Ending Discrimination and Protecting Equality:
A Challenge to the INAC Funding Formula of First Nations Child and Family Service Agencies

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Throughout history, First Nations children have been the subject of confused jurisdictional debates and unfair treatment by all levels of government. As a result, these children have been subjected to unspeakable harm, violence

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and neglect. In turn First Nations Child Welfare Agencies have attempted to address these issues and care for the children of their communities, bringing spiritual and cultural competence into the context of child protection. But the federal government has directly ensured their failure: unfair funding practices and unequal service provision has created a divide between the level of support and caring afforded to non-First Nations children and those children serviced by First Nations Child Welfare Agencies. This divide signifies a direct violation of a basic right often taken for granted by most Canadians: equality. Section 15 of the Charter of Rights and Freedoms exists to protect our rights as equal citizens of this nation; in this instance the federal government has simply chosen to ignore this basic tenet. The unequal funding structure created to support First Nations children is a volatile reminder that First Nations across our country continue to be marginalized and relegated to being second class citizens.

I INTRODUCTION

First Nations children are in a state of crisis. Their struggle, throughout history and into the present day, reflects a system that functions to deny First Nations children the opportunities and experiences afforded to other Canadian children. Indeed, First Nations communities across Canada have been aware for some time that their children face staggering levels of poverty, suicide, substance misuse and incarceration. Over the past two decades First Nations communities have responded by building First Nations child welfare agencies on reserve in an effort to provide culturally relevant and regionally appropriate services to the children of their communities, to protect them from harm and support them within their family environment. This effort, however, has been largely thwarted by an inequitable federal funding scheme that does not allow agencies to offer mandated protective and preventative services to families in need, a funding formula that actively discriminates against First Nations children. As a result First Nations children are entering the child welfare system at increasing rates and are significantly overrepresented within the child welfare population.

The purpose of this paper is to examine, articulate and unpack the discriminatory implementation of the federal government’s funding formula for First Nations Child and Family Service Agencies (“FNCFSA”). Through an examination of the historical, legislative and social parameters within which the formula operates, this paper proposes that the formula, known as Directive 20-1, is an action by the federal government that directly violates
the rights of First Nations children on reserve under Section 15 of the *Charter of Rights and Freedoms*.\(^1\)

Across Canada FNCFSA are provincially mandated and fall under the jurisdiction of provincial child welfare legislation. The provinces, however, do not fund FNCFSA, but rather provide the standards by which the agencies must adhere under the law. Under the federal head of power FNCFSA are funded directly by the federal government, which has developed a funding scheme to disperse monies to the agencies based on a strict formula. The crux of the concern regarding this tripartite relationship is that current funding levels do not allow FNCFSA to meet provincial standards. In turn, First Nations children on reserve are not afforded the same protection and services provided to non-First Nations children off reserve.

Over the past eight years First Nations communities across the country have raised this issue in an effort to negotiate a change in the funding formula. The First Nations Child and Family Caring Society of Canada (“Caring Society”) is a non-profit organization in Ottawa and acts as the voice of the collected FNCFSA across Canada. This paper is largely a reflection of the work done by the Caring Society in their efforts to negotiate change for the children of their communities. In 1999 the federal government publicly acknowledged that First Nations children on reserve receive less funding and fewer services than all other Canadian children. Since that moment, the Caring Society has been vigorously working to pressure and lobby the government while simultaneously developing, through research and collaboration with FNCFSA across Canada, solutions to the funding inadequacies of the formula. The Caring Society has participated in countless round table discussions with the Department of Indian and Northern Affairs Canada (“INAC”) and to this moment has not been reciprocated with action by the federal government. This paper is dedicated to the Caring Society and it represents what I hope is a foundational piece of research that could be used to launch a *Charter* challenge against the federal government.

**II  FIRST NATIONS CHILD WELFARE AGENCIES: CONTEXT AND OPERATION**

In contrast with the lives experienced by other Canadian children and youth, First Nations children are more likely to be born into poverty, to suffer

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health problems, maltreatment, incarceration, and placement in the child welfare system. In 2004, the Caring Society, in recognition of what was the last year of the International Decade of Indigenous Peoples and consistent with the United Nations *Convention on the Rights of the Child*, prepared a report in an effort to describe the lived experience of First Nations children across the country. It focused on the following dimensions: poverty, urbanization, substance misuse, education, youth suicide, accidental injury, child welfare, sexual exploitation and youth justice. The findings were not unexpected: First Nations children continue to experience disproportionate levels of risk across all identified dimensions and the policies that have been developed to redress these risks and inequalities remain largely unimplemented or ineffective.

The following are a series of statistics taken from the report, which demonstrate the crisis standards that First Nations children continue to face:

- The average income on reserve is between $6,400 and $7,900;
- Three out of five Aboriginal children under the age of six live in poverty;
- Forty-four per cent of on-reserve dwellings are considered to be inadequate in condition;
- Aboriginal youth are 11 times more likely than non-Aboriginal youth to have abused solvents or sniffed aerosols;
- Only 30.7 per cent of grade 12 and 13 First Nations children on reserve graduate from high school;
- Thirty-eight per cent of all First Nations youth deaths are a result of suicide (ages 10 to 19);
- First Nations suicide rates are 2.1 times higher than non-First Nations Canadians;
- First Nations infants die from injuries at four times the rate of non-First Nations infants; First Nations toddlers die from injuries at five times the rate of non-First Nations toddlers and have a drowning rate 15 times higher than non-First Nations toddlers;
- Neglect is two times more likely to be the primary form of maltreatment in Aboriginal families;
- In some communities 90 per cent of child prostitutes are Aboriginal;
- Aboriginal youth account for 24 per cent of the youth in custody in Ontario, 23 per cent in Saskatchewan and 23 per cent in Manitoba, despite being only 3.9 per cent of the total youth population in Canada.

The hopes and opportunities open to First Nations children are currently severely limited.

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3. Ibid. at 8-11.
An additional study conducted by the Caring Society demonstrates that First Nations children, youth and families have almost no access to the $108 billion of revenue that supports the voluntary sector to provide a myriad of social services and quality life supports to other children and families. This includes such programs as Big Brothers, Big Sisters, YMCA programming, Meals on Wheels, and countless others that many families rely on daily for support. The lack of access to voluntary sector resources coupled with the absence of municipal and provincial services means that despite the greater needs of children and youth on reserve, communities living at crisis standards have less infrastructure supports than other Canadians.

Overall, best estimates indicate that there are currently between 22,500 and 28,000 First Nations children in the child welfare system—three times the highest enrollment figures at the peak of the residential school era. Tragically, research indicates that the number of First Nations children entering into child welfare care is rising. INAC data confirms that between the years 1995 and 2001 the number of registered Indian children entering into care rose 71.5 per cent nationally. These disproportionate statistics suggest that while First Nations children represent only eight per cent of the child population in Canada, 35 per cent of Canadian children in the child welfare system are of Aboriginal heritage. How and why is this happening?

There are currently over 120 First Nations child welfare agencies across Canada. These agencies reflect the strong convictions of First Nations communities to care for their children in an attempt to redress the past atrocities of the residential school period and the ‘60s scoop, and to provide culturally and regionally appropriate services.

Although it is beyond the scope of this paper to analyze and fully consider the effects of the residential school and ‘60s scoop periods within the current dynamic of the First Nations child welfare system, it is essential to understand these historical times as symptoms of a greater pattern of the government’s policy towards First Nations children. The residential school period witnessed the first forced removal of First Nations children from their

5. Ibid.
families and communities. Sexual and physical abuse was rampant and death from disease was common.\textsuperscript{9} The residential school era has had a profoundly negative impact on family functioning that reverberates through successive generations, resulting in layers of pain that touches whole communities as well as individuals.\textsuperscript{10} This devastating period was rapidly followed by the '60s scoop, which ushered in a new level of forced removal of First Nations children. This era reflected extended assimilation practices in which First Nations children were permanently removed from their communities and often placed in non-Aboriginal homes, forever disconnected from their families and culture. Social workers and government agents perpetuated a system where “protecting” First Nations children from poverty (experienced on reserve largely as a result of their parents dealing with the effects of residential school) translated into foster care and adoptions. This system severed any connection many First Nations children had with their families and communities as these children often did not return home or have any contact with their home reserve.\textsuperscript{11} Thus, while this paper focuses on the situation facing First Nations children today, we must be mindful of the historical factors that have contributed to the current parameters in which First Nations families and communities continue to live.

First Nations child welfare policies are largely a product of the jurisdictional divide between the federal and provincial governments. Although First Nations matters generally fall within the federal scope of power, the \textit{Indian Act} delineates “laws of general application” to the provinces. The current jurisdictional reality is that First Nations children in need of care fall within the provincial legislative schemes but are funded exclusively by the federal government. As a result, an FNCFSA must follow the legislative and regulatory standards of the province in which it resides, but can only access funding from the federal government. The federal funding formula, operated by INAC, is the National Program Directive 20-1 Chapter 5.\textsuperscript{12} Directive 20-1 was put into place in an attempt to provide equity, comparability and flexibility in funding agencies.\textsuperscript{13} Under the

\begin{itemize}
\item \textsuperscript{10} Cindy Blackstock & Marilyn Bennett, \textit{National Children’s Alliance: Policy Paper on Aboriginal Children} (Ottawa: National Children’s Alliance, 2003).
\item \textsuperscript{11} Suzanne Fournier & Ernie Crey, \textit{Stolen From Our Embraces} (Vancouver: Douglas & McIntyre, 1997).
\item \textsuperscript{12} Indian and Northern Affairs Canada, \textit{First Nations Child and Family Services: National Program Manual} (Ottawa: INAC Social Policy and Programs Branch Headquarters, 2005).
\end{itemize}
Directive, agencies are required to be mandated by their reference province and meet the requirements of provincial child welfare legislative schemes.

Directive 20-1 requires FNCFSA to enter into two agreements in order to provide child and family services on reserve. The first is with the province/territory governments to set out the delegation of authority which the FNCFSA will exercise. These agreements allow for the transfer of statutory powers and authority to First Nations or their appropriate governing bodies to administer child and family services according to provincial legislation. The second agreement is with the federal government for funding, in order to allow FNCFSA to carry out child and family services on reserve. Consequently, there is a complex, three party relationship between FNCFSA, the provinces and INAC, all of whom are responsible for the funding and delivery of child and family services in Canada.14

The federal funding formula provides for two categories of funding: operations and maintenance. Agencies receive operations based on the number of children within the agency’s jurisdiction. Alternatively, maintenance funds are intended to cover the cost of maintenance for each child. These funds, however, are only provided for children in care. Small agencies, therefore, have difficulty finding funding for family assistance or prevention services. The result is that children have to be placed in care simply to receive services.15 It is also important to note that if the federal government funding levels are inadequate to meet provincial legislation standards, the provinces typically do not provide any additional resources, resulting in First Nations children receiving a lower standard and range of services than their non-First Nations peers.16

In 2000, the Assembly of First Nations (“AFN”) and INAC reviewed the federal funding formula in order to provide insight into the reasons why there had been a dramatic increase in the numbers of First Nations children entering the system.17 The overall finding of the Joint National Policy Review (“NPR”) study indicates that the average per capita per child expenditure of the federally funded system provides 22 per cent less than its provincial counterparts. Perhaps more notably, the review found that funding for a statutory range of services intended to ameliorate risk factors for First

17. MacDonald & Ladd, supra note 13.
Nations children and youth, required by all provincial and territorial child welfare legislation (known as targeted prevention and least disruptive measures), is inadequately funded via Directive 20-1. Meanwhile, the formula does reimburse agencies for services once a child is removed from his or her family. In practice, FNCFSA can only provide services to a child who is apprehended and placed in out-of-home care. This is clearly unjust and inequitable.

The crux of the problem with this arrangement is that the funding provided by Directive 20-1 is not enough to ensure that provinces can meet their own legislative standards.

**Least Disruptive Measures**

One of the fundamental findings of the NPR is the inability for FNCFSA to provide prevention and least disruptive measures to First Nations children on reserve, as mandated by their reference province or territory. The report notes that Directive 20-1, while facilitating the development of over 100 FNCFSA serving on reserve communities, has been broadly criticized for its emphasis on supporting child removal and placement, versus allocating resources to community development and prevention resources. Moreover, further research demonstrates that the current funding formula works against a comprehensive prevention agenda for FNCFSA and the lack of funding negatively affects First Nations children living on reserve. This reality could provide the basis for a Section 15 challenge under the *Charter of Rights and Freedoms*.

The vast range of professionals who work with and advocate for children believe that keeping children in their homes always provides them with the best opportunity for a successful outcome. Over the past decade child welfare legislation across the country has changed to reflect this principle and has built in mechanisms to ensure that children at risk receive support from social workers but are able to stay safe within their family environments. Least disruptive measures, as the term is used in child welfare legislation, refers to a decision making process set out to determine

the most appropriate level of service needed by a family whose children are at risk of being abused.\textsuperscript{23} Child removal is always considered a last resort.

The definition of the range of services composing least disruptive measures is not well articulated in provincial and territorial legislation and varies across the country. However, all legislation incorporates the fundamental principle that child welfare agencies will take steps to support a family, to help a family with at risk and child maltreatment issues before making a decision to remove a child from that family and place him or her in out-of-home care.\textsuperscript{24} The following list includes examples of least disruptive measures found in some of the provincial and territorial child welfare legislation:

(a) family counselling, guidance and assessment;
(b) in-home support, parent aides;
(c) child care, respite care;
(d) parenting programs;
(e) services for improving the family’s financial situation;
(f) services for improving the family’s housing;
(g) drug and/or alcohol treatment and rehabilitation;
(h) mediation of disputes;
(i) services to assist the family to deal with the illness of a child or a family member; and
(j) other services agreed to by the agency and the person who has lawful custody of the child.\textsuperscript{25}

Least disruptive measures have the potential to play a particularly important role in protecting First Nations children on reserve. There is a general consensus that the traditional practice of placing greater emphasis on child protection through child removal, including from their home and cultural environment, is immobilizing in terms of building healthy First Nations communities.\textsuperscript{26} Beyond the traumatizing effects that all children experience when removed from their families, First Nations children experience the added complexity of often being severed from their culture and spiritual development. Indeed, most First Nations children placed in out-of-home care are placed with non-First Nations foster parents, long time caregivers or adoptive parents.\textsuperscript{27} Regrettably, not all provinces and territories track the rates at which Aboriginal children are placed in Aboriginal homes. The available data, however, suggests that many First Nations children in care

\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid.

\textsuperscript{25} Ibid. at 31.


\textsuperscript{27} See for example Re Family & Child Service Act, [1990] 4 C.N.L.R. 14 (B.C. Prov. Ct.).
are being denied a cultural upbringing. For example, in 1988 the British Columbia Children’s Commissioner found that only 2.5 per cent of Aboriginal children in the care of the Ministry for Children and Families were placed in Aboriginal homes.28

Echoing the findings of the NPR, a research project conducted by the Caring Society in 2004 surveyed FNCFSA to determine which agencies were able to provide least disruptive services, those which are categorized as legislatively mandated services under the family services acts of their jurisdiction. Not one agency could fulfil its mandate of providing least disruptive services.29 Agencies indicated that the funding formula did not allow them to provide families with these services. As noted by Kenn Richard, Executive Director of Native Child and Family Services Toronto,

[most agencies indicated that a significant number of children in care could be returned home if there was an adequate and sustainable range of least disruptive measures and child welfare funding was not decreased in other areas. There was also a strong indication that future placements of children in care could be avoided if said services were provided.]30

First Nations children must be allowed to remain in their homes under circumstances that allow least disruptive measures to facilitate their continued connection with their kinship and community. Understanding the best interests of the child from the perspective of a First Nations child means viewing the best interests of the child as inexorably linked to the best interests of the community and vice versa.31 Implementing least disruptive measures in First Nations communities, as facilitated by FNCFSA, has the potential to protect cultural and community links while ensuring that First Nations children are provided with corresponding services available to other Canadian children.

III THE CROWN “DUTY” AND THE ABORIGINAL “RIGHT”

It is beyond the scope of this paper to unpack the complexities of the fiduciary relationship between the Crown and First Nations Child Welfare Agencies and whether child welfare is an Aboriginal right protected under Section 35 of the Constitution Act.32 However, any court action brought

29. Shangreaux, supra note 22.
30. Ibid, at 41.
against the federal government regarding Directive 20-1 will have to seriously contemplate these issues. Fiduciary relationships and Aboriginal rights are live issues within the legal context and understanding them within a structured framework is an essential advocacy tool. What follows is a brief outline of some of the issues which touch upon these two fundamental areas of the law.

The federal government articulates its legal position regarding the delivery of programs and services to First Nations peoples as follows:

1.21 Section 92 of the Constitution Act states that provincial governments are responsible for welfare services, which include protection and care of children including children resident on reserve.

1.22 Section 91 of the Constitution Act empowers Canada to enact legislation in respect to Indians and Indian lands. To date, Canada has chosen not to exercise this discretionary power in respect to legislation governing the protection and care of Indian children.

1.23 Section 88 of The Indian Act states that laws of general application apply on reserve unless and to the extent that such laws conflict with the Indian Act and its treaties. Accordingly, consistent with Section 88, First Nation peoples on reserve fall under the child and family services legislation of the reference province or territory. These are laws of general application. To date, no conflict of laws has been identified.33

Fiduciary Obligation

Does the federal government have a fiduciary obligation to fund FNCFSA? Rotman stipulates that “the specific nature of a relationship and the situation under which it germinated is what renders it fiduciary, not the actors involved or whether it fits neatly into an already established category of fiducial relations.”34 Although there is no clear test to define a fiduciary relationship between the Crown and First Nations peoples, one has been recognized to exist under the law, between the Crown and First Nations peoples.35 Frame v. Smith sets out the common characteristics that usually serve to identify fiduciary relationships:

(1) the fiduciary has scope for the exercise of some discretion or power;

(2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interest;

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33. INAC, supra note 12 at 5.
Therefore, we must ask: Is the current relationship between the Crown and FNCFSA representative of a fiduciary relationship? The answer, although speculative at this point, is in the affirmative. First, the federal government, to its own admission as stated above, funds FNCFSA under its discretion and initiated Directive 20-1 on its own accord. Second, if the federal government stopped the funding of FNCFSA, the interests of the agencies and, in turn, the interests of First Nations children would be severely jeopardized. Finally, FNCFSA are clearly vulnerable as outlined above. They rely solely on federal funding to ensure that they can provide service, although at inadequate levels, to First Nations children on reserve. Trust and reliance has been garnered between the federal government and FNCFSA and this is demonstrated by ongoing round table talks, joint research initiatives and the shared principle of protecting First Nations children on reserve from harm and loss of cultural identity and rights.

Indeed, the federal government has taken on this responsibility even though the provinces may be legally liable to fund such agencies. For example, in the case of *Director of Child Welfare for Manitoba v. B.*, Garson J. not only affirmed that child welfare legislation in Manitoba is of general application under Section 88 of the *Indian Act*, but went on to say that the province has a statutory duty to provide a full level of social services as contemplated by the *Act* to First Nations peoples on reserve:

> The refusal by the provincial government [to provide services] was not only unfair, unjust and discriminatory, but also illegal. I am further persuaded that there is no constitutional impediment either inhibiting or preventing the provincial government from providing requesting services. But most importantly, the present law makes it obligatory that the Province of Manitoba provide the same social and child care services under the *Child Welfare Act* to Treaty Indians resident in Manitoba as other residents of the province receive.37

This case was decided in 1979, before the implementation of Directive 20-1 and centred on the issue of who had jurisdiction over social services on reserve. Interestingly, the facts of the case are relatively similar to the situation facing First Nations families today: the plaintiff mother could not access counselling because she lived on reserve. The provincial position was that responsibility for such services fell under federal jurisdiction, whereas the federal position was that social services fell within the sphere of

provincial power. Clearly, the judge in this case found that the responsibilities fell to the province.

**Aboriginal Rights Under Section 35**

The second issue that must be examined here is to what extent Section 35 applies to FNCFSA. In other words, is child welfare an Aboriginal right and therefore outside of provincial jurisdiction, and possibly outside of the strict federal funding formula? An Aboriginal right was defined by the Supreme Court of Canada in *R. v. Van der Peet*:

> The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society’s distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive—that it was one of the things that truly made the society what it was.38

Most likely any claim that child welfare is an Aboriginal right protected under Section 35 will fail and certainly could not be advanced as an issue of self governance.39 In *Re Family & Child Services Act (British Columbia)*, the respondent parents, both status Indians, applied for a determination of whether or not “Aboriginal rights” referred to in Section 35 include the right to the full responsibility for the care and upbringing of Aboriginal children.40 The Court stipulated:

> The right [of child welfare] is essential to the continual regeneration of the [N]ative community …. There is no doubt that if the [N]ative culture is to survive, [N]ative people must have control over raising their own children.41

Basing his analysis on *R. v. Sparrow* (as this decision came down before *Van der Peet*), Gordon J. found that caring for children and having control over child welfare authority is not a recognized Aboriginal right under Section 35:

> The right to determine if children are abandoned, neglected or abused to the extent of being in need of protection, and the power to implement appropriate remedies is an authority vested in every viable society. It is not something exclusive to [A]boriginals in general or to the [A]boriginals of Canada in particular. Being a feature common to all viable societies, I am satisfied it is not

41. *Ibid.* at paras. 33 and 34.
an Aboriginal right as referred to s. 35(1) of The Constitution Act 1982. As a result, the respondent’s application is dismissed.42

The landscape of fiduciary law and Aboriginal rights under Section 35 are not fertile grounds for advancing the issue of equality under the law. At this juncture perhaps the greatest opportunity to effect change for FNCFSA and First Nations children is a Charter challenge under Section 15.

IV A CHARTER CHALLENGE UNDER SECTION 15

We now turn to the crux of this discussion. To date, there has not been a Section 15 claim brought against the federal government. There are many reasons for this, including the immense cost, the time commitment and the absence of a named plaintiff who is prepared to dedicate a significant portion of his or her life to this case. However, perhaps the primary reason that a claim has not been issued has been the ongoing dedication to the process of negotiation. The Caring Society in conjunction with FNCFSA across the country has attempted to work with INAC in a process of reconciliation, consultation and discussion. Following the publication of the NPR, and the recommendations which flowed from it, there was a hopeful attitude to the future of the underfunding of FNCFSA. It seemed inevitable that the federal government would implement some if not all of the recommendations that stemmed from the NPR, as INAC itself had played a leading role in the research and development of the recommendations. The round table discussions that have subsequently followed, however, have provided little change for First Nations children on reserve in need of protection.43

The NPR included a total of 17 recommendations to improve the funding formula. It has been over seven years since the completion of the NPR and the federal government has failed to implement any of the recommendations which could directly benefit First Nations children on reserve.44 INAC documents obtained by the Caring Society through an Access to Information request in 2002 demonstrate that the lack of action by the federal government was not due to lack of awareness surrounding the problem or paucity of solutions. Documents sent between senior INAC officials confirm that the current level of funding provided by INAC is

42. [1990] 1 S.C.R. 1075 at para. 41 [emphasis added].
43. This information is based on my experience as an intern and research assistant to the Caring Society and my ongoing observation of the process through the Caring Society website and media links.
44. First Nations Child and Family Caring Society, supra note 28.
insufficient for FNCFSA to meet their statutory obligations under provincial child welfare laws—particularly with regard to disruptive measures resulting in higher numbers of First Nations children entering child welfare care.\(^45\) One can only assume that a lack of action on the part of the federal government is simply a lack of will.

Despite having the glaring evidence that Directive 20-1 is insufficient, INAC commissioned a second review of the funding formula in 2004. This three part research was completed in 2005 and involved over 20 researchers representing some of the most respected experts in a variety of disciplines. The major finding of this research confirms that FNCFSA are drastically underfunded across the administrative, policy and practice domains. Detailed economic analysis determined that an additional $109 million per year in federal child welfare funding is needed to ensure a very basic level of equivalency to provincial funding levels.\(^46\) The key area of underfunding continues to be least disruptive measures.

Against this backdrop we must consider if the current federal funding formula of FNCFSA violates Section 15 of the Charter of Rights and Freedoms. The threshold question that must therefore be asked is: Does Directive 20-1 and its impact offend the human dignity of Aboriginal children, by marginalizing or treating them as less worthy without regard to their actual circumstances? Is Directive 20-1 discriminatory under Section 15?

The purpose of Section 15, now accepted and applied by the Supreme Court of Canada, is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice. It is to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally deserving of concern, respect and consideration. Moreover, the equality rights protected under the Charter are substantive in nature. Therefore, the analysis under Section 15 considers the differences among people and communities in an effort to recognize that different people may require different treatment to achieve equality.\(^47\)

What follows is an analysis of a potential claim and therefore involves a degree of speculation regarding certain aspects. Moreover, it should be remembered that any claim brought on behalf of a First Nations child on reserve or perhaps by an agency itself would be dependent upon which

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\(^{45}\) Ibid.

\(^{46}\) Blackstock, Prakash, Loxley & Wien, supra note 21.

province the agency is mandated by; the more demanding the provincial legislation, the greater the chance for success.

The Distinction Is Glaring

In *Law v. Canada*, Iacobucci J. laid out the three part test to determine if Section 15 of the *Charter* has been violated.\(^{48}\) The first issue to consider is whether or not the law imposes a distinction between the claimant and others in purpose or effect. Second, we must ask whether this distinction is based on an enumerated or analogous ground. Finally, if the first and second criteria are made out, we must then move to consider if the differential treatment is discriminatory and denies or demeans the claimants’ human dignity.\(^ {49}\)

Under the first stage of analysis we must ask whether the impugned law (a) draws a formal distinction between the claimant and others on the basis of a personal characteristic; or (b) fails to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. In approaching this stage the Supreme Court of Canada in *Hodge v. Canada* (*Minister of Human Resources*), underlined the importance of identifying a comparator group in order to provide a comparative analysis.\(^{50}\) Thus, the question for us is whether or not there is a formal distinction between children off reserve in need of protection and First Nations children on reserve in need of protection. The answer is clearly in the affirmative: off reserve children in need of child welfare protection are provided with an arsenal of prevention and least disruptive measures outlined by the provincial legislation of their jurisdiction. On reserve children do not have access to these services; the research clearly indicates that FNCFSA cannot meet provincial standards and therefore First Nations children often receive services only when they are apprehended and placed in out-of-home care.

Second, there is undeniable evidence that Directive 20-1 has failed to take into account that First Nations children on reserve are already in a disadvantaged position. The Caring Society report regarding Canada’s lack of fulfillment of the *United Nations Convention on the Rights of the Child* for First Nations children clearly demonstrates that First Nations children are significantly disadvantaged in almost every area under consideration.\(^ {51}\) They

\(^{48}\) [1999] 1 S.C.R. 497 [*Law*].
\(^{49}\) Ibid. at para. 39.
\(^{51}\) Blackstock, Clarke, Cullen, D’Hondt & Formsma, *supra* note 2.
experience poverty, poor housing, hunger, death, accidental injury, sexual exploitation, poor educational outcomes, suicide, and substance misuse at significantly higher rates than any other group of children in Canada. Moreover, the federal government has known about the lived experiences of First Nations children for some time. One simply needs to reflect on the findings of RCAP to comprehend life on reserve for First Nations families and their children.

The Distinction Is Based on an Analogous Ground

As stage one is clearly made out, we must move to the second stage. Here we must consider whether the basis of the distinction is on one or more of the enumerated or analogous grounds protected under the Charter. Although there could be a strong case based on “race,” the more convincing argument is to advance a claim based on residency. As outlined above, FNCFSA have jurisdiction over “Indian” children on reserve and those who fall within their general catchment area. Thus, any claim made under Section 15 would most likely be based on residency.

In Corbiere v. Canada (Minister of Indian and Northern Affairs), the Supreme Court of Canada unanimously held that “Aboriginality-residence” is an analogous ground of discrimination under Section 15.52 The courts held that distinctions based on reserve residency touch on personal, immutable characteristics and are therefore automatically suspect of being discriminatory. Writing for the majority McLachlin and Bastarache JJ. state:  
The ordinary “residence” decisions faced by the average Canadian should not be confused with the profound decisions Aboriginal band members make to live on or off reserve, assuming choice is possible. The reality of their situation is unique and complex.53

The distinction between children off reserve and children on reserve is therefore based on an analogous ground and stage two is met.

The Distinction Violates Human Dignity

In approaching the third stage, the question asked is whether the distinction made is a violation of human dignity. Viewed from the perspective of the reasonable person, does the federal government’s choice to underfund FNCFSA, who provide child welfare services to on reserve First Nations

52. [1999] 2 S.C.R. 203
53. Ibid. at para. 15.
children, offend the human dignity and freedom of these children by marginalizing them or treating them as less worthy without regard to their actual circumstances? In *Law*, the Supreme Court established four contextual factors to help determine whether claimants have had their human dignity denied or demeaned by the differential treatment. These factors include (a) pre-existing disadvantage; (b) correspondence between the distinction and the claimants or circumstances; (c) the existence of ameliorative purpose or effects and; (d) the nature of the interest affected.54

Regarding pre-existing disadvantage, the court is asked to consider whether the distinction in question reflects and reinforces existing disadvantages, stereotypes and prejudices. First Nations children on reserve unquestioningly face pre-existing disadvantages; as noted above they are overrepresented in all areas of social concern. Moreover, Directive 20-1 reinforces these disadvantages by separating First Nations children on reserve from their families and their communities at higher rates than the comparator group. This separation serves to dilute the passing on of cultural heritage and violates their rights to be raised in a stable and secure family setting.

Moving to correspondence, the court is asked whether the alleged ground of discrimination corresponds to the actual needs, capacity or circumstances of the claimant. In *Gosselin v. Quebec (Attorney General)*, McLachlin C.J. noted, “a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory.”55 Correspondence is clearly not present in the case at hand; Directive 20-1 fails to correspond to the actual needs and circumstances of First Nations children on reserve. Over the past 10 to 15 years, child welfare social theory has evolved in recognition that keeping children in their homes is the ideal circumstance, even when there is risk of harm to a child. Children have better outcomes and develop fewer long term problems when they are able to remain in their homes.56 Apprehension is always and should always be the last resort. Provincial legislation has developed to reflect this evolution. All provincial legislative schemes outline avenues for prevention and least disruptive measures. Clearly, some provinces strictly mandate least disruptive measures while others simply embed this principle in the objective and purpose of the legislation. Children living off reserve are benefiting from this development: children at risk are receiving child welfare

54. *Law*, supra note 48 at paras. 63 to 85.
support within their familial environment. First Nations children on reserve are not.

Directive 20-1 does not correspond to the needs and circumstances of First Nations children on reserve. First Nations children on reserve need to be supported and protected within their homes. Parents and other family members need to be given the opportunity to attend counselling programs, substance misuse programs, and deserve support from FNCFSA to help keep children and caregivers together. Moreover these adults deserve special attention considering the multi-generational impacts experienced by many during the residential school era and the '60s scoop. First Nations children on reserve also need access to their communities, cultural traditions and spiritual guidance that is almost never available when these children are placed in out-of-home care. As outlined above, First Nations children on reserve who are apprehended are rarely placed with First Nations families and are almost never placed within their own communities. This breach of cultural ties fails to correspond with their needs and in fact aggravates many of the disadvantages already faced by the First Nations community. Directive 20-1 does not consider these realities and fails to correspond with the needs of First Nations children on reserve.

Third, the court must examine whether the purpose or effect of the challenged law or program is to ameliorate the condition of more disadvantaged groups and whether persons excluded from the benefit are more advantaged than those included. Is Directive 20-1 ameliorative? This factor potentially poses the greatest hurdle and presents a significant jurisdictional consideration. The federal government would likely argue that providing funding to FNCFSA is for an ameliorative purpose. Moreover, they could argue that off reserve children do not receive direct funding from the federal government and this exclusion is based on the unique disadvantaged position of First Nations children on reserve. They could argue that under Section 88 of the Indian Act child welfare falls to the provinces to provide and fund services to all children within the province, and that funding to FNCFSA is simply discretionary. Viewed within this context, the federal government could argue that Directive 20-1 is therefore ameliorative in purpose and provides support in place of the provinces who have the ultimate jurisdiction over child welfare.

The effect, however, is not ameliorative. At first blush it seems that the federal government could stipulate that the funding is discretionary and therefore its effect is to support First Nations communities at any level when presented with the alternative of providing no support at all. This argument, however, fails. Eldridge v. British Columbia (Attorney General) stands for the proposition that once a state provides a benefit, it must do so in a non-discriminatory manner, and must take special measures to ensure that
disadvantaged groups are able to benefit equally from government services. The test here is not a simple examination of the purpose of the differential treatment; if the effect of a law does not have an ameliorative outcome the government cannot rely on an altruistic view that it is trying to do the right thing. Here the government knows that the impact of Directive 20-1 is disproportionately admitting First Nations children on reserve into out-of-home care. Clearly, the effect of Directive 20-1 is not ameliorative.

Finally, the court must consider whether the nature and the scope of the interests affected by the challenged law go to the core of human dignity. The interest affected here is the best interests of the child. The best interests of the child is identified in a plethora of legislation in federal and provincial jurisdictions and was recognized and ratified by Canada in signing the United Nations Convention on the Rights of the Child as a leading principle in caring for children. Article 3 outlines the interests of the child as paramount and notes that budgetary allocations should give priority to children and to the safekeeping of their rights. Best interests of the child is also recognized as a legal principle, as outlined in Canadian Foundation for Children, Youth & Law v. Canada (Attorney General), and guides most policies directed at children.

As countless research demonstrates, it is in the best interests of the child to grow up and develop in their own homes. As noted by Shangreaux,

families are the best environment to provide a safe and loving atmosphere for children that respects and affirms their cultural and spiritual identity. Children are entitled to grow up in their families without interruption and without unwarranted interference from government agencies.

Directive 20-1 makes it virtually impossible for FNCFSA to ensure that the best interests of the child are protected and thus seriously hinders the development of healthy First Nations children on reserve.

There can be no question that through the lens of a Section 15 analysis Directive 20-1 is discriminatory. The evidence is overwhelming and there can be no rationalization of or justification for why First Nations children on reserve are treated in such an unfair manner.

Any litigation contemplated against the federal government under Section 15 of the Charter must consider the effect of Section 1. Under Section 1 the federal government must demonstrate how the discrimination

60. Shangreaux, supra note 22 at 15.
articulated under Section 15 can be justified in a free and democratic society. Here the burden would be on the federal government. At this juncture the evidence presented in this paper does not give the federal government a strong opportunity to justify the discrimination and one can only hope that should discrimination be found to exist in relation to First Nations children on reserve that the government would simply concede Section 1.

V Conclusion

On November 21, 2006, a Memorandum of Understanding was signed in Ottawa between National Chief Phil Fontaine of the AFN and Joan Glode, President of the Caring Society. At that time AFN also launched its Leadership Action Plan on First Nations Child Welfare. Both Phil Fontaine and Joan Glode recognized that this historic partnership could be a vehicle for change. Indeed, the Caring Society has played a significant role in helping to inform the AFN about the issues surrounding First Nations child welfare, and this collaboration may have set in motion a series of events that may result in progress.

On February 5, 2007, the Assembly of First Nations Chief Phil Fontaine announced that the AFN was filing a human rights complaint against the federal government. This complaint is fully supported by the Caring Society and the two organizations are continuing to work on this issue. At the press conference, Fontaine said that Ottawa must end its “systemic discrimination” of underfunding Aboriginal child welfare services. “This situation for children in care must end. I have always said that I would rather negotiate than litigate or demonstrate. But if this is the only way to bring attention and action to the situation, so be it.”

On May 18, 2007, NDP Aboriginal Affairs critic Jean Crowder called upon the Government of Canada to immediately adopt a Child-First principle, based on Jordan’s Principle, for services directed at First Nations children. Jordan’s Principle is named after a four-year-old First Nations boy who spent his entire life, and eventually died, in a hospital simply because no federal or provincial government would take responsibility for his care at home. Under the proposed principle, when a jurisdictional dispute arises between government parties (provincial/territorial and federal) or between two departments or ministries of the same government regarding payment for services for a status Indian child which is otherwise available to other Canadian children, the government or ministry/department of first contact must pay for the services without delay or disruption. A dispute resolution

mechanism can then be called into action as needed. But, ultimately, the child does not unnecessarily suffer.

Thus, we are beginning to see some movement. Today, First Nations communities across Canada continue to work to protect the needs of their children and their communities. The efforts of the Caring Society are echoed across this land and those in the field have watched with hope and awe at their endless dedication. But these efforts continue to fall on deaf ears. We, as members of the Canadian social, moral and political landscape, cannot ignore these efforts and we should not feel helpless in the movement to provide safe and appropriate supports for First Nations children. For many years the Caring Society has dedicated much of its time working with the federal government, but to no avail. Perhaps the tide is changing and the time for a new course of action has arrived.