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Indigenous Family Violence and Family Law in Canada

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Research and Education for Solutions to Violence and Abuse
RESOLVE MANITOBA

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RESOLVE Manitoba is based at the University of Manitoba, Winnipeg, Manitoba, Canada, on original lands of Anishinaabeg, Cree, Oji-Cree, Dakota, and Dene peoples, and on the homeland of the Métis Nation.

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Indigenous Family Violence and Family Law in Canada

INTRODUCTION

Indigenous family violence is a multifaceted issue that intersects with Canadian family law, particularly in child and family services and the protection of Indigenous children and families. The legacy of colonial policies, including residential schools and systemic discrimination, has contributed to intergenerational trauma, which exacerbates family violence within Indigenous communities. Canadian family law has expanded the definition of family violence to include various forms of abuse, and courts must consider its impact on children when determining their best interests. Specific legal measures have evolved to address the impact of intergenerational trauma and to prioritize culturally appropriate services for Indigenous families.

ABOUT THIS BRIEF

This brief addresses the legal considerations surrounding Indigenous family violence in Canadian family law, focusing on the role of intergenerational trauma, the specific legal standards and considerations in place to address its impact on Indigenous families and children, and the recognition of intergenerational trauma as a critical factor. It also discusses legislative and judicial measures aimed at mitigating the effects of family violence on Indigenous families.

CASE LAW, LEGAL STANDARDS AND LEGAL CONSIDERATIONS

EXPANDED DEFINITIONS OF FAMILY VIOLENCE

Canadian family law, including the *Divorce Act* and the *Family Law Act*, generally defines family violence broadly to include physical, sexual, psychological, and financial abuse, as well as coercive and controlling behaviour. Courts must consider the impact of family violence on children when determining their best interests.[1] The integration of Indigenous perspectives into Canadian family violence law is supported by recent legislative developments, particularly through the enactment of Bill C-92 *(An Act respecting First Nations, Inuit and Métis children, youth and families).*

CULTURALLY APPROPRIATE SERVICES AND LEAST DISRUPTIVE MEASURES

Canadian courts and tribunals are expected to emphasize the need for least disruptive measures and culturally appropriate services to address the unique needs of Indigenous families and children affected

[1] Family Violence: Advocating with Social Science Research (BC)

by intergenerational trauma, and to incorporate that emphasis into decisions and plans developed with respect to Indigenous families.[2]

BILL C-92: AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES (THE "ACT")

The Act affirms Indigenous peoples' inherent right to exercise jurisdiction over child and family services. It prioritizes the best interests of Indigenous children, cultural continuity, and substantive equality. The Act prohibits the apprehension of Indigenous children solely on socio-economic grounds and emphasizes the importance of reuniting Indigenous children with their families and communities.[3]

RECOGNITION OF INTERGENERATIONAL TRAUMA

Parliament has formally acknowledged the legacy of residential schools and the harmful effects of colonial policies, including intergenerational trauma. This acknowledgment guides legislative actions to address the impact of trauma on Indigenous families and children.[4]

CASE LAW

The precedent cases, *Napora v. Napora, M.J. No. 296,* and *Michif Child and Family Services v. S.A.S., M.J. No. 154,* provide significant guidance on the impact of family violence on children, including Indigenous children, and the factors courts must consider when determining their best interests. Both cases emphasize assessing the nature, seriousness, and frequency of family violence, its direct or indirect impact on the child, and whether it has resulted in, or poses a risk of, physical, emotional, or psychological harm to the child. The perpetrator's willingness and capacity to take measures to prevent further harm and enhance their ability to care for the child are also pivotal factors in this evaluation.

MICHIF CHILD AND FAMILY SERVICES V. S.A.S., M.J. NO. 154

In *Michif Child and Family Services v. S.A.S.*[5]*,* the court emphasized the determinants set out in Section 10(3) of the Act for establishing the best interests of an Indigenous child. These determinants include the child's cultural, linguistic, religious, and spiritual upbringing, as well as the importance of preserving relationships with their family and Indigenous community. The court further recognized the necessity of considering the impact of family violence, including exposure to such violence and its repercussions on the child's physical, emotional, and psychological well-being.

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[2] First Nations Child & Family Caring Society of Canada v. Canada (Minister of Indigenous and Northern Affairs), [2019] C.H.R.D. No. 7, First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indigenous and Northern Affairs), [2017] C.H.R.D. No. 14.

[3] Child Protection and Indigenous Children: Constitutional and Legal Challenges (ON), An Act respecting First Nations, Inuit and Métis children, youth and families, Preamble Preamble

[4] An Act respecting First Nations, Inuit and Métis children, youth and families, Preamble Preamble, First Nations Child & Family Caring Society of Canada v. Canada (Minister of Indigenous and Northern Affairs), [2020] C.H.R.D. No. 20.

[5] Michif Child and Family Services v. S.A.S., [2022] M.J. No. 154.

The case was deciding an application for summary judgment, seeking a permanent order for the two-year-old child, V.J.A.M-M. Despite the parents' assertion that a trial was necessary to resolve genuine issues and that the child was no longer in need of protection, the court ruled against their opposition and granted the permanent order. The court's ultimate determination was that the child remained in need of protection and that a permanent order was in the child's best interests.

A critical element informing the court's judgment was the presence of family violence. As mandated by Section 35(4) of *The Family Law Act*, the court was required to assess the impact of family violence on the child's best interests by considering a range of factors. These mandatory considerations included the severity, nature, and frequency of the violence; the existence of a pattern of controlling and coercive behaviour; whether the child was exposed to the violence, either directly or indirectly; the emotional, physical, and psychological harm, or the risk of such harm, to the child; whether the violence compromises the safety of the child or other family members or instils a sense of fear for safety; and whether the perpetrator has successfully implemented measures to prevent future violence and enhance their capacity for child care. The decision emphasizes that addressing family violence is a fundamental aspect of applying these statutory considerations to ensure the child's well-being.

NAPORA V. NAPORA [2024] M.J. NO. 296

The case of *Napora v. Napora*[6] underscores the importance of assessing family violence within the context of the best interests of the child. The proceedings primarily addressed allegations of family violence, including harassment and coercive control, and their subsequent impact on parenting and decision-making authority.

The court determined this case to be a clear example of family violence as defined under Section 2(1) of the *Family Law Act.* Specifically, the court found that Mr. Napora engaged in harassment and coercive control through near-constant text messaging, conduct explicitly included in the legislative definition of family violence. This behaviour caused Ms. Napora to feel unsafe and rendered meaningful consultation between the parties unreasonable, further demonstrating the negative impact of family violence on interpersonal relationships and parenting.

In its assessment, the court relied on Family Evaluation reports to determine the effects of this violence on the children and the parties' parenting capabilities. In accordance with Section 35(4) of the *Family Law Act,* the court considered the nature, seriousness, and frequency of the violence, as well as its impact on the children and the parents' ability to care for them. The decision to grant sole decision-making authority to Ms. Napora aligns with the principle that family violence compromises the safety and well-being of children and family members.

[6] Napora v. Napora, [2024] M.J. No. 296.

The legal precedents discussed above demonstrate that a thorough evaluation of the effects of family violence on children, particularly Indigenous children, is required. Judicial consideration must focus on the child's best interests, prioritizing their physical, emotional, and psychological safety, while also ensuring the preservation of their cultural and familial connections.

THE ROLE OF INTERGENERATIONAL TRAUMA

Intergenerational trauma, rooted in historical injustices such as residential schools and systemic discrimination, is a crucial element in understanding family violence within Indigenous communities. The cumulative transmission of trauma across generations has played a significant role in perpetuating cycles of violence, socio-economic difficulties, and mental health challenges. Parliament has recognized the harm inflicted by colonial policies and practices and has underscored the importance of addressing intergenerational trauma within child and family services. Additionally, courts and tribunals have acknowledged the necessity of considering intergenerational trauma when evaluating the best interests of Indigenous children, especially in cases pertaining to child apprehension and custody.

The legacy of colonialism has profoundly affected family life in Indigenous communities. Historical policies, including residential schools and forced resettlement, disrupted traditional values, governance, and social systems. To effectively address family violence, we need a comprehensive approach that recognizes historical trauma and systemic inequalities while respecting Indigenous governance and legal traditions.

Colonial policies, including the Indian Residential Schools system, were designed to assimilate Indigenous children into the dominant culture by forcibly removing them from their families and communities. This disconnection produced profound intergenerational trauma, undermining traditional family structures and cultural values. The Truth and Reconciliation Commission of Canada has recognized these policies as components of a broader strategy of cultural genocide, which has inflicted enduring wounds on Indigenous families and communities. The legacy of residential schools has contributed to social dysfunction, including higher rates of family violence, poverty, and systemic discrimination against Indigenous peoples. These issues have fostered conditions that sustain cycles of violence and trauma within Indigenous communities.[7]

Regrettably, the child protection system has exacerbated these issues, particularly for Indigenous families, who often face more severe consequences. Many children are taken from their homes and

[7] First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indigenous and Northern Affairs), [2021] C.H.R.D. No. 41, First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development), [2016] C.H.R.D. No. 2, Onashowewin and the Promise of Aboriginal Diversionary Programs, (2018) 41:3 Man LJ 127- 161.

placed in foster care or adopted, which can lead to the loss of cultural heritage and community ties. This situation is seen as a continuation of the legacy of residential schools, with harm rooted in colonial policies. Evidence shows that Indigenous children adopted by non-Indigenous families are more likely to experience adverse outcomes, highlighting the importance of culturally respectful and sensitive child and family services. Traditional caregiving strategies, which prioritize keeping children within their extended families or communities, are generally viewed as more effective in preserving cultural identity and supporting their well-being and healing.

Addressing family violence in Indigenous communities requires confronting historical and systemic issues. This entails acknowledging the harm caused by colonial policies and implementing systemic reforms to redress injustices. Indigenous communities should be empowered to govern child and family services, as outlined in Section 24(1) of the Act. This clause emphasizes respecting the laws of the Indigenous group with which the child is most connected, and considering the child's habitual residence, views, preferences, and those of their parents and caregivers.

Respecting Indigenous legal traditions and cultural practices is vital to addressing family violence. These traditions, which historically prohibited family and sexual violence, offer valuable insights for fostering healthier relationships. However, colonialism has eroded these values, contributing to the troubling normalization of violence against Indigenous women and children. It's essential to actively reverse this trend through culturally respectful interventions and support systems that genuinely resonate with Indigenous communities.

Considering the points discussed, tackling family violence in Indigenous communities requires a holistic strategy that includes understanding the historical context, reforming systems, and honouring Indigenous legal traditions and jurisdiction. Emphasizing culturally sensitive child and family support, empowering Indigenous self-governance, and addressing colonial legacies are crucial for Canada to make genuine progress towards healing and reconciliation with Indigenous peoples.

LEGAL MEASURES TO ADDRESS THE IMPACTS OF INTERGENERATIONAL TRAUMA

The legal framework in Canada recognizes the significant impact of family violence and intergenerational trauma on Indigenous families and children and has implemented legislative and judicial measures to address these issues. However, further measures could be considered to enhance protection and support for Indigenous families.

ACT EMPHASIZES INDIGENOUS AUTHORITY

As discussed, the Act emphasizes Indigenous communities' authority over child and family services and sets national standards to safeguard Indigenous children. It recognizes the legacy of residential schools and the intergenerational trauma inflicted by colonial policies, and it stresses the importance of reuniting

Indigenous children with their families and communities. Additionally, it underscores the need to support Indigenous women and girls in overcoming past disadvantages and addressing family violence.[8]

> ***Section 10(3)*** of the Act sets out specific factors for determining the best interests of an Indigenous child, including cultural, linguistic, religious, and spiritual upbringing, as well as the importance of maintaining relationships with family and Indigenous communities. This underscores that various aspects of the child's identity and heritage are integral to their development and well-being. These factors are essential to determining the child's best interests, particularly in the context of child and family services.

CULTURAL UPBRINGING CONSIDERED

Cultural upbringing involves maintaining the child's ties to their Indigenous community, traditions, and practices. This includes access to cultural ceremonies, traditional knowledge, and customs. Linguistic upbringing focuses on preserving the child's connection to their Indigenous language, a vital part of their cultural identity and continuity. Religious and spiritual upbringing entails exposing the child to their community's spiritual beliefs and practices, such as ceremonies, teachings, and rituals that are core to their cultural heritage.

FAMILIAL RELATIONSHIPS ARE CRITICAL

Familial relationships are also a critical factor in determining the best interests of an Indigenous child. Section 10(3) of the Act emphasizes the importance of the child's relationships with their parents, care providers, and other family members who play significant roles in their lives. This includes prioritizing placements that allow the child to maintain these relationships and connections to their family and Indigenous community. For example, Section 16 of the Act establishes a hierarchy of placement preferences, prioritizing placement with the child's parents, followed by other adult family members, and then members of the child's Indigenous community, to preserve the child's cultural and familial ties.

BEST INTERESTS OF THE CHILD ARE ASSESSED

The Divorce Act, particularly Section 16, sets out explicit considerations of family violence when assessing the best interests of the child. It requires courts to evaluate the nature, severity, and recurrence of family violence, its effects on the child, and the measures the perpetrator has taken to prevent future violence. This framework ensures that parenting arrangements are guided by the paramount importance of the child's safety and well-being.

The best interests of the child is a paramount principle in Canadian and international law, as underscored

[8] An Act respecting First Nations, Inuit and Métis children, youth and families, SECTION 10 Best interests of Indigenous child, Assented to 2019-06-21 An Act respecting First Nations, Inuit and Métis children, youth and families.

by judicial decisions such as *Baker v. Canada (Minister of Citizenship and Immigration), [1999] S.C.J. No. 39*. This principle is particularly relevant in matters concerning Indigenous children, where critical considerations include the preservation of cultural identity and the addressing of intergenerational trauma.[9]

CONCLUSION

Addressing Indigenous family violence within family law presents a complex challenge deeply connected to the lasting effects of intergenerational trauma. Canadian family law has adapted to this issue by expanding the definition of family violence and requiring courts to consider its impact on children and caregivers. Legal frameworks that emphasize culturally appropriate services and prioritize the best interests of Indigenous children are beginning to confront the systemic and historical causes of family violence through judicial and legislative efforts.

Although notable progress has been achieved, further improvements are necessary. Moving forward, increased support for culturally sensitive services and proactive systemic change strategies are crucial to reducing family violence and promoting the well-being of Indigenous families. This includes expanding culturally relevant services in line with international guidelines, addressing root problems such as poverty, substance abuse, and housing instability, and supporting Indigenous parenting and community healing. Additionally, enhancing screening protocols for family violence in legal processes will better identify and address trauma and power disparities. By maintaining this focus on systemic and culturally informed reforms, Canadian family law can more effectively protect and empower Indigenous children and families impacted by violence and intergenerational trauma.

ABOUT THE AUTHOR

Morgan Jackson is a family lawyer with professional experience handling family law matters involving family violence within the context of Indigenous families. Her work is informed by both her legal practice and her Métis identity, bringing an awareness of the unique challenges Indigenous families face in the legal system.

[9] First Nations Child and Family Caring Society of Canada v. Canada (Attorney General), [2016] 2 C.N.L.R. 270.