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Should Governments be Above the Law? The Canadian Human Rights Tribunal on First Nations Child Welfare

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Many child welfare statutes protect children when caregivers jeopardise their safety and best interests, but what if the risk is sourced in government child welfare policy or practice? Instead of including provisions to hold governments accountable for placing children in harm's way, governments and their agents are largely protected against any systemic maltreatment claims made against them. This paper describes a precedent-setting case before the Canadian Human Rights Tribunal attempting to hold the Canadian federal government accountable for its systemic failure to ensure that First Nations children are protected from maltreatment linked to inequitable federal child welfare funding on reserves. The case is a rare example using an independent judicial mechanism with the authority to make binding orders against the government and enveloping the proceedings in a public education and engagement movement. Implications of the case for child rights in Canada and abroad are discussed.

■ **Keywords:** First Nations, Indigenous, Children, Human Rights, Discrimination, Structural Risk

Introduction

Child welfare statutes across North America protect children when caregivers jeopardise their safety and best interests, but what if the risk is sourced in government child welfare policy or practice? Instead of including provisions to hold governments accountable for placing children in harm's way, governments and their agents are largely protected against any systemic maltreatment claims made against them. This paper describes one of the most famous Canadian human rights cases attempting to hold the Canadian federal government accountable for its failure to ensure that First Nations children are protected from maltreatment linked to inequitable federal child welfare funding on reserves. In 2007, Canada's lack of progress in addressing the inequalities, despite available solutions, spurred the Assembly of First Nations, the representative body for First Nations in Canada, and the First Nations Child and Family Caring Society of Canada (Caring Society), a public education and service organisation for First Nations children and families, to file a complaint pursuant to the *Canadian Human Rights Act* (RSC 1986) alleging that Canada's inequitable and structurally flawed child welfare funding on reserves was discriminatory. On 25 February 2013, the Canadian Government appeared before the Canadian Human Rights Tribunal (Tribunal) [*First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708] marking the first time in Canadian history that a government was being held to account for its systemic and contemporary treatment of children before a body that can make binding orders. The Tribunal has the authority to make a legally binding determination of discrimination and order an enforceable remedy. Witness testimony and legal argument were concluded in October of 2014 and a ruling is expected in early 2015.

This paper describes the Government of Canada's long history of mistreating First Nations children before arguing for strengthening of statutory provisions to hold governments and delegated child welfare authorities more accountable for systemic maltreatment sourced in flawed child welfare policy and practice.

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The Assimilative Roots of Canadian Child Welfare

The earliest advent of child welfare in Canada had assimilative versus protective goals (Milloy, 1999; Royal Commission on Aboriginal Peoples, 1996). In 1895, Duncan Campbell Scott, Acting Superintended of Indian Affairs, requisitioned a warrant from the Department of Justice for the removal of First Nations children aged 5–15 years old to facilitate their placement in residential schools (Scott, 1895). The warrant authorised Indian Agents to forcibly remove First Nations children for education purposes or because they were 'not properly cared for'. Scott demanded Indian Agents interpret both provisions with the vigorous aim of assimilating First Nations children into Christian culture (Milloy, 1999). The regulations accompanying the warrant provided for parents to challenge the removal, but this was practically obstructed as all proceedings were held in English or French, and no assistance was provided to families wishing to challenge the system.

In fact, Canada would soon put in place a rigorous series of legislative and policy regimes intended to thwart First Nations parents from raising their children or recovering them from residential schools. Among these measures was the prohibition of Aboriginal ceremonies, expropriation of land, the introduction of the pass system wherein First Nations peoples required permission of the Indian Agent to leave the reserve, and laws prohibiting First Nations from hiring legal counsel (Royal Commission on Aboriginal Peoples, 1996). As historian and expert witness John Milloy testified at the Canadian Human Rights Tribunal, this amounted to Canada 'cutting the artery of culture' [Transcript of Record at 34, *First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708].

Assimilation was woven into the residential school program. Children attending the schools were banned from speaking their indigenous languages, practising their cultures and spiritual traditions, and separated from their siblings to prevent any sharing of family stories and traditions (Milloy, 1999; Royal Commission on Aboriginal Peoples, 1996). As John Milloy explained in expert testimony in *First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708, First Nations children were taught to be ashamed of everything associated with being First Nations – including their parents:

> . . . in my Catholic boarding school here in Ottawa the priests regularly hit us over the head with the Latin book. It was the biggest book in school, and it was quite effective.
>
> But when you take that type of violence against these children and contextualize it in what everything else is going on in terms of their oppression of their language and their spiritualty and their beliefs and ideas, this takes on a, you know, a meaning that certainly it didn't have in my school.
>
> In my school I got punished because I had done something my parents would not agree with, like, lied or stole something.
>
> In these schools, in many times, children were – way too many times – children were punished for who their parents were. We must beat it out of you. We must kill the Indian in the child. You must not be like your parents. [Transcript of Record at 51–52, *First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708]

Far from protecting children from maltreatment, in many cases the schools were infested with it. Throughout the more than 100 years of operations, people of the period regularly reported child maltreatment and prolific deaths of children. One of the most famous examples is that of Dr Peter Henderson Bryce who, in 1922, went public with his report that over 24 per cent of children per year were dying in the schools from preventable causes of disease, and yet the Canadian Government refused to implement the reforms needed to save lives (Bryce, 1922). Bryce, an expert in tuberculosis and President of the American Public Health Association, was firm in saying 'medical science knows just what to do' to save the children and yet his appeals to the Canadian Government went unanswered and children continued to die. This blatant disregard for the safety of the children prompted lawyer Samuel Hume Blake to say, 'the appalling number of deaths among the younger children appeals loudly to the guardian of our Indians. In doing nothing to obviate the preventable causes of death, brings the Department in unpleasant nearness to the charge of manslaughter' (Milloy, 1999, p. 77). The Truth and Reconciliation Commission of Canada has documented over 6000 children who died at the schools from preventable disease and maltreatment, and Chief Commissioner, Judge Murray Sinclair, estimates the actual number may be 10 times that amount, meaning up to 60,000 children died needlessly in the schools (Sinclair, 2014).

Physical abuse was also rampant. In 1972, hunters found a First Nations boy who had been badly beaten after trying to run away from the residential school. They reported the incident to authorities — Indian Affairs Canada felt the appropriate thing to do was provide the children with survival training. Nothing was ever done about the physical abuse in the school (Milloy, 1999).

Despite the public reports by Bryce, no-one investigated the safety of the children at the schools; instead social workers were supporting the residential school regime. In 1948, the Canadian Association of Social Workers officially sanctioned Canada's policy of assimilation before a joint House of Commons and Senate Committee on the *Indian Act* (RSC 1985). They argued that mainstream child welfare should be extended on reserve to aid in the assimilative regime and protect children in need (Blackstock, 2011). They did not discuss any of the public reports of the deaths or abuses in the schools themselves. In fact, the only records of mainstream child welfare engagement are their efforts to reinforce the schools by serving on residential school committees and

furthering the usage of residential schools as child welfare placements. By 1967, George Caldwell confirms that over 80 per cent of the children attending residential schools in Saskatchewan were placed there for child welfare reasons, but many could be returned if the government began providing family support services at home. In 1969, an Indian Affairs official in Ontario was asked to project any child protection matters relating to children returning home from St. Anne's residential school. While documents show that he did not visit the children in the schools, or their parents, he recommended that child protection officials investigate the home circumstances of one-third of the children, and that a number of others never return home for their own protection. It was during this same time that public reports emerged that children in St. Anne's school were being electrocuted by clergy in a homemade electric chair for punishment and amusement. Child welfare did not investigate, but the police did. Law enforcement officials discovered the grisly electric chair and arrested the perpetrators, but the harm was already done (Baily, 1969).

This example also demonstrates the reluctance to view governments and faith-based institutions as perpetrators of child abuse and neglect. This trend of enforcing more extreme child maltreatment sanctions on families than on the systems that serve them persists today. A family faced with a substantiated child maltreatment finding risks losing their child, whereas in most cases the worst an institution will face for systemic maltreatment is a non-binding inquiry or review.

The last residential school closed in 1996 and the Government of Canada apologised to former residential school students in 2008 (Harper, 2008). The apology, while a meaningful gesture, did little to fix the multi-generational trauma. Nor did it provide an incentive for the federal government to reform its provision of First Nations child welfare to ensure First Nations children have an equitable and culturally based opportunity to grow up safely with their families (Blackstock, 2011).

Canada's Discrimination against First Nations Children Today

The negligence by the federal government is mirrored in mainstream child welfare, which has never publically acknowledged its role in the residential school system. Moreover, social workers across Canada characterise the dramatic over-representation of First Nations children in child welfare as the system failing First Nations children. Historians like John Milloy and many First Nations experts believe the system is not failing at all – it is simply doing what it was designed to do – remove First Nations children from their families and further the assimilation agenda. This is accomplished in several ways. First, mainstream child welfare forces First Nations to assume their laws and standards, while diminishing First Nations legal systems. Second, mainstream child welfare fails to examine critically its own role in assimilation. Third, the system offers services that are not targeted to the cultures and needs of First Nations children and families, thus predisposing children to removal and permanent placement.

Tragically, there are more First Nations children in child welfare care today than at the height of residential schools (Blackstock, 2003). First Nations children are entering the child welfare system at 6–8 times the rate of other children (Auditor General of Canada, 2008). Inadequate housing, poverty and substance misuse are the key drivers contributing to the over-representation of First Nations children in foster care (Auditor General of Canada, 2008; Trocmé et al., 2006). All of these factors can reasonably be linked to the multi-generational trauma arising from the residential school era and other colonial undertakings, such as forced land and resource appropriation, and banning of ceremonies (Daschuk, 2013). For example, First Nations students at residential schools typically received only a primary school education. The government viewed First Nations children as academically incapable of further progress, and judged them as only suited to domestic servitude or farm work (Milloy, 1999). The systematic deprivation of proper education, coupled with the trauma related to cultural dislocation, abuse and neglect, spurred multi-generational cycles of trauma and poverty that continue to undermine First Nations families today (Blackstock, 2011).

Beginning in the 1980s, First Nations began developing First Nations child welfare agencies to deliver culturally relevant services intended to target the unique factors placing First Nations children at risk. In a controversial move, the federal government requires First Nations child welfare agencies to use provincial child welfare laws and standards even though they have not proven very effective for First Nations children, and are not reflective of First Nations cultures. While provincial child welfare laws apply equally on and off reserves in Canada, the federal government funds child welfare on reserve whereas the provinces fund it for all other children. However, the federal government funds First Nations child welfare on reserves at less than 80 per cent of the funding levels provided to children off reserve by provincial governments, even though the needs of First Nations children are greater (Auditor General of Canada, 2008; Loxley et al., 2005; McDonald & Ladd, 2000; United Nations Committee on the Rights of the Child, 2012). This inequity is most prominent in services aimed at keeping children safely in their homes, and thus the Government of Canada's own reports have linked both the inequitable funding levels and the dated structure of the funding regimes to the growing numbers of children in care (Blackstock, 2011). As the Auditor General of Canada (2008) noted, the Government of Canada has known for many years that its funding for First Nations child welfare is flawed and inequitable, and yet has failed to take sufficient measures to remedy the problem. There were multiple statements against interest in government documents filed at the Tribunal where government officials characterised the funding as "woefully

inadequate" creating conditions where "the situation is dire" resulting in growing numbers of First Nations children in care (First Nations Child and Family Caring Society of Canada, 2014). In its defence, the Government of Canada pointed to their new funding approach, known as the enhanced prevention focused approach (EPFA), that was applied in some regions of the country beginning in 2007. Although this approach aimed to correct some of the flaws of earlier funding regimes, it is not available across the country and the Auditor General of Canada (2008, 2011) found it to be inequitable, and internal government evaluations also found significant shortcomings. For example, government witnesses confirmed before the Tribunal that EPFA does not fund the receipt or investigation of child welfare reports, even though First Nations agencies are legally compelled to provide such services (First Nations Child and Family Caring Society of Canada, 2014). Although EPFA is largely viewed as an improvement on previous formulas, it still has significant shortcomings, as confirmed by a 2012 presentation entitled 'The way forward' prepared by senior federal government officials in Aboriginal Affairs and Northern Development (2012a). They estimated the cost of ensuring that EPFA and other government funding approaches were comparable to what other children received off reserve to be 420 million dollars.

While First Nations and the Canadian Human Rights Commission marshalled four expert witnesses, including a respected economist, to provide expert testimony supporting the claim that Canada's provision of child welfare services was discriminatory, the Government of Canada was unable to find an expert witness to testify on its behalf. When the hearings began in 2013, the government advised the Tribunal and the parties that it intended to call KPMG LLP as their expert witness to review, and presumably refute, the calculations of the funding shortfall detailed in a report jointly commissioned by the Assembly of First Nations and Government of Canada (First Nations Child and Family Caring Society of Canada, 2005). The Government of Canada later dropped KPMG as an expert witness after First Nations filed the KPMG expert report in support of their case, noting KPMG's calculations of the shortfall came within .125 per cent of the jointly commissioned report (KPMG LLP, 2010).

In addition to claiming that Canada's flawed and inequitable provision of child welfare services is discriminatory, the human rights complaint alleges that First Nations children are unable to access government services on the same terms as other Canadian children. A lack of clarity in the division of child welfare obligations between provinces and federal government, and within federal government departments, regularly resulted in government officials denying First Nations children services that are available to other Canadian children, or delaying the provision of such services until the funding dispute was resolved (First Nations Child and Family Caring Society of Canada, 2014).

In an effort to address the problem, the House of Commons passed Jordan's Principle in December of 2007. This child-first principle requires the government department of first contact to provide the service to the child and then resolve any jurisdictional payment disputes later. Jordan's Principle is named in memory of 5-year-old Jordan River Anderson who spent over 2 years unnecessarily in hospital while the Governments of Manitoba and Canada argued over payment for his at-home care. He died in hospital never having spent a day in a family home. Sadly, as the Federal Court recently found, the Government of Canada took a very narrow view of Jordan's Principle, applying it only to children with multiple disabilities, multiple service providers, and to disputes between two different governments, despite research showing the most common disputes are between two federal government departments in the same government. Moreover, the Minister of Aboriginal Affairs and Northern Development has to proclaim it a Jordan's Principle case before the government officially acknowledges it. Not surprisingly, the Government of Canada maintains there are no Jordan's Principle cases. Canada's failure to implement Jordan's Principle was an issue at the Tribunal, and federal government documents showed that deplorable harms to children arose from this narrow interpretation. For example, a child off reserve in Canada with a disability would receive as many mobility devices as medically required, whereas a child on reserve can only receive one mobility device every 5 years and is ineligible for electric wheelchairs. Children off reserve receive orthodontic care when required, but a child on reserve is only entitled to orthodontic care when the child cannot eat or cannot talk (Aboriginal Affairs and Northern Development Canada, 2009). Provinces and professional groups object to the Canadian Government's narrow interpretation of Jordan's Principle (Aboriginal Affairs and Northern Development Canada, 2011) and yet the government has not reviewed its definition of Jordan's Principle to more closely reflect the original intent of Parliament. As the testimony of Canada's chief official on Jordan's Principle demonstrates, the government's attitude toward what it characterises as 'non-Jordan's Principle cases' is highly disturbing:

> **Government of Canada official:** Well, yes, I recognize this document, yes. I don't know this is one of the many documents that we would use to roll out the case information. I didn't draft this document.
>
> **Mr Wuttke, legal counsel for the Assembly of First Nations:** Okay. All right, thank you. I'd just like to turn you to the next page of the first chart, I'd say, and do you want to take a minute to read this to refresh your memory.
>
> **Government of Canada official:** So the Cross Lake [First Nation] case?
>
> **Mr Wuttke, legal counsel for the Assembly of First Nations:** Yes, the Cross Lake case.
>
> **Government of Canada official:** Okay.

– Pause

Government of Canada official: Okay.

Mr Wuttke, legal counsel for the Assembly of First Nations: For the record, this is a chart that states that it's First Nation children with disability cases. From my understanding of this text, it's regarding a child that was diagnosed with Batten Disease, a fatal inherited disorder of the nervous system, a disease that progressively causes loss of sight, speech, motor skills and respiratory distress.

Mr Wuttke, legal counsel for the Assembly of First Nations: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?

Government of Canada official: Well, it said the summer of 2008.

Mr Wuttke, legal counsel for the Assembly of First Nations: Okay.

Government of Canada official: 'Tomatoe/tomato'.

Mr. Wuttke, legal counsel for the Assembly of First Nations: Between half a year and three-quarters of a year?

Government of Canada official: Yes, yes.

Mr Wuttke, legal counsel for the Assembly of First Nations: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?

Government of Canada official: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. You could make many assumptions. Perhaps it took time to resolve the issue, order the bed, deliver the bed. There could have been a number of factors and I wasn't part of this case, nor the case conferencing process, so I am unable to indicate why there was that delay and the information just isn't here to provide any factual certainty as to what were the issues. (Canadian Human Rights Tribunal, 2014, p. 118)

In my view, the official testimony from the Government of Canada was much more characteristic of a government trying to protect itself than protect children. This theme was replicated in Canada's closing written submissions to the Canadian Human Rights Tribunal in this case. For example, the federal government tries to discredit the numerous government documents showing the inequalities and harms to children by suggesting these are simply personal views of federal government employees. The federal government tries to discount the reports by the Auditor General of Canada by suggesting the report should be given minimal weight even though the federal government agreed with her findings. The closing submissions are replete with technical defences of the government without citing one claim of how its position is in the best interests of children (Attorney General of Canada, 2014).

Overcoming Government Resistance to Equity for First Nations Children

Over the 7 years after the case was filed in 2007, the Government of Canada spent over 3 million dollars in its unsuccessful efforts to derail a public hearing on the facts, by challenging the jurisdiction of the Canadian Human Rights Tribunal to hear the case. Contrary to its commitments pursuant to the United Nations Convention on the Rights of the Child, none of Canada's unrelenting arguments to dismiss the case were based on the best interests of First Nations children. Rather, Canada argued that the case should be dismissed because federal funding should not be compared to provincial funding for child welfare, even though the same laws apply. In addition, they argued that it should be dismissed because it funds First Nations child welfare agencies that deliver the services, so if the service is discriminatory it is the agency that should be held accountable, not the government (Attorney General of Canada, 2014; Blackstock, 2011). Canada also suggested that the Canadian Human Rights Tribunal was not the appropriate place for this case to be heard without pointing to an effective alternative (Attorney General of Canada, 2014).

The Federal Court [*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445] and Federal Court of Appeal [*Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75] dismissed Canada's arguments to dismiss the case on a preliminary basis and ordered the hearings at the Tribunal to proceed.

The historic nature of these hearings cannot be overstated. The Canadian Human Rights Commission, a group charged with upholding the *Canadian Human Rights Act*, suggests that this case is one of the most important human rights cases in Canadian history as it will inform how Aboriginal peoples can use the Act to enforce their rights (Canadian Human Rights Commission, 2013). It has the potential of setting a legal precedent that could force the Government of Canada to provide equitable services to First Nations children in education, health and other areas.

While the law is one tool for government reform, it becomes more effective when nested in public education and engagement strategies designed to inspire political change. Despite the historic nature of the complaint, only a handful of people attended the news conference announcing the filing of the complaint in 2007. The Caring Society believed that the Canadian public would be outraged if they knew about the inequitable treatment of First Nations children and were provided with a meaningful way to

help. In that spirit, the Caring Society launched an on-line campaign called 'I am a witness' to complement the human rights complaint (First Nations Child and Family Caring Society of Canada, 2013). The 'I am a witness' website features all of the publicly available court documents, video records of the hearings, as well as relevant reports by independent groups such as the Auditor General of Canada (2008). Citizens and organisations are asked to register as a witness, meaning that they agree to watch the case on line or in person before making up their own minds about whether Canada is treating First Nations children fairly. To date, over 13,500 individuals and organisations across Canada and around the world have registered to be witnesses on line, and hundreds routinely attend the hearings, making the First Nations child welfare human rights case the most formally watched human rights case in Canadian history. The increased public engagement in the case spurred increase media attention and international interest.

Consistent with Article 12 of the United Nations Convention on the Rights of the Child, the 'I am a witness' campaign promotes child participation in a matter that directly affects them, and promotes public education and engagement. It also promotes confidence in the legal system by ensuring transparency in the process and respecting the right of individual witnesses to make up their own minds about what is happening.

Holding States Accountable for Systemic Maltreatment

The Canadian Human Rights Tribunal on First Nations child welfare is a useful example of how Indigenous peoples are employing binding domestic and international human rights mechanisms, and leveraging public education and engagement to rectify longstanding Indigenous child rights violations. Closing arguments were heard in October of 2014 and a ruling is expected in early 2015. While the Canadian Human Rights Commission and First Nations are hopeful that the Tribunal, upon hearing all of the evidence, will conclude discrimination has occurred and order an enforceable remedy, there is no doubt that this case will set an important national and international precedent on Indigenous child rights.

The longstanding nature of Canada's discriminatory behaviour in the face of opportunities to remedy the situation speaks to the importance of having a judicial body with binding authority to review government provision of child welfare services. By statute, the government or its agents can remove children from their families, but when the state itself fails to ensure the safety and wellbeing of a child there is little recourse. This sets in play a situation where the state becomes an omnipotent parent immune from child welfare legal oversight.

The international implications of this case for the rights of Indigenous children are significant. The United Nations Committee on the Rights of the Child (2003, 2012) has noted repeatedly that the Government of Canada's funding for First Nations child welfare is insufficient and UNICEF (2013) noted the importance of the Canadian Human Rights Tribunal as a redress mechanism for discrimination experienced by First Nations children. As noted by the United Nations Committee on the Rights of the Child (2009) in its general comment on the rights of Indigenous children, Indigenous children frequently experience discrimination. The discriminatory conduct includes states failing to ensure that Indigenous children receive non-discriminatory services that account for cultural needs and historical disadvantage. This includes Indigenous children in other wealthy developed countries, such as the United States and Australia, where Indigenous children receive inequitable child welfare services and other supports. Leaders in Indigenous child rights from both countries have studied the Canadian Human Rights Tribunal on First Nations child welfare and travelled to Canada to attend the hearings, to see if a similar approach could end longstanding government-based inequities for Indigenous children in their respective countries.

The repeated and preventable failure of child protection systems and the governments to prevent systemic maltreatment is not restricted to Indigenous children or to Canada. For example, poverty contributing to neglect is the biggest driver of child removals in the United States (US Department of Health and Human Services, 2010) and yet little effort has been made to remedy the situation (Pew Charitable Trusts, 2008). The economic and social costs of this lack of progress, despite promising interventions, is staggering. The Pew Charitable Trust (2008) estimates the cost of maltreatment in the United States to be 107 billion dollars. A similar study in Canada pegged the cost at 15 billion per annum (Bowlus, McKenna, Day, & Wright, 2003). Most importantly, the failure of child protection systems to act on available solutions to address systemic maltreatment arising from flawed policy and practice has significant implications for children themselves. For example, the Canadian Human Rights Tribunal case on child welfare will affect over 163,000 children, and it is estimated that First Nations children on reserve and in the Yukon Territory collectively spent over 66 million nights in foster care between 1989 and 2012 (Aboriginal Affairs and Northern Development Canada, 2012b). Life in foster care is very difficult; as case accounts by Hubner and Wolfson (2003) describe, obstructing the attachment between children and parents must only be contemplated when all other alternatives have been exhausted. Children, such as the First Nations children on reserve and in the Yukon Territory, affected by the Canadian Human Rights Tribunal case [*First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708] should not be placed into child welfare care because of systemic policy and practice breaches that fail to protect them.

Moreover, the current lack of government accountability puts in play an untenable and tragic situation where the

state becomes an omnipotent parent immune from the very obligations it enforces on families.

Considerations and Impacts

Child protection statutes are vested in the state's *parens patriae* authority (Stein, 2007) enabling states to supersede parental rights to ensure the safety and best interests of a child(ren). *Parens patriae* does not explicitly contemplate situations where the state itself is violating the safety and best interests of the child. While government immunity laws are important to protect against spurious complaints, they should not be interpreted in ways that subjugate children's fundamental right to safety and security, nor should they allow negligent systemic policy or practice to interfere unnecessarily with parents' rights to raise their children.

While it is difficult to rationalise why governments and child welfare organisations charged with ensuring child safety and best interests would resist reforms to address systemic maltreatment sourced in flawed policy and practice, they are likely to oppose them. However, as the success of First Nations in bringing Canada to account for its systemic treatment in *First Nations Child and Family Caring Society et al v. the Attorney General of Canada*, CHRT T1340/7708 demonstrates, such resistance should not thwart efforts to pursue those reforms. As the 'I am a witness' campaign has shown, the reform movement has significant and broad-based support among professionals allied with child well-being, child rights experts and, most importantly, among children, youth and families.

When the Caring Society filed the case against Canada, it had C$50,000 in unrestricted revenue for the case — clearly insufficient compared to the significant legal resources of the federal government. The Caring Society's financial situation became even more unstable when the Caring Society experienced a complete loss of federal government core funding 1 month after filing the complaint, and a government program to assist citizens and NGOs to bring public-interest cases was de-funded by the federal government. Despite these challenges, the Caring Society was able to leverage the importance of the case to secure private funding for the organisation and maintain high-quality *pro-bono* legal counsel throughout 8 years of litigation. While it is almost impossible to achieve a full state of readiness to challenge a powerful and well-resourced government for alleged child rights violations, if there are egregious and preventable harms to children at stake, the case should be brought anyway. It is not a logical position, but it is a practical and moral one. If the case is based on strong evidence, the Caring Society's experience is that credible supporters, including financial supporters, will step up to the plate. If the worst happens and the Caring Society or others in this situation collapse under the weight of government pressure, then at least they stood up for the children in ways that honour their values and show the children that they were important enough to fight for.

Conclusion

The omnipotence of child welfare organisations and governments to perpetrate preventable systemic maltreatment requires redress. This redress must include the development of independent review mechanisms with the power to bind states to implement remedies for a range of rights violations. For example, statutes such as the Canadian Human Rights Act, upon which the First Nations child welfare case is based, is one pathway, but its legislative frame is restricted to discrimination and thus it would be unable to address complaints on issues such as the failure to provide adequate poverty-directed services. International review mechanisms such as the *United Nations Convention on the Rights of the Child*, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 171, U.N. Doc. A/44/49 (1989) can make systemic child welfare reform recommendations to States Parties to improve compliance with the Convention but recommendations are not binding. While individual complainants may bring constitutional challenges in both Canada and the United States to bring about systemic reform, these claims are subject to government immunity laws that thwart a wide range of complaints.

One possible solution would be to amend the legislation for children's advocates across Canada so their recommendations were, in certain instances, binding on government and non-government organisations providing child welfare. Another option is to establish federal and provincial tribunals with the authority to hear complaints of systemic maltreatment by governments and delegated child welfare authorities. While the legal avenues for redress would require further research, the longstanding perpetration of systemic maltreatment of First Nations children in Canada shows that the status quo is simply unacceptable.

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