DEVLIN GAILUS
BARRISTERS AND SOLICITORS

556 Herald Street
Victoria, BC, Canada V8W 1S6

Telephone: 250.361.9469
Facsimile: 250.361.9429
www.devlingailus.com

Reply to: **John** W. **Gailus**
Mobile: 250.514.9955
E-**mail**: **john@devlingailus.com**

Delegated Child and Family Services Agencies

Introduction

Traditionally, aboriginal peoples have provided for the welfare of their own children according to their own cultural and legal systems. They lost control over the welfare of aboriginal children through the processes of colonization and assimilation. However, in the last 25 years, aboriginal peoples in Canada have increasingly taken measures to regain that control. One of the ways in which they have regained control is by entering into delegation agreements with the provinces. The resulting agencies, known as Aboriginal Child and Family Service Agencies, are delegated either some of all of the child welfare authority over aboriginal children and families. Details and implications of these delegated agencies are set out below.

Background: Division of Powers

Under the constitutional division of powers, the provinces are responsible for child and family services under s. 92(13) "Property and Civil Rights in the Province". However, the federal government is responsible for "Indians and Lands Reserved for Indians" under s. 91(24). Therefore, even though there is no reference to child welfare in the *Indian Act* or other federal legislation, prior to the 1950's the federal government administered child welfare services for First Nations on reserve.

Off reserve, the Province of British Columbia administered child welfare services through its *Child, Family and Community Service Act* respecting both aboriginal and non-aboriginal children. Then in 1951, section 88 of the *Indian Act* was revised to provide that provincial laws of general application apply to First Nations living on reserve. The federal government still has the jurisdiction to enact legislation regarding child welfare on reserve. However, because it has not, s. 88 allows the provincial child welfare act to apply to those First Nations. The application of the *Child, Family and Community Service Act* on reserve was affirmed in 1976 by the Supreme Court of Canada in *Natural Parents v. Superintendent of Child Welfare,* 60 D.L.R. 3rd 148.

Presently in British Columbia, the Ministry of Child and Family Development provides the following types of services, on and off reserve:

- residential services,
- foster care,
- adoption services,
- prevention and survivor counselling,
- parenting skills, etc.

Financial Responsibility

Though the provincial legislation applies on reserve, the federal government has retained financial responsibility for the administration of that legislation on reserve. Therefore, the federal and provincial governments negotiated a Memorandum of Understanding outlining a compensation scheme in which the federal government compensates British Columbia for exercising its authority under the provincial Act.

Delegation Agreements: General

Presently, there are approximately 9,000 children in care under the provincial Act in British Columbia, approximately half of which are aboriginal. Therefore, in an attempt to be more active in the welfare of aboriginal children and assert their inherent right of self-government, many Aboriginal groups have entered into agreements with the provincial government to receive some or all of the provincial government's authority over child welfare.

There is a structured process that an Aboriginal agency must satisfy and specific criteria before the Province will consider entering into a delegation agreement with it. The delegation process is a three-stage process. The first stage is the Pre-Planning stage where an initial community proposal is developed through consultation with the community. The second stage is the Planning stage where needs assessments are completed, plans are elaborated, and eventually a formal agreement with the Province is signed. The third step is the Start-up stage where criteria established in the Planning stage are put into operation. At the end of the Start-up stage, the Aboriginal agency is ready and qualified to deliver services.

One requirement for an agency to receive delegation under an agreement is that it must represent a band, or collection of bands, with a minimum number of children on reserve. Originally that number was 500. However, that requirement has been somewhat modified, and now some agencies represent fewer than 500 children.

Because an Aboriginal agency must represent a minimum number of people, most agencies represent more than one band. There are currently 24 delegated agencies in British Columbia, representing 156 bands of the approximately 200 bands in the province, operating mostly on reserve. Of the approximately 4,500 aboriginal children in care in B.C., about 1,340 of them are in the care of these delegated agencies.

Delegation Agreements: Operational Levels

Before an Aboriginal delegated agency can begin operating, it must complete the following requirements:

1) sign a Delegation Enabling Agreement with the Provincial Director of Child Protection;
2) obtain start-up funding; and
3) pass a program review by the Deputy Director.

Once those requirements are met, the agency may begin operations.

There are different levels of authority that an agency may be delegated depending on the criteria met by the agency. Older agreements cite Levels 11 to 15 as delegation categories. However, newer agreements use the operational levels set out below. Each level includes a description of the areas of service covered under that level:

- C3 – Resource development and voluntary service delivery (Levels 11 and 12)
    - support services for families,
    - voluntary care agreements for children, including temporary in-home care, and
    - special needs agreements, including those for children in care on no fixed term.
- C4 – Guardianship services for continuing custody wards (Levels 13 and 14)
    - all areas of service covered under level C3, and
    - guardianship of children in the continuing custody of the Director
- C6 – Full child protection services (Level 15)
    - all areas of service covered under levels C3 and C4, and
    - child protection.

Out of the 24 delegated Aboriginal agencies in British Columbia, three are in the start-up phase and as such have not yet received their delegated authority. Four can provide voluntary services and recruit and approve foster homes at the C3 level. Ten have the additional delegation necessary to approve guardianship services for children in continuing care as level C4 delegates. Seven agencies have the delegation required to provide full child protection, including the authority to investigate reports and remove children as C6 delegated agencies. An updated list of delegated aboriginal child and family service agencies is available on the Ministry of Children and Family website.

Once the Aboriginal agency is a delegated authority, however much that may be, it becomes subject to the provincial laws, policies and standards just as a provincial agency would be, unless they develop their own standards and policies. Delegation agreements provide the opportunity for Aboriginal agencies to develop their own standards or policies that must be approved by the Director designated pursuant to the *Child, Family and Community Service Act.* Individual workers who are delegated to act receive a province-wide authority to protect children.

Delegation Agreements: Funding

Aboriginal agencies that serve reserve communities with delegation agreements have entered into a funding agreement with the federal government that provides the same level of funding as the Memorandum of Understanding between the provincial and federal governments, discussed above. The funding is based on a basic amount calculated by the number of children in the

community plus an additional amount for the number of children in care. This formula is problematic for many Aboriginal communities who have a disproportionate number of children in care as compared to non-aboriginal communities under the Province's authority. The result is that many Aboriginal delegated agencies are under-funded as compared to the Province.

Another difficulty with this scheme is that delegated agencies have two levels of government to report to; the Province for a report of their activities and the federal government for their finances. To address this issue, the federal and provincial governments have begun performing joint audits of the Aboriginal agencies to consolidate and simplify the process.

Self-Government

Aboriginal people assert that they have an inherent right to self-government over child welfare matters, which has been recognized and affirmed by section 35 of the *Constitution Act, 1982.* This is affirmed by the B.C. Supreme Court in *Campbell v. British Columbia (Attorney General)* [2000] B.C.J. No. 1524 at para 179:

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

The B.C. Court of Appeal in *Casimel v. Insurance Corp. of British Columbia* [1993] B.C.J. No. 1834 affirmed that social self-regulation is an aboriginal right:

> I think that the conclusion which should be drawn from the decision for the court in *Delgamuukw v. The Queen* is that none of the five judges decided that aboriginal rights of social self-regulation had been extinguished by any form of blanket extinguishment and that particular rights must be examined in each case to determine the scope and content of the specific right in the aboriginal society, and the relationship between that right with that scope and content and the workings of the general law of British Columbia.

The court in *Casimel* affirmed that aboriginal customary adoptions are recognized by the courts and courts should apply statutory provisions and common law principles to those whose status is established by customary adoption. Similarly, aboriginal people have an inherent right to govern other aspects of family matters, like child protection.

However, delegated agreements do not represent true self-government as delegated agencies still work within the provincial framework. Therefore, in British Columbia, child welfare is one of many issues at the table in the current treaty process.

The Nisga'a Treaty, which predates the current treaty process, provides an example of a purer exercise of self-government than the delegation agreements. The Nisga'a Final Agreement

provides that the Nisga'a people will exercise their authority over child welfare services through their own tribal laws. In the meantime however, Nisga'a Child and Family Services is operating as a delegated agency while the Nisga'a Lisims Government drafts and implements its laws.

The recent Lheidli T'enneh Final Agreement arising out of the current B.C. treaty process provides similar provisions for child protection, custody and adoption as the Nisga'a Final Agreement. One of the few differences between the two agreements is that the Lheidli T'enneh Final Agreement provides that if the Lheidli T'enneh Government makes laws respecting child protection, it must share information with Child Protection Services and participate in British Columbia's information management systems.

In addition to treaty-making, there are other ways in which a First Nation can exercise its right to govern the welfare of its children. The Spallumcheen First Nation is one such example. In 1980, the Spallumcheen Band Council took control over the welfare of Spallumcheen children by passing child welfare bylaws pursuant to s. 81 of the *Indian Act,* indicating that they would have sole jurisdiction over child and family services extending to members on and off reserve. This by-law has been challenged numerous times in Canadian courts, but has been upheld. However, similar attempts by other First Nations to enact child welfare bylaws have been unsuccessful.

Child Protection

In addition to offering delegated authority to Aboriginal agencies, the *Child, Family and Community Services Act* also contains several provisions unique to aboriginal children. The Act specifically states in section 2(f) that the Act must interpreted and administered so that the cultural identity of aboriginal children is preserved, and in section 3(b) that "aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children." The Act provides that the applicable aboriginal organization or the Nisga'a Lisims government must be notified at all stages of a hearing under the Act if the child is an aboriginal child or Nisga'a child, respectively. With respect to foster care, section 71(3) states that when placing a child in a home, the child must be placed with the following priority:

(a) with the child's extended family or within the child's aboriginal cultural community;

(b) with another aboriginal family, if the child cannot be safely placed under paragraph (a); or

(c) in accordance with subsection (2), which outlines the placement priorities for non-aboriginal children.

First Nations may be awarded standing in a child protection hearing as well. The aboriginal organizations that must be given notice in respect of a hearing and designated representatives of Indian Bands and other aboriginal communities are listed in Schedules 1 and 2 to the *Child, Family and Community Service Regulation.*