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# Doing Better for Indigenous Children and Families: Jordan's Principle Accountability Mechanisms Report

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# **Doing Better for Indigenous Children and Families: A Report on Jordan's Principle Accountability Mechanisms**

Naiomi Metallic, Hadley Friedland & Shelby Thomas

March 31, 2022

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## **Disclaimer**

While this report was informed by interviews and feedback from stakeholders, including the First Nations Child and Caring Society and Indigenous Services Canada, the conclusions and recommendations expressed are those of the authors.

## **About the authors**

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articles and collaborated to produce accessible Indigenous legal resources for Indigenous communities, legal professionals and the general public. Dr. Friedland co-established and was the first Research Director of the Indigenous Law Research Unit at the University of Victoria and is co-founder of the Wahkohtowin Indigenous Law and Governance Lodge, an interdisciplinary initiative developed to uphold Indigenous law and governance through supporting community-led research. She is author of the book, *The Wetiko (Windigo) Legal Principles: Cree and Anishinabek Responses to Violence and Victimization*, University of Toronto Press, 2018.

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### **Appreciation**

We would like to thank all those who generously gave their time to give interviews for this report as well as those who gave feedback on drafts of the report. Thanks to Linda Reif for generously sharing her expertise with respect to accountability mechanisms. Thanks to the research assistants whose work helped inform the final product: Evan Cribb, Danielle-Vautour Wilmot and Toni Hynes.

## Executive Summary

### Introduction

In the Assembly of Seven Generations' report, *Accountability in Our Lifetime: A Call to Honour the Rights of Indigenous Children and Youth*, Indigenous youth stated clearly:

Indigenous youth and children need action and it is urgent. [...] [The human rights violations experienced by Indigenous children and youth] is beyond the point of advocacy, rights promotion and the power to report. There must be accountability for those in positions of power that demonstrate prejudice and racism towards Indigenous peoples as well as accountability for the decades of broken promises on behalf of Canadian governments. The bleak reality is that government inaction and its ongoing violations of the rights of Indigenous youth and children has resulted in harms.

Accountability and advocacy mechanisms can address and prevent violations of rights to substantive equality and resulting harms. They have an important role in ensuring, strengthening and promoting good governance in democratic countries world-wide. To date, existing accountability mechanisms in Canada have not generally served the accountability needs of Indigenous children and families. Numerous reports and inquiries have identified this unmet need, including the Auditor General of Canada, the TRC Final Report and the MMIWG National Inquiry Final Report. The Canadian Human Rights Tribunal ("CHRT")'s 2016 *Caring Society* case was a watershed decision in holding Canada accountable for systemic underfunding of child welfare and other essential services. However, this was a hard-won victory and much work remains to rectify systemic inequities and discrimination.

In the summer of 2020, the Caring Society, acting jointly with the Department of Indigenous Services Canada (ISC), approached the authors to undertake research on the design of an independent accountability mechanism to oversee the government's adherence with the numerous orders that have been made by the CHRT based on Jordan's Principle and substantive equality in *Caring Society et al. v Canada*. The intended outcome of our research was this report, setting out at least three potential, well-research options "for an effective national Jordan's Principle Ombuds-like function."

There is a wide breadth of general or specialized accountability mechanisms encompassed within the broad concept of "Ombuds." Their common elements are independence and the ability to investigate and address concerns relating to government action outside of the formal court system. Ombuds-like institutions may be referred to as Ombuds, Advocates or Commissioners, and may or may not be connected to a quasi-judicial process like a tribunal. More detailed information can be found in the section, "Primer on Accountability Mechanisms" of this report. Looking at the variety of models available, our objective, and the focus of this report, most simply, is to propose accountability institutions and measures to meaningfully address the discrimination identified by the CHRT in *Caring Society* and effectively prevent similar practices in the future.

In **Part 1** of this report, we attempt to summarize the long history that forms the context of the need for independent accountability measures to meaningfully address the discrimination identified by the CHRT in *Caring Society* and prevent similar practices in the future. Drawing from this context, in **Part 2**, we set out what we identify as 10 key accountability needs of Indigenous children and families that must be addressed in order to provide effective accountability. Finally, in **Part 3**, we discuss features of effective accountability mechanisms and propose three interconnected mechanisms that we believe address the accountability needs. Any of these three mechanisms, individually, would serve to provide greater protection of the rights of Indigenous children and families from the discrimination found in the *Caring Society* case by improving government accountability. However, as outlined in this report, none are sufficient, on their own, to address all of the identified accountability needs. Therefore, we reach the conclusion that combining all three mechanisms would be the most effective way of preventing discrimination from continuing or re-emerging in the future.

These 3 Parts are summarized in this Executive Summary and discussed in greater detail in the body of this report.

### **Part 1: Context: The Need for an Independent Accountability Mechanism**

Professor Linda Reif, an expert on international human rights and ombuds institutions, reminded us that the driving question in designing any accountability mechanism should be, “*What are the real accountability problems we want to address?*” Therefore we begin by reviewing the historic and continuing accountability problems that form the present context.

**Over-representation:** Governments in Canada have contributed to taking away thousands of Indigenous children from their families and communities. This started with the federal residential school system, through the so-called “sixties-scoop” and continues in the extreme over-representation of First Nation children in provincial child welfare systems today. In the last 70 years, the inadequate provision of services to meet the needs of Indigenous children living with their families has significantly contributed to this gross over-representation.

**Interjurisdictional Neglect:** Inequitable service provision is rooted in the “jurisdictional wrangling” between provincial and federal governments, to avoid funding these services. In its 2019 Final Report, the National Inquiry into Missing and Murdered Indigenous Women and Girls named this problem “interjurisdictional neglect.” This interjurisdictional neglect widens the gap between Indigenous children and families and other children and families in Canada.

**Findings of Inequitable Funding and Inadequate Reforms:** The TRC Final Report documented Canada’s refusal to adequately fund health services as a cause of high illness and death rates of Indigenous children in residential schools. There has been documented underfunding of essential services on reserve for decades, culminating in the CHRT *First Nation Caring Society* decision in 2016. First Nations began voicing concerns in the 1970s and 1980s. Canada developed the FNCFS program to address concerns, but in 2000 and 2005, the Assembly of First Nations [AFN] and Canada commissioned expert reports which confirmed the

systemic underfunding continued in the FNCFS program. Canada did little to implement the reports' recommendations. The Caring Society and the AFN finally filed a human rights complaint with the Canadian Human Rights Commission in 2007. Years of procedural arguments and delays followed.

**The Caring Society Case:** In 2016, the Tribunal ordered in favour of the complainants. It found that discrimination on race and/or national ethnic origin was made out. In extensive reasons, the Tribunal highlighted the real power and control Canada held over child welfare services on reserve. Funding formulas did not ensure culturally appropriate programming, were not comparable to provincial funding to meet provincial standards, and, in fact, led to perverse incentives to remove First Nations from their homes as a 'first resort' rather than a last one. The Tribunal also found that Canada had wrongly adopted a very narrow interpretation of Jordan's Principle, continuing to leave many First Nation children behind. Canada committed to not appeal this case and to make reforms to address its findings.

**Non-compliance Orders and Inadequate Reforms:** Since the main Caring Society decision, the Tribunal has found several instances of non-compliance by Canada, particularly its failure to implement a broad interpretation of Jordan's Principle and an effective process to respond to Jordan's Principle requests and appeals. The non-compliance decisions highlight numerous systemic and accountability issues, including following old approaches (comparability instead of substantive equality) and a too narrow definition of services and children covered by Jordan's principle, as well as using funding authorities to justify inaction, failure to collect appropriate data to properly assess Jordan's Principle requests and needs, and lack of an arms-length appeal process.

While some real reforms have been made, they remain inadequate. The Department of Indigenous Services [ISC] has attempted to respond to the CHRT rulings through internal measures, such as educating ISC staff, modifying some processes, funding community services coordinators to help applicants, and changing its Jordan's Principle's appeal process. However, meaningful internal change is challenging. There is high staff turnover, and the modified appeal process was stalled due to vacancies.

**Individualization of Claims and 'Projectification':** The Jordan's Principle application process remains individualized and onerous for applicants. In particular, requiring all applicants to provide documentary evidence and demonstrate how a request aligns with substantive equality is burdensome, and leads, unsurprisingly, to high numbers of requests being assessed as submitted without sufficient information (51% of all Jordan's Principle requests in 2019-2020), rather than granted or denied on their merits. This issue is part of a larger concern of "projectification", described in Sinha et al, 2021 - that ISC's view of Jordan's Principle appears to be akin to a program. The current process is individualistic case by case, demand-driven and contingent on the capacity of applicants to successfully navigate it. Systemic assessment and development of proactive policies and practices to ensure equitable services is still missing.

Canada has increased funding for FNCFS services through annual budget allocations, but has also resisted reforming its funding approach to the FNCFS Program to one that is needs-based, and informed by principles of self-government. Details of long-term reform in relation to funding have yet to be released by Canada.

**Statutory Reforms with Inadequate Education, Resources or Oversight for Compliance:**

Canada passed *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 ("C92"), which sets out national minimum standards and recognizes an inherent Indigenous right to self government, including child and family services. C92 legislates Jordan's Principle in s. 9(3)(e):

in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

However, Canada has provided little to no education or resources to support understanding and implementation of C92. C92 does not specify how s. 9(3)(e) will be ensured, or whether Canada or the provinces bear responsibility for funding services to achieve the national minimum standards or Indigenous self government. There are mixed messages regarding so-called "coordination agreements" between First Nations, provinces and Canada for the self government aspect. It is unclear how, without more, C92 responds to the tribunal rulings, and there are fears it may perpetuate, or even escalate, the jurisdictional wrangling in this area.

ISC standards within *Department of Indigenous Services Act*, SC 2019, c 29, s 336 ("*DISA*"), which came into effect in July 2019, provides further grounding to respond to the tribunal rulings. The preamble includes commitments to ensure service standards are transparent and meet the needs of Indigenous groups, recognize socio-economic gaps, promote Indigenous ways of being and doing, and that ISC collaborate and cooperate with Indigenous peoples. *DISA* identifies the group ISC serves as "Indigenous peoples", which includes "Indian, Inuit and Metis peoples." In s. 6(2) it states the minister "shall" ensure a range of services, including child and family services, education and health, and in s. 7(2) it requires collaboration in the development, provision, assessment and improvement of the services listed at s. 6(2). Further, the *DISA* commits Canada to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*, as does Canada's 2021 law, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ("*UNDRIPA*"), which affirms the Declaration as a universal human rights instrument with application to Canadian law.

C92, *DISA*, the Declaration and *UNDRIPA* provide solid statutory support for transparent, equitable needs-based and cooperative service provision. However, it is not clear to what extent *DISA* or *UNDRIPA* are being followed by the Department at this time. There is potential and a need for education and oversight of ISC regarding compliance and implementation.

### **Ongoing Gaps of Education, Advocacy and Accountability:**

Lack of awareness and education by both governmental and non-governmental professionals continues to present significant challenges to the effective implementation of Jordan's Principle and equitable culturally appropriate services for Indigenous children and families. Generally, both the MMIWG Final Report (2019) and the TRC Final Report (2016) called for national advocates in this area. Provincial governments continue to deny responsibility for services to First Nation children and families. According to Jordan's Principle Operational Committee respondents to a survey in early 2021, specific challenges to implementing Jordan's Principle continue to include informational limits to written documentation, interpretation of reviewers or failure to follow parameters causing claims being denied in error, lack of reasons for denials, barriers to appeals due to burdensome document requirements, requiring individuals or First Nations to demonstrate how substantive equality applies, timelines and delays, lack of information and communication, lack of aging out of care supports, high turnover of ISC staff, worker burnout, lack of expertise in substantive equality, and failure of provincial governments to come to the table. Respondents identified the need for more internal training and community educational outreach as well as quicker and easier access to services.

Currently, there is some support to address some of these challenges through government funded Jordan's Principle Navigators and Regional Focal Points. However, the Caring Society, a small fundraising reliant charity with no government funding, continues to play a crucial advocacy role in supporting families in seeking to access Jordan's Principle and substantive equality, including drawing on its network of lawyers who assist on a *pro bono* basis to address denials, from liaising with ISC to filing judicial reviews. The Caring Society also informally provides oversight of ISC's implementation of the CHRT decisions, by bringing issues of non-compliance to the CHRT's attention, as well as continuing to publicly raise awareness of systemic discrimination against First Nations children and families. ISC staff are uncertain as to what they can share with the Caring Society advocates due to privacy and confidentiality. The Society's staff recognize that they cannot help all who need assistance and emphasize the need for formalized and funded advocacy services for First Nations children and families.

### **Part 2: Accountability Needs:**

The preceding discussion demonstrates 10 major accountability needs relating to Jordan's Principle, and equitable services for Indigenous children, families and communities:

1. **Oversight of the current Jordan's Principle process at ISC:** While ISC staff may be well intentioned and committed to implementation, deep systemic inequality and the legacy of discrimination requires oversight from a body with relevant expertise.
2. **Oversight of ISC's long-term reform of CFS, including funding of agencies, as well as CIRNAC's funding and negotiation of self-government under C92:** Long term reform was a key order of the Main Decision and oversight is required to address the current lack of transparency, education and resources for understanding and implementation and funding of self government in relation to child and family services.

3. **Oversight of Canada's efforts addressing systemic inequality in services related to Indigenous children and families:** Eliminating systemic inequality in delivery of essential services is the ultimate goal of Jordan's Principle, the Main Decision, and a core recommendation in numerous reports and inquiries, including the TRC and MMIWG National Inquiry Final Reports.
4. **Oversight of federal-provincial efforts at cooperation in relation to funding and servicing of Indigenous children and families:** Ending interjurisdictional neglect requires oversight of federal-provincial cooperation and compliance with Jordan's Principle and C92 responsibilities to Indigenous children, families and communities.
5. **Ongoing education to ISC, CIRNA, provincial DCS staff, provincial agencies, Social workers, Crown lawyers, legal aid lawyers, judges:** Effective implementation of the CHRT Orders, Jordan's Principle and C92 requires more and ongoing education for all government and legal actors responsible for compliance and application.
6. **Investigating and mediating individual complaints about provincial governments funding failure to provide services to Indigenous children and families:** This is necessary as many provincial child advocates, ombuds and legal services providers aren't aware of or pursuing Indigenous children and families' rights.
7. **Investigating and mediating individual complaints about child welfare agencies' implementation of CFS laws and policies, including C92:** Several inquiries, including the MMIWG National Inquiry, called for an Indigenous-specific child advocate, as there is inconsistency with provincial child advocates ensuring compliance with provincial statutory protections, and now the C92 minimum standards.
8. **Powers for enforceable orders against Canada for non-compliance with Jordan's Principle, substantive equality and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc):** Supervisory jurisdiction has been key to the CHRT's ability to affect change in the *Caring Society* and something similar to take its place is necessary for when the Tribunal is no longer seized of the case, given the extraordinary long history and seriousness of substantive equality and statutory human rights violations, and Canada's intransigence to change even after the Main Decision.
9. **Powers for enforceable orders against provinces for non-compliance with Jordan's Principle, substantive equality against provinces and relevant laws and international requirements (C-92, UNDRIP, CRC, etc):** The history of provincial neglect of Indigenous children and families' needs justifies having a body that can also grant binding orders against the provinces for their failure to respect their obligations.
10. **Legal advocacy for First Nations children, families and communities for government services and in child welfare matters:** It is evident there continues to be a strong, largely unmet need for formal, funded advocacy to support Indigenous children

and families vis-a-vis both federal and provincial governments in relation to the provision of equitable services and child and family services matters.

**Part 3: Features of Effective Accountability Mechanisms and Recommendations:**

Based on research into provincial, national and international ombud-like and other accountability mechanisms to address substantive equality and statutory human rights concerns, including the importance of accountability mechanisms being context driven, so impacted by the history and needs discussed above, we have identified the following five features of effective accountability:

- A. External accountability mechanisms:** Currently, there are no external non-judicial accountability mechanisms that apply to the work of ISC and CIRNAC.
- B. Legislated mechanisms, not simply created by the executive:** For effective independence from the government of the day, legislatures, and not executives, ought to create accountability bodies, appoint their leadership, oversee the bodies' functions, and be the government entity receiving reports from the body.
- C. Mechanism with specific mandates relating to Indigenous children and families:** The unparalleled gravity and longevity of the ongoing substantive equality and statutory human rights violations of Indigenous children and families in Canada requires the creation of mechanisms with specific mandates in relation to Indigenous children and families.
- D. Mechanisms with powers over all Indigenous children:** As per SCC jurisprudence, DISA and C92, federal jurisdiction applies to First Nations, both status and non-status, Metis and Inuit peoples. Powers over all Indigenous children is necessary for any mechanism to reduce, not reproduce, exclusion or jurisdictional neglect. Such an inclusive approach is not the same thing as a pan-Indigenous approach. It is equally important that the mechanisms recognize the diverse legal traditions among Indigenous peoples.
- E. Mechanisms that bypass jurisdictional wrangling:** Currently, neither human rights bodies nor the courts in Canada can hear a complaint of denial of services involving both the federal and provincial government at the same time. Ironically, and tragically, as lawyer David Taylor puts it, there appears to be a Jordan's Principle problem in vindicating Jordan's Principle claims. For an accountability mechanism to be effective, it must challenge the conventional jurisdictional boundaries that could lead to delays and denials of services under it, and have led to the decades of interjurisdictional neglect of Indigenous children and families. Canada has the power to do this under s. 91(24).

**Recommendations:**

Based on the accountability needs identified in Part 2, and the features of effective human rights accountability mechanisms identified in this Part, we recommend **3 interconnected mechanisms to safeguard the needs of Indigenous children and families**. While originally we expected to propose 3 independent options, we have come to the conclusion that, while any of the three mechanisms, on their own, would be an improvement over the status quo, all 3 are necessary to achieve meaningful accountability. The stakes are too high, the pattern of

discrimination too long and entrenched, and Canada's practice, policy and even legal reforms still too inadequate, for anything less to actually be effective at this point.

**The 3 accountability mechanisms are:**

- 1. A National Indigenous Child and Family Advocate:** This would be a primarily based on the model a child advocate ombuds model, but also with specific jurisdiction to oversee governments' delivery of services to Indigenous children and families in accordance with Jordan's Principle, their right to substantive equality in statutory human rights instruments and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc). The Advocate would also oversee governments' implementation of child welfare legislation and policy in relation to Indigenous children and families. In this regard, in addition to addressing systemic issues, the Advocate would assist Indigenous children and families resolve individual complaints through informal and confidential means.
- 2. A National Indigenous Child and Family Tribunal:** This would have the power to hear complaints from individuals, groups, communities or the Child Advocate. Complaints would include those of a systemic nature against the federal or provincial governments and their delegates in relation to Jordan's Principle, substantive equality and the implementation of CFS laws and policies, including C92. The Tribunal should have robust remedial powers to effectively uphold the right to substantive equality and other statutory human rights of Indigenous children and families.
- 3. National Legal Services for Indigenous Children and Families:** This would be designed to provide Indigenous children and families with state-funded access to knowledgeable lawyers who can support them in their attempts to access substantive equality in essential services from federal and provincial governments, and in their interactions with child welfare systems. The power imbalance between individual children and families and the state makes advocacy essential for upholding the right to substantive equality and other statutory human rights.

We conclude that all 3 of these mechanisms are necessary to effectively address the government conduct that has contributed to the harm Indigenous youth name, including the overrepresentation of Indigenous children in state care and the senseless suffering and separation of Indigenous children and families with medical and disability needs, for decades.

**All 3 of these mechanisms must, at minimum, have the following features for effectivity:**

- Be set out in federal legislation and not simply created by the executive, in order to ensure independence from government and the greatest degree of oversight and accountability;
- Be specific to the interest and rights of Indigenous children and families (and not wrapped into to broader mechanisms);
- Apply to all Indigenous children and families, not just First Nations on reserve (e.g., non-status First Nations, off-reserve, Métis and Inuit) while recognizing distinctions based on local needs and diverse legal traditions among Indigenous peoples; and

- Apply to conduct of both federal and provincial governments, which Canada has the constitutional jurisdiction to legislate pursuant to s 91(24) of the *Constitution Act, 1982*.

We believe all three mechanisms we have outlined can and should be legislated within one federal statute. The following chart sets out the three accountability mechanisms, with reference to the accountability needs each would address as well as essential elements for efficacy.

**Accountability Mechanism 1: National Indigenous Child and Family Advocate**

<b>National Indigenous Child and Family Advocate</b>	
<b>Accountability needs to be addressed:</b>	<b>To be effective this Advocate <u>should</u>:</b>
<b>Need #1:</b> Oversight of Canada's implementation of Jordan's Principle	<ul style="list-style-type: none"> <li>a. Assess governments' obligations in relation to Jordan's Principle and substantive equality (protected under each government's human rights legislation and the <i>Charter</i>), C-92 and international instruments such as United Nations Declaration on the Rights of Indigenous Peoples, the Conventions with Rights of the Child, and the Convention of Rights of Persons with Disabilities.</li> <li>b. Scrutinizes governments' distinctions-based approach in relation to the need for equitable services on the grounds of the various subcategories of Indigeneity governments have relied on in the past to make distinctions (non-status, off-reserve, Metis, Inuit, etc.) as <i>prima facie</i> discrimination.</li> <li>c. Have the power to investigate individual, group and community complaints, as well as institute own-motion investigations, including into systemic issues.</li> <li>d. Have robust investigative powers to collect and compel necessary information from government parties to effectively respond to the different types of complaints as well as to be able to effectively conduct systemic oversight.</li> <li>e. Conduct research and hire experts in conducting systemic inquiries.</li> <li>f. Be mandated to meet with children and youth and ensure their voices are heard in the work of the Advocate's Office.</li> <li>g. Attempt to facilitate resolution of complaints through informal and confidential means. Such methods for resolving disputes should draw on Indigenous laws and the dispute resolution processes where possible. This would not prevent reporting and recommendations.</li> </ul>
<b>Need #2:</b> Oversight of Canada's long-term reform of child welfare, including C92 implementation	
<b>Need #3:</b> Oversight Canada's implementation of substantive equality in relation to all services impacting on Indigenous Children and Families	
<b>Need #4:</b> Oversight of Federal-Provincial cooperation in servicing Indigenous Children and Families	
<b>Need #5:</b> Ongoing education for federal and provincial government actors involved in child welfare services	
<b>Need #6:</b> Oversight of provincial governments'	

<p>implementation of substantive equality in relation to all services impacting on Indigenous Children and Families</p>	<p>h. Providing a “one stop shop” that can support Indigenous children, youth and their families in navigating the different accountability mechanisms that exist. This is not intended to limit peoples’ options for resolving complaints through other mechanisms. It is our hope that an individual or group might start with the Advocate to seek informal resolution or, at the least, obtain information to navigate their options, and possibly be connected with legal support if necessary (we explain this further below with our third mechanism, National Legal Services for Indigenous Children and Families).</p> <p>i. Have the power to make recommendations to governments, and to escalate these recommendations to higher levels (up to and including the Tribunal) if recommendations are not reasonably acted upon.</p> <p>j. Report annually to Parliament on its activities, as well as make special reports commenting on any matter within the scope of its powers that it deems appropriate.</p> <p>k. Intervene in any adjudicative proceedings relating to the jurisdiction of the Advocate.</p> <p>l. Educate the public and federal and provincial civil servants, and those involved in child welfare matters, about the right to substantive equality and Jordan’s Principle, of Indigenous children and families, as well as their rights within child welfare matters, including under C92.</p> <p>m. Play a ‘knowledge mobilization’ role in terms of ensuring that standards and practices are consistently applied/understood throughout the various jurisdiction and country, and act as a resource for Indigenous nations and communities to facilitate learning from each other.</p> <p>n. Promote connections to culture, families, lands, waters, language, songs and stories, as well as encourage the implementation of Indigenous laws in the work of the Advocate.</p> <p>Beyond these requirements, further details about the Advocate (composition, qualifications, terms, staff, etc.) ought to be determined in discussion and cooperation with Indigenous groups, including Indigenous children and youth, the Caring Society and the pro bono lawyers who have been supporting it. We further suggest that, in the actual development of the enabling legislation, further expert advice be sought to recommend specific statutory language.</p>
<p><b>Need #7:</b> Oversight of child provincial welfare agencies, including their implementation of C92</p>	

**Accountability Mechanism 2: National Indigenous Child and Family Tribunal**

<b>National Indigenous Child and Family Tribunal</b>	
<b>Accountability needs to be addressed:</b>	<b>To be effective this Tribunal <u>should</u>:</b>
<p><b>Need #8:</b> Enforce orders against Canada for non-compliance with Jordan's Principle, substantive equality and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc)</p>	<p>a. Have the power to issue binding orders against both the federal and provincial governments and their public servants and agencies.</p> <p>b. Have the powers to craft its own procedures and rules of evidence that are more flexible than the courts, including child-informed and child-friendly procedures, and the incorporation of Indigenous law and legal procedures into the process.</p> <p>c. Be mandated to issue remedial orders where discrimination is established.</p> <p>d. Have extensive remedial powers, including powers to grant interim orders and make summary decisions, as well as the power to exercise supervisory jurisdiction made explicit.</p> <p>e. Be composed of adjudicators with expertise in the discrimination issues faced by Indigenous children and families.</p> <p>Beyond these requirements, further details about the Tribunal (composition, qualifications, terms, staff, etc.) ought to be determined in discussion and cooperation with Indigenous groups, including Indigenous children and youth, including parties and lawyers that have been involved in the Caring Society case.</p> <p>The creation of a Tribunal with a focus on Indigenous child and family issues is critical to support the work of the proposed Advocate. Should Canada eventually implement recommendations from the MMWIG National Inquiry and others to create a National Indigenous and Human Rights Tribunal, we think this body could equally support the work of the Advocate, so long as the Tribunal is focused only on Indigenous matters, can bind both the provinces and governments, and has a sufficiently flexible process and robust remedies. However, until such time as a National Indigenous and Human Rights Tribunal, there needs to be a National Indigenous Child and Family Tribunal.</p> <p>Finally, to ensure the utmost independence from the federal government, the proposed Tribunal should not be included within the schedule of federal administrative tribunals falling under the <i>Administrative Tribunals and Support Services of Canada Act</i>, SC</p>
<p><b>Need #9:</b> Enforce orders against provinces for non-compliance with Jordan's Principle, substantive equality against provinces and relevant laws and international requirements (C-92, UNDRIP, CRC, etc)</p>	

	2014, c 20, s 36.
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**Mechanism 3: National Legal Services for Indigenous Children and Families**

<b>National Legal Services for Indigenous Children and Families</b>	
<b>Accountability needs to be addressed:</b>	<b>To be effective the National Legal Services <u>should</u>:</b>
<p><b>Need #10:</b> Formal advocacy for First Nations children, families and communities for government services and in child welfare matters</p>	<ul style="list-style-type: none"> <li>a. Include funding support from filling forms, letter writings and speaking on their behalf, to pursuing existing Ombuds, Child Advocate, human rights processes (before the federal or provincial human rights commission, or the new Tribunal we are proposing) or judicial review in the courts.</li> <li>b. Take the form of a legal referral service housed in the proposed Advocate (similar to the Legal Representation for Child and Youth branch of Alberta's Office of the Child and Youth Advocate). This includes:               <ul style="list-style-type: none"> <li>i. The Advocate's Office has the power to refer children and families to lawyers and appoint lawyers to represent them to access substantive equality in services from the federal and provincial governments, and in their interactions with child welfare systems.</li> <li>ii. The lawyers appointed would be from a roster maintained by the Advocate. To get on the roster, lawyers would have to meet standards and expectations set by Advocate (e.g., practice experience, years at the bar of a province, knowledge of Indigenous communities, etc.).</li> </ul> </li> </ul>

**Conclusion:**

In identifying the accountability problems to be addressed by an accountability mechanism for this report, we have looked thoroughly at the context of "one of the worst possible cases" of racial discrimination, that has deeply and irrevocably harmed multiple generations of Indigenous children and families. We have also reviewed features of effective accountability mechanisms that can contribute to the imperative work of bringing an end to these ongoing harms.

There has been progress, and genuine work toward internal, policy and even legislative reform. However, there is much work to be done and many of the reforms that Canada has unilaterally

implemented have been inadequate to stymy ongoing substantive equality and other statutory human rights violations. The vast majority of meaningful reforms to date have occurred since the Tribunal issued its 2016 Main Decision and retained supervisory jurisdiction.

There will come a day when the Tribunal will relinquish jurisdiction over the case. Given the very long history of systemic discrimination against Indigenous people by the government in Canada, particularly in the area of service delivery, it will be important to have alternative accountability mechanisms in place. We have set out 3 that, together, we believe will practically address the accountability problems that have facilitated one of the worst possible cases of racial discrimination in Canadian history for over half a century. There are also internal steps ISC can take in the interim, and in addition, to external legislated accountability mechanisms, discussed in Part 3 A and in the Conclusions and Recommendations of this Report.

The Assembly of Seven Generations report clearly emphasized that "Indigenous youth and children deserve accountability and responsibility from the federal government, as well as all levels of government." As Cindy Blackstock says, once we know better, we need to *do* better. We hope and believe a new and better chapter has begun and can be created for present and future generations. Accountability is an essential aspect of this. Indigenous children, youth and families deserve nothing less.

## Introduction

In the summer of 2020, we were approached by the Caring Society, acting jointly with the Department of Indigenous Services Canada [ISC], to undertake research on the design of an independent accountability mechanism to oversee the government's adherence with the numerous orders that have been made by the Canadian Human Rights Tribunal based on Jordan's Principle and substantive equality in *Caring Society et al. v Canada*.<sup>1</sup> Over the fall of 2020 we developed a workplan for this research, which was signed into a contract for services with ISC in February 2021.

Our work plan called for the review and analysis of general oversight, accountability and advocacy mechanisms in Canada and internationally; a review and analysis of Jordan's Principle-specific law, policies and processes; and having conversations with key stakeholders<sup>2</sup> to help us identify current needs, gaps and promising practices to inform the necessary scope, function and approach of an accountability mechanism related to Jordan's Principle and child welfare. The intended outcome of our research was this report, setting out at least three potential, well-researched options "for an effective national Jordan's Principle Ombuds-like function."

Early into the life of this project, both the Caring Society and ISC were using the specific language of an "ombudsperson function" on "Jordan's Principle." However, as we got deeper into our research, we determined that use of these phrases were not intended as pre-determining what the accountability mechanisms we propose should look like. Speaking with the Caring Society, ISC staff and others, we realized that there are several different accountability mechanisms that are encapsulated within the meaning 'ombuds', as we explain in our next section, entitled 'Primer on Accountability Mechanisms.' We also concluded that the accountability needs of Indigenous children and families go beyond Jordan's Principle because the principle arises from, and is informed by, the *Caring Society et al. v Canada* case, what led to it, and what has happened since the main decision.

According to international human rights expert, Linda Reif, author of *Ombuds Institutions, Good Governance and the International Human Rights System*, core elements of good governance include democratic government, rule of law, accountability, transparency of government, respect

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<sup>1</sup> *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Caring Society* 2016].

<sup>2</sup> We met with various key stakeholders including First Nations Child and Family Caring Society of Canada staff; Joint Policy and Operations Committee on Jordan's Principle; National Advisory Committee on First Nations Child Welfare; National Advisory Committee on First Nations Child Welfare; Consultation Committee on First Nations Child Welfare; lawyers involved in *Caring Society et al.* matter and advancing Jordan's Principle cases; and Indigenous Service Canada staff from Jordan's Principle branches. These meetings included local Jordan Principle service coordinators; relevant staff and directors from child welfare agencies, Indigenous health organizations; representatives from Assembly of First Nations (AFN); and relevant staff from human rights commission. We also presented at a one-day AFN forum on Jordan's Principle and spoke with Linda Reif, a leading Canadian expert in accountability mechanisms.

for human rights and public participation.<sup>3</sup> Accountability and advocacy mechanisms have an important role in ensuring, strengthening and promoting good governance. Reif explains that “[g]overnment accountability involves establishing “lines or forms of accountability” between the government and the public which can cross the spectrum from provision of information, through the application of procedural fairness legal principles, to subjection of government conduct to adjudicative decisions or prosecution”.<sup>4</sup> An important element of the accountability process is a mechanism’s ability to make decisions about conduct and make determinations to resolve inappropriate conduct. Answerability and enforcement are important elements of accountability. Metis legal scholar, Larry Chartrand, explains that “accountability is inherently a reciprocal relationship. [...] In other words, accountability of government actors to the public is seen as important in promoting ethical, fair and efficient government decision-making.”<sup>5</sup>

To date, existing accountability mechanisms in Canada have not generally served the accountability needs of Indigenous children and families. First of all, aside from the courts and the Canadian Human Rights Commission (CHRC) and Tribunal, there are no other oversight mechanisms in relation to the federal government’s departments of ISC and Crown-Indigenous Relations and Northern Affairs Canada. Further, it has been extremely difficult for Indigenous children and families to use the courts to hold governments accountable in relation to the funding of essential services.<sup>6</sup> The Canadian Human Rights Tribunal’s 2016 *Caring Society* case was a watershed decision in holding Canada accountability for systemic underfunding of child welfare services, however, this was a hard-won victory (over which the battle continues), and the fact is that the CHRC and Tribunal have significant shortcomings in meeting the various accountability needs of Indigenous children and families. There are more oversight mechanisms at the provincial level, such as ombuds and child advocates, but the extent to which they are able to or have advanced justice for Indigenous children and families is uncertain. In the Assembly of Seven Generations’ report, *Accountability in Our Lifetime: A Call to Honour the Rights of Indigenous Children and Youth*, Indigenous youth acknowledged that

Canada is long overdue in honouring inherent Indigenous rights, as demonstrated by generations and over 150 years of reports and recommendations that Indigenous peoples have provided to Canadians. Indigenous youth and children need action and it is urgent. [...] [The human rights violations experienced by Indigenous children and youth] is beyond the point of advocacy, rights promotion and the power to report. There must be accountability for those in positions of power that demonstrate prejudice and

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<sup>3</sup> Linda C. Reif, *Ombuds Institutions, Good Governance and the International Human Rights System*, 2nd rev Ed. (Boston: Koninklijke Brill NV, 2020) at 145.

<sup>4</sup> *Ibid* at 119.

<sup>5</sup> Larry N Chartrand “A Section 35 Watchdog: Furthering Accountability of Federal, Provincial and Territorial Governments to Aboriginal Peoples” Governance, Self-Government and Legal Pluralism Conference, April 23-24, 2003, Hull, Quebec, at 4.

<sup>6</sup> Janna Promislow & Naiomi Metallic, “Realizing Administrative Aboriginal Law” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017) [Promislow & Metallic] at 104-108; see also Yellowhead Institute, “Looking for Cash Back in the Courts” (2021), online: <https://cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Cash-Back-Court-Cases-Yellowhead-Institute-4.2021.pdf>.

racism towards Indigenous peoples as well as accountability for the decades of broken promises on behalf of Canadian governments. The bleak reality is that government inaction and its ongoing violations of the rights of Indigenous youth and children has resulted in harms".<sup>7</sup>

We agree with the assessment of the Assembly of Seven Generations of the bleak nature of Canadian governments' accountability to Indigenous children and families. In Part 1 of this report, we attempt to summarize the long history that informs this conclusion. Drawing from this history, in Part 2, we set out what we identify as 10 separate accountability needs of Indigenous children and families that must be addressed in order to provide effective accountability. Finally, in Part 3, we propose three interconnected mechanisms that we believe address these accountability needs.

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<sup>7</sup> Assembly of Seven Generations, "Accountability in Our Lifetime: A Call to Honour the Rights of Indigenous Children and Youth," (2021) at 16 [Assembly of Seven Generations].

## Primer on Accountability Mechanisms

There are various accountability mechanisms in democratic nations. Similar accountability mechanisms sometimes have different names, despite having similar purposes and functions. This primer aims to provide some high level definitions of common accountability mechanisms, grouped according to purpose and function, along with examples.

### 1. Independent Accountability Institutions

Independent Accountability institutions are institutions that “control the actions of other state bodies through actions ranging from soft monitoring to hard coercive standards”.<sup>8</sup> Accountability institutions include, but are not limited to, Ombuds. Some also have additional functions including litigation, intervention, providing, advice, research and education.<sup>9</sup> Generally, these institutions are established to monitor and supervise the actions and activities of governments to make sure that they are doing their work in a fair, just and transparent way.<sup>10</sup> They are designed to provide citizens with an accessible, impartial, and informal avenue to address problems with the actions of government.<sup>11</sup> Key roles of accountability institutions include improving human rights protection and promotion when judicial intervention not available or realistic, improving domestic human rights circumstances; changing the culture and mindset of bureaucracy, drawing attention to law reform needs; requesting binding decisions through the courts, reducing poor bureaucratic behaviour through monitoring, improving rule of law and strengthening good governance.<sup>12</sup>

In comparison to judicial institutions, these institutions have broad and flexible assessment criterion for determining violations. This gives them the ability to address a wider range of violations using a variety of remedies.<sup>13</sup>

Some examples of Independent Accountability institutions include:

- Auditor generals,
- Anti-corruption bodies,
- Electoral commissions
- Policing oversight institutions,
- Human rights commissions, and
- Ombudspersons.<sup>14</sup>

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<sup>8</sup> Reif *supra* note 3 at 123.

<sup>9</sup> *Ibid* at 124.

<sup>10</sup> *Ibid* at 23.

<sup>11</sup> Chartrand *supra* note 5 at 16.

<sup>12</sup> Reif *supra* at note 3 at 118, 147, 245.

<sup>13</sup> *Ibid* at 250-251.

<sup>14</sup> Chartrand *supra* note 5 at 5.

## 2. Ombuds Institutions (General or Classic)

An ombuds is one kind of independent accountability institution that reviews government, agencies, and other organizations' actions.<sup>15</sup> According to the Forum of Canadian Ombudsman, an ombuds is an independent and objective institution that reviews government, agencies, and other organizations' actions.<sup>16</sup> Reif explains the classic ombuds was established to fight maladministration<sup>17</sup> and supervise the actions of the government's administrative activities.<sup>18</sup> The office is provided for by constitution or action by legislature and it is headed by an independent, high level public official responsible to the legislature. Typically, the core powers of an ombuds are investigations, making recommendations and submitting reports to resolve problems by securing redress and improving administrative systems and redress.<sup>19</sup> Typical Ombuds functions include complaint handling and resolution, monitoring and reviewing functions, individual and systemic advocacy.<sup>20</sup> A small number have quasi-coercive powers.<sup>21</sup> The process is usually confidential, impartial, and neutral.<sup>22</sup>

Some examples of ombuds institutions in Canada include:

- Provincial and Territorial ombuds institutions,
- National Defence and Canadian Forces Ombudsman,
- Municipal ombuds institutions.<sup>23</sup>

## 3. Thematic Ombuds Institutions

The key distinction of a thematic ombuds institution is that they have jurisdiction over a specific and distinct thematic or specialized area.<sup>24</sup> Over the years, the concept of classic ombuds institutions have expanded and tailored to meet varying needs of local regions including public and private sectors, international, national and regional levels and crossing several thematic

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<sup>15</sup> Michelle LeBaron "Watchdogs and Wise Ones in Winter Lands: The Practice Spectrum of Canadian Ombudsman" (2008) Forum of Canadian Ombudsman (FCO) Liz Hoffman Ombudsperson Research Award Paper at 4, 5.

<sup>16</sup> *Ibid.*

<sup>17</sup> Reif *supra* note 3 at 5.

<sup>18</sup> *Ibid* at 23.

<sup>19</sup> Mary A Marshall & Linda C. Reif "The Ombudsmen: Maladministration and alternative dispute resolution" Alberta Law Review, Vol XXXIV No 1 (1995) at p. 218; *Ibid* at 225.

<sup>20</sup> Commissioner for Children and Young People Western Australia, "Oversight of services for children and young people in Western Australia" (November 2017) Commissioner for Children and Young People Western Australia, Perth at 9.

<sup>21</sup> Reif *supra* note 3 at 221.

<sup>22</sup> Mary Theresa Hunter "Canadian Child and Youth Advocates: A comparative analysis" Doctor of Philosophy Dissertation, School of Public Administration, University of Victoria, 2017 at 26.

<sup>23</sup> "Ombudsman Offices in Canada" (2021) online: *Forum of Canadian Ombudsman* <[http://www.ombudsmanforum.ca/en/?page\\_id=176](http://www.ombudsmanforum.ca/en/?page_id=176)>.

<sup>24</sup> Reif *supra* note 3 at 62.

areas. They require a level of expertise in the relevant area.<sup>25</sup> Thematic institutions may overlap with general accountability institutions and multiple departments may fall within the scope of thematic institutions depending on the specific focus of the institution.<sup>26</sup> Like classic ombuds, some thematic ombuds institutions have expanded to include additional mandates such as explicit human rights protection and promotion, functions related to children's rights, preventative measures, monitoring abilities,<sup>27</sup> and administrative law litigation functions. These institutions have a range of powers and functions. They are not only complaint-driven, and may have some decision-making powers and public education mandates. Some institutions have additional protection powers other than investigations including mediation and court litigation.<sup>28</sup> Some adjudicative powers have been given to thematic equality ombuds,<sup>29</sup> though these institutions rarely have coercive remedial powers.<sup>30</sup> Some can conduct audits to ensure compliance with the law in sensitive areas including police conduct, child protection, and government intrusion on private communications. Some also do administrative audits if it's in the public's best interest.<sup>31</sup> Like classic or general ombuds, thematic ombuds institutions generally monitor their recommendations and will attempt to use persuasion to encourage implementation.<sup>32</sup>

Some examples of thematic ombuds institutions in Canada include:

- Commissioner of Official Languages,
- Privacy Commissioner,
- Information Commissioner,
- Federal Correctional Investigator,
- RCMP External Review Committee, and
- Police Complaints Commissioner.

#### **4. Thematic Ombuds Institutions – Children's Rights Commissioners and Advocates**

Independent accountability institutions that focus on Children's rights are one type of thematic ombuds institution. These are typically either Commissioners or Advocates. Children's Commissioners have been appointed around the world and typically have similar powers and functions to other thematic ombuds, but in the area of children's rights.<sup>33</sup> Child Advocates

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<sup>25</sup> Marshall & Reif, *supra* note 19 at p. 230; Jo-Ann EC Greene "On-reserve matrimonial real property following relationship breakdown: a review of tribunal, ombuds and alternative dispute resolution mechanisms" INAC Paper, May 2003, at 3, 4.

<sup>26</sup> Reif *supra* note 3 at 71.

<sup>27</sup> *Ibid* at 5.

<sup>28</sup> *Ibid* at 221.

<sup>29</sup> *Ibid* at 227, footnote 22.

<sup>30</sup> *Ibid* at 227.

<sup>31</sup> *Ibid* at 230.

<sup>32</sup> *Ibid* at 28.

<sup>33</sup> Daniella Bendo "The Role of Canada's Child and Youth Advocates: A Social Constructionist Approach" Master of Arts, Child and Youth Studies Thesis for the Faculty of Social Sciences, Brock University, August 2016, at p. 21.

support children and youth populations through advocacy and other activities.<sup>34</sup> An important difference to highlight from other thematic ombuds institutions is that Advocates may not necessarily act impartially. Instead Advocates will act to protect the interest of the specific population they are mandated to protect.<sup>35</sup> In Canada, there are provincial and territorial Child Advocates. Child Advocates require specialized knowledge and experience. Hunter notes that all Child Advocates in Canada had advanced degrees and levels of experiences from various backgrounds including social work, legal backgrounds, education, youth services, nursing, employment, psychology and health administration, and public administration.<sup>36</sup> While Child Advocate functions vary, common functions of nine provincial and two territorial Child Advocate offices in Canada include providing individual advocacy, examining systemic issues and systemic advocacy, raising awareness about children's rights, and giving advice to improve the provision of services to children.<sup>37</sup> Most have a mixture of traditional functions and specialize solely on rights of children and youth.<sup>38</sup>

Almost all Child advocate' mandates in Canada include monitoring compliance and taking extra steps when the government is not complying with recommendations including reporting to higher authority.<sup>39</sup> Most Canadian child advocates expect governments to respond to their advice without formal means of holding the government accountable to improve services to children.<sup>40</sup> However, tracking and monitoring compliance were noted as key factors in influencing change.<sup>41</sup>

Some examples of Child Advocates in Canada include:

- **The Alberta's Office of the Child and Youth Advocate:** The OCYA is valued for its ability to identify systemic issues through its relationship and direct input from children and youth affected. This feedback and other quality assurance processes help to inform practice and make effective recommendations to improve services.<sup>42</sup> The OCYA conducts systemic reviews and advocacy as well as providing individual advocacy services to children and youth involved in designated services. It may appoint legal representation for young people in relation to those services.<sup>43</sup>
- **BC's Office of the Representative of Children and Youth:** In 2005, BC established a legislative office, the Representative of Children and Youth.<sup>44</sup> BC's

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<sup>34</sup> Reif *supra* note 3 at 49-50.

<sup>35</sup> *Ibid.*

<sup>36</sup> Hunter *supra* note 22 at 63.

<sup>37</sup> *Ibid* at 1, 6, 72.

<sup>38</sup> *Ibid.* Note, NS and QC, and now ON provide ombuds or advocacy services for children and youth as part of larger institutions serving the entire population.

<sup>39</sup> *Ibid* at 107, 176.

<sup>40</sup> *Ibid* at 176.

<sup>41</sup> *Ibid* at 177.

<sup>42</sup> *Ibid* at 45.

<sup>43</sup> *Ibid* at 59.

<sup>44</sup> *Ibid* at 48.

model was considered a hybrid model as it has functions of an ombuds, powers of a commissioner of inquiry and structural independence of an auditor general.<sup>45</sup>

## 5. Thematic Ombuds Institutions – Human Rights Commissions

Reif explains that Human Rights commissions have the same elements as a classic ombuds, other than their jurisdiction. Human rights commissions have jurisdiction over human rights protection and most have varying human rights prevention mandates,<sup>46</sup> Their scopes vary and may include the protection of civil, political, economic, social and cultural rights.<sup>47</sup> Some may have a specific role or function to monitor particular human rights issues such as the relations with Indigenous people.<sup>48</sup>

Human rights commissions typically have a broad mandate<sup>49</sup> and functions including complaint based investigatory powers, own motions investigations, holding public inquiries, making recommendations and reports, powers to bring or intervene in litigation and/or other legal avenues. Some also have human right promotion powers such as research, public awareness-raising, training, education and advice to governments.<sup>50</sup> Other human rights mandated functions include creating promotional information, education, advising, providing recommendations to governments, law reform, and investigatory powers.<sup>51</sup>

Some examples of human rights commissions in Canada include:

- **The Quebec Commission des droits de la personne et des droits de la jeunesse** Although similar to the Commission at the federal level, the Québec CDPJ has a specific unit dedicated to handling youth protection investigations.<sup>52</sup>
- **The Canadian Human Rights Commission:** At a federal level, the CHRC has numerous functions including a significant public human rights education and promotion role, public interest role by researching and monitoring systemic patterns and practices and investigating, mediating and referring matters to the CHRT.<sup>53</sup>

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<sup>45</sup> *Ibid* at 6.

<sup>46</sup> Reif *supra* note 3 at 61.

<sup>47</sup> Marshall & Reif *supra* note 19 at 232; *Ibid* at 7.

<sup>48</sup> Chartrand *supra* note 5 at 20.

<sup>49</sup> Reif *supra* note 3 at 157.

<sup>50</sup> *Ibid* at 15.

<sup>51</sup> *Ibid* at 154, 155.

<sup>52</sup> "Investigations (Youth Protection)" (March 2022) online: *Québec Commission des droits de la personne et des droits de la jeunesse*.

<sup>53</sup> Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" 2017 CanLIIDocs 45 at p. 34.

## 6. Human Rights Tribunals

A final type of independent accountability institution is a tribunal. An accountability institution becomes a quasi-judicial administrative tribunal when it has abilities to make legally binding decisions. Tribunals perform a quasi-judicial but not a purely judicial function. Administrative tribunals may have a particular expertise, and due to this expertise, they may be enabled by statute to deal with claims that are broader than those dealt with by courts and to grant forward-looking systemic remedies to deal with policy issues and further social goals and to remain seized of matters longer than courts.<sup>54</sup> Although the tribunal process will be formal, it does not need to be an adversarial process. It is important that the tribunal is impartial, non-political and has a level of expertise.<sup>55</sup> There is a wide variety of judicial and administrative tribunals in Canada.<sup>56</sup> There are some limitations to tribunals due to their capacity to make legally binding decisions. This capacity means the work and process of the institutions subject to administrative law standards and reviews. This can seriously limit the flexibility and informality of the institution's work and process.<sup>57</sup> A major concern related to this type of institution is the accessibility.<sup>58</sup>

At times, an independent and accessible appeal tribunal is established within a broader independent accountability institution in order to hear matters where a resolution has not been reached through the "advisory" part of the institution. These enforcement and adjudication abilities are developed to ensure accountability and reform where more informal individual advocacy, systemic reports or advice to governments are not sufficient to protect human rights.<sup>59</sup>

An example of a human rights tribunal in Canada includes:

- **The Canadian Human Rights Tribunal:** An important feature of the CHRT is its ability to make binding orders and grant remedies.<sup>60</sup> The CHRC and CHRT are a "federal human rights machinery [...] comprised of an adjudicative body and a Commission. Both are "essential to the remedial function of the legislation".<sup>61</sup> Chartrand characterizes the CHRC and CHRT as "a more formally structured process than the Ombudsman Office although less formally structured than the court system. It is intended to be accessible to everyone and in particular those individuals that have been most marginalized in society".<sup>62</sup>

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<sup>54</sup> *Ibid* at 31.

<sup>55</sup> *Ibid* at 26.

<sup>56</sup> Greene *supra* note 24 at 2.

<sup>57</sup> Brodsky, Day & Kelly *supra* note 53 at 32.

<sup>58</sup> *Ibid* at 22.

<sup>59</sup> *Ibid* at 24, 25.

<sup>60</sup> *Ibid* at 19.

<sup>61</sup> *Ibid* at 34.

<sup>62</sup> Chartrand *supra* note 5 at 19.

As a final point, we wish to address possible confusion around use of different terminology for Ombuds-like mechanisms such as Ombudsman, Advocates or Commissioners. The terms are largely synonymous. Any distinction seems to be one of degree versus difference in kind (e.g., they are all forms of ombuds). For example, 'Commissions' are considered a variation/adaptation of the ombuds model, though sometimes viewed as having broader powers than the "traditional/ classic-based" model.<sup>63</sup> As between Commissions/Ombuds and Advocates, the former seem to stand in a more neutral/impartial place (until a complaint is substantiated), whereas children's advocates may have more active role in defending the rights of children and youth due to the fact that most are mandated to uphold children's rights, including the UN Convention on the Rights of the Child. However, like Ombuds/Commissions, Advocates investigate complaints and write reports about their investigations.

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<sup>63</sup> See Marshall & Reif *supra* note 19 at 226 footnote 50: "The term "Ombudsman" is used in many countries that have adapted the office from its Scandinavian roots (e.g. provinces of Canada, New Zealand). Other English language synonyms are: "Parliamentary Commissioner for Administrative Investigations" (e.g. Queensland, Western Australia); "Commissioner for Administrative Complaints" (Hong Kong); and "Parliamentary Commissioner for Administration" (e.g. United Kingdom, Sri Lanka). In French-speaking jurisdictions see e.g.: Mediateur (e.g. France, Senegal, Mauritania); Protecteur du Citoyen (Qufbec); Defenseur du Peuple (Madagascar). In Spanish-speaking countries see e.g.: Defensor de/ Pueblo (e.g. Argentina, Spain); Defensor de los Habitantes (Costa Rica). In India, the office is called Lok Ayukta." See also Michelle Lebaron, in "Watchdogs and Wise Ones in Winter Lands: The Practice Spectrum of Canadian Ombudsman" Liz Hoffman Ombudsperson Research Award Paper, Forum of Canadian Ombudsman (FCO) 2008 at p. 11, made the following note "No classical ombudsman has been appointed in the federal sector, while some specialized ombudsman offices have been instituted, such as the offices of the Commissioner of Official Languages, the Correctional Investigator, and newer offices like the Taxpayers' Ombudsman/Ombudsman des Contribuables.

## Part 1: Why is there a need for accountability when it comes to Indigenous children and families?

Simply put, there is a need for accountability because federal and provincial governments in Canada have both contributed to the taking away of thousands of Indigenous children from their families and communities. This has wreaked countless harms on individual children, their families, their communities and nations. This started with the residential school system but morphed into the child welfare system after World War 2. In the last 70 years, the most significant contribution to this overrepresentation has been the inadequate provision of services to meet the needs of Indigenous children and families. Both the federal and provincial governments have been reluctant to fully fund services to Indigenous peoples, relying on dubious jurisdictional arguments to justify such discrimination. This continues up to the present. The watershed finding from the Canadian Human Rights Tribunal in *Caring Society* in 2016 that Canada had been knowingly underfunding its First Nations Child and Family Services Program underscores this point. The fact that the Tribunal has made 21 further orders since, many of these finding Canada to be in non-compliance with the original ruling, accentuates how pervasive these problems are. In its ruling on monetary compensation for the discrimination in the case, the Tribunal noted, “this case of racial discrimination is one of the worst possible cases warranting the maximum award.”<sup>64</sup> Below, we examine the context in relation to First Nations child and family services informing the need for accountability mechanisms.

### a) The history of First Nations child welfare services

Paradoxically, the taking of children away from Indigenous families and communities stems from both the exercise of extraordinary amounts of control over the lives of Indigenous peoples by governments in Canada, as well as these governments exhibiting extraordinary neglect for the well-being of Indigenous children and families. To carry out its objective to ‘kill the Indian in the child,’ Canada used the *Indian Act* and RCMP, among other forms of state control, to take thousands of Indigenous children from their families and place them in residential schools between the 1880s and 1950s.<sup>65</sup> The TRC Final Report documented Canada’s refusal to adequately fund health services as a cause of high illness and death rates of Indigenous children in residential schools.<sup>66</sup> Coinciding with the federal government’s decision to gradually divest itself of residential schools, with the federal government’s endorsement in the form of reimbursement of provincial costs, provincial child welfare systems were extended on reserve to effectively become the new residential school system.<sup>67</sup> Especially from the 1960s to the 1980s provincial legislation was used to apprehend large numbers of First Nations children from their

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<sup>64</sup> 2019 CHRT 39 at para 13 and 231 aff’d 2021 FC 969. Canada has sought an appeal of this decision but is simultaneously seeking to negotiate a resolution with parties at this time.

<sup>65</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future - Summary of the Final Report of Truth and Reconciliation Commission of Canada* (2015) [TRC], at 37-134

<sup>66</sup> *Ibid* at 90-99.

<sup>67</sup> See Naomi Metallic, “A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the *Caring Society* Case” (2019) 28:2 JLSP [Metallic 2019] at 8-11.

families, sometimes on the slightest of pretext (the “Sixties Scoop”).<sup>68</sup> Indigenous communities had no say, nor any mechanisms to stop these governments from making these forceful interventions in the lives of their children and families.<sup>69</sup> Overrepresentation of Indigenous children in provincial child welfare systems remains a significant problem today and has been dubbed the ‘Millennial Scoop.’<sup>70</sup>

These problems are also rooted in over 70 years of jurisdictional wrangling between the federal government and provincial governments, with neither level of government wishing to assume full responsibility for the provision of essential services to Indigenous peoples. This includes child and family services, but also health, education, social assistance, assisted living, housing and more.<sup>71</sup> While both levels of government gradually assumed some role in the delivery of child and family services to Indigenous peoples, perpetual disputes over who is responsible for paying for essential services for “Indians” have been used by all governments as justification for doing less, causing significant harm to Indigenous children and families.<sup>72</sup> In 2019 Final Report, the National Inquiry into Missing and Murdered Indigenous Women and Girls named this problem “interjurisdictional neglect” and suggested that it violated the s. 7 *Charter* rights to life, liberty and security of the person of Indigenous women and girls.<sup>73</sup>

Notably, starting in the 1960s, the federal government begrudgingly accepted temporary responsibility to provide some essential services to First Nations on reserve such as social assistance. Funding and services were intended to be provided at levels comparable to provincial services to other citizens. Although this became permanent and extended to a broader range of reserves, Canada resisted legislating in these areas or putting in place other accountability mechanisms to ensure adequate services or funding, despite the Auditor General and other reports highlighting the need for better accountability. Canada also downplayed its responsibility in relation to providing essential services, suggesting such services were not based on constitutional obligations, but simply a matter of good public policy.<sup>74</sup>

In the 1970s and early 1980s, First Nations began voicing concerns about services that were either lacking or utterly inappropriate and calling for more community-based services. In response, Canada began to gradually devolve program delivery to First Nations through funding

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<sup>68</sup> See *Brown v. Canada (Attorney General)*, 2017 ONSC 251.

<sup>69</sup> *Ibid* at paras 20-61. In the case, Canada argued that if it had honoured its contractual obligations (in Ontario) to consult with First Nations regarding child apprehension, nothing would have changed. The Court rejected this argument based on substantial evidence to the contrary, and referred to it as “an odd and, frankly, insulting submission” at para 42.

<sup>70</sup> Peter W. Choate, “The Call to Decolonise: Social Work’s Challenge for Working with Indigenous Peoples” (2019) 49 *British J Social Work* 1081 at 1094.

<sup>71</sup> Metallic 2019 *supra* note 67 at 8-11; Promislow & Metallic *supra* note 6 at 93-101.

<sup>72</sup> See Naomi Metallic “NIL/TU,O and Native Child v BCGSEU and CEPUC” in Kent McNeil & Naomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence*, (Special Collection of Canadian Native Law Reporter, Indigenous Law Center, Saskatchewan, 2020) [*Judicial Tales Retold*] at 21-43; and Hadley Friedland, “Reference re Racine v Woods,” in *Judicial Tales Retold* at 155-190.

<sup>73</sup> *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Canada, 2019) at 567 [MMIWG Final Report].

<sup>74</sup> Metallic 2019, *supra* note 67 at 11-12; Promislow & Metallic, *supra* note 6 at 103.

agreements, however, the federal government maintained ultimate control over funding levels and program terms and conditions. The funding agreements lacked effective dispute resolution mechanisms to permit First Nations to hold Canada accountable for inadequate funding.

In the context of child and family services, Canada unilaterally created the First Nations Child and Family Services Program (FNCFS Program) under Directive 20-1 in 1991, which required FNCFS Agencies to operate pursuant to provincial child welfare laws, with federal funding. The creation of the FNCFS Program spurred the establishment of over 100 FNCFS Agencies across Canada, intended to provide more culturally appropriate child welfare services to First Nations children. It quickly became apparent, however, that the funding formula under Directive 20-1 was entirely inadequate to provide preventative and culturally appropriate services. The formula did not provide funding comparable to the range of child welfare services funded in the province, and often resulted in situations where children were apprehended because alternative services could not be funded under Directive 20-1.

Two expert reports commissioned by the Assembly of First Nations and Canada in 2000 and 2005 confirmed the systemic underfunding in the FNCFS program. Despite these reports, Canada did little to implement their recommendations. In 2008, Canada developed a new funding formula, called the Enhanced Prevention Focused Approach (EPFA), and slowly began implementing it in some regions of the country. The EPFA, however, was only a slight improvement over Directive 20-1 and continued to perpetuate inequities in the FNCFS.<sup>75</sup>

An important development in this period was the Federal House of Commons unanimously affirming Jordan's Principle in 2007, a child-first principle to ensure no gaps or delays in services to First Nations children.<sup>76</sup> The Principle is in memory of Jordan River Anderson, a First Nations boy from Manitoba, born with multiple disabilities, who died in hospital never getting to live close to his family, due to jurisdictional wrangling between Canada and the province over who would pay his medical costs were he moved closer to home. The Principle requires that the first government approached by a First Nations community *pay* for the requested services for a First Nations child, and that any jurisdictional disputes be resolved afterwards. While Canada committed to, and ear-marked substantial funds to implement, Jordan's Principle, these funds were never used due to the very narrow interpretation given to the Principle by the federal government.<sup>77</sup>

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<sup>75</sup> Metallic 2019, *ibid* at 12-16; see also Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare," (2016) 62 McGill LJ 285 [Blackstock].

<sup>76</sup> Private Members Motion 296, tabled by Jean Crowder, MP Cowichan-Nanaimo for (NDP) the motion reads: "in the opinion of the House, the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children".

<sup>77</sup> See *Caring Society* 2016, *supra* note 1 at para 380.

**b) First Nations Caring Society et al. v Canada**

Given the lack of commitment by Canada to make real reform to the FNCFS Program, the Caring Society and the AFN filed a human rights complaint with the Canadian Human Rights Commission in 2007. After nine years, which saw several delays by Canada, retaliation against Dr. Cindy Blackstock, as well as attempts to strike the complaint,<sup>78</sup> the Tribunal ordered in favour of the complainants in 2016 ("Main Decision").<sup>79</sup> It found that discrimination on the basis of race and/or national ethnic origin was made out, and in the course of its extensive reasons, made several important findings, including that:

- Canada is not a "passive player" in funding child welfare services but exercises significant control and power over child welfare services on reserve. Canada may have a fiduciary obligation to act in the best interest of First Nations children and families to ensure the child welfare programming is adequate and culturally appropriate.<sup>80</sup>
- The funding models used by Canada underfund prevention services, do not ensure services are culturally appropriate, and in fact create incentives to remove children from their homes as a first resort rather than as a last resort, replicating the residential school era. It also resembles the residential school era because the fate and future of many First Nations children is still being determined by the Canadian government.<sup>81</sup>
- Canada knew its FNCFS program was not comparable to provincial services but had resisted doing any comparative (gap) study. Evidence before the Tribunal included an internal report from 2006 showing the Department of Indigenous Services knew it was underfunding First Nations, stating, "if current social programs were administered by the provinces, this would result in significant increase in costs for INAC."<sup>82</sup>
- While Canada failed to provide services comparable to the provinces, this standard in itself is discriminatory. Human rights principles, both domestically and internationally, require INAC to consider the distinct needs and circumstances of First Nations children and families living on-reserve—including their cultural, historical and geographical needs and circumstances—in order to ensure substantive equality in the provision of child and family services to them. Simply attempting to mirror provincial for First Nations communities runs afoul of human rights principles.<sup>83</sup>
- Canada had wrongly adopted a very narrow interpretation of Jordan's Principle, which had been adopted by a unanimous resolution of Parliament in 2007 as being limited to children with multiple disabilities and not to child welfare or other services. Jordan's Principle requires coordination and cooperation between the provincial and federal

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<sup>78</sup> Blackstock, *supra* note 75 at 291-297.

<sup>79</sup> *Caring Society 2016*, *supra* note 1.

<sup>80</sup> *Ibid* at paras 59-86 and paras 90-110.

<sup>81</sup> *Ibid* at paras 458 and 423-426.

<sup>82</sup> *Ibid* at paras 335-336 and 267.

<sup>83</sup> *Ibid* at paras 341-344, 388-389, and 462-465.

governments, as well as between departments of the same government, to address gaps and delays in health and social services. The Tribunal's language suggested Jordan's Principle applies to all federal programs aimed at addressing the needs of children and families on reserve.<sup>84</sup>

The Tribunal ordered Canada to stop its discriminatory practices and reform of FNCFS programs, stating, "a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve."<sup>85</sup> It retained jurisdiction over the case in order to consider compensation and other remedies requested by the Complainants, and until all of its orders are implemented. Canada did not appeal this case and committed to make reforms to address its findings.<sup>86</sup>

### **c) Canada's conduct since the Main Decision**

Since the Main Decision, the Tribunal has found several instances of non-compliance by Canada, particularly its failure to implement a broad interpretation of Jordan's Principle and an effective process to respond to Jordan's Principle requests and appeals. The non-compliance decisions point to a number of systemic and accountability issues, such as resistance to depart from old approaches (using comparability instead of substantive equality and narrow definition of services and children covered by Jordan's Principle)<sup>87</sup>, using funding authorities to justify inaction,<sup>88</sup> failure to collect appropriate data to properly assess Jordan's Principle requests<sup>89</sup> and needs, and lack of arm's-length appeal process.<sup>90</sup>

While ISC has been attempting to respond to the rulings of the Tribunal by providing education to staff and modifying some of its processes, such as funding community service coordinators to help applicants and changing its Jordan's Principle appeals process, there is a need for ongoing, comprehensive assessment of Canada's commitment to Jordan's Principle and substantive equality. Staff turnover at the Department is reported to be high and implementing meaningful change within the bureaucracy of ISC seems to be a real challenge. Further, the modified appeal process the Department sought to introduce was stalled due to vacancies.<sup>91</sup>

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<sup>84</sup> *Ibid* at paras 351-364, 374 and 391.

<sup>85</sup> *Ibid* at para 463.

<sup>86</sup> CBC News, "Federal Government Won't Appeal Ruling That Found It Discriminated Against Children on Reserves", CBC News (22 February 2016).

<sup>87</sup> See 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 35; 2019 CHRT 7 (interim) and 2020 CHRT 36.

<sup>88</sup> See 2018 CHRT 4 at paras 407-411; see also August 26, 2021 Letter Decision at section "VI. Financial Administration Act."

<sup>89</sup> See 2017 CHRT 14 at paras 73, 85 and 107.

<sup>90</sup> See *ibid* at paras 94-103.

<sup>91</sup> See *Jordan's Principle Guide*, last updated May 29, 2020; *Standard Operating Procedures: Jordan's Principle Service Coordinators Gathering: Building Connections* (Indigenous Services Canada, 2019); and *Jordan's Principle and Update on Development and Implementation of Appeals Secretariat PPT*, September 2021.

A 2021 article based on assessment of the Jordan's Principle in the Alberta region highlights how onerous the Jordan's Principle application process can be for applicants.<sup>92</sup> Requiring applicants to provide documentary evidence and particularize how a request aligns with substantive equality were identified as particularly burdensome, resulting in several complaints being treated as ineligible for consideration by the Department.<sup>93</sup> This was confirmed by our own analysis of data provided by ISC for the year 2019-2020, which showed that over 51% of Jordan's Principle requests in that year (32,587 out of 62,888) were not considered due to being assessed as submitted with insufficient information.<sup>94</sup> Finally, in interviews, Caring Society staff and lawyers for the complainants emphasized the crucial importance of oversight to ISC's approach to Jordan's Principle.

Early on in our research, we conducted a survey to gather further information about the current issues and needs for an accountability mechanism for Jordan's Principle. We received thirteen responses mostly from Jordan's Principle Navigators and a couple of Indigenous Services Canada Jordan's Principle National staff. Some challenges and barriers identified included: burdensome document requirements in the initial application and appeals process; lack of knowledge of the Indigenous context by ISC staff; high turnover of limited staff at ISC; failure of provincial governments coming to the table; timelines and delays; the perception that the current individual case-by-case process for Jordan's Principle fails to create broader and more meaningful change; the need for clear parameters and policy guidelines to assist service coordinators; ISC staff do not understand substantive equality and communities bear the burden of explaining the needs for substantive equality in their applications; lack of aging out of care supports; lack of consistency; and vague reasons for denials.

Canada has also shown ongoing resistance to reform of its funding approach to the FNCFS Program from one based on ad-hoc budget allocations to one that is needs-based, and informed by principles of self-government. Merely increasing funding for FNCFS services through annual budget allocations was found to be inconsistent with the Main Decision and the Tribunal ordered Canada in 2018 to develop an alternative system of funding based on needs assessments of Agencies and a cost-analysis of the real needs of First Nations agencies.<sup>95</sup> The Tribunal contemplated, however, that nation-to-nation self-government agreements over child welfare could be an alternative to Canada's FNCFS Program, however, it is clear that the funding of such self-government would need to reflect the principles set out in the Main Decision.<sup>96</sup> Details of long-term reform in relation to funding have yet to be released by Canada.

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<sup>92</sup> Vandna Sinha et al, "Substantive Equality and Jordan's Principle: Challenges and Complexities," (2021) 35 JLS 21.

<sup>93</sup> *Ibid* at 33.

<sup>94</sup> Indigenous Services Canada, Deep Dive Jordan's Principle - 2020-09-22 PPT, at slides 21-22. There are similar slides in the 2020-21 Deep Dive PPT, but the information is not presented exactly in the same way as the previous year making comparison impossible. Sometimes products and service #s are shown instead of actual requests. For this reason, we were not able to provide a similar breakdown for 2020-21.

<sup>95</sup> See 2018 CHRT 4, *supra* note 88 at paras 402-412.

<sup>96</sup> *Ibid*.

As part of responding to the Main Decision, as well the Truth and Reconciliation Commissions' call to action for national child welfare legislation, Canada passed *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 ("C92").<sup>97</sup> The law sets out minimum standards to be followed when an Indigenous child is involved in child apprehension matters, which overlays the various provincial child welfare laws.<sup>98</sup> It also recognizes Indigenous groups' inherent right to self-government in the area of child and family services and sets out a framework for how Indigenous governing bodies can pass their own laws.<sup>99</sup> C92 legislates Jordan's Principle in s. 9(3)(e):

in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

This was confirmed by the Quebec Court of Appeal in a recent reference decision on C92.<sup>100</sup> However, C92 remains unclear as to which level of government as between Canada and the provinces bears primary responsibility for funding compliance with national standards and self-government.<sup>101</sup> Canada could have chosen to clarify this issue in the legislation, but chose not to, raising fears that C92 will be used to perpetuate the same jurisdictional wrangling that has plagued this area for over 70 years.<sup>102</sup> This problem was also highlighted in the *QCCA C92 Reference*.<sup>103</sup> While C92 raises the prospect for the creation of a dispute resolution mechanism through regulation, we have yet to hear any further plans by Canada to implement such a mechanism.

Further, we have heard of some ISC staff saying that the Main Decision has no bearing on C92 issues, but we clearly believe this to be in error and demonstrative of a lack of real appreciation of the Main Decision, or the extent of Canada's obligations to conform with the right to substantive equality, statutory human rights and international law obligations in relation to Indigenous peoples.<sup>104</sup> In addition, there are concerns that the timeline for negotiating collaboration agreements under C92 (1 year) are unrealistic and may position communities to exercise jurisdiction without funding (which could be disastrous). We have heard issues of

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<sup>97</sup> Canada first announced its plans to pass legislation at an national emergency meeting on Indigenous child welfare: see John Paul Tasker, "Jane Philpott Unveils 6-Point Plan to Improve 'Perverse' First Nations Child Welfare System", CBC News (25 January 2018).

<sup>98</sup> SC 2019, c 24, ss 9-17.

<sup>99</sup> *Ibid* at ss 18-26.

<sup>100</sup> Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185 ["QCCA C92 Reference"] at para 226.

<sup>101</sup> See, in particular, *supra* note 98 at s 20(2)(c).

<sup>102</sup> See Naomi Metallic, Hadley Friedland, Aimée Craft, Jeffery Hewitt and Sarah Morales, "An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: Does Bill C-92 make the grade?," Special Feature for Yellowhead Institute, March 12, 2019; and Naomi Metallic, Hadley Friedland and Sarah Morales, "The promise and pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families," Special Feature for Yellowhead Institute, July 4, 2019.

<sup>103</sup> QCCA C92 Reference, *supra* note 100 at paras 271-277.

<sup>104</sup> The QCCA C92 Reference also acknowledged the clear relationship between the Main Decision, subsequent decisions of the Tribunal, and C92: see *ibid* at paras 146-164.

Indigenous Governing Bodies receiving conflicting information about negotiation terms from federal negotiators and being asked to sign confidentiality agreements, which raises issues of government transparency. The QCCA's suggested approach to negotiations and paramountcy around Indigenous law under C92, if it is upheld by the Supreme Court of Canada, will require education of provinces and others about their roles and limits on their powers, as well as accessible ways to address potential disputes between Indigenous governments and intransigent provinces.<sup>105</sup> There are also significant needs for resources for carrying out education and capacity building around C92 more generally, including for communities, for ISC and CIRNAC staff, as well as those involved in the enforcement of child welfare laws and implementation on the national standards, such as social workers, Crown lawyers, legal aid lawyers and judges.<sup>106</sup> It is surprising to us that, despite the stated importance of C92 by Parliament, Canada did not commit the same amount of resources for education and capacity building as it did for changes to the *Divorce Act*, or when the *Family Homes on Reserves and Matrimonial Interests or Rights Act* was rolled out with a Centre of Excellence.<sup>107</sup>

There also appears to be significant reluctance on the part of Canada to see the reform it needs to undertake to address long-standing systemic underfunding in services that affect long-term child and family well-being. It is clear from several statements from the Tribunal that Jordan's Principle is only intended as a temporary stop-gap measure to address gaps in underfunding and under-servicing in its services on the way to Canada overhauling these services to remove such gaps and inadequacy.<sup>108</sup> However, it is not at all clear that this is understood by the Department. Our concern is Canada simply seeing Jordan's Principle as akin to a program without addressing the systemic inequality that underlies the necessity for Jordan's Principle in the first place.

In their 2021 paper, Vandna Sinha, Colleen Sheppard et al., echo our concern. They characterize ISC's approach to Jordan's Principle as an individualistic, demand-driven process, and less as a requirement to ensure substantive and systematic equality in services and develop proactive policies and practices for securing equitable services for First Nations children and families. The authors describe how such an approach results in funding only being provided to First Nations individuals or communities with the capacity and wherewithal to make Jordan Principle requests, and needs are not being systematically assessed across

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<sup>105</sup> The QCCA, in the C92 Reference, struck ss 21-22 from C92 and said that, instead, issues of paramountcy between provincial and Indigenous laws were to be addressed through the s 35 Sparrow framework. This also imposes additional consultation and justification requirements on governments that may need to be adjudicated. The decision is currently on appeal to the Supreme Court of Canada.

<sup>106</sup> This observation is based on the sheer volume of unsolicited requests from all of these groups that the authors, the Caring Society, and affiliated lawyers, have received, and continue to receive for support filling these needs.

<sup>107</sup> In addition to continuing and public legal education presentation and webinars discussing and explaining the Divorce Act amendments, see for example: <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html>; <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/fam.html>. The Centre of Excellence was in place from 2013 to March 2021 to support First Nations developing matrimonial property laws on reserve. For more information, see <https://www.coemrp.ca/>.

<sup>108</sup> See *Caring Society* 2016, *supra* note 1 at paras 362, 364, 374 and 391; 2017 CHRT 14 at paras 85 and 107; and 2020 CHRT 36, at para 12.

communities.<sup>109</sup> This is exacerbated by ISC's lack of transparency in publishing details of group requests made or approved by First Nations organizations and communities or the range of services or level of funding that First Nations can request.<sup>110</sup> The authors refer to this as a "project system" or "projectification" approach and argue it is especially inappropriate given the degree of systemic inequality First Nations face:

This case by case approach to the implementation of Jordan's Principle can be described as what Tania Murray Li calls a "project system." In discussing this approach in relation to issues of rural development, she argues that the project system or "projectification" encourages people to think that a problem can be fixed without actually addressing the underlying processes that created the problem in the first place. Such an approach fails to make long-term systemic change, so when the time-bound project ends, the problems the projects were intended to address persist." ...

Under the demand-driven approach to Jordan's Principle, relief is contingent on the ingenuity, knowledge and ability of individual, community-based actors to make effective Jordan's Principle claims. Individuals or groups with identical needs may go unrecognized if they do not have the capacity to formulate Jordan's Principle requests, or if they fail to provide sufficient evidence of how the request is linked to substantive equality. ...

An individualistic, case-by-case approach to Jordan's Principle might be appropriate if First Nations children generally had access to equitable services. Exceptional, aberrant individual or group cases outside this norm of equitable services could be addressed through the Jordan's Principle claims process. However, the reality is that the problem of inequitable services for First Nations children living on reserves is persistent, systemic and impacts a wide range of health, social and education services. In such a context, the remedy of individual claims is a sorely inadequate means of addressing the challenge of larger systemic and structural problems.<sup>111</sup>

Building on the authors point about how inappropriate projectification can be in the context of systemic inequality of services to First Nations children and families, in our review of ISC Jordan's Principle data, we noted that for 2019-2020, 67% of individual requests and 87% of groups requests were within the normative standard of care, and in 2020-21, 51% of individual requests and 40% of groups requests were within the normative standard of care.<sup>112</sup> Services meeting "normative standard of care" are those that are readily available to children and families in the province of reference.<sup>113</sup> Thus, ISC's data reveals that a high degree of approved requests under Jordan's Principle were for services that are already provided to children within the province. Children and families in the province are not required to go through an extensive

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<sup>109</sup> Sinha et al., *supra* note 92 at 33.

<sup>110</sup> *Ibid* at 34.

<sup>111</sup> *Ibid*.

<sup>112</sup> Deep Dive Jordan's Principle - 2020-09-22 PPT, *supra* note 94 at slides 16-17; and Indigenous Service Canada, Deep Dive Jordan's Principle Q2 – 2021-05-04 at slides 25-26.

<sup>113</sup> See Standard Operating Procedures: Jordan's Principles (18 October 2019) at 23.

process similar to the Jordan's Principle request process in order to access such services. This sheds light on the degree of systemic inequality that continues to exist within ISC's system of essential services for First Nations. Further, future plans on the direction of Jordan's Principle put forward by ISC suggest a long-term vision of Jordan's Principle funding into the future (albeit administered by communities directly), as opposed to fixing the problems in existing programs and services. We believe there is a strong need for oversight of ISC to ensure they are not getting stuck in projectification, but in fact addressing and reforming all their programs and services that further the well-being of Indigenous children and suffer from underfunding and under-servicing.

The data on Jordan Principle requests suggests systemic inequality in a wide number of areas of ISC services from education, to health services (medical equipment and supplies, medical transportation, medical / nutritional supplements, mental wellness, oral health, orthodontics and vision care), child development, assisted living and respite, infrastructure, social assistance.<sup>114</sup> There are areas, such as with orthodontics and capital repairs and costs, that ISC has been reluctant to treat as falling within Jordan's Principle and intervention of the tribunal or the courts has been necessary.<sup>115</sup> The Caring Society relates there are certain areas, such as administration / governance costs, that ISC remains reluctant to fund pursuant to Jordan's Principle.

Even beyond the implications of the Main Decision, ISC should be striving to reform its services based on the commitments within *Department of Indigenous Services Act*, SC 2019, c 29, s 336 ("*DISA*"), which came into effect in July 2019. *DISA* replaced the old *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6 and introduced some important standards that were absent from the old act. These include:

- Identifying the group the Department services as "Indigenous peoples" which is defined as having the same meaning as "Aboriginal peoples" within subsection 35(2) of the Constitution Act, 1982. Section 35(2) defines "Aboriginal peoples of Canada" as including the "the Indian, Inuit and Métis peoples of Canada."
- Listing the main activities and responsibilities to be undertaken by the Department. Section 6(2) of the Act states that "[t]he Minister shall ensure services with respect to ... (a) child and family services; (b) education; (c) health; (d) social development; (e) economic development; (f) housing; (g) infrastructure; (h) emergency management; [and] (h.1) governance...".
- The preamble of *DISA* includes commitments by Canada to ensure its service standards are transparent, meets the needs of Indigenous group, consider the socio-economic gaps and negative social factors impacting Indigenous individuals in doing its work,

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<sup>114</sup> Deep Drive Jordan's Principle - 2020-09-22 PPT, *supra* note 94 at slide 30.

<sup>115</sup> See *Shiner v Canada*, 2017 FC 515 on orthodontics, which was unsuccessful but resulted in a settlement that included a policy change that considers pain as a criteria for NIHB eligibility; and see August 26, 2021 Letter Decision, *supra* note 87 on capital services.

recognize and promote Indigenous ways of knowing, being and doing, and collaborate and cooperate with Indigenous peoples in its work.

- Section 7(a) of the Act sets out a requirement of the Minister to collaborate in the development, provision, assessment and improvement of the services listed at s 6(2).

In other words, *DISA* requires ISC to ensure that all of its services and programs are needs-based and address socio-economic gaps, and that reform of such programs be done in collaboration with Indigenous communities.<sup>116</sup> It is not clear to what extent *DISA* is being followed by the Department at this time. We believe there is a need for oversight of ISC for its compliance with *DISA*.

Finally, the *DISA* commits Canada to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*, as does Canada's 2021 law, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, which affirms the Declaration as a universal human rights instrument with application to Canadian law. The Declaration contains several articles that ought to inform Canada's delivery of services to Indigenous peoples, including that Canada must take effective measures, and where appropriate, special measures to ensure the continuing improvement of Indigenous peoples' economic and social conditions.<sup>117</sup> We believe there is a need for oversight of ISC for its compliance with the Declaration and *UNDRIPA*.

#### **d) Role of First Nations Caring Society since the Main Decision**

Since the Main Decision, Dr. Blackstock and the Caring Society have been playing a crucial advocacy role in supporting families in seeking to access Jordan's Principle and substantive equality, informally providing oversight of ISC's implementation of the CHRT decisions, by bringing issues of non-compliance to the Tribunal's attention as well as continuing to publicly raise awareness of systemic discrimination against First Nations children and families. Further, by drawing on its network of lawyers who assist it on a *pro bono* basis, the Caring Society has engaged in strategic interventions such as intervening with ISC National Office staff to discuss matters on Jordan Principle files as well seeking judicial review of denials, for example, in the case of Josey and Stacy Shiner regarding denial of orthodontics. While this judicial review was unsuccessful, a settlement was reached which included a policy change that considers pain as a criteria for NIHB eligibility.<sup>118</sup> In the case of Carolyn Buffalo-Jackson and her son Noah, the Caring Society and a *pro bono* lawyer prevented a First Nations mother's human right complaint relating to her disabled son from being dismissed by the Canadian Human Rights Commission, leading to a settlement with ISC. In this particular case, Carolyn was both a lawyer and First Nation Chief and still faced significant barriers in navigating the Jordan's Principle and human

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<sup>116</sup> See also Naomi Metallic, "Making the most out of Canada's new Department of Indigenous Services Act," Policy Brief for Yellowhead Institute, August 12, 2019.

<sup>117</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61<sup>st</sup> Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 at art. 21.

<sup>118</sup> See *Shiner v Canada*, *supra* note 115.

rights system.<sup>119</sup> This and other stories of the Caring Societies' interventions provides compelling case-studies of the ongoing needs for advocacy vis-à-vis Canada when it comes to the need for services.

The Caring Society does not receive any funding from Canada but relies on fundraising to sustain itself. In carrying out its extensive advocacy, it relies on its small staff and the generosity of lawyers and other professionals who assist it in its work. The Society and its staff recognize that they cannot help all who need assistance and support and, in our conversations with them, have emphasized the need for formalized and funded advocacy services for First Nations children and families.

### **e) Role of the provinces**

From the 1990s and onwards, some provinces amended their child welfare policies and legislation to attempt to accommodate Indigenous cultures and give some voice to Indigenous communities in apprehension matters. However, such changes were not universal and resulted in a patchwork of protections across the country.<sup>120</sup> This provided unequal protections to Indigenous children across the country until the coming into force of C92. When it comes to the provision of child and family services to First Nations, we are not aware of any provinces who were willing to provide funding to meet the child and family of First Nations children and families to address the shortfalls of the FNCFS Program between the 1990s and 2016.

More broadly, in relation to the provision of services to Indigenous people, despite some provinces endorsing Jordan's Principle (AB, SK, MB, ON, NB, NFLD), up to the present, there continues to be significant reluctance on the part of the provinces to provide services to Indigenous peoples, particularly First Nations living on reserve, although, constitutionally, there is nothing preventing them from doing so.<sup>121</sup> This is illustrated in the 2020 Manitoba Human Rights Panel decision of *Sumner-Pruden v. Manitoba*.<sup>122</sup> In this case, Manitoba's Human Rights Panel agreed that the province discriminated against a young First Nations man with multiple disabilities and his mother for delay, and often denial, of healthcare and related services based on their First Nations status and the fact they lived on reserve. The Panel found that the delays and denials were caused by the policies and practices arising from the exercise of concurrent jurisdiction between the province and federal government, and this amounted to adverse effects discrimination.<sup>123</sup> Importantly, the Panel also found that the province could not rely on

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<sup>119</sup> Carolyn Buffalo, "Buffalo v Canada – My Family's Fight for the Right for Noah to ride a bus to school," PowerPoint Presentation, 2017.

<sup>120</sup> Metallic 2019 *supra* note 67 at 13-14 and Appendix B.

<sup>121</sup> See status report on provincial action on Jordan's Principle in Canadian Pediatric Society, "Are We Doing Enough? A status report on Canadian public policy and child and youth health," 2016 edition at 27. For a discussion of the concurrent jurisdiction between Canada and the province in matters of essential services, see Metallic in *Judicial Tales Retold*, *supra* note 72; see also Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28:1 J L & Soc Pol'y 132.

<sup>122</sup> *Sumner-Pruden v Manitoba* (2020), MHRC 15 LP 10.

<sup>123</sup> *Ibid* at paras 22-23.

jurisdictional arguments to justify the discrimination, noting, “The Canadian constitutional framework does not amount to a reasonable justification for the discriminatory treatment of the complainants.”<sup>124</sup> Further illustrating provincial reluctance, Manitoba has appealed this ruling, continuing to maintain Canada’s ability to fund and/or provide health and disability services on the First Nation constitutes a *bone fide* and reasonable cause for discrimination . This matter also further illustrates the need and importance of advocacy support services as the complainants in the case are represented by lawyers from the Public Interest Law Centre, and only citizens of Manitoba have access to this service.

We have also heard that some provinces have recently been denying funding services for urban Indigenous children in light of Canada’s approach to Jordan’s Principle since the Main Decision. In our discussion with ISC, Canada advised that it has yet to develop a system for negotiating reimbursement with the provinces in relation to services that Canada determines ought to be paid by provinces. These examples illustrate a further need to hold provinces more accountable to their substantive equality and Jordan’s Principle obligations. The Assembly of Seven Generations report clearly emphasized that Indigenous youth and children deserve justice and reparations for the harms that continue to impact daily lives, and in this regard “Indigenous youth and children deserve accountability and responsibility from the federal government, as well as all levels of government.”<sup>125</sup>

Beyond the provinces providing services, another area of needed oversight is in relation to those who enforce provincial child welfare laws—and now C92 as well—including agencies, government lawyers and judges, as well as those who represent parents and communities in child welfare proceedings, namely legal aid lawyers and members of the private bar. As noted earlier, there is a major need, especially with the coming into force of C92, for these actors to learn about their obligations under C92. More generally, there is a need to ensure that child welfare law enforcement is carried out appropriately with a knowledge and sensitivity to the history of residential schools and the overrepresentation of Indigenous children in state care through the Sixties Scoop and even up to the present. There are existing accountability bodies that already provide some oversight of child welfare enforcement in the provinces, but it is questionable whether these bodies provide sufficient attention to the challenges faced by Indigenous children and families. We explore this question further in the next section.

## **f) Conclusion**

Addressing the causes of overrepresentation of Indigenous children in state care is a complex matter with deep systemic discrimination underlying it - many of the problems stem from Canada and the provinces’ reluctance to prioritize and fund Indigenous children and families’ needs. Canadian courts have done little to protect or vindicate these interests over the past 70 years. While courts provide some backstop on accountability issues, such as in matters of judicial review, generally, they lack the jurisdiction to address systemic discrimination

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<sup>124</sup> *Ibid* at para 25.

<sup>125</sup> Assembly of Seven Generations, *supra* note 7 at p. 31.

complaints in the same way as human rights bodies or provide the types of systemic remedies that are needed to address long-standing systemic problems.<sup>126</sup>

Through the Main Decision and subsequent orders, the Canadian Human Rights Tribunal has been instrumental in holding the federal government accountable for systemic underfunding in the FNCFS Program and implementing Jordan's Principle. This is especially so because the Tribunal is remaining seized of its jurisdiction over the case until all outstanding remedial issues have been addressed. There will come a day, however, when the Tribunal will relinquish jurisdiction over the case. Given the very long history of systemic discrimination against Indigenous people by the government in Canada, particularly in the area of service delivery, we are not hopeful that this will signal the end of all such discrimination and believe it will be important to have alternative accountability mechanisms in place. Further, like the courts, the role of tribunals are reactive and not proactive. Tribunals and courts decide the matters in front of them based on evidence put forward by the parties. They cannot entertain or propose broader systemic solutions to problems. This is what fuels the need for consideration of other accountability mechanisms.

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<sup>126</sup> See for example *Malone v Canada (AG)*, 2021 FC 127, where a child self-identified as Mi'kmaq Acadian with connections to the Mi'kmaq First Nations people flowing through their maternal side since 1700's was seeking judicial review of the ISC Jordan's Principle Appeals Committee's decision to deny him funding under Jordan's Principle on the basis that such funding was only available to First Nations children registered as Indians under the *Indian Act*. In denying the judicial review, the Federal Court was deferential to Canada's approach to eligibility criteria for Jordan's Principle without scrutinizing the systemic discrimination underlying such criteria. This is in stark contrast to the analysis of the Canadian Human Rights Tribunal on the issues of lack of Indian status and Jordan's Principle eligibility criteria in 2019 CHRT 7 (interim) and 2020 CHRT 36.

## Part 2: What specific issues should be addressed by an accountability mechanism?

In undertaking our research, we learned there are several options and minute details to consider around different accountability mechanisms. It can be easy to get distracted by these. However, Linda Reif, author of *Ombuds Institutions, Good Governance and the International Human Rights System*, reminded us that the driving question in designing any accountability mechanism should be, “*What are the real accountability problems we want to address?*”

Based on the context and issues related in Part 1, we have identified ten different accountability problems that we strongly feel must be addressed in the context of ensuring the well-being of Indigenous children in Canada. We set these out below, explaining why these are crucial accountability needs that must be addressed. In the next section, we identify key features of effective accountability mechanisms and recommend three different accountability mechanisms that we believe can most effectively address these accountability needs if implemented together.

### Need #1: Oversight of the current Jordan's Principle process at ISC

We heard very clearly from Caring Society staff and the lawyers who have been involved in the case that this has to be a key function of any accountability mechanism. We heard concerns about the design of the Jordan's Principle request process, inadequate funding to cover all costs related to the provision of child and family services, delays in process requests, inability to accommodate urgent and emergency cases, lack of transparency in decision-making and data collection, and more. In their 2021 article, Sinha et al. identify a number of short-term recommendations to improve the current Jordan's Principle process.<sup>127</sup> However, they also stress that ongoing, comprehensive assessment of Canada's commitment to Jordan's Principle is needed, including collection and independent analysis of data collected by ISC.<sup>128</sup> We agree.

At this time, given the deep systemic inequality in services faced by First Nations children, an effective Jordan's Principle process is necessary in order to meet the immediate needs of Indigenous children and families, and we believe that any body providing independent oversight and recommendations to ISC is the best way to ensure this. While ISC staff may be well-intentioned and committed to implementing the Tribunals orders, staff turnover is frequent, the legacy of systemic discrimination runs deep within ISC, challenges due to the confidential nature of Jordan's Principle requests, and concerns of retaliation when staff attempt to address systemic discrimination, all demonstrate the need for independent oversight by a body with expertise in the nature of systemic discrimination faced by Indigenous children and families in order to ensure that mistakes of the past are not repeated.

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<sup>127</sup> Sinha et al., *supra* note 92 at 42.

<sup>128</sup> *Ibid* at 24 and 41.

**Need #2: Overseeing of ISC's long-term reform of CFS, including funding of agencies, as well as CIRNAC's funding and negotiation of self-government under C92**

Understandably, given the immediate needs of First Nations children and families, a lot of the focus and attention since the Main Decision has been on effectively implementing Jordan's Principle. However, we cannot lose sight of the fact that one of the main orders from the Main Decision was for Canada to "REFORM" the FNCFS Program, or that much of the evidence in the case was about Canada knowingly underfunding the Program for over a decade.<sup>129</sup> There are few public details available about the plans for long term reform in relation to the FNCFS program. We are surprised that, almost six years since the Main Decision, there isn't more available. This indicates a strong need for an independent oversight of Canada in order to ensure that it follows through with long-term reform of the FNCFS Program.

The introduction of the C92 legislation was in response to addressing long-term reform of child welfare, and needs to be viewed as such.<sup>130</sup> If ISC and CIRNAC staff are denying any connection between the Main Decision and Canada's obligations in relation to C92, internal education and external accountability is needed. As noted early, the Tribunal clearly made a connection between long-term reform and self-government.<sup>131</sup> This means that the legal principles identified as applicable to long-term reform, such as Canada's key role in funding child welfare services on reserve, its fiduciary obligations to ensure the best interest of First Nations children and families,<sup>132</sup> as well as the requirement to ensure substantive equality in funding and services, are equally applicable to Canada's obligations to fund self-government under C92.

There have been concerns raised about Canada using the vague funding requirements in relation to self-government in C92 to sustain the same types of jurisdictional wrangling that has been harming Indigenous children and families for decades.<sup>133</sup> Accounts of Canada not being transparent or clear in its approach to funding negotiations, and requiring Indigenous governing bodies to sign confidentiality agreements only accentuate these concerns. For these reasons, we believe oversight of long-term reform over child welfare, including the implementation of C92, is a serious accountability need that must be addressed.

**Need #3: Oversight of Canada's efforts addressing systemic inequality in services related to Indigenous children and families**

As noted earlier, there appears to be significant reluctance on the part of Canada to see that long-term reform includes ending the long-standing systemic underfunding in its services that

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<sup>129</sup> *Caring Society* 2019, *supra* note 1 at para 463 and see also paras 267 and 335-339.

<sup>130</sup> Canada first announced its plans to pass legislation at an national emergency meeting on Indigenous child welfare - see note 97.

<sup>131</sup> This is particularly apparent in 2018 CHRT 4, *supra* note 88 at paras 407-412

<sup>132</sup> See *Caring Society*, *supra* note 1 at paras 90-110; and 2016 CHRT 10 at para 116.

<sup>133</sup> See "An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: Does Bill C-92 make the grade?," and "The promise and pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families," *supra* note 102.

affect long-term child and family well-being. This includes, but is not limited to, ISC's programming in education, to health services, child development, assisted living and respite, infrastructure, and social assistance. It is clear from the Main Decision and several subsequent orders from the Tribunal that eliminating systemic inequality in the services that affect First Nations children and families is the ultimate long-term objective of Jordan's Principle.<sup>134</sup>

We agree with Sinha et al. that Canada must be held accountable to achieving substantive equality in all services that affect long-term child and family well-being, not simply continuing to use Jordan's Principle as a stop gap measure.<sup>135</sup> Otherwise, as they observe, this will simply perpetuate 'projectification' of Jordan's Principle and not address its true purpose. In this regard, it will be crucial for Canada to see its obligation in relation to these services as providing substantive equality, not just ensure a comparable level to provincial services, as this was found to be discriminatory in the Main Decision. Further, the *Department of Indigenous Services Act* also requires Canada to provide services that, similarly, are needs-based and address socio-economic gaps faced by Indigenous groups.

Finally, there have been several reports, including from the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls that have made several recommendations for the elimination systemic inequality in service delivery in relation to Indigenous children and families. We believe that part of the oversight of Canada here could also include assessment of relevant recommendations that Canada has committed to implementing.

#### **Need #4: Oversight of federal-provincial efforts at cooperation in relation to funding and servicing of Indigenous children and families**

Jordan's Principle recognizes that jurisdictional disputes between the provincial and federal governments (as well as disputes between departments within governments) should not result in the delay or denial of services that an Indigenous child is entitled to. It is not just a resolution of Parliament; it has been recognized by the courts and by the Tribunal as a human rights principle, which has both a substantive equality right and jurisdictional dimension to ensure First Nations children and families don't bear the brunt of jurisdictional disputes.<sup>136</sup>

The government of first contact should pay first, with any disputes over who pays to be determined between the governments at a later time. Under Canadian constitutional principles, both the federal and provincial governments have the jurisdiction to provide services to

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<sup>134</sup> See *Caring Society* 2016, *supra* note 1 at paras 362, 364, 374 and 391; 2017 CHRT 14 at paras 85 and 107; and 2020 CHRT 36 at para 12-14.

<sup>135</sup> Sinha et al., *supra* note 92 at 24.

<sup>136</sup> See *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 at 96-97; and see the Tribunal in CHRT 2020 36 at para 12, "Jordan's Principle is a human rights principle grounded in substantive equality ... [i]t is part of the solution for remedying the discrimination found in [the Main Decision ... [it] not limited to the child welfare program and instead addresses all inequalities and gaps in federal programs for First Nations children." See also Colleen Sheppard, "Jordan's Principle: Reconciliation and the First Nations Child," (2018) 27:1 Constitutional Forum 1.

Indigenous peoples. This is known as an area of 'concurrent jurisdiction.'<sup>137</sup> Jordan's Principle therefore mandates cooperation between the federal and provincial governments to ensure essential services are received by First Nations children and families and to work out who is responsible for funding what. However, there is currently little evidence that any such cooperation is occurring. ISC has advised that it is currently not pursuing provinces for reimbursement of any Jordan Principle expenses. While a handful of provinces have endorsed Jordan's Principle, few seem to be respecting it and most seem to still take the view that funding services to Indigenous children and families is Canada's sole responsibility.

While Canada seems to be carrying a majority of the responsibility for funding at this time (while it continues to be heavily scrutinized for compliance with the Tribunal's orders), we easily can imagine a future date where a different administration of the federal government may claim it has 'done its part' on Jordan's Principle and say it is time for the provinces to pull their weight. This would likely revive the old jurisdictional wrangling that has caused so much harm to Indigenous children and families for decades. There is a need for a body to oversee and monitor Canada and the provinces' efforts to cooperate on this key human rights issue, as well as make recommendations of legal principles and processes that can inform the cooperation between Canada and the provinces on the sharing of funding responsibilities over Indigenous services. Similar oversight is needed with respect to cooperation between Canada and the provinces in relation to funding of self-government and compliance with national standards under C92.

**Need #5: Ongoing education to ISC, CIRNA, provincial DCS staff, provincial agencies, Social workers, Crown lawyers, legal aid lawyers, judges.**

There are ongoing education needs to ensure that ISC and CIRNA staff, as well as various actors involved in the enforcement of provincial child welfare legislation and now C92. In order for there to be meaningful change, all of these actors need to properly understand the context of the systemic discrimination in services to Indigenous children and families that has resulted in the overrepresentation of Indigenous children in care, and how this relates to and impacts how these professionals carry out the functions of their position. As noted in the previous section, some of this education is currently not happening, or only on an *ad hoc* basis. A systematic approach to educating these individuals is needed.

There is also a strong need for Indigenous communities to receive education and capacity building to support their efforts to exercise jurisdiction in relation to child and family services, as well as understand their rights as set out in the minimum national standards under C92.

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<sup>137</sup> For a discussion of the concurrent jurisdiction between Canada and the province in matters of essential services, see *Metallic in Judicial Tales Retold*, *supra* note 72; see also Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada", *supra* note 121.

**Need #6: Investigating and mediating individual complaints about provincial governments' funding failure to provide services to Indigenous children and families**

As noted previously, many provinces are currently not meeting their obligations to provide services to Indigenous children and families. Most continue to take the position that this is the sole or primary responsibility of the government of Canada.<sup>138</sup> All provinces in Canada have Ombuds or Ombuds-like offices that could, in theory, investigate denial of services by provinces to Indigenous children and families. In practice, there is no evidence that provincial ombuds or child advocates are holding provinces accountable for their responsibilities to provide services to Indigenous children and families. This may either be because provincial ombuds offices' lack awareness of the provinces' obligations in this area, or because Indigenous families do not fit within their mandated criteria, or may not be aware of, or may not feel comfortable accessing, this avenue for accountability. In any event, this gap signals the need for some further accountability mechanisms to support Indigenous children and families vis-a-vis provinces.

**Need #7: Investigating and mediating individual complaints about child welfare agencies' implementation of CFS laws and policies, including C92**

Currently, NL, PEI, NB, MB, SK, AB, BC, YK and NU have child advocates offices charged with oversight of provincial child welfare services. In NS and ON, concerns about the conduct of child welfare authorities are dealt with by the provincial Ombuds office. In QC, such concerns are sent to Quebec's human rights commission.

Public inquiries in MB and BC called for child advocates offices to advocate for Indigenous parents and children in the child welfare system, and to monitor the actions of the child welfare authorities.<sup>139</sup> The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls called for the urgent establishment of units with specialized mandates in relation to Indigenous children and youth within the offices of child advocates in each province.<sup>140</sup> Currently, the extent of prioritization of Indigenous children within child advocate offices across the country appears to be patchwork. Only MB, AB, PEI, YK and NU have explicit provisions on Indigenous children and families in their child advocate laws.<sup>141</sup> Only the websites of MB, BC, YK and NU suggest Indigenous issues are a focus of Child Advocate's work. Further, some provincial child advocates offices are more limited in the extent of own-motion or systemic inquiries they can undertake.<sup>142</sup>

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<sup>138</sup> See *Sumner-Pruden v Manitoba*, *supra* at note 122.

<sup>139</sup> See the Manitoba Justice Inquiry (1991), Chapter 14, and *British Columbia Children and Youth Review Final Report* (2006).

<sup>140</sup> MMIWG Final Report, *supra* note 73, Executive Summary, 2019, Call for Justice 12.9.

<sup>141</sup> Manitoba's *The Advocate for Children and Youth Act*, CCSM, c A6.7, s 8(2); Alberta's *Child and Youth Advocate Act*, SA 2011, c C-11.5, s. 9.4; Nunavut's *Consolidation of Representative for Children and Youth Act*, SNU 2013, c 27, ss 5 and 6(1)(a); Yukon's *Child and Youth Advocate Act*, SY 2009, c 1, ss 3, 4(5)(a), 13-14 and 17; Prince Edward Island's *Child and Youth Advocate Act*, RSPEI 1988, c C-4.3, s 12(1)(c).

<sup>142</sup> From our research, the child advocates in NL, NB, MB, for example, appear to have more limited jurisdiction over some types of complaints.

Particularly with the passage of C92, there is strong need to ensure provincial child welfare authorities across the country are adhering to the minimum standards in the new federal law, and to ensure more generally that these authorities are not contributing, through their actions or inaction, to the overrepresentation of Indigenous children in government care. It is not clear to us that this is a priority for most provincial child advocates (or ombuds) offices, which suggest the need for a further accountability mechanism to ensure the needs Indigenous children and families' for oversight of child welfare authorities are not falling through the cracks.

**Need #8: Powers for enforceable orders against Canada for non-compliance with Jordan's Principle, substantive equality and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc)**

While we believe that having an accountability body to oversee, monitor and make recommendations to Canada on the provisions of services for Indigenous children and families is necessary (needs #1-6), we do not believe this is sufficient on its own to fully ensure accountability conditions under which Canada will make meaningful change.

While there is an important role for oversight and advice in accountability offered by bodies such as Ombuds and Child Advocates, these are circumstances that warrant stronger measures. In some countries that have faced extensive problems of political corruption, ombuds or commissions have been given enforcement powers in some cases.<sup>143</sup> While Canada does not face the challenges to democracy similar to those countries, we do not think it is an exaggeration to analogize the gravity of these problems to the extent of discrimination that Indigenous children and families have faced for decades. Canada's long history of systemic discrimination in relation to services resulting in the taking of thousands of children – called "one of the worst possible cases" of racial discrimination seen by the Tribunal<sup>144</sup> – as well as the intransigence the government has shown to change even following the *Caring Society* 2016 Main Decision, fully convinces us that enforcement powers must be a necessary last resort. As we stated at the outset, the overrepresentation of Indigenous children in state care and the federal government's role in this constitutes one of most serious, ongoing human rights violations in our country's history.

That said, we appreciate that it is not common within Canada to provide enforcement powers to ombuds-like bodies who primarily provide advisory functions.<sup>145</sup> Rather, as will be further developed below, what we envision is a 'layering' of accountability mechanisms through having both a National Indigenous Child and Family Advocate and Tribunal, the former providing ombuds-like oversight functions and the latter providing adjudication and having enforcement powers. The Advocate would have the power to investigate the implementation of Jordan's Principle and the substantive equality rights of Indigenous children and families' in relation to essential services, as well as CFS laws and policies, including C92. In addition to addressing

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<sup>143</sup> See, for example, Reif *supra* note 3 at 556-557 (Ecuador Defensoría del Pueblo), and 646 (Kenya Commission on Administrative Justice).

<sup>144</sup> 2019 CHRT 39 at para 13, *aff'd* 2021 FC 969.

<sup>145</sup> Reif, *supra* note 3 at 24-26, 110, 243, 244, 748.

systemic and education issues, the Advocate would also assist Indigenous children and families resolve individual complaints through informal and confidential means. The Tribunal would have the jurisdiction to adjudicate individual, group, community and Advocate-initiated complaints in the same areas as noted above. We believe a dedicated Advocate and Tribunal is what will be most effective to bring real change to the long-standing discrimination and neglect of the needs of Indigenous children and families in Canada. The Tribunal would enforce Canada's substantive equality and statutory human rights obligations under domestic law (human rights legislation and the *Charter*), as well as its obligations under C92, *DISA*, the *UN Declaration* and *UNDRIPA*, as well as other international instruments such as the *Convention on the Rights of the Child*. Finally, it will be imperative that the Tribunal have strong remedial powers, including robust supervisory jurisdiction. Supervisory jurisdiction has been key to the Canadian Human Rights Tribunal ability to affect change in the *Caring Society* and something similar to take its place is necessary for when the Tribunal is no longer seized of the case.

**Need #9: Powers for enforceable orders against provinces for non-compliance with Jordan's Principle, substantive equality against provinces and relevant laws and international requirements (C-92, UNDRIP, CRC, etc)**

Similar to our conclusion in need #8, and building on our points discussed at needs #6-7, we believe the history of provincial neglect of Indigenous children and families needs justifies having a body that can also grant binding orders against the provinces for their failure to respect their obligations under both domestic and international instruments in relation to the Indigenous children and families.

**Need #10: Formal advocacy for First Nations children, families and communities for government services and in child welfare matters**

Indigenous children and their families experience significant barriers in accessing existing avenues to hold governments for violations of their rights to services. Barriers can include lack of awareness of avenues, lack of resources or capacity to advocate on their own behalf, fear of retaliation, language and literacy challenges, and more. The case of Carolyn and Noah Buffalo-Jackson, related earlier, shows that even where First Nations parents have a legal education and influence to advocate for their children, attempting to resolve disputes with Canada can be very challenging, as well as navigating the Canadian Human Rights Commission system.<sup>146</sup>

While the Caring Society and its network of *pro bono* lawyers have been supporting families and communities to the best of their ability in an *ad hoc* way and on a shoe-string budget, we believe there is a strong need for formal, funded advocacy to support Indigenous children and families in their disputes with both the federal and provincial governments over the provision of services to children and families, as well as with child welfare agencies in their enforcement of child welfare laws. Such supports should run the gamut from providing information to navigate the different avenues for recourse, to filling forms, letter writings and speaking on their behalf, to

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<sup>146</sup> See "Buffalo v Canada – My Family's Fight for the Right for Noah to ride a bus to school," *supra* note 119.

pursuing Ombuds, Child Advocate, human rights challenges or judicial review. To our knowledge, most legal aid plans across the country, except for the Manitoba Public Interest Law Center, largely do not see their jurisdiction as extending to advocacy for pursuing denials and delay of services.

We would also see an important role for such advocates to represent parents, care providers and communities who now have a right to be represented, appear and make submissions in child welfare proceedings pursuant to the national standards in C92.<sup>147</sup> Except for parents, other care-givers and communities are not generally eligible for representation under most provincial legal aid plans, and so, without state-funded representation in these matters, their legal rights under C92 are rendered meaningless. Further, the guarantees of substantive equality in the exercise of the rights of children, their family members and communities under C92 suggest a positive obligation on governments to make legal services available (and Jordan's Principle provides a framework for determining who pays and reimbursement).

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<sup>147</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, supra note 98 ss 12-13.

### Part 3: What does effective accountability look like?

Here, we set out and explain those common features we believe are necessary for the accountability mechanisms to have, and then we identify and explain three accountability mechanisms we have selected. It bears repeating that what effective accountability looks like is context-driven. Therefore, the history and needs identified in Part 1 and 2 drive our recommendations in this Part.

#### a) External accountability mechanisms

While there can be both internal and external forms of accountability (e.g., mechanisms within the department versus those arms-length and independent from it),<sup>148</sup> our recommendations focus on external mechanisms. Currently, there are no external non-judicial accountability mechanisms that apply to the work of ISC and CIRNAC.<sup>149</sup> While external accountability mechanisms, such as Ombud and Child Advocate offices exist within the provinces, it does not appear that most of these bodies see themselves as having a role in holding provincial authorities accountable for adequate services delivery to Indigenous children and families.

Our focus on external mechanisms are not intended to discourage Canada, particularly the staff of ISC, from developing internal mechanisms for accountability, such as staff training, internal audits, dispute resolution mechanisms, reporting, etc. ISC is already engaging in some of these activities, and it should continue to do so. Further actions that ISC could be taking include:

- Creating a Code of Ethics and Network Panel as a framework for funding community-based youth organizations that would inform the disbursements of any funds that implicate Indigenous youth, and the co-development of the Indigenous Youth Voice Government of Canada Fund;<sup>150</sup>
- Putting in place internal human rights champions who are responsible for engaging with service coordinators and Indigenous children, families and communities to review and evaluate ISC processes, including standing operating procedures and policies, and advocate for changes to ensure compliance with principles of substantive equality to those with the authority to make changes;
- Review all Jordan's Principle requests, including those with inadequate documentation, to identify where ISC can reduce demands for documentation to a minimal data set, particularly for services commonly approved or falling within the "normative standard of care." This may result in greater efficiency for ISC, and possibly lead to two streams of

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<sup>148</sup> Kent Roach, "Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police," (2012) 61 *Crim Law Q* 29 at 71.

<sup>149</sup> Our research uncovered reference to an Ombudsman at the Department of Indian Affairs and Northern Development at some point, but no longer appears to exist. It was an internal body with only the softest type of ombuds powers: see Ombudsman for the Department of National Defense and the Canadian Armed Forces "The Way Forward – Action Plan for the Office of the Ombudsman" Jan 20, 1999, at p 21).

<sup>150</sup> Assembly of Seven Generations *supra* note 7 at 6.

claims (i.e. simple or complex; at or above normative standard of care), with documentation and process requirements that are proportional to the type of claim.<sup>151</sup>

- Reverse the onus of who has to establish how the requested service meets the standard of substantive equality, by requiring ISC staff to identify and give written reasons as to where and why they believe a specific request does not fall within that standard, prior to claimants ever being asked to explain how their request falls within this. This still addresses the issue but takes the burden off individual claimants and acknowledges it is ISC's responsibility to deliver services that meet the standard, not individuals to argue for their own substantive equality to ISC.
- Create and use confidential release forms, that, with the consent of Indigenous children and families, give their third party representatives access to information in order to advocate and support clarification, claims and/or appeals.
- Fund the advocates or lawyers who are supporting the ad hoc advocacy work of the Caring Society in the interim.

It is important to note that these actions do not replace the mechanisms we are proposing in this report. Nonetheless, they could and should be implemented in the interim while these mechanisms are being established. The long history of interjurisdictional wrangling and neglect by both Canada and the provinces leading to pervasive underfunding of services to Indigenous children and families, as well as continued resistance by Canada to implement the Tribunal's orders in the last six years, all make it clear to us that arms-length, external accountability mechanisms are necessary.

#### **b) Legislated mechanisms, not simply created by the executive**

To ensure the independence of these external accountability mechanisms, which is crucial for the same reasons as noted in the preceding section, we believe that these mechanisms must be legislated by Parliament and not simply be created by the executive.<sup>152</sup> Many of the external accountability mechanisms of the federal government tend to be created by the executive (the Governor in Council through orders in Council or through regulation). This can severely hamper the independence and powers of the accountability body. For example, the National Defence and Canadian Armed Forces Ombudsman, created by the executive, has been critiqued in several reports for having serious problems with its independence, ability to ensure confidentiality, ability to serve its constituents, operate effectively and fulfill its mandate.<sup>153</sup>

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<sup>151</sup> See also Sinha et al, *supra* note 92 at 42, who make several thoughtful recommendations for short-term reform to improve the Jordan's Principle request process.

<sup>152</sup> See Reif, *supra* note 3 at 344.

<sup>153</sup> Ombudsman for the Department of National Defense and the Canadian Armed Forces "The Way Forward – Action Plan for the Office of the Ombudsman" Jan 20, 1999, at 6, 11; André Martin, Ombudsman, "Overhauling Oversight: Ombudsman White Paper, March 30th, 2005, at 1, 13, 33; National Defence and Canadian Forces "The Case for a Permanent and Independent Ombudsman Office: The Defence Community Deserves No Less", March 2017 Report to the Minister of National Defence, at 8, 9, 10, 14, 15, 17, 18.

In our conversation with Professor Reif, an expert on human rights accountability mechanisms, she stressed that for effective independence from the government of the day, legislatures, and not executives, ought to be the ones to create accountability bodies, appoint their leadership, oversee the bodies' functions, and be the government entity receiving reports from the body.<sup>154</sup> Reif noted this has been a challenge for the federal government, pointing out that even the Canadian Human Rights Commission is not entirely independent from government, since its Executive Director is appointed by the Governor in Council. We agree with the Caring Society that it would be important for the selection of the leaders of our proposed accountability mechanisms to be arms-length from the executive. There are precedents of how this can work.<sup>155</sup>

As will be seen further below, we believe the three interconnected mechanisms we propose could be legislated within the same statute.

### **c) Mechanism with specific mandates relating to Indigenous children and families**

There have been recent calls for the creation of accountability mechanisms on Indigenous issues that could potentially serve as accountability mechanisms to address the accountability needs identified in this report. However, we believe that the unparalleled gravity and longevity of the ongoing substantive equality and statutory human rights violations of Indigenous children and families requires the creation of mechanisms with specific mandates in relation to Indigenous children and families.<sup>156</sup>

The 2015 Report of the Truth and Reconciliation Commission recommended the creation of a National Council for Reconciliation to monitor, evaluate and report annually on Canada's progress on reconciliation, including implementation of the calls to action.<sup>157</sup> In Budget 2019, Canada announced \$126.5 million in fiscal year 2020 to 2021 to establish a National Council for Reconciliation and endow it with initial operating capital.<sup>158</sup> Despite the TRC containing five calls to action on child welfare, our concern would be that the focus of the Nation Council on

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<sup>154</sup> See also Reif, *supra* note 3 at 179, 182, and 748.

<sup>155</sup> See for example, ss. 2(1)-(3) of Alberta's *Child and Youth Advocate Act*, *supra* note 141, which requires the executive to appoint the Child and Youth Advocate based on the recommendation of the Legislative Assembly. Parliament's selection could, in turn, be based on recommendations from Indigenous organizations, or possibly even elections for the role. An interesting model is the bylaws of the former Court Challenges Program, where members of the funding selection committee were elected by organizations representing equality-seeking advocacy groups and had to identify as a member of a group protected under section 15 of the *Charter*.

<sup>156</sup> See Reif, *supra* note 3 at 77, where Reif highlights the benefits of specific mandates to seriously prioritize addressing concerns for discrete vulnerable populations.

<sup>157</sup> TRC, *supra* note 65 at 215-219. In making this recommendation, the TRC noted Canada's poor record of accountability, and reconciliation, observing that Canada has long ignored its obligations and has breached and failed in its duty to do the work needed to revitalize its relationship with Indigenous peoples. However, the monitoring would go beyond the federal government and include all levels and sectors of Canadian society.

<sup>158</sup> CIRNAC website, "National Council for Reconciliation" under tab, "What's happening?" online: <https://www.rcaanc-cirnac.gc.ca/eng/1524503926054/1557514163015>.

Reconciliation would likely be too diffuse to provide the necessary attention to the accountability needs identified in Part 2. Further, it's not clear what kind of investigation, recommendation or enforcement powers, if any, a National Council would have, thus it likely would lack sufficient powers to be effective in the circumstances.

The 2019 Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls called for the creation of both a National Child and Youth Commissioner to strengthen the framework of accountability for the rights of Indigenous children in Canada, as well as National Indigenous and Human Rights Ombudsperson and a National Indigenous and Human Rights Tribunal.<sup>159</sup> The proposed scope and jurisdiction of these mechanisms by the National Inquiry was broad, suggesting these mechanisms could be designed to possess effective powers to hold governments accountable in the area of child welfare, Jordan's Principle and services for Indigenous children and families. Canada's June 2021 MMIWG National Action Plan has partly taken up this recommendation, identifying the creation of "an oversight body which represents the interests of families, survivors, and Indigenous communities by investigating and addressing mal-administration or a violation of rights" as a short-term priority that it will begin to implement.<sup>160</sup> This scope, however, appears focused on the interests of the families and communities of missing and murdered Indigenous women and girls. It therefore would not be sufficient to address the accountability needs identified in Part 2.

In June 2020, Senator Rosemary Moodie introduced Bill S-217, *An Act to establish the Office of Commissioner for Children and Youth in Canada* (which died on the order paper when the election was called in the summer of 2021).<sup>161</sup> The bill proposed the creation of an independent Commissioner to serve children and youth in Canada to promote, monitor and report on Canada's implementation of its obligation to advance the rights of children and youth, focusing on the best interests of the child. The bill was criticized by the Caring Society and other Indigenous advocates, as well as some First Nation Senators, for not being sufficiently focused on the needs of Indigenous children.<sup>162</sup> The bill provided, but did not mandate, the creation of an Assistant Commissioner on First Nations, Inuit and Metis children and youth matters. It also did not contemplate the Commissioner having any oversight and enforcement over legislation like C92 and *DISA*, or implementation by Canada of Jordan's Principle or substantive equality.

A report from the Assembly of Seven Generations also concluded that Bill S-217 did not meet Indigenous youth needs around accountability. The report suggests that Indigenous youth and children seemed to be an afterthought in the Bill. Other concerns raised include Bill S-217 providing the Commissioner insufficient powers to hold governments accountable. The Assembly of Seven Generations' report indicated that Indigenous youth want to have ongoing

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<sup>159</sup> MMIWG Final Report, *supra* note 73 Executive Summary, 2019, Call for Justice 12.9 and 1.7.

<sup>160</sup> Government of Canada, *2021 Missing and Murdered Indigenous Women, Girls, and 2SLGBTQIA+ People National Action Plan: Ending Violence Against Indigenous Women, Girls, and 2SLGBTQIA+ People*, June 3, 2021, at 28-29.

<sup>161</sup> Canada, Bill S-217, *An Act to establish the Office of the Commissioner for Children and Youth in Canada*, 1st Sess, 43rd Parl, 2020, cl ss 17-18 (first reading 16 June 2020) [Bill S-217].

<sup>162</sup> First Nations Caring Society, "Briefing Note: Bill S-217", June 2020. Senator Brian Christmas was particularly outspoken about his concerns about the bill.

conversations about accountability: regional conversations and to establish an ongoing network to share best practices and critical discussions on the topic of accountability.<sup>163</sup> On this point, the literature is clear that effective accountability mechanisms geared at children should be child and youth-informed.<sup>164</sup>

We agree with the Assembly of Seven Generations' report that, to address the long and ongoing history of discrimination faced by Indigenous children and families in Canada, effective accountability mechanisms have to be specifically focused on them. While there may be a need for a federal children's commission focused on the needs of other children (and our recommendations are not intended to dissuade Canada from taking other action on this front), no other group of children have been so detrimentally affected by Canada's exercise of jurisdiction over them. The context justifies an Indigenous-specific national child and family commissioner (or advocate).

#### **d) Mechanisms with powers over all Indigenous children**

We believe that effective accountability mechanisms must be focused on all Indigenous children and families, including First Nations (status and non-status), as well as Métis, and Inuit. While the FNCFS Program and the *Caring Society* decision focused on First Nations children (e.g., with Indian status) on reserve, we do not think the accountability needs discussed in this report are limited to status First Nations children and families on reserve.

The exclusion of non-status, Metis and Inuit children from the FNCFS program is a by-product of the same jurisdictional wrangling and discrimination that has preoccupied the federal and provincial governments for over 70 years. Canada did not discriminate between groups when it came to residential schools: Inuit and Metis children were forced to attend along with First Nations children.<sup>165</sup> However, after World War 2, Canada only begrudgingly accepted to provide services on reserves after much public pressure, and then provided inadequate services to First Nations.<sup>166</sup> Similarly, the provinces only begrudgingly provided services to Metis, non-status and off-reserve First Nations because Canada refused to, and were often similarly as neglectful as Canada in the delivery of services to these groups.<sup>167</sup> Due to a ruling from the

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<sup>163</sup> Assembly of Seven Generations, *supra* note 7.

<sup>164</sup> See Bendo *supra* note 33 at 6, 50, 64, 65, 93, 103 and 104; Ombudsman New South Wales "Youth Participation Information Sheet", at 2 and 3, notes the importance of youth participation at different levels and times; *Report of the United Nations High Commissioner for Human Rights on Access to justice for children*, OHCHR, 25<sup>th</sup> sess, Supp No 35, UN Doc A/25/35 (16 December 2013) at p. 4, 9, 12, 14-16 [OHCHR: Access to justice for children]; and Assembly of Seven Generations, *ibid* at p. 6-9, 26, 27, 31 notably, recognizing Indigenous youth participation as a fundamental right.

<sup>165</sup> See TRC, *Canada's Residential Schools: The Inuit and Northern Experience* (2015), and *Canada's Residential Schools: The Métis Experience* (2016).

<sup>166</sup> See Metallic 2019, *supra* note 67 at 8-11.

<sup>167</sup> *Sumner-Pruden*, *supra* note 122 and *Malone*, *supra* note 126 are both recent examples of this. See Constance MacIntosh, "Indigenous Mental Health: Imagining a Future Where Action Follows Obligations and Promises," (2017) 54 *Alta LR* 589; Josée Lavoie, "Medicare and the Care of First Nations, Métis and Inuit", (2018) 13 *Health Economics, Policy and Law* 280; UNICEF, "Aboriginal Children's Health: Leaving No Child Behind," (2009) online:

Supreme Court of Canada, the federal government was eventually forced to provide services to the Inuit, and then chose to do without a legislative framework and inadequately.<sup>168</sup>

In our view, only recommending accountability mechanisms for status First Nations children and families on reserve would be akin to reproducing the same jurisdictional neglect by Canada and the provinces that has been harming Indigenous children and families for decades. The Assembly of Seven Generations also acknowledged problems with the exclusion of Métis children from Jordan's Principle and Inuit Children First Initiative services.<sup>169</sup> Furthermore, decisions of the Supreme Court of Canada have now clearly confirmed that the federal jurisdiction over "Indians" includes First Nations, both status and non-status, Metis and Inuit peoples.<sup>170</sup> Due to ongoing discrimination through the second-generation cut-off rule in the *Indian Act*, since 1985, more and more First Nations are without status.<sup>171</sup> Recently Canada seems to have accepted its jurisdiction in relation to all three groups: *DISA* recognizes ISC's jurisdiction in relation to all three groups, and C92 extends the protections in the act to all Indigenous peoples.<sup>172</sup> Further, even the Tribunal in *Caring Society* has extended the protection of Jordan's Principle beyond status First Nations children living on reserve.<sup>173</sup> For all these reasons, we strongly feel that accountability should be extended to all Indigenous children and families.

We feel such an inclusive approach is necessary to ensure Indigenous children do not fall through jurisdictional cracks in the future. There are precedents in situations involving the human rights complaints of a subgroup of a larger equity-seeking group, where human rights tribunals have issued broader, more inclusive remedies to the larger equity-seeking group in order to effectively prevent future discrimination. For example, in the case of discrimination on the basis of mobility rights in accessing voting stations, the Canadian Human Rights Tribunal ordered the respondent, Elections Canada, to engage in greater consultation with voters with disabilities and disability groups (not just those with mobility disabilities) in order to prevent similar discriminatory practices in the future.<sup>174</sup> In another case involving discrimination on the basis of a person identifying as pangender for not having the ability to properly self-identify their gender on the provincial birth certificates, a Manitoba human rights panel ordered the government to revise its criteria for changing sex designation to include recognition of non-binary sex designations (not just for pangender peoples only).<sup>175</sup> Such an inclusive approach would prevent similar complaints of discrimination from other categories of non-binary persons in the future.

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[https://www.unicef.ca/sites/default/files/imce\\_uploads/DISCOVER/OUR%20WORK/ADVOCACY/DOMESTIC/POLICY%20ADVOCACY/DOCS/Leaving%20no%20child%20behind%2009.pdf](https://www.unicef.ca/sites/default/files/imce_uploads/DISCOVER/OUR%20WORK/ADVOCACY/DOMESTIC/POLICY%20ADVOCACY/DOCS/Leaving%20no%20child%20behind%2009.pdf)

<sup>168</sup> See *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] SCR 104.

<sup>169</sup> Assembly of Seven Generations, *supra* note 7 at 15, graphic image.

<sup>170</sup> *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

<sup>171</sup> Stewart Clatworthy, *The Changing Demography of First Nations Populations: Impacts of the 1985 Indian Act Amendment to the Rules Governing Indian Registration*. Winnipeg: Four Directions Project Consultants, 2007.

<sup>172</sup> *Department of Indigenous Services Act*, SC 2019, c 29, s 336 at s 2; and *An Act respecting First Nations, Inuit and Métis children, youth and families*, *supra* note 98 s 2.

<sup>173</sup> See 2019 CHRT 7 (interim) and 2020 CHRT 36.

<sup>174</sup> *Hughes v. Elections Canada*, 2010 CHRT 4 at paras 79-80.

<sup>175</sup> *T.A. v Manitoba (Justice)*, 2019 MBHR 12 at para 71.

Inclusive is different from pan-Indigenous. Instead of treating all Indigenous peoples identically, as a pan-Indigenous approach seeks to do, an inclusive approach, while recognizing all Indigenous peoples are worthy of human rights protection, acknowledges there can be differences between different sub-groups that need to be accommodated. An inclusive approach does not prevent a distinctions-based approach when necessary or appropriate. For example, distinctions based on unique needs and the diverse legal traditions among Indigenous peoples may be appropriate to achieve equitable outcomes.

#### **e) Mechanisms that bypass jurisdictional wrangling**

Further developing a theme from the last section, we believe that effective accountability in the circumstances must challenge the conventional jurisdictional boundaries the federal and provincial governments have set for themselves. These are the same jurisdictional boundaries that have facilitated decades of neglect of the needs of Indigenous children and families.

In other words, we do not think it will be effective if the jurisdiction of a federal accountability body over Indigenous children and families is solely focused on the conduct of federal authorities, leaving the conduct of provincial authorities in relation to Indigenous children and families to provincial accountability bodies. This will stymie robust oversight, allowing the needs of some Indigenous children and families to fall through the cracks as they have for decades. They need to be addressed together, since it is the combined force of neglect, denials and delays from both the federal and provincial governments that is continuing to harm Indigenous children and families. The fact is that various federal and provincial actors operate within the complex matrix of essential service delivery and child welfare enforcement that affect the well-being of Indigenous children and families. Trying to separate out issues to be dealt with by different federal and provincial accountability mechanisms will only result in delays and denials of services that harm Indigenous children and families.

This issue can be illustrated by the example of an Indigenous child seeking to challenge a denial of the same service by both Canada and their home province as violating their right to substantive equality and Jordan's Principle. Under current law, it would be impossible for the child to bring a discrimination complaint against Canada and the province in the same forum. She would have to bring a complaint against Canada to the Canadian Human Rights Commission, and bring another complaint against the province to her provincial human rights commission.<sup>176</sup> She would face the same issue if she sought to judicially review the decisions of Canada and the province; Canada would have to be sued in Federal Court and the province sued in her provincial superior court.<sup>177</sup> These scenarios present risks of inconsistent legal

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<sup>176</sup> This is because the jurisdiction of these tribunals is generally limited to the actions of the enacting government. However, it is possible for Canada to create a tribunal with jurisdiction over both federal and provincial action as we discuss below.

<sup>177</sup> Judicial review against Canada must be instituted in the Federal Court: *Federal Courts Act*, RSC 1985, c F-7, s 18. See also *Mousseau v. Canada (Attorney General)* (1993), 126 NSR (2d) 33 (NSCA), *Nolan v. Canada (Attorney General)* (1998), 155 DLR (4th) 728, and *Ochapowace Indian Band No. 71 v. Canada*, (1999) 167 Sask. R. 167

rulings, increased chances of appeals, delays and increased costs.<sup>178</sup> All of which is not in keeping with the spirit of Jordan's Principle that jurisdictional wrangling should not delay timely access to services by Indigenous children. As one of the pro bono lawyers for the Caring Society aptly put it: "Currently in Canada, there is a Jordan Principle problem with trying to vindicate Jordan's Principle."<sup>179</sup> Such a result is unacceptable in light of the long history of discrimination, delay and denial faced by Indigenous children and families. It is also unnecessary.

Under its jurisdiction under s. 91(24) of the *Constitution Act, 1982*, the federal government has the power to legislate in relation to Indigenous peoples in areas that would otherwise be regarded as areas of provincial jurisdiction. Such legislation can have incidental impacts on provinces.<sup>180</sup> Even legislative provisions that on their face encroach on provincial powers can be upheld so long as they are necessary to the effective functioning of the legislation.<sup>181</sup> This is all to say that Canada can pass legislation that would give an accountability body the power to investigate as well as make binding orders in relation to provincial authorities' actions in relation to Indigenous children and families. Historically, Canada has been reluctant to use its legislative powers to provide protection to Indigenous peoples from the provinces.<sup>182</sup> However, such action is in keeping with Canada's fiduciary and treaty obligations to Indigenous peoples, the Honour of the Crown and reconciliation.<sup>183</sup> With C92, however, Canada turned a page on that history by passing a federal law that has incidental impacts on the provincial powers over child welfare by legislating minimum standards. The Quebec Court of Appeal had no difficulty in concluding that this was within Canada's constitutional jurisdiction to legislate in relation to Indigenous people.<sup>184</sup> Canada did so because it recognized that the crisis of overrepresentation of Indigenous children in state care required such action.<sup>185</sup> The same reasoning applies in the

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<sup>178</sup> The only time the child could get a definitive ruling where both the federal government and a province are joined to the matter is if the different cases simultaneously worked their way all the way to the Supreme Court of Canada and were joined there.

<sup>179</sup> Naomi Metallic conversation with David Taylor, June 16, 2020.

<sup>180</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28; *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 28; *R v Morgentaler*, [1993] 3 SCR 463 at p 486.

<sup>181</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.

<sup>182</sup> See John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 474.

<sup>183</sup> Borrows, *ibid*; see also Grammond, *supra* note 121.

<sup>184</sup> QCCA C92 Reference, *supra* note 100 at paras 313-355. The matter is now being appealed to the Supreme Court of Canada.

<sup>185</sup> See preamble of C92; see also Attorney General of Canada's Brief in Reference to the Court of Appeal of Quebec in Relation to An Act Respecting First Nations, Inuit and Métis Children, Youth and Families (500-09-0287151-196), dated April 1, 2021 at para. 47.

case of passing effective accountability mechanisms in the circumstances, and this is supported in legal scholarship.<sup>186</sup> There is also precedent for this internationally.<sup>187</sup>

#### **f) Recommendations for Specific Accountability Mechanisms**

We have identified 3 specific accountability mechanisms which could stand alone, but would most effectively safeguard the needs of Indigenous children and families if all 3 were enacted as interconnected mechanisms.

Based on the accountability needs identified in Part 2, and the principles we outlined above, we have identified three mechanisms that we believe will effectively address the government conduct that has contributed to the overrepresentation of Indigenous children in state care for decades. We believe that all 3 are necessary to achieve true accountability. Any of these three mechanisms, individually, could stand alone and would serve to provide greater protection of the rights of Indigenous children and families from the discrimination found in the *Caring Society* case by improving government accountability. However, none are sufficient, on their own, to address all of the identified accountability needs. Therefore, combining all three mechanisms would be the most effective way of preventing discrimination from continuing or re-emerging in the future.

First, we identify the mechanism and the accountability needs each would address. Following this, we explain our rationales for each mechanism, why we ruled out some other options, and what should be included in these mechanisms.

Note that we are not attempting to be exhaustive in setting out details for the mechanisms we propose. We believe there are several details about the proposed Advocate's Office and Tribunal, such as composition, qualifications, terms, staff, etc., that ought to be determined in future discussions and collaboration with Indigenous groups, including Indigenous children and youth, the Caring Society and the pro bono lawyers who have been supporting them. That said, when it comes to appointment criteria and the selection process, we agree with comments received from the Caring Society that it should be a priority for staff of these bodies to be diverse, knowledgeable about human rights and Indigenous child welfare issues, selected in a way that ensures their independence from the government, and for such details to be set out in the enabling legislation.<sup>188</sup>

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<sup>186</sup> Patrick Macklem has also argued that the federal government has the jurisdiction under s91(24) to establish an independent accountability body with the power to implicate provincial interests: see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 272-273; as see Borrows, *supra* note 182 and Grammond, *supra* note 121.

<sup>187</sup> See for example Reif, *supra* note 3 at 755, who discusses the prospect of national accountability bodies with jurisdiction over subnational governments and gives examples, such as Peru's *Defensoría del Pueblo* (at 588) and Namibia's Ombudsman (at 669).

<sup>188</sup> See, for example, *Human Rights Code*, RSO 1990, c H.19, ss. 27(3) and (4) on mandated composition requirements.

Our mandate did not include drafting of the enabling legislation for these mechanisms, though we have given some ideas for precedent clauses in what follows. These are based on our review of different child advocates and human rights commissions laws in the county. However, we suggest that in the actual development of the enabling legislation, further expert advice be sought to recommend specific statutory language.

**Accountability Mechanism 1:**

<b>National Indigenous Child and Family Advocate</b>
<b>Need #1:</b> Oversight of Canada's implementation of Jordan's Principle
<b>Need #2:</b> Oversight of Canada's long-term reform of child welfare, including C92 implementation
<b>Need #3:</b> Oversight Canada's implementation of substantive equality in relation to all services impacting on Indigenous Children and Families
<b>Need #4:</b> Oversight of Federal-Provincial cooperation in servicing Indigenous Children and Families
<b>Need #5:</b> Ongoing education for federal and provincial government actors involved in child welfare services
<b>Need #6:</b> Oversight of provincial governments implementation of substantive equality in relation to all services impacting on Indigenous Children and Families
<b>Need #7:</b> Oversight of child provincial welfare agencies, including their implementation of C92

**Accountability Mechanism 2:**

<b>National Indigenous Child and Family Tribunal</b>
<b>Need #8:</b> Enforce orders against Canada for non-compliance with Jordan's Principle, substantive equality and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc)
<b>Need #9:</b> Enforce orders against provinces for non-compliance with Jordan's Principle, substantive equality against provinces and relevant laws and international requirements (C-92, UNDRIP, CRC, etc)

**Accountability Mechanism 3:**

## National Legal Services for Indigenous Children and Families

**Need #10:** Formal advocacy for Indigenous children, families and communities for government services and in child welfare matters

### **(1) A National Indigenous Child and Family Advocate**

The body that we feel would be most effective at addressing accountability needs #1-7 is a national Indigenous child and family advocate. Effectively, this would be based on the ombuds model of a child and youth advocate office, but also with specific jurisdiction to oversee governments' delivery of services to Indigenous children and families in accordance with Jordan's Principle, their right to substantive equality in statutory human rights instruments and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc). This is because of the dual need for such a body to take a child and family centered approach on the one hand, and to also apply a substantive equality lens informed by both domestic and international human rights principles. The Advocate would also oversee governments' implementation of child welfare legislation and policy in relation to Indigenous children and families.

In discussions with ISC and the Caring Society early on in this project, the specific model of an ombudsperson was of interest. However, as we got further into our research, we reached the conclusion that the 'classic' ombuds model of it would not have the tools and powers necessary to address the accountability needs we have identified in this report. Most classic ombuds offices in Canada focus mainly on the function of a government's administrative systems and procedures, and generally do not consider matters from a human rights lens, which is imperative in the circumstances. Furthermore, most ombuds in Canada also have limited powers to make systemic inquiries, and they generally do not have a mandate for education. Nor do they generally have requirements to take a child-centered approach. The federal government has a number of specific ombuds, some are created pursuant to executive power. These have received critiques for lacking sufficient independence from the government and powers to make effective change.<sup>189</sup> In the circumstances, we do not think a classic ombuds is a sufficiently robust model, and this is why we recommend a child advocate (a form of a thematic ombuds).

In an earlier draft, we had called this mechanism a 'commission' as opposed to an 'advocate.' There is no magic in the name. As we note in our 'Primer on Accountability Mechanisms,' the concepts are largely synonymous, however, advocates usually have a more active role in defending the rights of children and youth than commissions/thematic ombuds offices might, given that children's rights are at stake. 'Advocate' more clearly also distinguishes this office from a human rights commission with a role in screening complaints, which, based on feedback we received from the Caring Society, is a concern about using 'commission.' We had always

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<sup>189</sup> See our earlier note 153.

intended that this mechanism would be involved in 'soft advocacy' by assisting Indigenous children and families resolve individual complaints through informal and confidential means. Children advocate office's are typically staffed with trained social workers or other helping professionals who can intervene on children and youth' behalf within the system and help navigate processes.

Below, we set out the functions and powers we believe the Advocate should have in order to be effective.

### Mandate

The mandate of the Advocate ought to reflect accountability needs #1-7, and it should specifically identify the assessment standards upon which the Advocate would scrutinize the conduct of governments. For both the federal and provincial governments this would include Jordan's Principle and substantive equality (protected under each government's human rights legislation and the *Charter*), C-92 and international instruments such as *United Nations Declaration on the Rights of Indigenous Peoples*, the *Conventions with Rights of the Child*, and the *Convention of Rights of Persons with Disabilities*. On top of this, ISC's conduct should also be assessed for compliance with its enabling statute, *DISA*. Language in the enabling legislation should convey that these instruments set the minimum standards that government decision-makers are expected to comply with in all circumstances. The mandates in PEI and Ontario's 2007 Child and Youth Advocate law provide a robust mandate for their advocate and this could be drawn upon for inspiration.<sup>190</sup>

Consistent with various human rights statutes, the mandate should also explicitly mention the Advocate's role to protect Indigenous children and families' right to substantive equality and statutory human rights, particularly in the delivery of government services. The protected grounds from discrimination should include all those listed in the *Canadian Human Rights Act*, but it will also be important particularize Indigenous origin (which is not mentioned in the *CHRA* but is viewed as included within 'ethnicity'), as well as the various subsets of Indigenous characteristics that government distinctions have often been based upon, such as being non-status, living off-reserve, being Inuit, being Metis, etc., in order to ensure that any actions based on such distinctions suggests *prima facie* discrimination.

### Jurisdiction

As we have said before, when it comes to jurisdiction, the Advocate ought to be able to oversee not just the actions of the federal government, but also provincial governments in the delivery of services to Indigenous children and families, as well as oversee the actions of child welfare agencies. This would include FNCFS Agencies, as well as other agencies dedicated to providing services to Indigenous groups (Métis, Inuit and off-reserve First Nations), all of whom currently exercise jurisdiction delegated from the provinces. Our interest in overseeing

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<sup>190</sup> See *Child and Youth Advocate Act*, RSPEI *supra* note 141 s 12; and *Provincial Advocate for Children and Youth Act*, 2007, SO 2007, c 9 s 16 [Ontario Advocate].

delegated Indigenous child welfare agencies lies mainly in the fact that such investigations will likely reveal problems with federal and provincial legal or funding frameworks that need to be addressed.

The question of whether the Advocate should oversee the child welfare systems of self-governing Indigenous Governing Bodies as these grow under C92 is more challenging. Of course, accountability of self-governing Indigenous groups is important, but accountability models should not be unilaterally imposed on Indigenous governing bodies. Moreover, the history reviewed in Part 1 reveals that the need for accountability at this time arises from the actions and inactions by federal and provincial governments, not Indigenous governing bodies. For this reason, we do not think the jurisdiction of the Advocate should automatically include jurisdiction over Indigenous governing bodies that become self-governing over child and family services. Recognizing the right to self-determination, an Indigenous governing body should be given the choice to opt-in to the accountability framework offered by the Advocate<sup>191</sup>, or be left to develop its own.

On the question of the wisdom of duplicating some of the functions carried out by existing accountability bodies, as addressed in Part 1, we know that many provincial governments continue to refuse many services to Indigenous peoples despite Jordan's Principle, and that many actors within provincial child welfare systems are not aware of, and not adhering to the minimum standards in C92. It does not seem that the majority of provincial child advocates, ombuds or human rights commissions are holding provincial authorities sufficiently accountable when it comes to their obligations to Indigenous children and families. The Canadian Human Rights Commission is not mandated to focus on Indigenous child and family issues, nor to take a child-centered approach that employs 'soft advocacy'--that is, working with governments to resolve individual complaints through informal and confidential means.<sup>192</sup> Moreover, as noted in section 3(e) above, both the federal human rights commission and provincial accountability bodies lack the jurisdiction to consider complaints that involve both federal and provincial refusals of a service at once.

There is precedent in the non-Indigenous context for the creation of a federal accountability body that may duplicate some of the functions of an existing provincial accountability body, and

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<sup>191</sup> See Reif, *supra* note 3 at 14; *Ombudsman Act*, RSY 2002, c. 163, s 11(5).

<sup>192</sup> On this, see Blackstock, *supra* note 75 at 297-298. See also the Summary Report of the 2013 and 2014 Aboriginal Women's Roundtable, "Honouring the Strength of Our Sisters: Increasing Access to Human Rights Justice for Indigenous Women and Girls," which highlights the challenges and barriers experienced by Indigenous peoples in accessing the CHRC, at 23, 27, 28, 31, 32, 34, 35, 36. There were recommendations made by Indigenous groups, after the repeal of s. 67 of the *Canadian Human Rights Act* to strengthen the legislative mandate of the CHRC in relation to Indigenous peoples, but this did not happen: see 2011 Report to Parliament - On The Readiness of First Nations Communities And Organizations To Comply With The *Canadian Human Rights Act*, Appendix C - Report of the Congress of Aboriginal Peoples. Further, the Commission's focus on Indigenous issues has waxed and waned over time. After repeal of s. 67 of the *CHRA*, the Commission had a National Aboriginal Initiative focused on Indigenous issues, however, this branch of the Commission was cut for budgetary reasons around 2015.

the Supreme Court had no issue with the prospect of these bodies operating concurrently.<sup>193</sup> Further, the legislation could be drafted such that, if another accountability body is effectively responding to a matter, the Advocate may decline to exercise jurisdiction.<sup>194</sup> The Advocate could also be mandated to provide outreach, education and coordination with provincial ombuds, child advocate and human rights commission to assist in their attempts to address matters relating to Indigenous children and families.

### Types of investigation

All child advocates, ombuds and human rights commissions have the power to investigate individual complaints relating to their areas of jurisdiction. There is clearly a need for this in the context of the services provided by Canada and provinces to Indigenous children and families. We could also foresee individual complaints including group or community complaints, especially in relation to funding issues relating to both Jordan's Principle, as well as funding under C92. Jurisdiction over group complaints is made explicit in some accountability legislation, and we recommend similarly in the proposed Advocate legislation.<sup>195</sup> It would be best if the law clarified that groups can include Indigenous collectives, such as communities, Bands, tribal councils, and organizations.

Many accountability bodies also have the power to initiate own-motion investigations into matters, and we recommend this for the proposed Advocate. We also recommend that the statute provide clear language that the Advocate has the power to undertake systemic investigations, including the powers to carry out studies and research in support of systemic inquiries, as in the case of some existing statutes.<sup>196</sup> Related to systemic inquiries, a power to carry out studies and research on any relevant question under the advocate's jurisdiction, such as found in Quebec's child advocate laws, is important to specify.<sup>197</sup> The power to engage any persons having technical or specialized knowledge of any matter relating to the work of the Advocate's Officer to advise and assist the Advocate, such as found in the *Official Languages Act*, would further assist the proposed Advocate in making systemic inquiries.<sup>198</sup>

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<sup>193</sup> *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, involving a federal and Ontario's securities regulatory. The Court held that duplication of legislative regimes in areas of concurrent jurisdiction (double aspect) was acceptable, so long as there was no conflict or 'incompatibility' between the statutes, and this would be conceived of narrowly. In true cases of incompatibility, however, the federal legislation would be paramount.

<sup>194</sup> This could be modeled on the provision on s 41(1)(a) and (b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], which give discretion to the Commission to decline dealing with a complainant if the complainant has not exhausted other grievance procedure otherwise reasonably available, or the complaint is one that could be more appropriately dealt through another procedure.

<sup>195</sup> See, for example, *Charter of Human Rights and Freedoms*, CQLR, c C-12, s 74; and Saskatchewan's *Advocate for Children and Youth Act*, SS 2012, c A-5.4, s 14(2)(b).

<sup>196</sup> See *Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2, s 24(h); Ontario Advocate, *supra* note 190 at s 16(1)(p); and *Child and Youth Advocate Act*, *supra* note 141 s 12(1).

<sup>197</sup> See *Youth Protection Act*, CQLR c P-34.1 s 23(f).

<sup>198</sup> *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 52.

### Investigative powers

The Advocate should have robust investigative powers to collect necessary information to effectively respond to the different types of complaints (individual, group, own-motion and systemic). In particular, we recommend that the Advocate have investigative powers similar to those of human rights commissions, including powers to make oral or written inquiries, demand the production of documents or records, and search any premises after applying for a warrant, and apply for enforcement of orders.<sup>199</sup> The investigative powers in Senator Moodie's proposed Bill S-217 would have given the proposed Commission all the powers of a commissioner appointed under Part II of the *Inquiries Act*, which covers most of the investigative powers above, so this may be a precedent worth considering.<sup>200</sup>

In terms of collection of data and systemic oversight of Canada's implementation of Jordan's Principle and CHRT's order to reform FNCFS, we agree with the Caring Society that it would be important to specify in the enabling legislation some types of data that it would be mandatory for the Advocate to collect and analyze. For example, this might include:

- Jordan's Principle decision-makers approval and denial rates, as well as number of requests deemed 'submitted with insufficient information'.
- Jordan's Principle decision-makers turn-around times.
- Jordan's Principle request by regions/communities.
- Disaggregated data by sub-group of Jordan's Principle requests by age, gender, disability as well as service/product/program types.<sup>201</sup>
- Identify gaps in services being addressed through Jordan's Principle.
- identify subgroups that are underrepresented in Jordan's Principle requests.
- The amount of funding being provided per capita through Jordan's Principle, and the variation in funding levels across provinces/territories and remote/rural/urban communities.
- Jordan's Principle appeal approval and denial rates.
- Jordan's Principle appeal turn-around times.
- Disaggregated data of complaints brought to the Advocate and Tribunal.

Further mandatory areas of data collection could be identified in discussions and collaboration with Indigenous groups, lawyers and experts in the area. Note that such a mandatory list should not preclude the Advocate from collecting other data they view as important to fulfilling their mandate, or to investigate specific complaints, and the legislation should also be clear on that.

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<sup>199</sup> CHRA, *supra* note 197 at s 43; *Human Rights Act*, RSPEI 1988, c H-12, s 23-24.

<sup>200</sup> Bill S-217, *supra* note 161.

<sup>201</sup> As recommended by Sinha et al., *supra* note 92 at 41, "The data needed is not simply the broad category of services being funded, such as "vision," but a specific description that supports examination of the existing policy framework, e.g., "second pair of glasses within a year, not covered by Non Insured Health Benefits (NIHB)."

We also agree with the Caring Society that, for the purposes of systemic oversight, there is value in listing issues or events that would create an obligation on provincial and federal government departments to report to the Advocate that would in turn trigger mandatory investigations by the Advocate. While this list is not exhaustive, examples of potential areas that could trigger investigations include:

- Jordan's Principle decision-makers with low approval rates.
- Jordan's Principle decision-makers with slow turnaround times.
- Jordan's Principle regions/communities with high and low request rates.
- Situations where there are a large number of requests from members of groups or for a specific service.

Such a list would benefit from further discussions and collaboration with Indigenous groups, lawyers and experts in the area.

Like with the powers of provincial child advocates, the Advocate should also be mandated to meet with children and youth and ensure their voices are heard in the investigation process. Helpful provisions to this effect are included in Newfoundland's *Child and Youth Advocate Act*, which calls for the Advocate to meet with children and youth and ensure their participation in decisions regarding services.<sup>202</sup>

We see real value-added in the model of a Child Advocate for engaging in 'soft advocacy' on behalf of Indigenous children and families. Advocate Offices employ trained social workers or other helping professionals who can intervene with government departments and agencies on behalf on children and youth and attempt to informally resolve their complaints. Thus, investigations should take place confidentially, as they do with child advocates and federal legislated ombuds,<sup>203</sup> in order to foster greater cooperation by government parties.<sup>204</sup> Confidentiality supports professionalism and diligence as it creates better access to information and gains the respect of senior government officials, which leads to opportunities for quick resolutions.<sup>205</sup> Further, confidentiality strengthens accessibility to the public,<sup>206</sup> independence,<sup>207</sup> trust, and confidence as well as protects from fears of reprisal.<sup>208</sup> The provisions in the (now repealed) Ontario *Provincial Advocate for Children and Youth Act* on confidentiality and privacy are a useful precedent to look to. However, this does not prevent public reporting by the Advocate, which we believe will be a crucial function of the Advocate in some cases, as we

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<sup>202</sup> Newfoundland and Labrador's *Child and Youth Advocate Act*, SNL 2001, c C-12.01, s 15(1)(d)-(f).

<sup>203</sup> *Official Languages Act*, *supra* note 198 at ss 60, 71, and 72; *Corrections and Conditional Release Act*, SC 1982, c 20, s 182.

<sup>204</sup> Canadian Audit and Accountability Foundation "Establishing a First Nations Auditor General Research Paper" November 2017, 24.

<sup>205</sup> Marshall & Reif *supra* note 19 at 219-220.

<sup>206</sup> Greene *supra* note 24 at 21; National Aboriginal Initiative "Honouring the Strength of Our Sisters", *supra* note 192 at 38.

<sup>207</sup> Canadian Audit and Accountability Foundation *supra* note 204 at 24.

<sup>208</sup> "The Case for a Permanent and Independent Ombudsman Office...", *supra* note 153 at 34-35.

discuss below. In the Ontario legislation, for example, the individual's information can only be disclosed in a public report with consent, or otherwise anonymized.<sup>209</sup>

The proposed Advocate may require tools to encourage reporting of concerns by public servants and others and discourage any form of retaliation. The *Official Languages Act* contains a provision allowing the Commissioner to make a report to the Treasury Board of any belief of an individual being threatened, intimidated or discriminated against for making a complaint or giving evidence or assisting in an investigation under the *Act*.<sup>210</sup> The *Canadian Human Rights Act* also prohibits any form of retaliation and treats it as a form of discrimination that can be subject to a compensation order by the Canadian Human Rights Tribunal.<sup>211</sup> We believe that these sorts of protection against discrimination must be included in legislation for the proposed Advocate.<sup>212</sup>

### Remedial powers

Commissions and child advocates do not typically possess remedial powers to make enforcement orders against government actors. By not giving these bodies enforcement powers, this allows them to instead investigate and seek to provide advice and recommendations to the government. The rationale is this will make government actors more amenable to cooperating and working with these bodies. We agree this should be the main function of the Advocate, however, as noted earlier in discussion of Need #8, this is why we are also recommending the creation of a Tribunal that can adjudicate matters when persuasion and advice are ineffective, as discussed further below.

The objective of the Advocate in cases of individual and group complaints should be to facilitate resolution, and like human rights commission and other child advocates, through informal and confidential means. Such methods for resolving disputes should draw on Indigenous laws and dispute resolution processes where possible. If complaints cannot be resolved internally, individuals or groups are free to pursue other modes of resolutions, including going to the proposed new Tribunal (or to existing methods for dispute resolution). We do not intend the Advocate's Office to 'gate-keep' individuals' or groups' access to the Tribunal or other forums. Typically, accessing options of dispute resolution through ombuds-functions does not prevent people from accessing other forums, and we do not intend to limit peoples' options with this mechanism. It is our hope that an individual or group might start with the Advocate to seek informal resolution or, at the least, obtain information to navigate their options, and possibly be connected with legal support if necessary (we explain this further below with our third mechanism, National Legal Services for Indigenous Children and Families). In other words, we

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<sup>209</sup> Ontario Advocate, *supra* note 190 at ss 19-20.

<sup>210</sup> *Official Languages Act*, *supra* note 198 at s 62(2).

<sup>211</sup> CHRA, *supra* note 194 at ss 4, 14.1 and 53.

<sup>212</sup> Also see Samantha Feinstein et al "Are whistleblowing laws working? A global study of whistleblower protection litigation" which offers insight on whistleblower protections to safeguard against retaliation to ensure whistleblowers become essential players in fighting against government abuse of power at 13 - 19, 21 - 23, 25, 27, 65, 68-71.

see the Advocate as providing a “one stop shop” that can support Indigenous children, youth and their families in navigating the different accountability mechanisms that exist. Essential, we envision the Advocate receiving complaints and, based on its knowledge and experience, quickly assessing whether a complaint could be handled based on its relationships with the government actors (through ‘soft advocacy’) or, if the complaint is more complex or beyond their soft advocacy abilities, connecting the complainant with legal counsel to advise them on their options, including going to the Tribunal. The Advocate as a ‘one stop shop’ can help coordinate and ensure complaints are handled efficiently, as well as ensure that the Tribunal is not overwhelmed with complaints that could be more quickly handled through the soft advocacy.

The proposed Advocate would also have similar powers to provincial child advocates to make recommendations to the government. For example, Saskatchewan’s child advocate can make recommendations on any matter concerning services provided to a child or group of children by the government, as well as on “any matter relating to the interests and well-being of children or youths who receive services from [the government].”<sup>213</sup> While such wide-discretion to make orders is important, it would be helpful for the enabling legislation to list examples of the types of recommendations the Advocate can make. For example,

- When data or investigations reveal bias in policies, process or staff members, recommendations for training or other corrective measures.
- Recommendations for government actors to take proactive measures, such as steps to ensure that Indigenous children and families are aware of their rights.
- Recommend policy or process changes to address systemic gaps or inequities, for example, driving a high level of Jordan’s Principle requests.
- Recommend a comprehensive solution to avoid the case-by-case or a “projectification” approach to Jordan’s Principle.

Such a list would not be intended to limit what the Advocate can recommend, but to allow Advocate staff, as well as government staff subject to Advocate oversight, to appreciate the Advocate’s role and powers.

Further, if an investigation under the Advocate’s jurisdiction reveals wrongdoing by a government actor (e.g., acting contrary to law, unreasonably, unjustly or based on a mistake of law or fact), we believe it would be important for the enabling legislation to specify, like in Saskatchewan, that the Advocate must report to the wrongdoing to the responsible minister or government service provider and may make recommendations that the Advocate considers appropriate.<sup>214</sup> The Advocate can also request the government entity who received the recommendation to provide notice within a specified time of the steps that it has taken to or propose action to give effect to the recommendation. If, within a reasonable time of the recommendation, no action is taken that seems to the Advocate to be adequate or appropriate, the Advocate may submit a report of the matter to the Cabinet, as well as mention the report in its annual report to the Legislative Assembly.<sup>215</sup> A very similar approach is found in Nunavut’s

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<sup>213</sup> Saskatchewan’s *Advocate for Children and Youth Act*, *supra* note 195 at ss 14(2)(d) and (3)(b).

<sup>214</sup> *Ibid* at s 28.

<sup>215</sup> *Ibid* at s 29.

*Children and Youth Act*, except that a report shall also “include a description of the application, use or incorporation of Inuit culture and Inuit societal values in relation to the conduct of the review.”<sup>216</sup> The federal Official Language Commissioner also has impressive escalation powers where its recommendations are not acted upon. If, after a reasonable time, the federal institution concerned has not acted on its recommendation, the Commissioner may transmit its report to Cabinet, following which, if no adequate and reasonable response is forthcoming in a reasonable time, the Commissioner may report to Parliament.<sup>217</sup> If no action is taken, the Commissioner can apply to Federal Court for remedy in relation to a complaint under the *Official Languages Act* with consent of the complainant.<sup>218</sup> We believe it would be important for the Advocate to have similar escalation powers up to Parliament, as well as to take issues to the proposed new Tribunal.

Beyond reports on specific complaints, human rights commissions and child advocates will normally have annual reporting requirements to the legislative branch on their activities for the year.<sup>219</sup> However, they are also empowered to make other or special reports commenting on any matter within the scope of its powers that they deem appropriate.<sup>220</sup> Finally, in addition to referring complaints to the federal court, the Official Language Commissioner also has the power to seek leave to intervene in any adjudicative proceedings relating to the status or use of English or French.<sup>221</sup> We believe these would all be important powers in the toolbox of the Advocate we are proposing.

### Education

Human rights commissions and child advocates typically have specified powers to educate the public. Nova Scotia's human rights legislation calls on its commission to “develop a program of public information and education in the field of human rights.” Alberta's child advocate law empowers its advocate to “promote the rights, interests, and well-being of children through public education.”<sup>222</sup>

We believe that the proposed Advocate should have a significant mandate to promote human rights, particularly the right to substantive equality and Jordan's Principle, of Indigenous children and families, as well as their interests and well-being. We also believe the Advocate should more specifically have a mandate to educate both federal and provincial civil servants in these areas, as well as those other professionals who play a role in child welfare matters (judges, legal aid lawyers, etc.), including their obligation in relation to C92. The Advocate could also

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<sup>216</sup> *Consolidation of Representative for Children and Youth Act*, *supra* note 141 s 33(2) and see ss 33-34.

<sup>217</sup> *Official Languages Act*, *supra* note 198 at ss 63-65.

<sup>218</sup> *Ibid* at s 78(1)(a).

<sup>219</sup> CHRA, *supra* note 194 at s 44(3); see also Ontario Advocate, *supra* note 190 at s 21(1).

<sup>220</sup> CHRA, *ibid* at s 44(2); Ontario Advocate, *ibid* at 21(5); see also *Official Languages Act*, *supra* note 198 at s 67.

<sup>221</sup> *Official Languages Act*, *ibid* at s 78(3).

<sup>222</sup> Alberta's *Child and Youth Advocate Act*, *supra* note 141 ; see also Saskatchewan's *The Advocate for Children and Youth Act*, *supra* note 195 at s 14(2)(a); and Manitoba's *The Advocate for Children and Youth Act*, *supra* note 141 at s 12.

play a 'knowledge mobilization' role in terms of ensuring that standards and practices are consistently applied/understood throughout the various jurisdiction and country, and act as a resource for Indigenous nations and communities to facilitate learning from each other.

### Other important provisions

Senator Moodie's proposed Bill S-217 included provisions in the mandate of the Commissioner to promote the collective rights of Indigenous peoples, encourage maintenance of connections to culture, families, lands, waters, language, songs and stories, as well as encourage the implementation of Indigenous laws.<sup>223</sup> It would be worthwhile to emulate such provisions in legislation for the Advocate we are proposing. However, any Indigenous Process designed for accountability purposes needs to recognize the diverse legal traditions among Indigenous Nations.

The Yukon *Child and Youth Advocate Act* includes provisions stipulating that the Advocate should have knowledge of First Nations culture, traditions and beliefs, as well as knowledge about child and youth development and disabilities affecting children and youth.<sup>224</sup> A similar provision can be found regarding the Advocate's knowledge of Inuit culture in Nunavut's Act.<sup>225</sup> Alberta's child advocate legislation requires the child advocate to maintain a roster of Indigenous, Métis, and Inuit advisors.<sup>226</sup>

## **(2) A National Indigenous Child and Family Tribunal**

The Advocate we propose above will provide badly needed oversight over the federal and provincial governments and play an essential role in safeguarding the rights of Indigenous children and families. However, as important as it is, given that government intransigence on services for Indigenous children and families is an ongoing problem, the Advocate will be ineffective if its recommendations on individual and systemic discrimination are only ever advisory without the possibility of being enforced through binding orders on governments.

In the choice between escalation by the Advocate to courts (which is the option in the case of the Official Languages Commissioner<sup>227</sup>) versus specialized tribunal, in the circumstances, we believe a specialized tribunal with the ability to have more informal procedures and rules around evidence, as well as more robust remedial powers, is preferable. Courts in Canada do not have the power to consider substantive equality and statutory human rights violations.<sup>228</sup> At best, they can consider violation of s. 15 of the *Charter* against government authorities in the context of a judicial review. In judicial review, the conduct of governments is most often assessed on the basis of reasonableness in accordance with the government authorities' statutory

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<sup>223</sup> Bill S-217, *supra* note 161 at s 11(1)(o)-(q).

<sup>224</sup> Newfoundland and Labrador's *Child and Youth Advocate Act*, *supra* note 202 at ss 4(5).

<sup>225</sup> Nunavut's *Consolidation of Representative for Children and Youth Act*, *supra* note 141 at s 6(1)(a).

<sup>226</sup> Alberta's *Child and Youth Advocate Act*, *supra* note 141 at s 9.4.

<sup>227</sup> *Official Languages Act*, *supra* note 198 at s 78(1).

<sup>228</sup> See *Seneca College v. Bhaduria*, [1981] 2 SCR 181; and *Honda Canada Inc. v. Keays*, 2008 SCC 39.

objectives.<sup>229</sup> The nature of these proceedings often results in significant deference shown to governments. Further, the lack of legislative frameworks in the context of services to Indigenous peoples can further up the level of deference courts will show the government.<sup>230</sup> For all these reasons, we believe the creation of a specialized tribunal is important and would be the optimal venue to hear matters relating to Indigenous children and families. As noted earlier, however, we do not intend to limit individual or group complainants to the Tribunal and think they should be able to choose between it and existing forums. Below, we suggest ways to improve access to justice in existing forums. Given the long history of non-existent or ineffective options, we believe Indigenous children and families would benefit from more avenues for vindicating their rights to substantive equality, not less.

The Tribunal's jurisdiction would be in relation to the same laws falling within the Advocate's mandate. While we generally recommend a Tribunal that is focused on Indigenous Child and Family issues, there has been recommendations and ongoing advocacy for a broader National Indigenous and Human Rights Tribunal that can adjudicate the gamut of disputes between Indigenous peoples and governments based on their Aboriginal rights and human rights, including all those rights protected under the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>231</sup> While we feel strongly that the proposed Advocate should be focused specifically on Indigenous children and family issues, we are less concerned about the complaints from the Advocate going to a Tribunal with broader jurisdiction, so long as the Tribunal is focused only on Indigenous matters, can bind both the provinces and governments, and has a sufficiently flexible process and robust remedies. Further, it is likely that a Tribunal that can provide broad remedies in *all* areas of the Crown-Indigenous relationship will avoid any potential jurisdictional gaps.<sup>232</sup>

In section 3(e), we explained our reasoning for why using the Canadian Human Rights Tribunal would not be an effective forum to adjudicate the issue we have identified in this report, since it cannot hear matters that simultaneously involve the provinces. We also think that the legislation creating the Tribunal (potentially the same legislation creating the Advocate) should impose a greater emphasis on ensuring those who adjudicate matters at the Tribunal have expertise in the discrimination issues faced by Indigenous children and families. In general, the qualifications of adjudicators of the Tribunal, terms of office, and further details about the

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<sup>229</sup> See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

<sup>230</sup> See Promislow & Metallic, *supra* note 6 at 104-108; see also Yellowhead Institute, "Looking for Cash Back in the Courts" (2021), *supra* note 6.

<sup>231</sup> MMIWG Final Report, *supra* note 73, Executive Summary, Call for Justice 1.7; see also Inuit Tapiriit Kanatami Position Paper – Establishing an Indigenous Human Rights Commission through Federal UN Declaration Legislation (2021).

<sup>232</sup> In *Canada (AG) v First Nations Caring Society of Canada et al*, 2021 FC 969, at paras 241-258, Flavel J. underscored the importance of general and broad remedial jurisdiction in order to remedy past and prevent future discrimination in relation to First Nations children and families. Linda Reif also emphasizes the importance of accountability mechanisms having broad jurisdiction due to the multifaceted and interrelated nature of matters, particularly as it relates to human rights: see *v supra* note 3 at 27, 77, 149, 251- 252 and 755.

Tribunal ought to be determined in discussion and cooperation with Indigenous groups, including Indigenous children and youth, as mentioned earlier.

As for the powers of the Tribunal, in general, we recommend similar procedural and remedial rules as those of the Canadian Human Rights Tribunal, perhaps with some adaptation to further facilitate effective resolution of complaints in the circumstances, including the powers to order costs against governments.<sup>233</sup> To ensure that the substantive equality rights of Indigenous children and families are vindicated, we believe it would be important for the Tribunal's power to grant the remedial orders be mandatory where discrimination is established.<sup>234</sup> Further, given the importance that supervisory jurisdiction has played in the *Caring Society* case, the power of the Tribunal to exercise this remedy ought to be made explicit. We also agree with the suggestion of the Caring Society that it would be important for the Tribunal to have the power to grant interim orders and make summary decisions in situations where there is a clear human rights violation, or in urgent circumstances.<sup>235</sup> The ability to incorporate Indigenous laws and legal procedures into the process should be made explicit. It would also be desirable to design child-informed and child-friendly procedures.<sup>236</sup>

Further advice on the design of such a Tribunal ought to be sought from those parties and other lawyers who have been involved in the *Caring Society* case. The Tribunal should also be designed to lessen the grounds upon which its decision can be reviewed.

Finally, we strongly recommend that this new Tribunal not be included within the schedule of federal administrative tribunals falling under the *Administrative Tribunals and Support Services of Canada Act*, SC 2014, c 20, s 36 (ATSSCA). The management of facilities and support services for federal tribunals under the jurisdiction of the Administrative Tribunals Support Services of Canada has been criticized as compromising the independence of federal tribunals, particularly those involving Indigenous issues.<sup>237</sup> Because the need for independence from the federal government is crucial for the mechanisms proposed in this report, the proposed Tribunal should not be included in the ATSSCA.

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<sup>233</sup> See Blackstock, *supra* note 75 at 299-300 on the need for reform in this area, as well as other further details of access to justice problems within the current CHRT process.

<sup>234</sup> For an example of this language, see s. 37(2) of the *Human Rights Code*, RSBC 1996, c 210

<sup>235</sup> Further suggestions made by the Caring Society for consideration include a one-way cost regime as is the case in American civil rights legislation. This might be especially important given the Supreme Court of Canada's decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, that powers to award costs should be made explicit for human rights tribunals.

<sup>236</sup> See OHCHR: Access to justice for children, *supra* note 164, for standards and good practices for childrens' access to justice; Commissioner for Children and Young People Western Australia "National Principles for Child Safe Organizations WA: Guidelines, November 2019; Australian Government National Office for Child Safety prepared by the New South Wales Ombudsman's Office "Complaint Handling Guide: Upholding the rights of children and young people" 2019; New South Wales Office of the Advocate for Children and Young People "NSW Strategic Plan for Children and Young People – Consultation Results Report" May 2016, and Assembly of Seven Generations, *supra* note 7.

<sup>237</sup> See letter, "Independence of Specific Claims Tribunal", to Ministers McKay and Valcourt from the Canadian Bar Association, February 8, 2015.

### **(3) National Legal Services for Indigenous Children and Families**

In addition to the Advocate and Tribunal described above, as long as federal and provincial governments have power and control over services for Indigenous children and families, and particularly as long as processes to access essential services remain individualized, there will be a continued need for advocacy and legal services. Indigenous children and families require access to knowledgeable advocates and lawyers who can support them in their attempts to access substantive equality in services from the federal and provincial governments, and in their interactions with child welfare systems. The power imbalance between individual children and families and the state makes advocacy essential for upholding the right to substantive equality and statutory human rights. These are complex areas that are challenging even for well-connected lawyers to navigate, as the story of Carolyn Buffalo-Jackson illustrates.<sup>238</sup> The specialized advocacy and support the Caring Society's staff and network of pro bono lawyers can provide in a limited number of cases is clearly needed but needs to be regularized and government funded on a national scale.

ISC funds Jordan Principle service coordinators from First Nations organizations to help children and families navigate the Jordan's Principle process. This is some recognition that Indigenous families and children need particular support in accessing services from the federal government. These positions are a good start because they help families navigate the process, but they are not able to provide deeper advocacy and legal support, which is essential.

As discussed in relation to accountability need #10, Indigenous children and their families experience significant barriers in accessing existing avenues to hold governments for violations of their rights to services, and the Caring Society and their pro bono lawyers have been assisting them informally on a shoe-string budget. There is a need for state-funded legal and advocacy support to be provided to Indigenous children and families to address the discrimination and breaches of the *Canadian Human Rights Act* found by the Canadian Human Rights Tribunal and prevent further discriminatory practices in the future as well as realize their rights to substantive equality and statutory human rights under human rights law, C92, *DISA* and international human rights instruments. This should include funding supports to navigate the different avenues for recourse, to filling forms, letter writings and speaking on their behalf, to pursuing ombuds, child advocate, human rights challenges (before the federal or provincial human rights commission, or the new Tribunal we are proposing) or judicial review in the courts.

The Supreme Court of Canada has held that parents living in poverty who face the prospect of losing their children in child protection proceedings have a right to state-funding for legal counsel.<sup>239</sup> This is because the stress, stigma and disruption of family life caused by the prospect of having the state take one's child engages a parent's right to security under s 7 of the *Charter* and also violates the parent's right to fair hearing if they do not have the opportunity to present their case effectively. Three judges also said that because single mother's are

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<sup>238</sup> See "Buffalo v Canada – My Family's Fight for the Right for Noah to ride a bus to school," *supra* note 119.

<sup>239</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46.

disproportionately impacted by child welfare proceedings, this also engaged equality protections that informed a finding of a *Charter* violation.

Arguing from analogy, we can argue that lack of effective representation in procedures (Jordan's Principle requests) that may eventually result in child apprehension (and the link between denial of services and child apprehensions in the First Nations context has been established by the *Caring Society* case) violates s 7 of the *Charter*. Further, the MMIWG National Inquiry Report also suggested that interjurisdictional neglect, delays and denials of services constituted a s 7 *Charter* violation.<sup>240</sup> On top of this, there is a s. 15 equality rights dimension here given the Indigeneity of the claimants. In our view, there is a strong *Charter* case for effective legal representation in Jordan Principle matters.

With respect to child welfare hearings, provincial legal aid plans in Canada can represent parents in provincial child welfare matters, however, applying for legal aid and qualifying based on an increasingly narrow income and other criteria, creates another barrier for many families. Legal aid providers may not have the specialized knowledge necessary for adequate representation, or the case may simply not meet the criteria set for legal aid (i.e. in some provinces, legal aid can only act for a parent after apprehension of a child, so a Jordan's Principle appeal for medical equipment or in-home support won't meet the threshold for representation). In addition, Indigenous care providers and communities now have rights to participate in child welfare hearings under C92,<sup>241</sup> and, to our knowledge, they are likely not covered under legal aid plans. However, without legal representation, they are likely not able to participate meaningfully in these proceedings. Again, based on the above-noted Supreme Court decision, there is a strong *Charter* argument for state-funded representation. Furthermore, as noted earlier, the guarantees of substantive equality in the exercise of the rights of children, their family members and communities in C92 suggest a positive obligation on governments to fund legal representation. Where there is some overlap with provincial Legal Aid, as noted earlier, duplication of provincial mechanisms is not a barrier and there are ways for bodies with similar functions to cooperate with each other.

This could take different forms. Ontario has the Office of the Children's Lawyer that is an independent law office that operates out of the Ministry of the Attorney General.<sup>242</sup> While such a model has promise, in the circumstances, we believe legal services situated outside government would be preferable. The Caring Society also recommended the Ontario Human Rights Legal Support Center or Ontario Specialty clinics as potential structures to look at to inspire the governance of this service.

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<sup>240</sup> MMIWG Final Report, *supra* note 73 at 567.

<sup>241</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families*, *supra* note 98 at ss 12-13.

<sup>242</sup> Ontario Government, Office of the Children's Lawyer, online: <https://www.ontario.ca/page/office-childrens-lawyer>

A model we find particularly promising is the Legal Representation for Child and Youth (LRCY) branch of Alberta's Office of the Child and Youth Advocate (OCYA).<sup>243</sup> Like other child advocate offices, the advocate office is precluded from acting as legal counsel in their role.<sup>244</sup> In general, this avoids blurring lines between the investigative and persuasive functions of advocates<sup>245</sup> and adversarial advocacy. To avoid this blurring, but also equip children and youth with needed legal supports, Alberta's *Child and Youth Advocate Act* also gives the advocate the power to appoint lawyers to represent children with respect to a variety of legal matters that affect children in the province.<sup>246</sup> Based on this, the OCYA created the LRCY. The LRCY does not provide legal advice *directly*, but instead receives referrals from young people, caseworkers, courts, parents, foster parents, other caregivers and concerned individuals, appoints lawyers from a roster, sets and monitors service standards for lawyers, and pays lawyers for services provided.<sup>247</sup> For lawyers to be considered for membership on the LRCY roster they must, be lawyers in the province in good standing, have practiced in Alberta in the area of Family Law/Child Protection for a minimum of five years, be willing to be bound by LRCY's expectations and services standards, and submit a completed application and any additional information requested by the LRCY Manager.<sup>248</sup>

We believe a similar dual model to the Advocates and the LRCY, coordinated from the proposed Advocate, would be effective for several reasons. First, we expect the proposed Advocate would become highly visible to Indigenous peoples, therefore having the Advocate be a 'one-stop-shop' for information, complaints, and legal referrals increases accessibility. Second, the referrals branch of the Advocate will benefit from the knowledge and expertise of staff at the Advocate and this should inform the development of representation expectations and standards of the Advocate, as well as development of the lawyers' roster. Third, by building this into the infrastructure of the proposed Advocate, this does not rely on uncoordinated provincial legal aid offices nor requires separate legislation for the creation of a new national legal aid entity. Building and maintaining a national roster of lawyers would create much needed capacity and expertise for effective advocacy in these complex, under-served legal areas. Finally, the Advocate could collect national data on common themes and regional differences in legal

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<sup>243</sup> Office of the Child and Youth Advocate Alberta website, "About Legal Representation for Children and Youth," online: <https://www.ocya.alberta.ca/adult/what-we-do/legal-representation-lrcy/about-lrcy/>

<sup>244</sup> Alberta's *Child and Youth Advocate Act*, *supra* note 141 at 9(2)(c) and 11.

<sup>245</sup> The persuasive function is cooperative and flexible, which fosters consensus decision-making that works to modify thinking and behaviour leading to long-term and widespread change, see Reif, *supra* note 3 at 24, 25, 26; and Chartrand, *supra* note 5 at p. 17, 18, 24, 25. This function is often accompanied by an investigative function that allows for a thorough investigation, consideration of all perspectives and analysis of all the issues that ultimately enables a more informed and reasoned approach to recommendations and decisions, see Reif, *supra* note 3 at p. 25, 49, 50. The inclusion of an adversarial function could significantly affect the strengths of these other functions.

<sup>246</sup> See Alberta's *Child and Youth Advocate Act*, *supra* note 141 at s 9(2)(c) and *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s 1.1(1).

<sup>247</sup> See "About Legal Representation for Children and Youth," *supra* note 243.

<sup>248</sup> Office of the Child and Youth Advocate Alberta website, "How To Get On The Roster," online: <https://www.ocya.alberta.ca/adult/what-we-do/legal-representation-lrcy/how-to-get-on-the-roster/>

cases, which would in turn help identify inadvertent barriers, helpful solutions, educational needs and potential subjects for systemic policy reforms.

## Recommendations

It is our conclusion that the history of overrepresentation of Indigenous children in state care, particularly the role of interjurisdictional wrangling between the federal and provincial governments over essential services to Indigenous children and families, which continues up to the present (see Part 1), creates accountability needs (see Part 2) which necessitate significant action to be taken by the government of Canada in order to create meaningful and effective accountability.

### Primary Recommendation:

We recommend three mechanisms external to the government of Canada to ensure true accountability. We believe all three of these mechanisms must:

- Be set out in federal legislation and not simply created by the executive, in order to ensure independence from government and the greatest degree of oversight and accountability. Further, the three interconnected mechanisms we proposed could be addressed in one statute.
- Be specific to the interest and rights of Indigenous children and families (and not wrapped into a broader mechanism).
- Apply to all Indigenous children and families, not just First Nations on reserve (e.g., non-status First Nations, off-reserve, Métis and Inuit). Such an inclusive approach prevents repeating exclusions of the past. Instead of treating all Indigenous peoples identifiably, as a pan-Indigenous approach seeks to do, an inclusive approach, while recognizing all Indigenous peoples are worthy of human rights protection, acknowledges there can be differences between different sub-groups that need to be accommodated.
- Apply to conduct of both federal and provincial governments, which Canada has the constitutional jurisdiction to legislate pursuant to s 91(24) of the *Constitution Act, 1982*.

The three mechanisms are:

1. A **National Indigenous Children and Families Advocate**, which would be based on the thematic ombuds model of a child and youth advocate office, but also with specific jurisdiction to oversee governments' delivery of services to Indigenous children and families in accordance with Jordan's Principle, their right to substantive equality in statutory human rights instruments and other relevant laws and international requirements (C-92, DISA, UNDRIP, CRC, etc), as well as implementation of child welfare legislation and policy. To be effective this Advocate should:
  - a. Have oversight over:
    - i. Canada's implementation of Jordan's Principle;

- ii. Canada's long-term reform of child welfare, including C92 implementation;
  - iii. Canada's implementation of substantive equality in relation to all services impacting on Indigenous Children and Families;
  - iv. Federal-Provincial cooperation in servicing Indigenous Children and Families;
  - v. Education for federal and provincial government actors involved in child welfare services;
  - vi. Provincial governments' implementation of substantive equality in relation to all services impacting on Indigenous Children and Families; and
  - vii. Child provincial welfare agencies, including their implementation of C92 (not including self-governing Indigenous Governing Bodies except with their consent).
- b. Assess governments' obligations in relation to Jordan's Principle and substantive equality (protected under each government's human rights legislation and the *Charter*), C-92 and international instruments such as United Nations Declaration on the Rights of Indigenous Peoples, the Conventions with Rights of the Child, and the Convention of Rights of Persons with Disabilities.
  - c. Scrutinizes governments' distinctions-based approach in relation to the need for equitable services on the grounds of the various subcategories of Indigeneity governments have relied on in the past to make distinctions (non-status, off-reserve, Metis, Inuit, etc.) as *prima facie* discrimination.
  - d. Have the power to investigate individual, group and community complaints, as well as institute own-motion investigations, including into systemic issues.
  - e. Have robust investigative powers to collect and compel necessary information from government parties to effectively respond to the different types of complaints as well as to be able to effectively conduct systemic oversight.
  - f. Conduct research and hire experts in conducting systemic inquiries.
  - g. Be mandated to meet with children and youth and ensure their voices are heard in the work of the Advocate's Office.
  - h. Attempt to facilitate resolution of complaints through informal and confidential means. Such methods for resolving disputes should draw on Indigenous laws and the dispute resolution processes where possible. This would not prevent reporting and recommendations.
  - i. Providing a "one stop shop" that can support Indigenous children, youth and their families in navigating the different accountability mechanisms that exist. This is not intended to limit peoples' options for resolving complaints through other mechanisms. It is our hope that an individual or group might start with the Advocate to seek informal resolution or, at the least, obtain information to navigate their options, and possibly be connected with legal support if necessary

(we explain this further below with our third mechanism, National Legal Services for Indigenous Children and Families).

- j. Have the power to make recommendations to governments, and to escalate these recommendations to higher levels (up to and including the Tribunal) if recommendations are not reasonably acted upon.
- k. Report annually to Parliament on its activities, as well as make special reports commenting on any matter within the scope of its powers that it deems appropriate.
- l. Intervene in any adjudicative proceedings relating to the jurisdiction of the Advocate.
- m. Educate the public and federal and provincial civil servants, and those involved in child welfare matters, about the right to substantive equality and Jordan's Principle, of Indigenous children and families, as well as their rights within child welfare matters, including under C92.
- n. Play a 'knowledge mobilization' role in terms of ensuring that standards and practices are consistently applied/understood throughout the various jurisdiction and country, and act as a resource for Indigenous nations and communities to facilitate learning from each other.
- o. Promote connections to culture, families, lands, waters, language, songs and stories, as well as encourage the implementation of Indigenous laws in the work of the Advocate.

Beyond these requirements, further details about the Advocate (composition, qualifications, terms, staff, etc.) ought to be determined in discussion and cooperation with Indigenous groups, including Indigenous children and youth, the Caring Society and the pro bono lawyers who have been supporting it. We further suggest that, in the actual development of the enabling legislation, further expert advice be sought to recommend specific statutory language.

2. **A National Indigenous Child and Family Tribunal** with the power to hear complaints (individual, group, community or systemic). To be effective, the Tribunal should:
  - a. Have the power to issue binding orders against both the federal and provincial governments and their public servants and agencies.
  - b. Have the powers to craft its own procedures and rules of evidence that are more flexible than the courts, including child-informed and child-friendly procedures, and the incorporation of Indigenous law and legal procedures into the process.
  - c. Be mandated to issue remedial orders where discrimination is established.
  - d. Have extensive remedial powers, including powers to grant interim orders and make summary decisions, as well as the power to exercise supervisory jurisdiction made explicit.

- e. Be composed of adjudicators with expertise in the discrimination issues faced by Indigenous children and families.

Beyond these requirements, further details about the Tribunal (composition, qualifications, terms, staff, etc.) ought to be determined in discussion and cooperation with Indigenous groups, including Indigenous children and youth, including parties and lawyers that have been involved in the Caring Society case.

The creation of a Tribunal with a focus on Indigenous child and family issues is critical to support the work of the proposed Advocate. Should Canada eventually implement recommendations from the MMWIG National Inquiry and others to create a National Indigenous and Human Rights Tribunal, we think this body could equally support the work of the Advocate, so long as the Tribunal is focused only on Indigenous matters, can bind both the provinces and governments, and has a sufficiently flexible process and robust remedies. However, until such time as a National Indigenous and Human Rights Tribunal, there needs to be a National Indigenous Child and Family Tribunal.

Finally, to ensure the utmost independence from the federal government, the proposed Tribunal should not be included within the schedule of federal administrative tribunals falling under the *Administrative Tribunals and Support Services of Canada Act*, SC 2014, c 20, s 36

3. **National Legal Services for Indigenous Children and Families** to provide Indigenous children and families with state-funded access to knowledgeable lawyers who can support them in their attempts to access substantive equality in services from the federal and provincial governments, and in their interactions with child welfare systems. The power imbalance between individual children and families and the state makes advocacy essential for upholding substantive equality and human rights. To be effective, these services should:
  - a. Include funding support from filling forms, letter writings and speaking on their behalf, to pursuing existing Ombuds, Child Advocate, human rights processes (before the federal or provincial human rights commission, or the new Tribunal we are proposing) or judicial review in the courts.
  - b. Take the form of a legal referral service housed in the proposed Advocate (similar to the Legal Representation for Child and Youth branch of Alberta's Office of the Child and Youth Advocate). This includes:
    - i. The Advocate's Office has the power to refer children and families to lawyers and appoint lawyers to represent them to access substantive equality in services from the federal and provincial governments, and in their interactions with child welfare systems.
    - ii. The lawyers appointed would be from a roster maintained by the Advocate. To get on the roster, lawyers would have to meet standards

and expectations set by Advocate (e.g., practice experience, years at the bar of a province, knowledge of Indigenous communities, etc.).

**Additional Recommendations:**

We believe all three mechanisms we have outlined can and should be legislated within one federal statute.

This federal statute, and the details of these 3 mechanisms should be co-developed in partnership with the AFN, the Caring Society and the Assembly of Seven Generations, and with broad and robust consultation with Indigenous children, youth and families, knowledge holders across all regions of Canada.

In the interim, and in addition to this external mechanism, as discussed in more detail above in Part 3(a), we recommend the following internal steps that ISC could take immediately to address some of the ongoing issues:

- Continue and increase activities such as staff training, internal audits, dispute resolution mechanisms and reporting,
- Create a Code of Ethics and Network Panel<sup>249</sup> as a framework for funding community-based youth organizations,
- Put in place internal human rights champions who are responsible for engaging with service coordinators and Indigenous children, families and communities to review and evaluate ISC processes, and advocate for changes to ensure compliance with principles of substantive equality;
- Review all Jordan's Principle requests, including those with inadequate documentation, to identify where ISC can reduce demands for documentation to a minimal data set, particularly for services commonly approved or falling within the "normative standard of care."
- Reverse the onus of who has to establish how the requested service meets the standard of substantive equality, by requiring ISC staff to identify and give written reasons as to where and why they believe a specific request does not fall within that standard, prior to claimants ever being asked to explain how their request falls within this.
- Create and use confidential release forms, that, with the consent of Indigenous children and families, give their third party representatives access to information in order to advocate and support clarification, claims and/or appeals; and
- Fund the advocates or lawyers who are supporting the ad hoc advocacy work of the Caring Society in the interim.

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<sup>249</sup> See Assembly of Seven Generations, supra note 7 at 6, 7, 26.

Finally, to be clear that we are not proposing the 3 accountability mechanisms we have outlined to be exclusive mechanisms. We do not intend that once developed, Indigenous children, families and communities would be precluded from accessing the existing (albeit imperfect) infrastructure that we seek to supplement. Given the history of systemic discrimination against Indigenous children and families discussed in Part 1, we feel strongly that Indigenous children and families should have more avenues for vindicating their rights to substantive equality, not less. Accordingly, along with our recommendations above, we encourage Canada, in the enabling legislation to create the mechanisms below, to include the following provisions in order to improve access to existing mechanisms:

- A provision giving courts hearing matters touching on Jordan's Principle or the substantive equality rights of Indigenous children and families, the ability to address such discrimination. For example, section 46.1 of the *Ontario Human Rights Code* contains such a provision.<sup>250</sup>
- Even leaving aside the jurisdictional issues in judicially reviewing Jordan's Principle claims in Part 3(e) above, there remain several challenges for Indigenous children and families to bring successful judicial review proceedings in the courts. One challenge is lack of clear legislated reference standards courts can use to review governments' interactions with Indigenous children.<sup>251</sup> While *DISA* and *C92* now provide reference standards to applicable to some decision-makers, given the gravity of discrimination against First Nations' children in *Caring Society v. Canada*, a more universal standard, applicable to all decision-makers may be called for. This could be effectuated through a clause in the proposed legislation stating: "The best interests of the child must be the paramount consideration in all decisions impacting Indigenous children. The unique cultural, historical, and geographic strengths, needs and circumstances must be considered as part of the best interests of the child."
- To avoid closing any legal doors for potential complainants, including to existing human rights commission and tribunals, it would be important to include a specific provision to neutralize provisions commonly found in human rights statutes requiring the complainants to exhaust alternative grievances or review procedures reasonably available.<sup>252</sup> This provision could read as follows "Nothing in this Act shall be construed so as to abrogate or derogate from the rights provided for under the *Canadian Human Rights Act*, any provincial human rights statute or provincial child advocate or ombuds state." A similar provision appears in the *Canada Labour Code*.<sup>253</sup>

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<sup>250</sup> *Human Rights Code*, RSO 1990, c H.19, s. 46.1.

<sup>251</sup> See Promislow & Metallic, *supra* note 6 at 101-108; see also Naiomi Metallic, "Deference and legal frameworks not designed by, for or with us," Paul Daly - Administrative Law Matters, February 27, 2018.

<sup>252</sup> For example, s. 41(1)(a) of CHRA, *supra* note 194, states: "...the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;..."

<sup>253</sup> *Canada Labour Code*, RSC 1985, c L-2 at s. 123.1

## **Conclusion**

In identifying the accountability problems to be addressed by an accountability mechanism for this report, we have looked thoroughly at the context of a “one of the worst possible cases” of racial discrimination, that has deeply and irrevocably harmed multiple generations of Indigenous children and families. We have also reviewed features of effective accountability mechanisms that can contribute to the imperative work of bringing an end to these ongoing harms.

There has been progress, and genuine work toward internal, policy and even legislative reform. However, there is much work to be done and many of the reforms that Canada has unilaterally implemented have been inadequate to stymy ongoing substantive equality and statutory human rights violations. The vast majority of meaningful reforms to date have occurred since the Tribunal issued its 2016 Main Decision and retained supervisory jurisdiction.

There will come a day, when the Tribunal will relinquish jurisdiction over the case. Given the very long history of systemic discrimination against Indigenous people by the government in Canada, particularly in the area of service delivery, it will be important to have alternative accountability mechanisms in place. We have set out 3 that, together, we believe will practically address the accountability problems that have facilitated one of the worst possible cases of racial discrimination in Canadian history for over half a century. There are also internal steps ISC can take in the interim, and in addition, to external legislated accountability mechanisms.

The Assembly of Seven Generations report clearly emphasized that “Indigenous youth and children deserve accountability and responsibility from the federal government, as well as all levels of government.” As Cindy Blackstock says, once we know better, we need to *do* better. We hope and believe a new and better chapter has begun and can be created for present and future generations. Accountability is an essential aspect of this. Indigenous children, youth and families deserve nothing less.