

Children Need Families, Not Courtrooms: Alternatives to Adversarial Litigation in Child Welfare

EXECUTIVE SUMMARY

**A Special Report by the
Office of the Children's Advocate
Manitoba**

March 2016



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Manitobans must make the well-being of our indigenous children and youth our top priority. With more than 10,000 children living in the care of child and family services, Manitoba has some of the highest rates of children living in state care in the world. Roughly 90% of these children are indigenous. This overrepresentation has nothing to do with cultural differences or the capacity of indigenous families and communities to love and care for their children. In his final report on the life and death of Phoenix Sinclair, Commissioner Ted Hughes found “[r]esearch shows that aboriginal children are taken from their homes in disproportionate numbers, not because they are aboriginal, but because they are living in far worse conditions than other children.” Everywhere in the world, it is the children of the poorest, most disadvantaged and marginalized populations who are at greatest risk of coming in to the care of the state as a result of child welfare interventions.

Colonization brought disease, dislocation, starvation, disenfranchisement, through laws and policies expressly designed to destroy indigenous cultures. These assimilationist policies have recently been described as consistent with cultural genocide by the Supreme Court's Chief Justice McLachlin.² This includes the forcible removal of children through the imposition of the residential school system. Canada's Truth and Reconciliation Commission has likewise described these laws and policies as consistent with cultural genocide. The destruction of families, communities and cultures resulting from colonization was also effected by the mass apprehension and adoption of indigenous children to non-indigenous families popularly referred to as "the 60s scoop." Upon reviewing the mass apprehension and adoption of these children within Manitoba, Judge Kimelman reported “unequivocally that cultural genocide has been taking place in a systematic, routine manner.”³

¹This is a companion document and summary of a report prepared for the OCA by Dr. David Milward, Assistant Professor of Law at the University of Manitoba. Dr. Milward conducted research on behalf of the OCA exploring alternatives to the adversarial processes in Manitoba child welfare courts that may better address the best interests of children in Manitoba who are apprehended under the *Child & Family Services Act* of Manitoba. The full report will also appear as a chapter in an upcoming publication from Dr. Milward.

²McLachlin, B. (2015, May 28). Reconciling unity and diversity in the modern era: Tolerance and intolerance. *Global Centre for Pluralism*, lecture. Online: http://www.pluralism.ca/images/PDF_docs/APL2015/APL2015_BeverleyMcLachlin_Lecture.pdf

³Kimelman, E. C. (1985). *No quiet place: Final report to the Honourable Muriel Smith, Minister of Community Services*. Government of Manitoba.

“Humans have strong needs for a sense of personal identity and group membership.”⁴ Culture is learned through the lessons of socialization passed between individuals and from one generation to another. Far too many of Manitoba's indigenous children continue to experience forcible removal from their families and communities, and continue to be denied the experience of learning to be Ojibwe, Cree, Dakota, Oji-Cree, Metis, Dene and other indigenous peoples. Without these cultural teachings to pass on to their own children, Manitoba's indigenous peoples continue to experience cultural loss and destruction. This is unacceptable and must not be allowed to continue.

The Truth and Reconciliation Commission (“the Commission”) has stated that “Canada's child-welfare system has simply continued the assimilation that the residential school system started.”⁵ The Commission has called upon provincial and Aboriginal governments to reduce the number of aboriginal children in care. Whether or not this happens will reflect not only the will of political leadership, but the collective desire of all of Manitoba’s citizens to heal the legacies of assimilation and cultural genocide. Manitoba sits at a critical juncture in its story, with a tremendous opportunity to explore and extend support to approaches that are improving outcomes for children, youth, and families, while reducing and eliminating practices that continue to result in adverse conditions for many families and communities.

Manitoba's child welfare system is rooted in provincial child welfare legislation. Almost every single child who is in care of the child and family services system, is a subject of legal proceedings - with all children under temporary or permanent orders, being so ordered by provincial courts. Regardless of Manitoba's attempts to “devolve” the child welfare system through the creation of culturally appropriate aboriginal child welfare authorities and agencies, one of the criticisms that many indigenous people have leveled against the child welfare system, is that it is premised within the very same legal and court system that has facilitated colonization and assimilationist laws and practices, including the laws that facilitated and enforced the residential school system, the 60s scoop, and contemporary child welfare trends that include gross overrepresentation of indigenous children in care. The Manitoba Centre for Health Policy reported that “...1.7% of the non-Indigenous children were ever in care, compared to 16.6% of Manitoba Indigenous children (22.4% of First Nations, 6.4% of Metis, and 15.4% of Inuit children).”⁶

Manitoba is a “common law” jurisdiction - relying on a blend of legislation and laws evolved from 19th century English judge-made law which was adopted at confederation. One of the hallmarks of the non-indigenous legal system that Manitoba's child welfare system is premised within is that it is “adversarial” - pitting the state against parents, and relying upon judges to decide the *best interests of the child* after hearing evidence put forward through witnesses who provide testimony under direct- and cross-examination by lawyers representing opposing parties. The witnesses who the state relies upon to provide evidence to prove that a child is in need of protection, often include the very same social workers

⁴ http://www.med.uottawa.ca/sim/data/Cultural_Awareness_e.htm

⁵ Truth and Reconciliation Commission of Canada. *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada*, page 186. Online: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf

⁶ Brownell M, Chartier M, Au W, MacWilliam L, Schultz J, Guenette W, Valdivia J. (2015, June). The Educational Outcomes of Children in Care in Manitoba. *Manitoba Centre for Health Policy*: Winnipeg, MB, page xiii.

who are responsible for providing direct support and service to the family. The proceedings tend to be formal, and are closed to the public so as to protect the privacy interests of children and their families. In smaller communities, the court is generally comprised of people who do not reside in, or have any meaningful or significant connection to the community and the people who live there. This process has been described to be in marked contrast to traditional indigenous legal processes which were collaborative instead of adversarial, included family and community members, and relied on collective wisdom rather than the exclusive jurisdiction of a single decision maker lacking any significant relationship (read: accountability) to the family and community.

There has been an abundance of research and criticism by scholars from the areas of law, conflict resolution, and restorative justice, suggesting that the traditional adversarial court model is not necessarily the best means to make decisions so as to resolve problems. Therapeutic jurisprudence is an area of legal scholarship that questions how law is experienced by people and whether it is helpful or harmful.⁷ These kinds of questions have led to innovations like the emergence of *problem solving courts* as seen by way of mental health, drug treatment, and domestic violence courts. The harm caused by adversarial litigation to children and families has led to innovations like *collaborative family law* wherein the parties attempt to resolve outstanding issues outside of the courtroom with the help of trained professionals.

The Children's Advocate questions whether conventional child welfare litigation practices are in the best interests of children and their families. This leads to questions like: *how is litigation experienced by children and youth involved in the child welfare system?* And given that upwards of 90% of Manitoba's child welfare litigation involves indigenous children and families, are there opportunities for innovation better suited to the needs of indigenous citizens?

As such, the Children's Advocate partnered with respected indigenous legal scholar, Dr. David Milward, of the University of Manitoba, to undertake some initial research examining innovative alternatives to conventional adversarial child welfare litigation. In the full report also released today by the Office of the Children's Advocate, Dr. Milward provides an analysis of both the benefits and the harmful consequences of adversarial court-based approaches to addressing child welfare issues.⁸ He discusses the power imbalances that disproportionately impact children and families versus child welfare agencies. He speaks to the unrealistic expectations placed on parents during temporary guardianship orders and the lack of program resources available to parents. He goes further to provide an overview of some potential innovations reflecting more mediation- and collaborative-based approaches to deciding what is in the best interests of children. These include promising work that has been done in the areas of family group conferencing and customary care. He concludes with a number of findings and recommendations, including that mediation-based alternatives result in better outcomes for children and their families, and that investments are needed to provide professionals with the skills they require to implement these

⁷For more:

<http://www.usask.ca/cfbsjs/documents/Lit%20Review%20MHC%20Saskatoon%20Academic%20Dec%202013.pdf>

⁸For the full report, please visit: <http://www.childrensadvocate.mb.ca/wp-content/uploads/MILWARD-FULL-web.pdf>

alternatives. Dr. Milward recommends investments in sufficient support resources required by children and their families to ensure effective outcomes, and that consideration is given to expanding the Aboriginal Courtworkers' Program so that it can provide services to indigenous families whose children have been apprehended.⁹

While innovations will require some investment, the financial and social costs of failing to take action will be greater. Our current system is very expensive – with a great deal of taxpayer monies required to cover the cost of lawyers, judges, and other court officials as well as the time of social workers and other witnesses whose skillsets would be better applied to directly supporting children and families. And while mediation and prevention may require new initiatives and more resources, it is important to bear in mind the social, emotional, and financial care costs associated with having children separated from families and communities when they come into the care of the child and family services system. The outcomes for children living in the care of the state in any jurisdiction are not as good as for those children who can be supported to remain in the care of their families and communities of origin. If one thing is clear, it is that Manitoba must resolve the gross overrepresentation of indigenous children in care. This task is not for the child welfare system alone. This will require each citizen of Manitoba to commit to improving the lives of indigenous children, youth, and families. That, in essence, is what is meant by reconciliation. The Truth and Reconciliation Commission of Canada states that “collective efforts from all peoples are necessary to revitalize the relationship between Aboriginal peoples and Canadian society – reconciliation is the goal. It is a goal that will take the commitment of multiple generations but when it is achieved, when we have reconciliation – it will make for a better, stronger Canada.”¹⁰

Manitoba is at the crossroads of an incredible opportunity. The truth is undeniable: indigenous peoples have suffered unconscionable violations of their basic human rights. Reconciliation cannot simply be passively accepted – for reconciliation to bring change it must be an active commitment by all to address the harms caused by these wrongs. To squander the opportunity for a new future defined by new relationships will result in more generations of indigenous children removed from their families and communities. Instead, we can commit to meaningful change and see the lives and futures of all Manitobans improve.

Dr. David Milward is a member of the Beaudy's & Okemasis First Nation and an Assistant Professor of Law with the University of Manitoba. He teaches Criminal Law, Evidence, and courses on Aboriginal justice at the University of Manitoba. He has published several articles in leading legal and interdisciplinary journals, has recently published a book with UBC, and was a researcher for the the Truth and Reconciliation Commission of Canada.

The Office of the Children's Advocate is an independent office of the Manitoba Legislative Assembly. It represents the rights, interests and viewpoints of children and youth throughout Manitoba who are receiving, or entitled to be receiving, services under *The Child and Family Services Act* and *The Adoption Act*. The office does this by advocating directly with and on behalf of children and youth and also by reviewing services after the death of any young person who received child welfare services in the year preceding his or her death. The office regularly publishes resources and information for the public on its work with young people. For more information visit: www.childrensadvocate.mb.ca.

⁹See: <https://www.gov.mb.ca/justice/courts/aboriginalcourtworkers.html>

¹⁰From <http://www.trc.ca/websites/reconciliation/index.php?p=469>