

Residential Schools:

Did They Really Close or Just Morph Into Child Welfare?

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opportunities for restitution and, equally important, learning by government so it does not happen again. Ten years later, on February 23, 2007, National Chief Phil Fontaine announced that the Assembly of First Nations was joining with the First Nations Child and Family Caring Society of Canada to file a complaint with the Canadian Human Rights Commission to seek redress for Canada's inequitable funding policy that contributes to more First Nations children being in state care than at the height of residential schools.¹ If reconciliation means not having to say sorry twice—Canada is failing. This article provides some background on the human rights complaint and sets out some of the evidence supporting the claim.

I INTRODUCTION

Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes that marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country.²

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In response to the filing of the human rights complaint, Minister of Indian Affairs Jim Prentice cited the amount that his department already spends on child welfare⁴ but did not address the overwhelming evidence of

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1. Assembly of First Nations, News Release, "Canadian Human Rights Complaint on First Nations Child Welfare Filed Today by Assembly of First Nations and First Nations Child and Family Caring Society of Canada (23 February 2007) [Assembly of First Nations, "Canadian Human Rights"].
 2. Indian and Northern Affairs Canada, "Statement of Reconciliation: Learning from the Past" (1998), online: *Indian and Northern Affairs Canada* <http://www.ainc-inac.gc.ca/gs/rec_e.html>.
 3. Assembly of First Nations, "Canadian Human Rights", *supra* note 1.
 4. "Chief wants \$109M for Aboriginal Children" *National Post* (6 February 2007) A4.

the inequality in child welfare funding that has been documented over the past seven years.⁵ It seemed that equality simply cost too much—surprising when the federal government was running a \$13 billion surplus.

Most Canadians would expect a good rationale from government for perpetuating such a grave inequality for First Nations children, especially in the dawn of the residential schools fiasco. So what is the evidence that the inequality exists? What are its impacts, and what Canada can do about it?

II FIRST NATIONS CHILD AND FAMILY SERVICE AGENCIES: MASTERS OF THEIR OWN UNIVERSE?

For thousands of years, First Nations communities in Canada had their own systems of caring for children when their parents were unable or unwilling to do so.⁶ Beginning in the 1950s, these systems were forcibly usurped by provincial child welfare laws that emphasized the safety and well-being of the child as the paramount consideration whilst assuming parents could, with available support, ensure the safety of their children. The provincial approach of making children the paramount consideration sounds reasonable and, as Kathleen Earle Fox⁷ notes, it is transferable to Aboriginal cultures as definitions of abuse and neglect don't vary significantly between non-Aboriginal and Aboriginal communities. There is, however, a significant difference between non-Aboriginal and Aboriginal peoples when it comes to dealing with children at risk. Provincial models do not consider whether or not parents can actually change the factors contributing to the risk to their child, but Aboriginal societies believe that parents should only be accountable for things they can reasonably change, and society is compelled to work with families to deal with the factors outside of the parent's sphere of influence. For example, Earle Fox found that when it comes to neglect, Native American families did not believe that poverty was a reason to remove a child. Instead, it was a signal to society to redistribute resources in such a way that families had the resources they needed to safely care for their children.

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5. R. McDonald & P. Ladd, *Joint National Policy Review of First Nations Child and Family Services* (Ottawa: Assembly of First Nations, 2000); K. MacDonald, *First Nations Summit Child Welfare Committee Discussion Paper: Phase One* (Paper prepared for the First Nations Summit Child Welfare Committee and the Ministry for Children and Families, 31 October 1999).
 6. C. Blackstock, "First Nations Child and Family Services: Restoring Peace and Harmony in First Nations Communities" in Kathleen Kufeldt & Brad McKenzie, eds., *Child Welfare: Connecting Research Policy and Practice* (Waterloo: Wilfrid Laurier University Press, 2003) 331.
 7. "Are They Really Neglected? A Look at Social Workers Perceptions of Neglect through the Eyes of the National Data System" (2004) 1:1 First Peoples Child and Family Review 73.

Very few would argue for a restoration of First Nations systems of child protection and care if the provincial systems had proven to be effective in ensuring the safety and well-being of First Nations children over the past 50 years of use—but they have not. In fact, there are more First Nations children in child welfare care today than at the height of residential schools by a factor of three.⁸ A detailed analysis of child-in-care data provided by three provinces revealed that 0.67 per cent of non-Aboriginal children were in child welfare care as compared to 3.31 per cent of Métis children and 10.23 per cent of status First Nations children.⁹ The overrepresentation of First Nations children in care has persisted over four decades, spurring the development of First Nations child and family service agencies (“FNCFSA”) to try to stem the tide of First Nations children going into child welfare care.¹⁰ The importance of FNCFSA in providing culturally appropriate welfare care has been affirmed by the United Nations Committee on the Rights of the Child¹¹ and initial evidence suggests that the FNCFSA have been successful in keeping greater numbers of First Nations children in their communities.¹² However, FNCFSA efforts to keep children safely in their own family homes have been frustrated by a lack of control over their operations. FNCFSA must operate according to provincial child welfare legislation, but are funded by the federal government for services provided on reserves.¹³ The problem is that the federal government funding formula is not adequate to ensure equitable child welfare on reserve, nor does it support meaningful advancements in the development of culturally based child welfare standards, policies or programs.¹⁴ The inequity is magnified by the fact that provincial governments rarely step in to top up inadequate federal child welfare funding levels, resulting in First Nations children receiving less child welfare service than their non-Aboriginal peers. Overall, First Nations have to operate within a legal straightjacket imposed by the

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8. Assembly of First Nations, *Leadership Action Plan on First Nations Child Welfare* (Ottawa: Assembly of First Nations, 2006); Blackstock, *supra* note 6.
 9. C. Blackstock, T. Prakash, J. Loxley & F. Wien, *Wen:de We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005).
 10. C. Farris-Manning & M. Zandstra, “Children in Care in Canada: Summary of Current Issues and Trends and Recommendations for Future Research” (Paper prepared for the Child Welfare League of Canada for submission to the National Children’s Alliance, 2003); Blackstock, *supra* note 6.
 11. *Concluding Observations of the Committee on the Rights of the Child: Canada*. (Geneva: United Nations Office of the High Commissioner for Human Rights, 2003).
 12. Blackstock, Prakash, Loxley & Wien, *supra* note 9.
 13. M. Sinclair, N. Bala, H. Lilles & C. Blackstock, “Aboriginal Child Welfare” in N. Bala *et al.*, eds., *Canadian Child Welfare Law*, 2d ed. (Toronto: Thompson Educational, 2004).
 14. McDonald & Ladd, *supra* note 5; Blackstock, *supra* note 6; Blackstock, Prakash, Loxley & Wien, *supra* note 9.

provinces and a funding regime imposed by Canada leaving little opportunity for First Nations to implement their own child safety solutions.¹⁵

So why are so many First Nations children in child welfare care? Is it something endemic to First Nations families that put their children at greater risk or are there fundamental problems with the child welfare system itself?

III UNDERSTANDING THE OVERREPRESENTATION OF ABORIGINAL CHILDREN IN CARE

Despite the drastic overrepresentation of Aboriginal children in care, until recently there was very little research on what factors contribute to this overrepresentation.¹⁶ The Canadian Incidence Study on Reported Child Abuse and Neglect¹⁷ (“CIS”) was the first study to include child welfare data specific to the experiences of Métis, First Nations and Inuit children in order to better understand the factors contributing to the overrepresentation of Aboriginal children in child welfare care. This cross-sectional study occurs every five years and collects information from social workers on child abuse and neglect cases reported to child welfare authorities from the time of the report to initial case disposition. Data from the 1998 and 2003 CIS cycles confirm that First Nations children are drastically overrepresented at every point of intervention by child welfare authorities.¹⁸ CIS also revealed that the reasons why Aboriginal children come to the attention of child welfare authorities are significantly different than for non-Aboriginal children. A detailed analysis of the primary type of child maltreatment indicates that Aboriginal children were less likely than non-Aboriginal children to be reported to child welfare authorities for physical, sexual and emotional abuse, and exposure to domestic violence, but were twice as likely to be reported for neglect.¹⁹ When researchers unpacked neglect, the only factors that accounted for the overrepresentation were caregiver poverty, poor housing and substance misuse.²⁰ It is important to consider that parents have

15. D. Durst, “The Wellness of First Nations Children: Seeking Solutions through Self-Government” in J. Hylton, ed., *Aboriginal Self-Government in Canada*, 2d ed. (Saskatoon: Purich, 1999), 187; MacDonald, *supra* note 5; Blackstock, *supra* note 6.

16. C. Blackstock & N. Trocmé, “Community Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change” in M. Unger, ed., *Pathways to Resilience: A Handbook of Theory, Methods and Interventions* (Thousand Oaks, Cal.: Sage, 2005).

17. N. Trocmé, D. Knoke & C. Blackstock, “Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child Welfare System” (2004) 78 *Social Service Review* 577; N. Trocmé, et al., *Mesnmimk Wasatek: Understanding the Overrepresentation of First Nation Children in Canada’s Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003)* (Ottawa: First Nations Child and Family Caring Society of Canada, 2006).

18. Trocmé, Knoke & Blackstock, *ibid.*; Trocmé, et al., *ibid.*

19. Blackstock & Trocmé, *supra* note 16; Trocmé, Knoke & Blackstock, *ibid.*; Trocmé, et al., *ibid.*

20. Trocmé, Knoke & Blackstock, *ibid.*; Trocmé, et al., *ibid.*

very little ability to influence change in two of the three factors (poverty and poor housing) especially over the short term. Research has shown that reducing barriers to service access is essential to eradicating poverty.²¹ First Nations families continue to experience substantial inequalities in child and family service access across the voluntary, public and corporate sectors.²² Importantly, differences between Aboriginal and non-Aboriginal children on child functioning characteristics were modest and did not account for the overrepresentation. Taken together, CIS findings suggest that First Nations children were not being removed because their families are putting them at greater risk, but rather because their families are at greater risk due to social exclusion, poverty and poor housing.²³ Investments in equitable child welfare services, with an emphasis on bolstering funding for family support services to keep children safely at home, accompanied by sustained investments in community development efforts targeted at poverty eradication and substance misuse appear to hold the most promise in redressing the overrepresentation of Aboriginal children in care.

IV WHY DOESN'T THE FEDERAL GOVERNMENT ACT TO ADDRESS THE INEQUALITY IN CHILD WELFARE FUNDING?

The Department of Indian Affairs website says, "A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for the agencies to meet their mandated responsibilities."²⁴ This statement reflects the findings of repeated reports documenting the inequitable levels of federal child welfare funding and how this underinvestment translates into higher numbers of First Nations children in child welfare care.²⁵ The federal government knows about the record

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21. World Bank, *Poverty at a Glance* (2006), online: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20040961~menuPK:435040~pagePK:148956~piPK:216618~theSitePK:430367,00.html>>.
 22. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/rpt/lk_e.html> [*Report of the Royal Commission*]; S. Nadjiwan & C. Blackstock, *Caring Across the Boundaries* (Ottawa: First Nations Child and Family Caring Society of Canada, 2003); Blackstock & Trocmé, *supra* note 16; M. Philp, "Save the Children Visits to Canadian First Nations Community" *The Globe and Mail* (3 February 2007).
 23. Blackstock & Trocmé, *ibid.*
 24. Indian and Northern Affairs Canada, *Fact Sheet: First Nations Child and Family Services* (October 2006), online: <http://www.ainc-inac.gc.ca/pr/info/fnsoccc/fncfs_e.html>.
 25. MacDonald, *supra* note 5; McDonald & Ladd, *supra* note 5; B. McKenzie, *Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review* (Winnipeg, MB: Kahnawake Shakotiiia'takehnhas Community Services, 2002); Blackstock, Prakash, Loxley & Wien, *supra* note 9.

numbers of First Nations children in care, it is aware that the only reason why First Nations children are overrepresented in child welfare care is neglect fueled by poverty, poor housing and substance misuse, and it acknowledges that the federal funding approach contributes to the growth rate of children coming into care. INAC²⁶ and the Assembly of First Nations²⁷ have commended the Wen:de reports²⁸ for providing an evidence-based and affordable solution to redress the funding inequality—so why isn't the federal government moving immediately to redress the inequality in child welfare funding?

A lack of money does not explain federal government inertia. It is running a \$13 billion budget and a detailed cost analysis reveals that it would only cost \$109 million per year to provide basic equity in child welfare funding.²⁹ Jurisdictional quagmires don't explain it either, as the federal government has unfettered authority to increase its funding for First Nations child welfare. Far from being barriers to redressing the inequality, Canadian law seems to stack up in the direction of redressing the inequality. For example, Section 15.1 of the *Charter of Rights and Freedoms* says every person has a right to equal benefit and standing under the law without discrimination, suggesting that the federal government's conscious decision to deny First Nations children equal benefit under child welfare laws could well be unconstitutional.³⁰

What other legitimate reasons are there for the federal government to knowingly underfund child welfare services for First Nations children? I have no idea. Perhaps someone should ask the government of Canada.

V CALLING ON CANADIANS TO STAND AS WITNESSES: THE CANADIAN GOVERNMENT IS SHAPING ITS HUMAN RIGHTS HISTORY

On February 23, 2007, a human rights complaint was filed against Canada by the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada to seek redress of the federal government's inequitable child welfare funding policy. Although neither organization

26. *Supra* note 24.

27. *Ibid.*

28. L. Loxley, L. De Riviere, T. Prakash, C. Blackstock, F. Wien & S. Thomas Prokop, *Wen:de: The Journey Continues* (Ottawa: First Nations Child and Family Caring Society of Canada, 2005); Blackstock, Prakash, Loxley & Wien, *supra* note 9.

29. Loxley, *et al.*, *ibid.*; Blackstock, Prakash, Loxley & Wien, *ibid.*

30. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, online: Department of Justice Canada <<http://laws.justice.gc.ca/en/Charter/index.html>>.

stood to financially gain if the Wen:de solution³¹ was fully implemented as all the funds were targeted for First Nations child and family service agencies, both felt it was essential to stand courageously against this inequity as it has devastating, and preventable, impacts for First Nations children and families. At the news conference announcing the human rights complaint, I felt deeply saddened that in 2007, ten years after the Royal Commission on Aboriginal Peoples³² set out a comprehensive plan to redress the pervasive inequalities experienced by Aboriginal peoples and recognize their rights, that a human rights complaint was needed to get Canada to do the right, and equal thing for First Nations children. Although the trajectory of the human rights complaint is uncertain, one thing is clear: Canadians can help make a difference for First Nations children by telling their government that every child in Canada deserves an equal chance to grow up safely at home—including First Nations children. Governments find embracing inequality more difficult when Canadians see them do it. Let's all watch intently to see if the Canadian government does the right thing—now that it can.

31. Loxley, *et al.*, *supra* note 28; Blackstock, Prakash, Loxley & Wien, *supra* note 9.

32. *Report of the Royal Commission*, *supra* note 22.