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A Choice for K'aila: Child Protection and First Nations Children

Jocelyn Downie

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Out of respect for the First Nations oral tradition and a belief in the subtle power of narrative, I begin this paper with a story.[1]

On June 13, 1989, K'aila Will Paulette was born at home in Fort Fitzgerald, Alberta, to Francois and Leslie Paulette. He seemed well and thrived during his first weeks of life. However, one day his mother noticed a small bruise on the side of his spine. This bruise was the first portent of difficult times.

At a follow-up medical appointment later that summer in Edmonton, blood tests revealed that K'aila had a liver disease known as biliary atresia. Francois and Leslie were told that without treatment for this liver disease, K'aila would die (probably within six to twelve months). They were also told that the only available treatment option for biliary atresia is liver transplantation. Francois and Leslie were faced with a difficult choice for K'aila — death within a year or a liver transplant. This is the story of their choice and the consequences of this choice.

After talking extensively with Dr. Adrian Jones (K'aila's pediatric gastroenterologist), Dr. Cal Stiller (the Director of the Transplant Program in London, Ontario, where K'aila would have gone for assessment), other doctors, and two families with children who had received transplants, Francois and Leslie

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* Jocelyn Downie was a Clerk at the Supreme Court of Canada in 1993 when this article was written.

1 This story was compiled from a videotape recording of "Man Alive" on CBC, newspaper clippings from the time, and *Saskatchewan (Minister of Social Services)* v. *P.(F.)* (1990), 69 D.L.R. (4th) 134 (Sask.Prov.Ct.). For stylistic reasons, I will not use footnotes to reference quotes. The quotations from Francois, Leslie, and Dr. Jones were taken from the recording and the quote from Mr. Justice Arnot was taken from his decision.
Since Mr. Justice Arnot and Dr. Jones act in a professional capacity in this story, I will use their professional names. I mean no disrespect to the Paulette family in my use of their first names. I will draw on this story throughout the paper.

considered the options. They reviewed all of the medical information they had gathered about transplantation. They also thought long and hard about their values and beliefs.

Francois is a Dene Indian and Leslie is half Mohawk and half white. Their "indianness" is an integral part of their identities and it infuses their value and belief systems. Together, Francois and Leslie decided to reject the transplant option, to provide K'aila with supportive care only, and to let him die.

For spiritual reasons, Leslie was uncomfortable with the general practice of transplantation:

> My misgivings came from a recognition that in this life our physical being is intimately connected with our spiritual being and what's more, putting part of somebody else from another body that had another spiritual identity connected with it, putting that into his body, just the possible implications of that were really disturbing to me.

Francois reflected on whether liver transplantations violate his view of the fundamental order of nature. He noted the fact that liver transplantations are not always successful (because the liver can be rejected) and, even if successful, they have serious side-effects. He too made his point with reference to his fundamental beliefs:

> All that we have here on this Mother Earth is a blessing and gift of the Creator. To me there is a fundamental order that I strongly believe in . . . if the Creator had meant it to be that we can take another liver and put it into another person's body and there's no complications whatsoever, nothing whatsoever, you sew up the person and everything is all right, everything checks out — but that's not the case.

Leslie asked how the known and unknown harms of transplantation stack up against the uncertain benefits. She asked herself:

> Is this going to give my son a chance to heal, to become well and whole again? If so, it's really worth looking at. But from what I learned about the aftermath, the effects of the drugs on his body, his body would be like a war zone for the rest of his life.

She drew an analogy:

> It's just like holding your hand open and a butterfly can land and as long as you keep your palm open that butterfly sits there and you think, wow, he's beautiful. His colours, his markings are so delicate. But then the other side of it is that he can leave any time and you just have to accept that and the only way that you can hold onto him is to [close your hand] and that option was given to us to put him through the transplant to try to hold onto him but I really felt like there was such a risk of going like this [closing and then opening your hand] and then "Oh God. What have I done to him?" You know, his wings are all crumpled and crippled, his colours are all faded. And it seemed right to just keep my palm open and appreciate how beautiful he was knowing that at any time he could go.

And she asked herself an important question:

> Who the hell are we doing this for? For him? Who would we be doing it for? Does he really want to go through this? Or do we want to put him through this because we don't want to lose him?

Because of the long-term side-effects of liver transplantation, Leslie concluded that the benefits for K'aila did not outweigh the harms. Therefore, despite the fact that she desperately wanted to keep K'aila with her, she decided to let him go.

Francois and Leslie told Dr. Jones of their decision for K'aila. Dr. Jones was then torn because he felt that Francois and Leslie's decision was not best for K'aila. He too looked to the medical information available to him and to his own beliefs and values.

He felt that although parents should make decisions for their children, their decisions should be in accordance with what society considers is best for children:

> The parents are stewards of the child for society . . . We don't own our children but we have a responsibility to society to bring those children up.

He felt that his role is to preserve the child's autonomy (whether it be actual or potential):

> I want to fight to let that child make his own decision. That's really what it comes down to. My job is to try to allow that child to make his own decision about his future.

He thought that the benefits of liver transplantation outweigh the harms and it was therefore unreasonable for K'aila not to be given a transplant:

> I felt that my responsibility as a pediatrician was for the child and this child had an opportunity to live with a pretty good quality of life.

In the face of the Paulettes' decision and his own beliefs and values, Dr. Jones called the Children's Guardian in Alberta and he was advised to call the Department of Social Services. The Department of Social Services decided that K'aila was a child in need of protection and it got a court order to apprehend K'aila anywhere in Alberta.

To escape the grasp of the court order, Francois and Leslie took K'aila and his older brother to live with friends in Saskatchewan. However, they did not find peace there. At the request of the Alberta government, the Department of Social Services in Saskatchewan applied to the court for permission to seize K'aila and send him to London for a transplant assessment.

On April 20, 1990, Mr. Justice Arnot refused the application on the grounds that Social Services had failed to prove that K'aila was in need of protection. Mr. Justice Arnot justified his conclusion on the grounds that qualified medical practitioners disagreed about the merits of liver transplantation over supportive care. He ignored the fact that Francois and Leslie are First Nations people until two thirds of the way into his judgement, and he said that "the parents' reasons for withholding consent are clearly personal and not cultural."

Within six weeks of the decision, K'aila died. He died in Saskatchewan in his mother's arms in a peaceful and calm setting. After a service at the Fort Fitzgerald chapel, he was buried in the woods with Indian singers and drummers playing him a traditional going home song.

Introduction

The horrors that were perpetrated on First Nations children and First Nations communities in the name of child welfare have been well-documented.[2]

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[2] See generally, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 12 August 1991) (Co-commissioners: A.C. Hamilton & C.M. Sinclair); B. Morse, "Native Indian and Metis Children in Canada: Victims of the Child Welfare System" in C.K. Verma & C. Bagley,

It is now clear that child welfare services, when provided at all, were provided to First Nations people in a eurocentric, assimilationist, racist, and destructive manner. I do not propose to go over areas that have been well-covered by others. Instead, in this paper, I will shift the focus to an area that has been neglected in the literature. Most of the attention of academics and activists has focused on what happens to children *after* they have been apprehended by child welfare agencies (for example, placement in residential schools and through transracial adoptions). Relatively little attention has been focused on what happens *before* this, i.e. what happens during the process of determining whether children are in need of protection. Therefore, in this paper, I will examine child protection and First Nations children.

K'aila's story raises serious questions about child protection and First Nations children. Was it appropriate that a non-First Nations social services agency made the initial assessment of whether K'aila was in need of protection, that a non-First Nations court had the power to decide whether K'aila was in need of protection, and that Francois and Leslie's decision was held to a non-First Nations standard of care? Was K'aila well-served by the child welfare system?

The central questions in this area include: 1) Who *does* decide whether a child is in need of protection in the context of child protection in general? According to what standard of care?; 2) Who *should* decide in this general context? According to what standard of care?; 3) Who *does* decide whether a child is in need of protection in the context of parental decision-making about medical care? According to what standard of care?; and 4) Who *should* decide in this particular context? According to what standard of care?

In this paper, I will focus on questions 3 and 4, i.e. I will examine child protection only in the context of parental decision-making about medical care. I have chosen to limit the paper in this way in order to avoid the confounding factor of parental behaviour coloured by alcoholism, drug abuse, and domestic violence[3] and to lay bare the essence of the self-government debate: whose

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eds., *Race Relations and Cultural Differences: educational and interpersonal perspectives* (London: Croom Helm, 1984); P.A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 Can. J. Women and L. 1; and E.F. Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986) 5 Can. J. Fam. L. 111.

[3] Examples of cases coloured by alcohol abuse that deal with the standard of care for child protection in the general context include: *Mooswa* v. *Minister of Social Services (Sask.)* (1976), 30 R.F.L. 101 (Sask. Q.B.); *Re Whitecap* (1980), 2 Sask. R. 429 (U.F.C.); *Re E.C.D.M.* (1980), 17 R.F.L. (2d) 274 (Sask. Prov. Ct.); and *Director of Child and Family Services* v. *B.B.* (1988), 14 R.F.L. (3d) 113 (Man. C.A.); *B.(B.)* v. *Director of Child and Family Services (Man.)* (1989), 62 Man. R. (2d) 233 (S.C.C.). To avoid muddying the waters, I will not consider these cases in this paper.

beliefs and values should determine the lives (and deaths) of First Nations people in Canada? The control of parental decision-making about medical care is a microcosm with macro-implications. Through a detailed consideration of the microcosm, I hope to reveal these macro-implications.

First, I will show that it is the courts who currently decide whether First Nations children are in need of protection, and they do so using a non-First Nations standard of care. I will do this with reference to child welfare legislation and the *Criminal Code*. I will suggest some alternative approaches that would shift the decision-making authority to First Nations people and introduce a First Nations standard of care.[4] Then I will consider how one might approach the questions of who *should* decide and according to what standard of care. I will conclude that this final question is extremely important and should be an explicit part of the current self-government negotiations.

Who Does Decide and According to What Standards?

Presently, the legal system impacts on parental decision-making about medical treatment[5] for children in at least two ways: 1) through the provincial child welfare provisions; and 2) through the *Criminal Code* of Canada. Effectively, the provincial child welfare provisions apply to hearings in which social services officials attempt to remove a child from parental authority on the grounds that the child is in need of protection. The *Criminal Code* provisions apply in circumstances in which a child is at risk of harm, has been harmed, or has died as a result of the parents' failure to provide the necessaries of life. Let us consider each of these in turn.

Child Welfare Legislation

a) The Traditional Approach

Although each province and territory has its own child welfare legislation, the acts are almost identical with respect to medical treatment (except in the

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[4] I should note here that there may not be only one voice that articulates the First Nations standard of care. I have therefore used the expression "a First Nations standard of care" throughout this paper. Implicit in this expression is the recognition that there may well be more than one.

[5] The reader should keep in mind that decision-making about medical treatment can lead to parents accepting the offered treatment, choosing an alternative form of treatment, or choosing non-treatment.

Yukon[6]). Section 37(2)(e) of Ontario's *Child and Family Services Act* is typical:

> 37(2) A child is in need of protection where . . .
> (e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to the treatment;[7]

An examination of the case law will clarify how child welfare legislation across Canada has been interpreted by the courts.

The case law on child protection can be divided into two categories: first, child protection necessitated by the parents being unable to provide "medically necessary" care; and second, child protection necessitated by the parents being unwilling to provide it. Let us consider each of these in turn.

The courts have demonstrated a readiness to find children in need of protection when their parents are unable to provide "medically necessary" care. For example, in *Director of Child Welfare (P.E.I.)* v. *H.(D.)*,[8] the P.E.I. Supreme Court found a ten-month-old infant with special neurological developmental requirements to be in need of protection as the child's mentally handicapped mother was incapable of meeting those physical, emotional and medical needs.[9]

The approach taken by the courts in this area appears to discriminate against First Nations people because it favours those who live near medical centres (i.e. urban dwellers). Many First Nations people live far away from any health care professionals (and even further away from tertiary care centres) and, for that

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6 The Yukon *Children's Act*, R.S.Y. 1986, c. 22 does not include the failure of parents to consent to medical care in its section on children in need of protection. Instead, in a separate section (s.132(1)), it provides that a judge may authorize child and family services to give consent to medical treatment without taking the child into care.

7 R.S.O. 1990, Chap.C.11.

8 (26 June 1986) Doc. No. FDS-825 (P.E.I.S.C.), summarized at [1986] W.D.F.L. 2222.

9 Some adoption cases also suggest that no one should be surprised to see this readiness echoed in child protection cases. See, for example, *McNeil* v. *Superintendent of Family and Child Services*, [1983] 4 C.N.L.R. 41 (B.C. C.A.), *Wilson and Wilson* v. *Young and Young* (1983), 28 Sask. R. 287, and *S.A.L. and G.I.L.* v. *Legal Aid Manitoba, The Legal Aid Services of Manitoba*, [1983] 1 C.N.L.R. 157 (Alta. C.A.). In all of these cases, the courts held that the First Nations parents' inability to provide medically necessary care was an important factor in determining the appropriate disposition for the case. However, these cases are relegated to a footnote because the standard for determining the disposition of a case is the best interests standard. This is not the standard for determining whether a child is in need of protection. Therefore, it not clear whether one can draw much more than suspicions from these cases.

reason, may face an increased risk of losing their children to the child welfare system. This problem can be illustrated by reference to a slightly modified version of the K'aila case. If the court had found that the liver transplant was in K'aila's best interests, then K'aila would have been sent to London for an assessment. If accepted into the transplant program, then he would have had to spend many months in London (both waiting for the transplant and recovering afterwards). Would the Paulettes have been able to relocate for that time? Even after the transplant recovery was complete, K'aila would have required considerable follow-up care. It is possible that the Paulettes could not have provided adequate care from Fort Fitzgerald. If the Paulettes had not been willing or able to move to an urban centre, would the court then have ordered the permanent apprehension of K'aila on the basis that his parents were unable to provide him with necessary medical care?

It can be concluded, that it is the courts who traditionally decide whether children are in need of protection and they find children to be in need of protection when their parents are unable to provide "medically necessary" care (according to standards set by the court by reference to the medical profession). Neither the decision-making authority nor the standard of care is First Nations.

The courts have also demonstrated a readiness to find children in need of protection when their parents were unwilling to provide "medically necessary" care. In *Re R.K.*,[10] an Alberta court found the child to be in need of protection as the boy's parents were refusing to consent to a blood transfusion because of their religious beliefs, the risks associated with blood transfusions, and their belief that there was a safer and better alternative available. The criteria for "medically necessary" care suggested by the court were that treatment is not necessary if: 1) the child's life or health would not be seriously endangered without it; 2) the proposed treatment would not significantly improve his chances of survival or state of health; 3) the treatment recommended presents greater risks to the life or health of the child than the condition itself; or 4) another equally safe form of treatment is readily available.[11] In *Re R.K.*, these criteria were not interpreted in a manner sensitive to the religious beliefs of the parents.[12]

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10 (1987), 79 A.R. 140 (Prov.Ct.).

11 *Ibid.* at 144.

12 In *Re S.M.*, November 3, 1988, the B.C. Provincial Court took this same approach. In *Re C.P.* (1988), 215 A.P.R. 287 (Nfld. U.F.C.), a Newfoundland court held that a child was in need of protection because his parents failed to consent to a blood transfusion. In *Re P.(B.)*, April 20, 1987, Ont.F.C., an Ontario court came to a similar conclusion.

In *New Brunswick (Minister of Health and Community Services)* v. *B.(R.)*,[13] the court held that a severely retarded and neurologically handicapped ten-year-old girl was in need of protection because her parents refused to consent to treatment with antibiotics. Her parents and her neurologist believed that it was in her best interests to be allowed to die. Her pediatrician believed that she should be treated. The court held that not treating the infection would violate ss.7, 12, and 15 of the *Canadian Charter of Rights and Freedoms*.[14]

In *Children's Aid Society of Peel* v. *B.(C.)*,[15] an Ontario court held that a child was in need of protection because the child's mother refused to consent to a gastrostomy necessary for the child's survival (the mother felt that the gastrostomy was not necessary). In *Re Castle*,[16] a Saskatchewan court included the mother's unwillingness to administer oil and ointments and keep appointments with the physician as factors in finding a child in need of protection.

In *Wintersgill and Minister of Social Services*,[17] a Saskatchewan court held that a child was in need of protection when its Jehovah's Witness parents refused to consent to blood transfusions. However, softening its stance somewhat, the court held that:

> parents are not obliged to provide the best and most modern methods. They must provide that care which a duly qualified medical practitioner deems essential to the life and health of the child.[18]

In *Saskatchewan (Minister of Social Services)* v. *P.(F.)*[19] (K'aila's case), a Saskatchewan court held that a First Nations child was not in need of protection despite the fact that his parents were refusing a liver transplant without which he would die. The court's decision rested on the fact that since both the transplant and supportive care (the option the parents preferred) were within accepted medical practice, the parents' choice was not "unreasonable".

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13 (1990), 70 D.L.R. (4th) 568 (N.B.Q.B.).

14 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter the *Charter*].

15 *Children's Aid Society of Peel v. B.(C.)*, February 9, 1988, Brampton 095/87 (Ont. Fam. Ct.).

16 (1980), 8 Sask. R. 442 (U.F.C.).

17 (1981), 131 D.L.R. (3d) 184 (Sask. U.F.C.). The most recent in a long line of cases involving Jehovah's Witness parents is the March 17, 1994 Supreme Court of Canada dismissal (with reasons to follow) of the appeal of *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto* (1992), 96 D.L.R. (4th) 45 (Ont. C.A.).

18 *Ibid.* at 199.

19 *Supra* note 1.

At first glance, the cases of *Re J.W.* and K'aila might appear to be significant for child protection and medical decision-making for First Nations children. In *Re J.W.*, the court admitted that parents need not provide the best and most modern methods of health care. In K'aila's case, the court upheld the parents' decision to refuse the medical treatment recommended by a physician. However, both of these cases may actually be empty victories for First Nations parents. In *Re J.W.*, the court relaxed the standard for necessary medical care, but kept the assessment of medical necessity in the hands of a "duly qualified medical practitioner". First Nations people might have difficulty finding practitioners who the court will consider "duly qualified" to endorse treatment decisions informed by First Nations values and beliefs. In K'aila's case, the court upheld the parents' decision but I believe that the Paulettes won this case only because their decision fit within accepted medical practice, not because the court respected their First Nations perspective.

If the Paulettes had only been able to find traditional healers to endorse their decision not to proceed with the liver transplant instead of conventionally trained medical doctors, they might not have won their case. If K'aila had needed a form of treatment accepted as standard therapy by the medical community but rejected by his parents on cultural grounds, then the Paulettes might not have won their case.

All of these cases show that, traditionally, it is the courts who decide whether a child is in need of protection and they decide in accordance with their own standard determined by reference to the medical profession. Parental views, whether idiosyncratic or based on non-dominant cultural or religious beliefs about what is appropriate medical care, are subordinate to the courts' views.

All of these cases suggest that, if traditional approaches to child protection continue to be taken, then there will be conflicts in the future between Child and Family Services agencies and First Nations parents about medical decision-making. Sometimes First Nations parents will be unable to provide medical treatment because the resources are unavailable where they live. Sometimes First Nations parents will not wish to consent to treatment because they feel that the treatment violates some fundamental values or beliefs.[20] And yet courts have overruled parents' decisions based on each of these factors in the past. They may very well do so again. As will be discussed later in the paper, this is a state of affairs that should be made an explicit part of the self-government negotiations.

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[20] For example, they might believe that there are alternatives to the non-aboriginal medical model or they might believe that there are times when death is better than continued life.

b) Non-Traditional Approaches

In recent years, some non-traditional approaches have been taken to the provision of child welfare services. These attempts include tripartite agreements,[21] Band by-laws,[22] and the passage of more culturally-sensitive child welfare legislation.[23] Let us consider each of these in turn to determine their impact on child protection in the context of parental decision-making about medical care.

1. Tripartite Agreements

Tripartite agreements are agreements between the federal government, the provincial government, and First Nations people. Usually, the federal government agrees to provide full or partial financial support, the provincial government agrees to provide a mandate for First Nations child welfare agencies under provincial legislation, and the First Nations people agree to provide child welfare services.

One example of a tripartite agreement in practice can be found in Manitoba. The "master tripartite agreement" is an agreement between the federal government, the Manitoba government, and the Indian Four Nations Confederacy.[24] This agreement gives First Nations people living on reserves in Manitoba the authority to provide child welfare services. However, it does not give them full control. The First Nations' authority is given by the provincial director of Child Welfare, the services must be provided in accordance with the Manitoba *Child Welfare Act* (and its standards), and the provincial courts retain their jurisdiction over children who have been found to be in need of protection.

What does this agreement mean for child protection decision-making authority and the standard of care? On a specific level, it means that K'aila's parents might have faced the same ordeal if they had lived in Manitoba. On a more general level, it represents delegated authority given by the provincial government (rather than sovereignty acknowledged by the federal government). It changes things slightly for First Nations people who live on reserves in that

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21 See J. A. MacDonald, "Child Welfare and the Native Indian Peoples of Canada" (1985) 5 Windsor Y.B. Access Just. 284.

22 See J. A. MacDonald, "The Spallumcheen Indian Band By-Law and its Potential Impact on Native Indian Child Welfare Policy in British Columbia" (1983) 4 Can. J. Fam. L. 75.

23 See E. F. Carasco, *supra* note 2. See also R. W. Langen-Jones, "Practicing Family Law for Indian and Native Clients: An Orientation to the Indian Specific Provisions of *The Child and Family Services Act, 1985*" in *Representing Indian and Native Children* (Toronto: Department of Education, Law Society of Upper Canada, 1988) A1.

24 J.A. MacDonald, *supra* note 21 at 299.

the front line of Child and Family Services will be First Nations people. However, it ties First Nations people to the child protection standards of the provincial *Child Welfare Act* instead of letting them establish their own standards, and it retains the provincial courts' jurisdiction over dispositional issues. Furthermore, it applies only to First Nations people living on reserves and therefore does not serve many First Nations people (such as urban Indians, non-status Indians, and the Metis).

2. Band By-laws

The Band by-law approach involves a Band enacting a by-law under s.81 of the *Indian Act*[25] asserting control over child welfare. The Spallumcheen Band in British Columbia enacted the "By-law for the Care of our Indian Children"[26] in 1980. This by-law asserted the Band's exclusive jurisdiction over child custody proceedings involving Band children whether on or off the reserve (including the apprehension of children found to be in need of protection). If the Paulettes had been members of the Spallumcheen Band, then perhaps they could have remained at home with K'aila and made the most of his brief life instead of fleeing their home and spending much of his life battling with the child welfare system.

The Spallumcheen Band approach shifts the decision-making authority to the Band and it permits the Band to establish its own standard of care. However, it only applies to children who are members of the Band. This leaves many other First Nations children subject to the provision of child welfare services by non-First Nations agencies directed by non-First Nations standards.

In addition, the constitutional validity of this by-law is shaky. Under s.81 of the *Indian Act*:

> The council of a band may make by-laws not inconsistent with this Act . . . for any or all of the following purposes, namely,
> (a) to provide for the health of residents on the reserve . . .
> (d) the prevention of disorderly conduct and nuisances . . .
> (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section.[27]

Section 81 does not explicitly provide Bands with the authority to make by-laws for child welfare. Without amendment to the *Indian Act*, any by-law for child welfare will always be subject to the Minister of Indian and Northern Affairs'

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25 R.S.C. 1985, c.I-5.

26 By-Law #3, 1980 discussed in J.A. MacDonald, *supra* note 22.

27 *Supra* note 25.

power of disallowance. Although the Spallumcheen Band by-law has not been disallowed, it could be. Furthermore, the federal government has indicated that it will disallow any future attempts to pass similar by-laws by other Bands.[28]

Therefore, while the Spallumcheen approach may work well for the Spallumcheen Band (it shifts both the decision-making authority and the standard of care), it is not a viable option for other Bands or for non-Band member First Nations children.

3. Culturally-sensitive Provincial Legislation

Some provinces have enacted child welfare legislation that includes provisions specifically tailored to First Nations families. The Ontario *Child and Family Services Act*[29] is the most sweeping example of this approach.

The sections of the Ontario *Child and Family Services Act* most relevant for the purposes of this paper are s.1(e) and (f) and s.37(4):

> (1) The purposes of this Act are . . .
> (e) to recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences; and
> (f) to recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.
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> 37(4) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity.

Other sections provide that notice of child protection proceedings must be given to the child's Band and that the Band must be given the opportunity to participate as a full party in the proceedings. Other sections provide for the

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28 M. Sinclair, D. Phillips and N. Bala, "Aboriginal Child Welfare in Canada" in N. Bala, J. P. Hornick, & R. Vogl, eds., *Canadian Child Welfare Law: Children, Families and the State* (Toronto: Thompson Educational Publishing, 1991) 171 at 189.

29 *Supra* note 7.

establishment of "Indian Child and Family Service Societies" equivalent to the Catholic, Jewish, and secular Child and Family Services Societies that already exist.

This approach requires that, wherever possible, First Nations people should provide their own child and family services and that, wherever possible, the standard should be sensitive to First Nations culture, heritage, traditions, and the concept of the family.

However, it is not as revolutionary with respect to child protection as it appears at first glance to be. For example, s.37(4) seems like a strong statement and appears to place a burden on the judge to take the First Nations' perspective seriously. However, it does not apply to determinations of whether a child is in need of protection because the child protection determination is not done in accordance with the best interests standard.[30] Therefore, the standard for finding a child in need of protection is not affected by s.37(4).

While under this legislation First Nations people may eventually be on the front lines in providing child protection services, the ultimate decision about whether a child is in need of protection will remain with the non-First Nations judiciary, and the standard will be at the discretion of this judiciary. The "wherever possible" clawback clause found in both s.1(e) and (f) leaves it open to judges to decide that where medical treatment is necessary according to the dominant medical model, it is not necessary to respect First Nations ways. In *Re Whitecap*, the judge foreshadowed such an approach in noting that "[h]owever important Indian culture may be, life and health are essential before it can be enjoyed."[31] Ultimately, the decision remains with the courts and the determination of the standard of care remains with the courts.

If the Paulettes had lived in Ontario they could have encountered the same problems as they did in Alberta. Furthermore, if K'aila had needed a medical intervention considered standard medical therapy by the medical profession, then they would likely have lost their case if they had fled from Alberta to Ontario.

Therefore, despite the efforts made in the most recent Ontario legislation and all of the other alternative approaches (except the Spallumcheen Band By-Law which apparently cannot be repeated) the courts continue to decide whether a child is in need of protection, and they do so according to their own standards.

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30 Cases which establish this distinction include: *Re E.J.C* (1987), 79 A.R. 125 (Prov. Ct.); *Re Milner* (1975), 58 D.L.R. (3d) 593 (N.S. C.D. T.D.); *St. Pierre* and *Meloche v. Roman Catholic Children's Aid Society for Essex County* (1976), 27 R.F.L. 266 (Ont. S.C.).

31 *Supra* note 3 at 444.

The Criminal Code

The *Criminal Code* is rarely (if ever) discussed in the child protection literature.[32] However, it also affects who decides about children being in need of protection and what standard they use in the context of parental decision-making about medical care. The relevant sections of the *Criminal Code* are ss. 215, 218, 219, 220, 221, 222 and 226.[33] These sections establish the following:

Parents have an obligation to provide their children with the necessaries of life. If parents fail to perform this duty without lawful excuse and if their failure endangers the life of their children or causes or is likely to cause the health of their children to be endangered permanently or causes or is likely to cause the health of their children to be injured permanently, then they will be liable for failure to provide necessaries (s. 215).

If parents unlawfully abandon or expose their children who are under the age of ten such that the children's lives are endangered or their health is or is likely to be permanently injured, then they will be liable for abandoning a child (s. 218).

If parents, in doing anything or omitting to do anything that it is their duty to do, show wanton or reckless disregard for the lives or safety of their children, then they will be liable for criminal negligence (s. 219).

If parents, by criminal negligence (as defined in the previous paragraph) cause the death of their children, then they will be liable for causing death by criminal negligence (s. 220). If they, by criminal negligence (as defined in the previous paragraph), cause bodily harm to their children, then they will be liable for causing bodily harm by criminal negligence (s. 221).

If parents cause the death of their children by criminal negligence, then they will be liable for homicide (s. 222).

If parents cause bodily injury to their children that results in death, then they will be said to have caused the death notwithstanding the fact that the effect of the bodily injury is only to accelerate the death from a disease or disorder arising from some other cause (s.226).

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32 One notable exception is P.A. Monture, *supra* note 2.

33 R.S.C. 1985, c. C-46.

Having canvassed the *Criminal Code* for relevant provisions, it is now necessary to turn to the common law to determine the meanings of (and standards for) some of the key terms used but not defined in the *Criminal Code*. Consider, for example, the terms "necessaries of life", "lawful excuse", and "negligence".

In *R.* v. *Brooks*, the court held that "'necessaries of life' and 'necessaries' . . . mean such necessaries as tend to preserve life" (including "medical attendance and remedies").[34] Similarly, in *R.* v. *Brown and Urbanovich*, the court held that "[a] mother has a duty of care to an infant; she must provide it with medical aid and the necessities of life."[35]

In *R.* v. *Cyrenne, Cyrenne and Cramb*, the court provided a rough standard for necessaries of life and the headnote reports that:

> the decision to force treatment on a child over parental objection should only be taken if the physicians can demonstrate that the child would have a substantially better chance of recovery with the treatment than without it. 'Recovery' in this context meaning a significant remission, not a mere brief and transitory slowing.[36]

Therefore, it can be concluded that First Nations parents who fail to provide medical treatment which would give their children a substantially better chance of recovery than non-treatment or an alternative treatment (according to the court's view of recovery and probability), could be found criminally liable for failure to provide "necessaries of life".

Courts have clarified "lawful excuse" in several cases. In *R.* v. *Yuman*,[37] the court held that financial inability to provide necessaries may be a lawful excuse and which will therefore vitiate liability for the failure to provide necessaries. However, it is important to note that this case came before universal health care. It is also important to note that in *Re Whitecap* (albeit not a criminal case), a Saskatchewan judge held that "[i]n matters of health care which is not paid for by the parents and therefore does not depend upon income, a very high standard is to be expected."[38] It is not at all clear how financial inability would be interpreted by a contemporary court in a criminal case.

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34 (1902), 5 C.C.C. 372 at 372 (B.C. C.A.).
35 (1985), 31 Man. R. (2d) 268 at 275 (Man. C.A.).
36 (1981), 62 C.C.C. (2d) 238 at 238 (Ont. D.C.).
37 (1910), 17 C.C.C. 474 (Ont. C.A.).
38 *Supra* note 3 at 443.

In *R.* v. *Brooks*, it was reported that the court held that the "conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse."[39] Similarly, in *R.* v. *Tutton*, the court held that:

> The duty imposed by statute to provide necessaries of life is applicable to all parents. It is not a lawful excuse for a parent who, knowing that a child is in need of medical assistance, refuses to obtain such assistance because to do so would be contrary to a tenet of their own particular faith.[40]

The court also held that the fact that this is not a lawful excuse does not offend s.2(a) of the *Canadian Charter of Rights and Freedoms*.[41] Therefore, it can be concluded that First Nations parents who refuse to consent to medical treatment for their children on religious or conscientious grounds would have no lawful excuse to vitiate their criminal liability.

The court, as reported in the headnote, turned its attention to the standard for negligence in *R.* v. *Cyrenne, Cyrenne and Cramb*:

> In determining whether conduct is criminally negligent, the Courts apply an objective standard, except that the background and experience of the accused must be one of the factors to be considered in determining whether the accused was reckless in adopting the particular course of conduct. The standard of conduct, which in this case was that of reasonable parents, must then be applied to the conduct of the particular accused in the particular circumstances which existed.[42]

The rationale provided for this standard is revealing of the underlying philosophy:

> At least where the right to life is concerned the decision to reject a potentially life-saving treatment which, even if it fails, can leave the child in no worse position than before cannot be left to the varying whims of individual families. Life and death decisions of this nature go beyond the interests of the family and enter the sphere of the public

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39 *Supra* note 34 at 372.

40 (1985) 18 C.C.C. (3d) 328 at 355 (Ont. C.A.), affirmed on other grounds [1989] 1 S.C.R. 1392.

41 *Supra* note 14.

42 *Supra* note 36 at 239.

> interest; which is to protect children from the caprice of varying dogmatic beliefs until they are old enough and hopefully wise enough to make such decisions for themselves.[43]

Therefore, it can be concluded that First Nations parents will be held to an objective "reasonable person" standard for negligence (findings of recklessness will be tempered with an awareness of the parents' background and experience).

To return to the case of K'aila, if the Saskatchewan court had found that K'aila was a child in need of protection and the Paulettes had fled Saskatchewan, then the Paulettes might well have faced charges such as failure to provide necessaries and criminal negligence.

As with the child welfare provisions, it is non-First Nations courts who decide whether a child is or was in need of protection and it is a non-First Nations standard that they use.

Alternatives

If they wanted to shift the decision-making authority and/or the standard of care to First Nations people, federal and provincial governments could change the provision of child and family services in a number of ways.

First, the federal government could amend s. 81 of the *Indian Act* and include child welfare in the list of subjects about which Bands can enact by-laws. This would enable Indian Bands to enact by-laws and to have absolute control over the provision of child welfare services to the members of their Bands.[44] In order not to place a crushing financial burden on the Bands that enact by-laws, the government would have to simultaneously agree to provide funding for these services.[45]

Second, the federal government could introduce a *First Nations Child Welfare Act*.[46] Following the lead of the American *Indian Child Welfare Act,*[47]

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43 *Ibid.* at 263.

44 See the discussion of the Spallumcheen Band By-Law for in the text accompanying note 26.

45 To get a sense of how crushing the burden could be, consider the fact that the federal contribution to the Spallumcheen Band for the 1984–5 fiscal year was $404,000 (*supra* note 21 at 294).

46 For further consideration of this possibility, see *The Proceedings of the National Indian Child Welfare Workshop* held April 13th and 14th, 1982 in Ottawa, at which the desirability of federal child welfare legislation was endorsed by the National Indian Brotherhood (*supra* note 21 at 301).

it could vest jurisdiction for child protection proceedings involving children living on reserves in the Bands, establish Band courts to decide what should happen to children taken into care, and order provincial courts and governments to respect the Band actions and decisions. Pushing the limits of the American Act, the government could vest exclusive jurisdiction for all child welfare services in First Nations child and family services societies (including the establishment of standards of care). These societies could be authorized to serve all of the First Nations people of Canada (not just Band members and not just those who live on reserves). It could authorize the First Nations people to establish their own system (such as tribunals) to deal with child welfare cases. It could order the provincial courts and governments to respect the actions and decisions of the First Nations system. As with the previous alternative, the government would have to make a concomitant guarantee of financial support in order not to place a crushing financial burden on the First Nations people.

Third, the federal government might enter into bilateral agreements with First Nations people. The federal government could agree to fund the provision of child welfare services and the First Nations people could agree to exercise exclusive authority over child welfare. Depending upon how this agreement was phrased, it could either represent the granting of authority by a "superior" body to an "inferior" body or it could represent the recognition by two equal parties of an interdependent relationship.

Fourth, the federal government could recognize First Nations' sovereignty and leave First Nations people free to exercise self-government. It should be noted that this is the only solution that substantially affects the *Criminal Code* concerns discussed earlier in the paper.

Each of these alternatives shifts the decision-making authority over to First Nations people and enables them to make child protection decisions according to a First Nations standard of care. They differ from one another in scope (for example, the first alternative would affect only those who are members of a Band that enacts a by-law while the others could affect all First Nations people). They also differ in their implicit assumptions about First Nations self-government. The first two (and possibly the third) clearly deny First Nations' inherent sovereignty because they assume that the federal government has an authority to transfer to the First Nations people. The fourth (and possibly the third) recognize First Nations' sovereignty. The preferred alternative (if any) will depend explicitly upon one's beliefs about who should decide and according to what standard, and implicitly upon one's beliefs about self-government.

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[47] 25 U.S.C. ss. 1901 *et seq.* (1978), For further information, see B. Davies, "Implementing the Indian Child Welfare Act" (1982) 16 Clearinghouse Rev. 179.

Who Should Decide and According to What Standards?

The fundamental question that arises out of the preceding consideration of the criminal law and child welfare legislation is "should First Nations parents be held by non-First Nations people to non-First Nations standards of necessary medical treatment?" In other words, who *should* decide whether a child is in need of protection and according to what standards? One way of attempting to answer this question is to argue that the child welfare legislation and the *Criminal Code* provisions violate the *Charter* when applied to First Nations people. This project, however, must remain the topic for another paper. The argument is sufficiently complex as to require a separate paper. In addition, the argument may depend, at least in part, upon the reasons in *Richard B. and Beena B.* v. *Attorney General of Canada* (heard by the Supreme Court of Canada on March 17, 1994), and will depend upon the results of self-government negotiations.

Another way of attempting to answer this question is to look to non-First Nations parental decision-making about medical treatment and then to argue by analogy. Consider the case of a child of fourth generation Scottish immigrants. Doctors agree that the child needs antibiotic treatment for pneumonia (assume that, apart from the pneumonia, the child is healthy). If the child's parents refuse the treatment, then a court will find the child in need of protection and will authorize Child and Family Services to consent to the administration of the antibiotics. The court will make this decision according to its own conception of necessary medical treatment.

Next, consider the case of a child of Jehovah's Witness parents. Doctors agree that the child needs a blood transfusion (assume that the blood transfusion is necessary for survival and there is no other alternative treatment available). If the parents refuse the blood transfusion, then the court will decide that the child is in need of protection and authorize child and family services to consent to the blood transfusion. The court will justify its interference with the parents' religious convictions on the ground that:

> [p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[48]

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[48] *Prince* v. *Massachusetts*, 321 U.S. 158 at 170 (1944). Although this is an American case, it captures the underlying philosophy of the Canadian cases.

When parents are members of specific sub-communities bound together by particular religious or cultural beliefs (for example, Jehovah's Witnesses and Christian Scientists), it is the court that decides whether the children are in need of protection and the court uses a standard that ignores religious differences.

Third, consider the case of a child of parents who are citizens of another country but are living permanently in Canada. The child needs an appendectomy but the parents refuse to consent. The court will find the child in need of protection and will do so according to the same standard of care it uses for Canadian citizens.

Consider finally the case of a child in an English hospital born of parents who are citizens of England and are currently living in England. The child was born with Down's Syndrome and requires surgery to correct a heart defect. The parents refuse to consent to the surgery. In England, such a refusal is not considered a violation of the standard of care. In Canada, such a refusal might well be considered sufficient to render the child in need of protection. Yet, Canadians do nothing to save English children born with Down's syndrome in England.

Are First Nations people analogous to any of the above? If First Nations people are like special sub-communities within the general Canadian population, bound together by religious or conscientious beliefs, or citizens of another sovereign state living permanently in Canada, then arguably the courts should decide whether their children are in need of protection and the standard of care should be the same for all Canadian children.

However, if First Nations people are more like citizens of another sovereign state living outside Canada, then First Nations people should appoint their own decision-makers and should establish their own standard of care.

We have arrived at the very heart of the self-government debate. If First Nations people have never lost their sovereignty, then arguably they should not be subject to the Canadian *Criminal Code*, the provincial Child and Family Services legislation or the *Charter*. They should be left alone to determine an appropriate standard of care for First Nations children and they should be left alone to administer their own child protection schemes. However, if they have lost their sovereignty, then arguably they should be held to the same standard of care as all other Canadians and should not be allowed to refuse to consent to medical treatment deemed necessary by the courts (according to a non-First Nations standard). On this view, they might well be given authority to administer child welfare services but they would be required to administer these services in accordance with the provincial legislation (and parents would have to be careful not to run afoul of the *Criminal Code*). One's answer to the

question "who *should* decide and according to what standards?" is therefore contingent upon one's answer to the question of self-government.

Conclusion

For obvious reasons I cannot resolve the self-government debate here. However, I hope that this paper has shown that child protection may be greatly affected by any changes that come about as a result of the current constitutional reforms. First Nations people and non-First Nations people should be made aware of the lack of ultimate control First Nations people currently have over child protection (even under the alternative regimes that are now in place). They should also be made aware of the implications for child protection of shifting to self-government. As both First Nations and non-First Nations people know, children are the future of any society. Child protection is too important an issue to be revised by default. It should be an explicit item in the constitutional reform talks.