CHILD ADVOCACY IN SASKATCHEWAN CHILD WELFARE CASES:

ACCESS TO JUSTICE AND INDIGENOUS CHILDREN'S RIGHTS

A Thesis Submitted to the College of

Graduate and Postdoctoral Studies

In Partial Fulfillment of the Requirements

For the Degree of Master of Laws

In the College of Law

University of Saskatchewan

Saskatoon

By

JAMESY ANITA PATRICK

PERMISSION TO USE

In presenting this thesis in partial fulfillment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis in any manner, in whole or in part, for scholarly purposes may be granted by the professor who supervised my thesis work or, in their absence, by the Deans of the Colleges in which my thesis work was done. It is understood that any copying or publication or use of this thesis or parts thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis.

Requests for permission to copy or to make other uses of materials in this thesis in whole or part should be addressed to:

Dean
College of Law
University of Saskatchewan
15 Campus Drive
Saskatoon, Saskatchewan S7N 5A6Canada

OR

Dean
College of Graduate and Postdoctoral Studies
University of Saskatchewan
107 Administration Place
Saskatoon, Saskatchewan S7N 5A2 Canada

ABSTRACT

This thesis sets out to examine the status of implementation of the *United Nations Convention on the Rights of the Child* (CRC) in Saskatchewan and the CRC's impacts on Indigenous children and their access to justice within the child welfare system. Research methods included a review of case law, literature and legislation. Informed persons employed in the child welfare field were then interviewed. I argue that Canada's inadequate implementation of the CRC has devastating impacts on Indigenous children subject to the child welfare system in Saskatchewan. The overrepresentation of Indigenous children in Saskatchewan's child welfare cases is alarming and is the result of Canada's colonial history. Representation for children is limited to a Euro-Canadian framework that perpetuates racism and an un-interrogated cultural bias rooted in our understanding of children's rights as being limited to individual rights. This thesis identifies different models of legal representation adopted by lawyers and justice systems in child welfare cases and offers alternatives to the current model used in Saskatchewan. The current use of lawyers as representatives for Indigenous children raises concerns with respect to availability of counsel and potential bias when advocating for an Indigenous child. This thesis argues that provincial jurisdiction over child welfare is invalid, as Indigenous peoples never ceded child welfare, and that child welfare needs to be deliberately transitioned to Indigenous control. I conclude that rights in the CRC would be better met for Indigenous children if child welfare were deliberately placed back into the hands of Indigenous peoples. Indigenous models of child welfare have greater potential to ensure that meaningful voice for Indigenous children is met and thereby ensures that international obligations under the CRC are fulfilled.

ACKNOWLEDGMENTS

I am incredibly grateful to my supervisor, Wanda Wiegers, for your guidance and support throughout this process. You are a champion for women. Thank you to my committee members, Mark Carter and Marilyn Poitras: you both have had a significant impact on this thesis. Thank you to the Interviewees for giving your time and your insight on such an important issue. Thank you to my parents, Linda and Bob Patrick, for being there for my children every single day through this process. Without your support this thesis would not have been possible. You taught me to always pursue my dreams and the importance of education - I promise to pass on your lessons to my children! I dedicate this thesis to my children, Gwendolyn and Russell. You both sacrificed time with me - thank you for your patience and love. And finally, to my sister Rosalind Barabash - you reminded me on many occasions through this process that the greatest gift I could ever give my children is showing them that I can achieve anything.

TABLE OF CONTENTS:

CHAPTER 1: INTRODUCTION

> For thousands of years, Indigenous communities successfully used traditional systems of care to ensure the safety and well-being of their children. Instead of affirming these Indigenous systems of care, the child welfare systems disregarded them and imposed a new way of ensuring child safety for Indigenous children and youth, which has not been successful. Indigenous children and youth continue to be removed from their families and communities at disproportionate rates, and alternate care provided by child welfare systems has not had positive results.[1]

In Saskatchewan, Indigenous children make up approximately 30 percent of the child population and over 80 percent of the children in child apprehension cases.[2] This thesis explores the relationship between the implementation of Article 12 of the *United Nations Convention on the Rights of the Child*[3] (CRC or Convention) and the overrepresentation of Indigenous children in the child welfare system. The CRC has been signed by 194 countries and ratified by 192 countries. It is the most ratified convention in the world, but despite its vast acceptance it has not been intentionally implemented into the legislative frameworks of the signatory or ratifying countries. In Canada, the CRC is not incorporated into legislative frameworks at the provincial or federal level. The CRC intended to universalize children's rights and recognize children as 'rights bearers.'

---

[1] Cindy Blackstock et al, *Reconciliation in child welfare: Touchstones of hope for Indigenous children, youth, and families*. Ottawa, ON, Canada: First Nations Child & Family Caring Society of Canada / (Portland: National Indian Child Welfare Association, 2006.) online: http://www.fncaringsociety.com/sites/default/files/docs/Touchstones_of_Hope.pdf

[2] V. Galley, *Summary Review of Aboriginal Over-representation in the Child Welfare System.* Prepared for: Saskatchewan Child Welfare Review Panel, 2010. SEE Aboriginal Children in Care: Report to Canada's Premiers" (Prepared by: Aboriginal Children in Care Working Group, 2015) online: <http://www.canadaspremiers.ca/phocadownload/publications/aboriginal_children_in_care_report_july2015.pdf>.

[3] The United Nations General Assembly, *Convention on the Rights of the Child*, *(20 November 1989)* vol. 1577, p. 3 (entered into force 2 September 1990) [*CRC*].

However, much dispute remains as to what 'rights' children can properly hold, their capacity as 'rights bearers,' and whether children's rights undermine parental rights.[4]

Article 12 of the CRC expressly recognizes the child's 'voice' (participatory right) in matters affecting them. Article 12 further recognizes that children's rights are not limited to welfare rights (protective rights and provisional rights), which include rights such as rights to shelter, food and clothing:

> Article 12
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[5]

The signatory countries unanimously agreed that children should be afforded some 'voice' when facing the realities of state intervention in their lives. However, the mechanisms by which countries afford children 'voice' in matters of child welfare differ considerably. This difference is in part due to how a country may characterize children's rights and how a country may decide to legitimize the CRC in its legislative framework. In Saskatchewan, the overrepresentation of Indigenous children in child welfare cases poses an additional threat to Indigenous children's 'voice' because the Indigenous child's

---

[4] SEE David Archard,*Children: Rights and Childhood* (New York: Routledge, 1993)., Brenda Hale, "Understanding Children's Rights: Theory and Practice" (2006) 44 Family Court Review 350, Martin Guggenheim, *What's Wrong with Children's Rights* (Boston; Harvard University Press, 2005)., and James G. Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 Cal. L. Rev. Also SEE Confidential interview with a Director of a First Nations Child and Family Service Agency [FNCFSA] who identified parental issues in relation to child apprehensions as, "*part of it is once you take a child out of their home and away from their parents it disengages them [parents] so much as parents it is like something happens to them. when they lose their parental authority it is really hard to put back. It is like you have stripped them of something inherent to them*".

[5] *Supra* note 3.

access to justice in the child welfare system is limited by a colonial justice system and advocacy models based on western frameworks. A review of the case law, literature and interviews related to this research showed that current mechanisms for providing a child voice in the child welfare process are deeply rooted in euro-colonial frameworks.

This thesis identifies different models of legal representation adopted by lawyers and justice systems in child welfare cases and offers alternatives to the current justice framework used in child welfare cases in Saskatchewan. Intended is a representational model that will afford Indigenous children meaningful 'voice' in child protection hearings that will reflect cultural and communal needs identified by Indigenous peoples as essential to maintaining their culture, language, identity and community. The current model of advocacy for children in Saskatchewan offers legal representation in a limited number of cases to children, and raises concerns with respect to how the lawyer advocating can adequately represent the child. Incorporating the CRC into the Canadian legislative framework may alleviate the current uncertainty and ambiguity regarding the status of the Indigenous child's right to be heard in child protection proceedings.

For Indigenous children, access to justice includes notions of access to legal advocates, to information about their rights, access to culturally appropriate services and access to a culturally appropriate process. Procedural and substantive access to justice barriers for Indigenous peoples have been identified as including, "poverty, illiteracy, poor education, recognition of lands and territories, and self-determination"[6]. Additionally, Anaya describes the collective dimension of access to justice including, "the right to maintain [Indigenous peoples'] own judicial system as part of their essential

[6] States News Service, *Human Rights Council Holds Panel Discussion on Access to Justice for Indigenous Peoples*.(Sept. 18, 2012). Maryland, United States. Quoting James Anaya.

right to self-determination and therefore the recognition of these systems" as an essential "part of their assertion of collective rights. Mainstream justice systems should aim to better integrate traditional and indigenous justice systems"[7]. With respect to Indigenous children in Saskatchewan Woods described access to justice as having limitations based on the geographical location of many Indigenous communities. Remote communities are often unaware of advocacy services available for children, and therefore do not access those services. Additionally Woods notes that limitations of access to justice include inadequately trained counsel with respect to Indigenous culture and community that extends to judicial assessment of child welfare cases and front-line ministry workers.[8]

This thesis takes a grounded theory approach with respect to interviews conducted and a mixed methods approach to qualitative research that includes document review, case law and legislation analysis, and key informant interviews. Grounded theory is a qualitative research approach traced to Glaser and Strauss.[9] It is rooted in observation, where the researcher seeks to develop an explanatory theory about real-world conditions, or phenomena, of interest.[10] For this research, interrogating the high representation of Indigenous children in the child welfare system, common contributing themes of which became evident throughout the interview process, was paramount to the consideration of alternative models of Indigenous child welfare. The iterative process of grounded theory supports data analysis, case study review and open-ended interview techniques as a means of collecting an array of integrative results to support a rational explanation of

[7] *Supra* note 6.
[8] Sheri Woods, Panel Discussions, counsel for children and youth training program, Wanuskewin, October 14 2016.
[9] SEE Glaser BG Strauss AL (1967) *The discovery of grounded theory: Strategies for qualitative research* New York: Aldine de Gruyter.
[10] *Ibid*.

phenomenon of interest. The intended output of grounded theory is not abstract reality, but rather, a contextually relevant and well-considered explanation of real world problems. Key informant interviews were conducted with representatives from First Nations Child and Family Service Agencies (FNCFSA), Child Advocacy Programs and lawyers advocating for Indigenous children. Each chapter relies on a literature review including case law, policy, legislation and secondary sources. In order to contextualize the use of those sources, interview quotations are used throughout the body of the work and are not limited to one particular "results" section of this research.

The interviews conducted in this research were used to identify common themes contributing to the Indigenous child's lack of access to justice in Saskatchewan's child welfare system. The themes consistently identified by interviewees included Saskatchewan's colonial history, residential schools, funding discrepancies of First Nation's Child Welfare Agencies, concepts of children's rights, western concepts of best interests of the child, role of the CRC, jurisdictional conflicts, and the role of lawyers and the justice system. All of the above issues are multi-faceted; therefore, identified issues are discussed to the extent that they relate to Indigenous children's access to justice. Reviewing a large body of sources was essential because the ongoing crisis for Indigenous children in the child welfare system stems from multiple historical and current issues, including but not limited to racism, cultural bias, poverty, uneven access to resources, colonialism, and jurisdictional conflict. In order to gain an appropriate understanding of these many issues, a research approach based on grounded theory was necessary.

Eight people who could provide context to the Indigenous, policy, legal and sociological dimensions of child welfare in Saskatchewan were identified for interviews. Interviewees were contacted by email, and a time and place for the interview was arranged at their convenience. Six of the interviews were conducted in person; two interviews were conducted over the phone. All interviews were approximately 60 minutes in length and were recorded. One interviewee identified that they preferred to remain confidential. All other interviewees are identified by name throughout this work. The framework that guided interviews for this thesis can be found in Appendix A. This research was approved by the University of Saskatchewan Research Ethics Office, which can be found in Appendix B. I am a non-Aboriginal woman, who was employed as a lawyer in Saskatoon prior to commencing this research project. My experience working on Ministry of Social Services files suggested that there were barriers in access to justice for Indigenous children subject to the child welfare system, which I ultimately wanted to explore in this research project.

Chapter 2 of this thesis focuses on literature and informed interviews to support the notion that the child welfare in Canada and Saskatchewan is merely an extension of the residential school system albeit under a different institutional name (child welfare). Chapter 3 focuses on concepts of children's rights and rights theory and how those concepts may perpetuate Indigenous overrepresentation in the child welfare system. Understanding the child's communal interests will achieve decisions in child welfare cases that more accurately reflect the child's best interest as opposed to a perceived best interest. Chapter 4 explores other jurisdictions' attempts to incorporate Article 12 of the CRC and what models may be useful in affording voice to Indigenous children in

Saskatchewan. Chapter 5 focuses on concepts of 'best interest' of the child, and how concepts of best interest in legal frameworks contribute to Indigenous overrepresentation. Chapter 6 explores current provincial programs intended to offer 'voice' to children in child welfare cases, and identifies limitations to the current legal framework. It is suggested that outcomes for children will vastly improve in Saskatchewan if Indigenous peoples were able to regain sovereignty over child welfare. Ultimately, sovereignty over child welfare would significantly reduce the number of Indigenous children in care and would help restore Indigenous culture. Chapter 7 provides a conclusion and recommendations. Chapter 7 also identifies the limitations of this research.

CHAPTER 2: THE STATUS OF CHILD WELFARE IN SASKATCHEWAN

The intention of this chapter is to provide the contextual framework, which has resulted in the vast overrepresentation of Indigenous children in Saskatchewan's child welfare system today. Providing historical context is essential to both the reconciliation process and to any recommendations made with respect to this research.

2.1 SASKATCHEWAN'S CHILD WELFARE HISTORY: SHAPING THE CURRENT LANDSCAPE

> *We have a sanitized history in Canada, and it has not been like that for Indigenous people at all... So when you have five or six generations of the total institution of the residential schools then we have a context that is more understandable as to why there are community and family issues…layered overtop of that is a euro-Canadian child welfare system which is a total failure on all counts.*[11] *Raven Sinclair*

Child welfare is the first issue identified in the Truth and Reconciliation Commissions (TRC) of Canada's *Calls to Action*.[12] Identifying child welfare as a primary concern in the reconciliation process explicitly identifies the pressing need to address child welfare concerns immediately in Canada. The federal, provincial and territorial governments have diminished inherent Indigenous child welfare rights. A lack of understanding of the Canadian legal system and a denial of access to justice during the Residential School system and the "Sixties Scoop" prevented Indigenous peoples from asserting their rights concerning matters involving their children.[13]

In order to understand the current framework regarding child welfare in Saskatchewan, it is necessary to understand Saskatchewan's child welfare history as it relates to Canada's colonial history. Blackstock states that the residential school system

---

[11] Raven Sinclair, personal interview. Associate Professor, Faculty of Social Work, University of Regina, June 6 2016.
[12] Truth and Reconciliation Commission of Canada, *Calls to Action* (2015) online: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf
[13] Kent McNeil, "Indigenous Rights Litigation, Legal history and the Role of Experts" 2014 77 Sask. L Rev 173 at 185.

was simply the beginning of the current child welfare system today.[14] The TRC *Calls to Action* also notes this connection: "[w]hat has come to be referred to as the "Sixties Scoop" – the dramatic increase in the apprehension of Aboriginal children from the 1960's onwards – was in some measure simply a transferring of children from one form of institution, the residential schools, to another, the child-welfare agency."[15] Blackstock states that "[t]he bright line distinction in removal motivation does not survive a historical review."[16] Although the two institutions are often distinguished—the residential school system as being one that involved the forced removal of Indigenous children from their homes and community, and the child-welfare system as being involved in the protection of children facing harm—they are often indistinguishable. Both institutions are/were premised on the assimilation of Indigenous children and a colonial project that arguably remains active in today's child welfare system.

This colonial project ignores the fact that Indigenous peoples exercised inherent jurisdiction over their children and families since time immemorial. At the Treaty Table,[17] elders stated that the responsibility for children and families is sacred and fundamental to the laws of Indigenous communities. Indigenous Nations never ceded this responsibility to their children at the time of Treaty making. Further, Indigenous peoples have an inherent right to self-government, and by extension, child welfare matters, as recognized and affirmed by section 35 of the *Constitutional Act*, 1982

---

[14] *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada* (representing the Minister of Indian Affairs and Northern Development), 2011 CHRT 4 (CanLII) at para 60
[15] *Supra* note 12 at page 71.
[16] *Supra* note 1.
[17] Honourable Judge David M. Arnot, *Statement of Treaty Issues*. (Office of Treaty Commissioner of Saskatchewan, October, 1998).

(Constitution).[18] In *Campbell v British Columbia (Attorney General)*[19] Williamson J. stated:

> I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, **it was not extinguished**. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation, which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty.[20] [Emphasis added].

However, between 1885 and 1993, twenty residential schools operated in Saskatchewan to assimilate Indigenous Children into Anglo-European culture.[21] A 1920 amendment to the *Indian Act*[22] permitted the government to enter any home on a reservation wherein it believed that a child between the ages of 7 and 15 years resided. These children were then removed from their homes, families and communities and were forced to attend a residential school.

The introduction of section 88 of the *Indian Act* in 1951 significantly changed Saskatchewan's landscape of children in-care because provincial laws became applicable to those residing on reserve:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, **all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province**, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

---

[18] *Constitutional Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c.11.
[19] *Campbell v. British Columbia (Attorney General*) [2000] B.C.J. No. 1524.
[20] *Ibid* at para 179.
[21] Anna Kozlowski et al, *First Nations Child Welfare in Saskatchewan (2011),* online: Canadian Child Welfare Research Portal online <http://cwrp.ca/infosheets/first-nations-child-welfare-saskatchewan >
[22] *Indian Act,* RSC 1985, c I-5.

Effectively, section 88 of the *Indian Act* authorized provincial child welfare agencies' interference with the governance of children on reserve. The lack of explicit reference to child welfare in either the *Indian Act* or the *Constitution* resulted in the provinces assuming responsibility for child welfare with limited regard to Indigenous child welfare practices. During the 1950s provincial child and family services agencies began to apprehend Indigenous children.[23] Between 1950 and 1970 the representation of Indigenous children in Ministry care increased from 1 percent to 63 percent, now historically identified as the "Sixties Scoop."[24] Disputes during the "Sixties Scoop" regarding federal and provincial funding on-reserve resulted in child apprehensions being the only provincial child welfare service provided to First Nations communities.[25] The dramatic overrepresentation continues today in Saskatchewan: approximately 80 percent of children in care are Indigenous while only 30 percent of the child population is Indigenous.[26]

Dissatisfaction with provincially operated child welfare agencies in the 1980s caused many First Nations to develop independent federally-funded FNCFSA. These agencies developed out of a need for First Nations to regain autonomy over Indigenous children. Indigenous communities began entering into multilateral and bilateral agreements under the provisions set out in section 61 of the *Child and Family Services*

[23] *Supra* note 21.
[24] David McDonald and Daniel Wilson, "Poverty or Prosperity: Indigenous Children in Canada" Canadian Centre for Policy Alternatives (2013) online: www.policyalternatives.ca
[25] Marlyn Bennett, Cindy Blackstock, Richard De La Ronde, "A literature review and annotated bibliography on aspects of Aboriginal child welfare in Canada 2nd Ed" (Ottawa: First Nations Child and Family Caring Society, 2005) online: www.fncfcs.com/docs/AboriginalCWLitreview_2ndEd.pdf relationship based on self-determination.
[26] "Aboriginal Children in Care: Report to Canada's Premiers" (Prepared by: Aboriginal Children in Care Working Group, 2015) online: http://www.canadaspremiers.ca/phocadownload/publications/aboriginal_children_in_care_report_july2015.pdf

Act (CFSA),[27] wherein First Nation operated agencies could contract with the province of Saskatchewan to administer all or a portion of the provisions identified in the CFSA:

> 61(1) The minister may, having regard to the aspirations of people of Indian ancestry to provide services to their communities, enter into agreements with a band or any other legal entity in accordance with the regulations:
>
> (a) for the provision of services or the administration of all or any part of this Act by the band or legal entity as an agency; or
>
> (b) for the exercise by the agency of those powers of the minister pursuant to this Act that are specified in the agreement
>
> (2) An agency that enters into an agreement pursuant to subsection (1) is responsible for the exercise of the powers of the minister to the extent to which those powers are specified in the agreement.

Section 61 agreements in no way granted full autonomy to First Nations operated agencies but did put some limited control back into the hands of the community to administer all or part of the CFSA as articulated by the province.[28] Policy decisions on how to implement child welfare policies are still subject to provincial control and forced upon FNCFSA, which contributes to First Nations' frustration with implementing provincial legislation:

> *When you think about it, there should be two different sets of policies, policies that the province makes with respect to non-indigenous peoples and policies that First Nations make on how they want to interpret the Child and Family Services Act…the government should not be able to tell first nations how to implement the Child and Family Service Act…. the Saskatchewan government says "you now have to implement this new policy", instead of going to the chiefs and negotiating how to mutually get the best out of legislation.*[29] *Josephine de Whytell*

[27] *Child and Family Services Act*, RSO 1990, c C.11. s.61.
[28] Raymond Shingoose, personal interview. Executive Director Yorkton Tribal Council Child and Family Services June 2016. Shingoose describes having very little control over policy development on how to implement the provincial *CFSA*.
[29] Josephine de Whytell, personal interview. Lawyer, Saskatoon Saskatchewan. June 8 2016.

Litigation between the Province and Saskatoon Tribal Council (STC) with respect to the section 61 agreements and the two parties' relationship on the delivery of services has commenced [30]:

> At its core, Saskatchewan [the province] seeks a declaration that it lawfully terminated a 1996 agreement which had delegated ministerial authority under *The Child and Family Services Act*, SS 1989-90, c C-7.2 [*CFSA*] to the Agency. By virtue of this termination, Saskatchewan contends the Agency no longer possesses the legal authority to exercise the powers, duties and responsibilities under the *CFSA* with respect to children on STC First Nations reserves. Consequently, Saskatchewan argues the Agency should be judicially constrained from purporting to exercise powers under the *CFSA* or in any manner interfere with Saskatchewan's exercise of its statutory mandate under the *CFSA*.[31]

The relationship between the province, provincial legislation and funding arrangements with Indigenous and Northern Affairs Canada (INAC) creates a piecemeal framework, which continues to plague the jurisdiction and authority to provide child welfare services in Indigenous communities. By way of example, through the course of the litigation, STC describes its 1996 section 61 agreement with the province as a "bilateral agreement." The Government of Saskatchewan describes the agreement as a "delegation" of Ministerial authority.[32] However, STC relies on funding to administer the CFSA from the federal government [INAC]. As many of these provincial agreements come to an end or time for renewal, FNCFSA are increasingly concerned about their status under provincial agreements and about culturally appropriate care for children due to the vast overrepresentation of Indigenous children. As Raymond Shingoose, the Director of the Yorkton Tribal Council FNCFSA, articulates, unlike STC his agency is no longer arguing jurisdiction: they simply are asking the province to communicate its plan for on-reserve care to FNCFSA:

---

[30] *Saskatchewan v STC Health & Family Services Inc*, 2016 SKQB 236 (CanLII).
[31] *Ibid* at para 2.
[32] *Supra* note 30 at para 16.

> *The system right now just removes children and it makes it worse. We have been asking the province and the child advocates office, "what is your process for on reserve?" We aren't arguing jurisdiction like they think we are, we just want to know what's your process, how to implement their rules and laws - your investigations. They just go in without telling us.*[33] *Raymond Shingoose*

Canada's colonial history created a patchwork framework resulting in jurisdictional conflict, policy conflict, and an unbalanced access to services for Indigenous people all at the expense of Indigenous children.

2.2 Funding Provincial and Federal Child Welfare Programs

> *If Indigenous agencies were funded at an equitable level, there is no telling what creative processes could be implemented.*[34] *Raven Sinclair*

In 1991 INAC introduced a systematic method of allocating resources to federally funded First Nations child welfare agencies. The method introduced was two pronged, consisting of a new formula for allocating resources, *Directive 20-1*, and a manual, *First Nations Child and Family Services National Program Manual*.[35] Both the formula and the manual "place[d] greater constraints on First Nations child welfare agencies by requiring them to conduct child welfare services based on provincial standards and by increasing control over funds for such services."[36] *Directive 20-1* specifically granted funding for operational and maintenance costs related to child welfare, but not for preventative funding. It also failed to address specific community needs in relation to child welfare.

In 1990 the Federation of Saskatchewan Indian Nations (FSIN) drafted the *Indian Child Welfare and Family Support Act* (ICWFSA), acknowledging Indigenous jurisdiction over child welfare. However, it has not been passed by the Saskatchewan

[33] *Supra* note 28.
[34] *Supra* note 11.
[35] *Supra* note 21 at 10,11.
[36] *Supra* note 21.

Legislature, despite approval by First Nations' in Saskatchewan.[37] In response to INAC's proposed ICWFSA legislation, the Saskatchewan government amended s. 61(1) of the CFSA to allow only for delegation of the provincial CFSA, which, arguably, was meant to stifle any First Nations' sovereignty over First Nations operated agencies.

The first CFSA section 61(1) agreement was signed in 1993 between the province and Touchwood Child and Family Services, and permitted Touchwood to conduct investigations under the CFSA. At this time funding remained under the Directive 20-1 model wherein the operational and maintenance costs of conducting investigations under the CFSA were funded but preventative child welfare funding was not provided. To allow for a greater focus on prevention, INAC proposed the Enhanced Prevention-Focused Approach (EPFA) in 2008. This approach complimented ICWFSA, which had expressed a need for preventative funding in conjunction with operational and maintenance funding.[38] Although preventative costs were addressed in the EPFA model,

> Operations costs continue to be partially based on an assumed average rate of out of home placements rather than actual agency expenses and there does not appear to be a formal mechanism for linking AANDC funding levels to the shifting responsibilities mandated by provinces/territories. In addition, in contrast to directive 20-1, which covered actual maintenance expenses for children in out of home care, the new model designates **a block of maintenance funds based on agency maintenance costs during the preceding year**. This block funding method does not include a formal mechanism for covering costs associated with the maintenance of children with particularly complex special needs...[39]

---

[37] Government of Canada, *Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement* **(**October 2007) online:< http://www.aadnc-aandc.gc.ca/eng/1326400134161/1326400183723>. SEE *Supra* note 28, as this was also highlighted by Raymond Shingoose.

[38] *Supra* note 21.

[39] *Ibid*. ALSO note interview with (Confidential interviewee) wherein the interviewee identified that block funding (funding that is provided once annually and not necessarily based on actual costs to the agency) does not work for FNCFSA's because if the agency has a child who requires special needs facilities, equipment, or a special care arrangement, the FNCFSA will not have the funds to cover that child's costs or will use all of the block funding provided to the agency.

Funding disparities relating to First Nations operated child welfare agencies resulted in a Human Rights challenge pursued by both the *First Nations Child and Family Caring Society (FNCFCS) of Canada* and the *Assembly of First Nations*[40] against the Federal Government of Canada (at this time AANDC). The FNCFCS claimed that funding disparities between First Nations operated agencies and provincial agencies were in breach of section 5(b) of the *Canadian Human Rights Code.*[41] The complaint was summarized in the decision as follows:

> Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN), allege AANDC discriminates in providing child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint). On October 14, 2008, the Canadian Human Rights Commission (the Commission) referred the Complaint to this Tribunal for an inquiry. [Emphasis added].[42]

FNCFCS and AFN alleged that the provisions for services for children and families on First Nations' failed to meet the needs of children and communities because inequitable and insufficient funding is available to implement services as compared to provincial funding for non-Indigenous children and families. On January 26 2016, the Human Rights Commission determined that the funding schemes provided to First Nations' governed agencies were insufficient and substantially less than the funding provided to children who fell under provincial MSS program:.[43]

---

[40] *First Nations Child and Family Caring Society (FNCFCS) of Canada* and the *Assembly of First Nations* 2016 CHRT 2.

[41] *Canadian Human Rights Act* R.S.C. 1985, c. H-6. at s.5.

[42] *Supra* note 14 at para 6.

[43] *Ibid* at para 121:

> [AANDC funds child and family services on reserves and in the Yukon in various ways. At the time of the complaint, there were 105 FNCFS Agencies in the 10 provinces across Canada (104 at the time of the hearing). The FNCFS Program applies to most of the FNCFS Agencies in Canada, uses two funding formulas: Directive 20-1 and the Enhanced

> *A real advocate would look at the inadequacies and the disparity of services….Thank God for the human rights outcome, because our evidence there was real.*[44] *Raymond Shingoose*

The Human Rights Commission also confirmed that the funding formulas used by the federal government allocating resources to First Nations' operated agencies were outdated, provided less support than that available at the provincial level for services to meet the needs of Indigenous children and ultimately perpetuated discrimination against First Nations' children and communities. Unlike other jurisdictions (like the United States for example), the Canadian federal government has not specifically legislated in the area of child welfare:

> Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programming and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. **However, this delegation and programming/funding approach does not diminish AANDC's constitutional responsibilities [emphasis added]**
> …
> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake.[45]

Prevention Focused Approach (the EPFA). In Ontario, funding is provided through the *1965 Agreement*. In certain parts of Alberta and British Columbia, funding is provided through the *Alberta Reform Agreement* and the *BC MOU* and, since 2012, the *BC Service Agreement*. Finally, in the Yukon funding is allocated pursuant to the *Yukon Funding Agreement*.

[44] *Supra* note 28

[45] *Supra* note 40 at para 83 & 95.

Additionally, by virtue of section 88 of the *Indian Act*, the federal government has permitted the provinces to enter into agreements with First Nations governed agencies to carry out the provincial legislation. The financial means to do so has remained the responsibility of the federal government. As such, "AANDC has undertaken to ensure First Nations living on reserve receive culturally appropriate child and family services that are reasonably comparable to the services provided to other provincial residents in similar circumstances."[46] However, rather than focusing on actual needs of communities, funding formulas (both the EPFA and Directive 20-1)[47] focus on population and outdated data to provide the allocation of funds. The Complainant argued that these formulas contributed to Canada's long-standing goals of assimilation and continued discrimination stemming from Residential schools, which fail to meet the best interests of the child.[48] Canada's provincial legislation, Canada's commitment to international obligations under the CRC and international law in relation to Indigenous children unequivocally focuses on the "best interests" of the child being the paramount or primary consideration to programming and services for families and children.[49] By failing to provide comparable funding to the provincial system, the best interests of Indigenous children were compromised by the Canadian federal government.[50] Shingoose describes the gap in funding between the Ministry and FNCFSA as widening in his agency "the inequality of funding started off at 22%, then it went up to 38%, and now it is at 41%."[51]

---

[46] *Supra* note 40. at para 111.
[47] *Supra* note 21.
[48] *Supra* note 40.
[49] SEE Nicholas Bala & Rachel Birnbaum & Lorne Bertrand. "Controversy about the role of children's lawyers: Advocate or best interest guardian? Comparing practices in two Canadian Jurisdictions with different policies for lawyers" (2013) 5 Family Court Rev 681.
[50] *Supra* note 40.
[51] *Supra* note 28.

The Human Rights Commission's decision emphasized a need to implement "Jordan's Principle."[52] Jordan's Principle mandates that a government of first contact bear the responsibility of ensuring that services are provided to Indigenous children where there is a dispute between the federal and provincial branches of government. As such, Jordan's Principle requires that, should a dispute arise, the government of first contact shall provide the necessary services and recoup its cost should that be appropriate. Ultimately this principle prevents a situation arising wherein services are not adequately, efficiently or effectively provided due to an intergovernmental dispute. In light of the evidence provided, the tribunal found that the complaints were substantiated by the complainants and held that,

> The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.
>
> More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "…equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).[53]

The decision ultimately found that the federal government's funding of FNCFS falls within its fiduciary relationship to First Nations, and funding increases to FNCFSA have now been promised by the federal government,

---

[52] "Jordan's Principle": In 2007 the House of Commons unanimously passed this principle; however, it has not been fully implemented by the federal, provincial or territorial governments. Notably one of the TRC recommendations in relation to child welfare is that Jordan's Principle be fully implemented by all levels of government.

[53] *Supra* note 40 at para 481 and 482.

> *... one of the things that has happened is the federal government has said 'ok we are going to increase funding for child welfare on reserve". What they have done is set a formula for increases... so they are increasing the funding over the next five years to First Nations agencies.*[54] *Director of FNCFSA.*

While funding discrepancies significantly contribute to the over-representation of Indigenous children in the child welfare system (which in part results from the lack of preventative funding and culturally-appropriate services), the decision does not go as far as to suggest that child welfare programming be placed exclusively into the hands of the FNCFSA, nor was there the authority to do so under Canada's Human Rights Legislation. Rather it remains the Canadian position, which is reflected in our Constitution and history with regards to First Nations' communities and section 88 of the *Indian Act*, that First Nations are prohibited from assuming sovereignty in relation to laws and legal frameworks applying to Indigenous children.

Children residing on reserve, or under reserve purview, were found to receive significantly less funding than children subject to the provincial or territorial schemes. Substantiated in the findings is that both operational and preventative costs hindered the ability of FNCFSA to provide mandated provincial and territorial services - which in turn impacted the FNCFSA ability to provide culturally appropriate services. The CHRC decision found as a finding of fact that the funding disparity was a breach of the Canadian *Human Rights Act.*[55] Funding discrepancies prevent Indigenous children from having a 'voice' in the child welfare process:

> Of particular concern for children's rights is the federal government's argument that federal services cannot be compared with provincial services. **This violates**

[54] Confidential, personal interview. Director of FNCFSA, August 29, 2016.
[55] First Nations Child and Family Caring Society of Canada, "Staying at Home: examining the implications of least disruptive measure in First Nations Child and Family Service Agencies" (2004) online: http://www.fncaringsociety.com/sites/default/files/docs/Staying_at_Home.pdf at 7.

> **the Convention right to equitable treatment for all children in Canada.**[56][Emphasis added]

Indigenous communities argue that this chronic underfunding of child welfare services on reserve leads to poverty and poor living conditions, which then contributes to the vast overrepresentation of Indigenous child apprehensions.[57] The evidence overwhelmingly supported the FNCFCS and AFN's position that Indigenous children are disadvantaged by the current lack of services. During the course of the proceedings Blackstock identified that:

> The federal government wants to limit any comparator group analysis to First Nations children on reserve implying that: 1) it funds all First Nations children on reserves equally and thus there is no discrimination and 2) funding for non-Aboriginal child welfare is outside of the federal government's mandate and thus any comparisons to provincial child welfare funding for other children is irrelevant.[58]

Regardless of the federal government's attempt to limit any comparator group, it was held that the Federal government has discriminated against Indigenous children and families receiving child welfare services by providing those families and children of federal jurisdiction significantly less funding,[59] which runs counter to Canada's obligations under the CRC.[60] The only equitable solution is to ensure that funding is available to meet the needs of children, regardless of whether that child is considered to be a federal or provincial responsibility; however, implementation of this in light of the

---

[56] Right in Principle, Right in Practice: Implementation of the Convention on the Rights of the Child in Canada. (2011) online: Canadian Coalition for the Rights of Children http://www.cccabc.bc.ca/res/pubs/pdf/CCRC_Report_UN_CRC.pdf at 64.
[57] Cindy Blackstock, "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice lose" (2011) 33:1 Children and Youth Services Rev 187.
[58] *Supra* note 57.
[59] *Supra* note 40.
[60] *Ibid.*

outcome of the *First Nations Child and Family Caring Society* decision remains uncertain.[61]

Although First Nations communities now have some control over the implementation of provincial legislation on reserve, the serious discrepancies in funding between the mainstream provincial child welfare system and FNCFSA system is causing what can be described as a second "Sixties Scoop." The underfunding of FNCFSA perpetuates systemic disadvantages for Indigenous communities. Jurisdictional conflicts have resulted in "piecemeal progress towards self-determination for aboriginal peoples in Canada [which] has produced a patchwork of child welfare models serving aboriginal children"[62]:

> Aboriginal youth in care reported additional challenges they faced while in care. They stated that being placed into care and frequent placement moves in care separates young people from their immediate families and extended family and friends, as well as their cultural heritage and traditions. Many Aboriginal youth in care report feeling disconnected from their culture, which makes it difficult to develop their own identity.[63]

The lack of funding contributes significantly to the overrepresentation of Indigenous children apprehended in the child welfare context, and thus contributes to the genocidal effect on Indigenous culture and the assimilation of Indigenous children, the loss of which gives rise to a loss of access to substantive justice. Further, underfunding raises access to procedural justice issues for Indigenous children, as their access to 'voice' in

---

[61] *Re-Imagining Child Welfare in Canada, Symposium*. Toronto Ontario, Osgoode Law School. October 22, 2016. Working group discussions focused on how implementation of the decision has not been met by the federal government, as funding has not been increased to FNCFSA. Additionally, Cindy Blackstock indicated that following the Human Rights decision, the federal government ceased to provide any funding assistance to the Assembly of First Nations.

[62] Child Welfare Services in Canada: Aboriginal & Mainstream (2009-2010) online: National Collaborating Centre for Aboriginal Health<http://www.nccah-ccnsa.ca/docs/fact%20sheets/child%20and%20youth/NCCAH-fs-ChildWelServCDA-2EN.pdf>

[63] *Supra* note 56 at 67.

the child welfare process is met with more barriers than non-Indigenous children. The provincial threshold system of removal forced upon Indigenous communities continues to drive forced assimilation and the erosion of Indigenous culture in Saskatchewan:

> *The answer is not to remove the child from the family,… It breaks down creator's laws, grandfathers' law, grandmothers' laws, and traditional laws specific to families… and breaks down tribal affiliation. They come and force these laws upon us.*
>
> ...
>
> *I was traditionally adopted by my grandparents. I was the oldest of the cousins, and one reason for doing that was so that the traditional knowledge could be passed down. Then the Ministry came and said that they [my grandparents] were too old, and I was adopted out at 11 years old...my mom was not consulted, and there you have it, I ended up in Calgary then ran away when I was 17 and then caught the tail end of residential schools.*[64] *Raymond Shingoose*

[64] *Supra* note 28.

CHAPTER 3: UNDERSTANDING CHILDREN'S RIGHTS: DIFFERENT RIGHTS MODELS IN THE INDIGENOUS CONTEXT IN CANADA.

> *We have developed our own legislation and it is premised on the spirit of the child being the voice of the child…. every year I ask for forgiveness from the creator through ceremony, because this job forces me to break our laws.*[65] *Raymond Shingoose*

Perceptions of childhood vary significantly between different cultures, but perhaps even more acute are the variations between the historical view of children compared to the present western characterization of children and the rights they hold.[66] In Canada, Indigenous children are the primary subjects of child welfare cases.[67] As such, concepts of children's rights in an Indigenous context cannot be ignored when discussing child welfare in Saskatchewan. The lens through which we identify concepts of childhood and the rights children hold varies between cultures and significantly impacts children subject to the legal system. Western concepts of childhood and child advocacy may not appropriately address child welfare issues specific to Indigenous culture. This chapter further exposes some of the competing rights present in the Canadian child welfare context as they relate to Indigenous children.

3.1 CHILDREN AS RIGHTS BEARERS: WILL THEORY AND INTEREST THEORY MODELS

> Can you have rights at all if you are too young to exercise choice, when others have to enforce your rights for you, when the obligations upon which your most essential rights depend are often vague and ill-defined, and when you are too young to have reciprocal obligations of your own?[68]

The above question raises opposing philosophical responses regarding the representation of children in child welfare cases. Different perceptions of childhood

---

[65] *Supra* note 28.
[66] David Archard, *Children: Rights and Childhood* (New York: Routledge, 1993) at 37.
[67] *Supra* note 21.
[68] Brenda Hale, "Understanding Children's Rights: Theory and Practice" (2006) 44 Family Court Review 350 at 351.

shape child representation in the context of child welfare in Saskatchewan. Archard suggests that concepts of childhood today are more distinct than in previous societies, and states that we define a child as someone who cannot yet enjoy the full rights or the responsibilities of an adult.[69] In discussing moral rights, Archard states the following:

> [M]oral rights are possessed and exercised by children, if, according to the will theory, they can make choices, or according to the interest theory, they have interests of sufficient importance. It may be that children have some rights only insofar as they are children, though these rights may also be thought of as protecting the future adults the children will become. Children may share some rights with adults, although it is normally thought that they do not have the same liberty rights because they are not competent to make the same choices adults can.[70]

The CRC, the *Canadian Charter of Rights and Freedoms*[71] and domestic law all codify on some level certain rights for children. Perhaps the most significant, certainly the most globally accepted, is the CRC, which was ratified by 192 countries. The CRC sets out basic rights that are afforded to children, including, but not limited to, the right to heath, education, freedom of expression, and protection against abuse, violence, and economic exploitation. The CRC recognizes children's rights and confirms that children, on some level, are in fact rights bearers. However, the rights protected within the CRC are predicated on the importance of individual rights, which raises specific concerns with respect to Indigenous children. One argument is that the CRC can no longer be considered in isolation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) with respect to Indigenous children.[72] As such the relationship

---

[69] *Supra* note 66 at 55
[70] *Ibid*.
[71] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [*Charter*].
[72] *Supra* note 26

between the CRC and Article 1 of UNDRIP may offer some reconciliation of individual rights and communal rights with respect to Indigenous children:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.[73]

Additionally, UNDRIP has been identified as a means to recognize Indigenous peoples right to sovereignty and self-determination, and by extension child welfare in an international context; however, what remains uncertain in light of Canada's adoption of UNDRIP is how autonomous and sovereign the right to self-determination will be interpreted in relation to Canada's Indigenous peoples and how UNDRIP will be used to support Indigenous governance over child welfare matters.[74]

Although Canada signed the CRC, the CRC has not been explicitly codified in Canadian law through legislative amendments at respective levels of government; however, Canada has committed to ensuring that existing and future legislation will conform to the CRC.[75] Archard argues one reason that the CRC has not been codified in domestic law is that there is no international court to enforce those commitments made by ratifying counties,[76] which suggests that only international treaties that have held signatory nations accountable in international courts have had significant impact.[77]

---

[73] The United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online: http://www.refworld.org/docid/471355a82.html [accessed 31 March 2016]. Article 1.

[74] Sonya Harris-Short, Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children Protecting the Vulnerable Under International Law. Ashgate Publishing Limited , England 2012 at 242.

[75] Final Report of the Senate Committee, *Children: The Silenced Citizens (*April 2007) at 226-37 online:www.fncfcs.com/docs/Children_TheSilentCitizens_April2007.pdf .

[76] *Supra* note 66 at 58 and 59.

[77] *Supra* note 66 at 59.

Despite not being explicitly legislated in Canada's domestic law, Canada's ratification of CRC demonstrates that Canada represents to the world that it intends on holding its laws accountable to the children's rights standards as set out in the CRC, whether or not those intentions have been realized.[78] The same is true for UNDRIP. However, UNDRIP is a Declaration and not a Convention, and therefore arguably less persuasive a tool in the international law context. By way of example, in child welfare cases in Saskatchewan, the courts have not challenged cases wherein it has been argued that independent counsel be appointed for a child or youth; however, the availability for child counsel in all cases directly involving a child is not guaranteed.[79]

The preamble of the CRC, adopted directly from the *Declaration on the Rights of the Child*,[80] states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[81] This statement articulates that children's rights differ from those of adults. This difference becomes explicit when we look at judicial decisions relating to children and youth. In the Supreme Court of Canada (SCC) decision of *R. v. D.B.*[82] the court found that the presumption of reduced moral culpability for children and youth was in fact a principle of fundamental justice:[83]

---

[78] SEE Final Report of the Senate Committee, *supra* note 75. Canada has taken the position that instead of specifically legislating to include the provisions of the CRC in domestic law that it will ensure that domestic law does not conflict with the provisions in the CRC. However, concerns have been expressed regarding whether parliament and the legislature have actually ensured that domestic legislation complies with the provisions of the CRC.
[79] Sheri Woods, Personal Interview, Saskatoon Saskatchewan. August 2016.
[80] *Declaration on the Rights of the Child*, GA Res 1386 (XIV), UNGAOR, 16th Sess, Supp No 16, UN Doc A/4354, (1959) at 19.
[81] *Supra* note 3.
[82] *R. v. D.B.,* [2008] 2 S.C.R. 3, 2008 SCC 25 [*D.B.]*.
[83] SEE *ibid* at para 74. "The remaining issue, therefore, is whether the presumption of an adult sentence in the onus provisions is consistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. In my view, they are not.

> [82] A young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7.

The rationale for the distinction between adult sentencing and youth sentencing rested on the view that children and youth by reason of age have diminished moral culpability.[84]

The child liberationist view, which became predominant during the birth of the civil rights and feminist movements of the 1960s, argues that children should hold equal rights to those of adults.[85] Archard criticizes this perspective, advocating, instead, the modest collectivist view,[86] which posits that there is a balance between the rights children hold and the responsibility of the state to rear children. Archard's position raises the question of whether state interference in the upbringing of a child denigrates individualism. Guggenheim has argued that state interference does denigrate individualism,[87] suggesting that the best place for a child to be brought up is in the care of their immediate family with very limited state intervention:

> But "the child is not the child of the state" and it is important in a free society to maintain the rich diversity of lifestyles, which is secured by permitting families a large measure of autonomy in the way in which they bring up their children.[88]

The family's role in the upbringing of a child is highly respected and supported in western-style liberal democracies, and is often based on the premise that parents have

---

They deprive D.B. of this presumption by putting the onus on him to justify his continued entitlement to the presumption, rather than on the Crown to demonstrate why it no longer applies to D.B., thereby allowing him to be sentenced as an adult."

[84] *Supra* note 82.
[85] C. R. Margolin, "Salvation versus Liberation: The Movement for Children's Rights in a Historical Context" (1978) Social Problems, Vol. 25, No. 4, pp. 441-452.
[86] *Supra* note 66 at 178.
[87] Martin Guggenheim, *What's Wrong with Children's Rights* (Boston; Harvard University Press, 2005) at 174-81, 192-212.
[88] *Supra* note 87.

traditionally held rights over their children.[89] Hale argues that it is equally the case that children are the product of the state, suggesting, "[the child] too is a person endowed with individual rights. If her family does not respect these rights, the state may have a positive obligation to step in to protect her."[90] It has been further suggested that the role of state involvement runs deeper than a protectionist role:

> It would be a mistake to see the state in merely 'negative' child protectionist terms as only a guardian of the child against abuse, which acts by intervening into the family and removing the child from any detected abusive situation. The state should also serve as a positive guarantor that every child within its jurisdiction enjoys a minimally decent upbringing.[91]

Children's rights as they relate to parental rights can be limited in certain situations. In the case of neglect or abuse, the state has a positive obligation to protect the child and the child's right against those harms. The *B.(R.) v. Children's Aid Society of metro Toronto*[92] decision, although monumental for its constitutionalization of parental rights,[93] did support the proposition of state intervention in situations where the best interest of the child, in particular the life of an infant, was at risk.

In the context of child welfare in Saskatchewan, the issue arises as to whether the state interferes with Indigenous families more than with non-Indigenous families based on western concepts of child rearing, and, if so, whether this has resulted in the current climate of excessive state intervention in Indigenous families' lives.[94] Additionally, Indigenous children represented by lawyers in child welfare cases may not appropriately

---

[89] James G. Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 Cal. L. Rev.
[90] *Supra* note 66 at 355.
[91] *Supra* note 87 at 216.
[92] *B.(R.) v. Children's Aid Society of Metro Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1[*B.R.*].
[93] Mark Carter, ""Debunking" parents' rights in the Canadian constitutional context"(2008) 86 Can Bar Rev 479 at 491.
[94] *Supra* note 87 at 248.

be represented due to lawyer bias with respect to the Indigenous child's relationship to their culture and community. Systemic issues such as poverty, which have substantiated apprehensions based on neglect, have been used to legitimize state intervention in families' lives and essentially trump parental rights to raise children.[95] Guggenheim argues that parental rights are too frequently trumped by "children's rights", or what a state deems to be a child's right. Guggenheim's argument relates to Saskatchewan's child welfare crisis in that the province may be inappropriately removing children based on a very western concept of children's rights. Ultimately, western concepts of child rearing and regard for children's rights in an individual framework expose Indigenous children to higher incidence of state intervention than non-indigenous children, contributing to a vast overrepresentation of Indigenous child apprehensions in Saskatchewan.

3.2 Will Theory and Interest Theory Models

Theoretical debates within the literature surrounding what it means to suggest that children have rights have yet to reach a consensus:

> If children's rights have a special nature because of the very identity of children as rights-holders, then the failure to determine what this means in theoretical terms suggests critical difficulties for working with children's rights in the sphere of legal practice.[96]

Ferguson suggests that the problem with children's rights is not the concept of children's rights per se (like scholars such as Guggenheim would suggest) but that we do not have a child-centered model that can conceptualize children's rights in a utilitarian way.[97] Therefore, the argument that the "theoretical basis of children's rights [is] intimately

[95] *Ibid*.
[96] Lucinda Ferguson, "Not Merely Rights for Children but Children's Rights: the theory gap and the assumption of the importance of children's rights" (2013) 21 Int'l J of Children's Rts.
[97] *Ibid* at 95.

connected to their legal implementation" [98] exists. In the decision-making context of child welfare cases, how we characterize children's rights can strongly influence the outcomes for children:

> *We have all these procedures and ways of operating that people don't say, "wait hang on a second, there is something fundamentally flawed about this system" even though it is a system that is operating on the backs of Indigenous children and families. It is self- perpetuating now. So as long as there is a certain level of bias - the system will continue to perpetuate itself.*
>
> ...
>
> *If people are not being critical in analyzing what their role is in the [child welfare system]…. The system will continue to perpetuate itself, particularly a system that is premised on un-interrogated bias, discrimination and racism.*
>
> ...
>
> *There is unregulated power in the child welfare system at all levels, from intake workers, managers and in the legal system as well.*[99] *Raven Sinclair*

Some will theorists argue that if children cannot conceptualize or do not possess the capacity to understand their rights, they cannot properly be described as possessing a right. This theory is based on the concept that if one does not possess the capacity to waive one's right, one does not properly hold a right, suggesting that "[t]he individual who has the right is a small scale sovereign."[100] Conversely, interest theorists claim that a child's lack of competency to hold a right does not exclude that child from holding an interest. By shifting the focus from *rights* to *interests*, will theorists' arguments that children are incompetent and therefore cannot hold rights is overcome.

Children's lack of development, maturity and capacity does not preclude children from being rights bearers. However, critics of interest theory for children's rights have suggested that, in order to hold an interest right, the rights bearer must realize that

---

[98] *Supra* note 66 at 182.
[99] *Supra* note 11.
[100] H.L.A. Hart, "Essays on Bentham: Studies in Jurisprudence and Political Theory", at 183.

interest. Therefore, if a child cannot realize their interest they cannot hold a right.[101] Cowden suggests that "[i]nterest theory necessitates that the right-holder have the competence to realize the right in order for the interest to be of sufficient importance to impose duties and restrict the liberties of others."[102] Cowden identifies this concern as follows:

> [I]nterest theory allows the power to enforce a claim to reside outside the claim-holder; **therefore the competency to enforce or to waive is no longer necessary to hold a right**. What interest theorists have not done is to demonstrate that the competence to *realise* the claim is also unnecessary.
> From this, it follows that if a child does not have the competence to realise the benefit to which the claim pertains, the interest may not qualify as of sufficient importance to be protected.
> Determining whether one holds a right under interest theory is therefore a balance between (a) the claim-holder's interest, (b) the claim-holder's competence, and (c) the cost to others of bearing the duty.[103]

Children's rapidly evolving capacity makes the requirement that children hold the capacity to recognize their rights problematic.[104] As children evolve towards adulthood, their ability to possess rights adapts as they gain capacity to realize those rights. Cowden, however, suggests that, in order to restrict the liberty of others (such as parents), the duty may rest on the state to pass laws that restricts parents' liberties with respect to their children [105]

In child welfare cases, this limitation of the interest theory model of children's rights cannot fulfill the needs of children. For example, infants may not have the capacity to understand that they have a right to food, but they clearly have an interest in being fed. In this sense the idea that children must be able to conceptualize their interest

---

[101] Mhairi Cowden, "Capacity, Claims and Children's Rights" Contemporary Political Theory Vol. 11, 4, 362–380.
[102] *Ibid* at 374.
[103] *Ibid*.
[104] *Supra* note 101 at 364.
[105] *Ibid* at 378.

in order to hold a right exposes already vulnerable people by limiting their interest based on capacity. In the context of child welfare, children must be protected from harms, which may regularly involve state interference in a child's life, regardless of whether or not the child can conceptualize a particular right or interest. As will be further discussed, children can, and do, hold rights within both will and interest frameworks. Limiting children's rights to one model over the other in no way improves children's rights.

3.3 Rights Reflected in the Convention on the Rights of the Child

The CRC expresses three different children's rights: participation rights—rights wherein the child has a voice with respect to a particular outcome or event, protective rights—rights that have inherently paternalistic characteristics and provision rights. Participation rights more strongly align with children's rights and will theory approaches. Protective rights more closely align with concepts of the best-interest and interest theory. Protective rights are distinct to children. Adults are not often the subjects of protective rights, as that would infringe on the libertarian view of what it means to be adult. Ultimately, we do not limit adults from making bad decisions; being free to make bad decisions is a part of what it means to be adult. Protective rights and participation rights appear to be competing rights within the CRC, which is most obvious when comparing Article 3.1 and Article 12.1. Specifically, Article 3.1 reads as follows:

> 3.1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests** of the child **shall** be a primary consideration.[106] [Emphasis added]

Article 3.1 of the CRC expresses protective rights for children. Specifically, in matters that concern decisions regarding children, the best interest of the children *shall* be a

[106] *Supra* note 3 (Article 3.1.)

primary consideration.[107] The CRC however also sets out participation rights:

> 12.1. States Parties **shall** assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[108]

Article 12.1 expresses a participatory right insofar as the child is able to communicate their preference and opinions with regard to particular circumstance. The child's expressed views do not necessarily determine the outcome. Additionally, the language in Article 12.1, "child who is capable," limits the right based on whether the decision-making body believes the child is capable of forming an opinion on the matter that can be expressed and has been extended to lawyers representing children. As will be further discussed, lawyers in Saskatchewan representing children in child welfare cases determine what advocacy model they will adopt in relation to their child client based on their assessment of the child's capacity to communicate. How a decision-making body is to weigh a child's opinion is also restricted by the language: "the views of the child being given due weight in accordance with the age and maturity of the child."[109] Although Article 12 may appear to be a participatory right in the sense that some children will be able to "weigh in" on their views of the process, ultimately the decision maker (court) decides what weight to give to that child's opinion. Therefore, the participation rights as expressed in Article 12.1 are limited insofar as an adult will decide whether allowing for

---

[107] *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 S.C.R. 76, 2004 SCC 4.

[108] *Supra* note 3 (Article 12.1.)

[109] As will be discussed at greater length, the counsel for children and youth advocacy program in Saskatchewan discretionally appoints counsel for children, with a mandate that is limited to child welfare cases. The mandate partially fulfils Article 12 of the CRC. Independent Counsel maintains the discretion to identify and choose how he/she will advocate based on counsel's independent assessment on the child's ability to communicate their wishes. For example, if the child is pre-verbal counsel will maintain an *amicus curaie* role. If the child is communicative counsel is supposed to maintain an instructional role based on the programs mandate.

that child's expression is in the child's best interest.

However, compelling children to do what they do not believe is in their best interest may also not be in their best interest.[110] In this sense, Article 3 and Article 12 actually support each other. The child's participatory right is limited by whether or not a decision maker or body believes that participation is in the best interests of the child and on what level a decision maker or body decides to weight that participation. For children involved in child welfare apprehensions, the child's participation can be used as a tool to inform the welfare rights of the child, namely the best interest of the child. The problematic feature of this relationship is that the weight given to a child's voice is subject to the scrutiny of an adult. This relationship is particularly relevant in the Indigenous child welfare context where the Indigenous child may voice an opinion that an adult lawyer deems to be contrary to the child's best interest based on the lawyer's cultural bias. The lawyer in the child-client –lawyer relationship may stigmatize the evidence based on cultural difference heard by the judge—ultimately distorting the court's role in determining what is in the child's best interest.[111] The effects of the current use of counsel in Saskatchewan who represent Indigenous children in child welfare cases will be discussed in greater detail in Chapter (6) of this thesis.

---

[110] S*upra* note 101.

[111] SEE Dale Hensley, "Role and responsibilities of counsel for the child in Alberta: A practitioner's perspective and a response to Professor Bala" (2006). Alb L. Rev. , 43, 871–903. and Nicholas Bala et al. "Controversy about the role of children's lawyers: Advocate or best interest guardian? Comparing practices in two Canadian Jurisdictions with different policies for lawyers" (2013) Family Court Rev. 5, 681–697. This analysis is based on what advocacy model is adopted by the lawyer acting for the child in a child protection hearings. If the lawyer adopts a traditional advocacy model, the child's voice regardless of the lawyer's perspective is put before the court. If a best interest model is adopted by the lawyer, the child's voice is ultimately reduced to the lawyers cultural and social perception of what is in the child best interest.

3.4 CHILDREN & INDIGENOUS RIGHTS BASED THEORY:

COMMUNAL RIGHTS AND THE CHARTER

> In Australia and Canada, the forced removal of children to residential schools for several generations corroded the traditional child-rearing values and practices of many Indigenous individuals and communities. In both countries, very high rates of child removals continue within the child welfare system, and this continues to corrode Indigenous parenting skills, the passing on of culture and identity, and the very institution of the family."[112]

As previously identified, in Saskatchewan, 80 percent of children involved in child welfare cases are Indigenous. The current overrepresentation is in stark contrast for the 1950s wherein approximately 1 percent of children in the child welfare system were Indigenous.[113] Multiple factors stemming from colonization contribute to this over-representation of Indigenous children, including systemic racism, poverty, reduced access to healthcare and education, and poor housing.[114] While these factors will not be discussed here, concepts of rights and rights theory for Indigenous children must be considered in relation to child welfare.

Attention must be drawn to the relationship of Indigenous individual and group

---

[112] Marlyn Bennett, Cindy Blackstock & Richard De La Ronde. "A literature review and annotated bibliography on aspects of Aboriginal child welfare in Canada 2nd Ed" (Ottawa: First Nations Child and Family Caring Society, 2005) online: www.fncfcs.com/docs/ AboriginalCWLitreview_2ndEd.pdf relationship based on self-determination.

[113] *Ibid*.

[114] For factors contributing to the overrepresentation of indigenous children in child apprehension cases SEE Galley, V. *Summary Review of Aboriginal Over-representation in the Child Welfare System.* Prepared for: Saskatchewan Child Welfare Review Panel, 2010at 50: "Consistent with national data patterns, Aboriginal children in Saskatchewan are dramatically over represented in the child welfare system although the reasons for this over representation are not well understood and further research is needed. If the evidence from national studies also applies to Saskatchewan, then the over representation could be explained by neglect which is fuelled by poverty, inadequate housing and substance misuse. Statistics for Saskatchewan show that poverty levels for First Nations are higher for those people residing on reserve than off reserve and that First Nations are more likely to live in inadequate housing than other Aboriginal or non-Aboriginal persons. In addition, while reliable incidence rates of substance misuse among Aboriginal and non-Aboriginal persons in Saskatchewan was not available, the Federation of Saskatchewan Indian Nations cites it as a substantial driver of child welfare neglect reports".

rights in the context of the *Charter*. Isaac discusses this tension in his account of section 25 of the *Charter* and section 35(1) of the *Constitution Act*,[115] 1982:

> Section 25 is the "shield" that will protect the rights of aboriginal people from encroachment by the *Charter*. Caution, however, must be exercised in treaty negotiations and the judicial interpretation of section 25, so as not to allow the individual rights and freedoms of aboriginal people to become overshadowed by their collective rights. [116]

Isaac further states the following in relation to reconciling individual rights and collective rights in relation to the *Charter*:

> Nothing in section 25 or elsewhere in the *Charter* states or suggests that aboriginal people are not entitled to the full benefit of the *individual* rights and freedoms set out in the *Charter*. Whatever the impact of section 25, it appears that **it must balance the protection of the collective rights of aboriginal people, as a distinct group, with the rights and freedoms held individually by aboriginal people** and other Canadians.[117] [Emphasis added]

The concern raised by Isaac with regard to collective rights having the ability to overshadow individual rights is evident in child welfare apprehension cases. While s.35 has legitimized the province entering into s.61 CFSA agreements with 17 different FNCFSA in Saskatchewan, the *Charter*-protected individual rights may conflict with

---

[115] *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c.11. Note section 35(1) reads as follows:

> 35.(1).The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[116] Thomas Isaac "Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor Yearbook of Access to Justice 431 at 432. Note section 25 reads as follows:

> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[117] Thomas Isaac *Supra* note 115 at 437.

Indigenous communal rights.[118] Therefore, the framework for recognizing individual children's rights rests within the CRC, which remains the framework for ensuring legislative compliance but not specific law. Carter states, "[s]ection 35 protections could be drawn into this kind of scenario where *Charter* rights are used to challenge federal or provincial government activity that respects or implements section 35 rights."[119] In Saskatchewan cases, where it has been argued that counsel should be appointed, the courts have not opposed applications for appointment of counsel for the children, likely out of awareness of the CRC and in particular Article 12.[120] However, this practice tends to be limited to city centers where counsel is available, and as will be further discussed, is not readily used in cases of children who reside on reserve or in remote parts of the province.[121] Additionally, this practice is Euro-Canadian centered and presumes that the appointment of counsel satisfies Article 12 of the CRC with respect to Indigenous children and now UNDRIP. The following cases provide examples of the tensions between individual rights and communal interests of Indigenous children subject to child welfare decisions.

(A) *RE R.T ET AL: INDIVIDUAL RIGHTS AS PARAMOUNT*

Three decisions—*Racine v. Woods*, *Winnipeg (Child and Family Services) v. M.A.*, [122] and *Re R.T et al.*[123]— highlight the tension between individual rights and communal

[118] SEE *Re R.T et al.* (2005), 248 D.L.R. (4h) 303 (Sask. Q.B.).
[119] Mark Carter, "An Analysis of the "No Hierarchy of Rights" Doctrine" 12 Rev. Const. Stud. 19 2006-2007 at page 46.
[120] *Supra* note 79.
[121] Notably, access to counsel in Saskatchewan in typically limited to larger city centres. Identified in interview by the Director of the CFC program was that most requests for counsel come from Regina and Saskatoon.
[122] *Winnipeg (Child and Family Services) v. M.A.*, 2002 MBQB 209 (CanLII), (2002), 165 Man. R. (2d) 279 (Q.B.) [*M.A.*].
[123] *Re R.T et al.* (2005), 248 D.L.R. (4h) 303 (Sask. Q.B.) [*Re R.T.*].

rights. In all three decisions, the courts valued permanency (the child remaining in one home, usually under a permanent order under the CFSA which promotes the possibility of adoption) over communal rights. In *Racine v. Woods*, a 1983 SCC decision, the court focused on security of the child being paramount to the child's future identity:

> However, adoption-given that the adoptive home is the right one and the trial judge has so found in this case-gives the child secure status as the child of two loving parents. While the Court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of her child. This and this alone is our task.[124]

The focus on the individual remains the standard today, regardless of the costs to the identity of the child and the health of the child's community. Sinclair notes that the decision has had lasting implications:

> *I actually agree with the premise that children deserve to have a permanent home where they are safe, loved and cared for. That is ideal. But the system as it is set up, undermines that ideal, all that decision [Racine v. Woods] did was it gave more power to the courts to take children away indiscriminately, and that what Racine v. Woods, did*.[125] *Raven Sinclair*

In the *Winnipeg (Child and Family Services) v. M.A*. decision, Justice Beard perpetuates the courts' preference for individual rights over community rights:

> This is a case about an aboriginal child who is being denied her right to a permanent, secure family because the aboriginal agency and the band's community committee have vetoed any such placement. The reason for the veto arises from a desire to stop the removal of aboriginal children from their cultural heritage. While a laudable goal, its dogmatic application is counterproductive and unfair. The tragedy in this case is that the best plan for the child, which would see her placed with a permanent family, has been rejected for historical and political reasons that have nothing to do with her case. The irony is that, in trying to make up for past wrongs to aboriginal children and past discrimination towards the aboriginal community, more wrongs are being committed and the discrimination against individual aboriginal children goes on in another form, this time perpetuated by the aboriginal agency and the band community committee. While non-aboriginal children are offered a permanent adoptive family, aboriginal

[124] *Racine v. Woods* [1983] 2 S.C.R. 173 at 189.
[125] *Supra* note 11.

> children continue to be offered the lesser option of a foster family, which lacks the permanence and security that would come with an adoption.[126]

Justice Beard's comments raise serious concerns. First, it suggests that the "best plan" for the child has been rejected on the basis of historical and political reasons. However, these comments rest in the western framework of what that particular judge deems to be in the best interest of the child. The concept of "best plan" relied upon fails to address the possible loss of identity issues that the child may face in the future. Secondly, the court concludes that discrimination against individual Aboriginal children goes on in another form, this time perpetuated by the Aboriginal Agency. Justice Beard's comments suggest that the individual child is discriminated against because they will not be adopted into a presumably white family, but will, instead, float in and out of foster homes until the age of majority. The decision fails to consider that, while it may be the case that foster families lack the permanence and stability of an adoptive family, the concerns of the First Nation that the child will potentially permanently lose their cultural identity are significant. It also fails to address the systemic issues regarding poverty, lack of social services and funding for preventive services, which would reduce the number of children apprehended and facilitate finding appropriate culturally-sensitive placements for Indigenous children.[127]

---

[126] *Supra* note 122 at para 1.

[127] SEE "Aboriginal Children in Care: Report to Canada's Premiers" (Prepared by: Aboriginal Children in Care Working Group, 2015) online: http://www.canadaspremiers.ca/phocadownload/publications/aboriginal_children_in_care_report_july2015.pdf., AND Blackstock, C., Cross, T., George, J., Brown, I, & Formsma, J. *Reconciliation in child welfare: Touchstones of hope for Indigenous children, youth, and families*. Ottawa, ON, Canada: First Nations Child & Family Caring Society of Canada / (Portland, OR: National Indian Child Welfare Association, 2006.) online: http://www.fncaringsociety.com/sites/default/files/docs/Touchstones_of_Hope.pdf AND Sinha, V. , Kozlowski, A. (2013). *The Structure of Aboriginal Child Welfare in Canada.* The International Indigenous Policy Journal, 4(2) online: http://ir.lib.uwo.ca/iipj/vol4/iss2/2

In *Re R.T et al.*, Madam Justice Ryan-Froslie faced *Charter* arguments with respect to five Indigenous children apprehended by the Saskatchewan MSS. Ultimately, the court decided that long-term and permanent placement orders were in the children's best interest; however, the court was also faced with constitutional questions it identified during the course of the litigation, resulting in the appointment of counsel for the children. In setting out the facts of the case, J. Ryan-Froslie stated the following:

> All the children in issue here are members of, or entitled to be members of, the Sturgeon Lake band. That band, and its child and family service agency, have refused to consent to the adoption of any of the children. They assert it is an "aboriginal right" to speak for their children and to be involved in their placement. They do not want the children adopted by non-aboriginals because they do not want them to lose contact with their aboriginal community or their culture. Placement of the children is dependent upon the constitutional validity of the "aboriginal right" asserted and whether the policy breaches the children's *Charter* rights to equality and to liberty and security of the person.[128]

The FNCFSA argued that community and kinship care were integral to the protection of First Nations culture and that the community shared in the responsibility of the child-rearing process. As such, s.35(1) of the *Constitution* could not be impaired by the CFSA without the explicit consent for adoption by the First Nation, as band consent was argued to be a s.35.1 protected right to self-government.[129] Counsel for the children argued that the denial of a permanent order, which would allow for adoption of some of the children, infringed the children's s.7 rights. In identifying this infringement, counsel for the children argued that adoption promoted security and stability and, thus, was in the children's best interest. Counsel for the children adopted a best interest model of advocacy, which is presently not the representational model adopted by the province.

[128] *Supra* note 123 at para 2.
[129] *Supra* note 123 at para 58.

J. Ryan-Froslie found that the children's s.7 and s.15 *Charter* rights had been infringed because of the government policy allowing FNCFSA to veto the adoption of band member and band-eligible Indigenous children, that the policy was contrary to the principles of fundamental justice and was not saved by s.35(1). She further held that the First Nation's ability to veto a permanent placement of a child was not supported in a section 35(1) claim to self-government, with very limited discussion on the evidentiary basis in coming to this conclusion. In conclusion, Madam Justice Ryan-Froslie stated the following:

> When permanent orders are made with respect to First Nations children, those children should have the same opportunity to be placed for adoption as other children. The policy prevents this. It breaches the children's s. 7 and 15 *Charter* rights and accordingly cannot stand. There shall be a declaration that the policy in issue is unconstitutional and the Department is directed to deal with First Nations children in a manner consistent with their best interests and to place them for adoption where appropriate without reference to the impugned policy.[130]

The result of the *Re R.T et al* decision is the proposition that Indigenous children's individual rights will trump Indigenous communities' interests in maintaining the culture, language, and community of Indigenous children which remains the courts' standard today in most cases involving the Ministry of Social Services and Indigenous children.

(B) HAMILTON HEALTH SCIENCES CORP. V. D.H: UNDERSTANDING COMMUNAL INTERESTS

The *Hamilton Health Sciences Corp. v. D.H.*[131] decision takes a profoundly different view of individual rights in relation to community rights. Specifically, the court prioritized parental and communal rights above the child's individual rights. The facts of the case involved an Indigenous child (J.J.) of the Six Nations of the Grand River Nation

[130] *Supra* note 123 at para 107.
[131] *Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603A [*Hamilton Health Sciences*]

whose mother had removed her from chemotherapy treatment to seek traditional medicine. The child's leukemia was considered to have a 90 percent curable rate if treated with western medicine. It was presented in evidence that the treating physicians were unaware of any chance of survival without chemotherapy treatment. At issue in the case was whether "the Six Nations' practice of traditional medicine is integral to its distinctive culture today" and whether "the practice is an aboriginal right for the purposes of subsection 35(1)."[132] In conclusion Justice Edward held the following:

> **[81]** It is this court's conclusion, therefore, that D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right. Further, such a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm. To do so would be to leave open the opportunity to perpetually erode aboriginal rights.[133]

In a further endorsement of the decision[134] Justice Edward states the following with respect to the child's best interest:

> **[4]** In this court's view, this historical recital not only explains the reason aboriginal rights exist, it also speaks to the enduring legacy of aboriginal peoples and how the core tenets of their culture and society have allowed them to flourish for centuries. One of these core tenets, and something this court is reminded of regularly in dealing with child protection cases involving the Haudenosaunee, is the ultimate respect accorded to their children. They [children] are considered gifts from the Creator. So it is then that, in considering both the facts of this case as expressed by the mother and the history as it relates to aboriginal peoples, it does no mischief to my decision to recognize that the **best interests of the child remains paramount**. [Emphasis added][135]

The above endorsement in many ways reconciles individual and communal rights by suggesting that the child's individual rights and best interests are protected in the recognition of a s.35(1) protected aboriginal right. However, absent from the decision is

---

[132] *Ibid* at para 72.
[133] *Ibid* at para 81.
[134] *Hamilton Health Sciences Corp. v. D.H.*, 2015 ONCJ 229 (note different citation due to a publication of addendum addressing the 'best interest of the child)
[135] *Ibid* at para 4.

any reference to J.J.'s wishes. Further, unlike the *Re R.T.* case, the child was unrepresented.[136]

These cases are complex and a thorough evaluation of the cases is beyond the scope of this thesis. However, these cases are illustrative of how using an individual rights framework or communal rights framework can be reasoned by a decision maker to support an argument for the best interest of the child. The rights framework used potentially results in different outcomes. The effect of different frameworks on the courts' decisions is critical to child welfare cases in Saskatchewan because a communal rights framework may better support the Indigenous children's best interest in child welfare cases by supporting not only the child's communal rights but also their individual rights. Additionally, with respect to the use of lawyers representing children, the lawyers' training and concept of rights will influence the outcome for the child. If the lawyer advocates for a child from a primarily Euro-Canadian framework, loss of culture, community and identity will be perpetuated in the child welfare system. As such, the lawyer's involvement may reduce the Indigenous child's voice in the process and while initially seen as fulfilling Canada's obligations under the CRC in fact reduces the Indigenous child's voice. Therefore, CRC implementation goes beyond simply assigning a lawyer to a child in the child welfare context, but rather assigning a lawyer or person (elder, community member or group of elders) that can advocate without being limited by cultural biases.

[136] Although the 5 children in the *Re R.T.* decision were represented by counsel, counsel for those children advocated on a best interest approach rather than an instructional advocacy approach. While some of the *R.T.* children were very young, the older children were of an age where they could have communicated their wishes with the court.

CHAPTER 4: ARTICLE 12 IN THE CANADIAN AND INTERNATIONAL CONTEXT

This chapter identifies how Article 12 of the CRC has been implemented in Canada and in other jurisdictions and what role advocates have assumed in child welfare cases. As well, this chapter examines Canada's commitment to implementing the CRC in a meaningful way in child welfare cases and describes the current landscape of implementation in the Canadian context. The CRC as it relates to Indigenous children could be seen as another westernized document that lacks Indigenous voice; however, while the CRC is often interpreted based on the individual child's rights, it does not expressly identify the individual child's rights as superseding the child's communal interests. Additionally in concert with UNDRIP the CRC arguably has the ability to promote Indigenous children's access to justice. This chapter identifies what advocacy models support Indigenous children's access to justice.

Canada faces many challenges in the enforcement of its international commitments to the CRC. Despite having ratified the CRC, the Convention has not been explicitly legislated federally, provincially or territorially. The 2007 Final Report of the Senate Committee (2007 Final Report) criticized Canada's legislative inaction:

> ..[D]espite federal government assurances that it has reviewed existing laws and that Canada is in compliance with a Convention, if no legislation directly incorporates the terms of the Convention, what recourse is available to a child, adult, or institution that does not believe that Canada's laws are in compliance with its international human rights commitments? At the present time, no body or government other than the relevant UN human rights treaty body has a mandate to respond to such concerns. [137]

The 2007 Final Report identifies that only a UN human rights treaty body has the explicit mandate to respond to Canada's obligations in relation to the CRC. Without express

[137] *Supra* note 75 at13.

legislation that incorporates the CRC's articles, there is concern as to how the CRC can apply to domestic law. In Canada, the CRC is periodically referenced by the courts as a means of interpreting or reinforcing Canada's legislative framework, but never in the context of being an authority of explicit law.[138] Lawyers advocating for children in Saskatchewan identify that judges in city centers typically do not question counsel's authority to appear on behalf of a child in child welfare cases due to awareness of the CRC. However, the involvement of counsel is limited based on the judge's preference.[139]

The CRC Committee on the Rights for the Child is a UN body responsible for ensuring ratifying nations implement the Articles of the CRC.[140] Ratified countries are required to submit reports every five years on how CRC rights are being implemented.[141] The UN Committee on the Rights of the Child, Concluding Observations 2012 Report describes what measures have been undertaken in Canada (federally, provincially and territorially) to enhance the implementation of the CRC. It is not entirely clear from the report exactly what coordination has been taken by the federal, provincial and territorial governments; however, it is clear that no national effort has been taken to ensure the CRC's provisions are directly implemented into current and future statutes. A mechanism for ensuring that the implementation of international treaties occurs effectively is essential in the Canadian context to reduce the jurisdictional conflict that Canada often faces:

---

[138] See *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para 9 and 10 [*Foundations*]. Also see, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 75 [*Baker*].
[139] This was emphasized by roster counsel during Counsel for Children and Youth training that occurred on October 15, 2016 at Wanuskewin Heritage site, Saskatoon Saskatchewan.
[140] *Supra* note 3.
[141] United Nations Human Rights office of the High Commissioner, Committee on the Rights of the Child "*Monitoring Children's Rights*" online: http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx

> …as soon as international treaty negotiations begin, measures should be initiated at home to ensure national awareness of the issues at stake and the obligations that may have to be undertaken **by all levels of government in Canada**. Information about the negotiations should be available on relevant government websites, and consultations with other jurisdictions, Parliament **and other stakeholders should begin as soon as is practicable**.[142] [Emphasis added]

First Nations and Métis people are central stakeholders and, thus, need to be included in the negotiations. One recommendation of the 2007 Final Report concerning the lack of jurisdictional coordination suggests "Parliament and the provinces and territories should certainly be informed as soon as human rights treaty negotiations begin in order to get consultations under way."[143] Further, the 2007 Final Report recommends "[t]hat responsibility for the Continuing Committee of Officials on Human Rights be transferred immediately from the Department of Canadian Heritage to the Department of Justice"[144]. The current framework for negotiations limits any potential legal oversight on the implementation of treaty obligations. Transferring responsibility to the Department of Justice would signal a legal element to the CRC. Without legal oversight, a piecemeal approach to satisfying CRC obligations continues; one example being the Office of the Children's Advocate in Saskatchewan and the Counsel for Children and Youth program in Saskatchewan (CFC). Both offices purportedly meet some of Saskatchewan's CRC commitments, but as will be discussed at great length in Chapter 5, availability of services is *ad hoc* in many instances and arguably are less available for Indigenous children, families and communities.

Bob Pringle, Saskatchewan's Children's Advocate, explains that the disconnect between different organizations means that some agencies are unable to access vital

[142] *Supra* note 75 at 227
[143] *Supra* note 75.
[144] *Supra* note 75 at 227.

information, such as the reports filed to the CRC Committee for the Rights of the Child: "[t]he provinces and territories all send their assessments to the [federal government] and I cannot get a commitment as to why we [Children's Advocate] cannot see those [reports]…. And that's what goes on to the UN about the state of Canada's children."[145]. The result is a lack of transparency as to how Canada is actually measuring up internationally with its commitment to implementing the CRC and impact on Indigenous children. Some countries, like Norway, have gone so far as to expressly indicate that the articles set out in the CRC "shall take precedence over any other legislative provisions that conflict with them,"[146] ultimately mandating that the CRC is applicable.

The criticism against directly implementing the CRC into federal legislation is that the current legislative infrastructure may not enable Canada to comply with the CRC provisions and the provisions themselves could be seen as ambiguous or open to different interpretation, Additionally, the CRC's provisions are broad-based principles that relate to the protection of children's rights, and as such, direct implementation may potentially cause confusion regarding the meaning of certain provisions.[147] However, without implementation the overarching concern remains that Canada's international commitments are not enforceable in Canadian law.[148] Without expressly implementing the CRC, courts are left to argue that the rights set out in the CRC are unwritten constitutional principles[149] that can be assessed to support a judicial finding but not as

[145] Bob Pringle. Personal interview. Saskatchewan Children's Advocate. July 27, 2016.
[146] David Thor Bjorgvinsson, *The Intersection Between International and Domestic Law*, (2015, Edward Elgar Publishing Ltd., Cheltenham UK) at 143.
[147] *Supra* note 75 at 231
[148] *Baker, supra* note 133.
[149] Chief Justice Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (Lord Cooke Lecture, delivered at the Lord Cooke lecture, Wellington, New Zealand, 1 December 2005), [unpublished].

explicit law.[150] Limiting the CRC to an unwritten constitutional principle does not ensure consistent application. Simply hoping that Canadian federal, provincial and territorial legislation complies with the CRC is ineffective for children, families and communities.

Risk lies in the fact that a court faced with a children's rights issue that does not fall squarely into Canada's written law could be forced to assess that issue without explicit authority. Thus, children may be subject to legal uncertainty and varying outcomes on similar issues. This is precisely what is occurring with respect to the Counsel for Children and Youth Office: most FNCFSA do not access the services of the office, which means that the children in their authority have different legal processes and outcomes than children in the provincial system. Request for legal child counsel typically comes form front-line Ministry or FNCFSA workers. It has been suggested that FNCFSA workers are fearful of requesting counsel as Saskatchewan's Counsel for Children and Youth program is perceived as been part of the provincial government and not independent from the provincial government.[151] As Betty Ann Pottruff, Director of the Counsel for Children and Youth program (CLC), describes the uneven access to the CLC program, stating, "[t]he majority of requests for counsel are coming from social services but I am getting some from First Nations Agencies from across the province."[152]

---

[150] *Supra* note 149 In this paper the Chief Justice, describes some of the concerns and criticisms regarding unwritten constitutional principles. In describing how constitutional principles can be identified she states the following: "The answer is that they can be identified from a nation's past custom and usage; from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments. Unwritten principles are not the arbitrary or subjective view of this judge or that. Rather, they are ascertained by a rigorous process of legal reasoning. Where, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognize it. This is not law-making in the legislative sense, but legitimate judicial work" (at page 20).

[151] *Supra* note 8.

[152] Betty Ann Pottruff, Telephone Interview. Director Counsel for Children and Youth, August 2016.

Ultimately the risk for varying outcomes is in direct violation of the CRC. As the Canadian Coalition for the Rights of Children (CCRC) notes, conflicts between the federal, provincial and territorial governments regarding jurisdiction should subside to ensure that legislation does expressly protect children's rights:

> Laws that protect and fulfill children's rights are essential for effective implementation. There is, however, **no comprehensive law or policy for children. Canada has not taken steps to make the Convention or its core principles part of Canadian law. Furthermore, Canada has not undertaken a review of its legislation for compliance with the Convention since the ratification process two decades ago**. Children are invisible in Canada's constitution, including the Charter of Rights and Freedoms. In some cases, courts have considered the Convention in their interpretation of Canadian laws, but in other cases Canadian courts have made decisions inconsistent with the Convention…**Sometimes government officials argue that incorporating the Convention into Canadian law is not necessary because Canada already complies through existing policies. On other occasions, incorporation is rejected because it would require too many changes in existing laws and policies. These inconsistent responses to the suggestion of incorporation illustrate the need for greater clarity in the relationship between the Convention and Canadian law.**[153] [Emphasis added].

The CCRC argues that failing to incorporate the articles of the CRC into Canadian law and failing to review Canada's legislation for the purpose of confirming compliance at the provincial, federal and territorial level is a direct breach of Canada's obligation to the implementation of the CRC. The CCRC further argues that, because the CRC was ratified following the *Charter of Rights and Freedoms*,[154] the *Charter* alone does not adequately protect children rights, as children's rights will differ in some instances from adults'.[155] The CCRC notes that the CRC's lack of legal status contributes to Canada's "inequitable treatment of children across the country, gaps in implementation, and severely limited means for children to seek redress when their rights are not

[153] Canadian Coalition for the Rights of Children. Right in Principle, Right in Practice: Implementation of the CRC.(2011 at 11.
[154] *Supra* note 71.
[155] *Supra* note 153 at 11.

respected."[156]

> The CRC's lack of implementation is symptomatic of federalism:
>
> > It is not the practice in any jurisdiction in Canada for one single piece of legislation to be enacted incorporating a particular international human rights convention into domestic law (except, in some cases, regarding treaties dealing with specific human rights issues, such as the 1949 Geneva Conventions for the protection of war victims). Rather, many laws and policies, adopted by federal, provincial and territorial governments, assist in the implementation of Canada's international human rights obligations.[157]

Although there are issues with the incorporation of the CRC at a federal level and concern that matters concerning children generally fall under provincial jurisdiction, children's advocate groups argue that both legal legitimacy of the CRC and a National Children's Advocate or Commissioner is needed.[158] Other countries with federal systems have given the CRC teeth through national incorporation. Other countries' explicit incorporation of the CRC has signaled a commitment to children's rights.[159] The reliance on federalism is insufficient to support Canada's failure to directly incorporate the CRC. Although Canada is regularly required to report to the United Nations regarding its compliance and implementation of the CRC, no international court is available to

---

[156] *Ibid*.
[157] United Nations, International Human Rights Instruments, Core document forming part of the reports of States Parties: Canada,HRI/CORE/1/Add.91, Office of the United Nations High Commissioner for Human Rights, Geneva, 12 January 1998, para. 138. Child and Youth Advocates, Submission to the Senate
Standing Committee on Human Rights, Ottawa, 21 February 2005, p. 12,
<parl.gc.ca/38/1/parlbus/ commbus/senate/Com-e/huma-e/06mn-e.htm?>.
[158] Both individual advocates and the CCRC have outwardly expressed a need for both explicit CRC legislative incorporation and a National Children's Advocate. ALSO, FNCFSA in Saskatchewan articulated in interviews that a national children's advocate meets the federal governments responsibility with First Nations and Canada's commitment to UNDRIP. It is however notable that UNDRIP is not a treaty and therefore faces issues with respect to its legal status and its implementation into Canadian "law".
[159] Norway, Argentina and South Africa have all incorporated the CRC into national domestic law. In the aforementioned counties where the CRC conflicts with domestic law, domestic law takes precedence.

effectively enforce those obligations.[160] Additionally, and as was identified by several interviewees, the statistics in Saskatchewan may not adequately reflect the ongoing child welfare crisis. For instance, Pringle stated that, although the Minister of Social Services noted that Saskatchewan has "the lowest level of child poverty in Canada," the statistics hide a substantial discrepancy: "[w]ell, we do if you are talking about non-Aboriginal children, but we have the highest discrepancy between Aboriginal and non-Aboriginal children in the country. Are we satisfied with that?"[161] As was identified by several interviewees, the MSS is increasingly using PSI (Persons of Sufficient Interest) orders[162] in child welfare cases: "PSI is a better look on your statistics because those kids are no longer in care."[163] If the MSS can find a PSI and custody is awarded to the PSI, the case

---

[160] SEE David Archard, *Children: Rights and Childhood* (New York: Routledge, 1993) at 58 for discussion on the requirement of an international court to effectively enforce treaties ratified by nations.

[161] *Supra* note 145.

[162] *Child and Family Services Act*, RSO 1990, c C.11. [*CFSA*]. Section 23:

> Persons having sufficient interest
> 23(1) Subject to subsection (2), where an application for a protection hearing has been made, the court may, on an oral or written request, by order designate as a person having a sufficient interest in a child:
> (a) a person who, in the opinion of the court, is a member of the child's extended family;
> (b) where the child is a status Indian:
> (i) whose name is included in a Band List; or
> (ii) who is entitled to have his or her name included in a Band List; the chief of the band in question or the chief's designate; or
> (c) any other person who is not a parent of the child but who, in the opinion of the court, has a close connection with the child.
> (2) Where a request pursuant to subsection (1) is made, the court:
> (a) may direct the person making the request to notify each parent and the department of the request within any time and in any manner that the court considers appropriate; and
> (b) shall consider the views, if any, of each parent and the department before making an order pursuant to subsection (1).
> (3) Where the court makes an order pursuant to subsection (1), the court shall give directions respecting the service of notices on the person designated as a person having a sufficient interest in a child.
> (4) A person designated pursuant to subsection (1) as a person having a sufficient interest in a child is a party to a protection hearing respecting that child.
> 1989-90 cC-7.2 s23

[163] Glenda Cooney. Personal Interview. Past Deputy Children's Advocate. Independent

no longer falls with in the statistics of the child being identified as being in care, improving the international perception and national perception in Saskatchewan.

4.1 Canadian Case Law and the Legitimacy of the CRC

The SCC has not been consistent in its interpretation of the CRC's applicability. In *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*,[164] opposing opinions can be identified with respect to the legitimacy of the CRC. Conflicting opinions on the role of the CRC in SCC decisions is not unique to the *Winnipeg Child and Family Services* case. Without a consistent legislative framework and provincial, territorial and federal legislation, a serious risk exists that children involved in child protection cases are not treated consistently. The differing opinions of the CRC applicability at the SCC level indicates the need for uniformity with respect to the provisions of the CRC. In *Canada Immigration v. Baker*, the SCC held that, although the CRC is not explicitly incorporated into Canadian law, the best interest of the child should be **a** primary consideration in review of the circumstances:

> I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
>
> …
>
> Nevertheless, **the values reflected in international human rights law may help inform the contextual approach** to statutory interpretation and judicial review.[165]
>
> The values and principles of the Convention recognize the **importance of being attentive to the rights and best interests of children** when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing

---

Consultant for FNCFSA. July 2016.

[164] *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)* 2000 SCC 48, 2000 CSC 48, 2000 CarswellMan 469 [*Winnipeg Child and Family Services*].

[165] *Baker*, *supra* note 138.

> considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.[166]

In relation to Indigenous children, values reflected in UNDRIP, namely the importance of maintaining communal interests are also significant in ensuring the child's right to 'voice'. Courts interpreting ambiguity in the law discretionally apply the CRC when they feel it is beneficial and with no clear consistency. Therefore, it is not mandated that a court faced with a children's rights issue rely on the CRC at all or UNDRIP to the extent of Indigenous children. Legitimizing the CRC and UNDRIP in the Canadian context therefore requires a two-fold exercise: codifying the CRC and UNDRIP principles into domestic law and then addressing issues pertaining to the relationship of Indigenous rights within the framework of the CRC and UNDRIP.

4.2 Representational Models: International Perspectives

In civil law jurisdictions, the CRC has been directly legislated for and forms a part of the country's legal system and legislative framework.[167] In common law jurisdictions, direct incorporation of the CRC is rare.[168] Many common law jurisdictions, like Canada, use their international obligations, including the ratification of the CRC, to interpret current laws but not as explicit law. In a 1997 decision of the House of Lords, Lord Browne-Wilkinson stated the following with regard to the CRC's legitimacy:

---

[166] *Supra* note 165.
[167] UNICEF Innocenti Research Centre, *Law Reform and the Implementation on the Convention on the Rights of the Child,*(2007) online: http://www.unicefirc.org/publications/pdf/law_reform_crc_imp.pdf. at 5-9.
[168] *Supra* note 141.

> [the] Convention has not been incorporated into English law. But it is legitimate…to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country.[169]

Despite common law jurisdictions insistence that the CRC's articles will inform current and future legislation, the participatory rights articulated in Article 12 are not effectively recognized worldwide.[170] In 2005, Yale Law School conducted a survey (Yale Study) of 250 countries and the mechanism by which children are heard in the context of child welfare hearings in those countries.[171] The Yale Study concluded the following:

> For a substantial number of jurisdictions, representing **73.3% of children under the age of fifteen worldwide, research either revealed the country to be out of compliance with Article 12** or research findings were inconclusive.[172] [Emphasis added]

> Article 12 of the CRC is the most controversial provision, as it explicitly provides children participatory rights in the decision-making processes.[173] In the United States, for instance, the persistent controversy that children can possess independent rights from their parents has stifled the CRC's ratification.[174] Guggenheim has offered an alternative position, suggesting that it is the provision rights that have stifled ratification, because the United States has counsel more readily available for children in child welfare cases.[175]

Interpreting Article 12 is not easy. Open for interpretation are ambiguities in Article 12,

---

[169] *R v. [1997]* UKHL 25.
[170] Jean Koh Peters, "How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study" (2006). Faculty Scholarship Series Paper 2146 online: http://digitalcommons.law.yale.edu/fss_papers/2146 .
[171] *Ibid.*
[172] *Ibid* at 967.
[173] Laura Lundy, "'Voice' is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33:6 British Educational Research Journal 927 at 928.
[174] Paula S. Fass & Mary Ann Mason, eds., *Introduction to Childhood in America* (New York: NYU Press, 2000) at 609-10 wherein the editors state that the "[t]he idea of legal rights for children apart from those of their parents is relatively new and still very controversial for Americans."
[175] *Supra* note 87.

which include at what age is a child "capable of forming his or her own views,"[176] what weight to give children's views, the meaning of being "heard,"[177] the meaning of "representative"[178] and what is an "appropriate body."[179] Three possible vehicles for representation mentioned in Article 12 effectuate the child's right to be heard: (1) directly, (2) through the use of a representative, or (3) through the appropriate body.[180] However, the CRC is "silent on the extent to which the child's views must be advocated for, as opposed to merely expressed. In addition, the CRC does not necessarily require that the child be a party to proceedings or that the child's representatives be a lawyer."[181] Although child welfare is the subject of this thesis, Article 12 does not limit the children's voice to child protection proceedings. The focus of Article 12 is on the child's expressed views and not necessarily on the child's best interest, although there may be an intersection between what is in the child's best interest and their expressed views.[182] Interestingly, "[t]he CRC does not require that a child be mature enough to express a considered view in order to trigger this section."[183]

However, as the Yale study revealed, Article 12 is unevenly applied in the ratified countries:

> Roughly 35% of the jurisdictions surveyed (in which 44.2% of the world's children under age fifteen reside) **do not have provisions for children to be heard in child protective proceedings**, and slightly over 59% of the countries (in

[176] *Supra* note 170.
[177] *Ibid*.
[178] *Ibid*.
[179] *Ibid*.
[180] *Supra* note 170 at 969.
[181] *Ibid.*
[182] SEE David Archard, *Children: Rights and Childhood* (New York: Routledge, 1993). Note that Archard suggests that as the child approaches majority the intersection of best interest and expressed views will move closer together. Therefore, the result of opposing a mature child on their expressed interest will not generally act in the child best interest.
[183] *Supra* note 170 at 974.

> which 73.3% of the worldwide population of children live) fell into the three categories of child protective proceedings with no provisions for children to be heard, no evidence of child protective proceedings, or little or no information available.[184] [Emphasis added]

Despite being the most universally ratified international treaty, approximately three quarters of children worldwide reside in a jurisdiction where no mechanisms are available for a child to be heard.[185] Only approximately 15 percent of the world's children live in jurisdictions that provide for representatives for children in child welfare proceedings. [186] However, "[i]n the United States, while the laws provide for representatives for all children, many of those representatives do not focus on expressing the child's wishes to the court."[187] In Saskatchewan, Indigenous children in child welfare cases are the perfect example of inconsistent and inadequate satisfaction of Article 12.

Once a child is apprehended in Saskatchewan, he or she is not automatically entitled to counsel or a representative. Instead, there are two models of representation: *mandatory representation* jurisdictions and *discretionary representation* jurisdictions.[188] Complicating matters further are the plural systems of government (Canada's Federal-Provincial-Territorial system) because whether a child receives a representative and can make independent submissions is controlled by the particular state, territory, or

---

[184] *Supra* note 170 at 992.
[185] *Ibid* at 1030.
[186] *Ibid*.
[187] *Ibid*.
[188] *Supra* note 170. Mandatory jurisdictions mandate that the child have a representative in the child welfare context, while discretionary jurisdictions (which represent the majority of jurisdictions world-wide) have some form of child protection legislation that includes the potential use of a representative. Appointment of counsel typically is by way of request by a party (Ministry, parent, person of interest) or by the court.

province.[189] The lack of uniformity has been a contentious issue for Indigenous peoples in Canada. Indigenous children residing on reserve in Canada not only receive reduced funding for child and family services through the federal government, but also have inadequate access to resources that are mandated by the CRC. Reduced access to a culturally appropriate representative in the child welfare context effectively marginalizes an already overly-marginalized group of children.[190]

(A) MANDATORY JURISDICTIONS

Norway has the most sophisticated model of child advocacy in the world. In response to the CRC, Norway implemented national legislation wherein children over the age of 7 in child protection hearings systematically have a right to be heard in the proceeding.[191] Some children who are under the age of 7 are able to voice their opinions if granted special permission, which partially depends on the maturity of the child.[192] All children in Norway over the age of 15 are entitled to free legal counsel, and children under 15 are appointed a spokesperson that will represent the child's interests at a child protection hearing.[193] The Norwegian model does not specify the use of a lawyer when appointing a spokesperson. However, by mandating that the Articles set out in the CRC

[189] Canada, Australia and the USA have federal systems of government, wherein the particular province, territory or state has jurisdiction over child welfare. Therefore each province, state or territory has its own unique legislation respecting children in child welfare proceedings.
[190] Jordan's Principle aims to prevent Indigenous children from being denied prompt access to services because of jurisdictional disputes between different levels of government. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of their Aboriginal status. Also, see *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada* (representing the Minister of Indian Affairs and Northern Development), 2011 CHRT 4 (CanLII), online: http://canlii.ca/t/fz6rz. *In depth discussion of funding discrepancies in Canada will be discussed in Part 2 of this research paper.
[191] *Supra* note 170 at 987 and 1058.
[192] *Ibid*.
[193] *Ibid*.

be directly incorporated into its legislative framework, Norway has taken at face value the urgency of direct implementation.

While the Norwegian model is extensive, it may have its limits if applied directly in Saskatchewan. For example it mandates specific ages with respect to the representational model the lawyer (or representative) will use based on age. As such the representative is unable to use his or her discretion on whether they will take an instructional or amicus curiae role when advocating for the child if the child is over the age of 15.[194] An additional limitation is that the Norwegian model allows for only one advocate for the child. In relation to Indigenous children in Canada, another, equally valid, CRC implementation could be that the child be represented by a lawyer, community member, or a group of community members. Ultimately, adequate CRC implementations for Indigenous communities in Saskatchewan would allow for the Indigenous community to develop its own concept of satisfying the child's rights to voice. This would further support Canada's obligations with respect to UNDRIP.

Western-European countries, such as Belgium, Germany, France, Norway, and Sweden, have generally taken a holistic approach to child welfare that focuses on preventative care.[195] Germany's child welfare system does not focus on "risk" to the

[194] Note that the instructional model and amicus model will be discussed in greater detail in chapter 5.

[195] K. Baistow and G. Wilford, "Helping Parents, Protecting Children: Ideas from Germany. (2000) Children and Society 14 343. and Saskatchewan Child Welfare Review Panel, *For the Good of our Children and Youth; A New Vision, A New Direction"* online: http://saskchildwelfarereview.ca/cwr-panel-report.pdf at 24. It is notable that Pringle identified Indigenous peoples as being reluctant to access the child welfare supports because their perception and experience has been that if they access services the MSS will take their children away:

> "*A common theme is that indigenous people do not want to seek help because they are afraid that someone will take away their children away because that has been their experience*." SEE Bob Pringle. *Supra* note 145.

child as a threshold for state intervention, but rather focuses on a "perceived need" which includes, but is not limited to, a "risk" analysis.[196] Germany's prevention-oriented model on child welfare appears to lead to more satisfactory relationships between families and the state.[197] Parents do not wait for a crisis situation to arise (loss of housing, instability, addictions and financial hardship) before requesting assistance from the state with respect to their child-rearing responsibilities,[198] possibly because this preventative approach reduces a sense of failure by the parent and does not stigmatize the parent for seeking help. As a result, parents and children access child welfare supports. This model has been criticized for not focusing enough on children's individual rights or conflicts that may arise between parents and children.[199] In isolation, preventative programming may be interpreted as reducing children's rights and prioritizing parental needs. However, in the Western-European context, preventative programming is not used in isolation; rather it is partnered with the child's right to be heard.[200]

France similarly takes a voluntary approach to access to social services. Multidisciplinary teams are designed to provide preventative tools to families in need of support.[201] Both Germany and France impose a positive duty on the state to intervene where a child is at risk of harm or neglect; however, the preventative measures in place for families in need of support are intended to reduce the numbers of families subject to crisis requiring state intervention. The preventative model is in stark contrast with the Canadian model of requiring a threshold for intervention that is primarily based on

[196] Baistow, *Supra* note 195.
[197] *Ibid* at 351.
[198] *Ibid*.
[199] L Salgo "Child protection in Germany", in Freeman, M and Veerman, P eds (1992) The Ideologies of Children's Rights, Netherlands, Kluwer Academic.
[200] *Supra* note 195.
[201] *Ibid* at 25.

legislated mandate.[202] Pringle describes the threshold system in practice as problematic for Indigenous peoples: *"The threshold system was forced upon First Nations and fails to address Indigenous needs."*[203] Placing a positive obligation on a family to access child and family services does not diminish children's rights, but rather supports a relational right between parent and child to access services without prioritizing parental rights over children's rights or vice versa. Arguably, the Canadian threshold model discourages parents from seeking state assistance out of fear of harsh state consequences or the apprehension of their children. As one FNCFSA director indicated in describing the impact of the threshold system on Indigenous families,

> *Part of it is once you take a child out of their home and away from their parents it disengages them [the parents] so much as parents it is like something happens to them. When they lose their parental authority it is really hard to put back. It is like you have stripped them of something inherent to them…when you look from a parental view they might not go [to court] because they feel there is no point, "I can't go up against this child welfare regime, I'm going to lose so why even go, I've lost already". It is a sense of hopelessness.*[204] *Confidential*

By contrast, Western-European countries' preventative approach to child welfare helps to reduce the need for child apprehensions.[205] In addition, if a child is apprehended and subject to court process, the 'voice' of the child becomes mandated for.

How one perceives the role of the state in relation to child and parental rights determines the perception of this preventative model. Supporting families by making available support services could potentially promote children's rights if the child's voice is included in that process. Further, the infrastructure available to children who have been apprehended is supported by a system wherein apprehension is only considered in the

[202] *Supra* note 195.
[203] *Supra* note 145.
[204] *Supra* note 54.
[205] *Supra* note 194.

most extreme cases of neglect or abuse. This promotes not only the children's right to be heard but also the children's right in relation to parental rights and their communities' rights. For Indigenous children in Saskatchewan, the model is described as "*if you have contact you apprehend and ask questions later….the difference between having a preventative approach and interventative approach is that intervention is easier, there is not as much work. You don't have to work as hard at your job to deal with the cases*."[206] Informant interviews indicated that an Indigenous model of care would place additional focus on a preventative model of care, which would be accessible to Indigenous parents because it would limit the real fear that Indigenous families have of unnecessary state removal in situations where families simply need support services.

(B) DISCRETIONARY JURISDICTIONS

In 2014, Tasmania published a report reviewing the adequacy of advocacy services available to its children and youth.[207] The report suggests that a lack of centrality to services causes vagueness for families and professionals on how to access services.[208] In Queensland, Australia, under the *Child Protection Act,*[209] several mechanisms are in place to promote children's voice in child protection hearings:

> [C]hildren **can** be represented by a 'separate representative' in child protection matters. **A separate representative is a lawyer who must act in the child's best interests, regardless of any instructions from the child**, but also must, as far as possible, present the child's views and wishes to the court or tribunal. A child who is sufficiently mature may also be represented by a 'direct representative'. A direct representative acts under instructions from the child, and supports the child to express his or her views and give evidence.[210]

---

[206] *Supra* note 54.
[207] Maria Harris, *Advocacy for Children in Tasmania Committee (ACTC) Report and Recommendations*, (2013) The University of Western Australia online: http://www.aasw.asn.au/document/item/6571.
[208] *Ibid.*
[209] *Child Protection Act* 1999 (Qld) rr 20-1.
[210] Tamara Walsh & Heather Douglas "Lawyers, advocacy, and child protection" (2011) 35

The Queensland legislation is discretionary in that children 'can' be represented as opposed to stating that children 'shall' or 'must' be represented. One criticism of the Australian system is the lack of access to counsel. For instance, Walsh and Douglas suggested that the lack of access to counsel is not necessarily a result of a lack of resources available to children and families, but rather that children and parents of disadvantaged socio-economic backgrounds are unaware of free legal services available to them.[211] Similarly, Saskatchewan is faced with the issue of parents entering into what is termed a Section 9 Agreement under the CFSA[212] without the advisement of counsel. These agreements are intended to be voluntary wherein a parent voluntarily permits the MSS to place the child in Ministry care pending further determination. The 'voluntary' aspect of the agreement is highly contentions as parents approached to enter into these agreements by the MSS without the presence of counsel or a representative may be unduly pressured and lack a full understating of the Agreement's implications. Without counsel, parents in both the Australian and Canadian context may "unknowingly compromise their chances of preventing the removal of their children by making admissions or consenting to interviews without legal advice or assistance"[213].

Many jurisdictions have taken the position that individual liberty rights protected in state constitutions extend to the protection of children in relation to Article 12.[214] The difficulty with this proposition is that assuming children's individual rights are protected under state constitutions fails to recognize that children have significant barriers in

---

Melbourne UL 621 at 637.
[211] *Ibid* 646.
[212] *Child and Family Services Act*, RSO 1990, c C.11. [*CFSA*].
[213] *Supra* note 210 at 646.
[214] Aisling Parkes, *Children and international human rights law : the right of the child to be heard* (Routledge, 2013) at 49.

accessing legal systems. This is exacerbated in the context of child welfare, as children subject to child welfare proceedings are frequently the most disadvantaged children in a particular state.[215] The presumption by state bodies that constitutional protections afforded to adults will extend on an equal playing field to children ignores the vulnerabilities of children and assumes that children's protective rights are more legitimate than their participatory rights and right to the appointment of counsel.[216] As such, state parties have "been quite slow to expressly list the rights of the child, including the right to be heard at a constitutional level, despite the fact that it is something which is encouraged."[217] The Australian National Children's Commissioner commented on the status of the CRC as it relates to children's access to justice, stating that, "twenty years after we ratified the Convention on the Rights of the Child, vulnerable groups of children and young people in this country continue to lack adequate human rights protections."[218] However, the report on Tasmania shows that the CRC does not place children's rights in diametric opposition to parents' rights.[219] The study indicates that children's rights are properly placed with in the framework of parental rights and responsibilities, relying on statements in the CRC that recognize the family environment as being the best place for children to be nurtured and to grow.[220]

An additional aspect to the legislative frameworks in some jurisdictions is the use

---

[215] Bennett, Marlyn & Cindy Blackstock & Richard De La Ronde. "A literature review and annotated bibliography on aspects of Aboriginal child welfare in Canada 2nd Ed" (Ottawa: First Nations Child and Family Caring Society, 2005) online: www.fncfcs.com/docs/ AboriginalCWLitreview_2ndEd.pdf relationship based on self-determination.

[216] Daiva Stasiulus, "The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement." (2002) 6 Citizenship Studies 507.

[217] *Supra* note 214.

[218] National Children's Commissioner Website, (2014) Online:http://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights.

[219] *Supra* note 207 at page 14.

[220] *Supra* note 3 (CRC).

of Independent Human Rights Institutes for Children (IHRIC). The Tasmania report questions the effectiveness of IHRIC,[221] stating that the effectiveness of an IHRIC relies upon its independence, financial autonomy, accountability mechanisms, and child participation. IHRICs alone cannot produce favourable outcomes for children that ensure their rights are protected. Therefore, Tasmania has suggested that IHRICs and the National Commissioner must work alongside other forms of government to improve the status of children's rights.[222] Unlike the Canadian framework where independent children commissioners exist only at a provincial level, Australia and Tasmania use a national children's commissioner. It has been suggested that "[i]n the approximately 40 countries that have appointed children's commissioners or ombudspersons, such appointees have been able to act as links between children's grassroots activism and more formal political representation such as Cabinet Ministers for Children and parliamentary committees."[223] However, multi-agency oversight into child welfare processes and governance is strikingly problematic because it involves a piecemeal framework wherein independent agencies attempt to fulfill CRC obligations. Any piecemeal framework runs the risk of lack of coordination for ensuring children's 'voice,' such as with the discretionary approach to access representation for children.

One way to help ensure that children's voices are heard may be the use of *guardians ad litem* (GAL) in the child welfare context: "'[C]hild guardians' often work in tandem with lawyers to provide holistic representation of children. In some circumstances, the guardian will instruct the lawyer; in other situations, the guardian will

[221] *Supra* note 207
[222] *Ibid*.
[223] *Ibid* at 526.

assist the child to put forward their views and wishes to the court." [224] Several countries, such as Germany, Ireland, England, and the United States, use GALs, but no standard exists in regards to their role or training. In Germany, the inclusion of the GAL was intended to guarantee "that the independent interests of the child are incorporated into the procedure so that the child does not become a mere object of the proceeding."[225] The Irish system requires an appointment of a GAL, but does not specify the GAL's role. The English system requires the GAL to operate independently and to put forward the child's best interest.[226] In the United States' system, "many child guardians are lawyers with specialist training in child welfare." [227]

Australia does use GALs—"generally laypeople, often a family member or social worker, who act as a support person during court proceedings"[228]—but they remain an infrequently accessed resource. Because the courts exercise discretion in appointing representatives for children, and the representative's role is to present the best interests of the child and not necessarily the child's expressed interest,[229] GALs may help to protect the child's expressed interest. A benefit to the increased use of a GAL can be specifically related to Indigenous children:

> [I]n all cases involving indigenous children, an indigenous guardian ad litem should be appointed to the child even if the child has legal representation, because the very visible sight of a non-Indigenous independent legal representative performing such a pivotal role can only serve to reinforce the negative perceptions

[224] *Supra* note 210 at 648.
[225] M. Stötzel & J. M Fegert, "The representation of the legal interests of children and adolescents in Germany: A study of the children's guardian from a child's perspective" (2006) Int'l JL Pol'y & Fam 20, 201–224 at 202.
[226] G Shannon, "Giving a voice to the child-the Irish experience. (2000) Int'l JL Pol'y& Fam 14, 131–147.
[227] *Supra* note 210 at 648.
[228] *Ibid*.
[229] *Supra* note 210 at 648.

Indigenous people have of the Children's Court process.[230]

In Australia, the use of a GAL may be beneficial in protecting the 'voice' of the child in a situation where the child gives a direct representative direction that conflicts with what the direct representatives believes to be in the child's best interest.[231] In Canada the use of an Indigenous GAL could potentially alleviate the imbalance of Indigenous 'voice' with respect to the representation available for Indigenous children.

In the United Sates many children in child protection hearings are granted a representative to communicate the child's opinion. Guggenheim suggests that professional involvement in legal proceedings does not necessarily result in positive outcomes for children or their parents: "the lives of both the adults and children are advanced by limiting the situations in which either's fate is to be determined by state officials."[232] Guggenheim's critique raises the question of whether affording children voice by way of a third party child advocate in child protection hearings actually furthers children's rights or acts in the child's best interest.

The United States lacks consistent legislation, a central body, or consistent mechanism by which children and child advocates access representation for children in child protection proceedings. The United Satates refused to ratify the CRC, largely because of the perceived potential for children's rights to trump parental rights to authority.[233] Several reasons why children's rights have not been given the same

---

[230] *Supra* note 210 at 649. ALSO SEE Bao-Er, "Indigenous Guardians Ad Litem Are Needed in the Children's Court" (2009) 47(11) Law Society Journal 64.

[231] Marvin Ventrill, "Legal representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice in National Association of Counsel for Children (ed), *NACC Children's Law Manual Series* (1999) 167, 172.

[232] *Supra* note 87.

[233] Susan Kilbourne, "The wayward Americans: why the USA has not ratified the United Nations

attention they have in European counties, which has contributed to a lack of consistency in children's access to representation, have been suggested by critics: "(1) the lack of an express grant of positive rights for children in the Constitution; (2) the failure of the United States to ratify the United Nations Convention on the Rights of the Child; (3) difficulty in defining what is included within the term "rights"; (4) the perceived incapacity of some children to exercise their rights: and (5) the fear that children's rights will come at the expense of parental rights, thus extending government power over families."[234] Thus, similar to the situation in both Canada and Australia, children in the United States rely on a piecemeal approach to advocacy and access to services based on both federal and state legislation.

Although the American Bar Association (ABA) has begun to address the role of lawyers in child protection proceedings, lawyers primarily adopt the best interest approach.[235] Many question when a child's voice should be added to the debate.[236] Elrod argues that children's voices should be added "whenever the child's interests and the parent's interests are not aligned, or the same."[237] However, this interpretation does not address situations where the state's interest does not align with the parents' or where the child's interests do align with the parents' and not the state's. In both situations the child's interests may still require adequate voice and recognition in the process. Participation cannot simply be limited to situations where the child's interests do not align with the parents'. However, unlike mandatory jurisdictions such as Norway,

---

Convention on the Rights of the Child"(1998) 10 Child and Family Law Quarterly 243.
[234] Linda D. Elrod, "Client-Directed Lawyers for Children: It is the "Right" Thing to do" (2007) Pace Law Review 27 869 at 875.
[235] *Supra* note 234.
[236] *Ibid* at 891.
[237] *Ibid*.

Sweden, Germany and Finland, discretionary jurisdictions rarely have legislation placing a legal obligation on the state to ensure that the child is heard in determining the best interest of the child.[238]

In summary, representation must be made available in all proceedings involving a child (ideally in all matters involving children in both the private law setting and child welfare setting). Additionally, representation can not be limited to situations where a child welfare worker, judge or opposing counsel perceives a need for counsel and makes a request for counsel. Nor is it up to children to make a request for counsel, as presumably most children are unaware of their rights and the right to participation as identified by the CRC. The discretionary status of the CRC's implementation at both the provincial and federal level results in Indigenous children subject to the child welfare system being disadvantaged at a disproportionate rate to non-Indigenous children. Indigenous children are disadvantaged in two ways. First by the inadequate access of counsel to FNCFSA because of unawareness of the program. And secondly by real and perceived concern of FNCFSA and Indigenous peoples about the role of non-Indigenous counsel acting for an Indigenous child and what biases counsel may have during the course of their representation. Therefore, CRC implementation can not be limited to western concepts of children's 'voice', the use of only lawyers as child representatives, or the discretionary appointment of lawyers to meet Canada's commitment to the implementation of the CRC and UNDRIP.

[238] *Supra* 210 at 518.

CHAPTER 5: 'BEST INTEREST' IN CHILD WELFARE CASES IN SASKATCHEWAN

This chapter sets out to examine the concept of 'best interests' [239] of the child in child welfare cases, and how best interests is perceived in relation to Indigenous children. The best interests principle remains the framework in the Canadian context with regard to addressing issues related to children in both the domestic family law context and the child welfare context. In Saskatchewan, section 4 of the CFSA[240] articulates the best interest test with respect to child apprehensions. Although the CFSA considers the "cultural" and "spiritual" needs of a child, a reliance on the best interests principle may be problematic. As Appell and Boyer note,

> [the] standard is exceptionally vulnerable to arbitrary decision-making. The lack of a uniform understanding of the term "best interests", coupled with the uncertainty inherent in its use, raises significant concerns about "social engineering." Furthermore, such ambiguity will have the greatest impact on the least visible and respected population of families whose racial and economic status already places them at great risk of destructive state intervention. Most importantly, a threshold intervention standard purportedly based on the child's interest does not protect children from decisions based on the conflicting interests of unrelated adults; rather, it simply serves in practice to shift responsibility for making decisions about children

---

[239] The "best Interest" principle is relied upon by Canadian courts in deciding matters relating to children in both child welfare and domestic family matters. It is further identified as a primary consideration in the CRC.

[240] *Child and Family Services Act*, RSO 1990, c C.11. s. 4. Which reads as follows:
Where a person or court is required by any provision of this Act other than subsection 49(2) to determine the best interests of a child, the person or court **shall** take into account:

> (a) the quality of the relationships that the child has with any person who may have a close connection with the child;
> (b) the child's physical, mental and emotional level of development;
> (c) the child's emotional, cultural, physical, psychological and spiritual needs;
> (d) the home environment proposed to be provided for the child;
> (e) the plans for the care of the child of the person to whom it is proposed that the custody of the child be entrusted;
> (f) where practicable, the child's wishes, having regard to the age and level of the child's development;
> (g) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity; and
> (h) the effect on the child of a delay in making a decision. [emphasis added]

among adults.[241]

Appell and Boyer argue that the test for state intervention should be lowered to a standard of "parental unfitness or parental unwillingness."[242] Although best interest is problematic, reducing the standard to "parental unwillingness" will not further children's rights.

In determining best interest in relation to Indigenous children, the courts have prioritized individual rights over communal rights, which often fail to protect Indigenous groups' collective rights, and as such have failed to protect Indigenous children. This is not to suggest that there are not situations where individual rights may be in conflict to such a severe degree that communal rights are appropriately seen as less important. However; the jurisprudence and opinion of those working in the child welfare arena is that too often an insufficient assessment of the importance of a child's communal rights and interests is undertaken by the judicial system. Interviewees describe the Saskatchewan experience of 'best interest' in relation to child welfare cases as prioritizing an individual approach to understanding rights, which does not support Indigenous communities, children or concepts of communal rights:

> *In all the cases that I have read that notion [of best interest of the child] is so manipulated…the best interest of the child is a really great way to package the "best argument". Generally the judge will side with the non-Indigenous party as representing the best interest of the child.*[243] *Raven Sinclaire*

Typically the CRC is understood from the perspective of the individual child's rights. For example, Article 12.1 relates to a child's individual right to articulate their opinion with respect to matters involving them. However, an understanding of what "best

---

[241] Annette R. Appell and Bruce A. Boyer, "Parental Rights vs. the Best Interests of the Child: A False Dichotomy in the Context of Adoption" (1995) 2 Duke J. Gender L. & Pol'y 63 at 66.
[242] *Ibid* at 77.
[243] *Supra* note 11.

interest" means in the context of Indigenous cultural child-rearing practices would result in better outcomes for Indigenous children. As one FNCFSA Director articulated,

> *When we look at what is in the best interest of the child. You can't just say, what is in the best interest of this child only, you have to look at the context of their family their extended family and their community. In looking at this whole advocacy thing - children advocates then look at what they believe is in the best interest of that child, based on their understanding of the world.*[244] *Director of FNCFSA*

Article 30 of the CRC does address Indigenous children's rights to some extent, but these rights are based on an individual rights approach.[245] Focusing solely on individual rights ignores the reality of Indigenous children's lives because, as Indigenous groups argue, individual and collective rights are powerfully interconnected:[246] Article 30 of the CRC supports the notion that Indigenous children should not be denied their right in community or to culture. If the best interests analysis does not take into account communal interests and rights of Indigenous children, then the Articles of the CRC and UNDRIP are not being met:

> Indigenous children will not enjoy the full benefit of their rights unless they are living within healthy, strong communities that enjoy full rights to self-determination, to enjoy their traditional land and resources, and to maintain their unique culture and society. For these reasons, the UNCRC must be interpreted in such a way as to account for the reality of community experienced by Indigenous children.[247]

The suggestion that the CRC "*must be interpreted in such a way as to account for the*

---

[244] *Supra* note 54.

[245] *Supra* note 3. ***Article 30*** In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, **a child belonging to such a minority or who is indigenous shall not be denied the right,** in community with other members of his or her group, **to enjoy his or her own culture**, to profess and practice his or her own religion, or to use his or her own language.[Emphasis added][245]

[246] First Nations Child and Family Caring Society of Canada, "Indigenous Children rights and reality" (2006) online:http://www.fncfcs.com/sites/default/files/docs/ISGReport.pdf at 37.

[247] *Supra* note 246 at 38

reality of community experienced by Indigenous children" most accurately represents the best interest principle as it relates to the child's 'voice.'

If it is assumed that the best interests of a child are connected to the protection of their communal rights, then the best interest principle can be used as a framework for supporting and protecting both individual and communal rights. With respect to Indigenous children and the current overrepresentation of those children in the child welfare context, which too frequently includes the removal of Indigenous children from their communities, children's rights urgently need to become addressed not only in the individual context but also in the community context. As the First Nations Child and Family Caring Society (FNCFCS) identifies, often the only mechanism of protecting Indigenous culture is through the children of that particular group.[248]

> *That is the problem with un-interrogated racism is that there is this hegemonic way of being in the world and everyone else has to sort of conform to that, and it is not challenged or questioned at all.*
>
> ...
>
> *This is where the cultural bias come in, this un-interrogated assumption that the non-indigenous family is going to be able to provide a wonderful environment for an [Indigenous] child. It just goes without questioning, yet what we know from the literature is that attachment and bonding can be disrupted from a chaotic environment. I would argue that an Indigenous child being placed in a non-indigenous environment is inherently a chaotic environment. And people [foster parents] are not trained to deal with that. My own dad said, "we love you, but we had no business adopting you" as well intentioned as they were they had no idea how to raise an Indigenous child or what it meant to be Indigenous.*[249] *Raven Sinclaire*

Removal of children from Indigenous community and culture necessarily results in a form of cultural genocide similar to that of the residential schools era. Understanding Indigenous children's rights as both communal and individual rights creates a framework for protecting indigeneity:

---

[248] *Supra* note 246 at 56.
[249] *Supra* note 11.

> [I]n many Indigenous cultures extended family members and the community play an important and direct role in a child's upbringing, in addition to biological parents. To Western eyes, this has sometimes created the impression of parental neglect and has contributed to high rates of child removals by child welfare authorities in Australia, Canada, the United States and other places.[250]

Removing Indigenous children from their communities and families has considerable detrimental impacts; therefore, the western framework of prioritizing individual rights over Indigenous children's future rights to culture can result in a loss of identity that is unique for Indigenous children because of Canada's colonial history as it relates to residential schools and the Sixties Scoop and the assimilation of Indigenous children:

> The results of such policies for Indigenous children, and particularly during the adolescent stage, often involve drastic negative effects on all aspects of health and well being. One Canadian researcher interviewed a number of First Nations adults who had been adopted as children into non-Aboriginal homes. "The major loss identified by the adoptees," wrote Carriere, "**was identity**." The loss of family origins, relationships, and First Nations culture contributed to a number of poor health outcomes, such as substance abuse, suicidal tendencies, anxiety, eating disorders, depression, running away, and particularly feeling unwanted, confused, "like an outsider", and "wanting to belong". [251] [Emphasis added].

Edgar notes that "[t]he western world has decided that a rights-based liberal democracy is the system most suited to provide and protect these moral rights."[252] Part of realizing individual rights with respect to Indigenous children in child welfare cases involves realizing that those individual rights include collective rights. Newman suggests that individual rights can be harmonized with communal rights.[253] In discussing Indigenous child adoptions under the *American Indian and Child Welfare Act,*[254] Newman states the following:

---

[250] *Supra* note 246 at 40.
[251] *Supra* note at 81.
[252] Rob Edgar, "Collective Rights (Canada)", (2009) 26 Sk L Rev 1 at 5.
[253] Dwight G. Newman, "Theorizing Collective Indigenous Rights" (2006 -2007) 31 Am. Indian L. Rev. 273.
[254] *Indian Child Welfare Act* of 1978, 25 U.S.C. 1902 (2000) wherein tribal courts have a dual process of protecting the best interest of the child while preserving cultural stability.

> [T]here may be very good moral reasons for an adoption policy with goals that include cultural flourishing, fully consistent with a moral account of an interaction of individual and collective rights without a direct conflict of rights. That said, if some community, counterfactually, were genuinely insensitive to the interests of children and put them knowingly for adoption in families where they suffered abuses (actions deliberately directed against the interests of the children, as compared to those with some limited negative effects on the interests of the children), there would be reason for any political community, with the power to do so, to interfere with this violation…[255]

Although the rights and principles of the CRC have been ratified by Canada, the failure to incorporate specific child rights into the Canadian legal system has caused a delay and imbalance in the access to justice for Indigenous children. A western-focused framework of individual rights has further damaged the best interest of the Indigenous child in child protection proceedings and ignored the possibility of collective rights and individual rights supporting each other to determine the child's best interest. As Cooney identified in interview:

> *It is a very difficult role to advocate, because you want to fix things and you predetermine…a legal test for best interest is very difficult, because there are so many variables, ages, background, and mental capacity.*
>
> …
>
> *What is problematic is that the judge knows nothing about child welfare or the family*
>
> …
>
> *It's too easy for a lawyer advocating for a child to say, "you are right, they should stay in that foster home because the each get their own room, and they are well cared for". Glenda Cooney*

While best interests is intended to be context specific and unique to the individual child, recent decisions in the Canadian context continue to be fraught with western concepts of best interest despite provincial legislative frameworks that identify communal and cultural factors as significant to the best interest analysis.[256] *Algonquins of Pikwakanagan*

---

[255] *Supra* note 246 at 287.

[256] Problematic with finding evidence of cultural bias with respect to the determination of "best interest" in child welfare cases, is that by enlarge most decisions remain unreported. Therefore,

v. Children's Aid Society of the County of Renfrew[257] involved two Indigenous sisters who had been placed in non-Indigenous foster care families. Their biological grandmother and the respective First Nation appealed a decision of the Ontario Superior court granting a long-term order that the children remain in the care of the foster parents. The biological grandmother previously had the children in her care, but continually struggled with alcohol use. Because of the grandmother's struggle, the children were removed from her care and placed in foster care where they had consistently resided for approximately four years at the time of the appeal. The judicial history of the case is as follows:

> **1. The first trial and appeal:** The matter proceeded to trial in the fall of 2011. On the first day of trial, a representative of the Algonquins of Pikwakanagan attended and asked for a brief adjournment to review disclosure that had only been provided that day, and to consult with counsel. The trial judge refused the adjournment, proceeded with the trial and ordered that the girls were to be Crown wards without access for the purposes of adoption. The children were placed with Mr. and Mrs. D. On appeal, a new trial was ordered on the basis that the trial judge should have granted the adjournment and that the trial judge failed to give "due weight and consideration" to the children's First Nations status.[258]
> **3. The second trial:** A retrial commenced on July 30, 2012. By this time, M.B.[grandmother] had access visits with the girls. Mr. and Mrs. D. accommodated the access in an effort to keep the children connected to their Aboriginal heritage. The Society amended its application to pursue Crown wardship with access to M.B.[259]

The court engaged in weighing what are often identified as competing interests in determining the outcome for the children: specifically, the importance of attachment and continuity of care was weighed against evidence of cultural identity. Chief Kirby Whiteduck of the Algonquins of Pikwakanagan Nation testified that the removal of

---

the availability for outside scrutiny of the case law and the analysis as it relates to concepts of "best interest" is limited to the few decision that are reported or appealed.

[257] *Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew* 2014 ONCA 646

[258] *Supra* note 257 at 18.

[259] *Ibid* at para 22.

Aboriginal children from their communities leads to alcoholism, violence, suicide, anger and resentment"[260] and that the court "must look not only at the best interests of the child, but also at the best interests of the adult that the child will become."[261] Further, evidence was presented "about the damage caused to Aboriginal people in the 1960s and continuing to the 2000s, when children were removed from their families by child welfare authorities and placed in mostly non-Aboriginal homes. The children were lost on a personal and on a community level and often became homeless."[262] With respect to Indigenous children, the Ontario *Child and Family Services Act*[263] (CFSA) was summarized by the Ontario Court of Appeal in *Algonquin* as follows:

> Subsection 57(5) provides that, "unless there is a substantial reason for placing the child elsewhere", Aboriginal children shall be placed with a member of the child's extended family, a member of the child's "band or native community", or "another Indian or native family."[264]
>
> Subsection 37(3) of the *CFSA* lists the factors that must be considered in assessing the best interests of a child. When a child is from an Aboriginal community, the *CFSA* further directs in s. 37(4) that the importance of the child's cultural identity and the uniqueness of Aboriginal culture, heritage and traditions shall be taken into account. There is nothing in the *CFSA* that suggests that the "weight" given to one consideration must be greater than the weight given to another. All factors are considered with the over-arching goal of determining the best interests of the child. This is consistent with the paramount purpose of the Act and every section must be read in this context.[265][Emphasis added].
>
> Similarly, s. 57(5) requires the court to place an Aboriginal child with a member of the child's extended family, a member of the child's band or native community or another "Indian family", unless there is a substantial reason not to. Given the *CFSA*'s paramount purpose, s. 57(5) cannot be read as usurping the best interests of the child.[266]

Similar to past decisions with respect to Indigenous children, the Ontario Court of

---

[260] *Ibid* at para 29.
[261] *Ibid.*
[262] *Supra* note 257 at para 28.
[263] *Child and Family Services Act*, R.S.O. 1990, c. C.11
[264] *Supra* note 257 at para 59.
[265] *Ibid* at para 67.
[266] *Ibid* at para 68.

Appeal (ONCA) agreed with the trial court ruling and focused on what it describes to be the paramount importance of the Act, being the best interest of the child. In the language of section 57(5) of the Ontario CFSA, there is a presumptive requirement that an Indigenous child be placed with "*a member of the child's extended family, a member of the child's band or native community or another "Indian family,"*" which is limited by the language, "*unless there is a substantial reason not to.*" The ONCA decision followed the historical jurisprudential framework in Canada that focuses on the best interest from the perspective of the individual child. Ultimately the ONCA raised concern with respect to best interest of the child as something that could be analyzed within a community and cultural framework:

> The Act makes clear the Legislature's intention that First Nations' issues be seriously considered. However, all considerations, including First Nations' issues, are subject to the ultimate issue: what is in the best interests of the child? Nothing displaces the best interests of the child and no section of the Act overrides the child's best interests. [Emphasis added].[267]

There are circumstances wherein there is a valid reason not to remove a child from their placement in a long-term foster home, or where there may be other limiting reasons for not following the presumptive requirement to place the child in culturally appropriate care; however, Canadian courts use the "*unless there is reason not to*" language of the legislation to support western concepts of best interest to the detriment of the Indigenous child's *actual* best interests.

In a recent Manitoba decision, *West Region CFS v. L.A.H. et al. and M.H. et al.,*[268] a guardianship application was brought concerning a 6-year-old Indigenous child who had been residing with her foster parents for a period of 6 years (since infancy). The

[267] *Supra* note 257 at para 71.
[268] *West Region CFS v. L.A.H. et al. and M.H. et al* 2016 MBQB 48.

Manitoba West Region Child and Family Services Agency argued that it had found more culturally appropriate care for the child where her two siblings resided. Ultimately, in a similar finding to the ONCA decision, the court held that the child should remain with her foster parents on a continued basis as the foster home was the only home that the child had known:

> After having considered all aspects of best interest criteria in s. 2(1) of the Act, including primary consideration of H.H.'s security and safety and all other relevant matters to be considered under s. 2(1), I find overwhelmingly on the balance of probabilities that H.H.'s best interests require that she remain with the only people she has known as her mother and father and accordingly M.H. and D.H.'s guardianship application request is granted.[269]

This particular case included additional factors with respect to the proposed placement that reasonably made the court wary of removing the child from her foster home.[270] However, while the order in the case that places the children in their foster home permanently appears appropriate in terms of continuity of care for the child and the fact that the child was bonded to the foster family, the issue of cultural identity is yet again given minimal weight by the court's analysis of attachment and stability and arguably the court's reluctance to disturb the *status quo* in an effort to maintain attachment with the foster family. While foster parents often care for children for extended periods of time, that is not the intention of the foster parent relationship. The 6-year placement in the aforementioned decision raises serious questions with respect to the role of the foster parent relationship, which is ultimately intended to be temporary. To prevent the blurring of a foster parent relationship into a parental relationship, Sinclair suggests reform with respect to the role of foster parents:

---

[269] *Supra* note 268 at para 138.
[270] *Supra* note 268.

> *What I want to see across the country is a legal document that foster parents have to sign that the ideology of foster parents, stating that they will not pursue an adoption…Attachment is not a quantifiable construct. It is an idea, yet they will bring in professionals. She [worker/lawyer] says they look happy there, therefore they must be attached. I looked happy in my adopted pictures, but I was a very traumatized child.*[271] *Raven Sinclair*

In Canada, foster parent placements are intended until a long-term placement is ordered or an adoptive family is secured for the child, depending on the circumstances surrounding the child's adoptability. Cooney states that a "[p]ermanent order should not mean permanent in the sense that if a viable option arises where the kids can go home that they do not."[272]

5.1 Attachment and Cultural Genocide

The case law suggests an additional element wherein children are placed in a foster care relationship for such an extended period of time that they become entrenched in that placement. As a result of extended foster care placements, courts are reluctant to disrupt the *status quo* and may be correct in their assessment that the child has formed an attachment to the foster parent, which would render a change in living arrangements risky and potentially detrimental to the child's development. However, long term placements contribute to the genocidal effects of Saskatchewan's child welfare system:

> *Workers are now telling people if you want to keep a [Indigenous] child just foster them because the Ministry policies will work in your favour. Because by the time it gets to court they will win because of this idea of attachment….. the flaw with this precedence is that it is just not true. In my research and the research of people that I know, shows* ***that culture is the most important thing****. And any Indigenous person who is in care in any form will re-patriate between teen-hood until adult-hood. The irony in that case [Racina Woods]*[273] *is that*

---

[271] *Supra* note 11.
[272] *Supra* note 163.
[273] For a full description of the racial elements in *Racine v. Woods* SEE: Wesley Crichlow**,** **"**Western Colonization as Disease: Native Adoption & Cultural Genocide", Critical Social work. 2002 Volume 3 No. 1.

Another case illustrates the minimization of culture in an even more racist fashion and

> *within the year after they won this court case they[adoptive parents] returned her to care, it is appalling. If you are that attached and bonded to a child, you would never return them to care the way you would like a little puppy, returning them to the pound because the ideology of western adoption is that it is as if they [the child] is born to you, and yet* ***somehow Indigenous children are more disposable****."*[274] *[Emphasis added] Raven Sinclair*

One FNCFSA Director stated that his agency came across this scheme a while back and now takes the policy approach that if a child is apprehended at birth or in infancy, the FNCFSA ensures that one of its workers is available to provide culturally appropriate care to the infant child. The FNCFSA found that infant placements were being used as a way for non-Indigenous families to adopt Indigenous babies:

> *The Ministry has apprehended babies right after birth, and so what happens is that they go to a foster home. They actually have people lined up, they have a list of people looking for babies, so then the baby goes there. By the time that we find out there is already an application to court, and so we don't know what is going on so we oppose it. Next thing you know the Advocate is contacting us saying that the baby has been with this [foster] family for this long and we strongly urge that they need to stay with them so you need to back off, and we are like "no"."*
> ...
> *We actually came across this scam some time back and we were wondering what was going on, it is like a little baby farm scam and scheme going on. So how we have responded to this is that if a child is apprehended at birth, we go there immediately and assume care for that child or infant, and then we look for extended family from there, right from the very beginning. And we actually had to*

---

has been highly criticized by First Nation communities and child advocate activists. In *Racine v. Woods*, [1983] 1 D.L.R. (4 th) 193 (S.C.C.) [hereinafter Racine], the Supreme Court of Canada granted an adoption order of an Indian child to Métis foster parents. The child had been under the care of the foster parents since the age of six weeks with the mother's consent. At the age of two, the child was returned briefly to the natural mother, after which time the foster parents reclaimed the child and denied contact the natural parent, in this case the mother. At the time of the Supreme Court decision, the child was eight years old. Madame Justice Wilson made the following statements in reference to evaluating the best interests of the child test of an Indian child:

> ...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. (*Racine* 187).

[274] *Supra* note 11.

> *confront the Ministry on this practice in order for them to back down from it….It was strange that friends of workers were getting babies.*[275] *Director FNCFSA.*

However, the economic disadvantage of FNCFSA (because of the reliance on federal funding) means that they cannot forcefully address genocidal Ministry policies: *"part of it is that you have agencies that are not strong enough to stand up to the Ministry and say "no", so the practice is allowed to continue."*[276]

The concern with disrupting the attachment a child has formed with his or her foster parents has not been the focus of the United States case law. Under the *Indian Child Welfare Act* (ICWA), attachment is not the primary focus of the legislation. As a result, in the United States the presumption in favour of culturally appropriate care has been followed more aggressively than in Canada. Further, in the United States there is less reliance on the "*unless there is reason not to*" language, regardless of the attachment impact that it could have on the child.[277]

As previously identified, the Canadian *Hamilton Health Sciences Corp. v. D.H.*[278] decision has taken a profoundly different view on the best interest of the Indigenous child by focusing not solely on the child's individual rights but their communal rights.[279] It is notable that the judge in the *Hamilton Health Science* decision is himself First Nations. The judge's understanding of the importance of community and culture may have informed his decision in concluding that maintaining the right to engage in cultural healing was a way of protecting the best interest of the child. This case marks an exception to the typical jurisprudential understanding of best interest in Canada, which is

---

[275] *Supra* note 54.
[276] *Supra* note 54.
[277] SEE *Re Alexandria P.* 176 Cal. Rptr. 3d 468 (Ct. App. 2014).
[278] *Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603A.
[279] *Ibid.*

frequently framed by courts in *Charter* section 7 arguments, supporting the protection of the child's individual rights.

The focus on individual rights as being in the Indigenous child's best interest inherently ignores the communal interest of Indigenous communities and has resulted in western concepts of the child's best interest being entrenched in court systems in Canada. This is not to suggest that there are not circumstances where the child's right to security and safety should not be considered paramount based on the factual circumstances, nor situations where it may be appropriate for a child to remain or be placed in non-Indigenous child care or foster care. However, what has remained problematic in the Canadian context is that communal rights and cultural rights have been seen as a lesser interest to be considered by courts in child welfare cases. Cultural rights should not always trump attachment issues. However, they should be assessed to the same extent that the child's individual rights are accessed.

By comparison, application of the ICWA likely would have resulted in different outcomes in many Canadian decisions, as the ICWA supports tribes' veto rights. Interested parties and foster parents in the United States have challenged tribal veto rights. For example, the Goldwater Institute argues that, while the 1978 ICWA laws were well intentioned, they have resulted in the unequal treatment of Indigenous children by giving preference of adoption to Indian families.[280] This argument raises the question of whether preserving Indian culture, community and language should validly trump socio-economic status, security and availability of adoption or long-term placement.

[280] Goldwater Institute, "Goldwater Institute Files Class Action Lawsuit Against Parts of the Indian Child Welfare Act" (July 7 2015) Online < http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/goldwater-institute-files-class-action-lawsuit-aga/>

Additionally, the Goldwater Institute has argued in its case against the ICWA that Indigenous children are more likely to remain in abusive homes. However, their argument has neglected to consider that the high incidences of Indigenous child removals in the United States has been the result of prejudice towards Indigenous child rearing and families' socio-economic status and not directly related to child abuse.[281]

More commonly, and to the detriment of Indigenous culture, the Canadian perspective interprets "best interest" based on western concepts of child rearing and the individual child rights. The United States, through the use of the ICWA, has taken a broader approach to understanding the best interest in the framework of communal rights, even though it is not a signatory to the CRC. The ICWA has been used by courts to consider the future rights of the Indigenous child while considering the preservation of cultural identity. While some have criticized the legislative framework under the ICWA as failing to adequately consider the best interest of the individual child, the best interest test is actually more properly framed within a communal rights framework wherein the best interest of the individual child is related to an understanding of the best interest of child in relation to their community.

Provinces continue to exercise jurisdiction over child welfare on reserve through section 88 of the *Indian Act*. Indigenous communities in Canada may benefit from federal legislation similar to the ICWA that promotes Indigenous self-governance over child welfare, and a presumption in favour of placement within the child's community.

[281] SEE *supra* note 246.

CHAPTER 6: LAWYER ADVOCACY IN SASKATCHEWAN CHILD WELFARE CASES: THE ROLE OF COUNSEL, CFC PROGRAM AND THE SASKATCHEWAN CHILDREN'S ADVOCATE

> The role of the lawyer for the child is no different from the role of the lawyer for any other party; he or she is there to represent the client by protecting the client's interests and carrying out the client's instructions. At the same time, the lawyer is an officer of the Court and as such is obliged to represent these interests in accordance with well-defined standards of professional integrity.[282]

Despite Madam Justice Abella's, as she then was, recommendation that the instructional role of lawyering be adopted in a lawyer-child-client relationship, it is often not adopted in Canada, and even when it is, it often falls victim to the advocate's personal bias. This chapter examines advocacy models and programs available in Saskatchewan and identifies limitations and concerns with programs offering advocacy to children. Specifically, this chapter raises concerns with respect to Indigenous children's access to both procedural and substantive justice through current child representational models used in Saskatchewan, The current advocacy model employed in Saskatchewan does not provide Indigenous children with voice.[283] In addition, there are significant concerns regarding outside counsel representing children on First Nations in child welfare matters, particularly because not all lawyers are adequately trained to address Indigenous issues. This failure perpetuates a lack of Indigenous children's voice as mandated for by the CRC. Provincial programs identified below, which aim to provide advocacy for children, are especially inaccessible to communities in northern parts of the province. Presently there are only 11 lawyers trained to act as counsel for children on child welfare cases in

[282] *Re W*. (1980) 27 O.R. (2d) 314, at 5 (Prov. Ct.) at para 29.
[283] *Supra* note 79.

the province. These lawyers also practice on a range of other legal files and do not solely practice in the area of child advocacy.[284]

6.1 SASKATCHEWAN COUNSEL PROGRAM (CFC)

The presumptive use of lawyers appointed to act for children in the child welfare context raises issues with respect to what role that lawyer takes. This is particularly a concern when a lawyer advocates for an Indigenous child. As Sheri Woods identifies, "*I just don't know how anyone could just walk onto a reserve, and meet with a kid and adequately represent their wishes in a courtroom."*[285]

When looking at what role a lawyer has in child welfare cases involving Indigenous children, FNCFSA have expressed a lack of acceptance of provincial programs in place.[286] In Saskatchewan, as part of an effort to move away from an ad hoc system of appointment of counsel, the Counsel for Children and Youth Program (CFC) was created. As the program's Director describes, the program was developed from a 2008 report issued by the Ministry of Justice on access to justice for children and youth, which indicated a need for counsel for children.[287] Prior to the current program, a pro bono program was in place in Saskatchewan involving the Children's Advocate and the Law Society of Saskatchewan. Following the 2008 report, an inter-agency committee was formed involving the Law Society, Ministry of Social Services and Ministry of Justice, which was co-chaired by the Minister of Justice and the Minister of Social Services, with a goal of implementing some of the report's recommendations.[288] The stakeholders involved in the discussions included Legal Aid, the Law Society, the Children's

[284] *Supra* note 8.
[285] *Supra* note 79.
[286] *Supra* note 28.
[287] *Supra* note 152.
[288] *Supra* note 152.

Advocate and the Ministry of Social Services.[289] As Pottruff states, "*we designed the Saskatchewan approach, which is the instructional advocacy approach*."[290] This approach was borrowed heavily from the Alberta model. The program was then launched in 2014/2015 and is currently housed in government because the committee believed that housing the program with Legal Aid—which often represents parents in child welfare cases—would be an inherent conflict of interest.[291]

However, as Sheri Woods describes, housing the program in the government is also a conflict of interest:

> *There was zero consultation, and I am pretty critical of the program but I like the work, so right now I just do my files and represent my kids and try to disassociate from the program. When I started this work there was no program, so I made an application to be court appointed through court services and that was granted and that became the way we were doing it…. It was very ad hoc, very sporadic and mostly Saskatoon and Regina…. Then that became a bit of a budget issue for court services because they were not opposing any of those applications but that is not really what they [court services] is there for either. They knew enough not to oppose because of the Convention, that says that this is a right that kids have. So then the government created the program.* ***And there wasn't any consultation. There was not even consultation with lawyers who were doing the work.***[292]
> *She [Director] is not independent; she, in here words, "still wears some hats at civil justice and sits on committees".*[293]

Adding to the conflict is how lawyers advocating on MSS files get paid:

> *There was no extra money put at it [the CFC program]. The number that is attached to the program is exactly Betty Ann's salary…..so all they did was take Betty Ann's salary out of civil justice and physically moved her office. Then when we submit our bills on these files, she approves them under the program and then sends them to the MSS, and the child care workers who are responsible for these kids and then we get paid out of the child care budget of the MSS, which is another huge conflict, because the front line workers see our accounts, and know how much we are getting paid…*[294]

---

[289] *Ibid*.
[290] *Supra* note 152.
[291] *Ibid*
[292] *Supra* note 79.
[293] *Ibid.*
[294] *Ibid.*

The Public Guardian and Trustee (PGT) and not the MSS pay for counsel's fees on files involving a FNCFSA child. The PGT then collects its bill from INAC.[295] Woods describes the difficulties in getting paid in a timely manner contributing to additional issues with respect to the lawyers that the program attracts: "*it attracts people who want to do this work for the right reasons and a bunch of people who don't have work to do otherwise and are just doing legal aid farm out work and see this as another way to get tariff work*."[296]

The CFC program's manual describes the scope of the program as follows:

> The Counsel for Children Program provides for the appointment of lawyers for children and youth who are in the care of the Minister of Social Services pursuant to *The Child and Family Services Act* ("CFSA"). In situations where a child or youth is receiving services under the CFSA, a lawyer may be appointed for the child or youth on a case-by-case basis, at the discretion of the PGT, or in situations where the court has ordered that counsel be appointed. Situations where a child has been placed with a Person of Sufficient Interest are within the mandate of the program. Children who reside on reserve are also eligible to have a lawyer appointed for them, and to that end, the Children's Counsel will work with First Nations agencies to ensure access to the CFC program. The PGT or delegate may appoint a lawyer to act on behalf of a child or youth, if the child or youth is, or may be, subject to proceedings such as a dispute resolution process, application, or appeal under *The Child and Family Services Act.*

There are additional limitations to the CFC program. First, the program is limited to cases that fall within the CFSA. Specifically, counsel can only be appointed if there is an ongoing child abuse investigation. Should the Ministry decide not to pursue a child abuse investigation and instead the matter proceeds in the private sphere (as a custody and access matter for example) between a PSI and parent or between parents) the child is no longer entitled to their CFC lawyer:

---

[295] *Supra* note 79 & 152.
[296] *Supra* note 79.

> *If there is clearly and ongoing child protection matter than I clearly have the ability to appoint counsel, and I am supportive of them participating in the custody and access matter to make it fit within my mandate. Often our challenge has been that in those situations and other situations we will have an application going to court on the child protection matter and the Ministry withdraws its application and I have no legislative ability to intervene and keep the matters going.*
> …
> *It has become a real problem because the youth wants something resolved, but the Ministry says "nah" you are back with your PSI, or we are going to stop the child abuse investigation and we will have it dealt with in the custody and access proceeding, and that disentitles the child to their day in court.*[297] *Betty Ann Pottruff*

Secondly, the program's development is based on Euro-Canadian philosophies regarding child advocacy, even though the majority of children who require and are entitled to CRC representation are Indigenous. The program's development did not include FNCFSA and Indigenous voices. Thus, the program has been imposed on FNCFSA with zero consultation. As one FNSFSA Director stated, "We have no connection to the program."[298] Shingoose stated that not involving FNSFSA in program's development was "not a good practice" because "you need the community and family" involved in the advocacy process.[299] He notes that not having them involved is "scary":

> *Children and youth should not have to tell their story many times, they should tell it once. That the kind of system that we need - integrated services, and if there is a role for legal then they should be there too…*[300]

As a result, the CFC program fails to meet CRC requirements as it fails to provide voice in all child welfare cases, and additionally marginalizes Indigenous children by not consulting with Indigenous peoples as to what practice would permit the Indigenous child to be heard. As Pottruff described, the majority of requests for counsel come from the

[297] *Supra* note 152.
[298] *Supra* note 54
[299] *Supra* note 28.
[300] *Ibid.*

MSS with only some coming from FNCFSA,[301] suggesting the program fails to meet CRC standards by being both inaccessible to Indigenous communities and children as well as being created without meaningful consultation with FNCFSA.

6.2 Representational Models

Primarily there are three models of representation in relation to children: (1) the amicus lawyer, (2) the best interest lawyer, and (3) the instructional advocate. The amicus lawyer's primary function is to ensure that all relevant evidence is before the court or decision-making body.[302] As Bala notes,

> There is no expectation of confidentiality between the child and the lawyer; to the contrary, the amicus lawyer will be disclosing the child's views and perspectives to the court and the other parties. The lawyer adopting this role might retain a social worker or mental health professional to investigate the child's circumstances or assist in interviewing the child and providing evidence about the child's wishes[303]

The amicus role was adopted by Canadian lawyers in the 1970s and is still the model widely used in other jurisdictions.[304] The lawyer in this role can be described as being a "friend of the court": they are intended to provide a full picture of the child's situation to the court, without prejudicing that information by including a personal belief as to what the outcome should be. In Saskatchewan child welfare cases, the amicus model is used by lawyers where the instructional model is not practicable, due to age, mental capacity or maturity of the child.[305] Lawyers acting for children in Saskatchewan have identified one barrier to their ability to act for children in that the MSS does not provide full disclosure to CFC lawyer in all cases. It has been suggested by CFC lawyers that the Ministry

[301] *Supra* note 152.
[302] *Supra* note 49 at 683.
[303] *Ibid.*
[304] *Ibid*.
[305] *Supra* note 79.

provides only the legally related documents to the CFC lawyer and not the full Ministry file, which may include information about programs the child has attended in the past. CFC lawyers feel they cannot meet the requirements of the amicus role or instructional advocate role without this information.[306]

The best Interest model (frequently referred to *guardian ad litem* model in the Canadian context) requires that the lawyer introduce not just the relevant evidence and the child's views but "advocates for a position based on the lawyer's assessment of the interests of the child."[307] Confidentiality is not central to the best interest model. The best interest advocate is not bound to advocate based on the child's instructions. As such, the outcome advanced by the child may align with the lawyer's perception or may substantially differ. The evidence that the lawyer presents is arguably heavily influenced by what that lawyer perceives to be in the child's best interest. The lawyer may argue against the outcome the child has expressed.[308] Australia, the United States, Great Britain, and parts of Canada all have adopted the best interest model in the lawyer-child-client relationship. Although frequently adopted in many jurisdictions, the best interest model poses significant risk with respect to whether counsel appointed for the child has the training to identify what is truly in the child's best interest.[309] Significant risk exists that the lawyer is advancing personal bias as to what that lawyer believes to be in the child's best interest. Despite these concerns, the role has been adopted and promoted as providing a full picture to courts whose must determine the best outcome for the child.

---

[306] *Supra* note 8. Wanuskewin CFC Training, October 14 2016
[307] *Supra* note 49 at 683.
[308] SEE *Boukema v. Boukema (1997),* 31 R.F.L. (4th) 329 (Ont.Sup. Ct.). Child's counsel advocated a different position from the child's expressed wishes based on two mental health professionals' evidence that the mother was manipulating the child. However, the court held that the lawyer was still required to advance the child-client's views despite any manipulation.
[309] *Supra* note 49 at 683.

Models of advocacy within countries can vary considerably. For example, Saskatchewan and Ontario both have law society protocols in relation to the lawyer's role in advocating for children, which differ drastically. Saskatchewan has explicitly adopted an instructional advocate approach while Ontario remains under the best interest framework. Appell questions whether the approach of appointing a best interest counsel has enhanced attention to the child's 'voice' in cases involving state intervention.[310] The best interest model has the potential to seriously undermine the meaning of giving children 'voice' as articulated in the CRC: "[g]iven the silence of children in these processes, the contingency of childhood and the cultural diversity of norms, the person that represents a child's interests can make a great deal of difference regarding whether advocacy reflects the child's own values and experiences or those of his or her representatives"[311]. Complicating matters, the child's lawyer is unlikely to be from the same socio-economic, cultural and racial background, which could result in the homogenization of minorities.[312] Part of the function of a democratic liberal society is that "freedoms arguably mandate decisional privacy within the parent-child relationship (albeit with some limits) as expressions of adult moral autonomy and as the primary method for shaping future democratic citizens who are separate enough from the state to govern in a democracy."[313] The separation of children in the lawyer-child-client relationship results in isolating children from their immediate family, community, and lawyer (representative). This disconnect raises the risk that the lawyer will not be aware of the specific social and cultural norms of the child, permitting the lawyer to impose personal paternalistic ideas

[310] Annette R. Appell, "Representing children representing what? Critical reflections on lawyering for children" (2008) 39:3 Colum HRL Rev 573 at 575.
[311] *Ibid* at 586.
[312] Annette R. Appell, ""Bad" Mothers and Spanish-Speaking Caregivers" (2007) *7* Nev. L.J. 759.
[313] *Supra* note 310 at 603.

onto the child, supporting the chronic concern that the right to participation and the right to protection are mutually incompatible.[314]

The concerns raised by Appell are eerily familiar to the current issues faced by children subject to child welfare system in Saskatchewan. This concern was explicitly expressed by one Director of a Saskatchewan FNCFSA:

> *They are basically going to be doing what they think they should do, or what they would want in the case. You look specifically at children, this goes down to children that can't speak for themselves…you are going to have a lawyer who is going to argue on behalf of a baby on what should happen to that baby. It is a weird thing.*
> *you will have someone from down south who will have no connection to them even remotely, that is going to work on this file for a child that they really don't know anything about*
> *you [lawyer] are going to be operating from a different value position, it does not seem like that would be the most appropriate way to deal with if you have concerns regarding the voice of a child. There could be other ways to come up with something other than this [counsel for children and youth program].*[315]

Children have at least two competing sets of rights: participatory and dependency rights.[316] In the child welfare context, lawyers advocating for children can easily promote dependency/protective rights as a means of promoting state interests and fail to take into consideration the child's participatory rights.[317] Thus, lawyers may implant their perception of childhood norms onto the child in ignorance of cultural, social, racial, and ethnic diversity, which contributes to the legitimization of systemic problems.[318] Glenda Cooney, past Deputy Saskatchewan Children's Advocate identified this issue:

> *It is a very difficult role to advocate, because you want to fix things and you predetermine. A legal test for best interest is very difficult, because there are so*

[314] *Supra* note 49.
[315] *Supra* note 54.
[316] *Supra* note 310 at 614-616.
[317] *Ibid*.
[318] *Supra* note 310 at 619.

> *many variables, ages, background, mental capacity…what is problematic is that the judge knows nothing about child welfare or the family.*[319] *Glenda Cooney*

Viewing children in isolation and separating their interests from those of their families and communities, although sometimes necessary, can discount the fullness of their lives.[320] Dale Hensley notes that the best interest model in the Canadian context has the potential to allow lawyers, rather than the courts, to decide the outcome: "[a]nyone who represents children knows the incredible power and influence of counsel for the child. Professor Bala invites counsel to have even more power and influence but with no predictability or fairness. If counsel is 'guided by his or her own assessment of the best interests of the child,' counsel usurps the role of the decision-maker without the existing procedural safeguards."[321] Most lawyers acting for children do not intentionally usurp the role of the decision maker by advancing a best interest approach, nor do they intentionally wish to negatively influence the child's future. The reality is that the approach easily falls victim to stigma, bias, and arguably does not fully meet the requirements as articulated in Article 12 of the CRC.

The Instructional Advocate (traditional advocate) requires that "[l]awyers who adopt an 'instructional advocate' role have a relationship with a child that is based on the same ethical and professional responsibilities that apply to adult clients."[322] Despite several jurisdictions adopting the tradition lawyer-client model in relation to children, including the CFC, the model risks the infiltration of the lawyer's perceived best interest

[319] *Supra* note 163.
[320] *Guggenheim, supra* note 87.
[321] Dale Hensley, "Role and responsibilities of counsel for the child in Alberta: A practitioner's perspective and a response to Professor Bala." (2006) 43 Alb L Rev 871 at 902.
[322] *Supra* note 49 at 684.

for the child. With reference to the *F. (M.) v. L. (J.)*[323] decision, Bala noted that

> In a growing number of jurisdictions there are professional standards or court decisions that oblige lawyers who represent children to adopt an advocate role. For example, in the Canadian province of Quebec, Article 34 of the Civil Code requires that the child is to be heard by the court in any case where their interests are affected, if they have the ability to express themselves. There is a fairly extensive legal aid program in that province to provide representation for children who are the subject of family proceedings. **In 2002, the Quebec Court of Appeal ruled that lawyers who represent children should adopt an advocate role whenever a child gives clear instructions.**[324] [Emphasis added].

What remains debatable is whether lawyers actually feel comfortable in engaging in a clear instructional advocacy role with child clients in jurisdictions where there is direction from law societies, legislation and governing bodies to adopt an instructional advocacy model.[325]

This uncertainty is reflected in Bala's study involving interviews of lawyers in both Alberta and Ontario. In Alberta, "[a]lthough the vast majority of Alberta children's lawyers support in principle the Law Society's presumption of instructional advocacy, over half indicated that they would not adopt an instructional advocacy role if doing so would place the child at a 'serious risk of harm,'….[o]ther lawyers, however, feel ethically obliged to advocate based on the views of their child clients, regardless of the risk that this may pose."[326] Conversely, in Ontario, over half of the participants indicated that they adopt a best interest model which is legislatively mandated. Over 60 percent of those Ontario lawyers interviewed in the study stated that, even if the child expressed a

---

[323] *F. (M.) v. L. (J.)* 2002 CarswellQue 337, [2002] J.Q. No.480 (Que. C.A.)
[324] *Supra* note 49 at 684.
[325] In the United States ,the American Bar has recently become supportive of lawyers representing children adopting an instructional advocacy role.(see American Bar Association, Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (August 2011, adopted February 2012), section 7(c). online: <http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf>
[326] *Supra* note 49 at 691.

wish, they would not provide that information to the court if they believed the child to be too young to have capacity to understand their request.[327] Bala identifies that "[w]hile there is a need for flexibility and discretion in applying any ethical standards, one has to wonder how much the nature of representation that a child actually receives is affected by the individual lawyer who happens to be assigned to a case."[328] Australian studies have indicated a similar lack of consistency in models adopted by lawyers. A New South Wales study indicated that, despite the statutory framework that articulates a best interest model for children under the age of 12 and an instructional model for those children over 12, often the advocate's personal views of the best interest for the child influence what information to provide to the court.[329]

It is problematic when a lawyer imposes their personal views regarding what is in the best interest as it undermines the intentions of the CRC to promote children's voice in the context of the best interest of the individual child. The lawyer's failure to act as an instructional advocate undermines the court's role, which is ultimately there to assess all the relevant information, including the child's views. The risk of the best interest approach, which is the standard most heavily relied upon by lawyers practicing in this area of law, is that there is confusion about what "best interest" means. Best interest becomes confused when the lawyer attempts to understand it from their personal social and cultural background.

Saskatchewan has largely adopted an advocacy model from Alberta that mandates instructional advocacy. However, lawyers are typically not trained in understanding the

[327] *Ibid* at 690.
[328] *Ibid* at 693.
[329] Nicola M. Ross, "Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales" (2013) 27:3 Int's JL, Pol'y & Fam 332.

intricacies of child development nor is it their role to do so. Whether a lawyer can adequately advocate for a child does require that they are aware of the cultural difference that may result in the child's expression of their interests that could clash with what the lawyer perceives to be in the child's interest.

Child participation enhances children's social and economic status as well as fulfilling the child's participatory rights as the child procedural rights ensure access to substantively just outcomes.[330] While child participation helps fulfill international obligations to enhance children's rights under the CRC, participation needs to be meaningful and needs to reflect the social, cultural and spiritual needs of the child. Similar to the way environmental consultation with Indigenous groups requires that the consultation process be "meaningful," child participation also needs to be meaningful. The CCRC found that

> Young people in care indicated that often they are not informed about their rights, the options available to them for support or protection of their rights, and ways they can have a voice in decisions that affect them. Youth reported that decisions are generally made for them and not with them, sometimes with no explanation. Young people want their caregivers and social workers to ask for their views on options for their care, to be transparent with them about why decisions are made, and to facilitate access to appeal processes of decisions made for them. This includes participation in plans of care, placement options, family reunification, or continued contact with biological or adoptive family members when possible. To implement the Convention, these rights should be legislated as a mandatory standard for all child welfare agencies and services intended for young people in care.[331]

Current models available in Saskatchewan partially fulfill the child's right to be heard but no model currently utilized fully satisfies Article 12 of the CRC nor appropriately addresses issues specific to Indigenous children and their communities. Partial fulfillment results from discretionary appointments and lack of availability of representation in

[330] *Supra* note 321.
[331] *Supra* note 56 at 67.

remote communities and FNCFSA. Presently a lawyer, judge or MSS worker has to identify a perceived need for counsel, contact the CFC program and hope a lawyer is available for appointment.

6.3 Challenging Provincial Jurisdiction

Saskatchewan Advocate for Children and Youth (Saskatchewan Advocate) is an independent office of the Legislature with a goal of creating "systemic change for the benefit of the young people in Saskatchewan."[332] While an independent office, the Saskatchewan Advocate does make recommendations through public reports that are intended for government to adopt. These reports frequently address systemic issues in relation to child welfare; however, only approximately one quarter of their recommendations are actually implemented.[333] With respect to access to advocacy services, the Saskatchewan Advocate program was a stakeholder in the development of the CFC program. Although the Saskatchewan Advocate office has an explicit mandate to uphold the provisions of the CRC, the lack of legislative action at the provincial and federal level creates a patchwork framework for the implementation of Article 12.

To attempt to make CRC implementation more consistent, the CCRC raised the issue of establishing a National Children's Advocate.[334] They argue that absence of a National Children's Advocate or Commission results in gaps in the services available to children who fall under federal jurisdiction. Additionally, jurisdictional issues exist with respect to whether the provincial children's advocate properly has jurisdiction over FNCFSA:

---

[332] Saskatchewan Advocate: *a voice for children and youth*, online: Advocate for Children and Youth <http://www.saskadvocate.ca/about-us >.

[333] Trevor Bothorel, "Bob Pringle's term as Saskatchewan's children's Advocate won't be renewed" (December 2 2015) online: CBC News <http://www.cbc.ca/news/canada/saskatoon/bob-pringle-s-term-as-saskatchewan-s-children-s-advocate-won-t-be-renewed-1.3348141>.

[334] *Supra* note 56 at 11.

> *Provincial children's advocate was rejected right from the beginning by the First Nations Agencies, and the problem was not advocacy, the problem was jurisdiction. And the provincial government said this is the advocate and you have jurisdiction on reserve.*
> *From the First nations perspective it has always been a rejection against the way it was done and then the way it rolled out. I have had advocates say ' I don't need your approval I have authority over every child and everything and have threatened to go to court.*
> *...we consider ourselves a federal entity and undertaking and we have always maintained that. Our funding comes from the federal government. Should there be a First Nations children's advocate? I believe absolutely there should, but I also believe that it should be a federal children's advocate of some sort, because this is on reserve, we are on reserve. The province is saying, well you only have child welfare because we delegated it to you, so therefore we retain exclusive jurisdiction. What happens then if there is self-government?*[335] *Confidential*

A National Advocate would "resolve gaps for children that occur as a result of federalism"[336]. Pringle notes that he is "a strong proponent for transferring all aboriginal child welfare to First Nations and Métis"[337] and believes that this should include children residing both on and off reserve.[338] The jurisdictional conflict was highlighted by de Whytell:

> *The Child's Advocate office is not independent because they are operating from the same colonial view point of superiority of the First Nations….When the Childs Advocate reaches out, it reaches out as a representative of the government, "oh I deserve all this information, so give it to me"". Well actually, you are not the Child Advocate for the First Nation, you are the Advocate for the province, and therefore monitoring things for the province.*[339] *Josephine de Whytell.*

Woods also notes that the Children's Advocate does not properly have jurisdiction over FNCFSA because "there is no unified voice for the agencies in Saskatchewan."[340] Woods believes that, technically, the Children's Advocate does not have jurisdiction on reserve and that an independent Indigenous children's advocate with federal legislation that staffs

---

[335] *Supra* note 54.
[336] *Supra* note 56 at 15.
[337] *Supra* note 145.
[338] *Ibid.*
[339] *Supra* note 29.
[340] *Supra* note 79.

Indigenous peoples should have jurisdiction on reserve. Woods suggests that, if that were to occur, many of the issues that FNCFSA face could be unified: issues with respect to quality of services could be addressed and jurisdictional issues would no longer sidetrack the larger issues that FNCFSA face. A federal children's advocate with legislative oversight of FNCFSA would support Indigenous governance over child welfare and would be accepted by the FNCFSA as appropriate oversight.

CHAPTER 7: LIMITATIONS, CONCLUSION & RECOMMENDATIONS

Before providing a conclusion, it is notable that there are several limitations to this research and areas that are identified as needing further research. First, , more research is needed with respect to individual nations and what "advocacy" means for a particular nation. As such, it would be beneficial for research to be conducted with First Nations at a more community based level rather than review advocacy on the provincial scale. This is particularly relevant in Canada as cultural practices vary significantly between nations and even neighboring nations and within FNCFSA. Additionally, research is needed with respect to how culturally appropriate child welfare practices could be codified into provincial and federal legislation. Finally, it is noted that limited discussion in this thesis focused on Métis communities and what those communities need with respect to improving child welfare for their children.

This thesis identifies several issues contributing to the child welfare crisis that currently exists in Saskatchewan, namely the vast overrepresentation of Indigenous children in care. Canada's colonial history and Euro-Canadian understanding of childcare housed in an individual rights framework has resulted in misunderstandings of communal rights. Further, this has resulted in Canada's failure to meet CRC standards of meaningful voice for Indigenous children. Failing to implement the CRC in legislative frameworks not only disadvantages all children subject to the child welfare system, but also has disproportionate negative impacts on the Indigenous child's voice.

To properly implement CRC, as it relates to Indigenous children, at a minimum consultation between affected First Nations groups must take place prior to the implementation of provincial and federal programs affecting Indigenous children.

Provincial failure to meet consultation requirements is well documented in both the CFC office and the Children's Advocate office. Without consultation, CRC standards will not be met for Indigenous children. As many of the provincial agreements between the MSS and FNCFSA come to an end, rather than renegotiate s.61 CFSA agreements, a deliberate shift of governance over child welfare services to FNCFSA may be possible. Analysis of the current case law and informant interviews suggests that the current structure of contracting with the province to deliver provincial frameworks of child welfare does not work for First Nations and Métis peoples. Delegated FNCFSA continue to receive reduced program funding as compared to the MSS. This multi-agency structure results in fragmentation and miscommunication all at the cost of the Indigenous child's voice and access to justice. Uneven funding arrangements between First FNCFSA and the MSS raises serious questions around fairness, justice and equity. In order to maximize FNCFSA's ability to find culturally appropriate care for their children, funding must be provided equally to that provided by the provincial government.

In consideration of s.25 of the *Charter*, the Indigenous child's individual rights are potentially derogating from Indigenous self-governance, including the ability to raise children and protect children's culture. Balancing the communal right of cultural integrity is difficult when faced with a child's individual right to stability and security. Both the provincial child welfare system and FNCFSA operate on a threshold system. This system has inadequacies in both provincial and FNCFSA frameworks but its impacts are resulting in a disproportionate number of Indigenous children in care.

Legitimizing communal rights would enhance the child's individual rights and ultimately contribute to the child's best interest. Loss of culture and individual identity

does not contribute to the best interest of the child as set out in the CFSA, and Canada's commitment to the implementation of the CRC and Canada's commitment to the TRC *Calls to Action*. Balancing individual and communal rights would more accurately satisfy the best interest of the child test, which should be enhanced by the inclusion of counsel, a *guardian ad litem* or a band member(s) acting for the child. Suggested here is a role for culturally appropriate child advocacy nested in traditional values that is controlled by First Nations and Métis people and not by the MSS. Resources to meet these needs is the responsibility of the federal government.

Culturally appropriate advocacy for children is essential for a decision maker to ultimately find in the best interest of the child rather than finding in a perceived best interest, which is a risk with the current system of advocacy for children. In order for Saskatchewan to meet the criteria outlined in Article 12 of the CRC it is essential that child welfare be placed back in the hands of Indigenous communities to decide how children's voice will be implemented. Placing child welfare in the Indigenous community will promote the Indigenous child's voice in a meaningful and culturally appropriate way without westernized constraints and ideologies that have contributed to the genocidal effect of what is child welfare in Saskatchewan today. As a result of the research conducted, including discussions with Interviewees, reflection of the TRC's principles and recommendations, and issues identified by the Family Caring Societies Human Rights decision it is recommended THAT:

RECOMMENDATIONS:

1. **The federal government immediately provide funding that is equal to Ministry of Social Services funding provided to the provinces for First Nations Child and Family Service Agencies (FNCFSA) and Métis services.**

2. **The federal government works with and supports FNCFSA in the development of federal legislation that enables FNCFSA and Métis people to govern their own process.**

3. **A deliberate transfer of child welfare to First Nations and Métis control. In the interim, until control is placed back in the hand of Indigenous communities, that the MSS notify any Indigenous child's community immediately upon apprehension of any Indigenous child who is a member of the First Nation or Métis community, or who is eligible for membership.**

4. **The creation of an Indigenous National Children's Advocate which has jurisdictional oversight of First Nations and Métis child welfare agencies which can ensure that FNCFSA mandates, policies and legislation are being conformed with.**

5. **A commitment from the federal government and provinces that the *Convention on the Rights of the Child* be explicitly legislated for under both provincial and federal legislation involving children.**

6. **"Meaningful voice" for First Nations children not be limited to the use of a lawyer in child welfare matters, but rather be implemented by the child's community.**

7. **Lawyer representation for children be available in all court processes involving children and not be limited to child welfare matters.**

8. **Culturally appropriate representation for children not be discretionarily applied but mandated for in all child welfare matters.**

Future research in the area of child welfare is needed. Specifically, it would be useful to have recommendations from Saskatchewan First Nation communities that could provide direction as to how to implement 'voice' for Indigenous children in child welfare matters. It may be the case that Indigenous communities have very different concepts of how to provide their children with voice in matters affecting them. As such, it is essential that more research be conducted with respect to individual communities.

Finally, it is my hope that this research can be used to help policy makers and lawyers acting in child welfare cases identify the deeply rooted cultural biases that exist in the justice system. It is the obligation of people practicing in this area of the law to ensure the child's well being and voice is heard. This research is for Indigenous children in Saskatchewan.

APPENDIX A: RESEARCH INTERVIEW FRAMEWORK

Introductory questions:

- What is your role/employment currently?
- How/why did you become interested in this area of work?
    - Personal history
    - Employment history
    - What organizations have you worked with: Reasons for becoming interested in child advocacy/child welfare (and specific organization if applicable)?

Counsel for children in MSS Cases: (Questions for Counsel)

- How many files have you been involved in that have required a independent child advocate to act on behalf of the child?
- Have you been involved with a child who has been court appointed independent counsel?
- When considering child advocacy are you more concerned with the "best interest principle" of the child or advocating on behalf of the "child's wishes and opinions". What are the pros and cons of each model?
- What barriers exist for children having to access of counsel?

Funding issues:

- What funding is available in your organization/practice to advocate on behalf of children. Who provides this funding?
- What resources are needed (federal/provincial/Indigenous Child welfare Agencies and MSS Agencies)
- Recent Human Rights Decision (FNCFCS) -

Reasons for Child Apprehensions:

- In the child welfare context, what are the primary reasons you see children being apprehended from their families?
- What preventative programs could be introduced to support families and reduce child apprehensions?
- How has our colonial history shaped the current child welfare crisis for Indigenous children and communities in Saskatchewan?
    - Is the current system as form of cultural genocide?
    - How are systemic issues impacting current statistics in the province?

Indigenous Children in SK and TRC Calls to Action:

- What issues can you identify as being specific to Indigenous children (concerning both residing on reserve/off reserve)?
- What training do child advocates receive in relation to cultural sensitivities and awareness in relation to Indigenous children?
- What policy/legal/legislation could improve child welfare in SK
- What are issues specifically faced by First Nations Operated Agencies?
- Do you see a need for a national children's advocate/ombudsman?
- Do you feel that children of all ages should have legal counsel or an individual advocate, or should advocacy be specific to a particular age or at all?
- How can the TRC's Calls to Action be implemented in SK child welfare cases and services?

International obligations:

- Familiarity with Canada's international obligations under the CRC and UNDRIP
- CRC (for example) mandates that children have a "voice" in matters concerning them. What would meaningful voice for Indigenous children in Canada (specifically SK) require?

APPENDIX B: ETHICS APPROVAL

UNIVERSITY OF SASKATCHEWAN

Behavioural Research Ethics Board

Certificate of Approval

PRINCIPAL INVESTIGATOR	DEPARTMENT	BEH#
Wanda Wiegers	Law	15-369

INSTITUTION(S) WHERE RESEARCH WILL BE CONDUCTED
College of Law
University of Saskatchewan
15 Campus Drive
Saskatoon S7N 5A6

STUDENT RESEARCHER(S)
Jamesy A. Patrick

FUNDER(S) UNFUNDED

TITLE: Child Advocacy in Saskatchewan: a Review of the Current Status of Child Advocacy in Saskatchewan

ORIGINAL REVIEW DATE	APPROVAL ON	APPROVAL OF:	EXPIRY DATE
01-Dec-2015	14-Jan-2016	Application SampleLetter Consent Form Sample Questions	13-Jan-2017

Full Board Meeting ☐ Date of Full Board Meeting:

Delegated Review ☒

CERTIFICATION
The University of Saskatchewan Behavioural Research Ethics Board has reviewed the above-named research project. The proposal was found to be acceptable on ethical grounds. The principal investigator has the responsibility for any other administrative or regulatory approvals that may pertain to this research project, and for ensuring that the authorized research is carried out according to the conditions outlined in the original protocol submitted for ethics review. This Certificate of Approval is valid for the above time period provided there is no change in experimental protocol or consent process or documents.

Any significant changes to your proposed method, or your consent and recruitment procedures should be reported to the Chair for Research Ethics Board consideration in advance of its implementation.

ONGOING REVIEW REQUIREMENTS
In order to receive annual renewal, a status report must be submitted to the REB Chair for Board consideration within one month prior to the current expiry date each year the study remains open, and upon study completion. Please refer to the following website for further instructions: *http://research.usask.ca/for-researchers/ethics/index.php*

[redacted], Chair
University of Saskatchewan
Behavioural Research Ethics Board

Please send all correspondence to:

Research Ethics Office
University of Saskatchewan
Box 5000 RPO University, 1602-110 Gymnasium Place
Saskatoon SK S7N 4J8
Telephone: (306) 966-2975 Fax: (306) 966-2069

BIBLIOGRAPHY

LEGISLATION

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11.

Canadian Human Rights Act R.S.C. 1985, c. H-6.*Child and Family Services Act*, R.S.O. 1990, c. C.11. *Child and Family Services Act,* S.S. 1989-90, c. C-7.2.

Child Protection Act 1999 (Qld) rr 20-1.

Constitutional Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c.11.

Indian Act, RSC 1985, c I-5.

Indian Child Welfare Act, 25 U.S.C. § 1902.

INTERNATIONAL TREATIES & CONVENTIONS

Declaration on the Rights of the Child, GA Res 1386 (XIV), UNGAOR, 16th Sess, Supp No 16, UN Doc A/4354, (1959)

The United Nations General Assembly, *Convention on the Rights of the Child*, *(20 November 1989)* vol. 1577, p. 3 (entered into force 2 September 1990) [*CRC*].

The United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, online: http://www.refworld.org/docid/471355a82.html [accessed 31 March 2016].

JURISPRUDENCE

Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew 2014 ONCA 646.

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817

Boukema v. Boukema (1997), 31 R.F.L. (4th) 329 (Ont.Sup. Ct.).

B.(R.) v. Children's Aid Society of Metro Toronto, [1995] 1 S.C.R. 315, 122 D.L.R. (4th)
Canadian Foundation for Children, Youth and the Law v Canada (AG), [2004] 1 S.C.R. 76, 2004 SCC 4..

Campbell v. British Columbia (Attorney General) [2000] B.C.J. No. 1524

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development), 2011 CHRT 4 (CanLII).

F. (M.) v. L. (J.) 2002 CarswellQue 337, [2002] J.Q. No.480 (Que. C.A.)

Hamilton Health Sciences Corp. v. D.H., 2014 ONCJ 603A

Hamilton Health Sciences Corp. v. D.H., 2015 ONCJ 229
Racine v. Woods [1983] 2 S.C.R. 173 at 189.

Re Alexandria P. 176 Cal. Rptr. 3d 468 (Ct. App. 2014).

R. v. D.B., [2008] 2 S.C.R. 3, 2008 SCC 25 [*D.B.].*

Re R.T et al. (2005), 248 D.L.R. (4h) 303 (Sask. Q.B.).

Re W. (1980) 27 O.R. (2d) 314, at 5 (Prov. Ct.)

Saskatchewan v STC Health & Family Services Inc, 2016 SKQB 236 (CanLII).

West Region CFS v. L.A.H. et al. and M.H. et al 2016 MBQB 48.

Winnipeg Child & Family Services (Central Area) v. W. (K.L.) 2000 SCC 48, 2000 CSC 48, 2000 CarswellMan 469.

SECONDARY SOURCES

"Aboriginal Children in Care: Report to Canada's Premiers" (Prepared by: Aboriginal Children in Care Working Group, 2015) online: <http://www.canadaspremiers.ca/phocadownload/publications/aboriginal_children_in_care_report_july2015.pdf>.

American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (August 2011, adopted February 2012), section 7(c). online: <http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf>

Appell, Annette R. ""Bad" Mothers and Spanish-Speaking Caregivers" (2007) *7* Nev. L.J. 759.

Appell, Annette R. "Representing children representing what? Critical reflections on lawyering for children" (2008) 39:3 Colum HRL Rev 573.

Appell, Annette R & Bruce A. Boyer. "Parental Rights vs. the Best Interests of the Child: A False Dichotomy in the Context of Adoption" (1995) 2 Duke J. Gender L. & Pol'y 63 at 66.

Archard, David. *Children: Rights and Childhood*. (New York, Routledge, 1993).

Arnot, David M (Honourable Judge). *Statement of Treaty Issues*. (Office of Treaty Commissioner of Saskatchewan, October, 1998).

Baistow, K. & G. Wilford, "Helping Parents, Protecting Children: Ideas from Germany.

(2000) Children and Society 14 343.

Bala, Nicholas & Rachel Birnbaum & Lorne Bertrand. "Controversy about the role of children's lawyers: Advocate or best interest guardian? Comparing practices in two Canadian Jurisdictions with different policies for lawyers" (2013) 5 Family Court Rev 681.

Bao-Er, "Indigenous Guardians Ad Litem Are Needed in the Children's Court" (2009) 47(11) Law Society Journal 64.

Bennett, Marlyn., Cindy Blackstock, Richard De La Ronde. "A literature review and annotated bibliography on aspects of Aboriginal child welfare in Canada 2nd Ed" (Ottawa: First Nations Child and Family Caring Society, 2005) online: <www.fncfcs.com/docs/ AboriginalCWLitreview_2ndEd.pdf relationship based on self-determination.>.

Blackstock, Cindy. "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice lose" (2011) 33:1 Children and Youth Services Rev 187.

Blackstock, C., Cross, T., George, J., Brown, I, & Formsma, J. *Reconciliation in child welfare: Touchstones of hope for Indigenous children, youth, and families*. Ottawa, ON, Canada: First Nations Child & Family Caring Society of Canada / (Portland, OR: National Indian Child Welfare Association, 2006.) online: <http://www.fncaringsociety.com/sites/default/files/docs/Touchstones_of_Hope.pdf>.

Bothorel, Trevor. "Bob Pringle's term as Saskatchewan's children's Advocate won't be renewed" (December 2 2015) online: CBC News <http://www.cbc.ca/news/canada/saskatoon/bob-pringle-s-term-as-saskatchewan-s-children-s-advocate-won-t-be-renewed-1.3348141>.

Canadian Coalition on the Rights of the Child. *Right in Principle, Right in Practice: Implementation of the Convention on the Rights of the Child in Canada*. (Ottawa, Ontario: Canadian Coalition on the Rights of the Child, 2011) online: <http://rightsofchildren.ca/monitoring>.

Carter, Mark. "An Analysis of the "No Hierarchy of Rights" Doctrine" 12 Rev. Const. Stud. 19 2006-2007.

Carter, Mark. ""Debunking" parents' rights in the Canadian constitutional context"(2008) 86 Can Bar Rev 479.

Child Welfare Services in Canada: Aboriginal & Mainstream (2009-2010) National Collaborating Centre for Aboriginal Health online: < http://www.nccah-ccnsa.ca/docs/fact%20sheets/child%20and%20youth/NCCAH-fs-ChildWelServCDA-2EN.pdf>.

Counsel for Children Office. The Program Manual. December (2014) online: <http://www.justice.gov.sk.ca/cfc/lawyer-manual>.

Cowden, Mhairi. "Capacity, Claims and Children's Rights" (year) Contemporary Political Theory Vol. 11, 4, 362

Dwyer, James G. "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 Cal. L. Rev.

Elrod, Linda D. "Client-Directed Lawyers for Children: It is the "Right" Thing to do" (2007) Pace Law Review 27 869.

Edgar, Rob. "Collective Rights (Canada)", (2009) 26 Sk L Rev 1.

Fass, Paula S. & Mary Ann Mason, eds., *Introduction to Childhood in America* (New York: NYU Press, 2000).

Ferguson, Lucinda. "Not Merely Rights for Children but Children's Rights: the theory gap and the assumption of the importance of children's rights" (2013) 21 Int'l J of Child Rts.

Final Report on the Senate Committee. *Children the Silenced Citizens.* (2007) online: <www.fncfcs.com/docs/Children_TheSilentCitizens_April2007.pdf >.

First Nations Child and Family Caring Society of Canada, "Staying at Home: examining the implications of least disruptive measure in First Nations Child and Family Service Agencies" (2004) online: <http://www.fncaringsociety.com/sites/default/files/docs/Staying_at_Home.pdf>.

First Nations Child and Family Caring Society of Canada, "Indigenous Children rights and reality" (2006) online:<http://www.fncfcs.com/sites/default/files/docs/ISGReport.pdf >.

Galley, V. *Summary Review of Aboriginal Over-representation in the Child Welfare System.* Prepared for: Saskatchewan Child Welfare Review Panel, 2010.

Glaser BG, Strauss AL. *The Discovery of Grounded Theory: Strategies for qualitative research* (1967) New York: Aldine de Gruyter.

Goldwater Institute, "Goldwater Institute Files Class Action Lawsuit Against Parts of the Indian Child Welfare Act" (July 7 2015) Online <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/goldwater-institute-files-class-action-lawsuit-aga/>.

Government of Canada, *Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement* (October 2007) online: <http://www.aadnc-aandc.gc.ca/eng/1326400134161/1326400183723>.

Guggenheim, Martin. *What's Wrong with Children's Rights* (Boston; Harvard University Press, 2005).

Hale, Brenda. "Understanding Children's Rights: Theory and Practice" (2006) 44 Family Court Review 350.

Harris, Maria. *Advocacy for Children in Tasmania Committee (ACTC) Report and Recommendations*, (2013) The University of Western Australia online: <http://www.aasw.asn.au/document/item/6571>.

Harris-Short, Sonya. *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children Protecting the Vulnerable Under International Law*. Ashgate Publishing Limited , England 2012.

H.L.A. Hart, "Essays on Bentham: Studies in Jurisprudence and Political Theory", at 183.

Hensley, Dale. "Role and responsibilities of counsel for the child in Alberta: A practitioner's perspective and a response to Professor Bala." (2006) 43 Alb L Rev 871.

Isaac, Thomas."Charter of Rights and Freedoms: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002) 21 Windsor Yearbook of Access to Justice 431.

Kilbourne, Susan. "The wayward Americans: why the USA has not ratified the United Nations Convention on the Rights of the Child"(1998) 10 Child and Family Law Quarterly 243.

Kozlowski, Anna & Vandna Sinha & Gail Hartsook & Shelley Thomas & Monty H Montgomery. *First Nations Child Welfare in Saskatchewan (2011),* online: Canadian Child Welfare Research Portal <http://cwrp.ca/infosheets/first-nations-child-welfare-saskatchewan>.

Lundy, Laura. "'Voice' is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33:6 British Educational Research Journal 927.

Margolin, C. R. "Salvation versus Liberation: The Movement for Children's Rights in a Historical Context" (1978) Social Problems, Vol. 25, No. 4, pp. 441-452.

McDonald, David & Daniel Wilson. "Poverty or Prosperity: Indigenous Children in Canada" Canadian Centre for Policy Alternatives (2013) online: <www.policyalternatives.ca>.

McLachlin, Beverley (Chief Justice)."Unwritten Constitutional Principles: What is Going On?" (Lord Cooke Lecture, delivered at the Lord Cooke lecture, Wellington, New Zealand, 1 December 2005), [unpublished].

McNeil, Kent. "Indigenous Rights Litigation, Legal history and the Role of Experts" 2014 77 Sask. L Rev 173 at 185.

National Children's Commissioner Website, (2014) Online: <http://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights>.

Newman, Dwight G. "Theorizing Collective Indigenous Rights" (2006 -2007) 31 Am. Indian L. Rev. 273.

Parkes, Aisling. *Children and international human rights law : the right of the child to be heard* (Routledge, 2013).

Peters, Jean Koh. "How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study" (2006). Faculty Scholarship Series Paper 2146 online:<http://digitalcommons.law.yale.edu/fss_papers/2146>.

Ross, Nicola M. "Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales" (2013) 27:3 Int's JL, Pol'y & Fam 332.

Salgo, L. "Child protection in Germany", in Freeman, M and Veerman, P eds (1992) The Ideologies of Children's Rights, Netherlands, Kluwer Academic

Saskatchewan Advocate, *A Voice for Children and Youth*: online: <http://www.saskadvocate.ca/>

Saskatchewan, Ministry of Justice and Attorney General. "Family and Youth Access to Justice Committee Final Report" (July 2007) at page 18 online: <http://www.justice.gov.sk.ca/Final-Report-Family-and-Youth.pdf >.

Shannon, G. "Giving a voice to the child-the Irish experience. (2000) Int'l JL Pol'y& Fam 14, 131.

Sinha, V. , Kozlowski, A. (2013). *The Structure of Aboriginal Child Welfare in Canada.* The International Indigenous Policy Journal, 4(2) online: <http://ir.lib.uwo.ca/iipj/vol4/iss2/2>.

States News Service, *Human Rights Council Holds Panel Discussion on Access to Justice for Indigenous Peoples*. (Sept. 18, 2012). Maryland, United States.

Stasiulus, Daiva. "The Active Child Citizen: Lessons from Canada Policy and the Children's Movement." (2002) 6 Citizenship Studies 507.

Stötzel, M & J. M Fegert. "The representation of the legal interests of children and adolescents in Germany: A study of the children's guardian from a child's perspective" (2006) Int'l JL Pol'y & Fam 20, 201.

Thor Bjorgvinsson, David. *The Intersection Between International and Domestic Law*, (2015, Edward Elgar Publishing Ltd., Cheltenham UK).

Truth and Reconciliation Commission of Canada, *Calls to Action* (2015) online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

United Nations Human Rights office of the High Commissioner, Committee on the Rights of the Child "*Monitoring Children's Rights*" online: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>.

UNICEF Innocenti Research Centre, *Law Reform and the Implementation on the Convention on the Rights of the Child,*(2007) online: <http://www.unicefirc.org/publications/pdf/law_reform_crc_imp.pdf>.

United Nations, International Human Rights Instruments, Core document forming part of the reports of States Parties: Canada,HRI/CORE/1/Add.91, Office of the United Nations High Commissioner for Human Rights, Geneva, 12 January 1998, para. 138.Child and Youth Advocates, Submission to the Senate.

Ventrill, Marvin. "Legal representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice in National Association of Counsel for Children (ed), *NACC Children's Law Manual Series* (1999) 167.

Walsh, Tamara & Heather Douglas. "Lawyers, advocacy, and child protection" (2011) 35 Melbourne UL 621.

INTERVIEWS & CONFERENCES

Confidential Interviewee. Telephone Interview. Director of FNCFSA, August 2016.

Glenda Cooney. Personal Interview. Past-Deputy Children's Advocate. Independent Consultant for FNCFSA. July 2016.

Josephine de Whytell. Personal Interview. Lawyer, Saskatoon Saskatchewan. June 2016.

Bob Pringle. Personal Interview. (Past) Saskatchewan Children's Advocate. July 2016.

Betty Ann Pottruff. Telephone Interview. Director Counsel for Children and Youth. Regina August 2016.

Raven Sinclair. Personal Interview. Associate Professor, Faculty of Social Work, University of Regina, June 2016.

Raymond Shingoose. Personal Interview. Executive Director Yorkton Tribal Council Child and Family Services. June 2016

Sheri Woods. Personal Interview. Counsel for Children (Lawyer), Saskatoon Saskatchewan. August 2016.

Re-Imagining Child Welfare in Canada, Symposium. Toronto Ontario, Osgoode Law School (York University) October 22, 2016.

Counsel for Children and Youth Training. October 15, 2016 at Wanuskewin Heritage Site, Saskatoon Saskatchewan.