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A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case

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A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the *Caring Society* Case

NAIOMI WALQWAN METALLIC*

Le 26 janvier 2016, le Tribunal canadien des droits de la personne a rendu une décision qui marque un tournant dans la cause de la *Société de soutien à l'enfance et à la famille des Premières Nations du Canada et al. c. Procureur général du Canada (pour le ministère des Affaires indiennes et du Nord canadien)*. Le tribunal a conclu que la conception, la gestion et le contrôle des services d'aide à l'enfance dans les réserves et de leurs modes de financement par le ministère des Affaires indiennes et du Nord Canada (AINC) causent de nombreux préjudices aux enfants et aux familles des Premières Nations, allant jusqu'à de la discrimination. Un tableau complet des rouages et des préjudices du Programme des services à l'enfance et à la famille des Premières Nations (le Programme des SEFPN) d'AINC, jumelé aux deux principaux arguments de la décision du tribunal prouvent solidement l'argument que les Premières Nations ont un droit fondamental à l'autonomie gouvernementale à l'égard des services d'aide à l'enfance et à la famille. Ces deux arguments consistent à ce qu'en vertu des droits de la personne : 1) les Premières Nations ont droit à des services d'aide à l'enfance et à la famille adaptés à leur situation et leurs besoins culturels, historiques et géographiques et 2) ces services ne peuvent pas être conçu pour les assimiler ou avoir l'effet de les assimiler. De plus, comme les principaux éléments structuraux et préjudices du Programme des SEFPN se retrouvent dans pratiquement tous les autres programmes de services essentiels dans les réserves, l'insinuation finale de la *cause de la Société de soutien* est qu'un droit fondamental à l'autonomie gouvernementale s'applique vraisemblablement à tous les services essentiels des Premières Nations.

On 26 January 2016, the Canadian Human Rights Tribunal released a watershed decision in *First Nations Child and Family Caring Society of Canada et al v Attorney General (Caring Society)*, finding that the Department of Indigenous and Northern Affairs' (INAC) design, management, and control of child welfare services on reserve, along with its funding formulas, cause a number of harms to First Nations children and families that amount to discrimination. A full appreciation of the workings and harms of INAC's First Nations Child and Family Services Program (the FNCFS Program), paired with the two key propositions from the tribunal's decision—that, as a matter of human rights: (1) First Nations are entitled to child and family services that meet their cultural, historical, and geographical needs and circumstances, and (2) such services cannot be assimilative in design or effect—firmly ground an argument that First Nations have a human right to self-government over child and family services. Moreover, because the main structural features and harms of the FNCFS Program are common to virtually all other essential service programs on reserve, the final implication of the *Caring Society*

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case is that a human right to self-government likely extends to all First Nations essential services.

ON 26 JANUARY 2016, THE CANADIAN HUMAN RIGHTS TRIBUNAL (the “Tribunal”) released a watershed decision in a complaint spearheaded by the First Nations Child and Family Caring Society of Canada (the “Caring Society”), headed by Dr. Cindy Blackstock and the Assembly of First Nations (the “*Caring Society*” decision).¹ The complaint alleged that Canada, through its Department of Indigenous and Northern Affairs (INAC or the “Department”),² discriminates against First Nations children and families in the provision of child welfare services on reserve. In its decision, the Tribunal found that INAC’s design, management, and control of child welfare services on reserve, along with its funding formulas, cause a number of harms to First Nations children and families that amount to discrimination. Canada did not appeal the decision.³

Public discourse following the case emphasized that INAC can no longer underfund First Nations child welfare services as compared to the provinces’/territories’ funding of similar services to other residents of Canada.⁴ However, the case goes much further than setting out this

¹ *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 2 [*Caring Society*].

² In August 2017, the Prime Minister announced that the Department would be split into two new departments: A Department of Crown-Indigenous Relations and Northern Affairs (CIRNA), and a Department of Indigenous Services (DISC). See Office of the Prime Minister of Canada, Press Release, “New Ministers to Support the Renewed Relationship with Indigenous Peoples,” (28 August 2017). CIRNA’s mandate is to promote nation-to-nation, Inuit-Crown, and government-to-government relationships to accelerate self-government and self-determination agreements based on new policies, laws, and operational practices. DISC’s mandate is to continue the important work of improving the quality of services delivered to First Nations, Inuit, and Métis people. First Nations child welfare services now fall under the mandate of DISC. However, for reasons of ease and historical continuity, I will refer to DISC using its previous acronym, INAC, in this article.

³ See e.g. 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> [perma.cc/RNH2-DCW9]. The Tribunal ordered Canada to cease its discriminatory practices and reform the FNCFS Program. There remained a number of remedial issues to be addressed, however, and the Tribunal has retained jurisdiction until any and all orders are fully implemented. Over the past two years, there have been ongoing implementation and non-compliance issues and the Tribunal has issued further rulings. See: 2016 CHRT 10; 2016 CHRT 11; 2016 CHRT 16; 2017 CHRT 14; and 2018 CHRT 4. In the latest ruling, the Tribunal emphasized that its January 2016 decision “was not a recommendation; it is legally binding” (para 41) and suggested that Canada had been more focused on financial considerations than the best interests of First Nations or in addressing its liability since the decision (para 132). Following this last ruling, Canada announced a plan to address First Nations child welfare. See John Paul Tasker, “Jane Philpott Unveils 6-Point Plan to Improve ‘Perverse’ First Nations Child Welfare System”, *CBC News* (25 January 2018), online: <cbc.ca/news/politics/jane-philpott-six-point-plan-first-nations-child-welfare-1.4503264> [perma.cc/7BGN-6US8].

⁴ This focus may relate to the Tribunal’s endorsement and expansive interpretation of “Jordan’s Principle” (see *Caring Society*, *supra* note 1 at paras 362–93, 481). This principle holds 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, 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. Jordan’s Principle suggests, at the very least, that First Nations children are entitled to treatment equal to other children in Canada. It was an important principle for the Tribunal to endorse given that such disputes are commonplace in the First Nations context. My argument here, however, is that the decision goes even further than this. Consequently, this article will not be focusing on Jordan’s Principle. For an argument that Jordan’s Principle has broader equality and self-government implications, see Colleen Sheppard, “Jordan’s Principle: Reconciliation and the First Nations Child” (2018) 26:4 *Constitutional Forum constitutionnel* 3.

minimum standard of formal equality. In determining what the non-discriminatory treatment of First Nations children and families entails, the Tribunal held that the standard of substantive equality requires that First Nations people receive child and family services that meet “their cultural, historical and geographical needs and circumstances.”⁵ The Tribunal did not qualify that this requirement relates only to the funding; indeed it suggested that First Nations child and family services *as a whole*, inclusive of funding, must meet this standard.⁶

Despite the fact that the word “self-government” is never used in the decision, taken to its logical conclusion, the case implies that First Nations have such a right in regards to children and family services. While there are varying definitions and models of First Nations self-government, its core feature is real decision-making power resting in the hands of Indigenous peoples over matters affecting their day-to-day lives. The *Caring Society* decision, while not using the language of “self-government” or prescribing the particular form it should take, signifies that First Nations must exercise meaningful control over the content and delivery of child welfare services in their communities *as a matter of human rights law*. This is because, in order for child welfare services to meet their cultural, historical, and geographical needs and circumstances as required by the decision, First Nations people must *necessarily* be the ones to design and control such services. The idea was expressed most succinctly by a member of the Carrier-Sekani Tribal Council, quoted in a 1983 report of a special House of Commons Committee charged with studying Indian Self-Government: “The principle is simple. Only Indian people can design systems for Indians. Anything other than that is assimilation.”⁷

This conclusion builds on the Tribunal’s findings about how the design and delivery of INAC’s First Nations Child and Family Services Program (the FNCFS Program) harms First Nations children and their families. Ultimately, the Tribunal concludes that the FNCFS Program replicates many of the assimilative aims and effects of the Indian Residential School system.

⁵ *Caring Society*, *supra* note 1 at para 465. “Formal equality” as a concept tends to emphasize identical treatment between individuals (“treating likes alike”) as the high-water mark of equality. One problem with this approach is that it tends to privilege one set of norms (usually those of the majority) to the exclusion of other groups, and thereby can result in seemingly “neutral” laws or policies having a disproportionate effect on other groups going unchallenged. Formal equality has been discarded by the Supreme Court of Canada as a standard of equality in favour of substantive equality (see: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 166; *R v Beaulac*, [1999] 1 SCR 768 at paras 22–24; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203; *R v Kapp*, 2008 SCC 41 at paras 15–16; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 [Withler]; *Quebec (Attorney General) v A*, [2013] 1 SCR 61). According to the Court, substantive equality recognizes and celebrates difference, recognizing that all human beings are equally deserving of concern, respect, and consideration. This approach is mindful that laws and policies should not have disproportionate impacts on some individuals or groups more than others on account of protected group characteristics like race, ethnicity, gender, disability, et cetera.

⁶ Given the *Caring Society* case was about First Nations and First Nations Child and Family Services Program on reserve, my arguments will similarly focus on First Nations living on reserve. By “First Nations” I am referring to those people who are registered under the *Indian Act*, *i.e.*, “Status Indians.” (“First Nations” is now the more commonly used term to refer to “Indians,” but discussions in the context of the *Indian Act* or older documents or quotes may necessitate use of the word “Indian.”) Discussion of the implications of *Caring Society* for other Indigenous groups, including First Nations living off-reserve, Métis, and Inuit peoples, are beyond the scope of this article. However, the ruling in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, that Canada’s section 91(24) constitutional jurisdiction over “Indians” includes non-status Indians and Métis, coupled with the finding in *Caring Society* that Canada is primarily responsible for child welfare services pursuant to section 91(24), suggests that Canada ought to play a greater role in child welfare services for Métis and those off-reserve than it has in the past.

⁷ House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (12–20 October 1983) at 29 (Chair: Keith Penner) [Penner Report].

This is clear recognition that government programs that attempt to assimilate First Nations people violate Canadian human rights norms. One of the aims of this article is to detail the history of the FNCFS Program and catalogue its problems and the various harms it causes to First Nations people so that the reader has a full appreciation of the extent to which the FNCFS is assimilative and discriminatory.

A full appreciation of the workings and harms of the FNCFS Program, paired with the two key propositions from *Caring Society*—that, as a matter of human rights: (1) First Nations are entitled to child and family services that meet their cultural, historical, and geographical needs and circumstances; and (2) such services cannot be assimilative in design or effect—firmly ground the argument that First Nations have a human right to self-government over child and family services. Furthermore, because the main structural features and harms of the FNCFS are common to virtually all other essential service programs on reserve, the final implication of the *Caring Society* case is that a human right to self-government likely extends to all First Nations essential services.⁸

This article is in three parts. Part I gives an overview of how the FNCFS Program came to be and how it operates. Part II describes the various problems and harms arising from the FNCFS Program. Finally, Part III considers key findings of the *Caring Society* decision, how they relate to those harms, and the implications of the Tribunal's findings.

I. OVERVIEW OF FIRST NATIONS CHILD WELFARE SYSTEM⁹

Although informal systems to provide assistance and protection to orphaned and abandoned children sprung up in Canada in the late nineteenth and early twentieth centuries, child welfare as a formal system involving state-sanctioned intervention into the private lives of families to protect abused or neglected children, only took shape following the Second World War.¹⁰ WWII had a tremendous impact on the social and economic policies of countries throughout the world, including Canada. Revulsion to the treatment of Jewish people and other groups persecuted by the Nazis spurred increased concern for equality and human rights in Canada and beyond. Following the war came the rise of the welfare state in Canada and, with this, a great expansion

⁸ This includes First Nations' social assistance, elderly/disability care, housing, health, education, water, policing, and emergency services. These services have long suffered from all the same problems plaguing First Nations child and family services. Indeed, many of these services are currently the subject of ongoing human rights complaints similar to *Caring Society*. See Canadian Human Rights Commission, "Submission to the Committee on The Elimination of Racial Discrimination on the Occasion of its Consideration of Canada's 21st–23rd Periodic Reports" (July 2017) at 10: "Although the child and family services case was the first of its kind to be adjudicated on its merits, similar complaints have also been filed with respect to other services that the Government of Canada funds and provides to First Nations peoples on reserve. For example, *there are currently complaints before the CHRT with respect to such matters as special education, health services, assisted living and income assistance benefits, and policing*" [emphasis added].

⁹ In the remainder of the article, a reference to provinces is also intended to include a reference to the territories.

¹⁰ Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development in association with James Lorimer & Company, 1983) at 2. This is not to suggest that the Canadian state was not involved in taking children from First Nations families prior to WWII. Quite the opposite, child welfare matters were intertwined with the matter of education in the residential school policy. Prior to the 1960s, if a First Nations family was deemed by the Indian Agent to have some problem, children were often removed to residential schools. Sometimes, First Nations in need of alternative care would be taken in and looked after by members of their extended families, which included aunts, uncles and grandparents.

of laws dealing with essential services enacted by both provincial governments and Canada, including laws regarding the welfare of children.¹¹

Below I describe the origin of the child welfare system that applies to First Nations living on reserve in Canada, organizing this story to highlight the three key structural features that characterize this system: (A.) jurisdictional neglect; (B.) provincial comparability; and (C.) program devolution.

A. JURISDICTIONAL NEGLECT

Section 91(24) of the *Constitution Act, 1867*, gives the federal government legislative jurisdiction over “Indians, and Lands reserved for the Indians.” This power enables the federal government to pass laws that would otherwise fall under provincial jurisdiction if they were to apply to non-Indigenous persons.¹² On the other hand, under the *Constitution Act, 1867*, the provinces have jurisdiction over property and civil rights in the province and over all matters of a local or private nature pursuant to sections 92(13) and (16), respectively. These powers are generally regarded as assigning jurisdiction over social services to the provinces.¹³ These competing constitutional provisions form the backdrop of one of the leading features of the First Nations child welfare system—indeed of all essential services in First Nations communities—a long-standing jurisdictional dispute between the federal government and provinces. Unlike most jurisdictional disputes, however, it is not a situation of both levels of government claiming power over the other, but rather neither wanting to assume primary jurisdiction and each claiming the other is responsible. The result of this has been “jurisdictional neglect”—that is, both the federal and provincial governments play a role in this system, but neither accepts accountability for ensuring First Nations are receiving adequate services, resulting in a diluted responsibility on the part of both governments.

Space does not permit a lengthy review of the over three hundred years of history leading up to the post WWII period, but it bears emphasizing that there have been different phases in the relationship between Indigenous peoples and Canada,¹⁴ and the period from Confederation to the mid-twentieth century represented the darkest one. The Royal Commission on Aboriginal Peoples (RCAP) called it the era of “Domination and Assimilation,” when the new nation of Canada saw the Indigenous peoples on these lands as uncivilized and inferior peoples.¹⁵ Through a variety of coercive measures, First Nations peoples were displaced from their territories and placed on reserves, where it was hoped that they might eventually become extinct from disease and starvation or become assimilated into mainstream culture.¹⁶ On reserves, First Nations were barred from exercising their traditional subsistence livelihoods, and federal rations to alleviate

¹¹ See Gus Van Harten, Gerald Heckman & David Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Edmond Montgomery Publications, 2010) at 3–4, 8.

¹² See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (loose-leaf) (Toronto: Carswell, 2007), ch 28 at 5; Sébastien Grammond, “Federal Legislation on Indigenous Child Welfare in Canada,” (2018) 28 *JL & Soc Pol’y* 132 at 137–38. See also *AG Canada v Canada*, [1976] 1 SCR 170 at 191 (per Ritchie J).

¹³ See Hogg, *supra* note 12, ch 33 at 5.

¹⁴ There are: (1) Separate Worlds (pre-contact to 1600); (2) Nation-to-Nation relations (from 1600 to mid-1800s); (3) Domination and Assimilation (mid-1800s to mid-twentieth century); and (4) Renewal and Renegotiation (mid-twentieth century to the present). See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996), ch 4–7.

¹⁵ *Ibid*, ch 6.

¹⁶ *Ibid* at 132–38.

starvation were provided sparingly.¹⁷ Further, the federal government pursued a policy of cultural genocide through sending thousands of Indigenous children to residential schools.¹⁸ In addition, the federal *Indian Act* and policies of the government of Canada sought to ban First Nations' spiritual and governance practices, as well as erode First Nations' cultural, political, and collective identities.¹⁹ A point to underscore here is that until the end of WWII, the federal government fully accepted control over social policy and the welfare of First Nations pursuant to section 91(24) (albeit in a highly problematic and harmful way).²⁰ As will be seen, Canada would disclaim such jurisdiction in the post WWII era.

In addition to the rise of the welfare state, the period following WWII was also when Canadians became more aware and concerned about the impoverished living conditions of First Nations on reserve.²¹ The Canadian government first appointed a "Joint House of Commons and Senate Committee on Indian Affairs" in 1944 to inquire into the general conditions of Indians living on reserves, followed by a Special Joint Parliamentary Committee in 1946.²² The reports and recommendations of these committees consistently focused on the need to advance Indians to full citizenship and equality. The objective was still assimilation, but, as observed by Shewell and Spagnut: "It was no longer a question of subjugating Indians and of degrading their cultures, but of extending to them their rightful opportunities to be full and equal citizens of Canada."²³ The ethos of this period embraced formal equality. Pursuant to this, First Nations ought to be treated like all other citizens, and their legal status as "Indians" and different legal entitlements arising therefrom (treaties, reserves, the *Indian Act*, et cetera) were perceived as holding First Nations back from becoming full citizens.

In 1950, the Joint Committee reported that First Nations on reserves were excluded from many federal social programs and most provincial services that were now provided to Canadian citizens. In response, the Committee recommended that the provinces be more involved in delivering and funding social services to First Nations.²⁴ In response to this, at the time of making several amendments to the *Indian Act* in 1951, Canada inserted section 87 (now section 88) into the *Act*.²⁵ Section 88 provides that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province"²⁶ except to the extent such laws were inconsistent with the *Indian Act*, regulations, or by-laws made thereunder and subject also to the terms of any treaty or other federal law.²⁷ On its face, section 88 appears

¹⁷ Hugh Shewell, *"Enough to Keep Them Alive": Indian Welfare in Canada, 1873–1965* (Toronto: University of Toronto Press, 2004) at 327–29.

¹⁸ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 37ff [TRC].

¹⁹ *Ibid* at 1–21.

²⁰ Hugh Shewell, "Why Jurisdiction Matters: Social Policy, Social Services and First Nations" (2016) 36 *Canadian Journal of Native Studies* 179 at 193 [Shewell, "Jurisdiction Matters"].

²¹ Hugh Shewell & Annabel Spagnut, "The First Nations of Canada: Social Welfare and the Quest for Self-Government" in John Dixon & Robert P Scheurell, eds, *Social Welfare with Indigenous Peoples* (London: Routledge, 1995) 1 at 2.

²² *Ibid* at 3; Shewell, "Jurisdiction Matters," *supra* note 20 at 182.

²³ Shewell & Spagnut, *supra* note 21 at 3.

²⁴ See Canada, Indian and Northern Affairs Canada, *Income Assistance Program – National Manual* (Ottawa: INAC, 2005) at 13 [INAC, "Income Assistance"].

²⁵ *Indian Act*, SC 1951, c 29, s 87. The current legislation is the *Indian Act*, RSC 1985 c I-5, s 88.

²⁶ *Ibid*.

²⁷ Section 88 was initially regarded as the basis for the application of provincial laws to Indians. However, the Supreme Court of Canada altered this narrative in *Dick v La Reine*, [1985] 2 SCR 309 [*Dick*]. (Earlier the Court had

to delegate any matters not covered by the *Indian Act* or its regulations to provincial jurisdiction.²⁸

If section 88 was intended to be a delegation to the provinces in the area of social services over Indians, it was ineffective because it was done unilaterally. Parliament could not force the provinces to extend services to Indians—and spend provincial revenues on them—if the provinces were unwilling. Consequently, most provinces did not automatically assume legislative and fiscal jurisdiction over Indians with the passing of section 88. Most provinces took the position that the federal government had full responsibility to deliver services to First Nations on reserve and were reluctant to extend their child welfare services for that reason.²⁹ Their position was reinforced by First Nations organizations making similar arguments.³⁰

With section 88 being largely ineffective as a means of delegating responsibility over Indians to the provinces and territories, the federal government then sought to negotiate with the provinces for their assumption of jurisdiction over essential services to First Nations.³¹ Over the next fifteen-year period, the federal government would strike further Parliamentary Committees,³² undertake a national study of Indian Affairs,³³ hold Federal-Provincial

been split on this question in *Natural Parents v Superintendent of Child Welfare et al*, [1976] 2 SCR 751.) In *Dick*, a unanimous panel made up of five members of the Court stated that provincial laws that do not touch on the core of “Indianness” apply to Indians *ex proprio vigore* (of their own force) and section 88 only related to general provincial laws that affect Indianness. The ruling sits uncomfortably with the particular history of interactions between provincial and federal governments over First Nations issues, as well as Indigenous perspectives on the nature of their relationship with the federal government as treaty partners (see *infra* note 30). In the area of reconciliation, the Court may be called upon to reconsider *Dick* and find it outdated.

²⁸ There is little on the public record providing a clear explanation of the government’s rationale for it. See Kerry Wilkins, “Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty” (2000) 38:2 *Alta L Rev* 458 at 460–64.

²⁹ Johnston, *supra* note 10 at 5. Thus, initially, only some provincial child welfare programs were extended to residents of some reserves in some provinces (at 3).

³⁰ *Ibid* at 5. Writing in 1983, Johnston spoke of First Nations’ distrust of the provinces at the time: “The issue of jurisdiction is not simply a dispute between the province and provincial governments, however. The people most concerned, status Indians, have consistently taken the position that the federal government alone has authority and responsibility for all services provided to Indian people. The position of status Indians is also manifest in their deep mistrust of provincial government involvement in any issue that affects them” (at 6). For certain the picture has become more nuanced in recent years, as we have seen increased efforts at provincial and First Nations collaboration over policy and legislative changes to better accommodate First Nations’ needs in some jurisdictions, including in the area of child welfare (see Appendix C for a summary of legislative changes). Nonetheless, there continues to be scholarship critical of court decisions permitting extensive provincial jurisdiction over Indigenous affairs concurrent with the federal section 91(24) power. Such scholarship argues that the exclusive jurisdiction over “Indians and lands reserved for Indians” in section 91(24) stems from promises set out in the *Royal Proclamation of 1763* and treaties whereby the Crown, succeeded by the federal government post-Confederation, would protect Indigenous lands, rights, and sovereignty from encroachment from local interests represented by the provinces. See e.g. John Borrows, “Canada’s Colonial Constitution” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2016) at 17–38; Bruce McIvor & Kate Gunn, “Stepping into Canada’s Shores: Tsilqot’in, Grassy Narrows and the Division of Powers,” (2016) 67 *UNBLJ* 146.

³¹ See INAC, “Income Assistance,” *supra* note 24 at 13.

³² Canada struck a Joint Parliamentary Committee review of Indian Affairs’ policies and progress beginning in 1959. See Shewell & Spagnum, *supra* note 21 at 4.

³³ See Canada, Indian Affairs and Northern Development, “A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies in Two Volumes,” HB Hawthorne (ed) (Ottawa: IAND, October 1966).

Conferences on Indian Affairs,³⁴ and legislate a mechanism to enable Canada and individual provinces to enter cost-sharing agreements over the delivery of provincial social programs on reserve³⁵—all with a goal of persuading the provinces to extend their essential services to First Nations on reserve.

These efforts largely failed. Canada was only successful in persuading one province, Ontario, to extend its general social programs to First Nations.³⁶ Beyond this, there was no similar uptake from other provinces, or generally to other areas such as health, education, water, and infrastructure. It was only in the area of child welfare (and much later in the 1990s with regard to policing)³⁷ that provinces were receptive to extending their legislation and child welfare services to First Nations on reserve. Here, too, the results were mixed, as can be seen from the chart at Appendix A summarizing the arrangements for provincial welfare services on reserve by jurisdiction from 1960–1980 as set out in Patrick Johnston’s text, *Native Children and the Child Welfare System*.³⁸ Only five jurisdictions (British Columbia (BC), Ontario (ON), Nova Scotia (NS), Newfoundland (NFLD), and Yukon (YK)) signed general bilateral agreements with the federal government to extend some or all of provincial child welfare services to reserves.³⁹ The remaining jurisdictions did not sign agreements with the federal government; however, they nevertheless extended child welfare services, though the extent to which they did varied widely. Many of these jurisdictions only extended apprehension services in the most extreme cases of neglect or upon request (Saskatchewan (SK), Manitoba (MB), New Brunswick (NB), and Prince Edward Island (PEI)) while a couple (Alberta (AB) and Northwest Territories (NT)) extended a broader range of services. Consequently, the picture of child welfare services on reserve in this period was scattershot. In the words of Johnston: “The end result is an incredible disparity in the quantity and quality of child welfare programs available to status Indians from one province to another. In some instances, there is disparity within a single province.”⁴⁰ This picture would change dramatically in the 1980s and 1990s, with First Nations taking over the delivery of child welfare from the provinces with the rise of program devolution, discussed further below.

B. Provincial Comparability

While Canada was attempting to persuade the provinces to assume jurisdiction over social programs on reserve, most First Nations went without such basic services in their communities. Amidst mounting pressure to address this problem, Canada finally responded in 1964.⁴¹ Treasury Board approval in June 1964 to “adopt provincial or local municipal standards and procedures

³⁴ See Canada, Indian Affairs Branch, Department of Citizenship & Immigration, *Federal-Provincial Conference on Indian Affairs: Report of Proceedings* (Ottawa: October 1964) [*Federal-Provincial Conference*].

³⁵ In 1966, Canada enacted *Canada Assistance Plan*, 1966 SC c 45 [repealed SC 1995, c 17, ss 31–32], Part II, “Indian Welfare” [*Canada Assistance Plan*].

³⁶ The 1965 Memorandum of Agreement Respecting Welfare Programs for Indians between the Government of Canada and the Government of Ontario instituted a cost-sharing arrangement respecting the application of provincial welfare laws to Indian reserves in the province. See Shewell & Spagnut, *supra* note 21 at 16.

³⁷ This occurred pursuant to First Nations Policing Program. For more information see Expert Panel on Indigenous Communities, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities* (Ottawa, Ontario: Canadian Council of Academies, forthcoming 2019) ch 4.

³⁸ Johnston, *supra* note 10.

³⁹ MB and QC had smaller agreements for specific communities within their jurisdiction.

⁴⁰ Johnston, *supra* note 10 at 20.

⁴¹ Shewell, “Jurisdiction Matters,” *supra* note 20 at 184.

for the administration of relief assistance for Indians,”⁴² had the effect of authorizing the Department to pay for welfare relief (*e.g.*, social assistance) for First Nations in accordance with provincial standards and rates. Shortly after this, the regional offices of INAC instructed staff to develop their own social assistance policies modelled on provincial legislation.⁴³ Over time, the 1964 Treasury Board authority was replaced with similar authorities with expanded reach to all other essential service areas—always with the requirement that the services provided be similar to those provided by the provinces.⁴⁴ This requirement has come to be referred to as the “comparability” or “reasonable comparability” standard.⁴⁵ It has two general implications. First, it means that *funding* for services on reserve should reflect what the provinces fund for similar services. In providing this funding, Canada has consistently maintained it has no constitutional obligation to legislate or provide essential services to First Nations, and its involvement in this area is strictly as a matter of the federal spending power as a matter of good public policy.⁴⁶

Second, it means that the *substantive standards* of service on reserve must reflect those set out in provincial legislation and policy. In the case of essential services like child welfare and policing, where the provinces have accepted some involvement, provincial legislation applies on reserve *directly*. However, in the case of services where provinces have refused involvement, such as in social assistance and education, Canada applies provincial legislation *indirectly* through incorporation of provincial standards into its policies. In both cases, provincial standards have been imposed on First Nations without their consent even though, by the early 1960s, the government acknowledged that First Nations’ consent should be obtained.⁴⁷

Today, provincial comparability operates in tandem with program devolution.

C. Program Devolution

⁴² Canada, Indian Affairs Branch, Department of Citizenship & Immigration, “Authority to Introduce Increased Rates of Assistance to Indians: Details of Request to the Honourable The Treasury Board” (Ottawa: 16 June 1964).

⁴³ Canada, Department of Citizenship and Immigration, *Circular 107: Application of Provincial General Welfare Assistance Programs* (Ottawa: 20 July 1964).

⁴⁴ Shewell, “Jurisdiction Matters,” *supra* note 20 at 184.

⁴⁵ See *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342; *Simon v Canada (Attorney General)*, 2013 FC 1117, rev’d 2015 FCA 18.

⁴⁶ Shewell & Spagnut, *supra* note 21 at 15; INAC, “Income Assistance,” *supra* note 24 at 15; Culhane D Speck, “The Indian Health Transfer Policy: A Step in the Right Direction, or Revenge of the Hidden Agenda?” (1989) 5:1 *Native Studies Review* 187; Constance MacIntosh, “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in *Frontiers of Fairness* (Toronto: University of Toronto Press, 2005) at 6–7.

⁴⁷ In the Federal-Provincial Conferences on Indians Affairs that occurred in 1963 and 1964, First Nations consultation and consent to the extension of provincial services to their communities was identified as a fundamental principle among the Minister (see *Federal-Provincial Conference*, *supra* note 34 at 16). This was also a requirement of the 1965 Canada-Ontario Agreement (see *Brown v Canada (Attorney General)*, 2017 ONSC 251 at para 21 [*Brown*]), as well as a requirement of *Canada Assistance Plan*, *supra* note 35, s 11(2). Also, in a “circular” dated 9 December 1964, the Assistant Deputy Minister of the Indian Affairs Branch of the federal Department of Citizenship and Immigration advised his federal colleagues that he would view it as a “serious breach of faith with the Indian people if any provincial services were forced on a Band against its wishes” (see *Brown* at para 22). There is no evidence, however, that consultation or consent for the extension of provincial laws, including child welfare laws, ever occurred. This finding of fact regarding First Nations in Ontario was made in *Brown* at paras 34–36. This author is not aware of any evidence or argument that First Nations in other provinces were ever consulted or consented.

Program devolution is essentially a downloading process where a program's operations are shifted to the local level, producing what Rae calls "self-administration or self-management."⁴⁸ Through this, a First Nation government⁴⁹ or another body authorized by it, gains the ability to deliver the program to the community, using First Nations staff or other employees of its choosing.⁵⁰ This is effectuated through the use of funding agreements between Canada and First Nations.

Program devolution has its origins in Canada's attempts to back-peddle from negative First Nations reaction to the 1969 White Paper policy. The policy proposed to eliminate First Nations' "special rights" under the *Indian Act* and treaties in the name of formal equality.⁵¹ First Nations reacted with fierce opposition, seeing this as the ultimate form of assimilation, and Canada was forced to withdraw the policy.⁵² Following this, INAC began to explore program delivery mechanisms that gave greater priority to Aboriginal concepts of community priorities starting in the 1970s and 80s. It was during this time that the Department started to experiment with program devolution.⁵³

Regarding the history of program devolution in relation to child welfare services on reserve, INAC began experimenting with some informal child welfare agreements with First Nations in the late 1960s,⁵⁴ and a broader transfer of child welfare responsibilities to First Nations began in the 1980s.⁵⁵ In 1991, INAC introduced a new national funding formula, Directive 20-1, which formalized the mechanisms for program devolution of child welfare services to First Nations child and family service agencies (FNCFS Agencies).⁵⁶ FNCFS Agencies typically represent a collective of First Nations.⁵⁷ For a FNCFS Agency to exercise powers, Directive 20-1 also requires a preliminary agreement be signed between the province and Agency wherein it is delegated the power to exercise authority under provincial child welfare legislation.⁵⁸ While there are delegated FNCFS Agencies in Ontario, owing to the 1965 Agreement between Canada and Ontario, INAC does not *directly* fund program devolution to First Nations Bands and Agencies in Ontario. Instead, these Agencies are funded by the province, which is in turn reimbursed by the federal government.⁵⁹ There are also a handful of FNCFS Agencies that are not created by delegation under provincial statute, but pursuant to *Indian Act* by-laws and tripartite or self-government agreements.⁶⁰ The Caring Society indicates

⁴⁸ Judith Rae, "Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?" (2008-2009) 7 *Indigenous LJ* 1 at 7.

⁴⁹ In particular, I am referring to a "Council of a Band," the government of a Band, as recognized under section 2 of the *Indian Act*, *supra* note 25.

⁵⁰ Rae, *supra* note 48 at 7.

⁵¹ Shewell & Spagnut, *supra* note 21 at 5.

⁵² See Johnston, *supra* note 10 at 6-7.

⁵³ Shewell and Spagnut, *supra* note 21 at 17; INAC, "Income Assistance," *supra* note 24; INAC, "Indian Band Government Legislation" (1982) (National Archives).

⁵⁴ Johnston, *supra* note 10, ch 6.

⁵⁵ Vandna Sinha et al, "Kiskisik Awasisak: Remember the Children. Understanding the Overrepresentation of First Nations Children in the Child Welfare System" (Ontario: Assembly of First Nations, 2011) at 7.

⁵⁶ See Marlyn Bennett, *First Nations Fact Sheet: A General Profile on First Nations Child Welfare in Canada* (Ottawa: First Nations Child and Family Caring Society, n.d.) at 3-4; Sinha et al, *supra* note 55 at 7.

⁵⁷ Some individual First Nations in New Brunswick had their own agencies: see New Brunswick Child & Youth Advocate, *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick* (February 2010) at 18.

⁵⁸ Bennett, *supra* note 56 at 3-4.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 4-5; Vandna Sinha & Anna Kozlowski, "The Structure of Aboriginal Child Welfare in Canada," online: 2013) 4:2 *International Indigenous Policy Journal* 2,

that there are currently seventy-six FNCFS/First Nations Agencies operating across Canada.⁶¹ There are also some areas where provincial or territorial agencies continue to provide services to First Nations communities.⁶² A chart summarizing this current and varied picture of First Nations child welfare services across the country can be found at Appendix B.

Canada uses a funding model known as “contribution agreements” to deliver funds to FNCFS Agencies receiving funding directly from INAC (*i.e.*, all except those in Ontario). This is the least flexible funding model, as Canada dictates the terms and conditions and performance requirements to be met under these agreements.⁶³ This is how the provincial comparability standards get incorporated into the agreements. Typically, a schedule in the agreement will set out program requirements to each devolved program that stipulate adherence to provincial standards, either *directly* in the case of child welfare, or *indirectly* through incorporation of provincial standards into INAC policies that must be followed. For the FNCFS Program, the schedule requires FNCFS Agencies to “administer the [FNCFS] Program in accordance with Provincial/Territorial legislation, as well as DIAND’s *Social Programs-National Manual* and any other current approved program documentation issued by DIAND as amended from time to time.”⁶⁴

Contribution agreements also require First Nations to submit numerous reports on spending for different programs. In addition to these reports, the agreements require First Nations to prepare annual consolidated financial statements and disclose these to community members upon request, in addition to the Band’s conflict of interest policy, annual report of activities, and fiscal plans.⁶⁵ A delegation agreement with the provinces can also impose additional reporting and accountability requirements on a FNCFS Agency.⁶⁶

Canada could choose to use other, more flexible, funding models, such as grants⁶⁷ or intergovernmental transfers,⁶⁸ to transfer essential services funding to First Nations, but is resistant to doing so. Owing to criticism over the appropriateness of using contribution agreements in the First Nations context, over the years, successive governments have tweaked the model in an attempt to make it more flexible. This has included allowing some Bands to have longer-term agreements (typically two to five years) with slightly more flexibility in how Bands

<ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1127&context=iipj> [perma.cc/N2DC-9CDL]; National Collaborating Center for Aboriginal Health, “Indigenous Children and the Child Welfare System in Canada” (2017) at 5.

⁶¹ First Nations Child and Family Caring Society, “First Nations Child and Family Services Agencies”, online: <fncaringsociety.com/agencies?title=&field_address_administrative_area=&field_address_locality=&distance%5Bdistance%5D=100&distance%5Bunit%5D=6371&distance%5Borigin%5D=> [perma.cc/2WWJ-BRZH].

⁶² *Caring Society*, *supra* note 1 at para 46: “[INAC] also has agreements with the provinces of Alberta and British Columbia to provide child and family services to certain First Nations reserves. A similar agreement is also in place with the Yukon Territory.”

⁶³ Treasury Board of Canada Secretariat, *From Red Tape to Clear Results: The Report of the Independent Blue Ribbon Panel on Grant and Contribution Programs* (Ottawa: Treasury Board, 2006) at 3 [Blue Ribbon Report].

⁶⁴ This particular language from Schedule DIAND-3 of the 2016–2017 Funding Agreement for First Nations and Tribal Councils.

⁶⁵ DIAND/First Nation Funding Agreement, 2007–2008, clauses 4.6 and 4.7.

⁶⁶ See *Saskatchewan v STC Health & Family Services Inc*, 2016 SKQB 236 at para 21.

⁶⁷ Grants are often used when governments fund projects in the business or academic context. They have little to no conditions attached and require less accounting and oversight (see *Blue Ribbon Report*, *supra* note 63 at 20).

⁶⁸ Canada uses inter-governmental transfers to transfer funds for such things as equalization payments and the social and health transfers to the provinces and territories. Such transfers are unconditional and the lines of accountability for spending these funds are between the government receiving the funds and its citizens. The provinces receiving the payments are free to spend the money in accordance with their own priorities (see: *Blue Ribbon Report*, *supra* note 63 at 9, 20; Hogg, *supra* note 12, ch 6 at 10).

can spend surplus funds; however, the vast majority of agreements with First Nations and FNCFS Agencies are one-year agreements.⁶⁹ It is Canada who determines what type of agreement a First Nation or FNCFS Agency can enter.⁷⁰ In conclusion to Part I, the anomalous nature of First Nations essential services needs to be underscored. For other Canadians, the provinces readily assume jurisdiction, pass laws and policies regarding particular services, and fund and employ public servants to deliver these services. By contrast, on reserve, neither Canada nor the provinces want responsibility, but the federal government funds the service, provincial laws define the service, and First Nations and FNCFS Agencies provide the service through program devolution. It is a complex and convoluted system, as well as one that is dysfunctional and causes significant harm to First Nations, as we turn to next.

II. THE *CARING SOCIETY* CASE AND THE HARMS OF THE FNCFS PROGRAM

Dr. Cindy Blackstock is a Gitxan woman, a social worker, Executive Director of the First Nations Child and Caring Society, and a tireless advocate on behalf of First Nations children. Dr. Blackstock was a child protection worker for a provincial child and family services agency for eight years before she joined a FNCFS Agency operated by the Squamish First Nation, where she worked for several years before joining the Caring Society.⁷¹ Comparing her experience working in the provincial system with the First Nations child welfare system, Dr. Blackstock quickly realized the profound inequities of the system on reserve and the harms this was causing to First Nations children and families.⁷² She would go on to collaborate with other First Nations child welfare experts, to produce two reports outlining the problems of the FNCFS Program, in particular problems in its funding formulas.⁷³ INAC co-commissioned these reports with the Assembly of First Nations (AFN), but did little to implement the full extent of their recommendations. In 2008, Canada developed a new funding formula, called the Enhanced Prevention Focused Approach (EPFA), and slowly began implementing it in some regions of the country. The EPFA, however, was only a slight improvement over Directive 20-1 and continued to perpetuate inequities in the FNCFS.⁷⁴

Given the lack of commitment by Canada to make real reform, Dr. Blackstock and the AFN filed a human rights complaint with the Canadian Human Rights Commission in 2007. Specifically, the complaint alleged that funding of child welfare services on reserve is

⁶⁹ The longer agreements are called “Block Funding Agreements” and the one-year agreements are called “Comprehensive Funding Agreements” (CFAs). Bands in Block Funding Agreements are also given additional flexibility to keep any surplus funds within certain conditions; those in CFAs have no such flexibility (see Institute of Governance, “Special Study on INAC’s Funding Arrangements: Final Report” (22 December 2008) at 11–13 [IOG Report]).

⁷⁰ To do this, INAC undertakes an assessment of First Nations and FNCFS Agencies’ capacity and accountability and determines the degree of risk for financial mismanagement (for more information see INAC, “General Assessment,” online: <aadnc-aandc.gc.ca/eng/1322761862008/1322762014207> [perma.cc/626D-AGRP].

⁷¹ Cindy Blackstock, “The Complainant: The Canadian Human Rights Case on First Nations Child Welfare,” (2016) 62 McGill LJ 285.

⁷² *Ibid* at 291–93.

⁷³ *Ibid* at 293–95

⁷⁴ *Ibid* at 295–97.

inequitable and insufficient, and that FNCFS Agencies on reserve receive significantly less funding than agencies funded by the provinces.⁷⁵

Based on many of the harms identified below (though the Tribunal did not attempt to exhaustively address all the harms as I do here), and finding that these were based on the protected characteristics of race and/or national ethnic origin,⁷⁶ the Tribunal concluded that the FNCFS Program is discriminatory and called on Canada to “**REFORM**”⁷⁷ its child welfare program. To appreciate the implications of the decision discussed in Part III, it is important to understand how problems with the FNCFS Program relate to the three structural features highlighted in Part I (jurisdictional neglect, provincial accountability, and program devolution). Therefore, this Part itemizes the various harms caused by each of these features. Finally, I review cumulative harms resulting from the FNCFS Program as a whole.

A. HARMS ARISING FROM JURISDICTIONAL NEGLECT

Jurisdictional neglect results not only in a failure to properly address important First Nations policy issues (discussed more in the next section), but, curiously, can also result in excessive or inappropriate control exercised over First Nations by INAC. This is due to an absence of the normal checks and balances that come with properly regulated government services established through legislation. Canada has steadfastly refused to legislate in this area. While Canada could legislate in respect of First Nations child welfare, until very recently it has displayed zero interest in doing so.⁷⁸

Since 1994, the Auditor General of Canada has been raising concerns about the lack of legislative frameworks for program delivery on reserve. The Auditor General has linked the absence of legislation with ambiguity in key program terms, such as “comparability,” which creates a risk of underfunding of services. The Auditor General has also suggested that an

⁷⁵ John Loxley et al, “Wen:de: The Journey Continues,” 1st ed (Ottawa: First Nations Child and Family Caring Society of Canada, 2005) at 133, 189. (The 2005 study undertaken by Dr. Blackstock and other researchers pegged the shortfall between federal and provincial funding at approximately 30 per cent).

⁷⁶ *Caring Society*, *supra* note 1 at paras 395–98.

⁷⁷ *Ibid* at para 463 [emphasis in original].

⁷⁸ The proposal for specific federal legislation over First Nations child welfare has been floated since at least the late 1970s. See British Columbia Native Women’s Society, “Proposal for Recommended Legislative Enactment with Respect to Rights for Native Indian Children and Protection of Native Indian Children by Independent Indian Bands” (Kamloops: 1979), cited in Johnston, *supra* note 10, ch 4 at note 1. Johnston similarly recommends federal legislation as the best option for change (at 85–88). The Truth and Reconciliation Commission’s 2015 Calls to Action #4 specifically calls upon the federal government to enact Aboriginal child welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases (see Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> [perma.cc/SEZ5-SKF2] [TRC, “Calls”]). In response to this and a proposal that such legislation could recognize and implement First Nations’ self-government over child welfare similar to the *Indian Child Welfare Act* of the United States (see Grammond, *supra* note 12), Canada has publicly announced interest in exploring such legislation (see Tasker, *supra* note 3).

absence of legislation makes it difficult to hold INAC accountable to Parliament.⁷⁹ In 2011, the Auditor General went so far as to say that these structural problems in the delivery of essential services “severely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserves.”⁸⁰

An important element of the rule of law in Canada is that governments must publish laws so that individuals know the rules that bind both citizens and government.⁸¹ One of the benefits of this is greater clarity about the substantive norms to be followed in the delivery of programs and services. The absence of a federal legislative framework for First Nations child welfare has resulted in significant ambiguity around several important standards. For example, INAC has no clear definition of “comparability” and this has allowed it to take varying and sometimes inconsistent positions on its meaning at different times.⁸² As discussed further below, Canada’s interpretation of “comparability” around funding has facilitated the long-term underfunding of child welfare services. Another example is INAC’s program objective of providing “culturally appropriate” child and family services. In *Caring Society*, the Tribunal found that INAC does not know what “culturally appropriate” means and is currently not providing such services.⁸³

INAC also lacks legislated overall objectives about its relationship to First Nations people.⁸⁴ As a result, the Department vacillates between different objectives at different times. At times, INAC sees its role as achieving improved outcomes for First Nations,⁸⁵ including advocating and advising First Nations in their transition to self-government.⁸⁶ At other times, INAC has seen itself as responsible for monitoring First Nations and ensuring they are compliant with minimum program standards under funding agreements and filing all necessary reports. The

⁷⁹ Auditor General of Canada, *1994 Report of the Auditor General of Canada to the House of Commons*, vol 14, Chapter 23, “Indian and Northern Affairs Canada: Social Assistance” [Auditor General 1994 Report]; Auditor General of Canada, *2004 Report of the Auditor General of Canada to the House of Commons*, Chapter 5, “Indian and Northern Affairs Canada: Education Program and Post-Secondary Student Report” [Auditor General 2004 Report]; Auditor General of Canada, *2006 Report of the Auditor General of Canada*, Chapter 5, “Management of Programs for First Nations”; Auditor General of Canada, *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” [Auditor General 2008 Report]; Auditor General of Canada, *2013 Status Report of the Auditor General of Canada*, Chapter 6, “Emergency Management on Reserves” [Auditor General 2013 Report].

⁸⁰ 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” at 4 [Auditor General 2011 Report].

⁸¹ See Janna Promislow & Naomi Metallic, “Realizing Administrative Aboriginal Law” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017) at 101–08.

⁸² For example, when it comes to comparability to substantive provincial laws, Canada took the position (starting in 2011) that this required the delivery of essential services to mirror provincial law (see *Simon v Canada (Attorney General)*, 2012 FC 387, aff’d 2012 FCA 312 (interlocutory injunction); 2013 FC 1117, rev’d 2015 FCA 18 (merits), leave to appeal to SCC denied). However, with respect to comparability to provincial funding, Canada took the position that comparability does *not* require INAC to mirror or provide similar *service* levels to the provinces, but is only required to maintain comparable *funding* levels to the provinces (see: *Caring Society*, *supra* note 1 at para 338; *Pictou Landing Band Council v Canada*, 2013 FC 342).

⁸³ *Caring Society*, *supra* note 1 at paras 423–26.

⁸⁴ There is no substantive guidance provided in the *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6. All that exists therein is a bare grant of power to the Minister and her Department over “Indian Affairs” (see ss 2(1), 4).

⁸⁵ See e.g. INAC, Aboriginal Affairs and Northern Development Canada, “National Social Programs Manual” (Canada: 2012) at 12.

⁸⁶ IOG Report, *supra* note 69 at 30.

two functions are fundamentally at odds with each other.⁸⁷ Moreover, the lack of clear legislative guidance appears to have made the Department prioritize its monitoring functions. Evaluations of the Department from the late 2000s found that INAC resources were increasingly being used for monitoring and compliance and that staff were primarily focused on their policies and programs, not the priorities of First Nations.⁸⁸

The above illustrates how the absence of legislation gives INAC significant discretion. This can give rise to the possibility of arbitrary decision-making and abuse of power.⁸⁹ For example, lack of clear standards and controls on state power can embolden some in government to retaliate against First Nations people and organizations who challenge them. Dr. Blackstock and the First Nations Child and Family Caring Society both faced retaliatory actions for filing the human rights complaint against Canada. The Caring Society had all of its federal funding cut. Dr. Blackstock was barred entry from a meeting with Canada, which the Tribunal found to constitute retaliation, and she was the subject of extensive government surveillance in the hopes of finding information to discredit her and the case.⁹⁰

Legislation can also provide clear mechanisms for dispute resolution and, consequently, its absence can make access to justice more difficult. Currently, it is difficult for First Nations and FNCFS Agencies to challenge Canada's decisions on child welfare. First, because their funding agreements do not allow them to bring concerns about funding and reporting requirements to dispute resolution.⁹¹ Second, courts are uneasy about intervening when there is no legislative framework underlying a dispute. Administrative law principles suggest courts ought to be very deferential to governments in cases where they make policy decisions and exercise discretion outside legislation.⁹² In one case, involving INAC's decision to cut funding to a First Nations Tribal Council that had been providing child and family prevention services for twenty years, the judge suggested that INAC's decision was immune from review because it did not arise from legislation.⁹³

Such barriers in accessing justice are in addition to significant resourcing imbalance between Canada and First Nations when it comes to litigation. Many First Nations lack the financial resources to proceed with legal action. Canada also tends to vigorously defend such actions and this can serve to increase legal costs significantly. INAC has consistently had the highest litigation budget of any other federal department for the past ten years.⁹⁴ Canada

⁸⁷ The Penner Report made this observation as early as 1983: "There is a fundamental conflict between the monitoring and advisory roles of DIAND employees" (Penner Report, *supra* note 7 at 92).

⁸⁸ See INAC, Departmental Audit and Evaluation Branch, "Evaluation of the Alternative Funding Arrangement (AFA) and Flexible Transfer Payment (FTP) Funding Authorities" (December 2005) at 28 [2005 Evaluation Report]; IOG Report, *supra* note 69 at 39.

⁸⁹ See Promislow & Metallic, *supra* note 81 at 101–02.

⁹⁰ Blackstock, *supra* note 71 at 301, 315–20; see *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2015 CHRT 14.

⁹¹ See INAC: First Nations and Tribal Councils National Funding Agreement Model for 2018–2019, clause 12.3.1.

⁹² The logic of this principle is problematic when Canada deliberately chooses not to legislate over First Nations (see Promislow & Metallic, *supra* note 81 at 104–08).

⁹³ See *Lac Seul First Nation v Canada (Minister of Indian Affairs & Northern Development)*, 2004 FC 1183 at para 13.

⁹⁴ In some years, 2015–2016, its legal fees were *double* that of the department with the second-highest litigation budget: the Canada Revenue Agency, which unlike INAC, actually has a mandate to pursue litigation (against taxpayers who avoid paying taxes) (see: Indigenous and Northern Affairs Canada, "INAC Legal Fees", online: <www.aadnc-aandc.gc.ca/eng/1359569904612/1359569939970> [perma.cc/3D3P-984S]; Public Services and Procurement Canada, "Public Accounts for Canada, 2016, Vol. III, Section 3—Professional and Special Services",

aggressively defended the *Caring Society* case, seeking to block the complaint at almost every turn.⁹⁵ But for the perseverance of Dr. Blackstock and AFN, and the legal team that assisted them on a pro-bono basis, this watershed case might have been abandoned.⁹⁶ Canada had spent nearly eight million dollars on the case leading up to main decision.⁹⁷ Since the main decision up to 30 November 2017, Canada had spent an additional 1.2 million dollars on legal fees.⁹⁸

B. HARMS ARISING FROM PROVINCIAL COMPARABILITY

1. COMPARABILITY TO PROVINCIAL LEGISLATION

Provincial comparability renders First Nations child welfare services assimilative in nature. First, as seen in Part I, throughout the 1950s and into the 1960s, the federal Joint Committee emphasized the integration of Indians into mainstream society. Having the provinces and territories assume greater and greater responsibility over First Nations was key in this regard. Although the federal government came up short in persuading the provinces to assume full responsibility over First Nations essential services, having provincial laws set the substantive service norms (either directly or indirectly) achieves a significant part of this objective. Thus, although with its withdrawal of the White Paper, Canada officially declared an end to its assimilation policy in 1971, the policy of assimilation nonetheless continues to run through Canada's program delivery to First Nations based on the comparability standard.⁹⁹

Next, by allowing provincial laws to apply on reserve, Canada effectively abdicates any policy-making function over First Nations issues to the provinces—governments that were historically quite removed from First Nations issues and who resisted assumption of jurisdiction over social services on reserve (and in many cases continue to do so). Where Canada imposes provincial standards *indirectly* through the comparability standard, such as in regards to social assistance, the provinces have no policy or legal basis to concern themselves with how their laws may affect First Nations.¹⁰⁰ In the case of child welfare, however, where provincial legislators have accepted that their laws *directly* apply there is a stronger policy and legal basis for the province to care. To this end, in recent years we have seen increased efforts at provincial and First Nations cooperation in the area of child welfare. A scan of current provincial/territorial child welfare legislation for Indigenous-specific provisions (see chart at Appendix C) shows that a number of provinces have made specific accommodations within their child welfare legislation for First Nations. Nonetheless, Canada's abdication to provincial law-making over First Nations child welfare remains problematic.

First, this approach results in a wide variance of standards applicable to First Nations child welfare. Some provinces' laws include significant accommodations of First Nations interest

online: <epe.lac-bac.gc.ca/100/201/301/public_accounts_can/html/2016/recgen/cpc-pac/2016/vol3/ds3/index-eng.html> [perma.cc/X2V5-VSB2].

⁹⁵ See *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; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75.

⁹⁶ For more on this see Blackstock, *supra* note 71 at 303–08.

⁹⁷ *Ibid* at 302.

⁹⁸ See Canada, Department of Justice, Access to Information Requests A-2017-01473; see also *supra* note 3 regarding the further hearings following the main decision.

⁹⁹ See Shewell & Spagnut, *supra* note 21 at 6.

¹⁰⁰ *Ibid* at 43.

(BC, AB, ON and YK), some have a few (NS, NT, PEI, QC and SK), and some contain relatively minor or no accommodations (MB, NB and NL). Not only does this create disparity between different Indigenous nations, it can lead to disparities in the treatment of children from the same nation, if communities from the nation straddle different provincial or territorial borders. In its Final Report, the Truth and Reconciliation Commission stressed the need for greater consistency in the regulatory framework that guides the work of Indigenous child welfare authorities in Canada, emphasizing that, “[e]stablishing national standards is the first step towards developing greater consistency in decision-making and ensuring that overrepresentation is reduced and that culturally appropriate placements become the norm.”¹⁰¹

Next is the prospect that provinces may be constitutionally limited in the extent to which they can accommodate First Nations. Our constitutional law permits provincial laws of general application to apply to First Nations. However, such laws are not permitted to “single out” First Nations.¹⁰² Although the Supreme Court has recently signalled flexibility in what constitutes “singling out,” stating that simply referencing “Aboriginal” in a provincial law will not constitute “singling out,” this doctrine may still be seen as a proscription by provinces on accommodating specific First Nations interest.¹⁰³ In this regard, Quebec recently cited constitutional constraints as limiting the extent to which it could legislate in respect of Indigenous customary adoptions.¹⁰⁴

Even where a provincial law may contain some accommodations for First Nations, the fact is many general provincial laws and policies apply to First Nations and these run the risk of being culturally inappropriate. In this regard, Johnston argues that differences in values between First Nations and Europeans contribute to the problems in First Nations child welfare:

A system of child welfare is based on certain beliefs held by members of the dominant culture. Those beliefs evolve into normative standards of child rearing and define which practices should be considered good or bad, proper or improper. A problem arises if one set of standards is applied to a group with a different set of norms. Several observers have suggested that this is precisely what has happened to Native people, not only in Canada but in other countries as well, as they come into contact with child welfare services. A different approach to child rearing may have resulted in Native people receiving inappropriate and, perhaps, even discriminatory treatment by the child welfare system.¹⁰⁵

¹⁰¹ Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Legacy*, vol 5 (Montreal: McGill Queen’s University Press, 2015) at 55 [TRC, “Legacy”]. The Commission’s Call to Action #4 calls upon the federal government to establish national standards for Aboriginal child apprehension and custody cases (see TRC, “Calls,” *supra* note 78).

¹⁰² This is the rule that provincial laws cannot create special rules for Indians (whether for ameliorative or adverse purposes). See *R v Sutherland*, [1980] 2 SCR 451; *Leighton v British Columbia*, [1989] 4 WWR 654; *Delgamuukw v British Columbia*, [1997] 2 SCR 1010 at para 179.

¹⁰³ See *Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para 66. Post-*Kitkatla*, it would still appear that provincial legislation giving special treatment *specifically* to Aboriginal people would be *ultra vires*. But see Jean Leclair, “The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters,” (2003) 21 Sup Ct LR (2d) 73, who argues that, without saying so, the Court all but did away with the “singling out” rule in *Kitkatla*. See also *NIL/TU, O Child and Family Services Society v B C Government and Service Employees’ Union*, 2010 SCC 45 at para 41 [*NIL/TU, O*], where Abella J seemingly endorsed specific accommodation of First Nations interests in provincial child welfare legislation. However, the case was about labour jurisdiction and the “singling out” doctrine was not raised.

¹⁰⁴ Quebec, National Assembly, Committee on Institutions, *Recognition of Effects of First Nations Customary Adoption in and for the Purposes of Quebec Legislation* (23 November 2016) at 9.

¹⁰⁵ Johnston, *supra* note 10 at 71.

Johnston details how, with respect to child rearing, First Nations have a distinct and unique value system manifested in customs and traditions that have been passed down from generation to generation, and these approaches to child rearing may still prevail in First Nations communities. He discusses many, including a pacifistic approach to socializing and disciplining children, often seen negatively by Euro-Canadian as “permissive” parenting; having a broader concept of “family” that includes grandparents, aunts, uncles, cousins, et cetera.; as well as the prioritization of relationships and kinship over material possessions.¹⁰⁶ All of these values can clash with Euro-Canadian values embedded in provincial child welfare law.

In addition to difference in values, First Nations can have particular needs or circumstances that may differ significantly from other populations in the province, and which provincial laws may poorly accommodate. This includes intergenerational trauma from residential schools and other colonial policies, as well as living in poverty (which the current system for program delivery exacerbates). In this regard, there is empirical research suggesting that First Nations poverty paired with Euro-Canadian norms on child rearing is resulting in First Nations children being disproportionately apprehended on the grounds of “neglect.”¹⁰⁷

The purpose of this section is to highlight the problems of the federal government’s choice of provincial comparability as it relates to law-making over services on reserve, including over child welfare, and the harms it causes First Nations. This should not be construed, however, as a proposal for a federal law drafted by federal politicians and bureaucrats intended to substantively replace and be paramount over all provincial and territorial child welfare laws vis-à-vis First Nations. Such a law would run the risk of being equally culturally inappropriate and paternalistic as any provincial law, as a law designed by outsiders. Such a law would also run counter to the wisdom of the Royal Commission on Aboriginal Peoples,¹⁰⁸ the Truth and Reconciliation Commission,¹⁰⁹ several scholars,¹¹⁰ federal government reports,¹¹¹ and First Nations peoples who have all recognized that returning control to First Nations over key aspects of their day-to-day lives through the exercise of self-government is the key to improving Indigenous peoples’ living conditions and countering the impacts of colonialism. There is,

¹⁰⁶ *Ibid* at 65–76.

¹⁰⁷ See Vandna Sinha, Ashleigh Delaye & Brittany Orav-Lakaski, “Reimagining Overrepresentation Research: Critical Reflections on Researching Overrepresentation of First Nations Children in the Child Welfare System” (2018) 28 *JL & Soc Pol’y* 28; David Rothwell et al, “Explaining the Economic Disparity Gap in the Rate of Substantiated Child Maltreatment in Canada,” (2018) 28 *JL & Soc Pol’y* 28; and Vandna Sinha, Stephen Ellenbogen & Nico Trocmé, “Substantiating Neglect of First Nations and Non-Aboriginal Children” (2013) 35:12 *Children & Youth Services Review* 2080.

¹⁰⁸ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Canada Communication Group, 1996) at 2.

¹⁰⁹ TRC, “Legacy,” *supra* note 101 at 60.

¹¹⁰ See John H Hylton, “The Case for Self-Government: A Social Policy Perspective” in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) at 78; John O’Neil et al, “Community Healing and Aboriginal Self-Government” in John H Hylton, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing Ltd, 1999) at 130; Rae, *supra* note 48 at 3; Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable Under International Law* (Burlington: Ashgate Publishing Company, 2012) at 11–12.

¹¹¹ Indian and Northern Affairs Canada, Evaluation, Performance Measurement, and Review Branch Audit and Evaluation Sector, “Final Report Evaluation of the Federal Government’s Implementation of Self- Government and Self-Government Agreements—Project Number: 07065” (February 2011): “Empirical research shows that taking control of selected powers of self-government and capable governance institutions are indispensable tools to successful long-term community development in Aboriginal communities” at 41.

however, a potential role for the federal government here in clearing a legislative path to allow for effective implementation of self-government by First Nations as has been done in the United States,¹¹² as well as providing adequate funding. A proposal for similar federal legislation over First Nations child welfare in Canada has recently been proposed.¹¹³

2. COMPARABILITY TO PROVINCIAL FUNDING

As noted in Part I, Canada is authorized under Treasury Board approvals to fund child welfare services on a level “comparable” with the provinces. Canada has no legislated definition of this term, leaving it wide open to interpretation by Department staff. When it comes to funding, it has not been interpreted in a generous way. Although INAC says it provides funding for comparable services, indeed, several reports suggest otherwise. Numerous Auditor General of Canada reports have found that the Department in fact does not know—and *does not track*—whether it is funding a comparable level of services compared to the provinces. Such findings have been made with respect to virtually all First Nations essential services areas funded by Canada.¹¹⁴ The Auditor General’s 2008 report on Child Welfare stated: “We found that INAC has not analyzed and compared the child welfare services available on reserve with those in neighbouring communities off-reserve.”¹¹⁵ Based on the Auditor General findings and other significant reports, the Tribunal in *Caring Society* found that INAC had indeed failed to study and ensure that First Nations receive levels of service comparable to the provinces.¹¹⁶ The Tribunal also found that INAC often arbitrarily denied funding for similar kinds of prevention services available within provincial systems.¹¹⁷

Internal INAC reports cited in the *Caring Society* case show that staff within the Department were aware that their services did not measure up to the provinces. In a 2006 document entitled *Explanation on Expenditures of Social Development Programs*, the Department described all of its social programs as “... limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances.”¹¹⁸ It goes on to say that if current social programs were administered by the provinces this would result in a significant increase in costs for INAC.¹¹⁹ A policy that contributed to the underfunding of First Nations essential services in the last two decades was a two per cent cap on growth in funding for First Nations program. Instituted by Canada in 1996 as temporary deficit reduction strategy, the cap stayed in place for over twenty years—long after

¹¹² See TRC, “Legacy,” *supra* note 101 at 54–56. See also John Borrows, “Legislation and Indigenous Self-Determination in Canada and the United States” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on The Constitutional Entrenchment of Aboriginal And Treaty Rights* (Toronto: University of Toronto Press, 2016) at 474.

¹¹³ See Grammond, *supra* note 12.

¹¹⁴ On social assistance, see Auditor General 1994 Report, *supra* note 79 at para 23.48; on education, see Auditor General 2004 Report, *supra* note 79 at para 5.50; on emergency services, see Auditor General 2013 Report, *supra* note 79 at 3; and on policing, see Auditor General of Canada, *2014 Spring Report of the Auditor General of Canada*, Chapter 5, “First Nations Policing Program—Public Safety Canada” at 5.23–.25.

¹¹⁵ Auditor General 2008 Report, *supra* note 79 at para 4.19.

¹¹⁶ *Caring Society*, *supra* note 1 at paras 335–36, 338, 393, 462, 464.

¹¹⁷ *Ibid* at para 230.

¹¹⁸ Quoted in *ibid* at para 267.

¹¹⁹ *Ibid*.

other austerity measures instituted in this period were eliminated.¹²⁰ This would have resulted in annual funding to First Nations being capped at arbitrary numbers, not reflecting population growth, demand for services, or even inflation.¹²¹

Beyond evidence that federal funding does not generally keep pace, there is evidence that INAC has not reviewed or amended the funding formulas for a number of its specific programs for well over a decade, including with respect to the FNCFS Program.¹²² With regard to the FNCFS Program, the Tribunal in *Caring Society* found that INAC funding formulas are based on flawed assumptions on the percentages of children in care and families using services, and are not regularly reviewed or updated to reflect inflation/cost of living. Consequently, these formulas result in the underfunding of prevention services, which create a perverse incentive to remove children from their homes as a first resort instead of a last resort.¹²³

C. HARMS ARISING FROM PROGRAM DEVOLUTION

This structural feature creates an immense power imbalance between Canada and First Nations. First Nations and FNCFS Agencies largely have no say in the content of their agreements. These are standard form agreements prepared by INAC, often sent too close to the signing deadline to permit for meaningful discussion between the Department and First Nations.¹²⁴ Hence, there is no real negotiation and these agreements are a "take it or leave it" proposition.¹²⁵ Further, most First Nations are not in a position to "leave it" since most lack sufficient own-sources revenues to sustain their communities, and these agreements are for basic, essential services programs that the community cannot do without.¹²⁶ Funds from the Department can also come late, resulting in service delays or First Nations and FNCFS incurring large debt financing to cover the gap.¹²⁷

Excessive reporting requirements under the funding agreements are also a problem.¹²⁸ To give a sense of the numbers of reports a First Nation must file with INAC a 2002 Auditor General's report found that the average First Nation was required to complete 168 reports annually just to keep funding for basic services flowing to their community.¹²⁹ Since this time, Canada has made efforts to decrease reporting requirements.¹³⁰ However, a 2011 report by the

¹²⁰ Scott Serson, "Reconciliation: For First Nations This Must Include First Fairness" in Aboriginal Healing Foundation, *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Ottawa, AHF, 2009) 147 at 150–51.

¹²¹ For more information, see INAC "Cost Drivers Study," quoted in Rae, *supra* note 48 at 27, footnote 107.

¹²² See 2005 Evaluation Report, *supra* note 88 at 16.

¹²³ See *Caring Society*, *supra* note 1 at para 344.

¹²⁴ 2005 Evaluation Report, *supra* note 88 at 18.

¹²⁵ IOG Report, *supra* note 69 at 31. See also *Attawapiskat First Nation v Canada*, 2012 FC 948 at para 59.

¹²⁶ As stated by Chief Casey Ratt of Barriere Lake Nation, Quebec: "Now signing off mean we don't get any dollars for our community for I don't know how long. At the present time... we don't have any economic opportunities as some other First Nations communities do; we're pretty isolated," in David P Ball, "'A Gun to Our Heads' Pressure to Sign New Funding Agreement More Widespread Than First Thought," *Windspeaker* (2013) 31:1. See also Barb Pacholik, "Peepeekisis Cree Nation Members Gather on Highway to Protest Federal Funding Agreement", *Regina Leader-Post* (24 March 2016), online: <leaderpost.com/news/national/peepeekisis-cree-nation-members-gather-on-highway-to-protest-federal-funding-agreement> [perma.cc/45MV-QPJT].

¹²⁷ See IOG Report, *supra* note 69 at 2. See also 2005 Evaluation Report, *supra* note 88 at 24.

¹²⁸ 2005 Evaluation Report, *supra* note 88 at 19; IOG Report, *supra* note 69 at 43.

¹²⁹ Auditor General of Canada, *2002 December Report of the Auditor General of Canada to the House of Commons*, Chapter 1, "Streamlining First Nations Reporting to Federal Organizations" at 8.

¹³⁰ INAC, "Oversight of Transfer Payments: AANDC's Risk-Based Approach FMI Workshop Presentation" (Toronto: 4 June 2013) at 4.

Auditor General of Canada concluded that INAC's attempts to reduce reporting had been unsatisfactory.¹³¹ Excessive reporting requirements can strain the capacity of First Nations and FNCFS Agencies.¹³²

The stakes are high if reporting requirements are not met. Late reporting triggers a possible default under the funding agreements and intervention by INAC up to or including withholding funds or terminating an agreement.¹³³ In 2016, INAC threatened to terminate funding for a FNCFS Agency that was alleged to be behind on reporting. This further triggered the province to intervene and terminate the Agency's delegation agreement and send its own child welfare authorities into the First Nations that had been served by the Agency for twenty years.¹³⁴ There have also been reports about INAC staff occasionally losing or misplacing reports, resulting in funding being halted because of INAC's error.¹³⁵

Studies show that although there is a proliferation of reporting, the data obtained by INAC is not being used to help build sustainable capacity within First Nations,¹³⁶ or to improve outcomes in communities.¹³⁷ In particular, one study found that INAC evaluations rarely focus on the program beneficiaries or their long-term goals. Instead, INAC was primarily preoccupied with providing accounts to the federal governments on dollars spent.¹³⁸ The Institute on Governance has suggested that poor and irrelevant data analysis is depriving Parliament of information that could be used to improve the circumstances of First Nations.¹³⁹ First Nations themselves have also questioned the value of all of their reporting to INAC, as they do not receive any feedback on their reports and they are not being used to increase funding.¹⁴⁰

These various problems with funding agreements have been known for some time. The 1983 Penner Report argued that in order for First Nations governments to effectively govern the affairs of their people, their funding relationships with the federal government need to be on the same level as transfer agreements between the federal government and provincial governments, that is, unconditional.¹⁴¹ The 1996 RCAP Report urged Canada to embrace a new fiscal relationship with First Nations and to replace existing funding agreements with ones that support meaningful and effective self-government based on the principles of self-reliance, equity, efficiency, accountability, and harmonization.¹⁴² More recently, in 2006, an Independent Blue

¹³¹ Auditor General 2011 Report, *supra* note 80 at 4.

¹³² Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 408 [RCAP, vol 2]; IOG Report, *supra* note 69 at 42.

¹³³ See INAC, "Default Preventions and Management Policy 2013," online: <aadnc-aandc.gc.ca/eng/1386790074541/1386790301856#chp5-3> [perma.cc/M8DW-GAME]; Shiri Pasternak, "Mercenary Colonialism: Third-party Management", *Ricochet* (25 October 2017), online: <ricochet.media/en/1994/mercenary-colonialism-third-party-management> [perma.cc/7RSE-HRYM].

¹³⁴ See *Saskatchewan v STC Health & Family Services Inc*, 2016 SKQB 236; the matter continues to be before the courts.

¹³⁵ IOG Report, *supra* note 69 at 43.

¹³⁶ *Ibid* at 2.

¹³⁷ 2005 Evaluation Report, *supra* note 88 at 21–22; IOG Report, *supra* note 69 at 2, 33.

¹³⁸ Steve Jacob & Geoffroy Desautels, "Evaluation of Aboriginal Programs: What Place is Given to Participation and Cultural Sensitivity?," online: (2013) 4:2 International Indigenous Policy Journal 1 at 16 <ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1086&context=iipj> [perma.cc/D6NS-NJLQ].

¹³⁹ IOG Report, *supra* note 69 at 37.

¹⁴⁰ *Ibid* at 43.

¹⁴¹ Penner Report, *supra* note 7 at 89.

¹⁴² RCAP, vol 2, *supra* note 132 at 267–69.

Ribbon Panel tasked with evaluating Canada's grants and contribution program, found the use of contribution arrangements with First Nations to be "fraught with problems and [leading] to a costly and unnecessary reporting burden on recipients."¹⁴³ The Panel suggested that fiscal arrangements with First Nations should be treated more like intergovernmental transfers rather than typical contribution arrangements.¹⁴⁴ A 2008 Institute on Governance special study on INAC funding agreements concluded that contribution agreements were not appropriate vehicles for funding First Nations, listing several of the problems identified here and in the previous section around funding.¹⁴⁵ A 2011 report from the Auditor General concluded likewise.¹⁴⁶

Despite several reports raising alarm bells over a thirty-year period, Canada has been resistant to move away from contribution agreements.¹⁴⁷ Even Canada's most recent commitment to transforming fiscal relations with First Nations does not appear to contemplate alternatives to contribution agreements.¹⁴⁸ Critics have argued that Canada's resistance stems from deeply engrained paternalism.¹⁴⁹

Public misconception about program devolution has in fact helped entrench such paternalism by perpetuating stereotypes that First Nations leaders and organizations are either corrupt or incompetent and ultimately responsible for the poverty and social problems in their communities.¹⁵⁰ Many Canadians subscribe to the false narrative that large sums of taxpayers' money have been invested in First Nations communities (*i.e.*, that "pots of money" have been thrown at First Nations issues by successive governments over a number of decades).¹⁵¹ To someone on the outside, knowing little to nothing about First Nations and program issues on reserve, this is perhaps what devolution may look like. For many who hold this erroneous assumption, when they are confronted with stories of abject poverty and related social and health problems on reserve, instead of questioning their assumptions about the "pots of money," they instead prefer to believe that First Nations leaders have somehow stolen or mismanaged the "pots

¹⁴³ *Blue Ribbon Report*, *supra* note 63 at 8.

¹⁴⁴ *Ibid.*

¹⁴⁵ IOG Report, *supra* note 69 at 2.

¹⁴⁶ Auditor General 2011 Report, *supra* note 80 at 3.

¹⁴⁷ See *e.g.* Aboriginal Affairs and Northern Development Canada (Audit and Evaluation Sector), *Special Study: Evolving Funding Arrangements with First Nations, Final Report* (November 2011), prepared by Donna Cona Inc. (The report dismissed out-of-hand the suggestion that agreements akin to intergovernmental agreements could be appropriate because First Nations' "accountability mechanism would not reflect the fact that almost all First Nations' funding comes via the transfer and that they consequently have almost none of their residents' own money to account for" at 39).

¹⁴⁸ See Canada and the Assembly of First Nations, *A New Approach: Co-Development of a New Fiscal Relationship between Canada and First Nations* (2018), online: <aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ACH/STAGING/texte-text/reconciliation_new_fiscal_rel_approach_1512565483826_eng.pdf> [perma.cc/T65K-9F7B].

¹⁴⁹ Steven Salterio & Russell Evans, "Forcing Reports to Ottawa Undermines First Nations Accountability", *The Globe and Mail* (4 January 2016).

¹⁵⁰ One need only read the comment section of any online news story about conditions on reserve to become acquainted with this reality. Also see Todd MacKay, "All Politicians Must Disclose Basic Financial Information—Including First Nations Politicians", *National Post* (16 January 2016); Lois Frank, Harley Frank & Todd MacKay, "First Nations Leaders Benefit From Transparency", *National Post* (16 March 2016). While there have been cases documenting fraud and corruption by First Nations leaders, this is a small minority and by no means representative of the ethics and commitment of First Nations leaders generally.

¹⁵¹ See *e.g.* Jesse Kline, "Killing Aboriginals with our Kindness", *National Post* (14 May 2013).

of money” or lack the competency or capacity to manage their own affairs.¹⁵² Research findings show that such stereotypes have directly impacted public perceptions of FNCFS Agencies.¹⁵³

Although many have lauded the objectives of program devolution as encouraging greater First Nations control, others have argued it was intended as a subtle way to achieve goals similar to those outlined in the White Paper.¹⁵⁴ Whether well-intended or not, Judith Rae argues that it has been in place too long.¹⁵⁵ She argues that because of underfunding and weak progress towards genuine self-government, program devolution is not functioning as a transitional tool to self-government, but only making matters worse. It is a “quagmire” in which a dysfunctional, unjust, and ineffective system is entrenched, causing untold damage to First Nations people who rely on the system’s programs and services, and creating its own obstacles to positive change.¹⁵⁶

D. HARMS ARISING FROM THE FNCFS PROGRAM AS A WHOLE

Structural problems inherent to the FNCFS Program (and, indeed, all other essential services on reserve), wreak serious socio-economic harms on First Nations children, families, and communities. First and foremost, the system exacerbates the poverty that already exists in First Nations as a result of colonial policies.¹⁵⁷ The Auditor General recognized this in 2011 when she observed that structural problems in program delivery on reserve hinder improvements in living conditions on reserves.¹⁵⁸ In a 2014 report, the Special Rapporteur on the Rights of Indigenous people stated that “the human rights problems faced by Indigenous peoples in Canada ... have reached crisis proportions in many respect” and that “[t]he most jarring manifestation of these human rights problems is the distressing socio-economic conditions of indigenous peoples in a highly developed country.”¹⁵⁹

As noted earlier, First Nations poverty is often a significant factor in the apprehension of First Nations children.¹⁶⁰ There are several other services funded by Canada that are intended to ameliorate the health and well-being of First Nations children and families, such as social assistance, housing, education, and health, which are all interconnected with child welfare. If these services are also underfunded and dysfunctional, it follows that there will be more child

¹⁵² Indeed, it was a barely concealed message in many statements and actions of the Harper government, where Ministers would lament the “billions of dollars” spent on Indigenous issues as a basis for refusing requests for additional spending and commenting “let’s get value for the money we are currently spending” [see Assembly of First Nations, “Fiscal Fairness for First Nations” (2006)].

¹⁵³ See Robert Harding, “The Demonization of Aboriginal Child Welfare Authorities in the News” (2010) 35:1 Canadian Journal of Communication 85.

¹⁵⁴ See Rae, *supra* note 48 at 15. Rae discusses the incident dubbed “the Buffalo-Jump” where an internal memo from the Mulroney government was leaked in the mid-eighties that promoted program devolution under strict funding caps and transferring many expenditures as a strategy to compliment the elimination of Indian Affairs and the privatization of Indian Lands.

¹⁵⁵ *Ibid* at 22–23.

¹⁵⁶ *Ibid* at 3.

¹⁵⁷ The crushing poverty experienced by many residents on reserve is supported by INAC’s Community Well-Being Index, which reveals a persistent 20-point gap between First Nations and non-Aboriginal communities for over 30 years. See INAC, “Ministerial Transition Book: November 2015”, online: <www.aadnc-aandc.gc.ca/eng/1450197908882/1450197959844> [perma.cc/WTT9-F8J8].

¹⁵⁸ Auditor General 2011 Report, *supra* note 80 at 5.

¹⁵⁹ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya—Addendum—The Situation of Indigenous Peoples in Canada (Advance Unedited Version), UNHRC, 27th Sess, A/HRC/27/52/Add.2 (2014) at 7.

¹⁶⁰ This was noted by the Tribunal in *Caring Society* as well (*supra*, note 1 at para 120).

welfare interventions and apprehensions, especially where the funding formulas in the FNCFS Program create an incentive to remove First Nations children from their homes, as found by the Tribunal.¹⁶¹ Although this cannot be directly proven, the steady trend of increasing apprehension numbers since the time provincial child welfare agencies became involved on reserves to the present day suggests this is the case.

The percentage of First Nations children in the care of provincial/territorial child welfare systems was close to zero in 1950. By 1980, First Nations children, who made up two per cent of the nation's child population at the time, represented more than twelve per cent of the children in care.¹⁶² A Statistics Canada study in 2016 indicates that Aboriginal children account for almost half (forty-eight per cent) of all foster children in the country.¹⁶³ A July 2015 report breaks the overrepresentation down by provinces and territories:¹⁶⁴

Juris.	% of Aboriginal children in population	% of children in care who are Aboriginal
BC	8	55
AB	9	69
SK	25	65
MB	23	87
ON	3	21
QC	2	10
NB	3	23
NS	6	23
NL	11	34
NT	61	95
NU	85	94
YK	33	64

Johnston dubbed the significant increase in First Nations child apprehension from the 1960s to the 1980s as the “Sixties Scoop.”¹⁶⁵ It refers to the statement of a BC social worker who admitted to him that provincial social workers would scoop children from reserves on the slightest pretext.¹⁶⁶ Children were also placed in non-Indigenous homes with little consideration of the need to preserve their culture and identity.¹⁶⁷ Public discourse on the “Sixties Scoop” describes it in the past tense. Yet, although the specific intention to take Indigenous children

¹⁶¹ *Ibid* at para 344. The Tribunal also found poor coordination between these various programs at para 381.

¹⁶² See Johnston, *supra* note 10, ch 4.

¹⁶³ Statistics Canada, “Study: Living Arrangements of Aboriginal Children Aged 14 and Under, 2011”, in *Insights on Canadian Society*, Catalogue No 75-006-X (Ottawa: Statistics Canada, 13 April 2016), online: <www150.statcan.gc.ca/n1/daily-quotidien/160413/dq160413a-eng.htm?HPA> [perma.cc/A3YR-3PCZ].

¹⁶⁴ Aboriginal Children in Care Working Group, *Aboriginal Children in Care Working Group: Report to Canada's Premiers* (July 2015) at 7. Note that no data for PEI was reported as the province does not track the ethnic origin of children in care due to reasons of confidentiality.

¹⁶⁵ See Johnston, *supra* note 10, ch 4. There has been class action litigation on the Sixties Scoop, and there is now a decision from the Ontario Superior Court from February 2017 finding that Canada was negligent by failing to take steps to prevent Aboriginal children who were placed in the care of non-Aboriginal foster or adoptive parents from losing their Aboriginal identity (see *Brown*, *supra* note 47 at para 83).

¹⁶⁶ Johnston, *supra* note 10 at 23.

¹⁶⁷ TRC, “Legacy,” *supra* note 101 at 4.

away from their families and culture may now be gone, government neglect, assimilative laws and policies, and paternalism are nonetheless producing similar, if not more stark, results. Intended or not, Indigenous children continue to be scooped from their families in staggering numbers. This is so notwithstanding the creation of FNCFS Agencies to make First Nations child welfare services more culturally appropriate. Unfortunately, the hard work of the staff of such Agencies is outmatched by chronic underfunding and significant legal and policy restraints imposed by outside governments.

III. THE *CARING SOCIETY* DECISION AND ITS IMPLICATIONS

Part II reviewed numerous harms present within the First Nations child welfare services. These stem from three structural features that are common to all First Nations essential services: federal neglect; provincial comparability; and program devolution. Here I explore how the *Caring Society* decision finally equips First Nations with the legal arguments to show these are violations of their human rights. This should clear the path towards the only real alternative to the *status quo*, self-government.

A. CONFIRMS CANADA’S RESPONSIBILITY TO FIRST NATIONS

First, the Tribunal’s ruling is remarkable in being the first decision to hold the federal government fully accountable for the significant role it plays in First Nations child welfare. Canada argued that the *Canadian Human Rights Act*¹⁶⁸ did not apply to the complaint, as “funding” is not a service contemplated under the *Act*. More broadly, Canada argued child welfare was under provincial jurisdiction and the federal government only became involved in child and family services “as a matter of social policy under its spending power”¹⁶⁹ and not pursuant to any obligations owing under section 91(24) of the *Constitution Act, 1867*. These arguments were soundly rejected by the Tribunal, who, in addition to finding that funding in itself can constitute a service under the *Act*,¹⁷⁰ also found that Canada plays a primary role in child welfare services on reserve. In support of this finding, the Tribunal referred to the fact that the manner and extent of Canada’s funding significantly shapes the child and family services provided.¹⁷¹ Second, beyond funding, the Tribunal noted that Canada provides policy direction and oversight, and also negotiates and administers agreements with First Nations and/or provinces and territories regarding child welfare services.¹⁷² The Tribunal found that Canada is “not a passive player”¹⁷³ in its arrangement with First Nations and/or the provinces/territories. It found that, ultimately, it is Canada that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on reserve.¹⁷⁴ Overall, the Tribunal noted that Canada in fact exercises significant control, discretion, and influence over child welfare services on reserve “through policy and other

¹⁶⁸ *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

¹⁶⁹ *Caring Society*, *supra* note 1 at paras 34, 78.

¹⁷⁰ *Ibid* at para 40.

¹⁷¹ *Ibid* at para 71.

¹⁷² *Ibid* at paras 66, 73.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid* at paras 73, 75–76.

administrative directives,”¹⁷⁵ and that First Nations children and families are a vulnerable category of people vis-à-vis Canada in this regard.

Further, the Tribunal thoroughly dismissed Canada’s attempts to minimize its responsibility and pass it off to the provinces. The Tribunal was not persuaded by Canada’s argument that the *status quo* on reserve is the inevitable result of the division of powers in the *Constitution Act, 1867*, but instead concluded that it was as a result of a series of choices made by the federal government. The Tribunal recognized that Canada had the power to legislate over First Nations child welfare and chose not to, instead taking “a programing and funding approach”¹⁷⁶ to child welfare on reserve. The Tribunal also recognized that the application of provincial child welfare legislation and standards through the enactment of section 88 of the *Indian Act* was a deliberate choice of the federal government.¹⁷⁷ The Tribunal emphasized that Canada should not be able to evade its responsibilities to First Nations children and families by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territories,¹⁷⁸ stating that such delegation “does not diminish [Canada’s] constitutional responsibilities... .”¹⁷⁹

According to the Tribunal, the fact that Canada did not directly deliver the service on reserve could not be the end of the matter and could not be the excuse to allow Canada to escape scrutiny under the *CHRA*.¹⁸⁰ The Tribunal’s appreciation of the workings of the First Nations child welfare system impressed upon it that,

[D]espite not actually delivering the service, [Canada] exerts a significant amount of influence over the provision of those services. *Ultimately, it is [Canada] that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon ...*.¹⁸¹

These findings are a strong confirmation of Canada’s responsibility over child welfare services, and there is no reasonable basis to see why they would not apply with equal force to all other essential services programs provided by Canada on reserve. Canada has long used the fact of not having legislated to minimize its responsibility over services on reserve. These findings by the Tribunal will now prevent Canada and INAC from evading accountability. In fact, the Tribunal went so far as to use the above findings to suggest that Canada may owe First Nations specific fiduciary duties in the circumstances.¹⁸² First Nations’ vulnerability to the extensive control and discretion that Canada exercises over the delivery of child welfare services was a significant factor in the Tribunal’s analysis of fiduciary duty.¹⁸³ As discussed in Part I, there are many examples of First Nations’ vulnerability to INAC’s power and discretion in the delivery of

¹⁷⁵ *Ibid* at para 105.

¹⁷⁶ *Ibid* at para 83.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* at para 84.

¹⁷⁹ *Ibid* at para 83.

¹⁸⁰ *Ibid* at para 84.

¹⁸¹ *Ibid* at para 85 [emphasis added].

¹⁸² *Ibid* at paras 99–110. (The Tribunal ultimately held it was not necessary to decide the point to address the complaint, but suggested there were very likely specific fiduciary duties owing because INAC’s exercise of extensive discretion stood to affect important interests of First Nations, namely First Nations’ Aboriginal rights to transmission of their Indigenous languages and cultures.)

¹⁸³ *Ibid* at para 105.

essential services on reserve. By these *obiter* comments, the Tribunal has breathed new life into the fiduciary duty doctrine as a mechanism for redress from abuse of INAC's discretion.¹⁸⁴ However, the Tribunal also made findings that will permit First Nations to challenge provincial comparability and program devolution, as I turn to next.

B. FINDS SYSTEMS THAT PERPETUATE HISTORIC DISADVANTAGE ENDURED BY ABORIGINAL PEOPLE ARE DISCRIMINATORY

The Tribunal's decision makes it clear that Canada, in providing services on reserve, cannot perpetuate the historical disadvantage endured by Aboriginal peoples.¹⁸⁵ In this regard, the Tribunal found strong links between the residential school system and the on-reserve child welfare system. The Tribunal observed that when residential schools started to close in the 1960s, the extension of child welfare services on reserves came to be seen as its replacement in the eyes of government authorities.¹⁸⁶ At the time, the assumptions underlying significant numbers of First Nations children taken into state care via the "Sixties Scoop" were the same assumptions underlying the residential school system: namely that First Nations parents were not capable of properly caring for their children.¹⁸⁷

The Tribunal found that the FNCFS Program continues to perpetuate the legacy of residential schools today because Canada's systemic underfunding of the program creates incentives to remove children from their homes as a first resort rather than as a last resort.¹⁸⁸ The Tribunal also suggested that the removal of children by child welfare authorities and placement in non-Indigenous homes resembles the residential school system because it also stands to adversely impact First Nations children's ability to learn their languages and culture, which the Tribunal found are Aboriginal rights that all First Nations children possess.¹⁸⁹ Finally, the Tribunal also suggested that the child welfare system perpetuates the residential school era because First Nations have little to no control over this system:

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces."¹⁹⁰

The implications of the Tribunal's findings here are significant. The key message from the Tribunal is that perpetuating systems that are assimilative—prohibiting or adversely impacting First Nations' ability to exercise their culture and control their own destinies—is discriminatory. As seen in Part II, provincial comparability, where we see the federal government imposing both provincial substantive norms and funding schemes to First Nations, was intended to be assimilative and certainly has been assimilative in its effect in the context of First Nations child welfare. Program devolution, although arguably intended to give greater

¹⁸⁴ But see *Brown*, *supra* note 47 at paras 65–71 where the Ontario Superior Court rejected a similar argument (albeit the reasoning on fiduciary duty in the case is sparse).

¹⁸⁵ *Caring Society*, *supra* note 1 at para 403.

¹⁸⁶ *Ibid* at paras 218, 413–14.

¹⁸⁷ *Ibid* at para 413.

¹⁸⁸ *Ibid* at para 344.

¹⁸⁹ *Ibid* at para 109.

¹⁹⁰ *Ibid* at para 426 [emphasis added].

control to First Nations and move them towards self-government (albeit with an underlying current of paternalism), has similarly had an assimilative effect by strictly controlling First Nations' activities and subjecting them to excessive amounts of government oversight. Paired with chronic underfunding of essential services on reserves, program devolution has left First Nations in the situation of administering their own poverty. Without going so far as explicitly saying so, the Tribunal has suggested a strong connection between First Nations' equality rights and their right to self-government. This is bolstered by the final significant legal conclusion of the Tribunal in *Caring Society*, which I turn to next.

C. FINDS COMPARABILITY STANDARD DISCRIMINATORY

While the Tribunal found that the funding of child welfare services was far below and not comparable to similar services in the provinces and territories, it concluded that equality for First Nations requires *more* than just providing the same level of funding. In this regard, the Tribunal found that INAC's comparability standard is *itself* discriminatory. According to the Tribunal, an approach on reserve that seeks to mirror funding provided by the provinces and territories is not consistent with substantive equality as it does not consider "the distinct needs and circumstances of First Nations children and families living on reserve, including their cultural, historical and geographical needs and circumstances."¹⁹¹

The Tribunal's analysis was informed by international law principles, based on the presumption of conformity that holds that international human rights standards should inform the interpretation of domestic law (unless Canadian legislation clearly states the contrary).¹⁹² In this regard, the Tribunal took account of commitments Canada has made under the International Convention for the Elimination of all Forms of Racial Discrimination, the Convention on the Rights of the Child, and the UN Declaration on the Rights of Indigenous Peoples.¹⁹³ The Tribunal also considered the 2011 *Withler v Canada (Attorney General)* decision of the Supreme Court of Canada, where the Court rejected the idea that the complainant in a discrimination complaint must establish a comparator group that is identical to it in every way, except on the protected ground of discrimination, in order to show difference in treatment. In this regard, the Supreme Court stated, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison."¹⁹⁴ From this, the Tribunal distilled the principle that First Nations are entitled to services that meet their particular needs and circumstances, not simply services identical to the provinces'. Although not cited by the Tribunal in its decision, such reasoning is also consistent with other recent Supreme Court of Canada cases involving services provided to Anglophone and Francophone communities. In those cases, the Supreme Court affirmed that substantive equality can mean distinctive content in the provision of similar services, depending on the nature and purpose of the services in issue, as well as the characteristics of the population

¹⁹¹ *Ibid* at para 465. The Tribunal suggests that, while provincial legislation and standards can be a useful reference for assessing the adequacy of funding and services on reserve, it cannot be *the* sole, or driving, reference point (*ibid* at para 462).

¹⁹² *Ibid* at 431–35.

¹⁹³ *Ibid* at paras 436–55.

¹⁹⁴ *Withler*, *supra* note 5 at para 59.

to be served.¹⁹⁵ In another case, the Supreme Court stated, “The designated beneficiaries [of a service] may and undoubtedly should affect how those services are delivered... .”¹⁹⁶

According to the Tribunal, in order to meet the governing standard of equality, both funding *and* services on reserve must meet the needs of First Nations children and families and be culturally appropriate. The Tribunal found that INAC’s funding, as it was inadequate, obviously prevented the services provided by the FNCFS Program from being culturally appropriate, asking “If funding does not correspond to the actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate?”¹⁹⁷

This finding *directly* impugns the provincial comparability as discriminatory. It also renders program devolution, to the extent that funding agreements impose comparability on First Nations, discriminatory. Further, like the Tribunal’s discrediting of systems that perpetuate First Nations assimilation, this finding bolsters the connection between First Nations’ equality rights and their right to self-government. The connection is demonstrated in the following rhetorical question: How can a program meet the needs of the community and be culturally appropriate if the standards underlying it are not designed and controlled by First Nations themselves? Or, returning to the quote of the member of the Carrier-Sekani Tribal Council quoted earlier in the introduction: “The principle is simple. Only Indian people can design systems for Indians. Anything other than that is assimilation.”¹⁹⁸

By requiring that child welfare services meet the actual needs and circumstances of First Nations children and families and not be assimilative in nature, *Caring Society* effectively mandates that First Nations must exercise meaningful control over the design and delivery of such services. In other words, it sanctions self-government in this fundamental service area. “Self-government” is a term with varying definitions and can take a variety of forms.¹⁹⁹ In this regard, RCAP observed that,

For some peoples, it may mean establishing distinct governmental institutions on an ‘exclusive’ territory. For others, it may mean setting up a public government generally connected with modern treaties or land claims agreements. Alternatively, self-government may involve sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved. In other instances, it may involve setting up culturally specific institutions and services within a broader framework of public government.²⁰⁰

¹⁹⁵ *DesRochers v Canada (Industry)*, [2009] 1 SCR 1994; *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21. See also *Ewert v Canada*, 2018 SCC 30, at paras 53–55 (in the context of correctional services).

¹⁹⁶ *NIL/TU, O*, *supra* note 103 at para 45. This is in the context of provincial child welfare legislation (BC) aiming to accommodate First Nations interests. The decision is problematic, however, in that it is in tension with the constitutional rule against provincial legislation “singling out” First Nations for favourable or adverse treatment (see *supra*, note 103). It also takes for granted the application of provincial child welfare laws on reserve, which, based on the reasoning in *Caring Society*, may well be discriminatory (see also *supra*, note 27).

¹⁹⁷ *Ibid* at para 425.

¹⁹⁸ Penner Report, *supra* note 7 at 29.

¹⁹⁹ RCAP, vol 2, *supra* note 132, ch 3 at 106; Stephen Cornell, Catherine Curtis & Miriam Jorgensen, “The Concept of Governance and its Implications for First Nations” (2004) Joint Occasional Papers on Native Affairs, No 2004-02, at 8–10; Rae, *supra* note 48 at 8; Naomi Metallic, “*Indian Act* By-Laws: A Viable Means for First Nations to (Re) Assert Control over Local Matters Now and Not Later” (2016) 67 UNBLJ 211 at 213.

²⁰⁰ RCAP, vol 2, *supra* note 132 at 106.

Cornell et al likewise argue that the powers a community may pursue under self-government can vary: “There is no one set of jurisdictional powers that determines whether or not a First Nation is truly self-governing. . . . For instance, social services may be a priority for a community that is in healing from a history of conflict or abuse, while resource use may be a priority for a community with a large land base.”²⁰¹ Similar to RCAP, the authors indicate that self-government could possibly involve shared jurisdiction with other governments, stating that “self-rule does not necessarily mean absolute sovereignty across the board.”²⁰² Nor need it mean that First Nations would have to be entirely self-financed in the exercise of self-government, since federal funds are often essential and are justified in light of the crippling resource loss historically imposed on First Nations peoples.²⁰³

Despite the variability in the form self-government can take, RCAP emphasized that “[i]n its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction.”²⁰⁴ This concept of self-government fully aligns with the main propositions in *Caring Society* that (1) First Nations are entitled to child and family services that meet their cultural, historical, and geographical needs and circumstances, and (2) such services cannot be assimilative in design or effect. This is especially so when these propositions are fully understood in the context of the harms of the FNCFS Program reviewed above.

To be clear, the Tribunal in *Caring Society* never goes as far in its reasoning to *directly* make this connection between substantive equality and First Nations self-government. But it is a significant implication of the decision, especially given the Tribunal’s comments that equality prohibits the perpetuation of historic disadvantage like the legacy of residential schools. That being said, this reading of the case leaves some uncertainty. Taken to its logical conclusion, the finding that services on reserve must meet community needs and circumstances and be culturally appropriate suggests section 88 of the *Indian Act* and the application of provincial child welfare legislation on reserve is discriminatory.²⁰⁵ For the most part, the Tribunal remained largely silent on the imposition of provincial child welfare laws on First Nations via section 88 of the *Indian Act*. The Tribunal’s only comment about section 88 was to suggest that it does not “diminish [INAC]’s constitutional responsibilities [to First Nations].”²⁰⁶ To be fair to the Tribunal, the complainants did not challenge section 88 of the *Indian Act* as discriminatory, but only the

²⁰¹ Cornell et al, *supra* note 203 at 15.

²⁰² *Ibid.*

²⁰³ *Ibid* at 21. This finding is consistent with article 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) [UNDRIP], which states that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, *as well as ways and means for financing their autonomous functions*” [emphasis added].

²⁰⁴ Similarly, Rae has argued: “What matters for the purpose of being self-governing is not any particular form, but rather the extent of the nation’s ability to choose its own structure, laws, mechanisms and institutions” (*supra* note 48 at 8).

²⁰⁵ As stated at *supra* note 27, although section 88 was regarded as a basis for provincial legislation, including child welfare legislation, applying on reserve, the Supreme Court of Canada later clarified that most provincial laws apply *ex proprio vigore*. The analysis in *Caring Society* is in tension with the Supreme Court’s decision in *Dick*, *supra* note 27. I would argue that the decision in *Caring Society* displays a much greater appreciation of the realities faced by First Nations owing to jurisdiction neglect, as well as a greater appreciation of how the Aboriginal right of First Nations children to their language and culture, as well as First Nations rights to self-government, are implicated in the area of child welfare. *Dick* was decided in 1985, and as I suggest in note 27, it may be time for the Supreme Court to revisit it.

²⁰⁶ *Caring Society*, *supra* note 1 at para. 83.

funding of the FNCFS Program. Thus, the Tribunal was not asked to decide whether the imposition of provincial child welfare laws on reserve was itself discriminatory and it may not have wanted to address the issue head-on. On the other hand, we could also draw inferences from the Tribunal's overall recommendation to Canada for INAC to "REFORM"²⁰⁷ its child welfare program "in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve."²⁰⁸ Obviously, the Tribunal's emphasis on the word 'reform' (all-caps and underlined) signals that it envisioned a transformative overhaul of FNCFS, jettisoning key structures in the *status quo*. Moreover, although not using language such as "self-government" or prescribing what the reformed FNCFS Program should look like, the Tribunal's lengthy review of the harms of the FNCFS Program in the decision and the condemnation of it as replicating the Indian Residential School system provide clear guidance on what the reformed FNCFS Program should *not* resemble.

Beyond the area of First Nations child welfare, the Tribunal's implicit linking of self-government and substantive equality and human rights is in itself noteworthy. This is a new argument for First Nations self-government in Canada. It stands separate and apart from arguments based on section 35 of the *Constitution Act, 1982*. Arguments for recognition of a section 35 right to self-government have stagnated since the Supreme Court of Canada's decision in *R v Pamajewon*, where the Supreme Court held that to prove a right to self-government, it would have to be shown that the right was integral and distinctive to the pre-contact culture of an Aboriginal group.²⁰⁹ This restriction on Aboriginal self-government in *Pamajewon* has been roundly criticized as unduly limiting First Nations' ability to self-govern in the twenty-first century.²¹⁰ However, the Supreme Court has yet to revisit the issue.²¹¹ On the political front, in the last thirty years, the federal government has concluded a handful of self-government agreements and passed legislation enabling some Indigenous groups to have greater control over some matters, but this has been slow and piecemeal.²¹² The resistance of courts and governments to greater recognition of self-government may be influenced in part by resistance to section 35 rights owing to questionable perceptions that these are "special" rights. An argument for First Nations self-government rights framed as a human right might be more graspable to certain members of the public. While it is true that self-government is already recognized as a fundamental human right of Indigenous peoples in international law,²¹³ such a principle has yet to be fully accepted within domestic law. Paul Joffe has argued that until an Indigenous right to

²⁰⁷ *Ibid* at para 463 [emphasis in original].

²⁰⁸ *Ibid*.

²⁰⁹ *R v Pamajewon*, [1996] 2 SCR 821.

²¹⁰ See e.g. BW Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (1997), 42 McGill LJ 1011; PJ Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill LJ 607 at 656–57; JE Dalton, "Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 Can JL & Soc'y 11 at 19–20.

²¹¹ To date, the Court has had at least two opportunities to do so. In 2008, the Court denied leave to hear a case that would have required it to squarely reconsider its decision in *Pamajewon* (see *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al*, 2008 CanLII 18945 (SCC)). In 2011, it denied leave to hear a case that would have allowed it to directly address the right to self-government again (see *Chief Mountain et al v Attorney General of Canada, et al*, 2013 CanLII 53406 (SCC)).

²¹² Naomi Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" forthcoming in *Redefining Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) at ch 10.

²¹³ See article 4 of the UNDRIP, *supra* note 207.

self-government is understood through a human rights framework, violations or denials of Indigenous rights will continue to be treated casually by governments and courts.²¹⁴

IV. CONCLUSION

In this article I have tried to tell the story of how First Nations have come to be saddled with an extremely dysfunctional and problematic system for essential service delivery on reserve, using the First Nations child welfare system on reserve as an illustration. The provision of child welfare services, like all essential services on reserve, is characterized by three structural features: federal neglect of its responsibility over such services; provincial comparability; and program devolution. Together, these features wreak serious harms on First Nations people. In the child welfare context, this includes the imposition of culturally inappropriate provincial child welfare standards on reserve over which First Nations have little to no say. It also involves First Nations and their Agencies being bound to “take it or leave it” funding agreements that impose significant controls and reporting requirements and are based on arbitrary funding formulas that have resulted in over a decade of known underfunding. Cumulatively, these problems have contributed to the staggering overrepresentation of First Nations children in state care. Meanwhile, the federal government’s half-hearted commitment to the provision of child welfare, inconsistent and arbitrary interpretation of program terms, and unilateral imposition of funding terms have been extremely difficult for First Nations to challenge.

The *Caring Society* decision is a powerful indictment of this system. First, it finds that Canada—not the provinces—is primarily responsible for child welfare and must be held accountable for knowingly underfunding services to some of the most vulnerable people in this country, First Nations children. Second, it finds that child welfare services on reserve have been perpetuating a system reminiscent of the residential school system because First Nations children are being separated from their families, losing language and culture, and “the fate and future of many First Nations children is still being determined by the government.”²¹⁵ Third, it finds the “comparability standard” to be discriminatory because it insists on mirroring of provincial standards and funding, instead of promoting programming reflective of First Nations needs and circumstances. Although only dealing with the Department’s child welfare program, the decision has broad implications for the delivery of programs on reserve, suggesting that all essential service delivery is inconsistent with the standard of substantive equality.

For decades, First Nations have argued that self-government is an inherent Aboriginal right, recognized and affirmed by section 35 of the *Constitution Act, 1982* and international law.²¹⁶ Now the *Caring Society* decision also suggests it is a matter of human rights.²¹⁷ While the decision does not speak directly about self-government, this would appear to be the inevitable result of a human rights-compliant approach since the only way for programs to be truly

²¹⁴ Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples: Canada Government Positions Incompatible with Genuine Reconciliation” (2010) 26 Nat’l J Const L 121 at 136.

²¹⁵ *Caring Society*, *supra* note 1 at para 426.

²¹⁶ See *e.g.* Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (Research Paper for the National Center for First Nations Governance, 11 October 2007); Peter Hutchins, “The Golden Thread of Continuity, the Federalism Principle and Treaty Federalism—Where’s the Gap?” (Paper delivered at the National Center for First Nations Governance “Rebuilding our Nations” Conference, 3 March 2009).

²¹⁷ The right to self-government, as part of the larger right of self-determination, is recognized as a fundamental collective human right of Indigenous peoples under international law. See Brenda Gunn, “Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination” (2016) 38 Dalhousie LJ 237.

culturally appropriate and meet community needs and circumstances is for them to be designed and controlled by First Nations. Anything else perpetuates assimilation. The *Caring Society* decision therefore arms First Nations with very powerful arguments to push for the dismantling of the current dysfunctional, discriminatory, and wholly unacceptable system for program delivery on reserve in favour of self-government.

Appendix A. Provincial Child Welfare Services On-Reserve, 1960–1980²¹⁸

	Agreement²¹⁹	Services Offered	Funding
BC	1962	- Only child protection and in-care services, not pre-protection, such as daycare	- Feds pays 100% of costs
AB	None	- Prior to 1970s, only intervened in the most extreme cases of neglect - Since 1970s, investigation, assessment, counselling in cases of abuse or neglect, and foster or residential care placement for apprehended children	- Feds reimburse fixed rate for foster care, and per diem for those in group homes or institutions - Administrative costs not included
SK	None	- Limited services (“life or death”) and only where feds unable or unwilling to provide the services	- Prov bills feds for full costs to status Indian children
MB	None	- Only limited services (primarily protection) in central & northern MB (serving 70% of Bands)	- Feds totally reimburse provincial
	1966	- Full range of services to 14 Bands located in southern MB	
ON	1965	- Same child welfare services available to other Ontario residents	- Province recovers 95–97% of the total costs
QC	Various tripartite	- Since 1970s, individual agreements signed between Band Council, social services centres, and Canada. - Includes full range of child welfare programs	- Cost is totally subsidized by the federal government
	1975	- James Bay Agreement provides for transfer of child welfare to province (using Cree employees)	- Costs are shared between Quebec and feds
NB	None	- Services extended to residents as requested or required	- Feds reimburses the per diem and supervision costs of status children in care - Other services are recovered through the Canada Assistance Plan
NS	1964	- Same child welfare services provided to other residents, including assessment, counselling, child protection and placement services,	- Canada reimburses province for 100% of the costs

²¹⁸ Based on summary by Johnston, *supra* note 10 at 7–16.

²¹⁹ Unless indicated otherwise, these are bilateral agreements between the federal and provincial/territorial government.

		homemaker and daycare services, research and evaluation	
PE I	None	- Services provided upon request from a chief or welfare office	- Feds reimburse province for per diem costs related to foster care; administrative costs not covered
NL	1965	- Same child welfare services extended to Indian communities (at the time, no reserves in NFLD)	- Cost sharing—10% province; 90% feds
NT	None	- Status Indians receive the complete range of child welfare services provided by the NWT Department of Social Services	- Included in the overall federal/territorial financial agreement and there are no special provisions relating only to child welfare.
Y K	1961	- Full range of child welfare services provided by Yukon government to all status Indians—includes protection, family counselling, foster and group home care, adoption services	- Feds reimburse Yukon for 100% of actual costs of services to status Indian children in care - Fixed dollar payment for administrative costs.

Appendix B. Current Picture of First Nations Child Welfare Services²²⁰

Province	Service Provider	Lawmaker	Funding
BC	Provincial agencies serving some communities	Province	Federal—reimbursement of costs
	16 Delegated FNCFS Agency	Province	Federal based on Directive 20-1
	1 Band Agency (Splatsin FN)	FN pursuant to Band by-law	Federal
	2 First Nations Agency pursuant to Self-Government / Comprehensive Claim Agreement (Sechelt FN & Nisga' Lism FN)	FN (fed and prov approved)	Federal
AB	Provincial agencies serving some communities	Province	Federal—reimbursement of costs
	12 Delegated FNCFS Agencies	Province	Federal based on EPFA
SK	12 Delegated FNCFS Agencies	Province	Federal based on EPFA
MB	9 Delegated FNCFS Agencies	Province	Federal based on EPFA
ON	9 Delegated Agencies	Province	Federal reimburses province based on cost-sharing in 1965 Agreement
QC	9 Delegated FNCFS Agencies	Province	Federal based on EPFA
NB	7 Delegated FNCFS Agencies	Province	Federal based on Directive 20-1
NS	1 Delegated FNCFS Agencies	Province	Federal based on EPFA
PEI	1 Delegated FNCFS Agency	Province	Federal based on EPFA
NL	Provincial agencies serving some communities	Province	Provincial
	1 Delegated FNCFS Agency	Province	Federal based on Directive 20-1
NT	Territorial agencies	Territory	Territory but federal contribution through territorial transfer agreement
YK	Territorial agencies	Territory	Federal based on Directive 20-1

²²⁰ Summary prepared based on Bennett, *supra* note 56; Sinha & Kozlowski, *supra* note 60; National Collaborating Center for Aboriginal Health, *supra* note 60; First Nations Family and Child Caring Society, *supra* note 61.

Appendix C. Indigenous Specific Provisions in Provincial/Territorial Child Welfare Legislation

Types of provisions	BC 221	AB	SK 222	M B	ON	QC	NB 223	NS	PE I	NL 224	NT	YK
Notification/participation of FN in hearing	✓ 225	✓ 226	✓ 227	✓ 228	✓ 229	✓ 230		✓ 231	✓ 232		✓ 233	✓ 234
FN involvement in case management / ADR		✓ 235	✓ 236		✓ 237				✓ 238			✓ 239
FN involvement in service planning or delivery	✓ 240	✓ 241			✓ 242							✓ 243
Customary	✓ 244				✓ 245	✓ 246		✓ 247				✓ 248

²²¹ British Columbia has Aboriginal Operational and Practice Standards manual (see TRC “Legacy,” *supra* note 101 at 20).

²²² The Federation of Saskatchewan Indian Nations’ *Indian Child Welfare and Family Support Act* exists alongside provincial legislation and includes standards recognized by the province as equivalent to ministerial policies, practices, and standards (see TRC, “Legacy,” *supra* note 101 at 20).

²²³ While having no specific provisions in its legislation, NB has a *Micmac and Maliseet First Nations Service Standards Manual*.

²²⁴ *The Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27 takes precedence over the *Child, Youth and Family Services Act*, SNL 1998, c C-12.1. There are no other special considerations for Indigenous people in Newfoundland.

²²⁵ *Child, Family and Community Service Act*, RSBC 1996, c 46 at ss 33.1(4), 34(3), 35(1), 36(2.1), 38(1), 39(1), 42.1(1) [*Child, Family and Community Service Act*].

²²⁶ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 67 [*Child, Youth and Family Enhancement Act*].

²²⁷ *The Child and Family Services Act*, SS 1989-90, c C-7.2, ss 23(1)(b); 37(10)–(11) [*The Child and Family Services Act*, SS].

²²⁸ *The Child and Family Services Act*, CCSM c C80, ss 30, 38, 77.

²²⁹ *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, ss 17(4), 186 [*Child, Youth and Family Services Act*].

²³⁰ *Youth Protection Act*, CQLR c P-34.1, s 81.1.

²³¹ *Children and Family Services Act*, SNS 1990, c 5, ss 36(3), 78(4).

²³² *Child Protection Act*, RSPEI 1988, c C-5.1, ss 12(3.1), 13(7), 13(8), 29(2), 35(1) [*Child Protection Act*].

²³³ *Child and Family Services Act*, SNWT 1997, c 13, ss 12.3, 27(2), 29(2) [*Child and Family Services Act*, SNWT].

²³⁴ *Child and Family Services Act*, SY 2008, c 1, ss 2(d), 27(1), 28, 32(d), 47, 48 [*Child and Family Services Act*, SY].

²³⁵ *Child, Youth and Family Enhancement Act*, *supra* note 226, s 3.1.

²³⁶ *The Child and Family Services Act*, SS, *supra* note 227, s 15.

²³⁷ *Child, Youth and Family Services Act*, *supra* note 229, s 17(2).

²³⁸ *Child Protection Act*, *supra* note 232, s 16.

²³⁹ *Child and Family Services Act*, SY, *supra* note 234, s 7(1)(c).

²⁴⁰ *Child, Family and Community Service Act*, *supra* note 225, s 3(b).

²⁴¹ *Child, Youth and Family Enhancement Act*, *supra* note 226, s 107.

²⁴² *Child, Youth and Family Services Act*, *supra* note 229, ss 68(3), 72–73, 338.

²⁴³ *Child and Family Services Act*, SY, *supra* note 234, s 2(e).

²⁴⁴ *Child, Family and Community Service Act*, *supra* note 225, s 71(3).

²⁴⁵ *Child, Youth and Family Services Act*, *supra* note 233, ss 71, 80, 101(5), 109(2), 187(2), 198(5), 212(1).

adoptions / kinship placements												
FN involvement in cultural connection plan		✓ 249										
Connection of FN child to culture / best interest	✓ 250	✓ 251			✓ 252			✓ 253	✓ 254		✓ 255	✓ 256
Agreement to develop own child protection program						✓ 257						

²⁴⁶ *Youth Protection Act*, supra note 234, ss 71.3.1–2.

²⁴⁷ *Children and Family Services Act*, supra note 235, s 68(11).

²⁴⁸ *Child and Family Services Act*, SY, supra note 238, ss 89, 134.

²⁴⁹ *Child, Youth and Family Enhancement Act*, supra note 230, ss 52–53.

²⁵⁰ *Child, Family and Community Service Act*, supra note 229, ss 2(f), 4(2).

²⁵¹ *Child, Youth and Family Enhancement Act*, supra note 230, ss 52(1), 56(1) and 57.01, 58.1, 63, 71.1.

²⁵² *Child, Youth and Family Services Act*, supra note 233, ss 74(3)–(4), 109(2), 187(1).

²⁵³ *Children and Family Services Act*, supra note 235, ss 6(kb), (kc), 76(1).

²⁵⁴ *Child Protection Act*, supra note 236, ss 12(3.1), 13(7).

²⁵⁵ *Child and Family Services Act*, SNWT, supra note 237, s 3.

²⁵⁶ *Child and Family Services Act*, SY, supra note 238, ss 2(d), 2(2).

²⁵⁷ *Youth Protection Act*, supra note 234, s 37.5.