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# Caring Society v Canada: Neoliberalism, Social Reproduction, and Indigenous Child Welfare

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## ***Caring Society v Canada: Neoliberalism, Social Reproduction, and Indigenous Child Welfare***

KATE BEZANSON\*

En janvier 2016, dans la décision de la *Société de soutien à l'enfance et à la famille des Premières Nations du Canada (Société de soutien)*, le Tribunal canadien des droits de la personne a constaté que le gouvernement canadien avait effectué de la discrimination envers les enfants autochtones vivant dans les réserves, relativement à l'octroi de financement pour la protection de l'enfance autochtone et pour certains autres services. La décision *Société de soutien* porte sur le travail quotidien et générationnel nécessaire dans une société pour assurer la survie sociale, culturelle et économique. C'est ce que les économistes féministes appellent « reproduction sociale ». Cet article pose une question fondamentale quant à cette décision : devrait-on interpréter les principales questions constitutionnelles qu'elle soulève comme des contestations ou une crise relative à la provision de soins?

In January 2016, the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v Canada (Caring Society)* found that the Canadian government had discriminated against Indigenous children on reserve in its provision of funding for child welfare and certain other services. *Caring Society* is a case about the daily and generational work that is needed in any society to ensure social, cultural, and economic survival, or what feminist political economists call social reproduction. This article thus asks a central question of this decision: are the main constitutional issues it raises best understood as contests over, and crises of, care?

THIS ARTICLE EXAMINES THE January 2016 Canadian Human Rights Tribunal's (CHRT or the Tribunal) decision in *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*.<sup>1</sup> In this landmark case, the CHRT found that the Canadian government had discriminated against First Nations<sup>2</sup> children on reserve in its provision of funding for child welfare and certain other services.

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<sup>1</sup> 2016 CHRT 2 [*Caring Society*].

<sup>2</sup> There is confusion and elision when it comes to the terms Aboriginal, First Nations, and Indigenous. In the decision under consideration in this paper, the term First Nations is used *primarily* as the Tribunal is referencing the provision of child welfare services in First Nations communities on reserve. The term Aboriginal is used in the decision and more generally with reference to its constitutional inclusion of First Nations, Inuit, and Métis peoples. In this paper and in keeping with international conventions, I use the term Indigenous as a collective referent for First Nations, Inuit, and Métis peoples where possible, but deploy the term First Nations in relation to matters related to child welfare on reserve.

*Caring Society* is, at its core, a case about what feminist political economists call social reproduction.<sup>3</sup> At the broadest level, social reproduction refers to the daily and generational work that is needed in any society to ensure social, cultural, and economic survival.<sup>4</sup> Law and social policy are frequently called upon to grapple with the “fleshy, messy, and indeterminate stuff of everyday life”<sup>5</sup> that is social reproduction, yet often do so inadequately such that questions of culture, gender, racialization, income, and power are not well incorporated.<sup>6</sup> In a post-Truth and Reconciliation Commission era, this case offers an opportunity to critically assess questions such as: what constitutes care, who pays for it, in what amounts, provided by whom, with which words, in which language, with what kind of memory, and in which kinds of families? It illuminates processes and sites of struggle, including at the macro level in social, legal, political, and economic legacies and dynamics of settler colonialism, neoliberalism, and federalism; at the meso level, in and among institutions, policies, state/agency/body/social work actors; and at the micro level, in the day-to-day (usually gendered and unpaid) transmission of culture, norms, socialization (including to racism) as well as love, support, and material/physical care.

This article asks a central question of the *Caring Society* decision: are the main constitutional issues it raises (policy and funding jurisdiction/obligations and a *sui generis* relationship) best understood as contests over, and crises of, care? It proceeds in three stages. First, it reviews and contextualizes the CHRT ruling and subsequent compliance orders. Second, it suggests that since the inception of the First Nations Child and Family Services (FNCFS) Program in 1990, the struggle over child welfare on reserve has occurred concurrently with an escalating neoliberalization of social and economic policy. This neoliberalization process has dovetailed positively with greater community/First Nations based control of service provision, and negatively with a broader trend toward a downloading and individualizing of social risks. This neoliberalization occurred along with an expansion of a culture of accountability in a context that either reduced, or made increasingly conditional, the provision of material and social supports. Third, it applies the lens of social reproduction to the case, showing how the conflicts

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<sup>3</sup> Nancy Fraser, “Contradictions of Capital and Care” (2016) 100 *New Left Rev* 99; Kate Bezanson, “Return of the Nightwatchman State? Federalism, Social Reproduction and Social Reproduction in Conservative Canada” in Katie Meehan & Kendra Strauss, eds, *Precarious Worlds: Contested Geographies of Social Reproduction* (Athens: University of Georgia Press, 2015) 25 [Bezanson, “Return of the Nightwatchman State?”]; Isabella Bakker, “Social Reproduction and the Constitution of a Gendered Political Economy” (2007) 12:4 *New Political Economy* 541; Shirin M. Rai & Georgina Waylen, eds, *New Frontiers in Feminist Political Economy* (Abingdon, UK: Routledge, 2014); Diane Elson, “Economic Crises from the 1980s to the 2010s: A Gender Analysis” in Shirin M. Rai & Georgina Waylen, eds, *New Frontiers in Feminist Political Economy* (Abingdon, UK: Routledge, 2014) 189.

<sup>4</sup> Kate Bezanson, “*Mad Men* Social Policy: Families, Social Reproduction, and Childcare in a Conservative Canada” in Rachel Langford, Susan Prentice & Patrizia Albanese, eds, *Caring for Children: Social Movements and Public Policy in Canada* (Vancouver: University of British Columbia Press, 2017) 19 [Bezanson, “*Mad Men* Social Policy”]; Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992).

<sup>5</sup> Cindy Katz, “Vagabond Capitalism and the Necessity of Social Reproduction” (2001) 33:4 *Antipode* 709 at 711.

<sup>6</sup> While areas such as family law and income assistance may be the most obvious instances of the intersections of a social reproduction analysis and law, this theoretical lens has broad and pressing application including in relation to land and title claims for Indigenous peoples. For example, in the ground-breaking case *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in*], the Supreme Court considered robust anthropological, historical, and oral history accounts of cultural practices and land usages. This evidence, while sufficient to unanimously grant Aboriginal title, missed a crucial nuance that norms, habits, practices, customs, and languages are transmitted via (often gendered) individual, family, and group practices, and are eroded when the conditions of social reproduction are directly or indirectly undermined, and importantly, are not fixed but adaptive and thus change over time.

over social reproduction are shifted: among levels and branches of government and crystallized in the misapplication of Jordan's Principle;<sup>7</sup> among child welfare service providers, agencies, and agents; and within families, communities, and foster care providers. The lens of social reproduction here illuminates both the multi-scalar and multigenerational effects of neo-colonialism and its practices, and a potential for law and social policy to attend to its limits and failures. It concludes by suggesting that *Caring Society* reflects profound substantiated claims for equality,<sup>8</sup> material redress and recognition, with implications for the goal of reconciliation.

## I. CARING SOCIETY V CANADA

Although the Tribunal issued its decision in early 2016, *Caring Society* remains only partially finished. The initial complaint was filed in 2007, and was referred by the Canadian Human Rights Commission to the CHRT in 2008.<sup>9</sup> In 2012, the Federal Court<sup>10</sup> set aside the CHRT's<sup>11</sup> 2011 dismissal of the complaint on jurisdictional grounds, and in 2013 the Federal Court of Appeal dismissed the government's appeal of that decision.<sup>12</sup> A newly constituted CHRT panel was formed in 2012, and it ruled that the complaint would be heard. Allegations of retaliation were added to the complaint in 2012, and in June 2015, the CHRT panel found the allegations of

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<sup>7</sup> Jordan's Principle is a "child-first" principle that requires that whomever is contacted first (provincial/federal government or department) pays for a public service that is available to children in that province, and reimbursement is sorted out later. See *Caring Society*, *supra* note 2 at para 351.

<sup>8</sup> In studying this and related cases, I have wondered why this claim was brought to this tribunal rather than as a section 15 *Charter* case. See *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (UK), 1982, c 11, s 15. There are benefits and drawbacks to this important case having been heard at the Canadian Human Rights Tribunal. The benefits of a tribunal include lower costs, greater accessibility, greater flexibility in evidence rules and procedures, ostensibly time efficiencies, specialization in human rights jurisprudence, and some evidence (though no consensus) that the test for discrimination may be met more easily under the *Canadian Human Rights Act* than under section 15 of the *Charter*. See e.g. Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 *JL & Equality* 103. It is also worth noting that the repeal of section 67 of the *Canadian Human Rights Act* in 2008 meant that, as of 2010, federal and First Nations governments were no longer shielded from discrimination complaints. Section 67 read: "nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." See *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30. Among the most important detriments is that the results of a case at the Human Rights Tribunal level are not binding on courts, though notice is generally taken of such findings. See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Press, 2013) at 16. The *Caring Society* case is thus not directly in conversation with developments in other areas of constitutional case law involving Indigenous peoples in Canada, nor are the substantive equality issues it raises given a formal voice in reconciliatory dialogues flowing from such cases.

<sup>9</sup> The Canadian Human Rights Commission hears complaints related to discrimination under the *Canadian Human Rights Act*, has a process of investigation, offers mediation where possible, and where not possible, refers cases to the CHRT for consideration. The CHRT conducts formal hearings and renders decisions based on evidence and relevant law. See *Canadian Human Rights Tribunal*, online: <[chrt-tcdp.gc.ca/index-en.html](http://chrt-tcdp.gc.ca/index-en.html)> [perma.cc/F6FP-PMRY].

<sup>10</sup> *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 [*Caring Society* FC].

<sup>11</sup> *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4.

<sup>12</sup> *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75 [*Caring Society* FCA]; *Caring Society*, *supra* note 2 at para 8.

retaliation to be partially substantiated.<sup>13</sup> The CHRT hearing on the complaint commenced in early 2013 and formally ended in late 2014, but the CHRT retains jurisdiction until orders are implemented. Since its decision was issued in January of 2016, Indigenous and Northern Affairs Canada (INAC)<sup>14</sup> has been found to be in violation of portions of the orders in the original ruling and three compliance orders have been issued.<sup>15</sup> Although the spring 2016 federal budget increased spending to FNCFS, additional new funding was announced in the summer of 2016, and a motion was unanimously passed in the House of Commons in November supporting compliance with the CHRT ruling, the complainants' submission to the CHRT in December 2016 alleging a continued failure to comply fully with orders related to this case suggests that these measures are inadequate.<sup>16</sup> Despite its initial claim that it would not seek judicial review of the ruling,<sup>17</sup> the most recent non-compliance order, issued May 26, 2017, was appealed by the Government of Canada on June 23<sup>rd</sup>, and later repealed.<sup>18</sup>

The issues raised in this decision and the difficulties in compliance with its orders reflect both the complexity of the policy questions addressed and the insufficiency of legal processes to adequately redress materially or symbolically the weight of internally colonialist historical legacies. The policy questions are complex because child and family services is an area of social policy that addresses sometimes supportive, sometimes life-altering, and sometimes life-threatening issues ranging from counselling support, to domestic violence, to removal of a child from a family home. The policy questions are also complex because although Aboriginal Affairs

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<sup>13</sup> *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14.

<sup>14</sup> Indian Affairs and Northern Development Canada (INAC or IAND) was renamed AANDC in 2011, and then changed to Indigenous and Northern Affairs Canada (INAC) in 2015. See Zi-Ann Lum, "Liberals' Indigenous Affairs Name Change Called 'Important' Symbolic Gesture", *Huffington Post* (4 November 2015), online: <[huffingtonpost.ca/2015/11/04/aboriginal-affairs-name-change\\_n\\_8475496.html](http://huffingtonpost.ca/2015/11/04/aboriginal-affairs-name-change_n_8475496.html)> [perma.cc/RQ5M-8GEA]. In this paper, I refer to Indigenous and Northern Affairs Canada (INAC), its name when the *Caring Society* decision was issued, where possible. In August 2017, INAC was dissolved and two ministries—Indigenous Services ("responsible for providing services for non-self-governing communities") and Crown-Indigenous Relations and Northern Affairs—were created. See Kathleen Harris, "Trudeau Remakes Indigenous Affairs Ministry, Adds 2 Rookies to Cabinet", *CBC News* (28 August 2017), online: <[cbc.ca/news/politics/seamus-oregan-veterans-affairs-minister-1.4264773](http://cbc.ca/news/politics/seamus-oregan-veterans-affairs-minister-1.4264773)>.

<sup>15</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 [*Caring Society* 2016 CHRT 10]; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16; *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14.

<sup>16</sup> Canada, Ministry of Finance, *Budget 2016: Growing the Middle Class* (Ottawa: Ministry of Finance, 2016) at 139; Canada, Government of Canada, "Joint Statement from the Minister of Health and the Minister of Indigenous and Northern Affairs on Responding to Jordan's Principle" (Ottawa: Government of Canada, 25 July 2016). See *House of Commons Debates*, 42nd Parl, 1st Sess, No 102 (1 November 2016) at 14:35. Motion 296 in support of Jordan's Principle also passed unanimously in the House of Commons in 2007. See House of Commons, *Votes and Proceedings*, 39th Parl, 2nd Sess, No 27 (12 December 2007). The December submissions filed by the Caring Society, the Assembly of First Nations, and the Nishnawbe Aski Nation related specifically to the failure to implement the orders in *Caring Society* 2016 CHRT 10, *supra* note 15 at para 33 relating to Jordan's Principle.

<sup>17</sup> CBC News, "Federal Government Won't Appeal Ruling that Found it Discriminated Against Children on Reserves", *CBC News* (22 February 2016), online: <[cbc.ca/news/politics/federal-government-not-appeal-children-reserves-1.3458969](http://cbc.ca/news/politics/federal-government-not-appeal-children-reserves-1.3458969)>.

<sup>18</sup> Kristy Kirkup, "Ottawa Seeks 'Clarity' on Tribunal Findings on First Nations Health", *Maclean's* (24 June 2017), online: <[macleans.ca/news/canada/ottawa-seeks-clarity-on-tribunal-findings-on-first-nations-health](http://macleans.ca/news/canada/ottawa-seeks-clarity-on-tribunal-findings-on-first-nations-health)> [perma.cc/4XHY-9AS3].

and Northern Development Canada (AANDC at the time, later changed to INAC)<sup>19</sup> funds services delivered by agencies or provincial/territorial governments, it does not directly provide those services. Additionally, child and family services necessarily exist within a range of related human services such as health and education, which are governed and administered under provincial/territorial jurisdiction. The interplay of agencies, branches, and levels of government results in confusion about responsibility and at times, denial of service. Importantly to this case, the level and quality of services and supports, both directly within the purview of the federal government's FNCFS Program, and complementary to it, have been found to be woefully insufficient by numerous external experts for many years.<sup>20</sup>

The central question in *Caring Society* was whether, under section 5 of the *Canadian Human Rights Act*,<sup>21</sup> AANDC/INAC discriminated on the basis of race and/or national/ethnic origin in its provision of child and family services on reserve.<sup>22</sup> The complainants, the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN), alleged that AANDC/INAC provided "inequitable and insufficient funding"<sup>23</sup> for child and family services. The Tribunal found:

AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.<sup>24</sup>

The Tribunal concluded that "these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system."<sup>25</sup> It ordered that AANDC/INAC cease "its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program,"<sup>26</sup> and to "cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle."<sup>27</sup>

<sup>19</sup> See *supra* note 14 regarding the recent splitting of INAC into two ministries.

<sup>20</sup> See John Loxley, Fred Wien & Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report* (Vancouver: First Nations Child and Family Caring Society of Canada, 2004); Cindy Blackstock et al, *Wen:de: We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005); John Loxley et al, *Wen:de: The Journey Continues* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005); Auditor General of Canada, *May 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations Child and Family Services Program—Indian and Northern Affairs Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2008) [AG Canada 2008 Report]; Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011) [AG Canada 2011 Report].

<sup>21</sup> *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

<sup>22</sup> *Caring Society*, *supra* note 2 at para 6.

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

<sup>24</sup> *Caring Society*, *supra* note 2 at para 28.

<sup>25</sup> *Ibid* at para 459.

<sup>26</sup> *Caring Society* 2016 CHRT 10, *supra* note 15 at para 2.

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

In determining that there was a *prima facie* (on its face, or assumed to be true unless proven otherwise) case of discrimination, the Tribunal considered issues of jurisdiction, definitions and quality of service provision, and more broadly, the Crown's constitutional and fiduciary duty with Indigenous peoples.<sup>28</sup> These aspects of this decision merit deeper consideration.

## A. JURISDICTION AND SERVICE

Because this complaint falls under section 5 of the *CHRA*, questions of jurisdiction and service—who pays for and delivers what—were central features of this case.<sup>29</sup>

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<sup>28</sup> The issue of requiring comparator evidence to substantiate a claim of discrimination under human rights legislation was extensively considered by the Tribunal. AANDC/INAC argued that because no evidence was provided by the complainants pertaining to provincial/territorial budgets and funding models, it was not possible to conclude that discrimination occurred and amounted to perceived differences, rather than substantiated ones. This argument was rejected by the Federal Court, the Federal Court of Appeal, and the CHRT. See *Caring Society FC*, *supra* note 10; *Caring Society FCA*, *supra* note 12; and *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 17. The Federal Court, following *Withler v Canada (AG)*, 2011 SCC 12 [*Withler*], noted that a requirement of a mirror comparator group in every case would mean that “First Nations people will be limited in their ability to seek the protection of the Act [*CHRA*] if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin.” See *Caring Society FC*, *supra* note 10 at para 337. The Federal Court of Appeal extended this analysis, following *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] and *Quebec (AG) v A*, 2013 SCC 5 [*Quebec v A*], suggesting that substantive equality is imperiled if the *existence* of a comparator group is accepted as determinative in a finding of discrimination. See *Caring Society FCA*, *supra* note 12 at para 18. Recalling *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 at 164, the Tribunal cautioned against a formalistic approach to equality: “every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.” The Tribunal challenged AANDC/INAC's assertion that no comparator evidence had been presented, and delineated at paragraphs 329 to 339 submissions that supported a discrimination finding in funding and service provision on and off reserve. See *Caring Society*, *supra* note 2.

<sup>29</sup> Leave to appeal to the Supreme Court was recently granted in March 2017 for a CHRT case raising similar issues. See *Canadian Human Rights Commission v Canada (AG)*, 2016 FCA 200 [*CHRC v Canada*]. It seeks clarity on whether specific discriminatory federal legislation must be challenged via the *Charter* rather than as a human rights complaint, potentially shifting cases such as *Caring Society* outside of the purview of the CHRT. *CHRC v Canada* concerns the applications of two different parties in two separate CHRT cases (*Andrews et al v Indian and Northern Affairs Canada*, 2013 CHRT 21 [*Andrews*]; and *Matsen et al v Indian and Northern Affairs Canada*, 2013 CHRT 13 [*Matsen*]) regarding status under the *Indian Act*, RSC 1985, c I-5. Ruling on both simultaneously, the Federal Court and the Federal Court of Appeal unanimously upheld the *Matsen* and *Andrews* decisions on the grounds of reasonableness. See *Canadian Human Rights Commission v Attorney General of Canada*, 2015 FC 398; *CHRC v Canada*. *CHRC v Canada* is pertinent for *Caring Society* because it has the potential to clarify the Court's view on cases where: (1) a service may not be available to the general public (a claim made by Canada in *Caring Society*, *supra* note 2); (2) what constitutes a service is in question; and (3) whether discrimination in a legislative scheme is the purview of a tribunal or if it should be subject to a potentially more rigorous section 1 *Charter* test. This case is thus an opportunity for the Court to provide guidance on whether the *CHRA* (a statute with quasi-constitutional status) can be used to challenge “denials of government benefits that are based on discriminatory criteria written into federal legislation.” See Memorandum of Argument in support of the application for Leave to Appeal of the Applicant, the Canadian Human Rights Commission, in *CHRC v Canada* at para 1. In relation to the *Caring Society* case, *CHRC v Canada* may provide guidance on the questions that the *Caring Society* decision hinged on, that is whether funding is a service and what constitutes a service customarily available to the general public. However, while taking note of the significant similarity in questions raised, the *Caring Society* case does not involve a denial of benefits because of *legislated* eligibility criteria. Moreover, the provinces and territories, unlike the federal

Section 5 of the *CHRA* reads:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.<sup>30</sup>

Establishing provision and/or denial of services along with adverse differentiation required a finding that AANDC/INAC provided a service and not simply funding. Under section 91(24) of the *Constitution Act, 1867*, child welfare services for First Nations children and families living on reserve and in the Yukon are funded by AANDC/INAC via the FNCFS Program.<sup>31</sup> These services are provided by provincially mandated First Nations Child and Family Services Agencies, and to a lesser extent, by provinces and non-Aboriginal service providers. Child welfare is, however, governed by provincial legislation and standards.

Following *Kelso v The Queen* and *Bitonti v College of Physicians and Surgeons of British Columbia*, the Tribunal found that funding can constitute a service, citing from *Kelso* that “the government’s right to allocate resources cannot override a statute such as the *Canadian Human Rights Act*.”<sup>32</sup> Further, it concluded that the on reserve child and family services benefit provided by AANDC/INAC constitutes much more than funding. The more-than-funding relationship, which is in many ways at the heart of the discriminatory practice, involves policy directives and funding agreements.

Different policy regimes govern First Nations child and family service agencies. Under the FNCFS Program, two primary funding approaches exist: Directive 20-1 applies in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory; and the Enhanced Prevention Focused Approach (EPFA) applies in Alberta, Manitoba, Quebec, Saskatchewan, and Prince Edward Island.<sup>33</sup> A unique cost-sharing agreement between Ontario and AANDC/INAC—the 1965 Indian Welfare Agreement—provides for child and family services on First Nations reserves.<sup>34</sup> The funding approaches—their form and amount of funding—hem and shape the services provided to First Nations children and families on reserve and in the Yukon Territory. They shape practice.<sup>35</sup>

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government, do have legislative and regulatory frameworks governing child welfare; federal child welfare funding aims to provide comparable levels of, and compliance with, sub-national programs. Thus, the outcome of *CHRC v Canada* may not apply tidily to *Caring Society*.

<sup>30</sup> *Supra* note 21, s 5.

<sup>31</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91(24) [*Constitution Act, 1867*].

<sup>32</sup> *Kelso v The Queen*, [1981] 1 SCR 199 [*Kelso*]; *Bitonti et al v College of Physicians and Surgeons of British Columbia et al*, 1999 BCHRT 63; *Caring Society*, *supra* note 2 at para 42.

<sup>33</sup> Prior to 2007, when the complaint was first filed with the Canadian Human Rights Commission, Directive 20-1 governed all provinces (save Ontario) and the Yukon (*Caring Society*, *supra* note 2 at para 44). Since then, some have transitioned to the EPFA.

<sup>34</sup> Similar agreements are also in place in Alberta, British Columbia, and the Yukon. See *Caring Society*, *supra* note 2 at para 46.

<sup>35</sup> Blackstock et al, *supra* note 20 at 21.



These policy regimes have significant and longstanding problems, extensively documented in joint AANDC/INAC/Assembly of First Nations/FNCFS agency reports, independent reports by the Auditor General of Canada, and House of Commons Standing Committee reports since 2000.<sup>36</sup> These reports find that the principal objective of the FNCFS Program, which is “to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to them are comparable to those available to other provincial residents in similar circumstances,”<sup>37</sup> including services that aim to “increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities,”<sup>38</sup> has been consistently unrealized under the FNCFS Program. Even following joint and external review, the EPFA program that serves as a replacement agreement for Directive 20-1, retains its central flaws, although funding is increased. The Tribunal delineated the myriad shortcomings of Directive 20-1, the EPFA, and the Ontario agreement, including: inflexible funding formulas that are generally unresponsive to variance in community needs based on size or service demand and volume; cost of living freezes and a failure to adjust to inflation and current wage levels; inadequate funding in almost every social policy jurisdiction AANDC/INAC controls; limited or absent compliance with provincial/territorial standards and legislation; and a failure to fund legal counsel for band representation in child removal cases.<sup>39</sup>

Three issues are particularly important to the finding of discrimination in service provision, and have racialized dimensions: first, AANDC/INAC’s funding structure incentivizes removing children and placing them into care rather than focusing on prevention and support; second, AANDC/INAC has interpreted Jordan’s Principle narrowly, resulting in service delays and denials to First Nations children in care; and third, there is inadequate coordination and support between the FNCFS Program, the suite of other social programs AANDC/INAC offers, and other social and human services.

In the first instance, the Tribunal found that insufficient fixed budgets for prevention and family support, and a schema of full cost, dollar-for-dollar reimbursement for taking children into care, created a distortion that made it financially and practically more feasible to remove children from their homes as a first course of action rather than as the last option explored.<sup>40</sup> Off reserve, provincial child welfare policies follow best practices models that prioritize the best

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<sup>36</sup> See Loxley, Wien & Blackstock, *supra* note 20; Blackstock et al, *supra* note 20; Loxley et al, *supra* note 20; AG Canada 2008 Report, *supra* note 20; AG Canada 2011 Report, *supra* note 20; Dr. Rose-Alma J. McDonald et al, *First Nations Child and Family Services Joint National Policy Review Final Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000); House of Commons, Standing Committee on Public Accounts, *Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (March 2009) (Chair: Shawn Murphy) [House of Commons 2009 Report]; INAC, *Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (August 2009), online: <[ourcommons.ca/DocumentViewer/en/40-2/PACP/report-7/response-8512-402-43](http://ourcommons.ca/DocumentViewer/en/40-2/PACP/report-7/response-8512-402-43)> [perma.cc/DS23-QNGG].

<sup>37</sup> INAC, *Fact Sheet – First Nations Child and Family Services* (October 2006) at 1, cited in *Caring Society*, *supra* note 2 at para 67.

<sup>38</sup> INAC, *First Nations Child and Family Services – National Program Manual* (May 2005) at 6, cited in *Caring Society*, *supra* note 2 at para 52.

<sup>39</sup> *Caring Society*, *supra* note 2 at paras 122–148, 157, 217, 289, 306, 384, 387, 485.

<sup>40</sup> *Ibid* at paras 168, 258, 344.

interests of the child and the least disruptive measure as a guiding objective.<sup>41</sup> The objective of the FNCFS Program—culturally appropriate child and family services that are comparable to those provided off reserve—was not here met; moreover, this outcome has been well documented in joint AANDC/INAC reports since at least 2000.<sup>42</sup> Here, the provision of funding facilitated a model of service delivery discordant with the practices and regulations of provincial child welfare; adverse effects were generated linked to race and/or national or ethnic origin. These adverse effects built upon historical state practices of child removal and extended generational damage.<sup>43</sup>

In the second instance, the Tribunal found that the narrow interpretation that AANDC/INAC applied to Jordan’s Principle meant delays and denials of service for First Nations children. Jordan’s Principle is:

a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.<sup>44</sup>

Inter-governmental disputes over funding (most of which are between federal departments) can result in delays, denials, and children being put into care in order to access services, especially where there are complex medical or care needs.<sup>45</sup> The Federal Court in *Pictou Landing Band Council v Canada (Attorney General)* found the approach taken by AANDC/INAC and Health Canada to be exceedingly narrow, in that case for failing to reimburse a band council for in-home health care that would have been available under provincial social assistance policy.<sup>46</sup> *Pictou Landing* and the CHRT decision considered here underscore the importance of the final issue outlined below: the failure to coordinate among departments and services, both within AANDC/INAC and more generally as a matter of policy. The CHRT agreed with the Federal Court in *Pictou Landing* when it suggested that “Jordan’s Principle is not an open-ended principle. It requires complimentary social or health service be legally available to persons off reserve. It also requires assessment of the services and costs to meet the need of the on reserve First Nation child.”<sup>47</sup>

The issue of coordination and access to services goes beyond the purview of the FNCFS Program. In a context where AANDC/INAC is not in compliance with child welfare provincial standards, regulations, and funding, a watertight compartments approach (the FNCFS Program funds x but not y) bureaucratizes a complex social problem. Comprehensive approaches and best practices in child welfare at provincial levels include incorporating a range of social supports

<sup>41</sup> *Ibid* at para 342.

<sup>42</sup> *Ibid* at paras 150, 341–342, 347, 383, 393.

<sup>43</sup> *Ibid* at paras 62, 66, 72, 73, 111, 123, and 125 specifically related to incentivizing child removal from family homes.

<sup>44</sup> *Ibid* at para 351 [emphasis in original].

<sup>45</sup> *Ibid* at para 382.

<sup>46</sup> *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 [*Pictou Landing*].

<sup>47</sup> *Ibid* at para 116, cited in *Caring Society*, *supra* note 2 at para 378.

under the umbrella of these programs. AANDC/INAC's assertion that funding is not a service thus does not absolve it from responsibility. A lack of coordination among departments/agencies and difficulty in accessing core and related services inform the finding of discrimination.

## B. FIDUCIARY RELATIONSHIPS AND EQUALITY

*Caring Society* confronted the issue of substantive equality.<sup>48</sup> It found that First Nations children and families living on reserve were denied equal opportunity to child and family services available to others. This finding raises a final related issue: the Crown's fiduciary relationship with Aboriginal peoples.

As will be elucidated further in section three below, federalism and interjurisdictional disputes in social policy often involve shifting responsibility and blame for funding and action. In *Caring Society*, the Tribunal queried the claim by the respondent that fiduciary duty principles did not apply to this complaint.<sup>49</sup> Following *Eldridge v British Columbia (Attorney General)*, the Tribunal affirmed that the delegation of funding rather than legislating under applicable federal statutes *does not* decrease AANDC/INAC's constitutional responsibilities.<sup>50</sup> The CHRT found that "AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship

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<sup>48</sup> Although this article does not focus on this point, the question of the *requirements* for making out discrimination claims under human rights law is obviously critical. Legal scholars, and indeed Justice MacTavish in her Federal Court ruling on the *Caring Society* CHRT case, raise concerns about the section 15 test for discrimination creeping into human rights law. See *Caring Society* FC, *supra* note 10. In a careful review of the test for discrimination under human rights legislation and the *Charter*, Koshan argues that "the test for discrimination under human rights legislation should remain the traditional *prima facie* approach, unencumbered by extra requirements that may be imported via section 15 of the *Charter*." Among the reasons Koshan cites for her conclusion is access to justice, noting that section 15 requirements impose a greater burden with "real financial, temporal, and outcome-based consequences for the claimant pursuing a discrimination claim." See Jennifer Koshan, "Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*" (2014) 3:1 Can J of Human Rights 115 at 139, 140–41 [footnotes omitted]. See also Wayne MacKay, "The Marriage of Human Rights Codes and Section 15 of the *Charter* in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice" (2013) 64 UNBLJ 54 at 97. Réaume extends this analysis, suggesting that "section 15 places the burden on the claimant to prove that the legislation does indulge in stereotyping, whereas under the conventional approach to human rights adjudication ... the burden falls on respondents to prove that their generalizations are accurate." See Leslie Réaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" (2012) 9 JL & Equality 67 at 68–69. Mummé situates the tension—supplanting the *O'Malley* (*prima facie*) standard with the formerly *Law*, now *Kapp* section 15 framework—as one in which constitutional analysis is adopted in order to build room for deference to state decision making (see *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 536 [*O'Malley*]; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*]; and *R v Kapp* [2008] 2 SCR 483 [*Kapp*]). Mummé raises questions about whether there is, or should be, a division of labour between codes and the *Charter* (*supra* note 8 at 151). These conversations bear on the *Caring Society* case, and others like it, moving forward for a number of reasons. Beyond financial and expediency considerations, there is some support for the idea that the *prima facie* test for discrimination in a human rights setting is less burdensome to meet than the section 15 test. The evidentiary flexibility of a tribunal and its scope in remedies are also important reasons for seeking redress in this venue. Section 15 requirements, imported ad hoc into human rights settings, dilute these benefits without necessarily adding either the clarity a proportionality test affords or setting broad precedent about how equality would be satisfied.

<sup>49</sup> *Caring Society*, *supra* note 2 at para 88.

<sup>50</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*]; *Caring Society*, *supra* note 2 at para 83.

between the Crown and Aboriginal peoples;”<sup>51</sup> thus it must, following *Haida Nation v British Columbia (Minister of Forests) (Haida Nation)*,<sup>52</sup> act honourably. This *sui generis*<sup>53</sup> relationship is not limited to section 35 of the *Constitution Act, 1982*.<sup>54</sup> The duty of the Crown and fiduciary relationships more generally have often been applied to cases involving land, which this case does not.<sup>55</sup> The Tribunal, following *Frame v Smith*, contended that a fiduciary duty *could* extend to human and personal interests.<sup>56</sup> Thus in this case, the Aboriginal interests relate not to land but to culture and language, and the transmission of these generationally. These interests find support in the Supreme Court decisions *R v Côté* and *Doucet-Boudreau v Nova Scotia (Minister of Education)*.<sup>57</sup> Here, the potentially adversely affected interest is socio-cultural. Mingling discrimination claims and fiduciary duty, the Tribunal’s ruling suggests that AANDC/INAC put its budgetary and other interests ahead of those receiving support from the FNCFS Program and thus met neither its fiduciary responsibilities nor provided equitable and sufficient support to First Nations children on reserve and in the Yukon.

Relatedly, the issues raised in this decision regarding comparability or similarity of circumstances show that despite their importance in human rights law, they may be limited lenses with which to consider questions of equality in unique relationships between states and historically subjected peoples. The normative liberal ideals of equality have a hollow translation in social policy terms when applied to the *sui generis* relationship between governments and Indigenous peoples.

## II. FROM NEOLIBERALIZATION TO AUSTERITY IN SOCIAL POLICY

<sup>51</sup> *Supra* note 2 at para 87.

<sup>52</sup> 2004 SCC 73 [*Haida Nation*].

<sup>53</sup> Significantly overlapping with *Charter* issues of substantive equality, *Caring Society* considered and recognized the *sui generis* relationship of First Nations peoples in Canada, extending the Supreme Court’s analysis in *Moore*, *Withler*, and *Quebec v A* that a mirror comparator group is not always needed or even useful. In *Moore*, the Court reiterated that insistence on a mirror comparator group would subvert substantive equality and “risks perpetuating the very disadvantage and exclusion from mainstream society the [Human Rights] Code is intended to remedy,” concluding that the focus must not be on comparator groups, but “whether there is discrimination, period.” In *Quebec v A*, Abella J for the majority confirmed that “a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply.” See *Moore*, *supra* note 28 at paras 30–31, 60; *Quebec v A*, *supra* note 28 at para 346; and *Withler*, *supra* note 28.

<sup>54</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35.

<sup>55</sup> See *R v Van der Peet*, [1996] 2 SCR 507; *R v Sparrow*, [1990] 1 SCR 1075; *Guerin v the Queen*, [1984] 2 SCR 335; *Tsilhqot’in*, *supra* note 6; *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*].

<sup>56</sup> *Frame v Smith*, [1987] 2 SCR 99 [*Frame*]; *Caring Society*, *supra* note 2 at paras 99–101.

<sup>57</sup> *R v Côté*, [1996] 3 SCR 139; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3. At paragraph 104, the Tribunal in *Caring Society* found that the three criteria were met under the common law test for a fiduciary duty from *Elder Advocates Society*, namely: (1) the fiduciary can exercise some power or discretion; (2) it can exercise this discretion in a way that affects the recipient’s interests; and (3) the recipient is vulnerable to the fiduciary holding power. See *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 27. The respondents, in their factum and oral arguments in *Caring Society*, argued that because the interest asserted was not a land interest as in *Wewaykum*, there was no fiduciary duty owed (see *Wewaykum*, *supra* note 55 at para 81, cited in *Caring Society*, *supra* note 2 at para 96).

The FNCFS Program was introduced in 1990. Beginning in earnest in the mid-1990s, the next two decades were marked by significant tumult in Canadian social policy writ large; Canadian social policy was subject to reform, retrenchment, instrumentalized investments, and austerity measures.<sup>58</sup> In the 1990s in areas of federal jurisdiction, such as Employment Insurance and transfers to provinces under a revamped cost-sharing arrangement for health, education, and social services called the Canada Health and Social Transfer, budgetary restrictions and heightened eligibility thresholds and criteria were introduced.<sup>59</sup> Similarly, in 1995–96, a cap on spending limited growth in AANDC/INAC (then Indian Affairs) budgets for core programs (including child and family services) to 2 per cent per year.<sup>60</sup> By way of example, eligibility for Employment Insurance decreased significantly after reforms were introduced in 1996, claimable amounts were reduced, and certain groups of claimants, particularly women, had difficulty qualifying under the new regime.<sup>61</sup> A managerial model of service assessment and delivery—sometimes called a new managerialism—was widely adopted in government and third sector/not-for-profit practice.<sup>62</sup> This model is nested in a discourse of efficiency and borrows heavily from private sector management theory.<sup>63</sup> It finds theoretical expression in a resurgence and recalibration of classical liberal theory, often called neoliberalism.

The term neoliberalism is often imprecisely deployed to explain myriad practices and processes.<sup>64</sup> It originated in what has been called the Chicago school of economics, and was popularized in the work of Milton Friedman and Friedrich von Hayek. Finding application first in Latin America in the 1970s, neoliberalism came to be adopted in structural adjustment lending policy conditions by international agencies such as the World Bank and International Monetary Fund in the 1980s, and in the policies and approaches of conservative governments in the United States under Ronald Reagan and in the UK under Margaret Thatcher.<sup>65</sup> It became ubiquitous—with variations and in hybridized forms—in most Organization for Economic Cooperation and Development (OECD) nations in the 1990s, such that the approach came to be referred to as the

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<sup>58</sup> See Jane Jenson, “Historical Transformation of Canada’s Social Architecture: Institutions, Instruments, and Ideas” in Keith Banting & John Myles, eds, *Inequality and the Fading of Redistributive Politics* (Vancouver: UBC Press, 2013) 43; Rianne Mahon, “Childcare, New Social Risks, and the New Politics of Redistribution in Ontario” in *ibid*, 359.

<sup>59</sup> See e.g. Marjorie Griffin Cohen & Jane Pulkingham, “Introduction: Going too Far? Feminist Public Policy in Canada” in Marjorie Griffin Cohen & Jane Pulkingham, eds, *Public Policy for Women: The State, Income Security, and Labour Market Issues* (Toronto: University of Toronto Press, 2009) 3 at 19.

<sup>60</sup> INAC Cost Drivers Study, *From Poverty to Prosperity: Opportunities to Invest in First Nations Pre-Budget Submission to the House of Commons Standing Committee on Finance, September 2007* (Ottawa: AFN, 2007) [INAC Cost Drivers Study] cited in Judith Rae, “Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?” (2009) 7:2 *Indigenous LJ* 1 at 27, n 107.

<sup>61</sup> Martha MacDonald, “Income Security for Women: What About Employment Insurance?” in Cohen & Pulkingham, eds, *supra* note 59, 251 at 254–58.

<sup>62</sup> John Shields & Bryan Mitchell Evans, *Shrinking the State: Globalization and Public Administration “Reform”* (Halifax: Fernwood Publishing, 1998) at 102.

<sup>63</sup> See e.g. Bryan Evans, Ted Richmond & John Shields, “Structuring Neoliberal Governance: The Nonprofit Sector, Emerging New Modes of Control and the Marketisation of Service Delivery” (2005) 24:1 *Policy and Society* 73.

<sup>64</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015); Jaime Peck, Nik Theodore & Neil Brenner, “Neoliberalism Resurgent? Market Rule after the Great Recession” (2012) 111:2 *South Atlantic Q* 265; Simon Springer, “Fuck Neoliberalism” (2016) 15:2 *ACME: An Intl J for Critical Geographies* 285.

<sup>65</sup> See e.g. Kate Bezanson, *Gender, the State and Social Reproduction: Household Insecurity in Neo-Liberal Times* (Toronto: University of Toronto Press, 2006) at 25, 32 [Bezanson, *Household Insecurity*].

Washington Consensus.<sup>66</sup> In economic terms, neoliberalism refers to a form of laissez-faire liberal capitalism in which markets are viewed as the best vehicle for all distribution, and social/regulatory conditions and limits (such as public assets and services) are viewed as distortions.<sup>67</sup> Neoliberalism, however, is both economic theory and ideology; the latter is insidious as its features are internalized at the state/third sector/institutional level and in individual practice and belief. Some scholars thus use the term neoliberalization rather than neoliberalism to reflect the transfer of ideology to practice at market/state and individual levels.<sup>68</sup> Beyond terminological and conceptual shifts that redefine Keynesian citizens as neoliberal consumers, this merit-based economic philosophy views structural disadvantage as a result of individual failing. At the state and policy level, deregulation, increased financialization, privatization of public services and assets, a fiscally constrained state, and reforms aimed at disciplining and surveilling the poor take centre stage.<sup>69</sup> Importantly, though, neoliberalism is not about deregulation; rather it is a re-regulation that prizes market-based competition and is cautious of redistribution via non-market means.

The period preceding the economic crisis of 2008 was marked by a social policy current germane to the FNCFS Program: the rise of the social investment state in Canada and elsewhere.<sup>70</sup> Departing from earlier Washington Consensus neoliberal approaches, this social investment perspective is one in which human capital and often anti-poverty promoting policies are developed by international agencies and third-way governments (usually centrist and centre-left). It marks an often instrumental deployment of a softened neoliberalism in social policy. Strategic investment in certain social policy areas expanded from the mid-1990s to 2008 in many Canadian provinces/territories and at certain points federally. These expansions were usually tied to a specific new managerialism model.<sup>71</sup> Strategic investment approaches often transfer social risks from society to the individual and tend to increase performance reporting requirements such as cost efficiency exercises or workfare-type policies (parts of neoliberal practice). Such practices often make all levels of government and agencies receiving funding leaner in both staffing and resources.<sup>72</sup>

Two additional features of neoliberalism are particularly relevant to *Caring Society*. First, this form of economic liberalism and concomitant social practice is adaptable and versatile, despite its noted instability.<sup>73</sup> Second, one of the features of neoliberal governance in Canada at federal, provincial/territorial, and municipal levels over the last twenty-five years has been a

<sup>66</sup> See e.g. Alfredo Saad-Filho, “Growth, Poverty and Inequality: From Washington Consensus to Inclusive Growth” (2010) United Nations Department of Economics and Social Affairs Working Paper No 100, online: <[un.org/esa/desa/papers/2010/wp100\\_2010.pdf](http://un.org/esa/desa/papers/2010/wp100_2010.pdf)> [perma.cc/NM9L-47PV].

<sup>67</sup> David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005) at 64–65.

<sup>68</sup> See Peck, Theodore & Brenner, *supra* note 64.

<sup>69</sup> See Loïc Wacquant, *Punishing the Poor: The Neoliberal Governance of Social Insecurity* (Durham, NC: Duke University Press, 2009); Bezanson, *Household Insecurity*, *supra* note 65.

<sup>70</sup> On social investment, see Jane Jenson, “The LEGO™ Paradigm and New Social Risks: Consequences for Children” in Jane Lewis, ed, *Children, Changing Families and Welfare States* (London: Edward Elgar Publishing, 2006) 27. On financialization, see Malcolm Sawyer, “What is Financialization?” (2013) 42:4 *Intl J of Political Economy* 5 at 9.

<sup>71</sup> See *ibid*; Mahon, *supra* note 58.

<sup>72</sup> Banting & Myles, *supra* note 58 at 19.

<sup>73</sup> For a good discussion of the 2008 economic crisis and its relationship to neoliberal capitalism, see Stephen McBride, Rianne Mahon & Gerard Boychuk, eds, *After '08: Social Policy and the Global Financial Crisis* (Vancouver: UBC Press, 2015).

general trend toward a centralized decentralization. Here, control and decision-making power over programs and services is often centralized to one level of government, but the day-to-day delivery is increasingly delegated to other levels of government, third-sector/not-for-profit agencies, or sold or shared with private enterprise. A delegated welfare state model exists alongside a recentring of control in departments and ministries of finance and executive bodies such as the Privy Council Office.<sup>74</sup>

The adaptability of neoliberalism as economic theory and as social practice is well documented.<sup>75</sup> The period following the economic crisis of 2008 was briefly marked by significant infrastructure investments as economy boosting measures, but was swiftly followed by a renewed neoliberal economic approach under austerity measures.<sup>76</sup> Some scholars and policy analysts have claimed that austerity measures, brought about by the near-collapse of many national economies owing to the deregulation of financial markets and sectors characteristic of neoliberalism, are a form of “neoliberalism 3.0.”<sup>77</sup> Owing to significant budget shortfalls stemming from economic malaise, neoliberalism 3.0 or austerity has resulted in cuts in social and other spending, particularly for provinces and territories that have responsibility for most social programming. The tasks related to providing services, particularly in areas such as social assistance and income supports, and child welfare and prevention services, are thus made more challenging in such a context. As the FNCFS Program is meant to both comply with provincial standards and legislation and is meant to be reasonably comparable to services available off reserve, the provincial/territorial climate flavours the AANDC/INAC provision of services. It is also subject to its own budgetary regimes. Moreover, until 2015, the federal government followed an austerity approach to budgeting and social policy delivery.<sup>78</sup> Although there was significant joint reporting and external assessment of the problems with the FNCFS Program beginning in the early 2000s, coupled with the findings of the 1996 Royal Commission on Aboriginal Peoples and the 2015 Truth and Reconciliation report, the broader institutional and bureaucratic political structure retained funding based on formula and population, rather than based on needs.<sup>79</sup> The context of neoliberal managerialism and then austerity also meant that

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<sup>74</sup> On delegated social policy, see Kimberly J Morgan & Andrea Louise Campbell, *The Delegated Welfare State: Medicare, Markets and the Governance of Social Policy* (New York: Oxford University Press, 2011). On the changing control of distributive policies, see David A Good, “The New Bureaucratic Politics of Redistribution” [Good, “Bureaucratic Politics”] in Banting & Myles, *supra* note 58, 210.

<sup>75</sup> For popular works on the subject, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto: AA Knopf Canada, 2007). See also Thomas Piketty, *Capital in the Twenty-First Century*, translated by Arthur Goldhammer (Cambridge: The Belknap Press of Harvard University Press, 2014). Notable academic sources include: Jaime Peck, “Explaining (with) Neoliberalism” (2013) 1:2 Territory, Politics, Governance 132.

<sup>76</sup> See the annual series *How Ottawa Spends*, available at [www.carleton.ca](http://www.carleton.ca). See e.g. Michael J. Prince, “The Hobbesian Prime Minister and the Night Watchman State: Social Policy Under the Harper Conservatives” in G. Bruce Doern & Christopher Stoney, eds, *How Ottawa Spends, 2012-2013: The Harper Majority, Budget Cuts, and the New Opposition* (Montreal: McGill-Queen’s University Press, 2012) 53. The most recent series is: G. Bruce Doern & Christopher Stoney, eds, *How Ottawa Spends 2016-2017: The Trudeau Liberals in Power* online: Carleton University Faculty of Public Affairs <[carleton.ca/sppa/wp-content/uploads/How-Ottawa-Spends-2016-2017.pdf](http://carleton.ca/sppa/wp-content/uploads/How-Ottawa-Spends-2016-2017.pdf)> [perma.cc/W688-69ND].

<sup>77</sup> See Riejer Hendrikse & James Sidaway, “Neoliberalism 3.0”, *Commentary*, (2010) 42:9 Environment and Planning A 2037. See also Stephen McBride, “Neoliberalism in Question?” in McBride, Mahon & Boychuk, *supra* note 73, 21.

<sup>78</sup> Doern & Stoney, *supra* note 76.

<sup>79</sup> See *supra* note 20; Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength*, vol 3 (Ottawa: Communications Group—Publishing, 1996); *Honouring the Truth, Reconciling the Future: Summary of the Final*

other social services were streamlined and reassessed so the effects of cuts in social spending were cumulative, and felt acutely for vulnerable, low income, and marginalized populations.<sup>80</sup> Significantly, although with some variation depending on philosophical orientation, provincial and federal governments enacting neoliberal practices often reflect neoliberalism's hostility to equity claims.<sup>81</sup>

The final feature of the neoliberal period that is relevant to the *Caring Society* decision relates to centralized decentralization/delegation. In social policy development and funding, especially at the federal level, planning, analysis, and decision-making often occur in a centralized and often fragmented, incremental fashion.<sup>82</sup> David Good notes that:

The focus of redistributive policy making is increasingly central agency (PMO, PCO, and Department of Finance) centred and driven as a basis for strategically positioning issues, designing programs, and managing political conflict. The Department of Finance is undertaking the policy analysis and design, bypassing social departments, drawing directly upon pre-selected think tanks and external advisors, and engaging directly with provincial governments on the redistributive and other aspects of tax and expenditure proposals.<sup>83</sup>

This centralization of policy control, often framed in budgetary rather than program specific processes, has meant that adjusting policies, particularly their funding levels, is more difficult as bureaucrat experts in the area may not be direct participants in planning. Although political will matters enormously, twinned with a culture of austerity and accountability, effecting funding and policy changes (absent legal compulsion to do so) has been often ineffective.

The other side of centralization is decentralization.<sup>84</sup> Decentralization can have salubrious and important effects: local delivery of a service by those who know an issue and community, and in this case, can provide vital culturally appropriate services. Yet in a context of widespread new managerialism and financialization of social policy, this decentralization can make it exceptionally challenging to deliver services.<sup>85</sup> In *Caring Society*, this is evident in a range of areas such as the funding choices that incentivized child removal and a lack of supports for compliance, reporting, and auditing requirements. The increase in the number of FNCFS

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*Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: TRCC, 2015) at 189–90.

<sup>80</sup> In my own research in the 1990s and 2000s on changes in taxation policies and in social spending in Ontario during a period of neoliberal retrenchment, the effects of such changes were compounding, especially since those requiring certain services were often recipients of services funded by another ministry or agency (e.g. health services and social assistance). See Bezanson, *Household Insecurity*, *supra* note 65. See also Ronald Labonté & Arne Ruckert, “Austerity Lite: Social Determinants of Health under Canada’s Neo-Liberal Capture” in McBride, Mahon & Boychuk, *supra* note 73, 272.

<sup>81</sup> See e.g. Bezanson, “*Mad Men* Social Policy”, *supra* note 4; Ann Porter, “Neo-Conservatism, Neo-Liberalism and Canadian Social Policy: Challenges for Feminism” (2012) 29:3 *Canadian Woman Studies* 19.

<sup>82</sup> Good, “Bureaucratic Politics”, *supra* note 74.

<sup>83</sup> *Ibid* at 216.

<sup>84</sup> Decentralization is sometimes also called devolution. See Rae, *supra* note 60.

<sup>85</sup> Devolution can also be a deliberate and duplicitous cost saving measure. Rae recalls: “In the mid-80s, a leaked memo from the Mulroney government urged further devolution of ‘community management’ to Bands—under strict funding caps—as a strategy to cut federal spending. The memo, strongly reminiscent of the White Paper, also recommended the transfer of as many expenditures as possible to provinces, the privatization of Indian land, and the complete elimination of the department of Indian Affairs.” *Ibid* at 15.



agencies operating on reserves in Canada is essential; the decentralization, however, absent coordination among federal departments and with provincial departments, and absent adequate funding, resources, support, and infrastructure, shifts the responsibility for service provision to providers without also providing robust capacity to deliver services and comply with regulatory and reporting regimes.<sup>86</sup>

The FNCFS Program came into being at the beginning of a process of retrenchment and restraint in social policy in Canada. As this process unfolded, its characteristics—managerialism, decentralization, financialization, and at times, indifference to issues of social inequality— informed the struggles for appropriate and adequate funding for child and family welfare on reserves. The ubiquity of neoliberal processes in almost all policy portfolios meant that other supports such as health care were also subject to such regimes, compounding inequities. I turn now to an examination of the interplay between the necessities of life and the social policies that touch on the *Caring Society* decision.

### III. INDIGENOUS CHILD WELFARE AND SOCIAL REPRODUCTION: TENSIONS AND THRESHOLD EFFECTS

At the outset of this paper, I suggested that *Caring Society* is fundamentally about how people put together and sustain the necessities of life; it concerns a contest over social reproduction. What is social reproduction? Like neoliberalism, social reproduction is at times imprecisely deployed to reference caring labours. In feminist political economy usage, social reproduction refers to the processes and practices involved in maintaining and reproducing people on a daily and generational basis.<sup>87</sup> The ways in which this occurs vary historically and culturally, but always involve putting together the necessities of life, including shelter, food, culture, intimacy, affection, socialization, and security, among others.<sup>88</sup> As I have argued elsewhere, social reproduction involves:

the day to day work of maintaining and reproducing people and their labour power, including creating space for the building of their capacities such as learning, caretaking, and playing ... It often involves internalizing and coping with discrimination and racism [and] is usually carried out in homes and involves the teaching of social norms, which are social assets and which are integral in coordinating the activities of an economy ... It involves negotiations over power and resources within households, usually between men and women ... It is often characterized by an unequal division of labour and a gender-specific socialization process. It also includes provisioning beyond individual households, through volunteer work, intra-household care work, and local initiatives pertaining to shared

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<sup>86</sup> For an insightful review of neoliberalism, shifting responsibilities for services, and the Australian child welfare system, see Chris Cunneen, “Surveillance, Stigma, Removal: Indigenous Child Welfare and Juvenile Justice in the Age of Neoliberalism” (2015) 19:1 *Austral Indigenous L Rev* 32.

<sup>87</sup> Barbara Laslett & Johanna Brenner, “Gender and Social Reproduction: Historical Perspectives” (1989) 15:1 *Annual Rev Sociology* 381 at 382; see also Kate Bezanson & Meg Luxton, eds, *Social Reproduction: Feminist Political Economy Challenges Neoliberalism* (Montreal: McGill-Queen’s University Press, 2006).

<sup>88</sup> Bezanson, “Return of the Nightwatchman State?”, *supra* note 3 at 31.

social space or services. Social reproduction involves pooled risk services and programs, such as getting access to income via citizenship-based entitlements such as those which have been provided through the welfare state ... In short, social reproduction encompasses the work that must be done in order to ensure that people at least survive and ideally thrive and develop as well as to ensure that the economic system is perpetuated.<sup>89</sup>

Social reproduction is thus dynamic and is in tension, in capitalist economies, with the aim of profit maximization.<sup>90</sup> It requires mediation at a number of levels, especially by states, families and households, and to different extents, markets.<sup>91</sup> States, for example, can take on some of the mediation by underwriting certain costs and supports, such as health care. These costs and supports can also be left to markets to provide for a price, to the third sector to provide as charity, or they can be shifted to families (and usually women within them) to provide via their own labours. The latter is usually the cheapest way for these costs and services to be met, often through a discourse of obligation and care. Yet such mediation requires the creation and stabilization of class, gender, and racialized orders; neoliberal capitalism, and in the case under review, white settler neocolonialized versions which follow ready conduits of inequality in assigning social reproduction and its corollary order. The familiar version of the post-Fordist compact is an easy illustration of a short-lived entente between regimes of capital accumulation and social reproduction.<sup>92</sup> In this post-war compromise, capital accepted limits on profit accumulation in exchange for a labour accord held broadly in place by a rigid gender accord in which almost exclusively white men aspired to, though did not always achieve, a family wage. This compact consolidated a division of labour in the work of social reproduction done in homes, although it was significantly bolstered by an emergent Keynesian welfare state that underwrote certain processes and tasks. These class, gender, and racialized orders required mediation and to different extents repression, whether in the form of direct suppression and state violence, in the form of legal structures that denied access to reproductive freedom, or in the over-incarceration, denial of services to and/or surveillance of poor or racialized groups.<sup>93</sup> In the case of Indigenous peoples in Canada, it took racist expression in, among other things, residential schools whose ostensible aim was to resocialize children into white settler culture and to destroy the capacities for social reproduction in communities.

The work of social reproduction requires material inputs. These can come from multiple sources including wages, subsistence, rent, income transfers from governments, gifts and charity, barter, and more indirect pooled risk transfers and credits such as tax credits or childcare subsidies. These inputs are transformed, often via women's labour, into material necessities and goods. But it also requires affective, social, and cultural inputs.<sup>94</sup> States play a significant role in establishing the *conditions under which* social reproduction, including its social and cultural

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<sup>89</sup> Bezanson, *Household Insecurity*, *supra* note 65 at 26.

<sup>90</sup> Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992) at 1.

<sup>91</sup> Bezanson, *Household Insecurity*, *supra* note 65 at 10.

<sup>92</sup> For an excellent discussion of the Fordist compact, see Leah F Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

<sup>93</sup> Bezanson, *Household Insecurity*, *supra* note 65.

<sup>94</sup> *Ibid* at 26.

dimensions, takes place.<sup>95</sup> They do this via their roles in regulating capital, labour markets, social policy and welfare state entitlements, and in enforcing obligations within families.<sup>96</sup> The work of social reproduction is thus often rendered invisible; we tend to recognize and name it when it fails: a child taken into care, generational cycles of abuse, violence and incarceration, and youth suicide among others. Failure to invest in households and families reveals threshold effects on care economies, and is often expressed in higher spending in corrections. Beyond paying for in the justice system what might be more wisely invested in social services, crises in social reproduction ripple beyond the micro household experience of depletion. As Elson argues in relation to macroeconomic policy, the domestic, the economic, and the political are interconnected and rely on one another:

We have identified three sectors: the domestic, the private and the public; and three circuits: the market, the tax-and-benefit circuit and the communications network. We have argued that the domestic sector produces a labour force; and, more than that, plays a foundational role in the production of people who possess not only the capacity to work but also to acquire other more intangible social assets—a sense of ethical behaviour, a sense of citizenship, a sense of what it is to communicate—all of which permit the forming and sustaining of social norms. We have argued that, without these intangible social assets, the three circuits could not function with any degree of regularity or continuity.<sup>97</sup>

The lens of social reproduction, particularly when it is applied in concert with an understanding of neoliberalization, brings important clarity to *Caring Society*. Three intertwined aspects merit closer consideration. First, federalism is in this case an expression of social reproduction and can be viewed as producing a kind of constitutionally derived havoc. Second, a crisis of care, including related to fiduciary duties, animates this case. Here, funding levels, discrimination, and new managerial bureaucratic practices extend the risk and effects of a loss of cultural, affective, and familial social reproduction. Finally, a lack of coordination among departments and ministries as expressed most starkly in Jordan's Principle compartmentalizes and can deny substantive tools to enable positive social reproduction.

It is easy to forget, in the abstractions of policy and funding directives, discussions of forms of capital accumulation and regulation, and theoretical abstractions of social reproduction theory, that the case under consideration is principally about children, families, and their wellbeing.<sup>98</sup> Rae argues that:

Research has found that poverty, poor housing and parental substance abuse—far

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<sup>95</sup> *Ibid.*

<sup>96</sup> It is beyond the scope of this paper to explore in detail the critiques of family forms in feminist political economy and social work literatures. I note here, however, that the normative family forms associated with much social policy in the field of child welfare does not often accord with ideas of kinship and care found in many Indigenous and immigrant belief structures.

<sup>97</sup> Diane Elson, "The Economic, the Political and the Domestic: Businesses, States and Households in the Organisation of Production" (1998) 3:2 *New Political Economy* 189 at 197.

<sup>98</sup> Hadley Friedland provides an important overview. See Hadley Friedland, "Tragic Choices and the Division of Sorrow: Speaking About Race, Culture and Community Traumatization in the Lives of Children" (2009) 25:2 *Canadian J Fam L* 223.

more than physical or sexual abuse—are the top three reasons First Nation families enter the child welfare system. These structural issues go far beyond child protection programming, and touch on the drivers of poverty including lack of education, the federal funding cuts to housing and infrastructure on reserve, and the weak availability of high quality and appropriate health and cultural services to help communities heal from addictions and associated trauma.<sup>99</sup>

These structural issues are principally the creatures of provinces. Scholars such as Barbara Cameron have made a case for understanding the constitutional divisions of responsibilities in sections 91 and 92 within a framework of social reproduction.<sup>100</sup> She traces the ways in which assigning responsibilities for economic development powers to the federal government and those related to private matters, or “local works and undertakings,”<sup>101</sup> to provinces created a framework in which the messy work of caring for people evolved into being a kind of division of social reproduction. She notes that the “1867 division of power assigned ‘Indians and lands reserved for Indians’ to the federal government, a power that it has exercised historically to destroy the material basis for the social reproduction of Aboriginal peoples.”<sup>102</sup> Returning to children and families, the evolution of this original constitutional framework nests the bulk of welfare state architecture—health care, education, childcare, child welfare, housing, and so on—with provinces. Labour and environmental regulations are also part of a broad social reproduction frame.<sup>103</sup> The conditions, inputs into, and regulation of social reproduction, where taken up by states, is often carried out at the provincial level. Provinces, one scholar of multilevel governance notes, “have women” because they have social services; this is equally so for children and families.<sup>104</sup>

The messiness of the *Caring Society* decision reflects a contest over social reproduction, where the provinces “have” children and families jurisdictionally and legislatively, but the federal government circumscribes the inputs into the funding and quality of that support. In an inversion of other policy areas, the federal government here “has” social reproduction. The 2009 Standing Committee on Public Accounts reflected on this problem:

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<sup>99</sup> Rae, *supra* note 60 at 37. See also Nico Trocmé et al, “The Experience of First Nations Children Coming Into Contact with the Child Welfare System in Canada: The Canadian Incidence Study on Reported Abuse and Neglect” (2005) in Blackstock et al, *supra* note 20, 60.

<sup>100</sup> Barbara Cameron, “Social Reproduction and Canadian Federalism” [Cameron, “Social Reproduction”] in Bezanson & Luxton, *supra* note 87 at 45.

<sup>101</sup> *Constitution Act, 1867*, *supra* note 31, s 92(10).

<sup>102</sup> Cameron, “Social Reproduction”, *supra* note 100 at 51.

<sup>103</sup> Federal approaches to social policy affect the social reproduction landscape in Canada. The approach followed by the previous federal government from 2006–2015, often termed “Open Federalism,” embraced a watertight compartments approach to jurisdiction. Largely consistent with neoliberal approaches to federalism, it sought to centralize “most market-enabling policy capabilities at the federal level,” limiting fiscal room for extant and new social policy initiatives. See Bezanson, “Return of the Nightwatchman State?”, *supra* note 3 at 28. This market enabling federalism served to provincialize “market-inhibiting policy capabilities such as labour ... and certain forms of ... social spending.” See Adam Harmes, “The Political Economy of Open Federalism” (2007) 40:2 *Canadian J Political Science* 417 at 424.

<sup>104</sup> Caroline Andrew, “Federalism and Feminism: The Challenge for Women’s Urban Safety” in Melissa Haussman, Marian Sawyer & Jill Vickers, eds, *Federalism, Feminism and Multilevel Governance* (Surrey: Ashgate, 2010) 83 at 87.

it should be possible to compare the level of funding provided to First Nations child and family services to similar provincial agencies, and given their unique and challenging circumstances, it would be reasonable to expect First Nations agencies to receive a higher level of funding. Yet, when asked how the funding for First Nations child and family service agencies compares to agencies for non-natives, the Assistant Deputy Minister said, “I’m sorry, but we don’t know the answer.” The same question was put to the Deputy Minister and he replied, “Our accountability is for the services delivered by those agencies *to the extent that we fund them.*”<sup>105</sup>

This constitutional arrangement, a kind of race-to-the-bottom approach that shifts responsibility for substantiveness and culpability for inadequacies, provincializes and familializes social reproduction. Such bureaucratic reasoning, coupled with a neoliberal devolutionary managerialism, frustrates and evades equality claims. Failing to meaningfully invest in prevention and household infrastructures (including their affective, material, and cultural capacities) encourages crises of care. This jurisdictional contest over social reproduction led the Standing Committee on Public Accounts to reflect: “Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren’t funded, and all these children are being put into care.”<sup>106</sup>

The fiduciary and possibly *Haida Nation* duty<sup>107</sup> owed to Indigenous people stemming from a *sui generis* relationship is here squarely related to multi-generational interests; beyond language and cultural transmission, *Caring Society* forms part of a conversation about a need for *disproportionate* culturally appropriate resource investment and control over social reproduction in First Nations communities on reserve. Such investment is multilayered, and requires a broad conception of inputs into social reproduction to address the structural and historical basis of crises in social reproduction. “We believe,” the Auditor General of Canada noted in 2011, “that there have been structural impediments to improvement in living conditions on First Nations reserves.”<sup>108</sup> “Real improvement,” they continued:

... will depend on clarity about services levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserves will approach those existing elsewhere across Canada.<sup>109</sup>

The profiles of First Nations families differ dramatically to non-First Nations families, and while not enforceable, the conclusions of the Tribunal acknowledge that disproportionate need is best tied to disproportionate and coordinated investments in supports for social reproduction.<sup>110</sup> This

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<sup>105</sup> House of Commons 2009 Report, *supra* note 36 at 5 [emphasis added].

<sup>106</sup> *Ibid* at 9.

<sup>107</sup> *Haida Nation*, *supra* note 52. The *Haida Nation* duty refers to a duty to consult and to act honourably.

<sup>108</sup> AG Canada 2011 Report, *supra* note 20 at 5.

<sup>109</sup> *Ibid*.

<sup>110</sup> Blackstock et al, *supra* note 20 at 15. See also *Caring Society*, *supra* note 2 in which the Tribunal noted that: the provinces’ legislation and standards dictate that all alternative measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets

is most starkly articulated in the jurisdictional disputes over funding and services seen in the narrow application of Jordan's Principle.

The lens of social reproduction reveals the ways in which crises of care are mediated, taken up, and delegated. Combined with an understanding of neoliberal approaches and practices, it illuminates the shifting of costs, responsibility, and blame among levels of government, to local communities and agencies, and to families. This lens has the potential to alter a legal lens that must answer questions of equality and discrimination to one that also asks how Indigenous interests and equity are best served.

#### **IV. CONCLUSION: RECOGNITION, REDRESS, AND RECONCILIATION? MOVING BEYOND CRISES IN CARE**

Among the most important elements of *Caring Society* is its confirmation both that children and families on reserve have been discriminated against in the provision of child and family services (recognition of harm) and that redress is also material: increased and coordinated funding. It acknowledged that there may be a fiduciary duty owed in cases of discrimination and inequality, with implications for cases and situations well outside of land based claims. The decision anchored historical practices including residential schools and the sixties scoop, along with consistently documented under-resourcing of social and infrastructure services, to the current crisis tendencies in social reproduction on many reserves. The escalation of these crisis tendencies can be traced in part to neoliberal logics in policy formation and in a discursive frame that individualizes blame for structural social problems. Culturally appropriate service provision on the part of First Nations agencies is critical to addressing some of the most egregious features of the FNCFS Program; yet such control cannot resolve the features of miscoordination, funding shortfalls, and paternalism that stem from AANDC/INAC, and to some extent provincial, practices. Federalism, neoliberal governance, and social reproduction are thus central to this case.

*Caring Society* suffers from a range of lingering questions, confusions and implementation struggles, and delays.<sup>111</sup> The Tribunal missed an opportunity to affirm a systemic remedy that

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for prevention, AANDC [INAC]'s funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for FNCFS Agencies to keep pace with provincial operational requirements that may include ... costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards (*ibid* at para 344).

<sup>111</sup> I return to the question of tribunal versus court and wonder while there is no guarantee that a court hearing the case would provide greater guidance, the stringency of the section 15 and section 1 tests would give full airing to both legislative/administrative aims and scope, as well as breadth and legacy of discrimination. Additionally, I am cognizant that the Court's "version of reconciliation is formed from the litigation process in a Canadian court system imposed on Indigenous peoples, which uses colonial precepts and terminology that precludes genuine

might touch on some of the inputs into social reproduction, such as the remedy delivered in *CN v Canada (Canadian Human Rights Commission) (Action Travail)*.<sup>112</sup> The *Action Travail* case addressed the need for disproportionate investments based on need, and socioeconomic and historical impact:

the Canadian Human Rights Tribunal ruled Canadian National Railway Co. (CNR) had discriminated against women in its hiring practices for certain types of front line railway positions (so-called ‘blue-collar’ jobs), otherwise thought to be the work of men. As part of a comprehensive remedial order, the Tribunal required at least one-in-four new employees hired by CNR for ‘blue-collar’ positions be filled by a woman until the overall employment rate at CNR reached thirteen percent – the national percentage at the time of women working in equivalent jobs elsewhere. The Supreme Court of Canada unanimously upheld the Tribunal’s decision.<sup>113</sup>

Such an approach, nested in disproportionate investment to remedy historical inequalities, in concert with an eye to a self-governing solution for the myriad issues plaguing areas beyond child welfare and service coordination within INAC’s jurisdiction, could have a broad and salutary reconciliatory reach.

The Tribunal’s assessment of discrimination is one that underscores the need for a nuanced legislative, policy, and legal approach to social reproduction as a lens to build a reconciliation culture. Investing in the conditions that not only allow people to survive but to thrive is a social and forward-looking process. The changes required by the Tribunal of AANDC/INAC are significant, but its scope is necessarily narrowly construed and thus cannot substantively address the amalgam of inputs into the conditions for social reproduction. The latter requires considered legislative and political will, good will, and an openness to a kind of rebuilding of comprehensive policies that may well give greater space for autonomy over social policy remedies and practices. Unique relationships require new solutions that do not deplete existing capacities, but that meet the aim of supporting children and their families so that they might have childhoods from which they do not need to recover.<sup>114</sup>

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reconciliation.” Kim Stanton, “Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Truth and Reconciliation Commission” (2017) 26 J L & Soc Pol’y 21 at 22. However, the interplay of a disposition toward reconciliation in recent Supreme Court jurisprudence may weigh on deliberations related to the Crown’s fiduciary duty, even outside of its traditional land and title frame, see especially *Tsilhqot’in*, *supra* note 6.

<sup>112</sup> [1987] 1 SCR 1114.

<sup>113</sup> Jeffery Gordon Hewitt, “The Failure of the Canadian Human Rights Regime to Provide Remedies for Indigenous Peoples: Enough Time Has Passed” (LLM Thesis, Osgoode Hall Law School of York University, 2015) [unpublished].

<sup>114</sup> CBC Radio, “Indigenous Children are Dying While Ottawa Fights a Ruling that Calls for Action”, *CBC Radio* (17 July 2017), online: <[cbc.ca/radio/day6/episode-347-cindy-blackstock-seeks-justice-man-vs-beast-steve-jobs-opera-women-s-rights-in-saudi-and-more-1.4213358/indigenous-children-are-dying-while-ottawa-fights-a-ruling-that-calls-for-action-1.4213378](http://cbc.ca/radio/day6/episode-347-cindy-blackstock-seeks-justice-man-vs-beast-steve-jobs-opera-women-s-rights-in-saudi-and-more-1.4213358/indigenous-children-are-dying-while-ottawa-fights-a-ruling-that-calls-for-action-1.4213378)>.