supra*, note 26 at 51. See also Treaties and Historical Research Centre, *supra*, note 23 at 149.

³³ This notion of a "shift ... in the modality of ... regulation" is adopted from S. Hall, "Reformism and the Legislation of Consent" in National Deviancy Conference, ed., *Permissiveness and Control: The Fate of the Sixties Legislation* (Great Britain: MacMillan, 1980) 1 at 2.

³⁴ *Indian Act, 1952*, s. 87.

³⁵ See H.B. Hawthorn, C.S. Belshaw & S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press & University of British Columbia, 1960) at 399; A. Pratt, "Federalism in the Era of Aboriginal Self-Government" in D.C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 19 at 31.

³⁶ Though this was not firmly established until the *Natural Parents* case: see *infra*, note 84.

services on reserves.”³⁷ According to the federal government, the new amendment did not authorize additional federal funding to defray the cost of newly provided services,³⁸ and provincial service providers were loathe to extend their already overburdened child welfare services to First Nations without such funding.³⁹ By 1956, only Ontario had entered into an agreement with the federal government to extend provincial children’s aid services to reserves.⁴⁰ As late as 1959, residential schools were still the primary facility relied on by the Indian Affairs Branch to provide child welfare-like services to First Nations.⁴¹ In 1961, a study of the social work implications of the *Indian Act* described as “entirely inadequate” the commitment of only nine social workers across the country to work with the 179,000 residents of reserves.⁴² By 1964, only the Yukon, Nova Scotia, and several children’s aid societies in Manitoba had joined Ontario in entering into funding agreements with the federal government.⁴³

The uneven provision of child welfare services to First Nations had not significantly improved in 1966 when a federal commission, appointed to examine the social, educational, and economic situation of Indians in Canada, concluded that “the situation [respecting the provision of child welfare services to the First Nations in jurisdictions with no federal/provincial cost-sharing agreements] varies from unsatisfactory to appalling.”⁴⁴ Nonetheless, the commission’s report hailed the limited extension of child welfare services as “one of the most significant achievements in the elimination of discriminatory treatment

³⁷ *Final Report*, *supra*, note 6 at 3. See also Hawthorn, *supra*, note 6 at 327.

³⁸ Johnston, *supra*, note 4 at 3.

³⁹ A.I. Holmes, *The Social Welfare Aspects and Implications of the Indian Act* (M.S.W. Thesis, University of British Columbia, 1961) at 61 [unpublished].

⁴⁰ Holmes, *ibid.* at 60; and Hawthorn, *supra*, note 6 at 327.

⁴¹ Holmes, *ibid.* at 57; and Hawthorn, *supra*, note 6 at 399. But see also W.T. Stanbury, *The Social and Economic Conditions of Indian Families in British Columbia* (Vancouver: British Columbia Family and Children Law Commission, 1974) at 50 providing evidence that the Indian Affairs Branch, at least in British Columbia, also placed Indian children in foster homes in the 1950s and early 1960s.

⁴² Holmes, *supra*, note 39 at 60.

⁴³ Hawthorn, *supra*, note 6 at 327.

⁴⁴ *Ibid.*

between Indians and non-Indians in the field of welfare."⁴⁵ Despite these limitations, by the time of the report, significant numbers of First Nations children had been brought into state care. In British Columbia, for example, the number of First Nations children in care increased from 29 children in care in 1955 to 39 per cent of the total number in care in 1965.⁴⁶

The introduction of the Canada Assistance Plan in 1966 allowed for a significant expansion of provincial child welfare services by providing federal cost-sharing to offset provincial costs.⁴⁷ As a consequence, the proportion of First Nations children in care began to increase dramatically across the country. By 1977, almost 20 per cent (15,500) of the total number of children in care in the country were First Nations children.⁴⁸ In the four western provinces, where First Nations populations tend to be larger, the proportions were estimated to be above the average: 39 per cent in British Columbia, 40 per cent in Alberta, 50 per cent in Saskatchewan, and 60 per cent in Manitoba.⁴⁹ In particular locales, the percentage of apprehended children was even higher. For example, in 1981 in the Kenora region of Ontario, 85 per cent of children in care were First Nations children, although First Nations people made up only 25 per cent of the local population.⁵⁰ According to a 1980 study, status Indian children were placed into state care at a rate of four and one-half times that of other Canadian children.⁵¹ Altogether, in the last twenty-five years, vastly

⁴⁵ *Ibid.* at 328-29.

⁴⁶ Union of British Columbia Indian Chiefs *et al.*, *A Survey of Adoption and Child Welfare Services to Indians of B.C.* (Vancouver: Department of Human Resources, 1974) at 5-6 [hereinafter *Survey of Adoption*]. At the same time that Indian children were being brought increasingly into the care of provincial authorities, those involved were concerned with the difficulty that they were having in finding "suitable Indian foster homes." Hawthorn *et al.*, *supra*, note 35 at 399. See also *Survey of Adoption, supra* at 5.

⁴⁷ H.P. Hepworth, "Trends in Provincial Social Service Department Expenditures, 1963-1982" in J.S. Ismael, ed., *Canadian Social Welfare Policy: Federal and Provincial Dimensions* (Kingston, Ont.: McGill-Queen's University Press, 1985) 139 at 140-41.

⁴⁸ Hepworth, *supra*, note 6 at 111.

⁴⁹ *Ibid.* at 115.

⁵⁰ Johnston, *supra*, note 4 at 44.

⁵¹ *Ibid.* at 57.

disproportionate numbers of First Nations children have ended up in the custody of child welfare authorities.

Studies have also documented how First Nations children are much less likely than other children to be returned to their own parents or placed for adoption once admitted into care, and that, if placed in foster homes, they are likely to be situated with non-First Nations families.⁵² A 1987 report found that status Indian children were placed into care predominantly outside their community and that they remained in care longer than non-First Nations children.⁵³ Further, status Indian children were more frequently moved out of care through adoption or by being relinquished into their own custody at age eighteen or nineteen, than through being returned to their familial home.⁵⁴ With respect to adoption, the total number of First Nations children adopted by non-First Nations parents increased fivefold from the early 1960s to the late 1970s.⁵⁵ From 1969 to 1979, an average of just over 78 per cent of status Indian children placed for adoption each year were adopted by non-First Nations families.⁵⁶

III. CHILD WELFARE LAW AND ITS APPLICATION TO FIRST NATIONS

The above discussion shows that, since the 1950s when provincial child welfare schemes were first extended to First Nations people on reserves, the system has had the effect of removing large numbers of children from their natural parents, their extended families, and their communities. The results of extension have been to further the colonialization of First Nations and to erode their social and political structures. In terms of these effects, child welfare law can be understood as a new modality of colonialist regulation of First Nations, though one less explicit and apparently more "innocent" of colonialist intentions

⁵² Hepworth, *supra*, note 6 at 118; and Johnston, *supra*, note 4 at 9.

⁵³ *Final Report*, *supra*, note 6 at 9.

⁵⁴ *Ibid.*

⁵⁵ Hepworth, *supra*, note 6 at 119; and Department of Indian and Inuit Affairs Program, *Indian Conditions: A Survey* (Ottawa: Ministry of Indian Affairs and Northern Development, 1980) at 24.

⁵⁶ Hepworth, *ibid.* at 120. See also Stanbury, *supra*, note 41 at 57.

than the aggressive mechanisms of the past. Canadian child welfare law directs judges to make decisions that are "in the best interests of the child."⁵⁷ Unlike earlier colonialist mechanisms that openly segregated Indians and treated them as inferiors, the apprehension of First Nations children from their communities and its negative effects are facilitated and legitimated by a legal system that is based upon ideals of universality and neutrality, and which purports to protect individual children and act in their best interests. In other words, there are ideological dimensions of child welfare law which make decisions arrived at within the system appear natural, necessary, and legitimate, rather than coercive and destructive.⁵⁸ These dimensions can be investigated on two different

⁵⁷ In most jurisdictions, the best interests test applies only in decisions relating to a child at the dispositional stage after it has been determined according to specific statutory criteria that the child is in need of protection. See *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 2 [hereinafter *Alberta Act, 1984*]; *The Child and Family Services Act*, S.M. 1985-86, c. 8, s. 2(1) [hereinafter *Manitoba Act, 1985-86*]; and *Re Greenland* (1984), 50 Nfld & P.E.I.R. 193 (Nfld Unif. Fam. Ct). Some statutes explicitly provide that the best interests of the child is to be the paramount consideration in any interpretation or decision made pursuant to child welfare legislation: *Alberta Act, 1984*, s. 2; *Manitoba Act, 1985-86*, s. 2(1); *Child Welfare Act*, R.S.N. 1990, c. C-12, s. 4(1) [hereinafter *Newfoundland Act, 1990*]; *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(a) [hereinafter *Ontario Act, 1990*]; *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2, s. 2 [hereinafter *P.E.I. Act, 1988*]; and *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 2(2) [hereinafter *Nova Scotia Act, 1990*]. See also *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, ss. 3-4 [hereinafter *Saskatchewan Act, 1989-90*]. Of these, some statutes define the best interests of the child, either exhaustively or as an inexhaustive list of considerations: see *Manitoba Act, 1985-86*, s. 2(1); *Newfoundland Act, 1990*, s. 4(2); *Nova Scotia Act, 1990*, s. 3(2); *Ontario Act, 1990*, s. 37(3); *P.E.I. Act, 1988*, s. 1(1)(d); and *Saskatchewan Act, 1989-90*, s. 4. Other statutes establish no overriding best interests of the child principle or specific, defining criteria, but make reference to the best interests of the child or similar terms in a variety of provisions: see, e.g., *Child Welfare Act*, R.S.N.W.T. 1974, c. C-3, ss. 21(2), 26(1), 28(1). In interpreting child welfare provisions, however, courts have generally regarded the best interests of the child as an overriding factor: see, e.g., *Racine v. Woods*, [1983] 2 S.C.R. 173, [1984] 1 C.N.L.R. 161 [hereinafter *Racine*, (S.C.C.) cited to S.C.R.]. Even in jurisdictions where the best interests criterion is not legislatively established as overriding, the courts have nonetheless relied on their inherent *parens patriae* jurisdiction to establish it as such: see, e.g., *King v. Low*, [1985] 1 S.C.R. 87 [hereinafter *King*]; and Alberta cases discussed *infra*, Section IV.

⁵⁸ The works that have been particularly helpful to me in developing an understanding of the concept of ideology are: D. Hay, "Property, Authority and the Criminal Law" in D. Hay *et al.*, eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975) 17; R. Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984); M. Barrett, *Women's Oppression Today: Problems in Marxist Feminist Analysis* (London: Verso, 1980); A. Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 L. & Soc. Rev. 11; S. Hall *et al.*, *Policing the Crisis: Mugging, the State, and Law and Order* (London: MacMillan Education, 1978); S. Hall, "The Toad in the Garden: Thatcherism among the Theorists" in C. Nelson & L. Grossberg, eds, *Marxism and the Interpretation of Culture* (Urbana, Ill.: University of Chicago Press, 1988) 35; S.A.M. Gavigan,

levels. First, one can analyze the particular ideological form of the best interests standard and explore how it has affected the interpretation and application of this standard in the adjudication of First Nations child welfare disputes.⁵⁹ Second, one can look at how ideological thought about First Nations that is formally external to law is relied upon by judges in child welfare cases and thereby imported into, and reinforced by, law.⁶⁰ In this article, I will focus on the former kind of analysis.

A. "Best Interests of the Child" Ideology

The ideological form of the "best interests" legal standard in child welfare law is a product of its historical development in the material conditions of nineteenth and twentieth century Canada and Europe. It is premised on liberal notions of law and childhood. Anglo-Canadian law is liberal in form. It is individualistic and abstract, and it claims to be impartial and universal in that all individuals are treated the same without regard to their different social situations.⁶¹ These factors support the appearance of Anglo-Canadian law as incompatible with reproducing and reinforcing social relations of oppression and inequality.⁶² There is, however, a substantial literature demonstrating how the liberal form of law serves to obscure, and thereby legitimate and reproduce, oppressive structures.⁶³ In the context of racial oppression,

"Law, Gender and Ideology" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing and Publishing, 1988) 283; and T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991).

⁵⁹ This is an investigation of the form of law which corresponds to the first of two "coextensive" levels of inquiry required by the ideological analysis of law as described by Gavigan, *ibid.* at 292. Gavigan specifically identifies the best interests of the child principle as an example of legal doctrine appropriate for this type of analysis.

⁶⁰ This is what Gavigan characterizes as the second level of inquiry required by the ideological analysis of law. *Ibid.*

⁶¹ See, e.g., S. Picciotto, "The Theory of the State, Class Struggle and the Rule of Law" in P. Bierne & R. Quinney, eds, *Marxism and Law* (New York: John Wiley and Sons, 1982) 169; Hunt, *supra*, note 58; P. Fitzpatrick, "Racism and the Innocence of Law" (1987) 14 J.L. & Soc'y 119 [hereinafter "Innocence of Law"]; P. Fitzpatrick, "Law, Modernization and Mystification" in R.J. Simon & S. Spitzer, eds, *Research in Law and Sociology: A Research Annual*, vol. 3 (Greenwich, Conn.: Ai Jai Press, 1980) 161 at 172; A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278; and *infra*, notes 63-64.

⁶² See Fitzpatrick, "Innocence of Law," *ibid.* at 122.

⁶³ For recent examples, see H. Glasbeek & M. Mandel, "The Legalization of Politics in

for example, critics have demonstrated how formal equality and universality as central aspects of liberal legality facilitate, rather than counteract, the concrete reality of racial oppression in Canada, the United States, and Britain.⁶⁴ I want to argue that the application of the best interests standard in the context of First Nations child welfare can be understood in similar terms. The tragic impact of child welfare law on First Nations can be attributed in part to the liberal form taken by the best interests principle in child welfare adjudication. It has directed judges to focus on the child as an individual abstracted out of her community and cultural contexts, and it has rendered judicial decisions impartial and objective and, thereby, unassailable.⁶⁵

The ideological form of the best interests standard must also be understood in the context of the historical development of the conception of childhood and the role of the state in protecting children. During the sixteenth and seventeenth centuries, childhood emerged as a distinct stage in the life cycle during which time children were recognized as socially, intellectually, and emotionally dependent, and were thus entrusted to their families (and in particular their mothers) for protection, nurturing, and socialization.⁶⁶ In the nineteenth century, the

Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 *Socialist Stud.* 84; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall L.J.* 485; S.B. Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart & S. Sevenhuijsen, eds, *Child Custody and the Politics of Gender* (London: Routledge, 1989) 126; B. Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 *Osgoode Hall L.J.* 303; J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 *Can. B. Rev.* 307; and the cites *infra*, note 64.

⁶⁴ See, e.g., Fitzpatrick, "Innocence of Law," *supra*, note 61 at 119; K.W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 *Harv. L. Rev.* 1331; K.W. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U. Chi. L.F.* 139; A.D. Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" (1977-78) 62 *Minn. L. Rev.* 1049; A.D. Freeman, "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay" (1988) 23 *Harv. C.R.-C.L. L. Rev.* 295; A. Kobayashi, "Racism and the Law in Canada: A Geographical Perspective" (1990) 11 *Urb. Geography* 447; and N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1992, forthcoming) 6(1) *C.J.W.L.*

⁶⁵ I discuss these aspects separately not to imply that they are distinct or discrete, but to assist in analytical clarity.

⁶⁶ P. Ariès, *Centuries of Childhood: A Social History of Family Life*, trans. by R. Baldick (New York: Random House, 1962). See also N. Mandell, "The Child Question: Links Between Women and Children in the Family" in N. Mandell & A. Duffy, eds, *Reconstructing the Canadian Family*:

conception of childhood as distinct from adulthood reached a new height, and children's interests became increasingly recognized as severable from, and independent of, those of their parents.⁶⁷ As the middle classes assimilated these understandings of childhood, concern developed about the denial of childhood to working-class and poor children. Consequently, a "child saving" movement emerged from what had previously been a more generalized form of poor relief and religious benevolence.⁶⁸

Around this time, courts started to become involved in the protection of children.⁶⁹ Judicial concern, increasingly articulated in terms of doing what was necessary for the "welfare" of the child, became a justification for granting custody to mothers or removing children from their families at the expense of previously unquestioned rights of fathers to custody.⁷⁰ Reinforced at the end of the nineteenth century by

Feminist Perspectives (Toronto: Butterworths, 1988) 49 at 56. Historical variations in the status and role of children were closely intertwined with changing ideas about the status and role of women within the family and society at large: see J. Ursel, "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada" in J. Dickinson & B. Russell, eds, *Family, Economy & State: The Social Reproduction Process Under Capitalism* (Toronto: Garamond Press, 1986) 150 at 188.

⁶⁷ M.L. Fineman, "The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the USA" in Smart & Sevenhuijsen, *supra*, note 63, 27 at 30.

⁶⁸ P.T. Rooke & R.L. Schnell, *Discarding the Asylum: From Child Rescue to the Welfare State in English-Canada (1800-1950)* (Lanham, Md.: University Press of America, 1983) at 9-10. The child saving movement formed part of a broader range of social and moral reform movements which facilitated the internalization of middle-class conceptions of childhood and family by the dependent poor and working classes: see, e.g., M. Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart, 1991). For an incisive consideration of the regulatory and coercive legal processes involved in the imposition of bourgeois childhood and family ideology upon the working and dependant poor in the period between the World Wars, see D.E. Chunn, "Rehabilitating Deviant Families through Family Courts: The Birth of 'Socialized' Justice in Ontario, 1920-1940[1]" (1988) 16 Int'l J. Soc. L. 137; D.E. Chunn, "Boys Will Be Men, Girls Will Be Mothers: The Legal Regulation of Childhood in Toronto and Vancouver" in P.A. Adler & P. Adler, eds, *Sociological Studies of Child Development*, vol. 3 (Greenwich, Conn.: Ai Jai Press, 1990) 87; and D.E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

⁶⁹ C.B. Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 212 at 213 and at 240. See also C. Smart, "Power and the Politics of Child Custody" in Smart & Sevenhuijsen, *supra*, note 63, 1 at 5 and at 8-9.

⁷⁰ Backhouse, *ibid.* See also Smart, *ibid.* at 6. On the connection between the inherent *parens patriae* jurisdiction of superior courts and the best interest formulation, see M. Reitsma-Street,

provincial legislation aimed at protecting the welfare of the child,⁷¹ state authority to remove children from “unfit” parents continued to grow in the twentieth century.⁷² Gradually, the principle of the best interests of the child was adopted by courts and, subsequently, by various legislatures as the central test for resolving child welfare, custody, and other issues involving children.⁷³

Today, the best interests of the child standard provides broad discretion to children’s aid societies and judges. Such flexibility is considered necessary to allow each case to be treated on its own merits.⁷⁴ Though broad, the discretion afforded to judges and other legal actors in the child welfare context is not unlimited. While the best interests standard is conceptually indeterminate, the historical and ideological context in which it is interpreted limits the meanings that will be accepted by courts and other institutions.⁷⁵ In the context of First Nations child welfare, the liberal ideological form of the best interests standard has served to constrain judicial decision making so as to minimize, and even negate in some instances, the relevance and importance of maintaining a child’s First Nations identity and culture. It provides an interpretive framework in which the removal and placement of First Nations children away from their families and communities

“More Control Than Care: A Critique of Historical and Contemporary Laws for Delinquency and Neglect of Children in Ontario” (1989-90) 3 C.J.W.L 510. There is also some judicial authority for this connection: see *Re S.D.* (1989), 100 A.R. 214 (Q.B.), affg (1988), 17 R.F.L (3d) 183 (Alta Prov. Ct Fam. Div.); and *Re Adoption of Infant Registration No. 78-09-024190*, [1990] 2 C.N.L.R. 9 (B.C.S.C.).

⁷¹ See, e.g., *An Act for the Prevention of Cruelty to, and Better Protection of Children*, S.O. 1893, c. 45., s. 18(3); *An Act Respecting Infants*, S.A. 1913 (2d Sess.), c. 13, s. 6; and, generally, Ursel, *supra*, note 66 at 185 discussing the statutes which provided the “legal apparatus for extending state control over children.”

⁷² Backhouse, *supra*, note 69 at 241; and Reitsma-Street, *supra*, note 69 at 513.

⁷³ N. Bala, “Judicial Discretion and Family Law Reform in Canada” (1986) 5 Can. J. Fam. L. 15 at 22 contrasting this development to the earlier reliance of judges on more rigid rules based on the gender of the parents. See also *supra*, note 57.

⁷⁴ R.F. Barnhorst, “Child Protection Legislation: Recent Canadian Reform” in B. Landau, ed., *Children’s Rights in the Practice of Family Law* (Toronto: Carswell, 1986) 255 at 256.

⁷⁵ As Alan Hunt argues: “[T]he varieties of social construction of meaning and signification have their limits in the kind of people who construct their social reality, whose language, ideology and consciousness take particular (not just any) historical forms and thus result in determinant limits to the variability of the social.” A. Hunt, “The Big Fear: Law Confronts Postmodernism” (1990) 35 McGill L.J. 507 at 532.

appears natural, necessary, and legitimate,⁷⁶ thereby giving judges some basis for security and certainty in their decision making. Importantly then, the best interests principle is not simply a mask for unbridled discretion on the part of judges, but is itself “an instrument of regulation.”⁷⁷

Certainly, the focus on the best interests of the individual child in child welfare cases is not entirely invalid. The impact on a child will obviously be an important factor in any determination about her placement. This is consistent with the operation of ideology, a central characteristic of which is the potential for “something ‘real’ ” to be gained.⁷⁸ The attraction of ideologies like those associated with the best interests standard, even when such ideologies have negative consequences, is partly explained by this dynamic. Moreover, the interpretive framework established by best interests ideology is not so rigid as to preclude occasional acceptance of oppositional interpretations and justifications which do accord with the interests of First Nations. This interplay is illustrated by some of the cases considered below which reveal space within the legal framework of child welfare for judicial decisions that give priority to the maintenance of connections between a First Nations child, her extended family, and her First Nation.⁷⁹ Again, such positive results are consistent with the operation of ideology which derives strength precisely because it does not require complete enforcement.⁸⁰ Indeed, the very nature of

⁷⁶ See, e.g., Eagleton, *supra*, note 58 at 58:

Successful ideologies are often thought to render their beliefs natural and self-evident—to identify them with the ‘common sense’ of a society so that nobody could imagine how they might ever be different ... [T]he ideology creat[es] as tight a fit as possible between itself and social reality, thereby closing the gap into which the leverage of critique could be inserted. ... On this view, a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the unthinkable.

I am arguing here only that such decisions will appear natural, necessary, and legitimate in the eyes of the dominant society. I make no claims in the context of this article as to the extent of acceptance of such justifications by First Nations. See M.G. Kline, *Child Welfare Law, Ideology, and the First Nations* (LL.M. Thesis, Osgoode Hall Law School, York University, 1991) at 130 n. 24 [unpublished]; and Eagleton, *supra*, note 58 at 56.

⁷⁷ I. Thèry, “The Interest of the Child’ and the Regulation of the Post-Divorce Family” (1986) 14 *Int’l J. Soc. L.* 341 at 345.

⁷⁸ See Gavigan, *supra*, note 58 at 292. See also Eagleton, *supra*, note 58 at 45.

⁷⁹ See *infra*, notes 102, 110, 124, and accompanying text.

⁸⁰ As Douglas Hay has observed about ideology, “[p]rovided that its depths are not explored

dominant ideology is such that it must be continually constructed and reconstructed in the face of challenges by contradictory and oppositional ideologies.⁸¹ Altogether, the determination of what is in the best interests of a child in any given child welfare dispute is a site of ideological struggle. However, once an ideology has assumed dominance as a result of particular material conditions, its authority is difficult to dislodge or shift. Dominant ideology is unlikely to be transformed significantly without a change in the material conditions which gave rise to it in the first place.⁸² Understanding this last aspect of ideology provides some insight into the legislative reform experience in Alberta discussed in the fourth section of this article.

Before getting there, the next two sections will investigate the two inter-related aspects of the ideological form of the best interests of the child principle identified above; that is, the focus on the child as an abstract individual, and the purported universality and impartiality of decisions rendered according to that principle.

B. "Best Interests of the Child" Ideology in First Nations Child Welfare Cases

1. The First Nations child as abstract individual

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 privilege an understanding of children as *decontextualized individuals* whose interests are separate and distinct from those of their families, communities, and

too often or by too many, it remains a reservoir of belief throughout the society and flows into the gaps made by individual acts of protest." *Supra*, note 58 at 55.

⁸¹ D. Macdonell, *Theories of Discourse: An Introduction* (Oxford: Basil Blackwell, 1986) at 33 describing Althusser's position that "no ideology takes shape outside a struggle with some opposing ideology." See also A. Hunt, "Marxism, Law, Legal Theory and Jurisprudence" in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) 102 at 115 defining ideology as a "contested grid of competing frames of reference"; and Eagleton, *supra*, note 58 at 45.

⁸² At bottom, the concept of ideology directs attention to the "material conditions of [transformative] possibility" in any given context. Eagleton, *supra*, note 58 at 223. See also *ibid.* at 30.

cultures.⁸³ To this extent, it tends to render irrelevant or unimportant the child's cultural identity and heritage, thus helping to justify her separation from it. When judges determine "best interests" in First Nations child welfare cases, facts and arguments are constructed and organized so as to give credence and legitimacy to the removal of First Nations children from their families and communities. By constructing the child *conceptually* as separate from her culture, the *actual* removal of the child from it is made to seem unproblematic.

This abstraction of child from culture happens in a number of ways, some more subtle than others. First, courts may explicitly deny the relevance of maintaining a First Nations child's culture and identity or assign it little weight relative to other factors. Second, courts may hold that culture is important, but treat it as an abstract category that can be filled by any First Nations culture, rather than that of the particular First Nation to which the child belongs. Third, courts may emphasize the child's psychological bonds with her foster parents, but not consider relevant bonds with her culture. Alternatively, the courts may hold that the child needs the stability of a permanent placement, while ignoring the stability that would result from maintaining a connection to her culture. Finally, courts may consider parents, families, or bands who challenge removal orders or placement plans to have interests separate from, and in conflict with, the interests of the child. I will now consider examples of each of these constructions.

⁸³ See Thèry, *supra*, note 77 at 343.

a) *Individuation and the importance of maintaining a First Nations child's culture and identity*

*Natural Parents v. Superintendent of Child Welfare*⁸⁴ provides a good illustration of the relationship between an individualistic construction of the child and the deemed irrelevance of concerns about culture. A non-First Nations couple sought to adopt a status Indian child who had been apprehended from his parents and placed in foster care in their home. The natural parents refused to consent to the adoption and asked instead that the child be raised by an aunt and uncle in accordance with Tsartlip and Songhees traditions.⁸⁵ In the trial judge's view, the conflict that arose in the case could "only be resolved in the light of the best interests of the child *himself*. He [had to] be considered *as an individual*," and this meant considering the child "not a part of a race or culture."⁸⁶ Culture and heritage were thus deemed separate from, and irrelevant to, his best interests as an individual. The judge regarded the complex "claims of native custom" in the case as merely claims of "heredity" which were necessarily in conflict with claims of "environment."⁸⁷ In the end, "the best interests of the child himself" were held to require retention of custody by the foster parents through adoption.⁸⁸ In a more recent decision,⁸⁹ another Court stated that

⁸⁴ [1976] 2 S.C.R. 751 [hereinafter *Natural Parents*]. The Supreme Court of Canada decided the case on the basis of a constitutional point. The interesting issues from our perspective were addressed at trial and can be gathered from the reasons of the trial judge noted in the judgment of the Supreme Court. The specific constitutional point was whether the application of the provincial *Adoption Act*, R.S.B.C. 1960, c. 4 [hereinafter *Adoption Act*] would extinguish the child's rights to Indian status and was therefore not applicable to the adoption of status Indian children. The Supreme Court held unanimously that the *Adoption Act* applied and thus that the adoption order at issue was valid. A majority of six out of nine judges held that the application of the *Adoption Act* did not interfere with the federally determined question of status. For further commentary on the case, see McNeil *et al.*, *supra*, note 8 at 5; and McGillivray, *supra*, note 12.

⁸⁵ *Natural Parents*, *ibid.* at 768.

⁸⁶ *Ibid.* (emphasis added).

⁸⁷ *Ibid.*

⁸⁸ The trial judge arrived at this conclusion despite his acknowledgement that there was "potential danger to a native child being brought up in a white family, particularly when he reached the later stages of adolescence." This was balanced in his mind by an "intelligently imposed environment" which would in the end be determinative of the child's later adjustment. Although there were relatives in the community wishing to assume the care of the child, the trial judge held not only that it would be in the child's best interests to remain where he was, but also that the foster

“maternal instinct, the wishes of other members of the family *and matters of cultural background and heritage* cannot be allowed to interfere with the paramount consideration of the best interests of the child”⁹⁰—once again separating the analysis of best interests from concerns about maintaining cultural connection. On this basis, an Ojibway mother was denied access to her eight-year-old daughter who had been adopted by her foster parents.

The distinction which courts draw between a child’s best interests and the relevance of her “race or culture” is also apparent in cases where courts impose the burden of proving the importance of maintaining cultural connection for the individual child upon parties seeking to regain custody of a child. In *John v. Superintendent of Child Welfare*,⁹¹ for example, Perry L.J.S.C. of the British Columbia Supreme Court held that the proposition “that an Indian child has a better chance in life by living among his relatives and among others of his race” could not be accepted unless it was “possible to demonstrate that this [was] so, by way of some cogent evidence, *with particular reference to this child.*”⁹² Accordingly, the judge attached little weight to evidence demonstrating in *general* terms the experience of identity crisis and dislocation faced by First Nations children raised in white families, and the sense of identity and cultural understanding fostered in First Nations children when raised among their own people.⁹³ Because this general evidence did not establish the importance of the *particular* child involved in the dispute remaining in his community, Perry L.J.S.C. rejected an attempt by the child’s mother to regain custody from a non-First Nations couple who had adopted him. Similarly, in *C.J.K. v. Children’s Aid Society of Metropolitan Toronto*,⁹⁴ a statutory requirement to consider the “racial

parents had established a “right” to the custody of the child. *Ibid.* at 768-69.

⁸⁹ *Racine v. Woods* (1984), [1985] 2 C.N.L.R. 187 (Man. Q.B.). See *infra*, notes 100, 106-109, 113, 131, 132-42, and accompanying text for more detailed consideration of the various judgments in this case including a decision by the Supreme Court of Canada.

⁹⁰ *Ibid.* at 190-91 (emphasis added). See also *Re J.H. and N.H.* (1988), 3 Y.R. 282 at 291 where the Yukon Territorial Court concluded that, while “[t]he cultural heritage of the children [was] one of the factors and an important factor to be considered[,] ... [t]he welfare of the children ... is the predominant factor.”

⁹¹ (1979), [1982] 1 C.N.L.R. 40, 10 R.F.L. (2d) 330 [hereinafter *John* cited to C.N.L.R.].

⁹² *Ibid.* at 47 (emphasis added).

⁹³ *Ibid.* at 48.

⁹⁴ [1989] 4 C.N.L.R. 75 (Ont. Prov. Ct Fam. Div.) [hereinafter *C.J.K.*].

culture and origins” of children in the child welfare statute in question⁹⁵ was held to have been included only to “underscore the recognized importance, to any individual, of familial roots, heritage and tradition.”⁹⁶ Custody was denied to the First Nations grandmother of three apprehended children because, *inter alia*, there was no evidence that she would “ensure the retention and respect for the Indian culture.”⁹⁷ It was also important that the children themselves were considered by the judge to have no First Nations identity.⁹⁸ These cases demonstrate a heavy and individuated burden on those arguing the importance of maintaining a child’s First Nations cultural connection.

More generally, the retention and promotion of First Nations identity has seldom been recognized as an overriding, or even a substantially weighty, factor.⁹⁹ In *Racine*, for example, the Supreme Court of Canada rejected the proposition that the search for a home with the identical racial background as the child should be a paramount consideration in making a determination on adoption.¹⁰⁰ The result in *Racine* was followed in *Re W.W.* where the Alberta Court of Queen’s Bench indicated that, if the trial judge had “placed greater emphasis on [First Nations heritage considerations] ... than on the issue of bonding,” she would have been considered to have applied incorrect legal principles.¹⁰¹ A few recent decisions suggest some willingness on the part of courts to presume and judicially notice retention of First Nations identity and culture as a relevant factor in determining best interests.¹⁰²

⁹⁵ *Child and Family Services Act, 1984*, S.O. 1984, c. 55.

⁹⁶ *C.J.K.*, *supra*, note 94 at 81 (emphasis added).

⁹⁷ *Ibid.* at 81. Having left her reserve at the age of fifteen, the grandmother was considered to be “fully acclimated to urban life in Southern Ontario and to have long ago cast away her own racial heritage and tradition.” *Ibid.* at 82.

⁹⁸ *Ibid.* “[I]n this case there is no evidence of any recognition by the older children of their Native heritage.” Note: this line is reported in the original judgment (28 June 1988), Toronto #C1867/85 (Ont. Prov. Ct Fam. Div.), although it is missing in the C.N.L.R. report of the case.

⁹⁹ What I am describing as the importance of maintaining a child’s First Nations identity and culture seems to correspond to what Carasco identifies as “the indigenous factor.” See *supra*, note 4.

¹⁰⁰ This is the way Kerans J.A. characterized *Racine* in *Re H.I.R.*, [1984] 3 C.N.L.R. 86 at 96 (Alta C.A.).

¹⁰¹ (1989), 100 A.R. 221 at 232.

¹⁰² In *Re H.I.R.*, *supra*, note 100 at 96, for example, a First Nations mother declared to be

However, the individual and abstract focus of the best interests criterion makes such recognition difficult, and it is usually tenuous.

At best, the retention of First Nations culture and identity by a First Nations child plays an ambiguous role in judicial application of the best interests standard. It is not surprising then that the most legally authoritative description of the meaning of "best interests" fails to even mention the importance of retaining a child's First Nations culture and identity or to indicate the weight to be accorded to this factor.

[T]he dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult.¹⁰³

Thus, in some cases, the importance of maintaining a First Nations child's identity and culture is not taken account of at all; in others, a heavy individualistic burden is placed on those asserting it; and, in still others, it is understood by the courts as being separate from, and irrelevant to, the question of the child's best interests. What ties all of these together, I want to suggest, is a conceptual separation of the individual child in question from her cultural context. That context is

unfit as a parent was allowed access to her child in foster care to enable the child, who was being raised in a white foster home, to "have some happy exposure to the native community and culture." The Court recognized that "the simplest and most natural way was for [the child] to maintain a relationship with his natural relatives." See also Carasco, *supra*, note 4 at 126. Similarly, in *King, supra*, note 57 at 103, one of the factors relied on by the Supreme Court of Canada in upholding the decision at first instance and in the Court of Appeal in favour of adoptive parents was that the adoptive mother "share[d] with [the child, whose father was a First Nations man] ... some Indian ancestry." This factor was found to "stand ... in her favour" on the basis that "one would expect that she [would] be enabled to understand and deal with problems the child [might] encounter in [that] respect." While this general recognition of the importance of maintaining a First Nations child's cultural identity and heritage is welcome, the specific application of the importance of this factor in the particular context of this case is problematic. It is relied on in this case to deny custody to the white mother of a First Nations child as opposed to operating in favour of a First Nations mother and against the retention of custody by white *foster* parents. As well, this case can be understood as an example of the "abstraction of culture" discussed in the next section.

¹⁰³ *King, supra*, note 57 at 101.

portrayed as irrelevant or unimportant to the determination of her best interests.

b) *The abstraction of culture*

When courts do consider culture, they often do so in abstract terms. They reconstruct the concern of First Nations in maintaining the connection between each First Nations child and the heritage and culture of her *particular* First Nation into a concern about maintaining a connection to First Nations heritage and culture in the *abstract*. In other words, the specificity of different First Nations cultures is obscured. This tendency is, I suggest, partly the result of the abstract and individualistic character of best interests ideology. "Cultural connection" cannot be seen as directed to the maintenance of a tie between a child and her particular First Nation when the child has already been constructed as an individual abstracted out of her culture. For example, in *Re A.B.*, Landerkin J. of the Alberta Provincial Court assumed that, because the foster parents of the First Nations children in question lived in a small town "contiguous to a large Indian Reserve ... [i]t would be a fair inference that this physical location would allow this part of their heritage to be explored." This was despite the fact that the reserve in question was not the original home of the children.¹⁰⁴ The Court did not even consider whether the reserve community was part of the children's First Nation.¹⁰⁵

Similarly, in *Racine*,¹⁰⁶ the Supreme Court of Canada thought that concerns raised about maintaining the Ojibway child's culture and identity were sufficiently met by the "sensitivity" of the adoptive parents (one white, the other Métis) "to the interracial aspect [of the adoption] and their appreciation of the need to encourage and develop in [the child] a sense of her own worth and dignity and the worth and dignity of

¹⁰⁴ (1989), 100 A.R. 150 at 154 where permanent guardianship of three First Nations children, aged 6, 3, and 2, was granted to the Director on the basis that the children were thriving in the foster home where they had been for the past two years. The mother from whose care they were removed had substance abuse problems and lived "a transient lifestyle." *Ibid.* at 153.

¹⁰⁵ Tellingly, whether the reserve close to the foster parent's home and the children's home reserve belonged to the same First Nation is not ascertainable from the judgment.

¹⁰⁶ *Supra*, note 57 (S.C.C.).

her people.”¹⁰⁷ This ruling was made despite Matas J.A.’s concern in the Court of Appeal that the white, adoptive mother could never sufficiently provide the child with the information and role modelling required to transmit successfully to the child an understanding of Ojibway heritage and culture.¹⁰⁸ The Supreme Court was of the view that the Métis adoptive father would be in a position to provide the child with “a model ... of how to survive as a member of a much maligned minority.”¹⁰⁹ Though such instruction would obviously be important to the child, the Court was not concerned with finding out whether the adoptive father would be able to provide her with any exposure to the *Ojibway* language and culture that were *her* heritage.

It should be noted that, in some cases, courts have been sensitive to the specificity of First Nations identity and culture, holding that custody should be granted to someone capable of transmitting the identity and culture of the child’s First Nation and/or providing for continued access by the child’s parents or other extended family members. In *Sandy v. Nootchtai*,¹¹⁰ for example, a First Nations woman sought custody of a fifteen-month-old child who had been in her care for six months following apprehension from his mother who had subsequently died. A custody application was also brought by the child’s maternal aunt and supported by the late mother’s band. The Court stated that “[t]he assertion of blood relationship and more particularly Indian blood relationship must still be considered in the context of the child’s best interests”¹¹¹ and came to a determination in favour of the maternal aunt. In addition to the aunt’s demonstrated parenting capabilities, the Court appears to have recognized that, with her, the child would also have the benefit of being raised within his own First Nation.¹¹²

¹⁰⁷ *Ibid.* at 186 (S.C.C.).

¹⁰⁸ *Woods v. Racine* (1982), [1983] 2 C.N.L.R. 157 at 187 (Man. C.A.) [hereinafter *Racine* (Man. C.A.)].

¹⁰⁹ *Racine*, *supra*, note 57 at 178 (S.C.C.).

¹¹⁰ [1989] 3 C.N.L.R. 190 (Ont. Prov. Ct Fam. Div.) [hereinafter *Nootchtai*].

¹¹¹ *Ibid.* at 194.

¹¹² *Ibid.* at 196. See also *Kenora-Patricia Child and Family Services v. L.(P.)*, (2 September 1987), Kenora C227/81 (Ont. Prov. Ct Fam. Div.), Wang J. (recognizing that the child’s “cultural development” would be “almost a certainty” with the chosen foster mother, an Ojibway woman, and also providing for continued access by the mother); *J.T.K. v. Kenora-Patricia Child and Family*

c) *Psychological bonding and permanent placement versus cultural connection*

The above analysis suggests that courts are, at best, ambiguous about the importance of maintaining First Nations identity and heritage in child welfare cases. On occasion, they recognize the importance of a child's connection to his culture, but tend not to give it much weight—let alone see it as central. By way of contrast, the psychological connection—or bond—that a child has developed with her caregivers and/or the permanence of the care situation in which she is placed are generally regarded as crucial to the child's welfare. More often than not, courts find these latter factors to be more consistent with a child's welfare than maintenance of her First Nations identity and culture. Underlying the weighing of these factors by courts is a justifiable concern with the stability of the child's environment and her corresponding emotional security. The problem is that this concern is understood as severable from the maintenance of the child's First Nations identity and heritage, again reflecting the individualistic and abstract focus of the best interests standard.

This point is illustrated by Wilson J.'s reliance in *Racine*¹¹³ on the evidence of a medical expert to the effect that the case had

nothing to do with race, absolutely nothing to do with culture, ... nothing to do with ethnic background. It's two women and a little girl, and one of them doesn't know her. It's as simple as that; all the rest of it is extra and of no consequence, except to the people involved, of course.¹¹⁴

Services, [1985] 4 C.N.L.R. 76 (Ont. Prov. Ct Fam. Div.) (held in favour of placement of the children in the home of relatives on a northern Ojibway reserve their parents came from as opposed to with a more materially well-off Mohawk couple living on a southern Ontario reserve); *Re W.W.*, *supra*, note 101; and *Re W.W.* (1988), 93 A.R. 248 (Prov. Ct Fam. Div.).

¹¹³ *Supra*, note 57 (S.C.C.). The significance placed on bonding is also in evident in *King*, *supra*, note 57 at 87 (headnote), where a mother revoked her consent to the adoption of her child within three months following his birth, and sought to regain custody of him from the prospective adoptive parents whom she had chosen. Though the child had been in the care of the adoptive parents for only seven and a half months at the time of trial, the trial judge held that “[t]he benefits to the child of maintaining the blood ties to his natural mother were outweighed by those resulting from maintenance of his present home stability and his existing parental bonds to the adoptive parents.” This decision was affirmed by both the Court of Appeal and the Supreme Court. In *King*, however, it should be recognized that the emphasis placed on bonding served to reinforce rather than counter the importance of maintaining the child's First Nations identity.

¹¹⁴ *Supra*, note 57 at 188 (S.C.C.) quoting the words of the medical expert.

Accordingly, Wilson J. concluded that "when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes."¹¹⁵

A similar approach is evident in *Re E.J.C.*¹¹⁶ At issue was whether a two-year-old First Nations boy should be placed with his First Nations maternal grandmother or adopted by his non-First Nations foster mother. The child's mother wanted him to be placed in the care of his grandmother. The Court acknowledged that the child "would benefit from some peripheral contact with his own culture through the special efforts made by the foster parents in that regard,"¹¹⁷ but recognized that his cultural development would be far greater in his grandmother's home where he would also have the benefit of association with his extended family.¹¹⁸ Nonetheless, it concluded that the potential placements were, *prima facie*, "relatively equal" because of the potential strength of the child's bond to the foster parents, with whom he had lived for one year, as compared to that of any "remnants of bonding" to his grandmother, with whom he also had lived and who had provided "back-up" care for him prior to his apprehension.¹¹⁹ Accordingly, a further four months of temporary wardship and continued placement with the foster parents was granted, *inter alia*, to enable further evidence of the extent of the child's psychological attachments to be presented.¹²⁰ The difficulty with these cases is not so much that psychological bonding is viewed as important for a child's emotional stability and security, but

¹¹⁵ *Ibid.* at 187. See also *N.P.P. v. Regional Children's Guardian* (1988), 14 R.F.L. (3d) 55 (Alta Q.B.) [hereinafter *N.P.P.*] quashing a decision of the Children's Guardian of Alberta to place a child on a reserve with an extended family member because the relevance of disrupting the attachment of the particular child in question to her foster parents was not properly considered. For a more extensive discussion of this case, see *infra*, notes 156-61 and accompanying text.

¹¹⁶ (1987), 79 A.R. 125 (Prov. Ct).

¹¹⁷ *Ibid.* at 130. The foster mother had testified that the family "participate[d] in some native cultural and social events." *Ibid.* at 127.

¹¹⁸ *Ibid.* at 130.

¹¹⁹ *Ibid.* at 130 and at 126.

¹²⁰ *Ibid.* at 130. Increasing the time period during which the child remained with the foster parents, however, would also serve to increase the emotional attachment of the child to them.

rather that a child's connection to her First Nations culture is not understood in similar terms.

In addition to psychological bonding, permanent placement of a child has been accorded greater priority in a number of cases than maintaining a child's connection to her First Nations culture. In *Re S.D.*,¹²¹ for example, the Court was concerned that the provincial Children's Guardian, though requesting the permanent wardship of a First Nations child, had not provided a permanent placement plan. The Children's Guardian had testified that a permanent plan had not yet been determined because the First Nations child welfare worker assigned to the case was in the middle of investigating the possibility of placing the child with a family on the mother's reserve. The child's white father had submitted a plan proposing that the child come to live with him and the child's paternal grandmother in Ontario. Clearly, the Children's Guardian required more time to determine the best placement for the child and, in particular, to make every effort to find a placement for the child with members of his own reserve. Rather than leaving the timing of the preparation of a permanent placement plan to the discretion of the Children's Guardian, however, the Court granted permanent guardianship to the Children's Guardian on the condition that a plan be filed within sixty days. This decision was subsequently upheld on appeal to the Court of Queen's Bench.¹²² By favouring quicker assurance of a permanent placement elsewhere, the likelihood of the child being placed with a family on the child's reserve was substantially decreased. The Court's concern with a stable placement for the child, evident in the considerable weight it attached to permanency,¹²³ appears to have overridden concerns about maintaining the child's First Nations identity and connection to his culture. Indeed,

¹²¹ *Supra*, note 70 (Alta Prov. Ct Fam. Div.).

¹²² *Re S.D.*, *supra*, note 70 (Alta Q.B.). This decision was subsequently followed in *Re A.B.*, *supra*, note 104.

¹²³ See also *Re Cherie M.* (1983), 53 A.R. 48 at 56 (Prov. Ct), where the concern with permanent placement was described in this way: "it appears that the latest 'buzz-word' in the child welfare field is 'permanency planning.' The Director is receiving much criticism for permitting children to 'drift' through the system." In that case, however, where the First Nations child in question came into temporary care on the basis of a voluntary agreement between the society and her mother, the Court concluded that "[w]hatever validity there may be to the charge that the Director has permitted that to happen in other cases, ... it would be grossly premature to do other than to work at this time towards the reuniting of [this child] and her mother and her siblings." *Ibid.*

the Court's reasoning strongly implies that these latter concerns are not even related to the child's stability.

*Kenora-Patricia Child and Family Services v. M.M.*¹²⁴ provides an encouraging counter example to the tendencies evident in *Re S.D.*, though one that may be explained in part by the express requirement in the governing legislation to take account of culture.¹²⁵ The Provincial Court of Ontario considered an application by the Child and Family Services agency proposing the permanent and divided placement of four First Nations siblings, aged six, five, three and two, with two sets of non-First Nations foster parents with whom they had lived for two years. The agency also sought to have the children adopted by the foster parents. The application was opposed by the children's natural parents and band who proposed that the children all be placed with the mother's cousin and her husband and that there be continued contact with the parents. The agency argued that the children's need for "permanency, a stable placement" was a "substantial reason" for placing the children elsewhere than on the reserve.¹²⁶ This argument was rejected by the Court on the ground that the factors of stability and maintenance of First Nations identity could not be considered independently of one another. According to the Court, a truly successful permanent placement required that a First Nations child's need for retention of identity and culture be met.

Although permanency is important, cultural heritage is also important. In fact there is good reason to infer that without cultural heritage being recognized as integral to human growth, permanency will never succeed. One cannot deny what one is; we cannot deny what these children are. They are Ojibway, and unless that is an integral part of our decision making, there is little hope that permanency planning will succeed.¹²⁷

¹²⁴ (1989), 3 Ont. Fam. L. Rep. 38 (Prov. Ct).

¹²⁵ With respect to the protection of the children's First Nations identity accorded by the statute in question, the Court observed, *ibid.* at 39, that "[t]hese are not just bald, technical words but finally recognized [sic] as being of eminent importance to a child's healthy development. Without full respect and recognition of these children's past and cultural heritage, their future will be precarious."

Accordingly, the Court approved the placement of the children with members of their extended family on the reserve on the grounds that this was required by both the *Act* and the best interests standard.

¹²⁶ *Ibid.* at 39.

¹²⁷ *Ibid.*

d) *The construction of those who challenge dispositional decisions*

To this point, I have focused on how courts tend in many cases to construct the welfare of First Nations children in ways that obscure, or at least undervalue, the maintenance of a First Nations child's culture and identity. Underlying this approach, I have argued, is a conception of the child as an abstracted individual whose interests are severable from those of her extended family, community, and First Nation. In this section, I will analyze the judicial construction of parties who challenge the state's removal of First Nations children. Related to the emphasis on the separate and individual interests of the child considered above is a construction of parents or others who challenge the removal of a child from their care as acting in *their* individual—or selfish—interests.¹²⁸ First Nations mothers and members of a child's extended family or band who challenge a determination of a child's best interests are regarded as acting selfishly and as having "vested interests" rendering them incapable of "impartial" consideration of the child's best interests.¹²⁹ Moreover, the individualistic emphasis of the best interests analysis tends to preclude consideration of the collective interests and concerns of First Nations, usually represented by particular bands, in preventing First Nations children from being placed outside of their communities.¹³⁰

The judicial construction of First Nations mothers as selfish is well illustrated in *Racine*.¹³¹ The case involved a First Nations child who had spent most of her seven years in the care of a white foster mother and a Métis foster father. The Supreme Court of Canada had to decide between reinstating an adoption order in favour of the foster parents, previously overturned by the Manitoba Court of Appeal, or restoring

¹²⁸ Thèry, *supra*, note 77 at 347. See, for example, *Re K. and Children's Aid Society of Hamilton-Wentworth* (1989), 70 O.R. (2d) 466 (Unif. Fam. Ct) holding that the right of the parent to raise a child is subordinate to the best interests of the child, implying that the interests of the parent and the child are distinct, and the latter necessarily excludes the former.

¹²⁹ Smart, *supra*, note 69 at 24, makes a similar point relating to mothers in general in the context of intra-family child custody disputes.

¹³⁰ Monture, *supra*, note 4 at 13, also makes this point. For a discussion of the theoretical basis of the collective rights of the First Nations, see D.M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J.L. & Jurisprudence 19.

¹³¹ *Supra*, note 57 (S.C.C.).

legal custody or access to the child's natural mother, Linda Woods, an Ojibway woman. Wilson J., in considering the importance of maintaining a child's tie to her natural parents, concluded that this factor was relevant only in relation to its impact on the child, not the parent: "it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about."¹³² There is little doubt that considering the significance and meaning of a parental tie from the perspective of the child in question is important. Wilson J. goes further than this, however, and implies that a parent's concern with maintaining a tie is often based on self-interest:

As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations. In giving the court power to dispense with the consent of the parent on a *de facto* adoption the legislature has recognized an aspect of the human condition—that our own self interest sometimes clouds our perception of what is best for those for whom we are responsible. It takes a very high degree of selflessness and maturity—for most of us probably an unattainable degree—for a parent to acknowledge that it might be better for his or her child to be brought up by someone else.¹³³

Thus, 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.¹³⁴

The trial judge in *Racine* had found further evidence of the mother's apparent selfishness in her "exploitation of media attention"¹³⁵

¹³² *Ibid.* at 185. See also *Children's Aid Society of Halifax v. C.M.N.* (1989), 91 N.S.R. (2d) 232 at 235-36 (Fam. Ct) stating that "the argument concerning parental rights and the breaking of the bond between parent and child is valid up to a point. However, the best interest of the child has to come first ... the individual rights of the child override all others."

¹³³ *Racine, ibid.*

¹³⁴ See also *Kenora-Patricia Child and Family Services v. M.(C.)* (2 February 1989), Kenora C241/83 (Ont. Prov. Ct Fam. Div.), digested at (1989), 15 A.C.W.S. (3d) 78: Little J. sympathizes with an aunt, who wants custody of two First Nations children presently in foster care, but emphasizes that he must decide on the basis of what is best for children, not her. The aunt's reasons for wanting custody are characterized by the Court as "hav[ing] to do with meeting her own needs as opposed to the needs of the children." One would think, moreover, that given the "self-sacrificing ideology of motherhood," and the attendant expectation that mothers generally act in the child's best interest, mothers would be judged with particular severity when challenging determinations based upon the child's best interests. Susan Boyd has demonstrated this point in the context of intra-familial, child custody cases: *supra*, note 63 at 147. This may help to explain the particularly negative construction of the stated interests of the mother in *Racine*, both at first instance and in the Supreme Court.

¹³⁵ *Supra*, note 108 at 188 (Man. C.A.).

which was thought to “manifest ... an incredible indifference to the effect such an incident might have on her child.”¹³⁶ The mother’s politicization of the issue, moreover, was regarded by the trial judge, in statements uncritically repeated by Wilson J. in the Supreme Court, as being against the child’s best interests. According to Wilson J., the trial judge “saw danger signals in ‘the venom of her anti-white feelings’ and wondered what effect ‘her visible hatred for all things white’ would have on her child. She also wondered whether Mrs. Woods’ concern was for the child as a person or as a political issue.”¹³⁷ Implicit in these remarks is a presumption that the mother’s political concerns were necessarily inconsistent with the best interests of her child. The trial judge, and possibly Wilson J.,¹³⁸ regarded it as not in this child’s best interests 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.¹³⁹ Linda Woods not only failed to conform to the dominant conception of a good mother, but also to that of a “‘good’ Indian,” one who “is defined in terms of white values and culture and in terms of docile and apolitical behaviour.”¹⁴⁰ She defended the importance of her people maintaining an Ojibway way of life, actively resisted the impact of the child welfare system on her daughter and herself, and challenged the threat which the system provided to the survival of her community and First Nation.

¹³⁶ *Supra*, note 57 at 179 (S.C.C.).

¹³⁷ *Racine, supra*, note 57 at 179 (S.C.C.).

¹³⁸ Matas J.A. in the Court of Appeal had declared irrelevant concerns about the mother’s politicization of the case: *supra*, note 108 at 188. Wilson J. could have done the same.

¹³⁹ See also *J.T.K. v. Kenora-Patricia Child and Family Services, supra*, note 112 where the judge is disparaging of a Chief’s threat, prior to the court proceedings, to go to the media; and an unreported case discussed in York, *supra*, note 7 at 221 where a British Columbia Provincial Court judge placed a First Nations child with a Mormon family even though his aunt wanted to adopt him. The judge decided that the aunt was unsuitable “because she was a strong Indian activist who would take the boy to protests and political battles,” and thus could not provide “a stable, quiet structured life” for the child. See also K. Arnup, “‘Mothers Just Like Others’: Lesbians, Divorce, and Child Custody in Canada” (1989) 3 C.J.W.L 18 at 27-31 for a similar analysis in the context of the effect of lesbian “militancy” in child custody cases involving lesbian mothers. Drawing insight from this latter article, it might be that proud, “confrontational,” “militant” First Nations mothers have difficulty regaining custody of their children from the state because they directly flaunt dominant structures and are thus judged to be more likely to raise their children out of accord with dominant values.

¹⁴⁰ Kellough, *supra*, note 10 at 354.

Yet, Linda Woods's anger and frustration were portrayed in the judgments in *Racine* only in a negative light—as a barrier to, rather than evidence of, her continued rehabilitation and commitment to the best interests of her daughter.¹⁴¹ The judgments do not recognize the strength reflected in her anger, nor the fact that she overcame the adversity in her own life and successfully re-established a life with her other children, nor her determination to take every possible measure to regain custody of her child. Moreover, no attempt is made to perceive Linda Woods's anger as the understandable product of her repeatedly frustrated efforts to regain custody of her daughter prior to initiating the proceedings which resulted in the court case, let alone to situate that anger in the historical context of colonialist white/First Nations relations in Canada. She is presented as acting only for her own (impliedly self-serving and therefore illegitimate) political purposes.¹⁴²

In some cases, it is not only parents or other family members who challenge the removal of children, but also the child's band. The collective concerns of bands in such cases reflect a number of considerations. First, bands often consider the best interests of an individual child to require that the child not be removed from her community and culture.¹⁴³ Second, there is concern about the destructive impact that the system has had on First Nations communities, sometimes removing whole generations of children and thereby depriving communities of the capacity to regenerate themselves.¹⁴⁴ Third, and related to the first two considerations, is the traditional priority accorded by First Nations to collective, as well as

¹⁴¹ *Racine*, *supra*, note 57 at 178-79 (S.C.C.).

¹⁴² See also *V.S. v. M.M.*, [1989] N.W.T.R. 169 at 177 (S.C.) where the Court granted standing to a white, middle-class couple living in Nova Scotia who wanted custody of a twelve-year-old Chipewyan child in foster care in Yellowknife on the ground that there "appear[ed] to be no one else who [was] prepared to put forward the child's wishes, as expressed in her letters, or to ensure that the possibility of her finding a congenial and suitable permanent family environment [was] at least given a chance of realization." To arrive at such a conclusion, the judge must have considered that the child's grandmother and mother, who opposed the application, to represent their own, as opposed to the child's, interests. In contrast, the applicants, who had had only a short-term, long-distance relationship with the child, were thought to represent her best interests.

¹⁴³ See, e.g., D.J. Goldsmith, "Individual vs. Collective Rights: The Indian Child Welfare Act" (1990) 13 *Harv. Women's L.J.* 1 at 2.

¹⁴⁴ *Ibid.* See also *supra*, note 4; and Johnston, *supra*, note 130 at 32 arguing that "[t]he right of native communities to self-preservation" is the "foundational right accorded to collective entities capable of bearing rights."

individual, concerns.¹⁴⁵ With respect to the latter of these, Patricia Monture has stated, “[t]he structure of First Nation’s society is based on cooperation and consensus ... In a community which operates on norms of consensus and cooperation, the collective’s rights are the focus. By contrast, the structures of the dominant society operate with the individual as the problem-solving unit.”¹⁴⁶ In the context of child welfare, the traditional collective focus takes the form of a recognized communal responsibility for the care of children. An elder in Alberta explained the traditional approach this way:

The Indian Philosophy is that when you bring a child into this world, you are responsible for that child until that child can look after himself or herself ... For example: like in the family home, if things didn’t work out well for that young couple, supposing if there was a sickness in that family, or the mother died or the father died, it is the practice and the cultured belief of our native people that automatically an uncle, an aunt or grandmother, grandfather or a cousin or even a good friend or those people would take over the responsibility for raising that child and that is expected of society in those days ... It’s unfortunate now that there is so many things that have entered into the native way of life, that we have lost these values of the family home.¹⁴⁷

Within the individualistic structure of best interests ideology, however, courts tend not to acknowledge, nor act on, such collective concerns. In particular, as noted above, the individualistic structure of the best interests ideology supports a presumption that the collective interests of First Nations are “inevitably antagonistic”¹⁴⁸ 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, the child’s interests must necessarily be forgone.¹⁴⁹

This disregard for the collective concerns of First Nations has contributed to the difficulty bands¹⁵⁰ have had in advancing their

¹⁴⁵ Monture, *supra*, note 4 at 6.

¹⁴⁶ *Ibid.* See also Bull, *supra*, note 3 at 527. But, see also M.E. Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-90) 6 Can. Hum. Rts Y.B. 3 at 16-17 who writes “I would take issue with some scholars on their projection of ‘society’ as an either-or [*i.e.*, individualist or collectivist], and caution against an attempt to typify, for example, an Aboriginal society in such a fashion.”

¹⁴⁷ *Child Welfare Needs*, *supra*, note 7 at 50-51.

¹⁴⁸ Johnston, *supra*, note 130 at 19.

¹⁴⁹ Smart, *supra*, note 69 at 23, makes a similar point with regard to parental concerns in the context of a discussion of intra-familial child custody issues.

¹⁵⁰ Bands are now generally recognized by First Nations as having a major role in the

interests in child welfare proceedings involving First Nations children.¹⁵¹ In particular, their concerns about the impact of the child welfare system upon the collective interests of the First Nations or a particular band are liable to be deemed irrelevant, indeed, illegitimate. In *Kenora-Patricia Child and Family Services v. Rose F.*,¹⁵² for example, a Band representing the interests of a reserve had made a general argument urging the Court to take seriously its obligation, as set out in section 53(5) of the *Child and Family Services Act*, to place a First Nations child “with a member of the child’s extended family; [or] a member of the child’s band or native community.”¹⁵³ The Court ordered costs against the Band because it had advanced only this general position and had not presented a specific plan to the Court with regard to the placement of the particular child in question. According to Little J.:

I appreciate very much and sympathize with the position of the Islington Band but there are many children of the reserve who have become wards of the state ... [and] the Band is obliged with respect to every individual case before the court to develop the position not based on an opinion with regard to the effect of the child welfare system on the reserve but rather a position based on the facts of the particular case before the court.¹⁵⁴

articulation and protection of collective interests, and, in child welfare cases, they often take on this role: see, generally, Johnston, *supra*, note 130 at 31, considering whether bands constitute truly representative collectivities.

¹⁵¹ Increasingly, though, courts are recognizing the important contribution of bands to the determination of the best interests of a First Nations child by allowing them to intervene in child welfare proceedings: see, e.g., *Pitzel v. Children Aid Society of Winnipeg*, [1984] 5 W.W.R. 474, [1984] 4 C.N.L.R. 41 (Man. Q.B. Fam. Div.) [hereinafter *Pitzel* cited to W.W.R.]; *Noochtai*, *supra*, note 110; *Re Catholic Children’s Aid Society of Metropolitan Toronto and M.* (1986), 57 O.R. (2d) 551 (Prov. Ct Fam. Div.), *aff’d* (1987), 62 O.R. (2d) 535 (Dist. Ct); and *Children’s Aid Society of Nippissing (District of) v. Ruby M.*, [1989] 2 C.N.L.R. 21 (Prov. Ct Fam. Div.). However, courts continue to refuse to provide custody of a child to a band. The governing statutes in each province, which emphasize the provision of protective care by specific individuals, are partly responsible for this refusal: *Tom v. Winnipeg Children’s Aid Society*, [1982] 2 W.W.R. 212 (Man. C.A.); *Re Family and Child Service Act* (1982), (B.C. Prov. Ct) [unreported] cited in Carasco, *supra*, note 5 at 128; and *Simeonoff v. J.A.* (14 February 1992), Vancouver CA011869 (B.C.C.A.) arguing that the entire thrust of the custody provisions of the [*B.C. Family Relations*] Act is towards [a] person to person relationship ... In its simplest, organic form a tribe is an agglomeration of individuals like a congregation or a club. Regardless of the nature of the tie that binds the members together, the notion that such a group can be regarded as an individual for purposes of child custody is entirely foreign to the concept of custody and to the individual duties and responsibilities implicit in the concept.

¹⁵² (19 April 1988), *Kenora C102/85* (Ont. Prov. Ct Fam. Div.), Little J. [unreported] [hereinafter *Kenora-Patricia v. Rose F.*].

¹⁵³ S.O. 1984, c. 55, as am. S.O. 1990, c. C-11, s. 57(5).

¹⁵⁴ *Kenora-Patricia v. Rose F.*, *supra*, note 152 (emphasis added).

The order of costs in this case was clearly meant to discourage bands who wish to advance their collective concerns in First Nations child welfare proceedings.

The judicial approach in child welfare proceedings has also made it difficult for provincial governments and government officials to respond to the First Nations child welfare crisis with decisions and policies that take account of the collective interests of First Nations generally or of particular bands.¹⁵⁵ In *N.P.P. v. Regional Children's Guardian*,¹⁵⁶ white foster parents of a nine-year-old Cree child who had been in their care for three years applied for *certiorari* to quash the refusal by the Regional Children's Guardian to consent to their private guardianship order. Instead, the Guardian had decided to place the child with her aunt on her mother's reserve in northern Saskatchewan. This case was the first time a decision of the Regional Children's Guardian of Alberta had been challenged in the courts since the creation of the position in 1984.¹⁵⁷ The Alberta Court of Queen's Bench allowed the application for judicial review on the basis that the Guardian had wrongly interpreted the purpose of the Alberta *Child Welfare Act* respecting First Nations children in care.

The Regional Children's Guardian had interpreted the *Act* as requiring her to place First Nations children receiving care from non-First Nations foster parents, if at all possible, in a First Nations home in the particular band from which the child's mother or parents came.¹⁵⁸ The judge, however, narrowly construed the relevant sections of the *Act* and concluded that the Guardian's approach constituted an error of law. For example, he rejected the Guardian's construction of the word "family" in section 2(a) of the *Act* as including members of a band who share a common ancestry and insisted that "family" included only that group of people who, before intervention by the state, had been responsible for the care and supervision of a child.¹⁵⁹ Thus, since the child in question had been originally apprehended from the custody of

¹⁵⁵ See *infra*, Section IV for a more extensive consideration of legislative reform efforts in Alberta.

¹⁵⁶ *Supra*, note 115.

¹⁵⁷ *Alberta Act, 1984*. See also discussion, *infra*, notes 195-98 and accompanying text.

¹⁵⁸ *N.P.P.*, *supra*, note 115 at 74.

¹⁵⁹ Compare *Re E.J.C.*, *supra*, note 116 at 128, where the centrality of the extended family in Cree social structure is recognized and incorporated into the statutory reference to "family."

her mother, the maintenance of family ties as required by section 2(a) was held not to require the maintenance of ties between the child and an aunt, let alone more distantly related members of her band.

The Guardian had also interpreted a provision emphasizing placement of a child "as close as possible to the child's home community"¹⁶⁰ to mean placement on the particular reserve from which the child's mother had come and on which her aunt and one brother lived. The judge's view, however, was that the phrase meant only the *physical* community in which the child had lived prior to state intervention. On the basis of this interpretation, the Court concluded that it was incorrect to say that the "home community" of the individual child was the reserve. According to Macdonald A.C.J., "there [was] no indication whatever ... that the reserve in Saskatchewan was the home of the child at the time of apprehension," nor could the reserve be considered the mother's home community since she had not lived there for many years.¹⁶¹ This case places important constraints on administrative officials attempting to address the collective concerns of First Nations regarding the placement of First Nations children.

2. The "innocence" of law: child welfare law as impartial and universal

My analysis up to this point has sought to explain how the alarmingly disproportionate impact of the child welfare system is attributable, at least in part, to the legal form of the best interests standard. This has illustrated one of the subtle ways in which racism operates in the context of law. Now I want to turn to an examination of how this legal form also contributes to a portrayal of the child welfare process as innocent of its disparate and destructive effects on First Nations—an example of what Peter Fitzpatrick refers to as the "innocence" of law relating to racism.¹⁶² Within the liberal, ideological form of the best interests of the child standard, racism is rarely explicit. Instead, the form of law "both substitutes for explicit racism and provides a means of asserting that what is involved is not racism but

¹⁶⁰ *Alberta Act, 1984*, s. 2(h)(iii).

¹⁶¹ *N.P.P.*, *supra*, note 115 at 75.

¹⁶² Fitzpatrick, "Innocence of Law," *supra*, note 61 at 121.

something different."¹⁶³ Thus, law remains not only compatible with racism, but is also a mechanism for its reproduction and reinforcement. "[B]y taking elements of racism into itself and shaping them in its own terms,"¹⁶⁴ the particular form of law establishes "limits beyond which law will not proceed"¹⁶⁵ in addressing or countering racism. In the end, law's claim of innocence obfuscates its role in the reproduction and reinforcement of racism, thereby rendering its racist structures unassailable.¹⁶⁶

These general insights into the relationship between racism and liberal legality have important bearing on this analysis of the operation of the best interests principle in the context of First Nations child welfare. Here the innocence of law is expressed in terms of the impartiality of the best interests of the child standard—impartiality being a crucial presupposition of liberal legality. The portrayal of law as impartial ensures that it appears innocent of politics, thereby reinforcing its claim to legitimacy. This impartiality is premised upon universality of application: if the law applies equally to everybody, then it must be impartial.¹⁶⁷ In the context of child welfare law, universality is manifest in the application of the same standards and protective mechanisms established in child welfare legislation to all children within each province. The "universalistic pretensions"¹⁶⁸ of child welfare law, in turn, support the putative objectivity of the child welfare system.¹⁶⁹ The system is thus constructed as innocent of the disparate impact and destructive effects that it has had on First Nations.¹⁷⁰ Moreover, universality establishes a particular identity of law that submerges acknowledgement and recognition of unequal power relations between various groups in society. It presumes from the outset the "unity of

¹⁶³ *Ibid.* at 120.

¹⁶⁴ *Ibid.* at 122.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* Fitzpatrick illustrates and supports this argument through an analysis of the operation of the British *Race Relations Act 1976* (U.K.), 1976, c. 74.

¹⁶⁷ *Ibid.* at 130.

¹⁶⁸ *Ibid.* at 129.

¹⁶⁹ For a similar observation in relation to racism and law in other contexts, see Kobayashi, *supra*, note 64 at 451.

¹⁷⁰ See *supra*, notes 3-4 and accompanying text.

society and nation"¹⁷¹ that serves to obscure material relations of conflict and oppression.

The "universalistic pretensions" of courts in applying the best interests standard are illustrated by a recent decision of the Supreme Court of Nova Scotia Appeal Division. In *M.K.S. v. Minister of Community Services (Nova Scotia)*,¹⁷² a Micmac woman challenged a finding that her two children were in need of protection. She argued under section 15 of the *Canadian Charter of Rights and Freedoms*¹⁷³ that she had been discriminated against on the basis of race or ethnic origin, family status, and economic status. In evidence, she submitted a number of studies, characterized by the Court as dealing with the "social-economic problems of native people,"¹⁷⁴ and a federal government report demonstrating the disproportionate impact of child welfare law on First Nations children.¹⁷⁵ Palmetier C.J.C.C. acknowledged that the relevant section of the *Children's Services Act* "may have a greater impact on native people,"¹⁷⁶ but concluded that the "test for children 'in need of protection' [was] standard throughout the province" and "applied equally to all persons."¹⁷⁷ Thus, in his view, there was no discrimination.¹⁷⁸

¹⁷¹ Fitzpatrick, "Innocence of Law," *supra*, note 61 at 129. See also C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (London: Academic Press, 1979) at 293 (arguing that law through its universalistic pretensions provides the "expression of unity in the nation."); E. Lawrence, "Just plain common sense: the 'roots' of racism" in Centre for Contemporary Cultural Studies, ed., *The Empire Strikes Back: Race and Racism in 70s Britain* (London: Hutchinson & Co., 1982) 47 at 59 (arguing that the notion of nation is itself an ideological construction which contributes to the binding of disparate groups in society).

¹⁷² (1988), 86 N.S.R. (2d) 209, [1990] 1 C.N.L.R. 53 (N.S. Co. Ct), *aff'd* [1990] 1 C.N.L.R. 87 (N.S.S.C.A.D.) [hereinafter *M.K.S.* cited to N.S.R.].

¹⁷³ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁷⁴ *M.K.S.*, *supra*, note 172 at 223.

¹⁷⁵ *Ibid.* at 222-23.

¹⁷⁶ *Ibid.* at 223.

¹⁷⁷ *Ibid.*

¹⁷⁸ Given that there was strong evidence of physical abuse of the children in question, this was not a case with a particularly good factual basis for supporting a *Charter* challenge: D.A.R. Thompson, "Why Hasn't the Charter Mattered in Child Protection?" (1989-90) 8 *Can. J. Fam. L.* 133 at 136 and at 140. Nonetheless, it illustrates the judicial construction of child welfare law as impartial as a result of its universal application.

Evidence of the systemic impact of child welfare law was similarly ignored in *Re Cherie M.*¹⁷⁹ A First Nations mother, seeking the return of her daughter whom she had voluntarily placed into state care some months earlier, called as a witness an expert on child welfare. On the basis of a summary of facts provided to him in a letter prior to the trial, the expert had concluded that “it seem[ed] fairly clear to [him] ... that the ‘system’ ha[d] through close contact with this kind of work, lost some of its immediate sensitivity with regard to the removal of children from their family.”¹⁸⁰ Because the expert had discussed the system in general as opposed to the specific circumstances of the particular case before him and had had “no direct contact with the mother, the child or the child welfare workers involved in the case,”¹⁸¹ the Court declined to give weight to this evidence. Moreover, according to the Court, the expert’s evidence lacked “the neutrality and objectivity that should have been displayed.”¹⁸² The judge characterized the views of the expert as follows:

The thesis of Dr. Bagley as it relates to child welfare and children of native origin is that by and large intervention by child welfare in native families has done more harm than good. According to Dr. Bagley, all kinds of alternatives should be considered before apprehension or ward care, and in his opinion, as an expert in child welfare, “the grounds for apprehending are extremely slender.”¹⁸³

According to the Court, Dr. Bagley’s testimony and other similar materials “relating to child welfare in general and child welfare and the native community” were “of little assistance ... in conducting this inquiry.”¹⁸⁴ The Court’s only “duty” was “to inquire into and ascertain the facts of the case, and then apply the law as found in the existing *Child Welfare Act* and the authorities.”¹⁸⁵

The implication in *Re Cherie M.* is that concerns about the systemic impact of the child welfare system are related to policy and therefore not “neutral,” while concerns about the best interests of

¹⁷⁹ *Supra*, note 123.

¹⁸⁰ *Ibid.* at 52.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

individual children are legal, and thus innocent of politics. This point is further illustrated in *Pitzel v. Children's Aid Society of Winnipeg*.¹⁸⁶ Anishnaabe Child and Family Services, a First Nations-controlled child welfare agency in Manitoba, applied to intervene in an action addressing the guardianship of a three-and-a-half-year-old child who had been apprehended and placed in the care of foster parents nine days after her birth. The agency had become actively involved in the case with a view to placing the child with her maternal aunt on a reserve. The foster parents, who wanted to adopt the child, opposed Anishnaabe's application for intervenor status. They felt that the agency's involvement would " 'politicize' the case."¹⁸⁷ The Court granted the agency intervenor status and answered the foster parents argument by asserting that it would not allow the case to be "politicized"; rather, it would "confine all parties to the one and only issue—the arrangement that will best serve the needs of the child."¹⁸⁸ In other words, by confining arguments to the child's best interests, the case could not be politicized. Once again, then, the best interests standard is set up as apolitical—as "innocent" of politics.¹⁸⁹

¹⁸⁶ *Supra*, note 151.

¹⁸⁷ *Ibid.* at 477.

¹⁸⁸ *Ibid.*

¹⁸⁹ Another interesting example of the purported separation of child welfare law from politics can be found in *North West Child and Family Services Agency v. B.S.* (1988), 52 Man. R. (2d) 254 (Q.B.). The Court's rejection of a First Nations-controlled child and family services agency's argument that the Court's decision might have undesirable *political* consequences for the agency was reinforced by its implication that the best interests standard and its application thereof were, unlike the agency's practices, above political considerations.

IV. THE POWER OF BEST INTERESTS IDEOLOGY AND LEGISLATIVE REFORM

Child welfare law has been portrayed as impartial and apolitical. Yet, this portrayal has not completely obscured its disparate impact on First Nations. By the late 1970s, the destructive effects of the child welfare system on First Nations were being brought to public light through the lobbying efforts of First Nations, in particular First Nations women's organizations.¹⁹⁰ Demands for legislative change by First Nations and other critics over the past decade have often included recommendations for modification of the best interests standard, and some of these have been adopted in recent legislative reforms.¹⁹¹ The recent nature of such modifications makes it difficult to properly assess their impact. However, my analysis provides a useful starting point for understanding their potential impact and for developing other transformative strategies in the future. Most importantly, I want to suggest that the power and resilience of best interests ideology may serve to undermine attempts to avoid its destructive effects through legislative reform. Recent experience in Alberta provides a good example of this problem.

Around the time First Nations began to lobby for change to the child welfare system in Alberta, the government initiated an examination of the underlying premises and structures of existing child welfare legislation.¹⁹² First Nations organizations became involved in this process to ensure that any resulting legislation would be responsive to their concerns, although they also continued to pursue other strategies

¹⁹⁰ For example, three resolutions were passed by the Ontario Native Women's Association in July 1981 addressing child welfare issues as a priority: see Native People's Resource Centre, *supra*, note 11 at 44-45. See also Native Women's Association of Canada, "Our Children are Our Future" (Presentation to the Special House Committee on Child Care, 10 June 1986); and Monture, *supra*, note 4 at 5 and at 8 discussing the centrality of children's issues for First Nations women.

¹⁹¹ *E.g.*, Alberta, Ontario, Saskatchewan, Nova Scotia, and the current Child Protection Legislation Review process in British Columbia.

¹⁹² Alberta, Court of Queen's Bench, *Board of Review: The Child Welfare System* (Edmonton: Court of Queen's Bench, 20 October 1983) (Chair: J.C. Cavanagh); and R.J. Thomlison, *Case Management Review: Northwest Region, Department of Social Services and Community Health* (Edmonton: Alberta Department of Social Services and Community Health, Northwest Region, September 1984).

of child welfare reform.¹⁹³ Within the consultative process, they and numerous others¹⁹⁴ criticized the broad discretion afforded to agency workers and judges under the best interests standard. They recommended legislative circumscription of this discretion through the introduction of specific criteria to be considered in the determination of any care disposition.

Partly in response to such recommendations, new legislation which provided a more specific formulation of what had previously been a general and undefined best interests standard was drafted and assented to in 1984.¹⁹⁵ Most importantly, the general best interests of the child standard was not established as an overriding consideration. Instead, the revised *Act* began with an extensive list of specific considerations that any court or person exercising decision-making power under the *Act* was required to take into account.¹⁹⁶ That "the interests of the child" be "recognized and protected" was included only as one of the listed considerations.¹⁹⁷ Also explicitly required in "any decision concerning the removal of a child from the child's family" was consideration of "the benefits to the child of maintaining, wherever possible, the child's familial, cultural, social and religious heritage."¹⁹⁸ Finally, in response to failings in the case management processes of the Ministry of Family and Social Services, the *Act* created a new

¹⁹³ See *Final Report*, *supra*, note 6 at app. 4; and James, *supra*, note 12.

¹⁹⁴ A parallel critique of interventionist child welfare legislation was inspired by the work of American academics: see M. Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards" (1975) 27 *Stan. L. Rev.* 985; M. Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights" (1976) 28 *Stan. L. Rev.* 623; R.H. Mnookin, "Foster Care—In Whose Best Interest?" (1973) 43 *Harv. Educ. Rev.* 599; J. Goldstein, A. Freud & A.J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973); and J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979).

¹⁹⁵ *Alberta Act, 1984*. The previous Alberta legislation, R.S.A. 1980, c. C-8, had set out the best interests of the child as the fundamental consideration and did not specify in any way what was meant by that principle.

¹⁹⁶ *Ibid.* at s. 2.

¹⁹⁷ *Ibid.* at s. 2(b).

¹⁹⁸ *Ibid.* at s. 2(f)(i).

administrative position to perform an advocacy, as opposed to an administrative, role in relation to children in state care.¹⁹⁹

The absence of a mandatory and general best interests standard in the new legislation became a source of considerable controversy in its subsequent implementation. The question of interpreting the modified guidelines first arose in the context of judicial review of decisions made by the Children's Guardian relating to First Nations children in care. Soon after being appointed, the new Children's Guardian had developed and implemented a policy designed to find permanent homes for First Nations children who were in the long-term, temporary care of the Director.²⁰⁰ Under this policy, over two hundred First Nations children were returned successfully to the homes of their parents or extended families.²⁰¹ However, controversy arose in relation to a few difficult cases in which non-First Nations foster parents challenged the removal of their foster children. Decisions in their favour by the Child Welfare Appeal panel were subsequently overturned by the Children's Guardian. In two such cases, the foster parents then applied to the Court of Queen's Bench for review of the Guardian's decision.²⁰² The Court quashed the decision of the Children's Guardian in one case, *N.P.P.*,²⁰³ and, in the course of its reasons, drew critical attention to the absence of an overriding best interests of the child principle in the *Child Welfare*

¹⁹⁹ This new position was called the Children's Guardian. See Alberta, Legislative Assembly, *Hansard* (8 May 1984) at 757.

²⁰⁰ When asked in the Legislative Assembly to comment on the policy of "taking as many native children as possible back to the reserves," Connie Osterman, Minister of Social Services, replied that there was and had never been such a policy. Rather, there was a general concern to find permanent homes for the large number of children who had been in long-term, temporary care, which might involve either private adoption in favour of foster parents or the return of a child to a First Nations community. In her view, that had been achieved quite successfully except for "a small number of cases ... that ha[d] not been achieved with concurrence on both sides." Alberta, Legislative Assembly, *Hansard* (23 March 1988) at 71-72.

²⁰¹ See G. Koch, "Trying to end the nightmares: Alberta and Manitoba confront failed native child 'repatriation' policies" *Western Report* (7 November 1988) 8. This information could not be verified because the Alberta Ministry of Family and Social Services does not keep a record of the number of First Nations children in state care successfully returned to their communities. Telephone interview with Archie Arcan, Manager of the Child Welfare Information System, Alberta Ministry of Family and Social Services (7 August 1992).

²⁰² *N.P.P.*, *supra*, note 115; and *Tschritter v. Sohn* (1987), 83 A.R. 374 (Q.B.).

²⁰³ *Supra*, note 115 and accompanying text.

Act.²⁰⁴ Media reports of this case, along with similar arguments from foster parents' advocacy groups, heightened public concern that the best interests of the individual First Nations children who were being returned to First Nations communities were not being met.²⁰⁵ Questions posed in the Legislative Assembly relating to the "repatriation" controversies were met with assertions by the government that all decisions had been, and continued to be, made in accordance with the best interests of the individual children in question.²⁰⁶ Ultimately, the government bowed to political pressure by amending the *Child Welfare Act* to reinstate the best interests of the child standard as an overriding principle and to curtail the broad-ranging powers of the Children's Guardian.²⁰⁷

²⁰⁴ See *N.P.P.*, *supra*, note 115 at 65-66:

The list of considerations set forth in s. 2 does not state that the governing consideration is "the best interests of the child," which before the enactment of the 1984 Act had been regarded as the fundamental consideration. The omission is startling and must be regarded as significant ... Its significance must be that, the legislature having taken the trouble to enact a list of relevant considerations, that list cannot be read as subject to some unstated overriding principle that is neither stated as overriding nor even mentioned as one of the relevant considerations.

See also *Re C.W.L.L.* (1986), 74 A.R. 395, 5 R.F.L. (3d) 53 (Q.B.) where the Court relied on *Racine*, *supra*, note 57, and *King*, *supra*, note 57, to read an overriding best interests of the child principle into the Alberta Act, notwithstanding its absence. Paying particular attention to those matters mentioned in s. 2(h) of the Act, the Court concluded that the best interests principle ought to have governed in deciding whether to return the child in question to the mother or to order permanent guardianship.

²⁰⁵ See, e.g., J. Cote & T. Philip, "Fostering Heartbreak" *Western Report* (11 May 1984) 37; Koch, *supra*, note 201; and Alberta, Legislative Assembly, *Hansard* (24 March 1988) at 91.

²⁰⁶ See, e.g., Alberta, Legislative Assembly, *Hansard* (23 March 1988) at 71; Alberta, Legislative Assembly, *Hansard* (24 March 1988) at 92 (Osterman: "I believe there are many processes in place that speak to the best interests of the child, and they are being followed."); Alberta, Legislative Assembly, *Hansard* (21 April 1988) at 576 (Osterman: "certainly the [permanency planning] policy has to speak to the best interests of the child and not the various adults who have wishes to make a permanent home for that child."); and further down: "[I]n all instances—and it's certainly the direction from the minister and the deputy minister and senior staff—the needs of the child must come first and foremost."); and Alberta, Legislative Assembly, *Hansard* (20 June 1988) at 1846 (Osterman: "I think we do have to make a definitive statement about our policy in respect to what interests are to come first and foremost [regarding First Nations children], and it is the interests of the individual children.")

²⁰⁷ *Child Welfare Amendment Act, 1988*, S.A. 1988, c. 15, reported by the Legislative Assembly of Alberta on 5 July 1988. See Alberta, Legislative Assembly, *Hansard* (30 June 1988) at 2172, in regard to the re-instatement of the best interests standard in the *Amendment Act*, Osterman observes that "obviously, inherent throughout the Bill, that had always been there. But it was

This chain of events demonstrates the strength and resilience of best interests ideology. The original legislative amendments sought to address the First Nations child welfare crisis by, among other things, removing the general best interests standard from the child welfare legislation and creating a child advocate position. The amendments had significant positive effects in that large numbers of First Nations children were returned to their communities. However, these reforms were finally legislatively derailed. I want to suggest that this can be understood in part as a consequence of the continuing power of best interests ideology. While the amendments were a significant victory for First Nations, they were, nonetheless, a fragile and incomplete victory. Without a more direct transformation of the material conditions that gave rise to the development of best interests ideology, even explicit legislative action could not significantly challenge its power and tenacity in the minds of both judges and members of the public.

V. CONCLUSION

Liberalism has structured legal discourse such that racism is most often unintended and rarely explicit. To understand how and why law in its various aspects has an oppressive and discriminatory impact on First Nations and other racialized groups in Canadian society, one must look at some of its more subtle processes and, in particular, its ideological form. My goal in this article has been to provide some insight into the origins and operation of best interests of the child ideology and to illustrate how it structures and constrains judicial decision making in the context of First Nations child welfare. Best interests of the child ideology manifests the basic tenets of liberal ideology. In child welfare cases, this has served to portray the apprehension and placement of First Nations children away from their families and communities as natural, necessary, and legitimate, rather than coercive and destructive. This is accomplished, in part, through legal processes that appear to be universal and neutral, and to protect children and serve their best interests. As well, the relevance and importance of a First Nations child maintaining her First Nations identity and culture is minimized. As a result, I have argued, child welfare law has become a new modality of

important in terms of the way the situation had been addressed in a legal sense to do that.”

colonialist regulation of First Nations in the post-Second World War period.

Since best interests ideology has had such a destructive impact on First Nations in the context of child welfare, understanding its nature and operation is crucial in developing effective strategies to address and counter the continuing crisis. At a minimum, the power and effects of best interests ideology in this context should raise concern about any child welfare regime that maintains the best interests standard as central. However, the unsuccessful attempt in Alberta to avoid the power of best interests ideology demonstrates that more needs to be done than simply eliminating explicit legislative requirements to render decisions according to the best interests standard. A number of First Nations child welfare cases have chipped away at assumptions implicit in best interests ideology, but ideology cannot be countered simply through arguments that its assumptions are false or incorrect. To transform ideology substantially, it is necessary to work on changing the material conditions and power relations responsible for its production and reproduction.

In the child welfare context, this means addressing directly the power accorded to institutions of the dominant society to impose destructive child welfare regimes on First Nations in the first place. First Nations must be empowered, financially, politically, and otherwise, to develop their own child welfare services outside the framework of existing provincial legislative schemes. This approach would be consistent with the current, long-term strategies of many First Nations communities which are developing child welfare services with the more general goal of self-government.²⁰⁸ Autonomous First Nations child

²⁰⁸ See T. Isaac, "Justice for Whom?" *Akwesasne Notes [Rooseveltown, New York]* (Early Fall 1988) 27; and Esse Networks Ltd., *Together Today ... For Our Children Tomorrow: Our Most Valuable Resource: A Discussion of Indian Child Welfare* (Yukon Territories: Council for Yukon Indians, October 1990). See also the recommendations of the Aboriginal portion of the Community Panel established in November 1991 by the Ministry of Social Services in British Columbia to review child protection legislation stating that:

[t]he first step to righting the wrongs which have been done to us is to limit the authority to interfere in the lives of our families, and to provide remedies other than the removal of our children from our Nations. This must be accompanied by the financial resources which we require to heal the wounds inflicted upon us. At the same time, the responsibilities and jurisdictions vested in your Superintendent and the family courts must be vested in our Nations. Finally, as our Nations rewrite their own family law to meet our contemporary needs, as we rebuild the authority usurped from our Nations, the laws of our Nations must have paramountcy over your laws as they apply to our people.

welfare services, however, will not in themselves be enough. It is necessary as well to challenge (as First Nations are presently doing) the historical and continuing colonialist practices of exclusion, land dispossession, and destruction of traditional First Nations economies. These have resulted in the conditions of poverty, ill-health, and alcohol and drug dependency that, in turn, create much of the need for supportive or substitutional care for First Nations children. Ultimately, then, the welfare of First Nations children cannot be separated from the more general welfare of First Nations. The current crisis in First Nations child welfare will only be effectively resolved if addressed in conjunction with the wider and intersecting social, economic, and political goals of First Nations.

See also A.S. Pellatt, *An International Review of Child Welfare Policy and Practice in Relation to Aboriginal People* (Calgary: Canadian Research Institute for Law and the Family, 1991) at 5-30; Warry, *supra*, note 3 at 31 and at 33; Macdonald, *supra*, note 4 (describing a particularly interesting initiative of the Spallumcheen Indian Band of British Columbia in 1980 to address the child welfare crisis in its own community and develop autonomous, community-based services which involved passage of a by-law assigning exclusive jurisdiction over custody proceedings involving Band children to the Band); B. Wharf, *Toward First Nation Control of Child Welfare: A Review of Emerging Developments in B.C.* (Victoria: University of Victoria, 1989); and R.S. Ratner, *Child Welfare Services for Urban Native Indians* (Vancouver: United Native Nations, 1990).

