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Article abstract

In February 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint under the *Canadian Human Rights Act* alleging that the Government of Canada's inequitable provision of child welfare services to 163,000 First Nations children, along with its flawed implementation of Jordan's Principle, was discriminatory on the prohibited grounds of race and national ethnic origin. The case was highly contested. By the time the final arguments were heard in 2014, the Government of Canada had made eight unsuccessful attempts to get the case dismissed on technical grounds and breached the law on three occasions. On 26 January 2016, the Canadian Human Rights Tribunal substantiated the complaint and ordered the Canadian Government to cease its discriminatory conduct. This article describes this historic case from the perspective of the executive director of the complainant, the First Nations Child and Family Caring Society of Canada, highlighting access to justice issues for equality-seeking Indigenous groups, children, and civil society. Recommendations for reform are discussed.

THE COMPLAINANT: THE CANADIAN HUMAN RIGHTS CASE ON FIRST NATIONS CHILD WELFARE

*Cindy Blackstock**

In February 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint under the *Canadian Human Rights Act* alleging that the Government of Canada's inequitable provision of child welfare services to 163,000 First Nations children, along with its flawed implementation of Jordan's Principle, was discriminatory on the prohibited grounds of race and national ethnic origin. The case was highly contested. By the time the final arguments were heard in 2014, the Government of Canada had made eight unsuccessful attempts to get the case dismissed on technical grounds and breached the law on three occasions. On 26 January 2016, the Canadian Human Rights Tribunal substantiated the complaint and ordered the Canadian Government to cease its discriminatory conduct. This article describes this historic case from the perspective of the executive director of the complainant, the First Nations Child and Family Caring Society of Canada, highlighting access to justice issues for equality-seeking Indigenous groups, children, and civil society. Recommendations for reform are discussed.

En février 2007, la Société de soutien à l'enfance et à la famille des Premières Nations du Canada et l'Assemblée des Premières Nations ont déposé une plainte contre le Gouvernement du Canada en vertu de la *Loi canadienne sur les droits de la personne*. Cette plainte alléguait que la conduite du Gouvernement en matière de prestation des services à la protection de l'enfance, offerts à 163 000 enfants des Premières Nations, ainsi que les lacunes de mise en œuvre du principe de Jordan, étaient discriminatoires pour les motifs interdits de la race et de l'origine ethnique et nationale. Ce cas fût fortement contesté. Au moment où les plaidoiries finales furent entendues en 2014, le Gouvernement du Canada avait tenté à huit reprises infructueuses de faire rejeter l'affaire pour des motifs techniques et avait violé la loi à trois reprises. Le 26 janvier 2016, le Tribunal canadien des droits de la personne a jugé la plainte fondée et a ordonné au gouvernement canadien de cesser sa conduite discriminatoire. Cet article décrit ce dossier historique en adoptant la perspective du directeur général de la partie plaignante, la Société de soutien à l'enfance et à la famille des Premières Nations du Canada, et met en lumière les enjeux d'accès à la justice pour les groupes autochtones, les enfants et la société civile qui revendiquent l'égalité. Des recommandations de réforme sont abordées.

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Introduction

The day before Prime Minister Stephen Harper issued an apology for the multi-generational harms arising from residential schools on 11 June 2008,[1] I was at Beechwood Cemetery visiting Dr. Peter Henderson Bryce, a former chief medical health officer for the Department of Indian Affairs. In 1907, Dr. Bryce's internal government report on the health of residential school students was leaked to the Ottawa *Evening Citizen*, noting that twenty-five per cent of the children were needlessly dying each year because of the Government of Canada's refusal to provide them with adequate tuberculosis treatment.[2] As Dr. Bryce vigorously pushed for the life-saving reforms, Canada retaliated by cutting his research funding, preventing him from presenting his findings at medical conferences, denying him appointments for which he was eminently qualified, and ultimately pushing him out of the public service.[3]

One hundred years after Dr. Bryce's report appeared in the newspaper, the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations filed a human rights complaint alleging that the Government of Canada, through the Department of Indian and Northern Affairs Canada (INAC),[4] discriminated against 163,000 First Nations children residing on reserve by failing to implement Jordan's Principle[5] properly and by providing inequitable child welfare services, contrary to the *Canadian Human Rights Act*[6] (*CHRA*). These alleged inequities arise because INAC requires First Nations Child and Family Services (FNCFS) agencies to use provincial and territorial child welfare laws on reserve, and the federal government funds the service at

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1 See The Right Honourable Stephen Harper on behalf of the Government of Canada, "Statement of Apology to Former Students of Indian Residential Schools" (11 June 2008), online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/>.

2 See "Schools Aid White Plague", *The Evening Citizen* (15 November 1907) 1.

3 See John S Milloy, *"A National Crime": The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 51–61, 81–106 [Milloy, *National Crime*].

4 The department has borne multiple names over the past few decades, including: Department of Indian Affairs and Northern Development; Aboriginal Affairs and Northern Development Canada (AANDC); and Indigenous and Northern Affairs Canada (since November 2015).

5 Jordan's Principle is a child-first principle to ensure that government jurisdictional disputes related to First Nations status do not interfere with the access of First Nations children to public services on the same terms as other children (see Jordan's Principle Working Group, *Without Denial, Delay, or Disruption: Ensuring First Nations Children's Access to Equitable Services through Jordan's Principle* (Ottawa: Assembly of First Nations, 2015) at 4, 8).

6 RSC 1985, c H-6, ss 3(1), 5 [*CHRA*].

lower levels and with more restrictions compared to the funding that provinces and territories provide to children living off reserve.[7] I told Dr. Bryce that I would be back to visit when the kids won the case.

It would be another eight years until I could share the good news of the children's victory with Dr. Bryce. On 26 January 2016, the Canadian Human Rights Tribunal (CHRT) found the Government of Canada's flawed and inequitable provision of First Nations child welfare services to be discriminatory on the prohibited grounds of race and national or ethnic origin.[8] In its decision, the CHRT linked the discriminatory funding to the growing number of First Nations children coming into the care of child welfare, "acknowledg[ing] the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner."[9] The CHRT also "recognize[d] those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves."[10] The CHRT noted that INAC was aware of its flawed and inequitable child welfare funding for at least sixteen years, had access to solutions to address the problem, and yet repeatedly failed to take action.[11] When news of the decision broke, I asked, "Why did we have to bring the Government of Canada to court to get them to treat First Nations children fairly?"[12] Why would the federal government fight so vigorously to defend racism against children as fiscal policy?

While historians, legal scholars, and human rights activists will write thoughtfully about these and other questions, this article describes the historic, nine-year long First Nations child welfare case from my unique perspective as the executive director of the complainant,[13] the Caring Society. Using an access to justice lens, this article explains why the com-

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7 See Lawrence Joseph & Cindy Blackstock, *Human Rights Commission Complaint Form Against Indian and Northern Affairs Canada*, online: <https://fncaringsociety.com/sites/default/files/fnwitness/HumanRightsComplaintForm-2007.pdf>.

8 See *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 2 at paras 28, 456–67, 473, 83 CHRR D/207 [*Caring Society* 2016].

9 *Ibid* at para 467.

10 *Ibid*.

11 See *ibid* at paras 386, 454, 461.

12 Assembly of First Nations, "The Canadian Human Rights Tribunal: First Nations Child Welfare Human Rights" (26 January 2016), online: AFN <https://livestream.com/afn/iamawitness> at 00h:09m:05s.

13 While the Caring Society was the complainant in the First Nations child welfare case before the CHRT, the Caring Society and I acted as co-complainants in the retaliation case before the CHRT. I was also the complainant in the Privacy Commissioner's investigation on government surveillance related to the case. For details on the federal government's retaliation against the Caring Society and the author, see Part II, below.

plaint was filed, describes the nine-year procedural history of the case, including Canada's use of legal and illegal strategies to try to have the case dismissed before the facts could be heard,[14] and discusses the nesting of the case in a child friendly, public education, and engagement campaign, called "I Am a Witness."[15] The case narrative raises several access to justice issues, including: the right of First Nations clients to receive equal benefits under child welfare laws; the access of First Nations to human rights remediation; the right of children to participate in systemic cases; the effect of client-solicitor relationships, legal culture, and conventions on children's access to justice; the ability of small organizations to file public interest cases against change-resistant governments; and the retaliation of governments against human rights defenders. The article concludes by issuing recommendations to improve access to justice across these domains.

I. Red Tape and Duct Tape: Discrimination on the Ground

I served as a child protection worker for the province of British Columbia between 1987 and 1995, where I was stationed primarily on the north shore of Vancouver. The urban population in our catchment area was culturally and socio-economically diverse, but the families we saw at the child protection office were more homogenous. They were often low-income First Nations and refugee families from traumatic backgrounds reported to child welfare for neglect concerns.

At the time, reliable child welfare data was scant, but later studies confirmed what many of us saw on the front line: Aboriginal children are twice as likely as non-Aboriginal children to be placed in foster care.[16] The overrepresentation of First Nations children in foster care may be attributed to neglect fueled by poverty, poor housing, and parental sub-

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[14] See *First Nations Child and Family Caring Society of Canada v Canada* (*AG*), 2015 CHRT 14, 81 CHRR D/274 [*Caring Society* 2015]; *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2013 CHRT 16 (available on CanLII) [*Caring Society* 2013]; Office of the Privacy Commissioner of Canada, "Aboriginal Affairs and Northern Development Canada Wrongly Collects Information from First Nations Activist's Personal Facebook Page" (29 October 2013), online: OPC <https://www.priv.gc.ca/> [Privacy Commissioner, "AANDC Wrongly Collects Information"].

[15] The "I Am a Witness" website invites citizens and groups to follow the case in person or online by reviewing the legal submissions, the evidence, and the rulings (see First Nations Child and Family Caring Society of Canada, "I Am a Witness: Canadian Human Rights Tribunal Hearing", online: FNCFCSC <https://fncaringsociety.com/i-am-witness> ["I Am a Witness"]).

[16] See Nico Trocmé, Della Knoke & Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78:4 Social Service Rev 577 at 583–84.

stance abuse related to the multi-generational trauma arising from residential schools and other colonial experiences.[17] The sifting out of wealthy and middle-class families among neglect complaints is largely due to the child protection system's tendency to codify structural risk and historical disadvantage as personal and family deficits coupled with a dearth of child protection interventions targeting poverty, trauma, and addictions.[18]

During my tenure with the province, working conditions were relatively good: the office was fully accessible; it had child-friendly interview rooms, a family visiting area, and a secure file area; and it complied with workplace health and safety standards. My salary was reasonable with a generous benefits package, including a pension indexed for inflation. Most importantly, we had the tools we needed to assist families. There was a very well developed array of specialized services within government and voluntary sector services, such as food banks, low-income housing, child development supports, parenting programs, family recreation, and mental health services. While I always wished we had more services, the range of services we had at our disposal was adequate to meet the needs of most families, and thus our child removal rates were low.

The Squamish First Nation reserve lands were located across the street from our office. In 1993, the Squamish Nation opened its own FNCFS agency, known as Ayas Men Men Child and Family Services (Ayas Men Men). I left my position with the province to work at Ayas Men Men in 1995. Funding discrepancies in agency operation and services were absolutely astonishing and immediately apparent. Heavy rains, common to Vancouver, caused the high-voltage power lines crossing over our office to spark. The file room was a shed, the office boardroom doubled as a family visiting area, and golf balls from the adjacent driving range posed a frequent hazard in the parking lot. Basics like medical equipment for children in care and support services to keep families safely together

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17 See *ibid* at 594–96; Cindy Blackstock, "Should Governments Be Above the Law? The Canadian Human Rights Tribunal on First Nations Child Welfare" (2015) 40:2 Children Austl 95 at 97 [Blackstock, "Above the Law"]; Vandna Sinha et al, "Understanding the Investigation-Stage Overrepresentation of First Nations Children in the Child Welfare System: An Analysis of the First Nations Component of the Canadian Incidence Study of Reported Child Abuse and Neglect 2008" (2013) 37:10 Child Abuse & Neglect 821 at 828–29; Amy Bombay, Kim Matheson & Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes among First Nations Peoples in Canada" (2009) 5:3 J Aboriginal Health 6 at 6–7; Cindy Blackstock & Nico Trocmé, "Community-Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change" (2005) 24 Social Policy J NZ 12 at 16–29. See also James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013) (discussing the roots of the disparity in health conditions between Indigenous and non-Indigenous Canadians).

18 See Blackstock, "Above the Law", *supra* note 17 at 97.

were negligible, difficult to access, or unavailable. Voluntary sector organizations (providing family counseling, food banks, and emergency shelter services off reserve) often refused to serve families on reserve, citing limited resources and the incorrect assumption that the needs of on-reserve families were adequately addressed by the federal government.[19]

My clinical service assessments were often muted by a rigid federal funding formula applied to on-reserve FNCFS agencies, known as Directive 20-1. The Department of Indian Affairs launched the directive in 1991, which aimed at ensuring that First Nations children residing on reserve would receive culturally appropriate child welfare services comparable to those provided off reserve.[20] The formula featured two funding streams: an operations allocation to cover the costs of operating FNCFS agencies, including a negligible amount for prevention, and a maintenance allocation to reimburse the costs of maintaining children in care.[21] There was an inflation-adjustment mechanism built into the formula, but it was unilaterally eliminated by INAC in 1995.[22] The operations portion of the formula was driven by bureaucratic assumptions that failed to consider client needs and provincial or territorial statutory requirements. INAC's FNCFS program offered no funding to support culturally-based practices and failed to account for the higher client needs of First Nations children, which stem from the multi-generational trauma arising from residential schools.[23]

The disconnect between the directive and provincial child welfare laws, on the one hand, and the actual needs of First Nations families, on the other, resulted in profound service inequities, particularly in the range of services intended to keep children safely at home (i.e., prevention

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19 The lack of voluntary sector service access on reserve is discussed in Cindy Blackstock, "First Nations Children and Families: In Search of the Voluntary Sector" in Frederick Bird & Frances Westley, eds, *Voices from the Voluntary Sector: Perspectives on Leadership Challenges* (Toronto: University of Toronto Press, 2011) 173 at 173, 175–84 (presenting the findings of a study surveying FNCFS agencies serving 47 of the 196 First Nations reservations in British Columbia).

20 See Indian and Northern Affairs Canada, *First Nations Child and Family Services: National Program Manual*, May 2005 update (Ottawa: INAC, 2004) at 5.

21 See *ibid* at 13–18.

22 On the failure of the operations formula to adjust for inflation, see J Loxley et al, *Wen:de: The Journey Continues*, 1st ed (Ottawa: First Nations Child and Family Caring Society of Canada, 2005) at 18–19.

23 See Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons: First Nations Child and Family Services Program—Indian and Northern Affairs Canada*, ch 4 (Ottawa: OAG, 2008) at 8–13, 19–23, 29 [2008 OAG *Report*].

services and least disruptive measures).[24] The lack of prevention services meant that social workers had limited resources to stabilize family situations and prevent First Nations children from coming into child welfare care.

Federal funding deficits also had a direct impact on my workload. For example, when I worked for the province of British Columbia, I had access to a specialized policy unit; yet, policy support was unavailable on reserve, so my colleagues and I had to conduct such policy analysis in addition to our casework. Negotiating with federal officials to access basic services for children took up a significant amount of time, and I often gave up in frustration because the child could not wait for the service. I therefore ended up paying for the service personally or held fundraisers to compensate for systemic shortcomings in funding. Raising funds for statutory children's services by hosting raffles was unheard of in the provincial civil service, but such fundraising practices were a regular occurrence on reserve. The problem with relying on raffles in lieu of public funding is that it took away from my social work responsibilities and I did not always raise enough money to get children the services they needed. Despite my best efforts and those of my colleagues, First Nations families on reserve were often denied basic statutory child welfare services that would have been available to them off reserve without question.

The harm arising from the child welfare inequities echoed across other federally funded children's programs on reserve—such as early childhood, education, and health—making it difficult and all too often impossible to meet the children's needs, no matter how dire or urgent their situation. For example, one critically ill child required a nutritional supplement, as he could not eat a regular diet and his family could not afford it. Health Canada said to file an application, which would take several weeks to process. As Health Canada officials had no answer as to what the child was to do in the meantime, I bought the nutritional supplement. Another child with cerebral palsy had a standing frame that was held together with duct tape. The federal government said the child would have to wait several years before he became eligible for a new piece of medical equipment.

These injustices inspired me to leave front-line social work to focus on retooling federal child welfare policies to better support the best interests of First Nations children. At the time, I was naive enough to believe that, if we worked with the federal government to document the funding shortfall and its harmful impacts on children and to develop evidence-based

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[24] See Indian and Northern Affairs Canada, Fact Sheet, "First Nations Child and Family Services" (October 2006), reproduced in *First Nations Child and Family Caring Society of Canada*, online: <https://fncaringsociety.com/sites/default/files/docs/Fact-Sheet-FN-Child-Family-Services-Indian-Northern-Affairs.pdf> [INAC, "FNCFS Fact Sheet"].

and economically-sound solutions, the government would do the right thing. I was wrong.

II. Research to Nowhere: Reviews of INAC's FNCFS Program

In 1997, I began collaborating with other First Nations child welfare experts from across Canada to produce two national studies of INAC's FNCFS program, which were published in 2000[25] and in 2005.[26] The reports, commissioned by INAC and the Assembly of First Nations, engaged a team of scholars from a wide variety of disciplines, including social work, law, community development, information technology, management, and economics. The 2000 study, the *First Nations Child and Family Services: Joint National Policy Review* (*NPR*), revealed that federal funding for First Nations child welfare was on average 22 per cent lower than provincial expenditures for non-Aboriginal children in care.[27] The 2005 study, known as the *Wen:de* report, included a more detailed economic analysis and pegged the shortfall between federal and provincial child welfare funding at approximately 30 per cent.[28] Both studies confirmed what I had seen first-hand at the Squamish Nation Ayas Men Men agency: there was negligible funding to keep families safely together; resources for agency operations and staffing fell well below industry standards; funding was insufficient to ensure that services were culturally appropriate and kept pace with legislative changes; and a lack of coordination within and across federal and provincial governments resulted in service denials, disruptions, and delays. The reports also found that the directive failed to account for the higher needs of First Nations children related to the multi-generational impacts of residential schools. These inequities contributed to growing numbers of children in care.[29] INAC data showed that, between 1995 and 2001, the number of First Nations children placed in child welfare care on reserve increased by a staggering 71.5 per cent.[30]

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[25] See Rose-Alma J McDonald et al, *First Nations Child and Family Services: Joint National Policy Review* (Ottawa: Assembly of First Nations & Indian and Northern Affairs Development, 2000).

[26] See Loxley et al, *supra* note 22.

[27] See McDonald et al, *supra* note 25 at 14.

[28] See Loxley et al, *supra* note 22 at 133, 189 (estimating additional revenue needs to approximately 109 million dollars); Indigenous and Northern Affairs Canada, "First Nations Child and Family Services", online: <https://www.aadnc-aandc.gc.ca/eng/1100100035204/1100100035205#chp2> (calculating FNCFS expenditures for 2013–2014 to 365 million dollars).

[29] See *ibid* at 20, 30–31; McDonald et al, *supra* note 25 at 13–15, 110–18.

[30] See Canada, Department of Indian Affairs and Northern Development, "Year End Figures for Children in Care and Days Care, 1995–2001", cited in Brad McKenzie, *Block*

In addition to recommending funding enhancements, the *Wen:de* report proposed a series of economic and policy reforms. For example, the report recommended the full implementation of Jordan's Principle to ensure that First Nations children on reserve are not denied or delayed receipt of services because of funding disputes within or between federal, provincial, or territorial governments related to the child's First Nations status.[31] Jordan's Principle is a child-first response to jurisdictional disputes, which requires the government of first contact to fund services to First Nations children that are normally provided to other children and to address payment issues later.[32] The principle is named after Jordan River Anderson, a young boy from Norway House Cree Nation, who spent over two years in a hospital unnecessarily because the province of Manitoba, INAC, and Health Canada argued over the payment of his proposed in-home care because he was a First Nations child. Had Jordan been a non-Aboriginal child, he would have gone home. Because of the jurisdictional payment issues arising from his First Nations status, however, he never left the hospital, and tragically died there at the age of five.[33]

The *Wen:de* report confirmed that Jordan's tragic situation was not an isolated incident. Detailed case studies of 12 of the 108 FNCFS agencies found that 393 children had been denied or delayed receipt of public services available to other children in the past year, and that it took an average of 50.25 hours for social workers to resolve each case.[34] The *Wen:de* report urged the federal government to implement Jordan's Principle to ensure that First Nations children access public services on the same terms as other children, and that governments sort out payment after the child receives the service.[35] Parliament unanimously passed Motion 296 in support of Jordan's Principle in 2007,[36] but never properly implemented it.[37]

Funding Child Maintenance in First Nations Child and Family Services: A Policy Review (2002) at 19–20 [unpublished, archived at Kahnawake Shakotiia'takehnhas Community Services].

31 See Loxley et al, *supra* note 22 at 16.

32 See Cindy Blackstock, "Jordan's Principle: Canada's Broken Promise to First Nations Children?" (2012) 17:7 Paediatrics & Child Health 368 at 368.

33 See *ibid*; Trudy L Lavallee, "Honouring Jordan: Putting First Nations Children First and Funding Fights Second" (2005) 10:9 Paediatrics & Child Health 527 at 527.

34 See Loxley et al, *supra* note 22 at 10, 16.

35 See *ibid* at 15–18.

36 See House of Commons, *Votes and Proceedings*, 39th Parl, 2nd Sess, No 27 (12 December 2007). See also Indigenous and Northern Affairs Canada, "Jordan's Principle" (17 November 2016), online: INAC <www.aadnc-aandc.gc.ca/eng/1334329827982/1334329861879>.

The authors of the *Wen:de* report emphasized the interconnection of the proposed funding formula elements with policy reforms and warned against piecemeal implementation.[38] In addition, they noted that the *Wen:de* report was based on the best available evidence at the time, and thus it was important that INAC adjust the formula as needed to keep pace with best practices in First Nations social work and with changes to the contextual environment and child welfare statutes.[39]

The Liberal federal government often cited the *NPR* and *Wen:de* reports as a credible basis for policy reform,[40] but failed to implement the recommendations of either report before leaving power in 2006. When the Conservative party succeeded the Liberals as Canada's federal government, trumpeting financial responsibility as their political banner,[41] I expected that the economically-detailed solution contained in the *Wen:de* report would appeal to them by offering a meaningful and quick fix to a significant issue facing First Nations. It did not.

Instead, the Conservative government developed a new funding formula, called the Enhanced Prevention Focused Approach (EPFA), and slowly began implementing it in some regions of the country, starting with Alberta in 2007.[42] According to INAC, the goals of EPFA were to achieve equitable and culturally based child and family services, including an expanded range of prevention services, improved service coordination, and community engagement.[43] While EPFA included some of the *Wen:de* report's recommendations, INAC ignored the most substantial reforms, such as the proper implementation of Jordan's Principle, the provision of adequate agency operations funding, and the inclusion of an ongoing inflation adjustment mechanism. As the Auditor General of Canada noted in 2008, while EPFA provided more funding for prevention services than Directive 20-1, it preserved some of the directive's weaknesses, and was

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37 See *Caring Society* 2016, *supra* note 8 at para 381. See also *Pictou Landing Band Council v Canada (AG)*, 2013 FC 342 at paras 106–20, [2013] 3 CNLR 371.

38 See Loxley et al, *supra* note 22 at 36.

39 See *ibid* at 32–34.

40 See *Caring Society* 2016, *supra* note 8 at paras 257–73.

41 See e.g. John Jacobs, "Conservative Ideology Dressed in Rhetoric of Fiscal Responsibility" (3 November 2006), *Canadian Centre for Policy Alternatives*, online: CCPA <www.policyalternatives.ca>.

42 See Aboriginal Affairs and Northern Development Canada, *National Social Programs Manual*, June 2012 update (Ottawa: AANDC, 2012) at 37 [*National Social Programs Manual*].

43 See *ibid* at 37–38.

thus flawed and inequitable.[44] Despite the Auditor General's critique, along with internal INAC evaluations that evidenced the same flaws, INAC failed to correct the formula and implemented EPFA in Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island.[45]

FNCFS agencies in British Columbia, Newfoundland and Labrador, New Brunswick, and the Yukon never received EPFA funding; rather, they continued to be funded pursuant to Directive 20-1.[46] Ontario First Nations were funded by a separate funding formula, known as the *Indian Welfare Services Agreement*, which was developed in 1965 and has undergone very few changes since that time.[47] For example, the last time the child welfare sections of the statute were updated in the 1965 agreement was 1981, meaning that progressive legislative reforms acknowledging the cultural needs of First Nations and best practices in social work were never reflected in the funding agreement.[48]

Across First Nations programs, the Conservative federal government deepened First Nations services inequality by scrapping existing approaches and promising solutions, and feeding into a public narrative that suggested that the lack of First Nations accountability, not inequality, was the problem.[49]

All of this contributed to a dire and deteriorating situation for First Nations children and families on reserve and in the Yukon. Given substantial and growing harms to children, and INAC's repeated failure to act on available solutions despite changes in government, the Caring Society and the Assembly of First Nations agreed that legal action was required. In the fall of 2006, the Assembly of First Nations advised then INAC Minister Jim Prentice that, unless the department took immediate and meaningful action to address the inequality, the Assembly of First

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44 See 2008 OAG *Report*, *supra* note 23 at 22–23. While the 2008 OAG *Report* focused on the situation in Alberta, it critiqued the formula (EPFA) that INAC used there and then applied, without adaptation, to the other regions (Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island).

45 See *Caring Society* 2016, *supra* note 8 at paras 136–48, 186–216.

46 See *ibid* at para 124.

47 See *ibid* at paras 217–25. See also 2008 OAG *Report*, *supra* note 23 at 14; *National Social Programs Manual*, *supra* note 42 at 10.

48 See *Caring Society* 2016, *supra* note 8 at paras 223–46.

49 See e.g. Thomas Walkom, "Stephen Harper Ignores Canada's First Nations at Own Peril", *Toronto Star* (17 October 2013), online: <www.thestar.com>; "Harper Wants 'Accountable' First Nations Self-Government", *CBC News* (2 December 2011), online: <www.cbc.ca>; Joshua Ostroff, "Joseph Boyden on Harper, First Nations, The Election, and Canadian Racism", *The Huffington Post* (15 October 2015), online: <www.huffingtonpost.ca>.

Nations would seek authority from First Nations Chiefs for the Assembly of First Nations and the Caring Society to file a human rights complaint. As the Minister took no action, the Chiefs unanimously passed Resolution 53/2006 in December 2006, granting us authority to file the complaint.[50]

III. Writing the Complaint and Praying

Looking back now, I shudder knowing that I wrote the complaint. The Caring Society decided to submit the complaint under the *CHRA*, as it had no money for a lawyer, and the *CHRA* appeared to be a more accessible and citizen-friendly way to redress human rights violations than a constitutional challenge. As a social worker, I was not thinking about the law when I wrote the complaint; I was thinking about the best interests of Indigenous children[51] and tried to set out as many facts as the three-page length limit would allow.

Writing about the best interests of Indigenous children within the framework of the *CHRA* was not an easy task. While the concept of the "best interests of the child" is a cornerstone of child protection law in Canada, the United Nations Committee on the Rights of the Child (UNCRC) cautions that its interpretation is often culturally laden with Western preferences for individual rights.[52] In order to better ensure the rights of Indigenous children, the UNCRC adopted *General Comment No. 11* in 2009, situating best interests at both the individual and collective levels.[53] For example, children have an individual right to practice their culture and enjoy the collective right to practice their culture among members of their group. Consistent with the right to self-determination under the *United Nations Declaration on the Rights of Indigenous Peoples*,[54] *General Comment No. 11* requires states to consult with Indigenous

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50 See Assembly of First Nations, Special Chiefs Assembly, Resolution No 53/2006, (5–7 December 2006).

51 For critiques of the cultural compatibility between the concept of the "best interests of the child" in Canadian law and Indigenous approaches to child wellbeing, see generally Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375.

52 See UNCRC, *General Comment No. 11 (2009): Indigenous Children and their Rights under the Convention*, 50th Sess, UN Doc CRC/C/GC/11, 12 February 2009, arts 31–32 [*General Comment No. 11*]. See also Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48:2 Osgoode Hall LJ 287; Nicholas Bala, "The Charter of Rights & Child Welfare Law" (Paper prepared for Law Society of Upper Canada Program on *Conduct of A Child Protection File*, 9 March 2004), online: <www.canadacourtwatch.com/legal_documents/charter&childwelfare2004.pdf>.

53 See *General Comment No. 11*, *supra* note 52, art 30.

54 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007), arts 3–5.

peoples regarding the best interests of Indigenous children.[55] While the non-discrimination provisions of the *CHRA* concord with the spirit of the United Nations *Convention on the Rights of the Child*[56] and *General Comment No. 11*, the *CHRA* does not specifically consider the unique situation of children who are members of enumerated groups.[57] This matter deserves special consideration in future revisions of the *CHRA*, given the more pronounced, lifelong impacts of discrimination on children.[58]

Overall, I had no idea how critical the language of the complaint would be in successfully navigating the plethora of procedural objections that INAC could, and did, raise. For example, I did not appreciate how important my passing reference to section 5 of the *CHRA*[59], along with my citation of Jordan's Principle, would become as the case evolved. INAC tried to argue that Jordan's Principle was outside the scope of the complaint and that the complaint should only be reviewed pursuant to subsection 5(b) of the *CHRA* rather than in concert with subsection 5(a).[60] Sometimes, my legal naïveté was an advantage, in that I was less likely to be deterred by significant legal issues than an informed lawyer would be. For example, overcoming section 67 of the *CHRA*, which disallows complaints related to the *Indian Act*,[61] was vital.[62] This provision had success-

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55 See *General Comment No. 11*, *supra* note 52, art 31.

56 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990) [*CRC*].

57 See *CHRA*, *supra* note 6, ss 5–14.1.

58 For information on the impacts of discrimination on children, see e.g. Canadian Council of Child and Youth Advocates, *Aboriginal Children: Canada Must Do Better, Today and Tomorrow*, Special Report submitted to the UN Committee on the Rights of the Child (CCCYA, 2011) at 17–20; Margo Lianne Greenwood & Sarah Naomi de Leeuw, "Social Determinants of Health and the Future Well-being of Aboriginal Children in Canada" (2012) 17:7 Paediatrics & Child Health 381 at 382–83; Milloy, *National Crime*, *supra* note 3 at xiii–xiv.

59 Section 5 of the *CHRA*, *supra* note 6, provides that

> [i]t is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
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> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual
>
> on a prohibited ground of discrimination.

60 See *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 206–21, [2013] 4 FCR 545 [*CHRC* FC].

61 RSC 1985, c I-5.

62 Section 67 of the *CHRA* provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." This section was repealed in 2008 (see *CHRA*, *supra* note 6, s 67, as repealed by *An Act to amend the Canadian Human Rights* Act, SC 2008, c 30, s 1).

fully prevented First Nations from bringing human rights complaints pursuant to the *CHRA*. Since I knew this provision existed when I wrote the complaint, I simply wrote the complaint without mentioning the *Indian Act*, thereby miraculously staying within the scope of the *CHRA* and thwarting a federal government challenge on this point.[63]

At first glance, the quasi-judicial nature of the *CHRA* seems well suited for self-represented complainants, as it affords a greater degree of legal flexibility. In the beginning, I thought the case would be assessed on the facts. On this basis, we were well prepared, given the weight of evidence demonstrating inequities in the provision of child and family services and our specialized knowledge of this issue. The perils of proceeding without a skilled lawyer, however, came into sharp focus for me when it became clear that Canada was going to litigate the case on legal technicalities instead of directly engaging with the factual question of whether INAC's FNCFS program was discriminatory.

From the beginning, the imbalance in legal capacity between the parties was overwhelming. INAC had a publicly funded legal team supported by paralegals, contractors, and INAC staff. By contrast, the Caring Society was self-represented and had no clear funding pathway to retain skilled legal representation. Accessing pro bono legal support was not initially possible for us. While the small Aboriginal legal firms in our network cared deeply about the children's cause, they did not have the resources to take on a case filed against a well-resourced respondent like INAC, which had a reputation of using procedural tactics to exhaust complainant's legal resources before cases could be heard. Additionally, we lacked relationships with large, well-established law firms better positioned to take on such a novel and time-consuming case. As a result, we had to somehow raise money for legal fees on top of trying to manage the case.

Accessing justice in the *CHRA* process has not always been this difficult for complainants. Prior to 2006, equality-seeking groups bringing cases in the public interest could apply for financial support from the Court Challenges Program of Canada.[64] This mechanism was cut, howev-

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[63] Section 67 of the *CHRA* is but one of the provisions of the *Indian Act* that historically hindered First Nations from seeking legal redress in Canadian courts. For a discussion of the "chilling effect" of the *Indian Act* on First Nations' willingness to use the civil justice system to assert their rights, see Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy—The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5 (Montreal & Kingston: McGill-Queen's University Press, 2015) at 199 [TRC *Final Report*].

[64] See Court Challenges Program, "About CCP", online: <www.ccppcj.ca/en/about.php>.

er, when the Conservative government came into power, and it was never restored.[65] A 2011 Supreme Court of Canada decision closed another funding pathway for cases raising issues of systemic discrimination by ruling that the CHRT does not have the jurisdiction to award legal costs to successful complainants.[66]

The Caring Society's fiscal challenges in the First Nations child welfare case sparked some public debate about the Court Challenges Program. Marni Soucoff, a critic of the Court Challenges Program, argued that such programs detract from the real access to justice problem: the procedural rat's nest encumbering equality-seeking groups.[67] While reining in procedural tactics is needed, this solution must be accompanied by public subsidies for legal fees, as well-resourced parties, such as the Government of Canada, are more likely to try to swamp the financial resources and legal capacity of less powerful parties with procedural tactics and motions. Self-represented, equality-seeking groups cannot effectively curb these tactics, and may unwittingly contribute to procedural delays due to a lack of legal knowledge.

The economic virtues of public subsidies for legal fees must be assessed within the context of the economic benefits of thwarting bad public policy. For example, ending First Nations child welfare inequalities would likely save Canadian taxpayers billions of dollars, as healthy children are less likely to require public services as adults and are more likely to contribute to the economy. A 2003 study found that child abuse costs Canadian taxpayers over fifteen billion dollars per year, stressing the need to prevent child maltreatment before substantial child trauma occurs.[68] In 2013, the World Health Organization estimated that governments save twenty dollars for each dollar invested in children's and women's health.[69] Given that First Nations children are dramatically overrepresented in child welfare care in Canada, the taxpayer savings achieved through equi-

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65 See *ibid*.

66 See *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53 at paras 63–64, [2011] 3 SCR 471.

67 See Marni Soupcoff, "Reviving the Court Challenges Program is the Wrong Way to Address a Real Problem", *National Post* (1 February 2016), online: <news.nationalpost.com/>.

68 See Katherine McKenna et al, *The Economic Costs and Consequences of Child Abuse in Canada*, Report to the Law Commission of Canada (March 2003) at 91–93, online: Canadian Child Welfare Research Portal <cwrp.ca/sites/default/files/publications/en/Report-Economic_Cost_Child_AbuseEN.pdf>.

69 These figures are expressed in American dollars (see WHO, Partnership for Maternal, Newborn & Child Health, "The Economic Benefits of Investing in Women's and Children's Health" Knowledge Summary No 24 (2013) at 1, online: <www.who.int/pmnch/knowledge/publications/summaries/knowledge_summaries_24_economic_case/en/>).

table child welfare services on reserve would have exponentially outweighed the Caring Society's legal costs—had public subsidies been available to us.

Nonetheless, in light of the dismantling of the Court Challenges Program and the Supreme Court's decision disallowing costs for successful complainants in *CHRA* cases,[70] the Caring Society was left to try to secure enough money to keep operating and to pay legal fees. Our efforts to secure funding became more complicated when the federal government cut the Caring Society's core funding within thirty days of filing the case. Additional funding cuts followed in the coming months, leaving the Caring Society as the only national Aboriginal non-profit organization without any federal funding.

The Caring Society was blessed to have excellent pro bono representation from Stikeman Elliott between 2010 and 2012, and from our current legal team based out of Power Law, the University of Ottawa, and Clarke Child and Family Law.[71] Between 2009 and early 2014, however, the Caring Society paid over a quarter of million dollars in legal fees to various counsel and used air miles to pay for flights and accommodation, placing a substantial burden on our already strained budget. Even this substantial investment was insufficient to ensure consistent legal representation, so we parsed out the issues and hearing days requiring counsel, and attended the remainder alone. Frankly, had it not been for the decision of the Canadian Human Rights Commission (Commission) in 2009 to take primary responsibility of the case before the CHRT,[72] it is unlikely we could have succeeded in presenting a high quality—and ultimately successful—case for the children. We owe them a great debt of gratitude.

In order to cover legal fees, the Caring Society decreased its staff by fifty per cent, leaving us with one full-time position and three part-time positions. We further trimmed costs by doing our own office janitorial, buying used office furnishings and resale computers, and we raised money for legal fees through a combination of public speaking and consulting fees, fundraisers, and private donations. The loss of staff positions, along with the additional time dedicated to fundraising for legal fees, meant that the remaining staff had fewer working hours to assist counsel with the case.

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70 For more on the elimination of these funding avenues for public interest cases, see the text accompanying notes 62–65.

71 The complainant's legal team in the First Nations child welfare case is composed of Robert Grant, Sébastien Grammond, David Taylor, Anne Levesque, and Sarah Clarke.

72 See Canadian Human Rights Commission, *2014 Annual Report to Parliament* (Ottawa: Public Works and Government Services, 2015) at 3–4, online: <www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2014.pdf>.

The burden on the Caring Society and our staff was immense, but our spirit was strong. Staff regularly volunteered both their time and private air miles to ensure that the children's case was not compromised. Our efforts were bolstered by dozens of volunteers who assisted us with fundraising, disclosure review, and the maintenance of other Caring Society programs.

The situation on the federal side was very different. The number of INAC employees increased by thirteen per cent between 2007 and 2015, rising from 4,141 to 4,684.[73] INAC also benefitted from the full public subsidization of its legal fees—totalling at least eight million dollars[74]—to fuel a plethora of legal,[75] illegal,[76] and procedural tactics[77] to avoid a hearing on the merits of the First Nations child welfare case before the CHRT. In my view, the federal government's behaviour in the case fits within a broader pattern of defeating legitimate public interest cases through a combination of organizational funding cuts and the rollback of other sources of legal funding such as the Court Challenges Program.

Some may point to the Caring Society's survival and ultimate success in the First Nations child welfare case to argue that litigants can successfully access justice without public legal fee subsidies. It is important to recall, however, that the Caring Society endured substantial funding losses related to the case, which affected our programming and capacity to effectively engage in the litigation. Moreover, our good fortune in raising funds to cover legal fees and accessing quality pro bono legal representation should not be generalized to other groups. Access to justice for the Caring Society and other equality-seeking groups was, and largely remains, based on sacrifice, luck, and the generosity of lawyers providing services pro bono or at a reduced rate. Such barriers to access to justice are simply not acceptable in a democratic society where the courts play a critical role in constraining government power and wayward public policy.

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73 See Canada, "Population of the Federal Public Service by Department", (22 September 2016), *Government of Canada*, online: <https://www.tbs-sct.gc.ca/psm-fpfm/modernizing-modernisation/stats/ssa-pop-eng.asp>.

74 See Canada, Department of Justice, Access to Information Requests A-2012-00495; A-2013-00464; A-2014-01467.

75 See *Canada (AG) v Canada (Human Rights Commission)*, 2013 FCA 75 at paras 4–7, 76 CHRR D/353 [*CHRC* FCA].

76 See *Caring Society* 2015, *supra* note 14 at para 120; *Caring Society* 2013, *supra* note 14 at paras 53–58; Privacy Commissioner, "AANDC Wrongly Collects Information", *supra* note 14.

77 One month after the complaint was filed, INAC cut the Caring Society's core funding and ceased funding the Assembly of First Nations for child and family services.

IV. Client-Solicitor Relationship: A Client's View

It was a huge relief when the Caring Society could finally afford to hire a lawyer, as the technical nature of the case far exceeded what we could successfully navigate on our own. Working with counsel was one of the most rewarding and challenging parts of this highly complex and contested case. The client-solicitor relationship was nested within cross-cultural and cross-disciplinary differences. Culture infuses normative standards within cultural and professional groups to create consistency and predictability in roles and relationships. These normative standards and practices are habitual for members of the group but can be prioritized and interpreted very differently by others. The client-solicitor relationship in the First Nations child welfare case engaged cross-cultural and cross-disciplinary diversities, revealing several issues that may usefully inform others: cross-cultural learning; respect for First Nations self-determination and voice; cross-disciplinary learning; and the importance of balancing legal convention and etiquette with the best interests of children in systemic cases.

A. Cross-Cultural Competency in the Client-Solicitor Relationship

As a First Nations client in the child welfare case, I viewed the world from a relatively borderless and holistic perspective, governed by First Nations principles of respect for self-determination, holism, collective interest, expansive concepts of time, and the importance of spirit and ancestry.[78] By contrast, Canadian law is birthed from a colonial tradition giving preference to individual rights, hierarchy, and determinism.[79]

Transitioning across disciplines, cultures, and legal conventions and etiquette among counsel was sometimes a messy undertaking. The successful navigation of these differences requires an understanding of the ontological differences across cultures as well as across disciplines, which can only be achieved if the First Nations client and the legal team mutually accept responsibility for applied cross-cultural learning and sensitivi-

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78 For a discussion of cross-cultural differences in First Nations child welfare, see generally Cindy Blackstock, "Why Addressing the Over-Representation of First Nations Children in Care Requires New Theoretical Approaches Based on First Nations Ontology" (2009) 6:3 J Social Work Values & Ethics 3; Cindy Blackstock, "The Emergence of the Breath of Life Theory", online: (2011) 8:1 J Social Work Values & Ethics <jswve.org/>.

79 For more on differences between Indigenous and non-Indigenous legal traditions, see generally John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155; Robert A Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

ty. As the Truth and Reconciliation Commission (TRC) points out, there is a dramatic disconnect between the overrepresentation of Aboriginal peoples affected by the law, and lawyers' knowledge of Aboriginal peoples.[80] The TRC therefore calls on law schools and legal educators to ensure that all members of the legal community receive cultural competency training and take mandatory courses on Aboriginal peoples and Aboriginal law to better prepare themselves to work with Aboriginal clients.[81]

The First Nations child welfare case predates the TRC's *Calls to Action*.[82] At the time of its filing, we were unable to locate a lawyer with demonstrated expertise in First Nations cultures, laws, and the *CHRA*. As a result, we often had to support our legal counsel in learning about Aboriginal peoples, histories, and contemporary contexts. The most effective counsel enthusiastically welcomed this opportunity and took personal responsibility to enhance their knowledge by reading articles and attending seminars and cultural events. This knowledge allowed these lawyers to draw the connections between Canada's colonial history and the contemporary situation of First Nations children in the child welfare system. It also helped them appreciate the importance of calling witnesses to speak to the intergenerational transmission of culture and residential school trauma,[83] and of integrating First Nations protocols, ceremonies, and symbols into the CHRT and courts.

Given Canada's colonial history and the role of Canadian law in colonialism,[84] lawyers should embrace humility and decolonization in the client-solicitor relationship. A decolonial legal approach requires a client-solicitor relationship that clearly respects and promotes the right of First Nations clients to self-determination, as well as their authentic voice. This is not easy for lawyers who view themselves as the "voice of the client".

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80 See TRC *Final Report*, *supra* note 63 at 186, 199–210.

81 See Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015) nos 27–28 [TRC *Calls to Action*].

82 See *ibid*.

83 For a discussion of the intergenerational effects of childhood trauma, see e.g. Amy Bombay, Kimberly Matheson & Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential School Survivors" (2011) 48:4 Transcultural Psychiatry 367; Bruce D Perry, "Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture" (Margaret McCain Lecture delivered at the London Convention Centre, 23 September 2004), online: London Family Court Clinic <www.lfcc.on.ca/mccain/perry.pdf>.

84 See generally John Milloy, "Indian Act Colonialism: A Century of Dishonour, 1869–1969" (Paper for the National Centre for First Nations Governance, May 2008), online: <fngovernance.org/ncfng_research/milloy.pdf>; Gerald Taiaiake Alfred, "Colonialism and State Dependency" (2009) 5:2 J Aboriginal Health 42.

Absent proper tempering by professional humility or direct instruction by the client, such lawyers run the risk of becoming both the directing client and the litigator.

In the child welfare case, I was, and remain, a very actively involved client who frequently attends legal case conferences and occasionally speaks directly to the CHRT and courts rather than through counsel. I actively participated in the proceedings to assert a First Nations voice and so that I could properly brief First Nations communities, relay their concerns, and provide technical assistance and direction to counsel. I was not initially aware of how atypical my level of involvement was, or that it could be mistaken for a lack of confidence in counsel. Over time, I became more sensitive to these professional nuances and proactively clarified the reason for my involvement to avoid misunderstandings. However, I feel that the legal profession should do much more to encourage client involvement in cases, and to avoid conflating such involvement with professional inconvenience or legal disparagement.

The Caring Society's current legal team has succeeded in privileging the voice of First Nation clients without being unduly legally diminutive. While it may be impossible for some clients and lawyers to achieve this delicate balance, cultural competency training for lawyers[85] and appropriate legal training for clients would help both sides move in this direction.

B. Cross-Disciplinary Impacts on the Client-Solicitor Relationship

The importance of attending to cross-disciplinary differences emerged in an unexpected way during my testimony in the First Nations child welfare case. Prior to my testimony, counsel and I had focused on what I needed to learn to effectively convey my knowledge of First Nations child welfare and its relationship to INAC's policy on the stand. While this preparation was invaluable to me, when I was on the stand I naturally began applying my social work training on human behaviour in a new way by remaining attentive to counsel's deportment and adjusting accordingly. This natural response grew out of my First Nations culture and social work training and was an enormous asset for me during cross-examination. After this experience, I realized that it was crucial that I respect legal guidance while thinking more deliberately about how my own disciplinary skills could be applied for legal benefit.

The most effective members of the legal team in the First Nations child welfare case embraced cross-disciplinary learning with vigour. They informed themselves about social work by reading historical documents

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[85] See e.g. TRC *Calls to Action*, *supra* note 81, nos 27–28.

and First Nations child welfare training manuals, attending Indigenous social work lectures, watching films, and interviewing experts in the area. This learning enabled them to deeply understand the evidence, ask better questions, and interpret the law in ways that met the best interests of children. It also invoked an authentic appreciation for the First Nations peoples, cultures, and social work approaches, facilitating cross-cultural and cross-disciplinary working relationships. Humility should be ingrained in professional legal culture because the most effective lawyers embody it.

Clients interested in optimizing client-solicitor relationships should learn more about the law and legal profession than what we see on television. Shortly after we decided to file the case, I proactively learned about legal ontology, disciplinary culture, and practice by reading relevant legal cases and articles, attending lectures, interviewing lawyers, and eventually completing a Master of Jurisprudence degree. This knowledge allowed me to understand the intersections between the case's factual matrix, relevant legislation, and the common law, so that I could direct and assist counsel more effectively during this long and complicated case. It is unrealistic to expect, however, that every Aboriginal client has the capacity or the time to do this. Thus, there should be a focus on promoting culturally appropriate and accessible client-centered training materials on the law, client-solicitor relationship, cross-cultural communication, and legal etiquette and conventions.

As part of my legal education, I accessed some general client-centred resources on client-solicitor relationships, although most of these materials were not culturally based and none of them discussed more nuanced issues such as legal conventions and etiquette among counsel. Legal etiquette is normalized for lawyers but not for clients. Legal etiquette is not just a benign nicety; it can shape the conduct and eventual outcome of the case, so it is vital that clients understand it. As a social worker serving as complainant in the child welfare case, I often welcomed the civility of legal etiquette, although I sometimes worried that its normative and deferential nature could erode our legal strategy.[86] For example, when the Attorney General repeatedly filed extension requests, I was told that a party routinely consents to extension requests by the opposing party as a matter of professional courtesy.

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[86] For more on the perils of deference to authority, see generally Stanley Milgram, "Behavioral Study of Obedience" (1963) 67:4 J Abnormal & Social Psychology 371; Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca: Cornell University Press, 2000) at 151–68. On the practice of moral courage, see generally Rushworth M Kidder, *Moral Courage* (New York: HarperCollins, 2005). For a discussion of moral courage in the context of First Nations child welfare, see Cindy Blackstock "Wanted: Moral Courage in Canadian Child Welfare" (2011) 6:2 First Peoples Child & Family Rev 35.

Initially, given my unfamiliarity with legal procedure and that the extension requests normally only involved a matter of days or weeks, I deferred to counsel's respect for the rules of legal etiquette. Individually, the extensions did not appear unreasonable. However, it quickly became clear that a more strategic approach was required when repeated extensions added up to significant delays. I realized that the Attorney General was pursuing a "delay and defer" strategy by repeatedly failing to meet filing dates, relying on professional courtesy and the lack of official sanctions to prolong the proceedings. Accordingly, in consultation with counsel, we developed a "best interest of the child" test to apply to extension requests, as a means to ensure that professional courtesy would not trump the children's best interests.

The issue of the complainant's responsibility to those affected in a systemic rights case is an important one. Although technically, the Caring Society was the complainant in this case, I always viewed this case as ultimately belonging to the 163,000 First Nations children at the centre of the matter and to their families. As a result, I embraced a positive duty to constantly learn from the First Nations communities and to provide them with up-to-date and precise information on the legal process. This approach included: ensuring transparency by posting documents on the "I Am a Witness" website for public view and requesting the broadcasting of the hearings; consulting First Nations and First Nations agencies throughout the case; creating accessible and child-friendly reference materials; and promoting the inclusion of First Nations culture and children in the hearings. In addition, given the value of relationships for First Nations, it was important that the lawyers themselves engage directly with the First Nations and children who attended the case. In this way, the lawyers earned the respect of the First Nations and the children involved in the case, as well as the moral authority to represent them. While most lawyers really enjoyed this aspect of the work, it also added to their workload.

A positive client-solicitor relationship based on mutual respect is fundamental to ensuring access to justice. Both parties need to work effectively across cultural and disciplinary differences to cultivate such a relationship. Given the disadvantaged backgrounds of many clients, however, the higher burden lies with lawyers; to provide direction in the case, they need to ensure that their clients sufficiently understand the law, its formal and customary practices, and legal alternatives. In many ways, the First Nations child welfare case embodies reconciliation, as it required learning from the past, honouring differences, and respecting interdisciplinary skills, while having the courage to step outside professional and cultural comfort zones. The case also shows that, when it comes to confronting systemic racism in a powerful, change-resistant organization, it truly takes a community to raise a successful legal case. Governments do

not create change, they respond to change. Thus, the engagement of the Canadian public—and of children in particular—was absolutely essential to the success of this case.

V. It Takes a Community of Children to Raise a Legal Case: The "I Am a Witness" Campaign

In 1999, Justice Rosalie Abella, then judge of the Court of Appeal for Ontario, reinforced the need for public accountability in the administration of justice, noting that "justice may be blind, but the public is not."[87] Transparency in the administration of justice in Canada has long been expressed by allowing public attendance at hearings and ensuring legal decisions are publicly accessible in both official languages. While helpful, these measures presume that the interested public is able to attend the hearings and read the decision. In the First Nations child welfare case, neither of these assumptions could reasonably be relied on, as the affected public included low-income First Nations children and their families, located throughout Canada. Many families could not afford to travel to Ottawa to view the hearings, and the literacy skills of the children involved were not necessarily advanced enough to decipher the decision. Nonetheless, children enjoy an unqualified right to "participate in the proceedings" pursuant to the *Convention on the Rights of the Child*[88] (*CRC*). This right imposes a positive duty on tribunals and courts, the legal community, and the parties participating in a systemic children's rights case to take measures to ensure the full enjoyment of this right. In order to meet this duty, the Caring Society nested the First Nations child welfare case in a child-friendly online public education and engagement campaign, called "I Am a Witness."[89]

The Caring Society launched the "I Am a Witness" online campaign shortly after the case was filed in 2007. The campaign involved uploading all legal documents and reports relevant to the case on a user-friendly, bilingual website, and asking the public to sign up to "witness" the case by following it online or in person. Witness registration was free of charge to ensure children and families with low incomes could participate on the same terms as other children. Contrary to traditional campaigns, the "I Am a witness" campaign did not ask people to take a position on the case, but rather to draw their own conclusions based on the evidence. In this

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87 Justice Rosalie Silberman Abella, "The Law Society of Upper Canada Professionalism Revisited" (Opening address delivered at the Bencher's Retreat, 14 October 1999), online: <www.ontariocourts.ca/coa/en/ps/speeches/professionalism.htm>.

88 *CRC*, *supra* note 56, art 9(2).

89 See "I Am a Witness", *supra* note 15.

way, the campaign respected the judicial process, while educating and involving the public.[90]

The "I Am a Witness" campaign bolstered public knowledge and given its participants a direct role in the case as active witnesses, thereby holding all parties, including the government, more accountable. The relationship between the case, the "I Am a Witness" campaign, and children's right to participate was symbiotic in that the public campaign also served as a strategic advantage in litigation. For example, when supporting the Aboriginal Peoples Television Network (APTN)'s request to broadcast the proceedings, we called on our witnesses to provide affidavits stating why it was important for them to follow the case on television. In a precedent-setting case, Chief Justice Lutfy granted the request, quoting an affidavit from a single mother and former child in care from the Opaskwayak Cree Nation to support his decision:

> From the day I entered child protection, the inadequate funding of services provided to me affected every aspect of my life. The injustices I experienced while under welfare protection continue to affect me in a way that is impossible for me to convey. *I believe that viewing the proceedings will help validate the feelings of injustice I have experienced all of my life. It is important for me to know that these injustices are not being ignored as they have been in the past.* It is also important for me to know that my story and those of other First Nations children is being heard. I am hopeful that if our stories are heard, things will change for First Nations children. I believe there can be a brighter future for them.[91]

This was the first time in Canadian history that a human rights case was broadcast from gavel to gavel and watched by the public, including children, through regular APTN national news segments. A National Film Board documentary of the case, entitled *We Can't Make the Same Mistake Twice*, was released in the fall of 2016 to serve as a public education tool and historical record.[92]

For the first three years of its operation, the "I Am a Witness" campaign was successful in recruiting online witnesses, but few people came to the hearings. This situation began to change in 2010, when INAC filed a motion to have the case dismissed, submissions were filed, and I was about to be cross-examined by the Attorney General on my affidavit. The tribunal room was empty at first, and then a group of teenagers walked

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90 See Blackstock, "Above the Law", *supra* note 17 at 100.

91 *Aboriginal Peoples Television Network v Canada (Human Rights Commission)*, 2011 FC 810 at para 3, 35 Admin LR (5th) 45 [emphasis in original].

92 See *We Can't Make the Same Mistake Twice*, 2016, Documentary (Montreal, National Film Board of Canada, 2016).

in. The youth were from a local alternative school and had heard about the case through the local media. They believed that systems caring for children should be held accountable for their actions, and came to learn more. The teenagers stayed the entire day and returned at the next set of hearings with their friends, wearing "I Am a Witness" T-shirts that they had designed.

By 2012, so many children attended the Federal Court hearings that they had to be relocated to the Supreme Court of Canada and webcast into an overflow room. Children who could not be accommodated read their letters on the steps of Parliament Hill to the Prime Minister, demanding equitable funding for First Nations children in what has now become the annual "Have a Heart Day" event.[93]

Parents and teachers embraced the learning opportunity embedded in the "I Am a Witness" campaign, and encouraged students to research the alleged inequities, attend the hearings to hear all sides of the story and write about what they had learned from this experience. The legal teams for the Caring Society, the Assembly of First Nations, and the Commission were very generous in meeting with children during breaks in the proceedings to answer their questions. These opportunities engaged children in active learning about First Nations peoples, Canadian history, and the law. The children were also keen to learn about a contemporary injustice facing First Nations children and to have the opportunity to help fix the problem by writing letters to elected officials.

This experience also expanded children's views of the legal system and its role in their lives. Prior to the case, many children only associated courts with criminal and divorce cases. Children's participation in this case showed them that courts and tribunals could be welcoming places for children that respect and uphold their rights. Some children told me they were so inspired by the experience that they were thinking about becoming a lawyer or a judge when they grew up.

The Federal Court, Federal Court of Appeal, and the CHRT were all very welcoming of children. The CHRT made special provisions for children to sing opening and closing songs, store their belongings and eat lunch in a space set aside for them, and permitted the case to be webcast

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93 Have a Heart day invites people of all ages to write letters to elected officials so that First Nations children can have an equitable opportunity to grow up safely at home, to get a good education, and to be healthy and proud of who they are (see First Nations Child and Family Caring Society of Canada, "Have a Heart Day" (2016), online: <https://fncaringsociety.com/have-a-heart>).

so that children across Canada could watch the hearings from their homes and classrooms.[94]

The presence of children in the tribunal and at the court served as a moral anchor for the legal proceedings, as they symbolized the 163,000 children affected by the case and the millions of non-Aboriginal children who wanted to grow up in a Canada where all children were treated fairly. Even though the hearings involved technical legal issues, the children paid close attention and conducted themselves with respect, at no time disrupting the proceedings. In fact, the children's presence brought some joy and spontaneity into the legal system, when they would do things like collect autographs of the lawyers and witnesses.

By the time the CHRT issued its ruling in 2016 substantiating the complaint,[95] over 14,500 individuals and organizations had registered to follow the case through the "I Am a Witness" campaign, making it the most watched human rights case in Canadian history.

Canadian courts have increasingly recognized the importance of children's participation in legal matters affecting them.[96] In 2006, reforms to the *Criminal Code* accommodated the needs of child witnesses in criminal proceedings,[97] and reforms to the *Canada Evidence Act* empowered children to testify in all federal proceedings, including divorce, custody and access hearings.[98] Tribunals and courts, however, do not have formal guidelines for child participation in systemic rights cases. These should be developed in collaboration with children, young people, and experts on children's rights and child development.

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94 For video footage of the final arguments, see First Nations Child and Family Caring Society of Canada, "Final Arguments Video Archive" (2016), online: <https://fncaringsociety.com/final-arguments-video-archive>.

95 See *Caring Society* 2016, *supra* note 8 at para 468.

96 See generally Lorne D Bertrand et al, "Hearing the Voices of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial Interviews" (Calgary: Canadian Research Institute for Law and the Family, 2012), online: CRILF <www.crilf.ca/Documents/Hearing%20the%20Voices%20of%20Children%20-%20Aug%202012.pdf>.

97 See *Criminal Code*, RSC 1985, c C-46, ss 486–486.3, as amended by Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, 1st Sess, 38th Parl, 2005, cl 15 (assented to 20 July 2005), SC 2005, c 32 [Bill C-2]. See also Nicholas Bala et al, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary* (Ottawa: Department of Justice Canada, 2010) at 23ff.

98 See *Canada Evidence Act*, RSC 1985, c C-5, ss 16(1)–16.1, as amended by Bill C-2, *supra* note 97, cls 26–27. See also Bala et al, *supra* note 97 at 14ff; Canada, Department of Justice, "The Voices of Children in Divorce, Custody and Access Proceedings" (Ottawa: DOJ, 2010), ch 3.3, online: <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2002_1/p3.html>.

Ideally, First Nations and non-Aboriginal children could have testified in our case about the importance of non-discrimination to a healthy childhood; yet, doing so in the absence of clear guidelines, particularly in the context of cross-examination, risked resulting in negative experiences. Instead, the Caring Society incorporated letters authored by children into our opening statement at the hearing on the merits in 2013. We also invited children to prepare a video, called "Letters to Canada", sharing their views on what they needed to grow up healthy and proud, what discrimination meant to them, what the case was about, and why its outcome was important to the type of Canada they wanted to grow up in.[99] The Attorney General objected to the video being shown, characterizing it as "inappropriate" but not specifying why. The CHRT never saw the video, but it was posted on YouTube, linked to the "I Am a Witness" website, and has been viewed over ten thousand times.

What is so inspiring about the involvement of children is that they were not thwarted by the long procedural history during which legal arguments would lull even me into a slumber; they were fueled by it. Every time Canada moved to dismiss the case, more children would show up and they would keep on coming year after year. As one youth recently said during Have a Heart day, "I have spent half my childhood attending this case." To follow is a summary of what they witnessed.

VI. Procedural History: Best Interests of the Child v. Best Interests of the Government

In a 1999 address to the Law Society of Upper Canada, Justice Rosalie Abella cautioned that "[w]e have moved from being a society governed by the rule of law to being a society governed by the law of rules. We have become so completely seduced by the notion, borrowed from criminal law, that process ensures justice, that we have come to believe that process is justice."[100] The problematic nature of mistaking legal procedure and process for justice came into sharp focus in the First Nations child welfare case, as INAC's legal strategy focused on getting the case dismissed through a combination of procedural mechanisms and technical jurisdictional arguments. INAC's efforts to have the case dismissed on a preliminary basis began shortly after the case was filed with the Commission in February 2007, and intensified when the complaint was referred to the CHRT for hearing in September 2008.

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[99] See First Nations Child and Family Caring Society of Canada, "Letters to Canada" (20 February 2013), online: YouTube <www.youtube.com/watch?v=pHPHUHYq8A8>.

[100] Abella, *supra* note 87.

To establish discrimination under section 5 of the *CHRA*, a complainant must prove the denial of access to goods, services, facilities, or accommodations to any individual, or the adverse differentiation between individuals in the provision of such goods, services, facilities, or accommodations on an enumerated ground of discrimination.[101] INAC challenged the jurisdiction of the *CHRA* using two main arguments, known as the "comparator" and "service" issues. The comparator issue was based on INAC's view that the only way to prove discrimination was to compare the treatment of two different groups receiving the same service from the same service provider.[102] This argument would effectively immunize federal programs provided to First Nations from human rights scrutiny, as only First Nations receive essential government services from the federal government, whereas other Canadians receive them from provincial or territorial governments. On the service issue, INAC argued that it only funds First Nations child and family services that are provided to children by other agencies. INAC further argued that funding is not a service and thus the complaint lies outside the jurisdiction of the *CHRA*.[103] A complicated procedural history followed with the CHRT's dismissal of the case on the comparator issue in a highly controversial decision in 2011.[104] The Caring Society, the Assembly of First Nations, and the CRHC immediately applied to the Federal Court for judicial review on three main grounds: the CHRC had unfairly considered extrinsic evidence; the tribunal had erred in law by finding that a mirror comparator group was required to prove discrimination; and the tribunal should not have dismissed the complaint, as it confined its analysis to adverse differentiation of services pursuant to subsection 5(a) of the *CHRA*, while failing to address the alleged denial of services under subsection 5(b) of the *CHRA*.[105]

In April 2012, the Federal Court overturned the CHRT's decision, finding the decision procedurally unfair and unreasonable.[106] The Federal Court found a breach of procedural fairness, as the tribunal considered eight thousand pages of extrinsic evidence that the parties were unaware of and had no opportunity to respond to.[107] Furthermore, the Federal Court found the CHRT's reliance on a mirror comparator group to be un-

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101 See *CHRA*, *supra* note 6, s 5.

102 See *Caring Society* 2016, *supra* note 8 at paras 327–28.

103 See *ibid* at paras 33–34.

104 See *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2011 CHRT 4 at paras 9–17, 127–131, 139, 73 CHRR D/219.

105 See *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2012 FC 445 (Factum of the Applicant at paras 53–102).

106 See *CHRC* FC, *supra* note 60 at paras 7–10, 391–95.

107 See *ibid* at paras 167–204, 391.

reasonable, as was the tribunal's failure to consider the denial of services under subsection 5(b) of the *CHRA*, in dismissing the complaint.[108] The Attorney General appealed the judgment to the Federal Court of Appeal, which upheld the Federal Court's ruling and dismissed the application in March of 2013, finally clearing the way for a hearing on the facts.[109]

Hearings on the merits began in February of 2013 but were interrupted in April 2013, when I received thousands of pages of documents in response to my request for information on the federal government's funding approach for FNCFS under the *Access to Information Act*[110] (*ATIA*). These documents were highly prejudicial to Canada's case and had never been disclosed. The Attorney General[111] argued that it was always clear with the CHRT and the parties that disclosure was incomplete and ongoing. The complainants and the Commission disagreed, stating that they understood that the Attorney General had substantively completed its disclosure as of February 2013, and would disclose only "newly created" documents in a rolling fashion thereafter. The Caring Society brought a motion to compel the Attorney General to complete its disclosure with dispatch. In response, the Attorney General brought a motion for a lengthy adjournment to gain further time to fulfill its disclosure obligations.[112] The CHRT's view of the matter is summed up as follows:

> [T]he Respondent's conduct here is far from irreproachable. As demonstrated by the evidence brought by the Caring Society as a result of Dr. Blackstock's *ATIA* request, the Respondent knew of the existence of a number of these documents, prejudicial to its case and highly relevant, in the summer of 2012 and yet failed to disclose them.[113]

Accordingly, the tribunal ordered the Attorney General to complete its disclosure by the fall of 2013, holding the decision on additional costs to the complainant related to Canada's obstruction of process under reserve.[114]

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[108] See *ibid* at para 9.

[109] See *CHRC* FCA, *supra* note 75 at paras 1, 27.

[110] RSC 1985, c A-1 [*ATIA*].

[111] The Attorney General of Canada is based within the Department of Justice. At some points in this article, I employ the term "Attorney General" to refer to the role of chief law officer of the Crown, whereas at other points, I will use the term "Department of Justice" to refer to the department's broader law-making role.

[112] For the positions of the parties on disclosure, see *Caring Society* 2013, *supra* note 14 at paras 27–30 (INAC), at paras 31–35 (Caring Society) and at paras 36–39 (Commission). For a description of the interruption in hearing dates, see *ibid* at paras 12, 53–56.

[113] *Ibid* at para 53.

[114] See *ibid* at paras 47, 67.

Hearings resumed in November 2013 and concluded in October 2014. The Caring Society, the Assembly of First Nations, and the Commission all repeatedly urged the tribunal and the courts to balance the best interests of the children with the Government of Canada's interests in procedural fairness in addressing Canada's seemingly endless preliminary motions. The Caring Society also repeatedly appealed to the Attorney General to consider the best interests of children in its litigation strategy, but the Attorney General remained unmoved. Complicating matters, the tribunal and courts had no formal process to expedite children's cases in light of the vulnerability and unique developmental status of children.

Canada's legal arguments were completely at odds with my focus on children's best interests and it took me a while to understand why we would even need to address these arguments. I never entirely came to terms with the tension between the Government of Canada's right to a fair trial and the kids' rights to a childhood. In this case, Canada's procedural interests came before the children's best interests far too often. While respecting the parties' rights to due process is important, such rights should not trump the best interest rights of children. In this case, placing the children's interests first was particularly pressing, given the allegation that the failure of INAC's FNCFS program to implement Jordan's Principle was both driving children into foster care unnecessarily and denying them access to vital services. The alleged, and later substantiated, harm was ongoing during the six years it took for this case to come to trial, and the nine years before a decision was finally rendered. Tribunals and courts must develop guidelines to expedite children's systemic cases to avoid irrevocable harms to children caused by procedural delays. Further, the Government of Canada should review its litigation strategy to ensure that it complies with the *CRC*.[115]

VII. Retaliation: Never Fight on Their Low Ground

When children are directly affected by a systemic case, I believe that all parties and their counsel have a responsibility to model a high standard of personal and professional conduct. Throughout the First Nations child welfare case, I always tried to be attentive to how I managed myself, and this would become particularly important, and a more difficult challenge, when I faced retaliation by the government.

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[115] See *CRC*, *supra* note 56, art 3(1). For more information on children's right to participate in legal proceedings, see generally Continuing Legal Education Society of British Columbia, "Children's Participation in Civil Cases" by Tina Parbhakar (Paper delivered at the Access to Justice for Children Conference, May 2015), online: <www.cle.bc.ca/PracticePoints/HUM/15-children-civil-cases.pdf>.

I had expected the federal government to cut the Caring Society's funding after we filed the complaint, which they did, but I had never anticipated the reprisals that followed. It all began on 9 December 2009, when I was invited by the Chiefs of Ontario to attend a meeting at INAC headquarters to discuss child welfare. After clearing the proper security requirements, several Chiefs, technical advisors, and I arrived at the INAC Minister's office, where the meeting was held. As the other meeting participants entered into the meeting room, a senior INAC official placed himself near the door and asked who I was. After identifying myself, the official said that they would meet with me at another time, as I had issues with their FNCFS program and there was the matter before the CHRT. I clarified that I was not there to talk about other issues or the tribunal; however, the INAC official was unmoved and told a Grand Chief that, if I attended, the meeting would be cancelled. I voluntarily sat outside, where I was guarded by a male security guard, even though I had acted professionally throughout the encounter.

This extreme action prompted me to write to the INAC Minister to ask for further clarification. After receiving a vague response, I filed a request for records about me held by INAC under the *Privacy Act*[116]. The records, which arrived in the spring of 2011, showed that INAC and the Department of Justice had deployed at least 189 public servants to follow my movements and online postings, in an apparent effort to try to find "other motives" for filing the child welfare case, so that it could be dismissed on frivolous or vexatious grounds.[117] Needless to say, I was shocked, frightened, and wondered what else they were doing, feeling worried about my family members, friends, colleagues at the Caring Society, and our allies. While it was one thing for me to be the target of governmental surveillance as the complainant in the First Nations child welfare case, what really troubled me was the government's coincidental collection of information about other innocent people surrounding the case. The size and scope of government power were weighing down on me, and I had no idea what to do about it. Where do you report something like this—especially when the Department of Justice is involved in the activity?

Reporting the case is one consideration but thinking about how to manage it personally is equally, if not more, important. The first consideration is whether to wilt under the weight of fear or to keep going while taking appropriate precautions to mitigate personal and organizational harm. The second is to determine what new opportunities can be achieved

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116 RSC 1985, c P-21.

117 Email between Access to Information and Privacy Team Leader, AANDC and Corporate Services, AANDC, *Privacy Act* Request No P-2011-1591 (10 November 2011) at 2590 [on file with author].

given the retaliation. I decided three things very quickly: I was not going to give up on the children's case as I believed it was my duty as an adult to stand up for kids; I was interested in justice rather than revenge and thus would not fight on their low ground; and I would manage my response so that it would bring more attention to the children's case and hopefully offer some protection to other human rights defenders.

While this strategy may sound neat and altruistic in hindsight, in the moment I had to manage some very human emotions of fear, sadness, shock, and anger. My personal and professional support system was critical in helping me process my emotions, so that I could make the best decisions instead of acting on impulse. I decided to allow myself time to process my emotions and to find a way forward that would not discredit or detract from the children's case. This decision was vital, as INAC was aware that I was the main witness in the case charged with describing First Nations child welfare and analyzing the relevant reports and government documents, in order to establish the existence of discrimination. Taking this time helped me manage the retaliation in a way that set a good example for the children who were witnessing the case. It also allowed me time to think of the appropriate strategy, and I decided the best response was to publicize the retaliation, while withholding the names of the public servants involved, so that I did not violate their privacy rights as I tried to assert my own.

On 17 November 2011, I read the documents, without identifying the individual public servants involved, on CBC's radio program, *The Current*.[118] This interview gave rise to a plethora of media coverage,[119] as the revelations came at a time when the Canadian government wanted to strengthen its domestic surveillance capacity.[120] The interview on *The Current* captured the attention of the Office of the Privacy Commissioner, who advised me of the office's investigative powers. I filed a complaint in early 2012. A year later, the Office of the Privacy Commissioner released a report, which found that INAC and the Department of Justice had vio-

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[118] See CBC Radio, "Government Surveillance of Native Youth Advocate Cindy Blackstock" (17 November 2011), online: The Current <www.cbc.ca/radio/thecurrent>.

[119] See e.g. Tim Harper, "Government Spies on Advocate for Native Children", *Toronto Star* (15 November 2011), online: <www.thestar.com>; "Cindy Blackstock" (23 November 2011) *Voices-Voix*, online: <voices-voix.ca/>.

[120] See Amnesty International Canada, News Release, "Canada: Civil Liberties and Open Internet Groups Call for Answers on Secret Government Spying Program" (12 June 2013), online: <www.amnesty.ca/news/>.

lated my privacy rights by collecting personal information unrelated to their mandates.[121]

A request to amend the complaint before the CHRT to include a complaint of retaliation was made in early 2010 and accepted in 2012. A two-week trial on the matter was held in the summer of 2013, and two years later, the tribunal released its ruling. While the panel respected the finding of the Privacy Commissioner, it did not find that the surveillance constituted retaliation under section 14.1 of the *CHRA*.[122] The tribunal did, however, find that INAC had recklessly and willfully retaliated against me by blocking my participation in the Chiefs of Ontario meeting held at the Minister's Office in December 2009.[123] Accordingly, the tribunal awarded me 20,000 dollars in damages.[124] I donated the money to children's causes and charities, since my motives were to defend democratic principles and freedom of speech rather than to enrich myself.

The CHRT's finding of retaliation captured international attention: three United Nations Rapporteurs launched an investigation into Canada's conduct,[125] and Frontline Defenders, an international NGO that protects human rights defenders, provided a host of resources and information to assist me. These international resources were much appreciated, as domestically there is a dearth of injunctive measures to stop retaliatory behaviour perpetrated against human rights defenders by Canadian governments.

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[121] See Office of the Privacy Commissioner of Canada, *Securing the Right to Privacy: Annual Report to Parliament, 2012–2013* (Ottawa: Public Works and Government Services Canada, 2013) at 26–27.

[122] Section 14.1 of the *CHRA*, *supra* note 6, provides that "[i]t is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim". See also *Caring Society* 2015, *supra* note 14 at paras 80–81.

[123] See *Caring Society* 2015, *supra* note 14 at paras 57–60, 120.

[124] See *ibid* at paras 121–27.

[125] See *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya*, UNHRCOR, 25th Sess, Annex, Agenda Item 3, UN Doc A/HRC/25/55 (2013) at 15–16; *Report on Observations to Communications Sent and Replies Received by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,* UNHRCOR, 27th Sess, Annex, Agenda Item 3, UN Doc A/HRC/27/52/Add.4 (2014) at 13–14; Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *2014: The Year in Assembly and Association Rights* (Geneva: Office of the United Nations High Commissioner for Human Rights, 2015) at 16. See also Amnesty International Canada, First Nations Child and Family Caring Society of Canada & KAIROS Canada, Joint Press Release, "Human Rights Tribunal Finds Ottawa Retaliated Against First Nations Child Rights Worker" (8 June 2015), online: <www.amnesty.ca/news>.

The Office of the Privacy Commissioner is constrained by legislation that fails to account for technological advances in information technology, and only has the power to make recommendations.[126] Moreover, the CHRT lacks the authority to provide injunctive relief, meaning that I had to wait six years from the time the retaliation complaint was first filed until the decision was rendered. It is extremely important that legislative action be taken to ensure Canada's observance of the United Nations *Declaration on Human Rights Defenders*, which promotes the unhindered exercise of peaceful political, cultural, and civil rights in human rights advocacy domestically and internationally.[127] While declarations are non-binding in international law, many of the provisions in the *Declaration on Human Rights Defenders* are enshrined in binding human rights instruments that have been ratified by Canada, such as the *International Covenant on Civil and Political Rights*.[128] It is vital that Canada provide legislative protection for human rights defenders in Canada and applies such protections against the government itself, in order to ensure civil, political, and cultural rights are respected.

Consideration must also be given to protect witnesses from intimidation arising from government surveillance. In my case, the federal government was advised that I would be a key witness in 2009, when the case was originally scheduled for hearing before the CHRT. Evidence from government officials in the retaliation hearings before the tribunal indicated that the surveillance had been initiated in the spring of 2010 by Department of Justice officials under the direction of lead counsel for the Attorney General. The motive was to glean information that might have been useful during my cross-examination on the government's motion to dismiss the case.[129] While the Attorney General admitted that it was monitoring my online communications and public appearances without my knowledge, it argued this amounted to legitimate legal research. I believe the Attorney General's actions should have been constrained, however, as

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126 See David H Flaherty, "Reflections on Reform of the Federal *Privacy Act*" (Ottawa: Office of the Privacy Commissioner of Canada, 2008) at 9, online: <https://www.priv.gc.ca/media/2044/pa_ref_df_e.pdf>.

127 See *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UNGAOR, 53rd Sess, Supp No 49, UN Doc A/RES/53/144 (1999) [*Declaration on Human Rights Defenders*]. See also Office of the High Commissioner for Human Rights, "Declaration on Human Rights Defenders", online: OHCHR <www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

128 Compare *Declaration on Human Rights Defenders*, *supra* note 127, arts 2, 5–7 with *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 2, 18–22 (entered into force 23 March 1976, accession by Canada 19 May 1976).

129 See *Caring Society* 2015, *supra* note 14 at para 76.

I was witness in the case, and they failed to establish a clear factual link between my personal life and the matters at issue in the case. These issues were never surveyed in law and I went on to testify numerous times.

Although the government surveillance was frightening for me, I was determined to testify with integrity. However, my ability to overcome the intimidating effects of surveillance should not be generalized to other people. I am older, highly educated, and have a well-developed support network, all of which equipped me to manage the retaliation in ways that did not fetter my testimony. Given the chilling effect that government surveillance can reasonably have on potential witnesses, it is essential that prohibitions against witness tampering and intimidation in criminal law[130] be expanded to include surveillance and all forms of witness intimidation in human rights proceedings.

Clients and potential witnesses experiencing retaliation for filing systemic cases should avail themselves of all necessary resources in order to manage themselves in ways that uplift the values and objectives of the case they are standing for. In this regard, it is absolutely necessary that legal associations, in consultation with Indigenous peoples and human rights organizations, develop resources for people and organizations that suspect retaliation or are experiencing it.

It is also important that members of the legal community develop the specialized knowledge and sensitivity needed to respond to retaliation cases and avoid minimizing the impact of retaliatory conduct on their client, potential witnesses, or on those affected by a systemic case. As the motto of Frontline Defenders so rightly notes, "protect one, empower a thousand."[131] A girl following the case summed up Canada's lack of attention to children's rights and retaliatory conduct by quoting the poet Kahlil Gibran: "Pity the nation that acclaims the bully as hero."[132]

VIII. The Evidence

The complainants and the Commission called eighteen witnesses including four experts to testify. INAC called seven witnesses, all of whom were public servants. INAC had planned to call KPMG as an expert witness, but changed their mind when KPMG's forensic audit of the *Wen:de* report revealed that the calculation of the shortfall in federal funding for

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130 See *Criminal Code*, *supra* note 97, s 423.1.

131 Front Line Defenders, "Strategic Plan", online: <www.frontlinedefenders.org/en/strategic-plan>.

132 Kahlil Gibran, *The Garden of the Prophet* (New York: Knopf, 1966) at 14.

FNCFS found in the *Wen:de* report "appear[ed] correct".[133] The complainants and the Commission filed the KPMG report as further evidence of the discrimination.

In addition to the *NPR*,[134] the *Wen:de* report,[135] the Auditor General of Canada reports,[136] and the Standing Committee on Public Accounts reports,[137] the federal government's own documents contained a prolific number of admissions against interest. These documents confirmed the funding shortfalls[138] and linked those shortfalls to growing numbers of First Nations children in care.[139]

In substantiating the allegation that INAC is discriminating against First Nations children and their families, the CHRT aptly summed up the strength of the federal government's case this way: "Overall, the Panel

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[133] KPMG LLP, "Review of *Wen:de: The Journey Continues*" (Private and confidential report prepared for Indian and Northern Affairs Canada) (Ottawa: KMPG LLP, 2010) at 7, reproduced in *First Nations Child and Family Caring Society of Canada*, online: <https://fncaringsociety.com/sites/default/files/fnwitness/Expert-witness_Wen%20De_July2010.pdf> [released under the *ATIA*, *supra* note 110].

[134] See McDonald et al, *supra* note 25 at 109–18.

[135] See Loxley et al, *supra* note 22 at 35.

[136] See 2008 OAG *Report*, *supra* note 23 at 19–27; Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons: Programs for First Nations on Reserves*, ch 4 (Ottawa: OAG, 2011) at 3–4.

[137] See House of Commons, Standing Committee on Public Accounts, *Chapter 4: First Nations Child and Family Services Program—Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General of Canada* (March 2009) (Chair: Shawn Murphy) at 5–10; House of Commons, Standing Committee on Public Accounts, *Chapter 4: Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (February 2012) (Chair: David Christopherson) at 2, 8–9.

[138] See e.g. Indian and Northern Affairs Canada, "INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region", by Bill Zaharoff, Linda Stiller & Kim Louie (June 2009), reproduced in *First Nations Child and Family Caring Society of Canada*, online: <https://fncaringsociety.com/sites/default/files/TAB%2078%20Email%20re%20JP%20and%20Document%20'Gaps%20in%20Health%20Services%20On%20Reserve%20in%20B.C.'_0.pdf>; Aboriginal Affairs and Northern Development Canada, "First Nations Child and Family Services Program (FNCFCS): The Way Forward", by Odette Johnson (Presentation to Françoise Ducros, 29 August 2012) at 13, reproduced in *First Nations Child and Caring Society of Canada*, online: <https://fncaringsociety.com/tribunal-timeline-and-documents#2014>; Aboriginal Affairs and Northern Development Canada, "Renewal of the First Nations Child and Family Services Program", by Sheilagh Murphy (Presentation to DGPRC, 31 October 2012) at 2–5, 8–10, 13–14 [on file with author].

[139] See e.g. Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program*, by Departmental Audit and Evaluation Branch (March 2007) at 14–15, online: <publications.gc.ca/pub?id=9.700428&sl=0>; INAC, "FNCFS Fact Sheet", *supra* note 24.

finds [INAC]'s position unreasonable, unconvincing and not supported by the preponderance of evidence in this case."[140]

In my view, INAC and the Attorney General vigorously battled the case using legal technicalities, because they knew the facts were overwhelmingly against them. The question is why? Why would they fight so hard to protect the federal government's discriminatory conduct toward 163,000 children when doing so lies contrary to fundamental human rights and in uncomfortable juxtaposition with the Department of Justice's mission to "ensure that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice" and to "promote respect for rights and freedoms, the law and the Constitution"?[141] This mission does not square easily with INAC's retaliation, the Department of Justice and INAC's breach of the *Privacy Act*, INAC and the Attorney General's knowing withholding of records they were required to disclose, INAC's funding cuts to the complainants, and the federal government's spending of millions of tax dollars in trying to derail a case in which the evidence showed a clear violation of children's rights.

I welcome the Prime Minister's direction to the Attorney General to review Canada's litigation strategy to ensure its consistency with Canadian law and the commitments of the new government.[142] This review needs to be undertaken with urgency, giving priority to cases involving children and other vulnerable persons.

IX. The Decision: The Challenge of the "Win" or "Win and Still Lose"

The CHRT took the decision under reserve for fifteen months, during which time the TRC listed child welfare equity and reform as its top call to action,[143] and Justin Trudeau's Liberal party swept Stephen Harper's Conservatives out of the federal government. Prime Minister Trudeau promised to implement all of the TRC's *Calls to Action* and to set a new "nation-to-nation relationship" with First Nations, Métis, and Inuit peoples.[144]

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140 *Caring Society*, 2016, *supra* note 8 at para 460.

141 Canada, Department of Justice, "Our Mission" (25 July 2016), *Department of Justice*, online: <www.justice.gc.ca/eng/rp-pr/cp-pm/about-aprop/index.html>.

142 See Mandate Letter from Prime Minister Justin Trudeau to Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada (2015), online: <pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

143 See TRC *Calls to Action*, *supra* note 81, no 1.

144 Office of the Prime Minister, Media Statement, "Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission" (15 December 2015),

After nearly a decade of regressive Aboriginal policies under the Conservative government, many Aboriginal peoples took an enthusiastic breath of relief when the Liberals were sworn in. I was hopeful but also nervous. When the Liberal party was last in power, it ignored the recommendations of the *NPR* and *Wen:de* reports, and allowed inequalities in First Nations education, health, and basics like water to go untended—and in some cases, to worsen—despite running successive surplus budgets.

From a strategic point of view, it would be more difficult to make the case for reform with a government that smiled at Aboriginal peoples, while preserving discriminatory policies, than with the Conservative government, which was openly adverse. I was well aware that we could win the decision and still lose in terms of its implementation, particularly if the new government diminished media attention by responding favourably to a finding of discrimination, but doing little about it. In order to be proactive, I reviewed the recommendations from the *NPR*, *Wen:de*, and Auditor General reports, and the federal government's own documents to identify immediate measures of relief that the government could implement while long-term reforms were negotiated. These measures, to which government officials had previously agreed, were sent to INAC two weeks before the decision was released in hopes that they would take immediate action to relieve the discrimination and initiate long-term program reform.

The decision was released electronically on 26 January 2016. The first sentence set the tone: "This decision concerns *children*."[145] It was a relief and a harbinger of pending justice for First Nations children. The CHRT retained jurisdiction and set out a four-phase plan to address remedies: immediate relief measures; medium-term reform; long-term reform; and redress for harms to individual children.[146] The tribunal further held its decision regarding costs attributed to Canada's failure to disclose documents in 2013 under reserve.[147] While the federal government quickly welcomed the decision, it did not specify how it would resolve the discrimination.[148]

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online: OPM <pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission>.

145 *Caring Society* 2016, *supra* note 8 at para 1 [emphasis in original].

146 See *ibid* at paras 481–83, 493–94.

147 See *ibid* at paras 491–92.

148 See Indigenous and Northern Affairs Canada, Media Statement, "Statement on the Canadian Human Rights Tribunal Decision on First Nations Child and Family Services" (26

After the decision, our attention turned to the question of judicial review. While we determined quickly that we would not seek judicial review, it would take several weeks before we learned that the federal government would not apply for the judicial review of the decision. The government notice reached us via a Twitter post by a delegate listening to an address given by the Attorney General at a Canadian Bar Association conference. A letter from Department of Justice counsel, confirming their decision, arrived some time later. While the government's decision not to judicially review the decision was welcome, the lack of implementation that followed was not.

The federal government ignored our proposals for immediate relief based on the prior reports, choosing instead to act unilaterally and without consultation to table the 2016 budget, which provides 71 million dollars in funding for First Nations child welfare in the 2016–2017 fiscal year.[149] This amount is 37 million dollars short of what a secret government document said was necessary in 2012.[150] The total child welfare allocation in the 2016 budget was 634.8 million dollars forecast over five years with 53 per cent of the allocated funding coming the year of the next federal election or the year following the election.[151] Allocating the budget over several years and placing the most significant investments four to five years out fails to account for the severity of the harm facing First Nations children and their delicate developmental status. Instead of making increased immediate investments for children now, the federal government proposed another study absent credible assurances that it would act on the resulting recommendations.[152]

On 26 April 2016, the CHRT issued a decision regarding immediate relief, expressing concern regarding INAC's slow pace of reform.[153] The tribunal recognized the allocations in the 2016 budget, but required fur-

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January 2016), online: Government of Canada <news.gc.ca/web/article-en.do?nid=1029679>.

149 See Canada, Department of Finance, *Budget 2016: Growing the Middle Class*, by Hon William Francis Morneau, Catalogue No F1-23/3E-PDF (Ottawa: Department of Finance Canada, 2016) at 147 [*Budget 2016*].

150 See Johnson, *supra* note 139 at 15–16.

151 See *Budget 2016*, *supra* note 149 at 138. See also First Nations Child and Family Caring Society of Canada, Information Sheet, "Federal Budget, 2016: First Nations Child and Family Services" (22 March 2016), online: <https://fncaringsociety.com/sites/default/files/Budget%202016%20info%20sheet.pdf>.

152 See Letter from Paula Isaak, Assistant Deputy Minister, INAC to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (3 March 2016) [on file with author].

153 See *First Nations Child and Family Caring Society v Canada (AG)*, 2016 CHRT 10, 83 CHRR D/266 at paras 21–22.

ther information to determine whether it satisfied the requirements of immediate relief.[154] The tribunal reminded INAC that its January order required the immediate implementation of Jordan's Principle, and stated that the ruling was not satisfied by Canada's reports that they had only initiated discussions with the provinces and territories.[155] The tribunal ordered Canada to provide further information specifying how the 2016 budget would alleviate the discrimination by 24 May 2016, and to confirm that it had implemented Jordan's Principle with respect to all children and all jurisdictional disputes by 10 May 2016.[156] Canada filed a compliance report regarding Jordan's Principle on 10 May 2016; there were significant discrepancies, however, between what the tribunal ordered and what Canada reported it had complied with.[157] For example, the tribunal ordered Canada to apply Jordan's Principle to all children. In response, Canada reported that it was no longer restricting Jordan's Principle to children with multiple disabilities; yet, the government fell short of confirming it was now applying the principle to all children. Additionally, the tribunal ordered Canada to ensure that the government organization of first contact paid for the service; yet, Canada only committed to managing the cases "in a timely manner."[158]

The Caring Society and the other parties noted the discrepancies between the CHRT's orders on FNCFS funding in Canada's 24 May 2016 compliance report regarding the 2016 budget.[159] Following the receipt of Canada's compliance reports of 10 May 2016 and 24 May 2016, the tribunal directed the parties to provide an additional round of submissions. A second tribunal order on immediate relief is pending. Once the immediate relief stage is complete, the tribunal will invite submissions on medium- and long-term relief and on financial awards for the affected children related to pain and suffering, on the one hand, and willful and reckless damages, on the other.

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154 See *ibid* at para 25.

155 See *ibid* at paras 30–34.

156 See *ibid* at para 34.

157 For more information on the Caring Society's views on the discrepancies between the CHRT's orders regarding FNCFS funding and Jordan's Principle, on the one hand, and Canada's compliance, on the other, see generally *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 2 (Submissions in Response to Canada's 10 May 2016 and 24 May 2016 Compliance Reports to the Tribunal) [*Compliance Report Submissions*].

158 Letter from Jonathan DN Tarlton, Senior Counsel, Civil Litigation and Advisory Services, to Dragisa Adzic, Registry Officer, Canadian Human Rights Tribunal (10 May 2016), online: <https://fncaringsociety.com/sites/default/files/INAC_May%2010%2C%202016%20submissions.pdf>.

159 See *Compliance Report Submissions*, *supra* note 157 at paras 14–76.

Government intransigence in the wake of the CHRT's decision is disappointing. Some defend the new federal government's conduct, suggesting that First Nations need to be patient and wait until the federal budget. Yet, this argument ignores: the tribunal's order to the federal government to immediately cease its discriminatory behaviour; the immediate reforms proposed by the Caring Society, which have been known to, and agreed to by, federal government officials for almost two decades; and that the call for patience puts the conveniences of government officials and politicians ahead of the best interests of children.

The children often refer to the case as "our case" and regularly ask for status updates. When the decision was released, many children watched the webcast of the news conference in their classrooms, and over three hundred children joined a celebration of the case in Parliament on 10 February 2016. The children continue to write letters, as they have learned that legal rulings are only meaningful when they are implemented.

Conclusion

In January 2016, I went back to see Dr. Bryce at Beechwood Cemetery. I read him the decision. Although a hundred years had passed since his research confirming the preventable deaths of children in residential schools appeared on the front page of an Ottawa newspaper, the similarities in his experience and mine were profound. We were both whistleblowers in a sense, armed with reliable evidence showing that Canada adopted policies that created severe and irrevocable harm to First Nations children and yet repeatedly failed to implement necessary reforms. We both experienced retaliation from the government, and were both determined not to be silenced. Dr. Bryce's call for reform was supported by other prominent Canadians of the period, such as Samuel Hume Blake, cofounder of Blakes law firm;[160] nevertheless, Dr. Bryce was unable to garner enough public attention to force the government to take action. I hope this is where our paths diverge. While I do not want to see another generation of First Nations children suffer needlessly, it will take sustained media attention and public pressure on the government for meaningful change to happen. There was significant coverage of the CHRT's decision for a couple of days, but the media coverage is now sparse. The best friends of systemic discrimination are public silence and inaction.

If reconciliation means not saying "sorry" twice, the tribunal's decision must spur the federal government to stop using racial discrimination as public policy across all areas of First Nations experience. While some Ca-

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[160] See Milloy, *National Crime*, *supra* note 3 at 77.

nadians shield the Canadian government from culpability for the residential school fiasco by improperly suggesting that people of the period did not know any better, there can be no reasonable doubt that the current Canadian government knows better. The outstanding questions are twofold: Will the federal government do better for First Nations children? If not, what will the public do about it?

The actions of INAC and the Attorney General in this case were often contrary to access to justice principles and, in some cases, to the law itself. Real reform is needed in INAC, the Attorney General of Canada's litigation strategy, the legal profession, and in the law itself to ensure that First Nations peoples and all children can meaningfully access human rights justice in Canada, without fear of reprisal. In the spirit of reconciliation, the government must acknowledge its wrongdoing and undertake measures to avoid making the same mistake twice.

One of the first steps forward is for the Department of Justice and INAC's litigation branch to work with Indigenous peoples and organizations, such as the Indigenous Bar Association, to craft and deliver training on Aboriginal peoples and laws. Such training should include the topics recommended by the TRC and also explore why the Department of Justice is much more likely to litigate against the interests of Indigenous peoples, including Indigenous children, than to stand up for them. In addition, Canada must ensure that its litigation review strategy furthers the best interests of the child and complies with the UN *Declaration on Human Rights Defenders* and *Declaration on the Rights of Indigenous Peoples*. To be credible, the Department of Justice should avoid confining this review process to internal actors; rather, it should conduct a transparent and public review of its litigation strategy, consulting with independent experts as well as First Nations, Métis, and Inuit peoples and children.

In addition to providing legal support for systemic cases, it is vital that the TRC's call to action for culturally based legal training be implemented across the broader legal community to empower counsel to represent First Nations, Métis, and Inuit clients. Such education should be based on the UN *Declaration on the Rights of Indigenous Peoples*, and stress the importance of public consultation, engagement, and accountability in systemic human rights cases affecting Aboriginal peoples. Legal education should also be available to Aboriginal complainants filing systemic cases to better prepare them to work effectively with counsel and to situate the case in a broader public education and engagement approach.

Investments are needed to ensure equity-seeking groups have the financial and legal resources required to meaningfully access justice in the public interest. Any costs need to be situated within the critical function that the law plays in constraining wayward government power and the social and economic benefits of correcting injustice. Taxpayers should

simply not be expected to pay for government litigation regardless of the merits of the case and absent any convincing evidence that Canada's litigation aims and strategy are in the public interest. The First Nations child welfare complaint is a case in point. Had the Caring Society failed to retain pro bono counsel and to sustain operations while raising legal fees, the federal government's egregious discrimination against 163,000 First Nations children would continue unfettered. Taxpayer costs would grow exponentially as another generation of First Nations children would be traumatized, triggering significant social and economic support costs downstream.

Courts and tribunals must ensure that the interests of children, including the right to timely justice, are the paramount consideration in any legal proceedings. The First Nations child welfare case is about to eclipse its tenth anniversary or, put another way, a baby born in 2007 when the case was filed should now be grade four. In this light, the government's failure to implement meaningful reforms is completely unacceptable, given the irrevocable harm children have experienced, and continue to experience, due to the Government of Canada's discriminatory conduct.

While the reforms discussed in this article provide some fertile soil for true reconciliation to grow, ultimately the children's best hopes lie with the Canadian public knowing about the federal government's discriminatory conduct and standing up against such discrimination. The conversation is starting, but many more voices are needed. In my lifetime, I hope to see a generation of First Nations children who can live the lives they wish to have, and a generation of non-Aboriginal children who never have to grow up to say they are sorry. When that day comes, the 163,000 First Nations kids currently experiencing discrimination and their descendants can live the lives they wish to live, and the students who suffered in residential schools and Dr. Bryce can finally rest peacefully.