

**Jurisdictional Quagmire:  
First Nation Child Welfare as a Human Right**

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## A. Introduction

The Truth and Reconciliation Commission of Canada has been touring the country to hear from victims of residential schools trauma. The Commission's purpose is to acknowledge the experiences of survivors and promote awareness of the impacts of the residential school system. While it may appear that Canada has moved away from assimilationist policies<sup>1</sup> of the past, First Nations are continuing to struggle against modern day child welfare policies which have resulted in the apprehension of an overwhelming number of First Nations children. There are currently three times more Aboriginal children in care than there were at the height of the residential school era.<sup>2</sup>

Numerous reports, including those of Auditor General of Canada Sheila Fraser, indicate that First Nations children on-reserve receive 22 percent<sup>3</sup> less child welfare funding than other Canadian children, making child welfare services for children on reserve inadequate or unavailable. First Nations argue that this chronic underfunding of child welfare services on-reserve lead to poverty and poor living conditions and thus a vast overrepresentation of Aboriginal children in care.

A recent challenge by First Nations Child and Family Caring Society and the Assembly of First Nations over the federal government's funding of child welfare services in *First Nations Child and Family Caring Society v. Canada*,<sup>4</sup> highlights the tension created by Canada's constitutional arrangements and the practical application of human rights on reserve. Specifically, this case reveals the jurisdictional quagmire created by federal jurisdiction over "Indians and Indian lands" and provincial jurisdiction over child welfare matters.

This paper attempts to tease apart the tangled strands of Canada's colonial history and federalist system, which results in a knot of jurisdictional issues undermining the application of human

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<sup>1</sup> Government of Canada, "Prime Minister Harper Offers Full apology on Behalf of Canadians for the Indian Residential School System" (8 June 2008), online: <http://www.pm.gc.ca/eng/media.asp?id=2149> [PM Apology]. "There is no place in Canada for the attitudes that inspired the Indian Residential School system to ever prevail again."

<sup>2</sup> "First Nations Child Welfare on the Line in Federal Court" *Canada.com News* (10 February 2012), online: <http://yourlegalrights.on.ca/news/83875>.

<sup>3</sup> First Nations Child and Family Caring Society of Canada, "Staying at Home: examining the implications of least disruptive measure in First Nations Child and Family Service Agencies" (31 March, 2004) at p.7, online: [http://www.fncaringsociety.com/sites/default/files/docs/Staying\\_at\\_Home.pdf](http://www.fncaringsociety.com/sites/default/files/docs/Staying_at_Home.pdf) [Staying at Home].

<sup>4</sup> *First Nations Child and Family Caring Society v. Canada*, 2011 CHRT 4.

rights legislation to some of Canada's most vulnerable citizens—First Nations children residing on reserve.

## **B. Canada's History of Assimilation Policy**

In the not so distant past, Canada actively pursued policies with the goal of absorbing First Nations into Euro-Canadian society.

Recognizing the vulnerability and malleability of young children, the federal government aggressively pursued assimilation of First Nations through residential schools.<sup>5</sup> This involved removing First Nations children from their families and severing their cultural links. In some cases, government agents forcibly removed children<sup>6</sup> from their homes and threatened parents with jail if they did not turn their children over.<sup>7</sup> In other cases, Aboriginal parents were convinced that their children would benefit from attending residential school.<sup>8</sup> From 1890 until the early 1970s, First Nations children, aged 5 to 15, were taken from their families and put into schools run primarily by Christian churches.<sup>9</sup>

Residential schools often involved subjecting First Nations children to physical and emotional abuse while they were separated from family and community support structures.<sup>10</sup> Aside from the trauma of being removed from their homes, these children were punished for speaking their own languages or practicing their cultural traditions.<sup>11</sup> Children were forced to live in an environment where brothers and sisters were separated into different dorms,<sup>12</sup> and where same-sex siblings living in the same dorm were discouraged from comforting one-another.

Many of the residential schools also provided substandard living conditions. The deplorable housing facilitated the spread of disease and resulted in the death of approximately 50 percent of

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<sup>5</sup> "A History of Residential Schools in Canada" CBC News (16 May 2008), online: <http://www.cbc.ca/news/canada/story/2008/05/16/f-faqs-residential-schools.html> [A History of Residential Schools].

<sup>6</sup> *Ibid.*

<sup>7</sup> Truth and Reconciliation Commission of Canada, "Canada, Aboriginal Peoples, and Residential Schools: They Came for the Children" (2012) at p. 18, online:

[http://www.attendancemarketing.com/~atmk/TRC\\_jd/ResSchoolHistory\\_2012\\_02\\_24\\_Webposting.pdf](http://www.attendancemarketing.com/~atmk/TRC_jd/ResSchoolHistory_2012_02_24_Webposting.pdf).

<sup>8</sup> Nicholas Bala, Michael Kim Zapf, R. James Williams, Robin Vogl, and Joseph P. Hornick, eds., *Canadian Child Welfare Law, Children Families and the State*, 2d ed., (Toronto: Thompson Educational Publishing Inc., 2004) at p. 203 [*Canadian Child Welfare Law*].

<sup>9</sup> Shirley Joseph, "Assimilation Tools: Then and Now" (1991) *BC Studies* 89 at p. 68.

<sup>10</sup> *Canadian Child Welfare Law* at p. 202.

<sup>11</sup> *Canadian Child Welfare Law, supra.*

<sup>12</sup> A History of Residential Schools, *supra.*

the children attending residential school in Western Canada.<sup>13</sup> In 1907, the *Saturday Night Magazine* commented that ‘even war seldom shows as large a percentage of fatalities as does the education system that we have imposed on our Indian wards.’<sup>14</sup>

In total, approximately 150,000 aboriginal, Inuit and Métis children were removed from their communities and forced to attend residential schools.<sup>15</sup> The last residential school closed in 1998,<sup>16</sup> leaving an estimated 70,000 to 85,000 survivors of residential schools alive today.<sup>17</sup>

While residential schools began to lose popularity in the 1960s and 1970s, the removal of First Nations children from their communities continued under child welfare policies. During what is now referred to as the ‘Sixties Scoop’ euro-centric views of social workers<sup>18</sup> again led to large-scale removal<sup>19</sup> of First Nations children from their families. In total, over 11,000 Aboriginal children, including up to one-third of the child population in some First Nation communities, were adopted between 1960 and 1990.<sup>20</sup> Social workers placed these children in predominantly non-Aboriginal homes, thereby perpetuating assimilation of First Nation children.<sup>21</sup>

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<sup>13</sup> D.C. Scott, writing in 1920 quoted in *Canadian Child Welfare Law, supra*.

<sup>14</sup> *Ibid*.

<sup>15</sup> A History of Residential Schools, *supra*.

<sup>16</sup> Cindy Blackstock, Nico Trocme, Marlyn Bennett, “Child Maltreatment Investigations Among Aboriginal and non-Aboriginal Families in Canada” (2004) 10 *Violence Against Women* 8 at p. 3, online: [http://www.mcgill.ca/files/crcf/2004-Aboriginal\\_Non-Aboriginal\\_Investigations.pdf](http://www.mcgill.ca/files/crcf/2004-Aboriginal_Non-Aboriginal_Investigations.pdf).

<sup>17</sup> Jeff Thomas, “Where Are the Children Now Healing the Legacy of Residential Schools” (2009), online: <http://www.wherethechildren.ca/en/blackboard/page-17.html> [Exhibit] and Parliament of Canada, “Addressing the Legacy of Residential Schools” (1 September 2011), online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-76-e.htm>.

<sup>18</sup> *Child Welfare Law in Canada*, at p. 24. “...Despite the widespread nature of child abuse and neglect, child welfare agencies are more likely to be involved with families from disadvantaged economic, social and cultural groups. While child protection workers are typically white, well-educated and from middle-class backgrounds, their clients are generally socially marginalized.”

<sup>19</sup> *Canadian Child Welfare Law*, at p. 206.

<sup>20</sup> Vandna Sinha, Nico Trocme, Barbara Fallon, Bruce MacLaurin, Elizabeth Fast, Shelley Thomas Prokop, et al. “Kiskisik Awasisak: Remember the Children. Understanding the Overrepresentation of First Nations Children in the Child Welfare System” (2011) at p. 7, online: [http://www.cecw-cepb.ca/sites/default/files/publications/en/FNCIS-2008\\_March2012\\_RevisedFinal.pdf](http://www.cecw-cepb.ca/sites/default/files/publications/en/FNCIS-2008_March2012_RevisedFinal.pdf) [Overrepresentation].

<sup>21</sup> *Canadian Child Welfare Law*, at p. 206-207.

### C. Canada's Colonial Hangover

On June 11, 2008 Prime Minister, Stephen Harper, publicly apologized for Canada's policy of assimilation. In the formal apology by Canada, the Prime Minister admitted that the ultimate objective of assimilation was to "kill the Indian in the child":<sup>22</sup> He stated further that:

The two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal...Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.<sup>23</sup>

In this apology, the Prime Minister pointed to the Indian *Residential Schools Settlement Agreement* (the "Agreement") as supplying a mechanism for "moving towards healing, reconciliation and the resolution of the sad legacy of Indian Residential Schools".<sup>24</sup> The Agreement is the largest class action settlement in Canadian history<sup>25</sup> and provides compensation and recognition for survivors of residential schools. In doing so, the Agreement established the Truth and Reconciliation Commission of Canada to allow survivors and others involved with the residential school system voice their thoughts.

The effects of residential schools were devastating on First Nation individuals, families, and communities. The Legacy of Hope Foundation was established to address the long-term implications of residential schools.<sup>26</sup> Its national exhibit, "*Where are the Children? Healing the Legacy of Residential Schools*"<sup>27</sup> (the "Exhibit") summarizes how residential schools impacted on interpersonal skills, as well as parenting abilities, which lead to perpetuated cycles of violence within families and communities:

The residential school system deprived Aboriginal children of their traditions, and of a safe and supportive home in which they were cherished. It produced generations of people who lacked essential interpersonal and relationship skills.

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<sup>22</sup> PM Apology, *supra*.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> Aboriginal Affairs and Northern Development Canada, "Backgrounder – Indian Residential Schools Settlement Agreement" (15 September 2009), online <http://www.aadnc-aandc.gc.ca/eng/1100100015755/1100100015756>.

<sup>26</sup> Overrepresentation, *supra*.

<sup>27</sup> *Ibid*.

Many Survivors were not equipped with the skills to become loving partners and parents, and had difficulty expressing parental love; many did not know how to handle conflict in a constructive way. When these Survivors became spouses or parents, they did not always interact with others appropriately. The abuse and neglect that Survivors suffered at the schools often resurfaced in their own relationships, where the abused became the abuser. This perpetuated a cycle of violence within families, and produced generations of ‘broken children,’ many of whom also went on to attend residential schools.<sup>28</sup>

Importantly, the Exhibit also addresses the intergenerational impacts<sup>29</sup> of residential schools such as substance abuse, dysfunctional relationships, and parenting issues. Essentially, the legacy of physical, emotional, and sexual abuse is that unresolved trauma is passed from one generation to the next. That is, abusive behaviour is ‘normalized’ through repeated exposure to violence during childhood and later passed on by adults to their own children.<sup>30</sup> Thus, these intergenerational impacts have left many residential school survivors and their families with severely diminished parenting and personal coping skills.

The lasting legacy of Canada’s assimilation policies are one the factors that contributes to the fact that First Nations children are five times more likely to be taken into the child welfare system than non-Aboriginal children.<sup>31</sup> Put another way, despite being fewer than 8 percent of the population of children in Canada, First Nations children may account for at least 35 percent of all children in the child welfare system.<sup>32</sup>

A comprehensive review of child welfare investigations by the Assembly of First Nations<sup>33</sup> reveals that Aboriginal families have disproportionate contact with the child welfare system through high rates of investigation and apprehension.

Twenty-seven percent of child welfare investigations of First Nations children were ‘risk investigations’ where there was no suspicion of current maltreatment but a risk of it in the

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* “Intergenerational impacts” are defined as effects of physical and sexual abuse that were passed on to the children, grandchildren and great-grandchildren of Aboriginal people who attended the residential school system.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Canadian Child Welfare Law, supra.* An estimated 40% of children and youth placed in out-of-home care in Canada are Aboriginal. Reports indicate a 71.5% increase in the number of Aboriginal children in care in the 1995 to 2001 period.

<sup>32</sup> Kathryn Irvine and Cindy Blackstock, “Crisis Response in First Nations Child and Family Services” (15 March 2004) at p. 9, online: [http://www.fncaringociety.com/sites/default/files/docs/Communities\\_in\\_Crisis.pdf](http://www.fncaringociety.com/sites/default/files/docs/Communities_in_Crisis.pdf).

<sup>33</sup> Overrepresentation, *supra.*

future.<sup>34</sup> In cases of substantiated maltreatment, 46 percent involved neglect (compared to 29 percent in the non-Aboriginal population), with a failure to supervise identified as the primary concern.<sup>35</sup> “Research shows that “neglect is closely linked with household/family structural factors...such as poverty, caregiver substance abuse, social isolation and domestic violence that can impede caregivers’ abilities to meet children’s basic needs.”<sup>36</sup> This indicates that the overrepresentation of First Nations children in the child welfare system is at least partially driven by caregiver risk factors, household characteristics, and availability of supports. Notwithstanding the need to protect children from maltreatment, it is also necessary to examine how legal and constitutional factors may be influencing child welfare outcomes for First Nations children.

#### **D. Jurisdiction of Child Welfare Matters in Canada**

The *Constitution Act 1867*<sup>37</sup> acts as the framework for Canada’s federal system, vesting certain powers into three distinct branches of power: the executive,<sup>38</sup> the legislative (federal and provincial)<sup>39</sup> and the judiciary.<sup>40</sup>

Sections 91 and 92 of the *Constitution Act 1867* set out the division of powers between the federal and provincial governments. This division of powers is consistent with the principles of federalism which contemplates the division of government by areas of authority,<sup>41</sup> which in turn, serve to keep the balance of power in check. While section 91 provides the federal government with a residuary plenary power, section 92 allows the provinces to retain jurisdiction over property and civil rights, and local and private matters. Pursuant to section 91(24) of the *Constitution Act 1867*, Parliament has the power to make laws in relation to ‘Indians, and lands reserved for the Indians’.<sup>42</sup> Under the division of powers, “Indians” are subject to federal

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<sup>34</sup> *Ibid.* at p. 41.

<sup>35</sup> Overrepresentation, at p. 101.

<sup>36</sup> *Ibid.* at p. xix.

<sup>37</sup> *Constitution Act, 1867* 30 & 31 Victoria, c. 3 (U.K.).

<sup>38</sup> *Ibid.* at Part III.

<sup>39</sup> *Ibid.* at Part IV.

<sup>40</sup> *Ibid.* at Part VII.

<sup>41</sup> Constitutional Law Group, *Canadian Constitutional Law*, 3d ed. (Toronto: Edmond Montgomery Publications Ltd., 2003) at p. 4.

<sup>42</sup> Peter W. Hogg, *Constitutional Law of Canada*, Student Edition 2006 (Toronto: Thomson Carswell, 2006) at p. 616.

jurisdiction. “Indians” are not, however, defined in the *Constitution Act 1867* and may or may not include Inuit, Métis and other indigenous peoples in Canada.<sup>43</sup>

Nonetheless, pursuant to its power under s. 91(24), the federal parliament enacted and maintained the *Indian Act* which provides a statutory definition of “Indian” that has evolved over time. In 1868 with the term “Indian” applying to anyone who lead an Indian way of life.<sup>44</sup> By 1951, an “Indian” was defined as being someone not necessarily part of an Indian community *per se*, but someone who was entitled to registration as an Indian. After amendments to the *Indian Act* in 1985 and 2010, the present definition disenfranchises Indians after two generations of exogamy with non-Indians.<sup>45</sup> Entitlement to registration as an Indian is a complex legal issue beyond the scope of this paper.

Although the federal government has jurisdiction over Indians, section 88 of the *Indian Act* provides that provincial laws of general application apply to Indians and reserve land, provided that the provincial activity does not touch on the “core of Indianness” - that is, activities “at the center of what they do and what they are” as Indians.<sup>46</sup>

In the case of child welfare system, the federal government retains legislative authority for Indians and reserves lands, while the provinces maintain authority for child welfare matters. Due to section 88 of the *Indian Act*, provincial child welfare legislation applies on reserve.<sup>47</sup> This leads to a situation where on reserve children and child welfare agencies are funded by the federal government, but operate according to the laws of the province. These entwined jurisdictional arrangements have resulted in confusion and in some instances, mutual denials of

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<sup>43</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. In 1999, Mr. Harry Daniels and the Congress of Aboriginal Peoples launched the test case, *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, seeking, amongst other things, declaratory relief that Métis are Indians under subsection 91(24) of the *Constitution Act, 1867*. To date, the case has not been heard, but the Federal Court has considered some preliminary motions, for example *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 295, [2002] 4 FC 550

<sup>44</sup> *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c. 42, s. 15; see also Royal Commission on Aboriginal Peoples (“RCAP”), *Perspectives and Realities*, Vol. 4, p. 27

<sup>45</sup> *Indian Act*, R.S.C. c.I-5, as amended, section 6

<sup>46</sup> *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45 (“*NIL/TU, O*”) at para. 66.

<sup>47</sup> *Canadian Child Welfare Law*, *supra* note 7 at p. 206. See also *Natural Parents v. Superintendent of Child Welfare* (1976), 60 D.L.R. 3<sup>rd</sup> 148 (S.C.C.) where the Supreme Court held that provinces have jurisdiction to extend child welfare services to reserve.



responsibility for caring for children on reserve. For instance, during the 1950s and 1960s the federal government was reluctant to provide Aboriginal child welfare funding; in turn, without such funding, the provinces were reluctant to provide these services.<sup>48</sup>

Today, most services for on reserve children are provided by First Nations child welfare agencies.<sup>49</sup> First Nations child welfare agencies are delegated authority to administer child welfare services to children living on reserve through agreements with the provinces. Funding of these agencies is administered by Aboriginal Affairs and Northern Development Canada (AANDC) through a funding formula commonly known as Directive 20-1.<sup>50</sup> This creates a curious situation where First Nations child welfare agencies are expected to provide services comparable to those of the province but under the financial constraints imposed by federal government.

The Directive 20-1 funding formula has two components: an annual contribution to cover operating costs, calculated based on child population, and payments for children in care.<sup>51</sup> This funding structure severely restricts First Nations child welfare agencies in providing support and prevention services as funding for these services must be taken out of operation budgets. Given the economic and social disadvantages faced by many First Nations, child welfare agencies on reserve are faced with serious challenges in supporting families and allowing children to safely remain in their homes. Once a child taken into care, however, the province is fully reimbursed for the cost of the services provided to the child. AANDC acknowledges that this funding structure has likely been a factor in the increasing rates of First Nations children in care by steering agencies toward in-care options because only these costs are fully funded.<sup>52</sup> Indeed, Aboriginal children in British Columbia are removed from their homes at 12.5 times the rate of non-Aboriginal children.<sup>53</sup>

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<sup>48</sup> *Ibid.*

<sup>49</sup> First Nations child welfare agencies vary—some operate full child protection agencies, others only provide support and prevention services.

<sup>50</sup> Ontario is not funded under Directive 20-1 but through 1965 Indian Welfare Agreement. See Marlyn Bennett, “First Nations Fact Sheet: A General Profile on First Nations Child Welfare in Canada” (2001), online: <http://www.fncaringsociety.com/sites/default/files/docs/FirstNationsFS1.pdf>.

<sup>51</sup> Overrepresentation, at p. 18.

<sup>52</sup> Aboriginal Affairs and Northern Development Canada, “Evaluation of First Nations Child and Family Services Programs” (31 March 2007), online: [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev\\_pubs\\_ev\\_06-07\\_1332356163901\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev_pubs_ev_06-07_1332356163901_eng.pdf).

<sup>53</sup> Overrepresentation, at p. 5.

## **E. Dealing with First Nations Jurisdictional Issues: Case Law**

### **1. *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union***

The case of *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* (“*NIL/TU,O*”) sets out how these jurisdictional issues play out with respect to applying legislation on reserve. The issue in *NIL/TU,O* involved whether union certification of the employees of a First Nations Society located on reserve and providing “culturally appropriate” services to First Nation members, should proceed under the *Canada Labour Code*, or under the B.C. Labour Relations Board.<sup>54</sup>

Similar to child welfare laws, jurisdiction for labour relations is not delegated under s. 91 or s.92 of the *Constitution Act, 1867* to either the federal or provincial governments. Instead, Canadian courts have determined that labour relations are presumptively a provincial matter, with federal jurisdiction of labour relations applying only in exceptional cases.<sup>55</sup>

In *NIL/TU,O*, the Court set out that displacing a presumption regarding the application of jurisdiction (in this case the presumption that labour relations are a presumptively a provincial matter), requires the court to conduct a two-step “functional test.” The first step focuses on examining the entity’s operations and characteristics to determine whether it constitutes a federal undertaking. If the examination does not conclude that the entity falls under federal jurisdiction, then it is proper for a court to move to the next step. This second step involves determining whether provincial regulation of the subject matter would impair the “core” of the federal head of power.<sup>56</sup> For First Nations, this inquiry relates to the “core of Indianness” and whether the contemplated activities are “at the center of what they do and what they are”.<sup>57</sup>

In *NIL/TU,O* the Court rejected the Plaintiff’s argument that because its services assisted First Nation children and families, its labour relations fell under federal jurisdiction pursuant to s.91(24). Instead, the Court held that *NIL/TU,O*’s main function was to provide child welfare services according to provincial legislation and that its culturally tailored services were an

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<sup>54</sup> *NIL/TU,O*, at paras. 2 and 9.

<sup>55</sup> *Ibid*, at para. 11.

<sup>56</sup> *Ibid*, at para. 18.

<sup>57</sup> *Ibid*, at para. 66.

“incidental”. The Court, therefore, held that NIL/TU,O’s labour relations fall under provincial jurisdiction.

The Court clearly viewed NIL/TU,O’s operations narrowly, placing little weight on the fact that its services were created to serve First Nations. With respect, it is difficult to understand how services designed to preserve First Nations culture and identity, through the health and well-being of their children and families, fall outside of the “core” of who they are (and therefore federal jurisdiction). One may wonder how an adult Indian person falls under the core of s.91(24) but not his or her Indian child.

Canada has subsequently relied on *NIL/TU,O* to justify its argument that the Canadian Human Rights Tribunal lacks jurisdiction to deal with human rights complaints on reserve.<sup>58</sup>

## **2. *First Nations Child and Family Caring Society v. Canada***

In February 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations (collectively, the “Complainants”) filed a human rights complaint with the Canadian Human Rights Commission, alleging that the federal funding of child welfare services results in inequitable levels of services provided to First Nations children on reserve. As a result of this under-funding, child welfare services for on reserve children are either inadequate or unavailable. The Complainants contend that this constitutes discrimination on the grounds of race and national or ethnic origin under s. 5 of the *Canadian Human Rights Act*<sup>59</sup> (the “Act”). Section 5 of the Act states that it is a discriminatory practice, in the provision of goods, services, facilities or accommodation customarily available to the general public to:

- (a) deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

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<sup>58</sup> See Canada’s Reply in support of its motion to dismiss the human rights complaint (23 December 2012), online: <http://www.fncaingsociety.com/sites/default/files/fnwitness/NIL-TU-O-REPLY.pdf>.

<sup>59</sup> *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

Before the case could be heard before the Canadian Human Rights Tribunal (the “Tribunal”) on the merits, the federal government filed a motion to have the complaint dismissed. The government argued that the Tribunal did not have the jurisdiction to hear the matter as federal child welfare funding could not be compared to that of the provinces.

On March 14, 2012, the Tribunal held that there could be no “adverse differential treatment” in the funding of First Nations children living on reserve as s. 5(b) of the Act does not permit a comparison between services provided by two different service providers (i.e. the federal government and the provincial government) to two different sets of recipients (i.e. on reserve and off reserve children). As a result, the Chairperson dismissed the complaint without a full hearing.<sup>60</sup>

The parties subsequently sought a judicial review in Federal Court. On April 18, 2012, the Tribunal’s decision was set aside by the Honourable Madam Justice Mactavish.

The Court held that while the Tribunal has the ability to determine its own processes, including motions to dismiss complaints brought in advance of a full hearing,<sup>61</sup> it must abide by principles of procedural fairness. In this case, there was a breach in procedural fairness as the Tribunal considered extrinsic evidence without providing the parties with notice or an opportunity to respond.<sup>62</sup> That is, the Tribunal did not limit itself to the record generated by the motion to dismiss the complaint—it also considered materials filed in relation to the merits of the complaint.<sup>63</sup> The Court held that the breach of procedural fairness reasonably prejudiced the Complainants and rendered the decision invalid. Nonetheless, the Court also found the Tribunal committed three different errors in its interpretation of section 5 of the Act.<sup>64</sup>

First, the Tribunal provided no explanation why s. 5(a) of the Act was not considered when the complaint clearly alleged the denial of services otherwise available to children living off reserve. Instead, the Tribunal focused its analysis on s. 5(b). The Court found that the absence of reasons

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<sup>60</sup> *First Nations Child and Family Caring Society v. Canada*, 2011 CHRT 4.

<sup>61</sup> *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 157 [Canada (Human Rights Commission)].

<sup>62</sup> *Ibid*, at para. 168.

<sup>63</sup> *Ibid*, at para. 173.

<sup>64</sup> *Ibid*, at para. 204.

in this regard created an unacceptable lack of justification, transparency and intelligibility required of a reasonable decision.<sup>65</sup>

Second, the Tribunal erred in concluding that the meaning of “differentiate adversely” under s. 5(b) requires a comparator group receiving the same services from the same service provider in every case to establish discrimination. This interpretation was found to be unacceptable, as it leads to absurd results.<sup>66</sup> While equality is an inherently comparative concept, in some cases the use of a comparator group may not lead to the substantive equality sought by the Act.<sup>67</sup>

The Court recognized that First Nations peoples occupy a unique position in Canada’s constitutional and legal structure, as they are the only class of people identified by the government for legal purposes on the basis of race.<sup>68</sup> The Court concluded that it would be unreasonable if due to this unique situation, First Nations were placed in a legal “no man’s land.”<sup>69</sup> The result would be to deny the protection of the Act to individuals if they were unable to identify a suitable comparator.<sup>70</sup>

Further, the Court found that Tribunal’s interpretation could create an internal incoherence between s. 5(a) and s. 5(b) by imposing a higher evidentiary burden on those who suffer adverse differentiation than those who are denied a service altogether.<sup>71</sup> The Federal Court suggested that the plain word meaning of “differentiate adversely” simply refers to treating someone differently because of their membership in a protected group.<sup>72</sup>

The Court noted that the interpretation of human rights legislation requires a large, purposive and liberal approach in a manner consistent with the legislation’s overarching objectives. Further, interpretation of the Act must be consistent with Charter values, Parliament’s decision to extend human rights legislation to reserve,<sup>73</sup> and Canada’s international obligations.<sup>74</sup>

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<sup>65</sup> *Ibid*, at para. 221.

<sup>66</sup> *Ibid*, at para. 251.

<sup>67</sup> *Ibid*, at paras. 292-293.

<sup>68</sup> *Ibid*, at para. 332.

<sup>69</sup> *Ibid*, at para. 337.

<sup>70</sup> *Ibid*, at para. 360.

<sup>71</sup> *Ibid*, at para. 277.

<sup>72</sup> *Ibid*, at para. 254.

<sup>73</sup> In 2008, section 67 the *Canadian Human Rights Act* was repealed. Previously, it excluded people living on reserve from filing human rights complaints.

Finally, the Federal Court held that the Tribunal erred when it failed to consider the significance of the federal government's own adoption of provincial child welfare standards in its funding policies. The Tribunal never addressed what, if any, implications this may have had in determining that child welfare services could not be compared to those provided by the province.<sup>75</sup> The Court concluded this was a matter that must be dealt with by the Tribunal.

As a result of these errors, the Court set aside the decision of the Tribunal. The matter was remitted back to a new panel for re-determination in accordance with its reasons.<sup>76</sup>

While the Federal Court decision was not a finding that Canada's actions are discriminatory, the reasons in this decision confirm that the federal government will be unable to immunize itself with the argument that its funding policies cannot be compared to those of the provinces.

The federal government is currently challenging the decision in the Federal Court of Appeal.<sup>77</sup> Despite the appeal, a hearing before the Tribunal on the merits of the case is expected to take place on February 25, 2013.

## **F. Conclusion**

It appears that while Canada is willing to take responsibility for historic wrongs caused to First Nations people, it is quite unwilling to address its current human rights issues. This would, quite literally, require the federal government to put its money where its mouth is. Instead, Canada has chosen to spend \$3.1 million dollars defending its position that its inequitable funding for First Nations children living on reserve is justified.<sup>78</sup>

Although Canada's current underfunding of child welfare on reserve is not analogous to the atrocities committed under the residential school system, its failure to protect First Nations children from the harm of being removed from their families is also of concern. This conduct seems to typify an indifference to the plight of Aboriginal children consistent with the Canada's

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<sup>74</sup> Specifically, the UN Declaration of the Rights of Indigenous Peoples and UN Convention on the Rights of the Child.

<sup>75</sup> *Canada (Human Rights Commission)*, at para. 379.

<sup>76</sup> *Canada (Human Rights Commission)*, at para. 395.

<sup>77</sup> The Federal Court of Appeal is expected to hear the appeal of *Canada (Human Rights Commission)* in the spring of 2013.

<sup>78</sup> The Globe and Mail, "Ottawa spends \$3-million to battle first nations child welfare case" (1 October 2012), online: <http://www.theglobeandmail.com/news/national/ottawa-spends-3-million-to-battle-first-nations-child-welfare-case/article4581093/>.

shoddy history. This raises questions of whether we have truly moving towards meaningful reconciliation.

The ultimate decision in *First Nations Child and Family Caring Society v. Canada* will undoubtedly have a significant impact on the interpretation and applicability of human rights legislation to First Nations living on reserve. A decision in favour of First Nations is likely to have broad implications for human rights in indigenous law as it would open the door to similar challenges for funding of other services provided on reserve—such as education, health, policing and housing.

If no comparison between off and on reserve programming is permitted under the *Canadian Human Rights Act* and provincial human rights are not applicable on reserve, we will be left wondering whether human rights for First Nations living on reserve exist in a vacuum. For now, jurisdictional issues continue to plague First Nations struggle for human rights on reserve. Ironically, legislation designed to protect the rights of the underprivileged lie beyond the reach some of Canada's most disadvantaged people.

## SCHEDULE A

### “Where Are the Children? Healing the Legacy of Residential Schools”

#### **Intergenerational Impacts**

1. Alcohol and drug abuse;
2. Fetal alcohol syndrome (FAS) and fetal alcohol effect (FAE);
3. Sexual abuse (past and ongoing);
4. Physical abuse (past and ongoing; especially, but not exclusively, of women and children);
5. Psychological/emotional abuse;
6. Low self-esteem;
7. Dysfunctional families and interpersonal relationships;
8. Parenting issues such as emotional coldness, rigidity, neglect, poor communications and abandonment;
9. Suicide (and the threat of suicide);
10. Teen pregnancy;
11. Chronic, widespread depression;
12. Chronic, widespread rage and anger;
13. Eating disorders;
14. Sleeping disorders;
15. Chronic physical illness related to spiritual and emotional states;
16. Layer upon layer of unresolved grief and loss;
17. Fear of personal growth, transformation and healing;
18. Unconscious internalization of residential school behaviours such as false politeness, not speaking out, passive compliance, excessive neatness, obedience without thought, etc.;
19. Post-residential school community environment, seen in patterns of paternalistic authority linked to passive dependency; patterns of misuse of power to control others, and community social patterns that foster whispering in the dark, but



refusing to support and stand with those who speak out or challenge the status quo;

20. The breakdown of the social glue that holds families and communities together, such as trust, common ground, shared purpose and direction, a vibrant ceremonial and civic life, co-operative networks and associations working for the common good, etc.;
21. Disunity and conflict between individuals, families and factions within the community;
22. Flashbacks and associative trauma; i.e., certain smells, foods, sounds, sights and people trigger flashbacks memories, anxiety attacks, physical symptoms or fear; e.g. the sight of a certain type of boat or vehicle (especially containing a social worker or RCMP), the sight of an old residential school building, etc;
23. Educational blocks - aversions to formal learning programs that seem "too much like school," fear of failure, self-sabotage, psychologically-based learning disabilities;
24. Spiritual confusion; involving alienation from one's own spiritual life and growth process, as well as conflicts and confusion over religion;
25. Internalized sense of inferiority or aversion in relation to whites and especially whites in power;
26. Toxic communication - backbiting, gossip, criticism, put downs, personal attacks, sarcasm, secrets, etc.;
27. Becoming oppressors and abusers of others as a result of what was done to one in residential schools;
28. Dysfunctional family co-dependent behaviours replicated in the workplace;
29. Cultural identity issues - missionization and the loss of language and cultural foundations has led to denial (by some) of the validity of one's own cultural identity (assimilation), a resulting cultural confusion and dislocation;
30. Destruction of social support networks (the cultural safety net) that individuals and families in trouble could rely upon;
31. Disconnection from the natural world (i.e. the sea, the forest, the earth, living things) as an important dimension of daily life and hence spiritual dislocation;

32. Voicelessness - entailing a passive acceptance of powerlessness within community life and a loss of traditional governance processes that enabled individuals to have a significant influence in shaping community affairs (related to the psychological need of a sense of agency, i.e. of being able to influence and shape the world one lives in, as opposed to passively accepting whatever comes and feeling powerless to change it.<sup>79</sup>

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<sup>79</sup> Overrepresentation, *supra*.