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The Failure of the Canadian Human Rights Regime to Provide Remedies for Indigenous Peoples: Enough Time Has Passed

Jeffery Gordon Hewitt

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**THE FAILURE OF THE CANADIAN HUMAN RIGHTS REGIME TO
PROVIDE REMEDIES FOR INDIGENOUS PEOPLES: ENOUGH TIME
HAS PASSED**

JEFFERY GORDON HEWITT

A THESIS SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
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FOR THE DEGREE OF
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ABSTRACT:

In 2008, Canada amended the *Canadian Human Rights Act* to remove s.67, which in essence precluded Indigenous Peoples from bringing complaints as against Canada and Band governments. Since the amendment took effect in 2010, a multi-fold increase has occurred in the number of complaints filed with the Human Rights Commission of Canada from dozens to hundreds. The first such significant complaint to be heard by the Canadian Human Rights Tribunal was filed by the First Nation Child and Family Caring Society along with the Assembly of First Nations (the Complaint). The Complaint alleges Canada's funding with respect to First Nation child welfare services on-reserves is discriminatory and a service that falls within the meaning of the *CHRA*. Canada has aggressively denied any discrimination and challenged the Tribunal's jurisdiction. The Complaint seeks not only equality with respect to funding but also systemic remedies to address the socio-economic gap that exists between Indigenous and non-Indigenous Peoples in Canada. In addition to examining the Canadian human rights regime, this thesis explores ongoing colonialism in relation to Indigenous Peoples and how colonialism assists in maintaining the status quo. Will Indigenous Peoples with complaints before the Tribunal be able to access meaningful systemic remedies from a Tribunal, which itself derives authority from Canada's colonialist root? If so, what might such remedies look like? This thesis also posits that in addition to ordering substantive equality of funding for child welfare services, in crafting meaningful systemic remedies the Tribunal should make room for and access Indigenous laws in order to both narrow the socio-economic gap and provide access to culturally relevant child welfare services.

ACKNOWLEDGEMENTS

This is the most impossible part to write. Here, I cannot reference the well-chosen words of scholars nor draw upon the work of others and weave it into my own thinking as I have throughout this thesis. I am left solely to my own devices. The idea that I could dedicate the time and energy to this project seemed merry enough at conception (as is so often the case at the time immediately prior to conception), and was generously supported by both Dean Lorne Sossin and Professor Dayna Scott, to whom I am indebted in many ways. I also thank Professor Bruce Ryder for his thoughtful insights into early drafts. In addition, there were so many others who offered up bushels full of support, love, understanding, patience, courtesy, kindness, sharing, time, attention, laughter, nudging through my questions, queries, gut-clenching anxiety and dull headaches. You know who you are. You will be glad to know, it is finally done and I will stop bothering you.

I thank my committee – which includes Professor Ruth Buchanan as Chair, Professors Angela Cameron, Dean Lorne Sossin and Professor Sonia Lawrence – for their time and review of my work, which helped make it better and who were intellectually generous with me.

In particular, upon meeting Professor Sonia Lawrence, I knew for the moments of uncertainty, which would surely come, I had found someone who would tell me when it was time to stop eating chips and get writing. I am deeply grateful for Professor Lawrence's contributions and in particular her unparalleled editing notes.

Sometimes life deals us a good hand and when it does, my response has been to clutch it tightly. So it is with Professor John Borrows, who offered support, feedback and friendship that springs from a deep well of trust. There were flashes where I was certain

this was all a lark and if I pulled the covers over my head long enough the stacks and gigabytes of research would disappear, as though it was all a bad dream. The piles remained firmly entrenched and stubbornly refused to go away. For these times, I had good friends who knew when to call or just spontaneously show up.

During my work on this thesis the Chief of Rama First Nation has changed to Chief Rodney Noganosh (formerly Councillor), from Sharon Stinson-Henry. Byron Stiles retired from Council. Councillor Ron Douglas, Gina Genno, Tracey Snache, and Nemke Quarrington were reelected. Ted Williams and Ted Snache were both elected to Council. Each of them, along with the First Nation Manager, Daniel Shilling, my Assistant Audrey Bubel, Cathy Edney and many others have been supportive, patient and kind while I was off working on this thesis, thank you. You have all taught me so much.

Then there is family and I thank them all for without them (namely my parents), I would not be possible (let alone this thesis). My spouse has an uncanny ability to know when to let me work until my eyes are blurry and when to insist on adventure (not to mention superb editorial skills). My children have been unbelievably patient and tolerant – amused even – by the comings and goings of what it has taken to pull this thesis together. My family have been not only tolerant but embracing of this journey because I have attempted to explain I am trying to make some contribution, however small, to the world that they will inherit, so when I am not it is for good reasons. Now that it is completed, I hope this thesis was a good reason. It feels like it.

Not everyone who started this journey with me is here for the big reveal. In the winter of 2014, Rama First Nation lost a community member and culture-keeper, John Snake. I lost a friend, a guide and a teacher (among his gifts was to be these things to a

lot of people). Many days my heart is still heavy. John guided me since we first met over fourteen years ago. He actively encouraged me to draw upon the laws of my people, the Cree, and those of the Anishinabe (whose are generous hosts and in whose lands we are raising our family). Though a gentle soul, John could be relentless in his expectations. He would not for a moment let me forget why I do what I do. We talked at length about what my research should be about, how I should dedicate my time and what this is all really for. As I finish this work, the thirteenth moon after his passing has come and gone. I hope now that we can visit in my dreams and I can tell him all about what I have written. I secretly hope it earns me a song?

To anyone whom I have forgotten to list on these pages, please know it is only in my words that I missed you, not in my heart.

Hai-hai.

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CHAPTER 1 – DEBWEWIN (TRUTH): THE GAP

*Fire & Hummingbird*¹

Once, before the people came, there was a great green forest with many well-worn paths from the animals visiting each other every day. In a barren land far away where nothing grew, there lived a tiny Spark. He was glum and lonely. One day, little Spark convinced South Wind to carry him away to the north where he could make friends. Feeling sorry for Spark, South Wind blew the little one to the great forest and left him resting on a leaf. Spark nestled in and ate the leaf. It felt good because while he ate, Spark changed. He became a flame. He was bigger, stronger and more powerful now but the forest was still so vast and he was so small. That will change soon, he thought. He jumped to the next leaf and the next – growing larger each time he ate. The transformation and power felt so good that Spark forgot all about being lonely and wanting to make friends. Being a flame was not enough either. He craved more. Soon, he grew so big he became Fire and consumed the whole tree, then the next and the next until the entire forest was alight and the forest-dwellers ran for their lives.

Guidance of the Seven Grandfathers

“Ojibway tradition tells us that there were Seven Grandfathers who were given the responsibility by the Creator to watch over the Earth’s people. They were powerful

¹ After some handwringing, I intentionally open with a story. I close with one too. I have heard the story of Fire & Hummingbird from a number of storytellers, the most recent of whom was David Bouchard, Metis storyteller and author who told the story in Rama First Nation. I have tried to set out the story the same as David Bouchard told it, though I have been taught that in Cree culture (Anishinabe too), stories are often told but not explained on the understanding that meaning is left to the listener to take in what is needed and leave what is not for someone else. This is what I heard.

spirits...Wisdom...Love...Respect...Bravery...Honesty...Humility...Truth.”² Though there are wise people who carry teachings on each of these Grandfathers that would fill volumes of books, I refer to the Seven Grandfathers as set out by Edward Benton Banai.³ For the purposes of this thesis, the Grandfathers provide a lens by which to consider the relationship between Indigenous and non-Indigenous Canadians, human rights, reconciliation and remedies insofar as they form the basis of an Indigenous legal order – in this instance Anishinaabe⁴ – that is not as externally prescriptive as western legal orders but rather focuses on the internal.⁵ Why? As set out in this chapter, the socio-economic gap is vast and the relationship is frayed. Perhaps by the end of the thesis, the Grandfathers may assist in reflection on all the complications located within the Indigenous/Canada relationship and serve as guides to consider what comes next.

1.1. Thesis Roadmap

In this thesis, I consider the possibilities for law in closing the socio-economic gulf between Indigenous and non-Indigenous Peoples in Canada. Overall, I examine the value of the Canadian human rights process as a potential vehicle for change – and in particular investigate a complaint before the Canadian Human Rights Tribunal filed by

² E. Benton-Banai, *The Mishomis Book, The Voice of the Ojibway People*, Minneapolis, University of Minnesota Press, 2010, at 61 and 64.

³ Among other contributions, Edward Benton-Banai is of the Fish Clan (intellectuals clan), and is currently the Grand Chief of the Three Fires Medewiwin Lodge. I have been fortunate enough to meet him on occasion and hear him speak and like all good teachers, every time I leave further enriched in some way. The last interaction was in Rama First Nation in 2014 as I prepared for this work when we discussed using the Seven Grandfathers as a means to provide context for my thesis’ chapters as was previously suggested to me by John Snake, then Culture Advisor for Rama First Nation.

⁴ The Anishinaabe are a nation of Indigenous Peoples that includes the Three Fires Confederacy and whose traditional territory covers much of Ontario across to parts of Manitoba. My family and I live in Anishinabe territory and are grateful for the Anishinaabe hosting us and reminding us every day what it means to share. In both Cree and Anishinaabe legal orders I have been taught that we must follow the laws of the land within which we live. As such, I am grateful to the many Anishinabe teachers who continue to school me in Anishinaabe law (and of course, those to also teach Cree law).

⁵ For an excellent presentation of this, see: J. Borrows, *Drawing Out Law: A Spirit's Guide*, (Toronto: University of Toronto Press, 2010).

the First Nation Family and Child Caring Society and Assembly of First Nations (the “Complaint”).⁶ On first blush, the Complaint⁷ is about alleged discrimination in relation to funding for child welfare services of First Nation children on-reserves. But it is also about so much more. The Complaint raises complicated issues. This thesis considers direct links between the funding of child welfare for First Nation children and Canada’s colonialist history – such as the *Indian Act* and the Indian Residential Schools program.

Moreover, the landscape with respect to human rights in Canada is changing. Since the 2008 amendments to the *Canadian Human Rights Act*, (the “CHRA”), which took effect in 2010, there has been a sharp rise the number of complaints before the Canadian Human Rights Commission brought by Indigenous Peoples and groups. The Caring Society’s Complaint is the first to proceed and holds tremendous possibilities to set strong precedent and assist in recalibrating the relationship between Indigenous Peoples and the Crown – particularly with so many other complaints waiting to proceed before the Tribunal. Can Indigenous Peoples expect the umbrella of human rights to address the underlying systemic issues arising from the ongoing violence of colonialism? Can human rights really offer meaningful remedies?

This thesis comprises five chapters. In Chapter 1, I set out various numbers and data that are meant to provide a common understanding of what I mean by the socio-

⁶ First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, and the Canadian Human Rights Commission, and Attorney General of Canada (representing the Minister of Aboriginal Affairs and Northern Development Canada), and Chiefs of Ontario and Amnesty International Canada, Tribunal File No. T1340/7008.

⁷ At the time of writing the complaint has been heard, including closing submissions, though no decision has been released. Regardless, it is widely expected that no matter the outcome, a challenge to the decision will be brought. If granted, there may be further opportunity for the Courts to either uphold or reconsider the decision in light of the principles of Indigenous laws introduced to the Tribunal relating to children. A new federal government has formed as well, which may - or may not - signal change in Canada’s responses to date in relation to the Complaint.

economic gap,⁸ because the numbers tell as story. Stories matter. To that end, I have included Indigenous stories in each of the chapters to provide another lens through which to consider law. But there is another story that aids in supporting the vast socio-economic gap too. In Chapter 2, I examine Canada's master narrative – a well-crafted story from the early days of colonization, which in essence advances the view that Indigenous Peoples are subjects of the Crown. Canadian law has been complicit in solidifying the country's master story, which leads me to examine whether Indigenous Peoples might really be able to access justice through a human rights complaints process that was founded on a legal order that excludes the laws of Indigenous Peoples.

In Chapter 3 I explore human rights in the Canadian context. I focus on the Complaint – along with both the meaning of substantive equality and the role of section 15 of the *Charter of Rights and Freedoms* as it may relate to Indigenous Peoples. I also engage in a broader discussion as to how the United Nations Declaration of the Rights of Indigenous Peoples may be a vehicle for both resistance and change.

Chapter 4 considers how efforts to engage with Indigenous laws – though not necessarily utopian – may offer new remedial possibilities and given Canada's penchant for taking First Nation children for generations, suggests a supervisory role of the Tribunal in order to promote the sustainable creation of culturally relevant First Nation child welfare services. Chapter 5 offers some conclusions in relation to the Canadian human rights system, as well as with the relationship between Canada and Indigenous Peoples.

⁸ There are many numbers, statistics, data and reports that contribute to explaining the socio-economic gap that are not included in this thesis because they are beyond the scope – though are also important.

Ultimately, I hope to show that though the Complaint relates to First Nation child welfare, the hearing within the human rights process is also a site of colonialism in action. The dual narratives of the substantive Complaint and ongoing colonialism – or specific and broad actions – are impossible to disconnect. I also seek to assert the point that when it comes to systemic remedies it is vitally important to engage with Indigenous laws and Indigenous Peoples because neither Indigenous laws nor Peoples are the problem but part of the solution. The question remains whether we want to recognize this Complaint as a lever to address colonialism within human rights and use effective, systemic remedies to narrow the socio-economic gap. As to this, I also hope to demonstrate how the Tribunal might consider Indigenous legal principles, such as those found within the stories I offer in this thesis. I set out the stories as a means to push against colonization enough to possibly guide meaningful systemic remedies. I posit that if well crafted, systemic remedies can begin to close the socio-economic gap between Indigenous and non-Indigenous Canadians.

1.2 Considering Indigenous Laws & The Complaint

Attention to revitalizing Indigenous⁹ laws within Canadian legal scholarship is a relatively new phenomenon.¹⁰ Drawing Indigenous laws meaningfully into Canadian courts and tribunals, however, is a wall yet to be scaled.¹¹ Legal scholars and the

⁹ As often as possible, I seek to be specific in the use of language. The terms "First Nations," "Aboriginal Peoples," "Indigenous Peoples," "Native Peoples," and "Indian" in varying ways refer to descendants of the original inhabitants of the North American continent, including Inuit and Métis. For example, when discussing a human rights complaint specifically addressing First Nation children, I use the term "First Nation". When discussing remedies in relation to both the Complaint and considerations to broader relationships I sometimes use the broader terms "Aboriginal Peoples" or "Indigenous Peoples".

¹⁰ V. Napoleon and H. Friedland "Indigenous Legal Traditions: Roots to Renaissance," *The Oxford Handbook of Criminal Law* (2014).

¹¹ The query has also been considered as to whether climbing a wall built upon colonial foundations in an effort to bring Indigenous law into the Canadian legal system is a quest that should be undertaken. It raises another set of

Supreme Court of Canada have begun to craft an invitation for considering how Indigenous laws might be engaged with Canadian jurisprudence.¹²

Laws already exist within Indigenous Nations that illustrate how legal pluralism exists in Canada.¹³ Consider the stories set out in each chapter of this thesis. How we relate to stories matter, which is why the Seven Grandfathers have also been brought in. They might help us find connections through the process of both learning the stories (or law) and how to apply such laws to the elements set out in this thesis. The thesis itself is meant to demonstrate possibilities in relating to and applying Indigenous laws. Some stories may also be useful not only for the arguments contained in them, but also with respect to remedies aimed at closing the socio-economic gap between Indigenous and non-Indigenous Peoples. If we are going to make remedies that matter then the Seven Grandfathers might form the foundation by which we determine the outcomes we seek and work our way backward to craft an appropriate remedy. Establishing a connection between Indigenous laws and how they may be used to close the socio-economic gap is not a panacea. The best systemic remedies will not necessarily eliminate poverty but will hopefully seek to counter the effects of colonialism. The application of Indigenous laws alone will not be enough. It also requires political will along with appropriate levels of sustained funding.

complicated questions, including whether seeking to make room within the Canadian legal system is a foil for seeking approval from a settler colonial power versus truly revitalizing Indigenous laws. For a further discussion on this consider T. Alfred and J. Cortassel "Being Indigenous: Resurgences Against Contemporary Colonialism." *Government and Opposition* 40.4 (2005), 597-614; and, Coulthard, *supra*, note 11.

¹² J. Brean, 'Reconciliation with First Nations, not the Charter, Will Define the Supreme Court in the Coming Years, says Chief Justice,' National Post, March 13, 2014, <http://news.nationalpost.com/news/canada/reconciliation-with-first-nations-not-the-charter-of-rights-freedoms-will-define-the-supreme-court-in-coming-years-chief-justice-says>; S. Fine, 'Chief Justice says Canada attempted genocide on aboriginals', Globe and Mail, May 28, 2015, <http://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>.

¹³ J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002).

Forcing Canada's laws onto Indigenous Peoples has been tried. It fails time and again. As we will see, the numbers of Indigenous Peoples entangled with Canadian law continues to rise the more we apply it. I argue that drawing upon Indigenous laws to substantively acknowledge and address colonialism and the systemic issues that sustain the socio-economic gap is necessary to create a long-term healthy partnership between Indigenous and non-Indigenous Canadians.

Increasingly, Canadian tribunals are engaged with issues, which involve Indigenous parties; issues relating to treaty rights; the Crown's duty to consult and accommodate; and self-government agreements.¹⁴ Administrative law decision-making, such as environmental review panels,¹⁵ the Canadian Human Rights Tribunal,¹⁶ energy and transportation boards, and committees arising from self-government agreements,¹⁷ are typically possessed of wide mandates within their respective enabling statutes.¹⁸ Do broader inquiry powers translate into more opportunity for the expansion of Indigenous laws? Are tribunals able to more freely draw upon Indigenous laws alongside Canadian law and create something that is neither purely based in common and civil law traditions nor Indigenous laws but is rather something uniquely Canadian, something

¹⁴ L. Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012), *UBC L Rev* 45, 595.

¹⁵ *National Energy Board Act*, RSC 1985, c N-7

¹⁶ *Canadian Human Rights Act*, RSC 1985, c H-6.

¹⁷ For a discussion on the relationship between First Nation so-called self-government agreements and administrative law see Sossin, *supra* at note 14; for a current example of administrative law operating within a First Nation from powers arising out of self-government agreements see the Nisga'a Lisims Government/Wilp Si'ayuukhl Nisga'a *Nisga'a Administrative Decisions Review Act*.

¹⁸ For a general discussion on administrative tribunals and broadening mandates in Canada, such as the Canadian Human Rights Tribunal's authority to include *Charter* remedies, see D. Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law," (2002). The National Energy Board may also be the exception to wide-mandates with its limited ability to address environmental protection matters – even when they relate to pipelines crossing First Nation lands, see: Chippewas of the Thames First Nation Granted Leave by Federal Court of Appeal Line 9 Approval, <http://www.chiefs-of-ontario.org/node/883>.

‘intersocietal’?¹⁹ Are tribunals able to create remedies aimed at closing the socio-economic gap between Indigenous and non-Indigenous Canadians?

1.3 Changes to the Canadian Human Rights Act

The Complaint arises from changes to the *Canadian Human Rights Act* – namely the 2008 legislative amendment repealing section 67.²⁰ Moreover, the Complaint serves as a test case in determining whether the Crown has engaged in a discriminatory practice in accordance with the provisions of the *CHRA* and the extent to which the *CHRA* would apply to Indigenous complaints. The Complaint may prove precedent setting for a growing number of other complaints by Indigenous Peoples against government. Beyond the technical issues, the complaint asks whether the section 67 amendment creates real opportunity for substantive change in the lives of Indigenous Peoples or is it merely more rhetoric meant to maintain the settler-colonial status quo?

An examination of these questions matters because the repeal of section 67 has resulted in a considerable rise in the number of human rights complaints brought by Indigenous Peoples against government – both federal and First Nation. While the volume of complaints expands, the FNCFCS Complaint has captured considerable attention. The Caring Society is significant insofar as it features on-reserve and off-reserve differences; highlights the continued taking of First Nation children in a time when Canadians are waking up to the travesty of the Indian Residential Schools; reveals

¹⁹ B. Slattery, “The Generative Structure of Aboriginal Rights,” (2007) 38 S.C.L.R. (2d) 595, at 595-597.

²⁰ Section 67 of the *CHRA* read:

Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

and challenges the vast socio-economic gap between Indigenous and non-Indigenous Canadians; and offers a chance to make a difference.

1.4 A Brief Summary of the Complaint

Section 91(24), *Constitution Act, 1867*, establishes that Indians and lands reserved for Indians is a federal power while child welfare is a provincial power contained within s.92 (13). Therefore, First Nation children living on-reserves in care are subject to federal jurisdiction, while all other Canadian children in care are subject to the authority of the province within which they live. No two provinces regulate and fund child welfare the same. Canada, meanwhile, opted to adopt its own manual based on provincial funding formulae and has continued to rely on its own same funding formula for decades, as opposed to the provinces who continue to evolve their funding over time. The Caring Society alleges not only is Canada's funding outdated but also it is below that provided by any province and thus discriminatory as against First Nation children.

Canada's initial response to the Complaint was to argue that there is no discrimination because there is no comparator group. The Tribunal agreed with Canada and subsequently dismissed the Complaint without a hearing on the merits.²¹ The decision to dismiss was judicially reviewed.²² The Federal Court's Justice Mactavish overturned the Tribunal decision, ordered a new hearing and stated a comparator group is unnecessary for the Complaint to be heard on its merits. The Federal Court of Appeal

²¹ Ruling, Shirish P. Chotalia, December 21, 2009, File No. T-1753-08

²² *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2013 FCA 75

upheld Justice Mactavish's ruling.²³ In the second hearing, Canada's position is that funding for First Nation child welfare is simply funding and thus not a "provision of a service." Therefore, the issues alleged within the Complaint are outside the purview of the Tribunal and in the alternative, the funding regime is not discriminatory in that Canada is not appropriately compared to provincial regimes. Nuances of the parties' positions are explored further in Chapter 3.

In her decision Justice Mactavish provided considerable guidance to the Tribunal and indeed the parties as to how best to consider the Complaint. Justice Mactavish ruled Canada's funding of child welfare on reserves combined with its program manual and its own studies offer sufficient evidence to warrant a hearing on the merits²⁴. Thus, the Tribunal has the opportunity to determine the Complaint in both findings of fact and law as well as craft remedies that include Indigenous laws in an effort to close the socio-economic gap.

There is a lot riding on the Complaint, which gives rise to both cause for concern and opportunity for reflection on some fundamentals, such as process and decision-making. For example, in Chapter 3 I explore the question: if the Canadian legal system once systematically displaced Indigenous People in favour of the settler population, is the tribunal process – firmly rooted in colonialism – able to truly be fair to Indigenous Peoples? In Chapter 4, I consider that if remedies matter, is it legitimate for the Tribunal to make such decisions based on a set of legal principles derived from a western legal order that is not reflective of Indigenous laws?

²³ *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445.

²⁴ Federal Court, *supra*, at note 22.

1.4.1 Choosing Venue

Why not bring a *Charter* challenge arguing discrimination under section 15 rather than a human rights complaint? Every counsel must choose the venue that offers the best potential outcomes for a client's matter. There is some resistance among Indigenous Peoples about bringing challenges under the *Charter* in that outside sections 25 and 35 of the *Constitution Act, 1982*, the *Charter* is not generally reflective of Indigenous legal orders.²⁵ Indeed there are few significant *Charter* decisions relating to Indigenous Peoples.²⁶ It is possible there was reluctance to bring a *Charter* challenge for these reasons or possibly – and more likely – because the Tribunal's enabling statute provides broad powers in relation to remedies.

Moreover a growing number of Indigenous Peoples are joining an international human rights movement²⁷ that finds perhaps purchase because human rights creates a space where colonizing countries, like Canada, might better see itself and reflect on its role in relation to colonization. These arguments suggest that a human rights tribunal may well be a powerful agent of change and a progressive venue in which to pursue that change.

1.5 Methodology

A growing number of scholars are engaged in ongoing conversations related to the current status of the relationship between Canada and Indigenous Peoples;

²⁵ M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Can. Hum. Rts. YB* (1989), 3.

²⁶ For examples of Aboriginal People and the *Charter* see: *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41; and *Canada (Attorney General) v. Misquadis*, 2003 FCA 370.

²⁷ For more see: J.Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Addendum: Report on the Situation of Human Rights of Indigenous Peoples in Brazil*. UN, 2009; S.E. Merry, "Transnational Human Rights and Local Activism: Mapping the Middle," *American Anthropologist* (2006), 38-51.

colonization and racism; human rights and how it may be shaped by neo-liberal policies and decision-making. I considered these issues through examining primary sources in the fields of law and socio-legal studies such as articles, books, monographs as well as government legislation and published reports. Materials produced in the course of the First Nation and Family Caring Society complaint at the Canadian Human Rights Tribunal, including the legal submissions of all of the parties, were also reviewed.

Scholarship on systemic remedies is sparser than that on colonialism. For this thesis, I considered the case law and the doctrinally focused work of Professor Kent Roach, Justice Rosalie Abella and other published experts. Scholarship specifically considering systemic remedies and Indigenous Peoples in Canada is virtually non-existent. I draw upon a blend of domestic, international and Indigenous sources, to consider systemic remedies and Indigenous Peoples in Chapter 4.

In an effort to consider how to present my research and more fully reflect the inner workings of my own process, I have also drawn upon Indigenous legal traditions. Professor John Borrows' work has made room for others like me to follow. For example, in *Drawing Out Law, A Spirit's Guide*,²⁸ Borrows calls upon the reader to feel the contents of the book; peer into Anishinabe legal methodology; and examine the meaning of scholarship through both imagery and text sharing the same space. I have not set out to achieve such visual ideas of law within this thesis. I have, however, sought to draw upon my own experience working on a reserve in Ontario for over fourteen years as legal counsel. Also, my ongoing exposure to and comfort with both Anishinabe and Cree laws in action draw me toward moments where I may be able to examine how Indigenous laws may better inform both Indigenous and non-Indigenous Canadians. I know that the

²⁸ J. Borrows, *supra*, note 5.

invitation for Indigenous law and Canadian scholarship to share space through stories sometimes creates extraordinary results.

Stories are emerging more within scholarship as a means to convey, consider and examine Indigenous legal orders.²⁹ But this work requires effort. To that end, a challenge for my own work, the reader and hopefully those engaged in human rights is to find ways to make room for Indigenous legal orders. This includes how we relate to stories. For some, it may be an effort to read stories without trying to intellectually master them because mastery of law is the premise of Canadian legal traditions but not necessarily Indigenous legal traditions.³⁰

Rather, feel the stories. Be reflective. Consider over time how they may relate to the Western legal traditions, research and scholarship.³¹ This is not an insignificant task and caution is in order given that all too often there is a sense of destruction³² when Canadian law seeks to relate to Indigenous law.³³ Nonetheless, I have elected to include these stories because contemplation and feelings form part of Indigenous legal orders, which are “supposed to be at the heart, they become part of you and you don’t do bad things.”³⁴ The stories then, remind us to feel law and know inside what is right – whether or not we are prepared to acknowledge those Grandfathers by being honest with others and ourselves.

²⁹V. Napoleon, *Thinking About Indigenous Legal Orders*, National Centre for First Nations Governance, 2007.

³⁰ *Ibid.*

³¹ *Ibid.*

³² G. Christie, "Aboriginal rights, Aboriginal Culture, and Protection," *Osgoode Hall Law Journal* 36 (1998) at 450.

³³ C. Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" [Legal Professionalism] (2003), Law Society of Upper Canada,

http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf, wherein Backhouse presents various intersections of Canadian law and Indigenous perspectives.

³⁴ G. Christie, presentation on "Inuit Legal Traditions", Indigenous Bar Association conference, Winnipeg, October 2012. Recording available on the "accessing Justice and Reconciliation" website at <http://www.indigenousbar.ca/indigenoulaw/audiovideo/#conference>.

In some ways feeling law – in areas such as human rights, family and criminal law, intellectual property, torts and contracts – is not exclusively the purview of Indigenous legal orders. In relation to human rights, Canada has made considerable strides in educating the population generally. If a state is going to educate its population on human rights, for example, then ways must be found to implement such rights. As Canada is discovering, failure to do might result in a myriad of possible forms of resistance.³⁵ When people know their rights and believe such rights have been infringed or not implemented there is often public protest, disruption and complaints (both formal and informal).³⁶ Indigenous Peoples in Canada have both continued to nourish their own legal orders while learning the laws of Canada, including an understanding of and participation in human rights as may be evidenced by the sharp increase in the volume of human rights complaints in Canada brought by Indigenous parties. In this way – and as is examined further in Chapter 3 – the ruling in the Complaint is elevated to precedent setting and important in terms of addressing systemic issues generated by ongoing colonization.

The stories I have included in this thesis are deceptive. Though they may appear simple and perhaps cautionary, embedded within them is law.³⁷ I have been taught that in the beginning Cree³⁸ people were given Three Original Laws – the Laws of the People,

³⁵ S. Engle Merry, *The Quiet Power of Indicators, Measuring Governance, Corruption and the Rule of Law*, (New York: Cambridge University Press, 2015), in which the author considers the various ways a population may protest a state's failure to provide for human rights, including both peaceful and violent protests.

³⁶ K. Davis, A. Fisher, and S. Engle Merry, *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford University Press, 2012).

³⁷ J.Y. Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatchewan: Native Law Centre, 2006), at 127.

³⁸ The Cree are a nation of Indigenous people generally divided into eight groups and whose traditional territory generally spreads from what is now Quebec, around James Bay, through a northern swath of Ontario across Manitoba, Saskatchewan and Alberta. Cree and Anishinabe languages, laws and cultures are distinct but in some ways are similar, which as Maria Campbell has explained to me, is because the Cree and Anishinabe once shared a mother.

Laws of the Land and Laws of the Creator.³⁹ All of the Laws instruct us on how to be good.⁴⁰ As with many Indigenous cultures, Cree laws are not transmitted on paper and ink but through many means⁴¹ such as birch bark scrolls, sand drawings, songs, ceremony and storytelling. Storytelling is sometimes diminished in Canadian law as unreliable and foreign, inconsistent with the foundational principles of western legal traditions⁴² such as truth.⁴³ But Canadian law is also deeply rooted in stories⁴⁴ and does not have a lock on truth. As set out in this chapter, when it comes to colonization, reflecting on truth can be hard – even ugly – making it all the more important to consider how we come to understand and engage with Indigenous legal orders⁴⁵ and how we might reach toward something intersocietal⁴⁶ starting with the basics: Debwewin.⁴⁷

In fact, every case in Canadian law is a story dressed up. Courts, tribunals and adjudicators listen to varying versions of the story (argument) and determine how to get to a conclusion by a route meant to be instructive (precedent). The main difference, as I have been taught, is that in Cree culture every person (not just judges) should derive instruction from stories. Stories are a means that are personal and remind us individually how to be good. These lessons come from the cultural power of the stories rather than the institution of the Court.⁴⁸ In this way, stories – whether told in court, before a

³⁹ In addition to others, among my Cree teachers who have shared law with me at varying times in my life are Elders Vern Harper, Maria Campbell, Rose Saddleback and Pauline Shirt.

⁴⁰ *Ibid.*

⁴¹ J. Borrows, *supra*, note 5 [Drawing Law].

⁴² J. Borrows “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ, at 647-48.

⁴³ For more on Anishinabe perspectives on Debwewin (truth) and Canadian law see B. Johnston, “One Generation From Extinction,” *An Anthology of Canadian Native Literature in English*, D.D. Moses and T. Goldie (eds.), (Toronto: Oxford University Press, 1998), 101.

⁴⁴ J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

⁴⁵ V. Napoleon and H. Friedland. "Indigenous Legal Traditions: Roots to Renaissance," *The Oxford Handbook of Criminal Law* (2014), chapter 11 at 10. Napoleon and Friedland propose at Table 11.1 parameters by which to engage in Indigenous scholarship with less risk of losing the vitality of the law, such as stories.

⁴⁶ Slattery, *supra*, note 19.

⁴⁷ Borrows, *supra*, note 42 [Without You].

⁴⁸ Harper and Shirt, *supra*, note 39.

tribunal, in a circle, or around a fire – are a powerful means to transmit law and the practice of storytelling transcends culture. But there is an ongoing tension between reflection and reality – particularly in relation to the lives of Indigenous Peoples in Canada. You may find tension between the stories, which are meant to be reflective, and the numbers, which are less polite, harsh – even rude – but vividly portray the socio-economic gap between Indigenous and non-Indigenous Canadians.

In some ways, this thesis is reflective of and takes the reader through a journey of what the Truth and Reconciliation Commission of Canada’s Calls to Action⁴⁹ refers to as “intersocietal cultural competency” in that the stories ask the reader to make room for other approaches to law, obtained not through a linear process, such as taking prerequisite and subject-based courses for a prescribed period of time resulting in the granting of a degree and sitting subsequent competency examinations. In other words, Indigenous laws as presented through stories and western legal scholarship cohabiting in this thesis serves as an example of what it looks like to make room for each other.

Take what is for you. Leave what is not for someone else.

1.6 The (re)Flexibility of Canadian Human Rights

We have a problem. Canada continues to reap the benefits of colonization while Indigenous Peoples continue to carry the burdens.

In essence, colonialism seeks to ensure the original inhabitants of a colony are fundamentally changed through a variety of means, such as physical elimination, cultural

⁴⁹ Truth and Reconciliation of Canada: Calls to Action, recommendation 28,
http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

extinction or assimilation⁵⁰ and thereby typically has an end. This is differentiated from settler colonialism⁵¹ – a subject of growing conversation within scholarship – in which an imperial power sponsors mass immigration and displaces the original inhabitants. The settlers take over the land and create a new governmental authority. All of the settlers are considered racially superior to the original inhabitants. Rather than resources being the focus of commerce – such as fur in Canada’s pre-confederation, early colonization period⁵² – land is the primary focus of settler colonialists.⁵³ Land is required for permanency long after the original purpose of establishing a colony collapses.⁵⁴ The systematic dispossession of Indigenous Peoples from land as a means to increase production makes land – and subsequently rights of Indigenous Peoples – central as an

⁵⁰ Oxford Dictionary, 2014, defines colonialism as “the policy or practice of acquiring full or partial political control over another country, occupying it with settlers, and exploiting it economically.” Further, Ronald J. Horvath’s definition of colonialism in ‘A Definition of Colonialism’, *Current Anthropology* 13, 1, 1972, pp. 45 – 57 is ‘exogenous domination’ that contains two elements: (1) original displacement; and (2) unequal relations. The ‘colonialism/post-colonialism’ debate is a subject of increasing scholarship. As to whether Canada is “post-colonial”, I leave for another day but rather for the purposes of this thesis suggest that so long as settlers remain in Canada, there is a settler/colonial element we must contend with as a practical reality. For more on “post-colonialism” see: B. Ashcroft, G. Griffiths and H. Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literature*, (London: Routledge, 2003); V. Mishra and B. Hodge, “What Is Post(-)colonialism?”, *Textual Practice* 5, No. 3 (1991), 399-414; B. Moore-Gilbert, G. Stanton, and W. Maley, (eds). *Postcolonial Criticism* (London: Routledge, 2014); A. Loomba, *Colonialism/Postcolonialism*. (London: Routledge, 2007).

⁵¹ An exploration of settler-colonialism in the human rights sphere is a considerable subject on its own. For a more in-depth discussion on settler colonialism, however, see in particular: G.S. Coulthard and T. Alfred. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN, USA: University of Minnesota Press), 2014; Daiva K. Stasiulis and Nira Yuval – Davis (eds), *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Sage, 1995); Lynette Russell (ed.), *Colonial Frontiers: Indigenous - European Encounters in Settler Societies* (Manchester: Manchester University Press, 2001); David Pearson, *The Politics of Ethnicity in Settler Societies: States of Unease* (Basingstoke: Palgrave, 2001); Caroline Elkins and Susan Pedersen (eds.), *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies* (New York: Routledge, 2005); Annie Coombes (ed.), *Rethinking Settler Colonialism: History and Memory in Australia, Canada, New Zealand and South Africa* (Manchester: Manchester University Press, 2006); Carole Pateman, ‘The Settler Contract’, in Carole Pateman, Charles W. Mills, *Contract and Domination* (Cambridge: Polity, 2007), pp. 35 - 78; James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-world* (Oxford: Oxford University Press, 2009); Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Houndmills: Palgrave Macmillan, 2010); Daniel Martinez HoSang, Oneka LaBennett, and Laura Pulido, eds. *Racial Formation in the Twenty-First Century* (University of California Press, 2012).

⁵² For more on the fur trade in this period see V.P. Lytwyn *The Fur Trade of the Little North: Indians, Pedlars, and Englishmen, East of Lake Winnipeg, 1760-1821* (Rupert’s Land Research Centre, 1986); T.E. Holzkamm, V.P. Lytwyn and L.G. Waisberg, “Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy,” *The Canadian Geographer/Le géographe canadien* 32.3 (1988): 194-205; and also J. Promislow, “It Would Only Be Just,” *Between Indigenous and Settler Governance* (2012), 35.

⁵³ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999).

⁵⁴ Coulthard, *supra*, note 11.

“ontological framework for understanding relationships.”⁵⁵ Thus, without fundamentally understanding and changing relationships, settler colonialism never ends.

As discussed throughout this thesis – though more particularly in Chapter 2 – colonialism is alive in Canada. Whether settlement is counted in generations or weeks – settler superiority may be assumed over Indigenous Peoples.⁵⁶ Until we openly confront this reality and find a reasoned way to reconcile it, closing the socio-economic gap between Indigenous and non-Indigenous Canadians will remain elusive. In Chapter 2, I explore the way in which the Canadian legal system was created by settler colonialists without the input of Indigenous Peoples and has remained a means by which Canada continues to assert control over all of the lands and resources contributed to confederation by Indigenous Peoples.⁵⁷ Thus, the question then rises: is the Canadian legal system flexible, open and independent enough, even in the realm of human rights, to address its colonial past and make room for Indigenous laws? Consider the distance we have to go.

1.7 The Gap: Indigenous and non-Indigenous Canadians

Numbers matter.⁵⁸ They reveal a different kind of story, which may at times feel less reflective but nonetheless, relevant and have become part of the means by which to

⁵⁵ *Ibid.*

⁵⁶ A.J. Barker, "The Contemporary Reality of Canadian Imperialism: Settler Colonialism and the Hybrid Colonial State," *The American Indian Quarterly* 33, No. 3 (2009), 325-351. B. Lawrence and E. Dua, "Decolonizing Antiracism," *Social Justice* (2005): 120-143 posit that Indigenous People are so marginalised that even antiracist theorists and activists tend to set Indigenous Peoples aside when challenging racism in Canada. In this way, it is argued that the realm of antiracism participates in the continued colonization of Indigenous Peoples.

⁵⁷ Though there are many, two notable contributions to a discussion relating to the intersection between Indigenous Peoples' contribution to confederation and Canadian law see: S. Youngblood Henderson, "Sui Generis and Treaty Citizenship," *Citizenship Studies* 6.4 (2002), 415-440.; see also J. Hopkins and A. Peeling "Aboriginal Judicial Appointments to the Supreme Court of Canada" prepared for the Indigenous Bar Association, 2006, <http://www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>.

⁵⁸ S. Engle Merry, "Measuring the World," *Current Anthropology* (52.S3, 2011).

convey the existence of serious problems,⁵⁹ such as the socio-economic gap between Indigenous and non-Indigenous Canadians. It is important to consider the source of numbers and both why and how certain things are measured and reported.⁶⁰ The majority of numbers included here are produced by the Canadian government, whom as we shall see have sought numbers to either use against Indigenous Peoples, or ignore Indigenous Peoples entirely. Put plainly, numbers illustrate that Indigenous Peoples are “at the back of the line of every line you do not want to be at the back of and at the front of every line you do not want to be at the front of and usually by a multifold of five.”⁶¹ The most comprehensive numbers illuminate the fact that the socio-economic gap between Canadians and Indigenous People is widening. The numbers set out here are meant to both provide a common understanding of this aspect of the relationship between Indigenous and non-Indigenous Canadians relationships and to promote critical dialogue.⁶²

Approximately four percent of Canada’s population is Aboriginal,⁶³ which translates into just over 1.1 million people.⁶⁴ The Indigenous population is growing at a rate almost six times faster⁶⁵ than the general population and “is much younger than the non-Aboriginal population.”⁶⁶ There are now slightly more Indigenous Peoples living in

⁵⁹ K. Davis, A. Fisher, and S. Engle Merry. *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford: Oxford University Press, 2012).

⁶⁰ *Ibid.*

⁶¹ Caring Society Complaint: Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.

⁶² S. Engle Merry, "Legal Pluralism and Legal Culture: Mapping the Terrain," (2012).

⁶³ Statistics Canada. *2006 Census: Aboriginal Peoples in Canada in 2006: Inuit, Metis and First Nations, 2006 Census: Findings* (January 2008) (Ottawa: Statistics Canada, 2007). There has been both a 2010 update and 2012 update, which are not as comprehensive as the 2006 census report. Where possible, the updated numbers of 2010 and 2012 are specifically noted.

⁶⁴ Statistics Canada, *Aboriginal statistics at a glance* (12 June 2010) (Ottawa: Statistics Canada, 2007).

<http://www.statcan.gc.ca/pub/89-645-x/2010001/count-pop-denombrement-eng.htm>.

⁶⁵ Statistics Canada. *Aboriginal People Living Off-reserve and the Labour Market: Estimates from the Labour Force Survey: 2008-2009*, Danielle Zietsma (Ottawa: Statistics Canada, May 2010).

⁶⁶ Statistics Canada. *First Nations, Metis and Inuit Women*, Vivian O’Donnell and Susan Wallace (26 July 2011) at 9.

urban areas than on reserves.⁶⁷ Indigenous Peoples living in western provinces are “four to eleven times more likely to live in crowded conditions than their non-Aboriginal counterparts,”⁶⁸ while the urban Indigenous population living in major Canadian cities are “two to three times more likely than the non-Aboriginal population to live in dwellings needing major repairs.”⁶⁹ With respect to employment and incomes, Indigenous Peoples have lower employment rates and higher unemployment rates than their non-Indigenous counterparts⁷⁰ with the same levels of education while “on-reserve incomes are the lowest of all at 49 percent of total [national average] income.”⁷¹ Indigenous Peoples are also at the front of the line when it comes to living each day homeless.⁷²

The “back of the line” numbers show us Indigenous Peoples are the typically the last to have access to safe drinking water;⁷³ an afterthought when it comes to indoor plumbing;⁷⁴ limited access to safe housing;⁷⁵ participation in the economy;⁷⁶ preservation

⁶⁷ Statistics Canada. *The health of Inuit, Metis and First Nations adults living off-reserve in Canada: The impact of socio-economic status on inequalities in health*, Rochelle Garner, Gisele Carrier, Claudia Sanmartin and the Longitudinal Health and Administrative Data Research Team (23 June 2010).

⁶⁸ Statistics Canada, *supra*, note 63 [2006 Census].

⁶⁹ *Ibid.*

⁷⁰ Statistics Canada, *supra*, note 63 [Zeitsma Report]

⁷¹ M. Mendelson, *Aboriginal Peoples and Postsecondary Education in Canada*, Caledon Institute of Social Policy, (July 2006).

⁷² C. Patrick, *Aboriginal Homelessness in Canada, A Literature Review*, The Homeless Hub, <http://www.homelesshub.ca/sites/default/files/AboriginalLiteratureReview.pdf>.

⁷³ For a discussion on the impacts of unsafe drinking water and Canada’s lack of consideration for clean drinking water supply of First Nation communities based on smaller economies of scale (as is typical of many First Nation populations), see J-M. Davies and A. Mazumder, “Health and Environmental Policy Issues in Canada: the Role of Watershed Management in Sustaining Clean Drinking Water Quality at Surface Sources,” *Journal of Environmental Management* (68) 2003, 273-286.

⁷⁴ D.R. Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada.” *McGill LJ* 57 (2011), 81.

⁷⁵ Homelessness Report, *supra*, note 72.

⁷⁶ D. Wilson and D. Macdonald’s *The Income Gap Between Aboriginal Peoples and the Rest of Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2010), concludes it will take approximately 63 years and more political will than is currently on offering to close the current income gap between Aboriginal and non-Aboriginal Canadians; see also R.L. Barsh, “Canada’s Aboriginal Peoples: Social Integration or Disintegration,” *The Canadian Journal of Native Studies* 14.1 (1994), 1-46 at 12-15; R.B. Anderson and R. Giberson, “Aboriginal Entrepreneurship and Economic Development in Canada: Thoughts on Current Theory and Practice,” *International Research in the Business Disciplines* 4 (2004): 142-167.

of their cultures;⁷⁷ to live the life they choose versus one imposed by statute;⁷⁸ and access to health care⁷⁹ except if they are imprisoned wherein all of these elements (including a job), are more accessible.

The “front of the line numbers” exposes the way Indigenous Peoples are among the first Canada’s justice system is prepared to send to prison, so much so that the number of Indigenous and visible minority inmates has increased in the past decade by seventy-five percent.⁸⁰ Rather than examine the potential systemic issues giving rise to the numbers, Canada’s response has been to build more prison cells to house them all.⁸¹

1.8 Indigenous Women & Children

The sheer numbers of Indigenous women in Canada’s penitentiaries is staggering with a 97% increase since 2002.⁸² Indigenous girls and women are out in front for experiencing abuse with rates three to five times higher than their non-Indigenous Canadian counterparts.⁸³ Unsurprisingly, Indigenous girls and women are also at the front

⁷⁷ M. Battiste, "Language, and Culture in Modern Society," *Reclaiming Indigenous Voice and Vision* (2000), 192, at 197-202; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Can. Hum. Rts. YB* (1989), 3.

⁷⁸ M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women," *Can. J. Women & L.* 6 (1993): 174. It is concerning that this article was written over a decade ago and remains substantively relevant as a demonstration of how little has advanced in the Canadian legal system in relation to Aboriginal women.

⁷⁹ S.Y. Tang and A.J. Browne, "Race Matters: Racialization and Egalitarian Discourses Involving Aboriginal People in the Canadian Health Care Context." *Ethnicity and Health* 13.2 (2008), 109-127; S.W. Hwang, "Homelessness and Health," *Canadian Medical Association Journal* 164.2 (2001), 229-233. Also, though *Chaoulli v Quebec (AG)* 1 S.C.R. 791, 2005 SCC 35, opened up the possibility of private health care for Canadians in Quebec, Aboriginal people – particularly status Indians – remain more limited than their Canadian counterparts when it comes to access to health care.

⁸⁰ *Ibid.*

⁸¹ K.B. Carlson, "The Largest Expansion of Prison Building Since the 1930's," *National Post*, September 24, 2011, <http://news.nationalpost.com/news/canada/the-largest-expansion-of-prison-building-since-the-1930s>.

⁸² S. Rennie, "Huge Increase In Number of Aboriginal Women in Canadian Prisons", December 2, 2014 http://www.thestar.com/news/canada/2014/12/02/huge_increase_in_number_of_aboriginal_women_in_canadian_prisons.html.

⁸³ Statistics Canada. *Measuring Violence Against Women*, by Holly Johnson (Ottawa: Statistics Canada, 02 October 2006) at 62-63; see also Statistics Canada 2004 General Social Survey (Ottawa: Statistics Canada), <http://www.statcan.gc.ca/pub/85-570-x/2006001/findings-resultats/4054081-eng.htm>; Native Women’s Association of Canada, Fact Sheet: Violence Against Aboriginal Women in Canada, http://www.nwac.ca/files/download/NWAC_3E_Toolkit_e_0.pdf.

of the line for victims of homicide in comparison to Canada's general population.⁸⁴ More often than not the counter-narrative goes that the numbers of murdered and missing Indigenous women is their own fault for having the audacity of being born Aboriginal⁸⁵ and because they live a disproportionately high-risk lifestyle.⁸⁶ Though the claim of high-risk lifestyles is not true and such levels of going violence against Indigenous women ought to constitute national outrage.⁸⁷

When it comes to violence against Indigenous women in Canada the justice system's response has long been and continues to be troubling.⁸⁸ Consider that in his 2007 murder trial, it was revealed Robert Picton had been hunting, torturing and killing Indigenous women for years without coming to the attention of the police and still has yet to be tried for all of his other Indigenous victims.⁸⁹ In 1971, Helen Betty Osborne was preparing to become a teacher, was abducted by four white men, sexually assaulted and beaten to death so violently that it took weeks for the coroner to identify her remains and over fifteen years for the men responsible to be charged.⁹⁰ No matter Osborne's education, when the trial into her murder began, locals of The Pas, Winnipeg stated Osborne "had been given fair warning that she should consent to having sex with the four

⁸⁴ O'Donnell and Wallace, *supra* at note 66, at 43 that states Aboriginal women were victims of homicide at a rate of "5.4 per 1000 population, compared to 0.8 per 100,000 for non-Aboriginal victims (almost seven times higher)."

⁸⁵ Y. Jiwani and M.L. Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse," (2006) 31 Cdn. J. of Comm., at 898.

⁸⁶ S. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15 Cdn. J. of Law and Society, at 98.

⁸⁷ M. Pearce, *An Awkward Silence: Missing and Murdered Vulnerable Women and the Canadian Justice System*, PhD Thesis, University of Ottawa, Faculty of Common Law, 2013.

⁸⁸ N. Pietsch, "'I'm Not That Kind of Girl': White Femininity, the Other, and the Legal/Social Sanctioning of Sexual Violence Against Racialized Women," *Canadian Woman Studies* 28.1 (2009), 136.

⁸⁹ B. Hutchinson, "Bones a reminder Robert Picton not prosecuted for deaths of the other 27 women he's suspected of killing" National Post, January 28, 2015, <http://news.nationalpost.com/news/canada/bones-a-reminder-robert-pickton-not-prosecuted-for-deaths-of-the-other-27-women-hes-suspected-of-killing>.

⁹⁰ Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada Amnesty International, 2003-2004, <http://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf>.

[white men] or die.”⁹¹ As set out at trial, ‘fair warning’ were the sexually charged, racial slurs and demands of her attackers, standing as testament to our collective consciousness that sees Indigenous women as spoils of colonization. What about Felicia Solomon? A cousin of Helen Betty Osborne’s from the same First Nation and also forced to leave her home on-reserve to be educated in Winnipeg.⁹² She was murdered after school in 2003.⁹³ Helen Betty Osborne was nineteen years old.⁹⁴ Felicia Solomon was sixteen.⁹⁵ The list is painfully long and growing,⁹⁶ as the situation for Indigenous women continues to be dire. The children of Indigenous women live similarly precarious lives.⁹⁷

Approximately 150,000 Indigenous children attended residential schools between 1870’s to the mid 1990’s.⁹⁸ Though the then Prime Minister of Canada apologized to First Nations people for the residential school legacy and promised it would never happen again,⁹⁹ Indigenous children today remain more than eight times more likely than their counterparts to be placed in care.¹⁰⁰ The result is children continue to be taken and there are more First Nation children in care now than were ever in residential schools.¹⁰¹ Overall, children in foster care are more likely to suffer serious mental health problems and serious physical harm and are 4.5 times more likely to die preventable deaths than

⁹¹ L. Priest, *Conspiracy of Lies*, (Toronto: McClelland & Stewart, 1989), at 79.

⁹² Stolen Sisters Report, *supra*, note 90.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ For more details on the names, ages and numbers of murdered and missing Aboriginal women and a ground-breaking database developed by M.A. Peirce, *supra*, note 87.

⁹⁷ A. Clarkson, "The Cedar Project: Exploring the Health Related Correlates of Child Welfare and Incarceration Among Young Aboriginal People in Two Canadian Cities." (2009).

⁹⁸ N. Trocmé, D. Knoke, and C. Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child Welfare System," *Social Service Review* 78.4 (2004), 577-600; and see also C. Walker, New Documents May Shed Light on Residential School Deaths, January 7, 2014, CBC News, <http://www.cbc.ca/news/aboriginal/new-documents-may-shed-light-on-residential-school-deaths-1.2487015>.

⁹⁹ Former Prime Minister Stephen Harper, Statement of Apology to Former Students of Indian Residential Schools, June 11, 2008, <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

¹⁰⁰ N. Trocmé, *supra*, note 98.

¹⁰¹ *Ibid.*; see also Auditor General, 2003 – 2011 reporting on First Nation housing and related poverty issues; http://www.oag-bvg.gc.ca/internet/English/parl_oag_200304_06_e_12912.html and http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html.

children in the general population.¹⁰² These numbers lead to an adult Indigenous population – particularly women – who are more likely to have suffered physical harm as a child and more likely to suffer from mental health issues from being taken and placed in foster care. This early damage compromises the ability of people to create healthy families and passes the cycle of harm on to yet another generation.¹⁰³

Indigenous babies are among most likely to die young, with infant mortality rates considerably higher than the Canadian population.¹⁰⁴ Nationally, the infant mortality rate – regarded as a comprehensive indicator of a given society’s level of health that measures the well-being of infants, children and their families – is higher among First Nation children born whether on-reserve or off-reserve as well as Inuit and Metis children than their Canadian counterparts.¹⁰⁵

1.9 On-Reserves & Housing

The average unemployment rate on reserves in Canada typically tracks three times higher than Canada’s unemployment rate.¹⁰⁶ One in four First Nation children on-reserves lives in poverty, which is almost double the national average.¹⁰⁷ The average household income for First Nations living on reserve is just under \$16,000.00 - almost

¹⁰² Morley, J., Kendall, P. (2006). B.C. Child and Youth Review Report., [http:// www.childyouthreview.ca/down/BC_Children_and_Youth_Review_Report_FINAL_April_4.pdf](http://www.childyouthreview.ca/down/BC_Children_and_Youth_Review_Report_FINAL_April_4.pdf).

¹⁰³ C. Blackstock, N. Trocmé, and M. Bennett, "Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada," *Violence Against Women* 10, No. 8 (2004), 901-916.

¹⁰⁴ J. Smylie, D. Fell and Arne Ohlsson, "A Review of Aboriginal Infant Mortality Rates in Canada: Striking and Resistent Aboriginal/non-Aboriginal Inequities," *Canadian Journal of Public Health/Revue Canadienne de Sante'e Publique* (2010), 143-148. The review found that whether Aboriginal children were born on-reserve or off-reserve (i.e. in cities and towns), the infant mortality rate remained higher than in the mainstream Canadian population. This is another indicator that socio-economic disparities are not resolved with the over-simplistic proposal to simply migrate all Aboriginal people into cities and thereby close the gap.

¹⁰⁵ *Ibid.*

¹⁰⁶ Assembly of First Nations, Quality of Life of First Nations, June 2011 http://www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf

¹⁰⁷ *Ibid.*

half of the average Canadian household.¹⁰⁸ First Nations continue to experience an on-reserve housing crisis with an estimated shortfall of 85,000 housing units and in many situations single-family homes have multiple families living in one and two bedroom units.¹⁰⁹ Almost half of the current on-reserve housing stock is in need of major repairs and another fifteen percent require complete replacement.¹¹⁰ Similarly, at least half of First Nation houses are contaminated with mold and over five thousand houses do not have adequate sewage and indoor plumbing.¹¹¹ Moreover, First Nation people living on-reserve with regular employment are unable to secure a mortgage for their housing needs and repairs because Canada has statutorily barred them from doing so in the *Indian Act*,¹¹² which was a “monolithically injurious piece of legislation”¹¹³ passed to both “control and centralize all aspects of Indian life from identity and governance, to land and subsistence.”¹¹⁴ Both the law and government spending – or lack thereof – on accessible and safe housing combine to oppress Indigenous Peoples living on-reserves.

How is it that we continue to be unconcerned with the high death rate among Indigenous infants yet if they survive we steal them away? Why are we not addressing the housing crisis on-reserves for the benefit of First Nation children versus taking them away and placing them in foster care in unprecedented numbers? The breadth of the socio-economic gap between Indigenous and non-Indigenous Canadians is breath-taking.

¹⁰⁸ *Ibid.*

¹⁰⁹ Assembly of First Nations, Quality of Life Fact Sheet, June 2011, http://www.afn.ca/uploads/files/factsheets/quality_of_life_final_fe.pdf.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Section 87, *Indian Act* works to prohibit security for property located on reserve, which means that if an Aboriginal person living on reserve defaulted on their mortgage the lender would not be able to seize the property on-reserve. In addition, only Indians within the meaning of the *Act* are able to own property on-reserve so even if the lender could seize the house the market is severely limited to the number of buyers who are also Indians on the same reserve are the only people legally able to purchase the house.

¹¹³ P.S. Vicaire, “Two Roads Divergerd: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context,” 58 McGill L.J. (2013) 607, at 636.

¹¹⁴ K. A. Carpenter and A. Riley "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review* 102 (2014).

These numbers matter for the Tribunal as context when crafting remedies. The Caring Society Complaint offers a dual narrative of both narrow and broad insofar as creating opportunity to address proper funding for First Nation child welfare and the underlying issues of colonization. Remedies in the Complaint should be crafted to address both the equality of funding as well as more broadly the systemic and ongoing harm of colonization that has greatly contributed to the socio-economic gap between Indigenous and non-Indigenous Canadians.

If we care to meaningfully address the socio-economic gap, we must do so by facing the Grandfather of Debwewin.

1.10 Some Conclusions

The numbers reveal a fire that is raging through the forest, burning the prospects of First Nations children for healthy, successful futures.

There is an increasing engagement of Indigenous Peoples in the global human rights movement,¹¹⁵ which in part is reflected in the multi-fold increase in the number of complaints making their way through the Canadian human rights system. This rise in complaints presents opportunity to be reflective on the relationship between Indigenous and non-Indigenous Canadians. This also presents opportunity to draw not only on making room for Indigenous laws and strengthening Canada's history of legal pluralism but also to draw in the best of international perspectives.

¹¹⁵ For more on how Indigenous Peoples are engaging globally with human rights regimes see: S.J. Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004); K. Cmiel, "The Recent History of Human Rights," *The American Historical Review* 109.1 (2004), 117-135; R.A. Williams Jr, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *Duke Law Journal* (1990), 660-704.

There is no legal impediment preventing the Tribunal from drawing in the elements of the United Nations Declaration on the Rights of Indigenous Peoples¹¹⁶ (UNDRIP) that speak to self-determination, self-government, a right to culture, a right to be free. Ordering First Nation culturally relevant child welfare services is within the Tribunal's reach. To that end, there is a moral, political and legal urgency to closing the divide. From the Royal Commission on Indigenous Peoples to the Report of the Truth and Reconciliation to the growing number of rights cases being decided favourably by the Supreme Court of Canada.¹¹⁷ The time is ripe for the Tribunal to be brave and address the ugliness of ongoing colonialism.

As we shall see in the Caring Society complaint, the Tribunal has an opportunity to achieve substantive equality through narrowing the gap by harnessing a tremendous remedial potential and finding a conciliatory way forward for First Nations children and families. Upon a finding of discrimination against First Nation children, there is nothing preventing the Tribunal from ordering a Kelowna Accord, roundtable style design and implementation of new, culturally relevant child and family services for Indigenous People. In such a process, Indigenous Peoples must be relied upon as partners and the keepers of solutions, not considered as part of the problem. Indeed, there is much that would support such a remedial order, starting with addressing the high number of First Nation children in care, which currently surpasses the number of students in Indian Residential Schools.¹¹⁸

¹¹⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: Resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 7 January 2016].

¹¹⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.

¹¹⁸ L. Pelley, "Indigenous children removed from homes in the 1960s begin to heal," November 2, 2015, Toronto Star, <http://www.thestar.com/news/canada/2015/11/02/indigenous-children-removed-from-homes-in-the-1960s-just-now-beginning-to-heal.html>.

The engagement of Indigenous Peoples with human rights mechanisms is exciting and intriguing because of the way it opens up possibilities for carefully constructed and wide-ranging remedies. Such remedies would aim at the empirical fact of inequality between Indigenous and non Indigenous Canadians. Confronting these numbers may reveal important truths and suggest innovative and far-reaching remedial possibilities. Do the numbers serve only to demonstrate a seemingly insurmountable, unsolvable gap or do they also assist us toward solutions? What about the continued increase in the number of First Nation children in care? Are they not entitled to the same access to services as all other Canadian children? Numbers not only reveal the ongoing effects of colonialism but also may help us consider remedies, which are discussed further in Chapter 4. The burning fire of colonialism continues to ravage First Nations children, families and communities. What are we prepared to do about it?

CHAPTER 2 – MINAADENDAMOWIN (RESPECT): (re)STRUCTURING COLONIALISM

How Birch Got Its Marks¹¹⁹

Long ago, in a great valley not far from here there was a village of plenty. Indeed, the people of the valley had so much for so long they forgot how to share. The people took everything they had for granted as their right for simply being the people of the valley. They cast aside the ways of their ancestors. They stopped giving thanks. They forgot that although they needed the water, plants and animals to live the water, plants and animals did not need the people. The people of the valley lost respect for anything but themselves.

One spring, when Animikii (thunderbird) returned and began to build his nest, he saw how arrogant the people had become and set out to teach them a lesson. As the days passed the people had trouble lighting a fire. They could not cook or find warmth on cold nights. As the days turned into weeks the old people shivered and the children went hungry. Finally, one of the boys had enough and told the village of his plan to get fire. All agreed.

The boy turned himself into a rabbit and bounded out of the valley to the top of the highest mountain where he asked Animikii if he could come into the great bird's nest. Animikii agreed explaining to the rabbit how he withheld fire from the people of the valley for their contempt. As soon as Animikii looked away while pruning his feathers, the rabbit jumped into the fire that warmed Animikii's nest until his fur was alight. He

¹¹⁹ There are many stories about the birch. This one was shared with me by John Snake, Rama First Nation. While it was told to me by John Snake better than I relay it here, if you have heard it told differently, I ask that you make it right in your own mind and accept the spirit with which I restate it here.

hopped out of nest and returned to the valley where – before turning back into a boy – he rolled in the grasses so the people could come and retake fire.

Realizing he had been tricked, Animikii lifted off with his great wings and chased the boy who was frightened of the powerful bird and ran appealing for help. None was offered until finally the boy heard a voice offering shelter. It was the birch – known both for its beautiful white bark and celebrated skills as a healer.

Shaking the boy stood close to the tree and wrapped his arms around the smooth white bark. Animikii was furious at being deceived and from his great red eyes, lashed the birch with strikes of lightning over and over again. Each bolt scorched the birch's bark but the gentle tree held steady. Animikii grew tired and flew back to his nest leaving the boy to confess his deeds. In turn for his deception, the birch told the boy that it would not heal itself but instead keep the marks on its bark as a reminder of this time.

2.1 A Roadmap

In this Chapter I examine Canada's master narrative, which allows Canada to continue to draw power from a colonialist root and view Indigenous Peoples through a lens of white supremacy. Does this master narrative permit the Crown to continue see Indigenous Peoples as a problem with respect to child welfare versus part of the solution? What are some of the ways in which colonialism is entangled in the Complaint? By way of response, I briefly set out the historical relationship between Indigenous Peoples and Canada. In the section "Not Talking About Settler Colonialism" I turn to other branches of Canada's legal apparatus that might find more room for engaging in Indigenous laws and acknowledge colonial authority. I look to inquiries, such as the Stonechild Inquiry

that substantively makes recommendations that fail to address colonialism and racism while at the same time it is announced by the then Justice Minister as addressing racism. Stonechild offers lessons as a cautionary tale for the Tribunal when considering meaningful, systemic remedies regarding the Complaint insofar as there must be acknowledgment of systemic issues for there to be effective systemic remedies. Stonechild also illustrates how we might substantively do one thing while announce another. But all inquiries are not the same. I also examine the Manitoba Justice Inquiry (MJJ) as a more affirming use of inquiries even if the recommendations – however well structured – are ultimately not implemented. I propose hope may remain for an effective implementation of the Calls for Action from the Truth and Reconciliation Commission of Canada, in spite of Canada’s less than perfect record of using the inquiry process and subsequent recommendations to narrow the socio-economic gap.

I then turn to the international human rights and consider the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as how international agreements have been used in Canada’s courts. This too may offer the Tribunal opportunity to draw upon the principles set out in UNDRIP when crafting systemic remedies because Canada’s courts have a history of considering international agreements.

In this Chapter I also discuss some of the Indigenous responses to the 2008 amendment of the *CRHA* – in particular the debate between collective versus individual rights. As well I look at the relationship between the CHRA amendments and the *Indian Act*. Finally, I investigate Canada’s appointment process to the Tribunal and inquire why does not require commissioners in the human rights system to report directly to all of Parliament versus the Executive. The appointments process matters because it is the

commissioners of the Tribunal who are charged with deciding the Complaint. It should be asked what might qualify them to draw upon Indigenous laws and whether they are able to acknowledge colonialism as they craft systemic remedies. In the end, I conclude that there are some spots of hope but if the Tribunal is going to get the systemic remedies right, they will have to perform a lot of heavy lifting and unlike Stonechild, resist finding discrimination in the Complaint amounts to little more than administration in nature. I propose respect for Indigenous laws on the part of the Tribunal to acknowledge the white supremacist assumptions in Canadian law. I also conclude that in order for a finding of discrimination with respect to the Complaint to be effective at narrowing the socio-economic gap the Tribunal should meaningfully draw upon and respect the principles of UNDRIP and Indigenous laws.

2.2 The Master Narrative

“Canada has no history of colonialism.”

– Former Prime Minister Harper, 2009, G20 in Pittsburgh¹²⁰

Like numbers, law matters.¹²¹ Also like numbers, law matters so much that a discourse on the rule of law is found not only in the realm of academia but is folded into popular literature, everyday discussions, at dining room tables and across media.¹²² The

¹²⁰ This quote arises from a press conference at the close of the G20 summit in Pittsburgh in 2009. Specifically, former Prime Minister Harper stated:

[w]e also has no history of colonialism. So we have all the things that many people admire about the great powers but none of the things that threaten or bother them.

See also, David Ljunggren, “Every G20 Nation Wants to be Canada, Insists PM,” Reuters, September 25, 2009, <http://www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926>. For the full text of the then Prime Minister’s remarks, and the Prime Minister’s Office subsequent explanation these remarks, see Aaron Wherry, “What He Was Talking About When He Talked About Colonialism,” Macleans, October 1, 2009, <http://www.macleans.ca/politics/ottawa/what-he-was-talking-about-when-he-talked-about-colonialism/>.

¹²¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin, 1977), at 266.

¹²² B. L. Berger, Hamar Foster and A.R. Buck, “Does Law Matter? The New Colonial Legal History,” *The Grand Experiment, Law & Legal Culture in British Settler Societies*, H. Foster, B. L. Berger and A.R. Buck (eds.), (Vancouver: UBC Press, 2008), at 1.

premise that law matters upholds “notions of constitutionalism, of human rights, and of stable democratic government, to be contrasted with dictatorial and oppressive forms.”¹²³

Words and principles of law like ‘human rights’, ‘fairness’, ‘transparency’ and ‘freedom’ are often tossed about as laudable ideals of a democratic society. But what happens to the legal discourse founded on such principles when viewed through a colonialist lens?

Human rights matter enough to Canada that international principles of human rights have been woven into the *Charter*.¹²⁴ Canada is also a signatory to various international declarations on human and Indigenous rights such as the Declaration of Human Rights and the Declaration of the Rights of Indigenous Peoples, which reflect the principles of equality, that Canada’s human rights framework is based upon.¹²⁵ Yet, Canada’s pledges on the international stage diverge considerably from its domestic practices when it comes to Indigenous Peoples. This duplicity has been characterized as myth building through a self-reinforced master narrative¹²⁶ – ‘master narrative’ in this instance meaning the overarching story that Canada retells in many forums that Indigenous Peoples do have not laws and were conquered, surrendering all of the lands and resources now claimed by Canada. This master story is aided by a legal system that

¹²³ *Ibid.*

¹²⁴ S. Day, L. Larmarache and K. Norman, *14 Arguments in Favour of Human Rights Institutions*, (Toronto: Irwin Law, 2014).

¹²⁵ *Ibid.*

¹²⁶ S. Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007), at 4. Moreover, at 12 Thobani notes:

In the case of Canada, the marking of Native peoples as ‘doomed to extinction’ is an example of the necropolitics indispensable to the incipient sovereignty. The creation of reserves and, subsequently, the residential school system as the sites for the physical and cultural extinction of these peoples points to a long history of the deployment of necropower in the services of the colonial order and (re) production of the national subject.

In short, Canada’s building of a master narrative supports the taking of lands and resources held by Aboriginal Peoples, who are either extinct or it is simply a question of timing before Aboriginal Peoples, their laws, languages, cultures, customs, practices and traditions have vanished.

chronicles colonization through process,¹²⁷ rulings of courts, decisions of tribunals and findings of inquiry¹²⁸ and a universal human rights system built upon a colonialist regime that entangles Indigenous Peoples within it.¹²⁹ This veneer of inclusivity, layered over colonialism,¹³⁰ generates a glossy, positive reflection for Canada while ignoring the colonialist rot underneath.

In essence, here is how Canada's master narrative impacts Indigenous Peoples.¹³¹ The soft-underbelly of Canada's story marks Indigenous Peoples as more likely to commit crimes; eternal outsiders of civilized society; deviant. These ideas explain the historical legacies¹³² that predispose Indigenous Peoples toward troublesome conduct and their failure to uplift themselves,¹³³ justifying more stringent treatment. In other words, in both subtle and not so subtle ways, Indigenous Peoples are viewed as "deviant by choice and fundamentally different from the rest of "normal white society".¹³⁴ In these ways, among others, colonialism leads to racism that is at once overt and covert. Moreover, the "ultimate expression of sovereignty resides, to a large degree, in the power and the

¹²⁷ V. Leary, "The Effect of Western Perspectives on International Human Rights," in An-Na'im and Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: Brookings Institution, 1990), 290 at 316; A.A. An-Nai'im, "Problems of Universal Cultural Legitimacy for Human Rights," in An-Na'im, *ibid*, 331 at 348-51.

¹²⁸ J. Borrows, "With or Without You: First Nations Law (in Canada)," *McGill LJ* 41 (1995), 629; Coulthard, *supra*, note 11, at 451.

¹²⁹ *Ibid*. [Coulthard]; J. Y. Henderson, "Aboriginal and Treaty Rights and Tribunals," 19 *Can. J. Admin. L. & Prac.* (2006), 1; G.B. Yngvesson, *Virtuous Citizens, Disruptive Subjects*, (New York: Routledge, 1993).

¹³⁰ P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002).

¹³¹ The issues faced by Indigenous Peoples in Canada through Canada's master narrative is a long and complicated one, which I save for a more detailed examination at another time. For those interested in more on the panoply of issues see, for example: J.Y. Henderson, "Postcolonial Ghost Dancing: Diagnosing European Colonialism," *Reclaiming Indigenous Voice and Vision* (2000), 57-76; J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); J. Promislow, "Treaties in History and Law," *UBCL Rev.* 47 (2014), 1085; and, V. Napoleon, "Extinction by number: Colonialism made easy." *Can. JL & Soc.* 16 (2001), 113.

¹³² M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

¹³³ Y. Jiwani, "Symbolic and Discursive Violence in Media Representations of Aboriginal Missing and Murdered Women." In *Violence in Hostile Contexts E-Book*, (eds.) David Weir and Marika Guggisberg (Oxford: Inter-Disciplinary Press, 2009), <http://www.interdisciplinary.net/publishing/id-press/ebooks/understanding-violence-contexts-and-portrayals/> (February 10, 2010), at 310.

¹³⁴ N. Lugosi, "'Truth-telling' and Legal Discourse: A Critical Analysis of the Neil Stonechild Inquiry," *Canadian Journal of Political Science* 44.02 (2011), 299-315.

capacity to dictate who may live and who must die.”¹³⁵ As set out in this Chapter, the two faces of Canada’s human rights record domestically and its commitments internationally grate against each other, sometimes so violently that Indigenous Peoples are either silenced, left for dead or both. How did it start to go wrong?

2.3 What Lurks Beneath: Building the Relationship & Settling Canada

It has been argued that the master narrative of the relationship between Indigenous Peoples and the Crown was initially formed by the *Royal Proclamation, 1763*.¹³⁶ Though a long and complicated story, one of the key moments in Canada’s colonial legacy was the issuance of the *Royal Proclamation, 1763*¹³⁷ – a document providing for English control over the lands included as a part of Canada.¹³⁸ Indigenous Peoples were not involved in the drafting of the Proclamation. Nonetheless, the Proclamation acknowledges but does not did not fully consider the pre-existing relationship of Indigenous Peoples with the settlers regarding sharing of resources while respecting the others sovereignty and legal orders.¹³⁹ Moreover, without a war against Indigenous Peoples or surrender the *Royal Proclamation* is a statement of relationship, not a deed to the lands and resources of Canada, which were already in the possession of Indigenous Peoples.¹⁴⁰

Scholars have argued Canada’s legal system is complicit in continuously breaching human rights when it comes to Indigenous Peoples in order to protect the dubious

¹³⁵ J-A. Mbembe and Libby Meintjes, "Necropolitics," *Public Culture* 15.1 (2003), 11-40, at 1.

¹³⁶ J. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-government".

¹³⁷ *Ibid*, the Royal Proclamation, 1763 was the precursor to the Treaty of Niagara, 1764 between the English Crown and Aboriginal Peoples represented at Niagara in 1764.

¹³⁸ M. Asch, *On Being Here To Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), at 153.

¹³⁹ Borrows, *supra*, note 136.

¹⁴⁰ *Ibid*.

foundation of Crown sovereignty, upon which legal actors source their legitimacy.¹⁴¹ Coulthard further posits an “unprecedented degree of protection for certain ‘cultural’ practices within the state, it [the court] has nonetheless repeatedly and steadfastly refused to challenge the racist origin of Canada’s assumed sovereign authority over Indigenous peoples and their territories.”¹⁴² In sum, the settling of Canada through the assertion of Crown sovereignty is myth building of tremendous proportions¹⁴³ and all branches of the legal system – courts, tribunals, inquiries and police – legitimize this power. In other words, the law has a role to play in allowing politicians to proclaim, that there is no history of colonialism.¹⁴⁴ Yet the suppression of Indigenous Peoples under the guise of western moral superiority¹⁴⁵ over the “savages”¹⁴⁶ continues. Can the Tribunal see the master narrative at work in the Complaint and craft the systemic remedies necessary for

¹⁴¹ B. Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 S.C.L.R. (2d) 433, at 434 and 437 [hereinafter “Slattery, ‘Honour of the Crown’”] wherein Slattery sets out the Court’s careful wording in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.) [hereinafter “*Haida Nation*”] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) [hereinafter “*Taku River*”] to “avoid suggesting that the Crown gained sovereignty over Aboriginal peoples in a lawful or legitimate manner”. However, though the Court is cautious in its language, the decisions were careful to set out that Aboriginal people do not have a veto power to object to Crown action, which is not a relationship of equals but one that perpetuates Crown sovereign authority. See also, K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1996) 8:2 Const. Forum Const. 33; and J. Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 McGill L.J. 615.

¹⁴² Coulthard, *supra*, note 11.

¹⁴³ J. M. Blaut, *Colonizer's Model of the World Geographical Diffusionism and Eurocentric History*, (New York: Guilford Press 1992), at 1, writes:

The Purpose of this book is to undermine one of the most powerful beliefs of our time concerning world history and world geography. This belief is the notion that European civilization - 'The West' - has had some unique historical advantage, some special quality of race or culture or environment or mind or spirit, which gives the human community a permanent superiority over all other communities, at all times in history and down to the present...Europe eternally advances, progresses, modernizes. The rest of the world advances more sluggishly, or stagnates, it is 'traditional society'.

¹⁴⁴ Harper, *supra*, note 120.

¹⁴⁵ C. Tennant, "Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993," *Human Rights Quarterly* (1994), 1-57, reviews western scholarship relating to the superiority of westerners over the ‘noble savages’, 7-11.

¹⁴⁶ R. Harding, examines the evolving media representation of Indigenous Peoples as ‘savage’ in "Historical Representations of Aboriginal Peoples in the Canadian News Media." *Discourse & Society* 17, No. 2 (2006), 205-235 and concludes that although some of the words such as ‘savage’ may have fallen out of favour in the media the representation of Indigenous Peoples in Canadian news has remained consistent from the late 19th century. Similarly, until the Courts wholly reject the legitimacy of Crown sovereignty over Indigenous Peoples, the law of Canada is – like the Canadian press – arguably more polite toward Indigenous peoples but remains paternalistic.

change? Colonization is a well-travelled road. Using remedies to construct a new road, one that can narrow the socio-economic gap will be difficult.

2.4 Not Talking About Settler Colonialism

2.4.1 The Indian Act: An Instrument of Assimilation & Destruction

The *Indian Act*, introduced in 1876¹⁴⁷, is fraught with problems and prejudice, which remain today. If there was ever any doubt as to the *Indian Act's* purpose, Duncan Campbell Scott, Deputy Superintendent of the Department of Indian Affairs from 1913 to 1932, infamously stated, “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone...Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.”¹⁴⁸

The *Act* was intended first to ‘Indianize’ Indigenous Peoples¹⁴⁹ by legislatively defining the group and then eliminating them. First the *Act* homogenized all Indigenous Peoples with distinct cultures, languages, laws, practices and traditions into a singular “Indian” category. Then – up until 1985¹⁵⁰ – the *Act* worked to deny the ‘Indian’ identity

¹⁴⁷ The *Indian Act*, 1876 was a consolidation of laws that were previously enacted pre-confederation and was passed under section 19(24), Constitution Act, 1867. The *Act* replaced Upper Canada’s *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1869*. The *Act* creates reserve lands and its initial purpose was to administer Indians in a manner that forces Indians to renounce their status under the *Act* and become members of Canada’s civilized society – also known as enfranchisement. The *Act* has gone through numerous amendments over the years from 1877 up to and including 2013.

¹⁴⁸ J. Leslie, *The Historical Development of the Indian Act, 2 ed.* (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Branch, 1978), at 114. The Bill referred to in the quote was a Bill to amend the *Indian Act* in even more restrictive measures, including enfranchisement.

¹⁴⁹ M.E. Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women,” (1993) 6 C.J.W.L. 174.

¹⁵⁰ Bill C-31 was introduced to change the definitions within the *Indian Act* that determine who is entitled to status under the *Act* and who is not. Ultimately, the Bill was passed and the *Act* amended. Sharon McIvor brought litigation against Canada for the Bill citing its limitations of which Aboriginal women were entitled to regain their Indian status prior to 1985 and which women were not. The time period for entitlement matters because if a woman who lost status was able to regain it – even after her death – then so too was there potential for her descendants to regain Indian status. The provisions of Bill C-35 merely displaced the discrimination based on gender down to another generation whose

of every Indian woman who married a non-Indian man. Simultaneously, the *Act* eliminated Indians through enfranchisement upon high school graduations, and required, often by force, Indian children to attend residential schools, which not only beat the culture and language out of them but also would eliminate status upon graduation. The *Act* has had devastating consequences for the number of people identified by Canada as Indians.

Though some women and their children have regained status, the courts placed limitations on the retroactivity of Indian status with the effect of merely displacing enfranchisement by another generation.¹⁵¹ Moreover, though given opportunity to do so, as we have seen with inquiry after inquiry – examples of which are examined in this thesis – Canada has opted to avoid unraveling the colonialist underpinnings found in the language of the *Act*. Instead the *Act* allows for the continued attacks against Indigenous Peoples through legislation. Moreover, the critical position of First Nations children, a position the Complaint attempts to partly remedy, informs the larger question of First Nations rights because if children are not raised in their culture, then the master narrative is reinforced insofar as Indigenous Peoples were a ‘problem’ that was solved by removing children and prohibiting them from keeping Indigenous cultures, laws, languages and ceremonies. But support for the master narratives is not only found in the *Indian Act*. Attempts at ‘civilization’ and the elimination of the ‘Indian problem’ come in many forms that are assimilative and violent.

offspring will face the same challenges of who has status and who does not based on whom they choose to have children with.

¹⁵¹ See *Sharon Donna McIvor and Charles Jacob Grismer v. Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC).

2.4.2 Neil Stonechild

In 1990, on a November night when temperatures plunged to twenty-eight degrees below zero Celsius, Saskatoon police drove Neil Stonechild – a member of the Salteaux Nation – to the outskirts of the city and left him in a field to find his way home.¹⁵² The practice of driving Indigenous Peoples outside the city and forcing them to hand over their coat or shoes was so common it had a name: a starlight tour.¹⁵³ Stonechild’s last words from the back of a police cruiser to a friend ultimately proved prescient, “Help me. They’re going to kill me.”¹⁵⁴ Stonechild died that night of hypothermia and was found five-days later with marks on his wrist, abrasions on his face and missing one of his shoes.¹⁵⁵ An inquiry was called¹⁵⁶ that offers us lessons with respect to constructing remedies in the Complaint relating to First Nation children in foster care.

In the aftermath of an inquiry into Stonechild’s death no charges were laid in spite of testimony of police involvement; the finding of poor police investigation practices; the destruction or loss of police evidence related to Stonechild’s death; and the police practice of taking only Indigenous Peoples on starlight tours¹⁵⁷ – a glaring example of overt racism. Perhaps more tellingly, no recommendations from the Inquiry specifically addressed the colonialist assumptions of superiority and racism thriving in the bowels of Saskatoon’s police department.

¹⁵² Hon. Justice David H. Wright, Commissioner, Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild, Part I, Overview of the facts [hereinafter “Stonechild Inquiry”], 2004.

¹⁵³ S. Reber and R. Renaud, *Starlight Tour: The Last, Lonely Night of Neil Stonechild*. Toronto: Random House Canada, 2005.

¹⁵⁴ *Ibid*, at 39.

¹⁵⁵ Stonechild Inquiry, *supra*, note 152.

¹⁵⁶ There are, of course, other inquiries relating to the state and Aboriginal people (too many). I draw upon the Stonechild Inquiry as it most starkly addresses the distance of the gap – from the death of Neil Stonechild to a subsequent inquiry process and its conclusions to finally the Minister of Justice’s address to law graduates, in which he states Stonechild’s death motivated by racism and the importance of the justice system to uphold the values of human rights.

¹⁵⁷ Stonechild Inquiry, *supra*, note 152.

Conversely, shortly after the Inquiry's Report was released the Minister of Justice stated:

We cannot accept a society in which the most vulnerable people in our community are not able to turn for help to those entrusted with protecting them... Embedded in s. 15 [of the *Charter*], is the same principle that animated the United Nations' *Universal Declaration of Human Rights*, which was adopted by the UN General Assembly in 1948. That principle is that everyone is free and equal in dignity and rights and entitled to equal respect and consideration regardless of the group to which he or she belongs. One of the targets of s.15 and human rights legislation generally has been racism—the notion that a person's race is a significant factor in determining his or her worth as a human being. Racism is the notion that your race, your difference from me, makes you inferior to me.¹⁵⁸

In other words, the then Minister boldly asserts racism is an offence to human rights and not tolerated in Saskatchewan while the racist practices of the police were reduced in importance by the Inquiry to that of poor administration. The findings and recommendations of the report were presented as a common sense response to a terrible situation.

The remarkable difference between the actual substance of the Inquiry and the outward presentation of it as anti-racist is troublesome and serves as evidence of a white-knuckled grip on a master narrative, which ensures status quo in the larger socio-economic gap between Indigenous and non-Indigenous Canadians wherein Indigenous Peoples have very limited currency to effect fundamental change. Further, there was no mention in the Inquiry's recommendations that the *Indian Act* is racist law¹⁵⁹ that fosters the kind of second-class treatment Indigenous Peoples experience with the legal system.

¹⁵⁸ Hon. F. Quennell, Q.C. Stonechild, the Aboriginal Community, Equality and Justice: A Message from the Justice Minister, 68 Sask. L. Rev., at 113.

¹⁵⁹ S. Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007); B. Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview," *Hypatia* 18.2 (2003), 3-31, at 10.

Both the *Indian Act* and ignoring underlying, deeply problematic ideas of who is Indigenous,¹⁶⁰ allows colonialism to be reproduced and appear as racism. Neil Stonechild was just seventeen years old at the time of his death.¹⁶¹ He was a First Nation child and though the focus of the inquiry into his death was weighted toward the police, it is important to not overlook how vulnerable First Nation children are – particularly within the legal system that fails them repetitively. Moreover, that a legal process, such as an inquiry, could examine Stonechild’s death and fail to make recommendations that challenge the legal system’s role and its colonialist underpinnings elevates the level of caution in relation to the Canadian Human Rights Tribunal. Beyond finding for funding equality of First Nation children in care with all other Canadian children, can the legal system really see itself and its role in oppressing Indigenous Peoples and then go further to create remedies that address such profound systemic damage?

The then Saskatchewan Minister of Justice speaks of the hierarchical organizing of humans but fails to acknowledge, even tacitly, that settler colonialism is the name of the burr that rubs the relationship raw. While racism may also be at issue, ignoring the ongoing benefits derived by the settler population through colonialism is a more insidious and destructive force because everyone benefits – except for Indigenous Peoples – meaning everyone owns a piece of the mess too.

The final report of the inquiry into Stonechild’s death is not focused on rooting out settler colonialism or addressing racism as the Minister cast it. In this way, contrary to the Minister’s statement, Stonechild serves as an example of a failure to uphold the principles of s.15 and human rights legislation because the structure of inquiry itself is

¹⁶⁰ *Ibid* [Lawrence].

¹⁶¹ *Ibid*.

symptomatic of a larger paradigm: the subversion of Indigenous cultures, laws, people and lives in favour of the settler population.¹⁶² Canada's relationship with Indigenous Peoples is built upon a myth that the Crown is sovereign over Indigenous Peoples.¹⁶³ To perpetuate this myth, Indigenous Peoples are asked to play a role that requires their subjugation to colonialism and recasts any problems with the state as administrative in nature. Clashes come when Indigenous Peoples, who have not been conquered,¹⁶⁴ refuse to play. As the Stonechild Inquiry demonstrates, it is possible for investigations to produce volumes of documentation about the violence visited upon Indigenous Peoples without acknowledging colonialism, systemic racism, and the fact that the maltreatment of Indigenous Peoples is a founding principle of this country.

2.4.3 *Blind Inquiry*

The Stonechild Inquiry is a cautionary tale of how the Canadian legal system fails to see its own role in ongoing colonial violence and thereby does not offer recommendations or remedies aimed at addressing systemic issues. Though condemning the police's misconduct in relation to the death of Neil Stonechild, in keeping with Canada's myth that Indigenous Peoples are "doomed to extinction,"¹⁶⁵ the final report of the Inquiry sidesteps the issue and is entirely devoid of mention of colonialism. Rather the Report favours a casting of the affair as police misconduct.¹⁶⁶ Skating over considerable evidence that colonialism and racism was a central factor leading to

¹⁶² D. Johnston, Preface, in C. Bell & R.K. Patterson, eds., *Protection of First Nation Cultural Heritage: Laws, Policy and Reform* (Vancouver: UBC Press, 2009).

¹⁶³ K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 135, at 137.

¹⁶⁴ For an in-depth discussion on the meaning of sovereignty and Indigenous conceptualizations, see T. Alfred, "Sovereignty" in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln, NE: University of Nebraska Press, 2006), 33.

¹⁶⁵ Thobani, *supra*, note 159.

¹⁶⁶ J. Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges Ahead for Saskatchewan," (2006) 39(3) *Canadian Journal of Political Science* 507-27 at 508.

Stonechild's death is, in some ways, not surprising¹⁶⁷ and reinforces the premise that the “ideology of racelessness, a hallmark of the Canadian historical tradition, is very much in keeping with our national mythology that Canada is not a racist country.”¹⁶⁸ Ironically, from Duncan Campbell Scott's wish to eliminate the “Indian problem;” the enfranchisement of Indigenous Peoples under the *Indian Act*; creating Indian Residential Schools; the failure of then Prime Minister Harper to even acknowledge a history of colonialism – to list a few moments - Canada has all the while been reinforcing white racial superiority.

The Inquiry was offered a wide mandate and presented considerable opportunity to confront the broader elements that allowed settler-colonialism to thrive,¹⁶⁹ and resulted in starlight tours in the first instance. Indeed the Inquiry confirmed the existence of such a brutal police practice that targeted only Indigenous Peoples. There was opportunity to ferret out the roots of the starlight tour practice by the police, which was fed by colonialism, and examine how such notions about Indigenous Peoples have spread into police assumptions and practices; and how the resulting racism was seemingly openly accepted as part of the relationship between Indigenous Peoples in Saskatoon and the city's police department. In the end, the Inquiry had eight recommendations. None

¹⁶⁷ M. Bevir and R.A.W. Rhodes “Interpretive Theory.” In *Theory and Methods in Political Science*, ed. D. Marsh and G. Stoker (New York: St. Martin's Press) (1995) at 138, argues that circular reasoning is embedded within the master narrative that upholds how things are preferred to be understood and thereby viewed through a particular lens versus the way things really are. In this way, the Inquiry Commissioner was able to view police conduct as a few troublesome elements within a greater police authority meant to serve and protect rather than asking whom the police serve and protect and why Neil Stonechild was seemingly undeserving of protection?

¹⁶⁸ C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada* (Toronto: University of Toronto Press, 1999), at 14.

¹⁶⁹ Stonechild Inquiry, *supra*, at note 34, Part 2, Creation of the Inquiry, Terms of Reference, Stonechild Inquiry at 4. Among the Commission's mandate the first of five elements set out the authority necessary to address the soft-underbelly of race:

The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into any and all aspects of the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the province of Saskatchewan. The Commission shall report its findings and make such recommendations, as it considers advisable.

directly addressed racism. Surface efforts, like hiring Indigenous police officers, to tacitly address a deep and complicated issues like racism may polish the surface but are largely ineffective at challenging racism. None of the recommendations specifically address colonialism.¹⁷⁰

Once a master narrative has been formed, it is difficult to alter. Laws, policies, procedures, the very rules of evidence and practice of courts, tribunals and inquiries are pressed into service to uphold the narrative.¹⁷¹ The story can sometimes even be devious enough to seek a co-option of Indigenous Peoples within the system as though to offer a seal of approval. The Stonechild Inquiry recommended more Indigenous Peoples be made police officers – likely with a view to drawing Indigenous influences into the police force and possibly promote a cross-cultural understanding with a more diverse workplace. It seems aimed at somehow balancing the scales as if to say one life taken in the name of colonialism or racism can be neutralized by the hiring of a few representatives within an offending institution. This tactic allows for a veneer of change on the surface while the real offenses, namely the widespread acceptability of violent colonialist regimes to act to simmer unaddressed. To complicate it further, without any confrontation and redress of institutional racism or the colonialism that underpins it all, such actors – in this instance new Indigenous police recruits – may at once find

¹⁷⁰ In the aftermath of the Stonechild Inquiry, the Saskatoon Police has changed its Chief of Police more than once. Since the current Chief of Police Clive Weighill began his term, however, the police force has worked to not only implement the recommendations of the Inquiry but also to engage the Indigenous population in Saskatoon and Saskatchewan more broadly. For example, see T. Piller “Tenth Anniversary of Stonechild Inquiry” at <http://globalnews.ca/news/1636631/tenth-anniversary-of-neil-stonechild-inquiry/>.

¹⁷¹ N. Phillips, Thomas B. Lawrence and Cynthia Hardy “Discourse and Institutions,” (2004) *Academy of Management Review* 29(4), 635–52 at 644.

themselves propelling the tenets of a colonial power structure while simultaneously being singled out as legitimizing it.¹⁷²

2.4.5 Lessons from Stonechild

There are important cautions arising from this assessment of the Stonechild Inquiry for the Tribunal to consider with respect to the Caring Society Complaint. For example, care should be taken so as to not minimize actions with direct dire consequences as mere “administrative shortcomings” solved by a straightforward, common sense remedial approach to complicated issues. With a finding of discrimination but without the ordering of systemic remedies aimed at actually changing the system itself, the socio-economic gap will remain firmly entrenched. Remedies focused solely on the easiest fixes by adding more First Nation administrators and front-line workers should be minimized in favour of remedies that actually address the colonialist underpinnings of the system that allowed for the taking of First Nation children in the first instance, which are examined further in Chapter 4.

Canada’s legal system as built upon a story that claims the Crown is legally dominant over Indigenous Peoples.¹⁷³ In particular, the identification of Indigenous Peoples, since the arrival of the first wave of the settler population, as noble savages – deviant, backward outsiders with a natural predisposition toward violence, has been an important feature of this narrative.¹⁷⁴ When such racialised assumptions are processed through legal discourse the cultural assumptions are too often translated as white

¹⁷² J.A. Fiske, “Boundary Crossings: Power and Marginalization in the Formation of Canadian Aboriginal Women’s Identities,” (2006) *Gender and Development* 14(2), 247–58.

¹⁷³ Thobani, *supra*, note 42.

¹⁷⁴ *Ibid*, at 5.

supremacy under the guise of common sense,¹⁷⁵ which allows for the ongoing maintenance of an approved legal order.¹⁷⁶

The Canadian legal apparatus is vast. It includes state actors, such as police lawyers as well as institutions such as courts and tribunals who through judgments and rulings continuously influence the discourse of truth,¹⁷⁷ enshrined in liberal values of neutrality and fairness.¹⁷⁸ The entanglement of Indigenous Peoples within legal discourse does not just happen with the police – as with Neil Stonechild – but with legal institutions as well. Colonization of Indigenous lands required racist assumptions that Indigenous Peoples were not equal to the European settlers.¹⁷⁹ This hierarchical ordering of race continues to influence how Indigenous Peoples are treated by the Canadian legal apparatus. Framing Indigenous Peoples as less trustworthy and continuing to uphold those initial wrongful assumptions continue to persist.¹⁸⁰ By way of caution then, should the Tribunal find discrimination, it should name colonialism and create remedies that seek not only to establish equal funding for all Canadian children in care but also counter the assumptions of white supremacy that led to colonization in the first place.

The outcome of the Stonechild Inquiry reflects a long history of treating Indigenous peoples as less than human. The Royal Commission on Indigenous Peoples notes that building the “savage” stereotype of Indigenous Peoples was a key colonial policy in the 1830's – encouraged in large part by the existence and growth of settlers and

¹⁷⁵ L.H. Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991).

¹⁷⁶ S. H. Razack, “Gendered Racial Violence and Spatialized Justice.” In *Race, Space, and the Law: Unmapping a White Settler Society*, ed. S. H. Razack. Toronto: Between the Lines (2002), at 9.

¹⁷⁷ G. Torres, “Translation and Stories,” *Harvard Law Review* (2001–2002) 115, 1362–1395 at 1377.

¹⁷⁸ P. Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *The Hastings Law Journal* (1987) 38, 805–53 at 820.

¹⁷⁹ P. S. Vicaire, “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context,” 58 *McGill L.J.*, 607.

¹⁸⁰ *Ibid.*

the rise of a new economy dependent upon the claiming of land itself and land-based resources as belonging to the “civilized” settlers:

More and more, non-Aboriginal immigrants were interested in establishing permanent settlements on the land, clearing it for agricultural purposes, and taking advantage of the timber, fish and other resources to meet their own needs or to supply markets elsewhere. They were determined not to be frustrated or delayed unduly by those who claimed title to the land and used it in the Aboriginal way. In something of a return to earlier notions of the “civilized” and “savage” uses of land, Aboriginal people came to be regarded as impediments to productive development.¹⁸¹

Fast forward over a hundred and eighty years and we witness the success of this policy in the Stonechild Inquiry wherein not a single recommendation was directly at eradicating colonialist assumptions that Indigenous Peoples are a lesser form of human and are simply in the way.¹⁸² Meanwhile, the Minister of Justice – findings to the contrary – has the temerity to proclaim “[o]ne of the targets of s.15 and human rights legislation generally has been racism,” which may be true – but certainly was not in the Stonechild Inquiry. This bold attempt to relate the very process of inquiry to human rights and anti-racism, is ironic at best and a perpetuation of Canada’s colonial myth. A similar process resulted in the initial dismissal of the Caring Society Complaint on the grounds there is no comparator group to First Nation children on-reserve in care, as I will discuss further in Chapter 3.

Either way, a Tribunal finding issue with Canada’s child welfare system regarding First Nation children on reserves as merely administrative in nature holds no value in closing the socio-economic gap but rather serves as cover for the status quo. How can

¹⁸¹ Royal Commission on Aboriginal Peoples, 1996, Vol. 1, Ch. 5.

¹⁸² P. Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1996), 101; R. Ryser, “Nation-States, Indigenous Nations, and the Great Lie”, *Pathways to Self-Determination: Canadian Indians and the Canadian State*, L. Little Bear, M. Boldt, J.A. Long, eds., (Toronto: University of Toronto Press, 1984), 28-29.

Indigenous Peoples find justice when colonization and racism are perpetuated through a master narrative that skates over evidence, testimony and expert witnesses to conclude a Salteaux teenager's death at the hands of the police was 'administrative' in nature? Ultimately, settler-colonialism "continues to be the backbone of some ferocious systems of domination."¹⁸³ Thus, when examining the merits of the Caring Society's Complaint, the Tribunal should be alive to the underpinnings of colonialism. Although particularly focused on a discriminatory funding regime, the Caring Society Complaint targets the premise that Indigenous Peoples are not fully people, deserving of dignity.

2.5 Resisting the Master Narrative

There is ongoing resistance to by Indigenous Peoples to the master narrative. For example, in 1969, the federal government produced the so-called White Paper calling for the assimilation of Indigenous Peoples, which gave rise to an almost immediate First Nation response resulting in the formation of the National Indian Brotherhood,¹⁸⁴ now known as the Assembly of First Nations.¹⁸⁵ Similarly, responding to mounting concerns about the environment and socio-economic exclusion by government, Idle No More rose to national attention as a peaceful means to resist further settler-colonial intrusion.¹⁸⁶ The Caring Society Complaint joins this resistance by seeking a finding of discrimination and by demanding that settler-colonialism is named.

Resistance can have results. In contrast to the Stonechild Inquiry, which failed to squarely address colonialist assumptions and overt racism, which led to Stonechild's

¹⁸³ Bruce Baum, *The Rise and Fall of the Caucasian Race: A Political History of Racial Identity* (New York: New York University Press, 2006), at 193-194.

¹⁸⁴ H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (MG Hurtig, 1969).

¹⁸⁵ P. McFarlane, "Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement," *Between the Lines*, 1993.

¹⁸⁶ T. Wotherspoon, and J. Hansen. "The" Idle No More" Movement: Paradoxes of First Nations Inclusion in the Canadian Context." *Social Inclusion* 1.1 (2013), 21-36.

death, other inquiries have adopted a different approach. For example, the 1989 Marshall Inquiry examined racism in the Canadian legal system after Donald Marshall Jr. – a Mi’kmaq man – was wrongfully imprisoned for eleven years on murder charges. The Inquiry revealed the Crown assumed because Marshall was Indigenous he was guilty and intentionally failed to disclose key evidence that did not support the charges against Marshall. The Inquiry resulted in a ruling of the Supreme Court with respect to the Commission’s investigation powers relating to Cabinet privilege;¹⁸⁷ payment to Marshall; and in amendments to Canada’s *Evidence Act*, requiring new disclosure provisions for the Crown.¹⁸⁸

The Manitoba Justice Inquiry (“MJJ”) was commissioned in 1991 to examine the relationship between Indigenous Peoples and the province’s legal system. The MJJ final report boldly declared that “[i]n law, with law, and through law, Canada has imposed a colonial system of government and justice upon our people without due regard to our treaty and Indigenous rights. We respect law that is fair and just, but we cannot be faulted for denouncing those laws that degrade our humanity and rights as distinct peoples.”¹⁸⁹ Refusing to consider the relationship between the province and Indigenous Peoples solely within the confines of Canada’s master narrative, the Manitoba Justice Inquiry offered a critique of the deeply entrenched colonialism in Canada’s legal system. Moreover, it did so citing cornerstone principles of Canadian law; namely fairness and justice.¹⁹⁰

¹⁸⁷ *R. v. Marshall* [1999] 3 SCR 45.

¹⁸⁸ Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations, http://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf.

¹⁸⁹ Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. I, *The Justice System and Aboriginal Peoples*, (A.C. Hamilton and C.M. Sinclair, Commissioners) (Winnipeg: Province of Manitoba, 1991).

¹⁹⁰ *Ibid.*

By doing so, the MJI set out a mutual meeting place by which to address the gap in the relationship between Indigenous and non-Indigenous Canadians. Though it does not happen often enough, it is possible for inquiries to challenge the master narrative and offer considered recommendations for change. In this way, MJI offers a model of openly addressing colonialism and unravelling the carefully woven myth that Indigenous Peoples are second-class citizens, as a route to a finding of discrimination. Should the evidence support it, the Tribunal may also identify the role of settler-colonialism in allowing the discrimination against First Nation children on-reserves and consider remedies aimed at closing the gap.

As the Manitoba Justice Inquiry demanded, the legal system has to fundamentally change in order to stem the flow of incarceration of Indigenous Peoples.¹⁹¹ To that end, a new story must be told. But how do we find a new narrative? To start, Canada's judges, commissioners and adjudicators have the authority and responsibility¹⁹² to interpret Canada's international obligations in domestic venues.¹⁹³ This is not novel.¹⁹⁴ Given the pervasiveness of Canada's own master story, the myth that the Crown is sovereign over Indigenous Peoples may best be critiqued by drawing upon international perspectives that allow for a less self-reinforcing narrative. The 1996 Royal Commission on Aboriginal Peoples also served to resist the colonialist narrative and sought to seed a new, more inclusive Canadian narrative through its recommendations, such as Indigenous self-

¹⁹¹ *Ibid.*

¹⁹² B. Porter, "Judging Poverty: Using International Human Rights Law to Redefine the Scope of Charter Rights," (2000) 15 *JL & Soc. Pol'y* 117.

¹⁹³ A. de Mestral and E. Fox-Decent, "Rethinking the Relationship Between International and Domestic Law," (2008) 53 *McGill LJ* 573. For an overview of the evolving use of international law in the pre-Charter period, see William A Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Scarborough: Carswell, 1996) at 1-13.

¹⁹⁴ See *R. v Shindler*, [1944] *AJ No* 11, 82 *CCC* 206; *R. v Brosig*, [1944] 2 *DLR* 232, 83 *CCC* 199; and *R. v Kaehler and Stolski*, [1945] 3 *DLR* 272, 83 *CCC* 353.

government.¹⁹⁵ The themes of RCAP are carried forward in the Calls to Action and Reports of the Truth and Reconciliation Commission. The TRC proposes steps to be taken in order to confront Canadian history and strive to remedy ongoing damage caused by colonization. While the dominant myth prevails, there are rich veins of perspective for the Tribunal to consider in the Caring Society Complaint and addressing First Nations child welfare. There is also an international perspective that is helpful in seeing Canada from a more global perspective as evidenced through Canada's international commitments relating to Indigenous Peoples and human rights.

2.6 Marks on Paper

2.6.1 Overview

Almost two centuries after the *Royal Proclamation*, post-Second World War peace efforts culminated in commitments to the protection of human rights declared by many nations, including Canada, which sought to prevent a repetition of the War's atrocities inextricably linked to white supremacy. As a result a forged set of human values took hold in the form of newly articulated values and ideals,¹⁹⁶ resulting in language, such as 'human rights' entering the international lexicon with a resounding flourish.¹⁹⁷ By 1948 the then newly formed United Nations crafts and adopts the *Universal Declaration of Human Rights*.¹⁹⁸ At the time of enactment, the *Declaration* was so foundational in the codification of human rights that it served "directly and

¹⁹⁵ J. Corntassel, and C. Holder "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," *Human Rights Review* 9.4 (2008), 465-489; J. Frideres, "The Royal Commission on Aboriginal Peoples: The Route to Self-government," *Canadian Journal of Native Studies* 16.2 (1996), 247-266.

¹⁹⁶ A. Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization*, 54(02), (2000), 217-252.

¹⁹⁷ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Pennsylvania: University of Pennsylvania Press, 1999).

¹⁹⁸ Universal Declaration of Human Rights, G.A. Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71.

indirectly as a model for many domestic constitutions, laws, regulations, and policies that protect fundamental human rights,”¹⁹⁹ including section 15 of the *Charter*. The influence of human rights was potent enough to be sustained between 1948 and 1982 when Canada’s *Constitution Act*²⁰⁰ was drafted.

But how, are the principles of human rights – intended to be universal – applied toward Indigenous Peoples²⁰¹ in Canada when the decision-making authority exerted to render such decisions over unconquered people is founded in colonialist style myth-building in order to support the master narrative?²⁰² How might the principles of human rights found in the *Declaration* and Canada’s master narrative play out before the Canadian Human Rights Tribunal with respect to First Nation children and the role of the Crown?

2.6.2 Canada & UNDRIP

In 1982, a United Nations’ Working Group was struck and by 1985 commenced the drafting of what would become United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).²⁰³ The document was completed in 2007 and formally passed the United Nation’s General Assembly with 144 votes, thereby setting “the minimum standards for survival, dignity and well-being of the indigenous peoples of the world.”²⁰⁴ Despite its seat on the UN’s Human Rights Council, which endorsed the document, Canada refused to sign, as did the United States, Australia and New Zealand –

¹⁹⁹ H. Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law”, *Georgia Journal of International and Comparative Law*, 25 Ga. J. Int’l & Comp. L. (1995-1996).

²⁰⁰ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²⁰¹ S.J. Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).

²⁰² For a discussion on the tension in the relationship between the Constitution and Aboriginal people, see J. Borrows “(Ab)Originalism and Canada’s Constitution” (2012) 58 S.C.L.R. (2d), 351. See also Slattery, *supra*, note 23 and McNeil, *supra*, [Aboriginal Title] at note 45.

²⁰³ UNDRIP, *supra*, note 116.

²⁰⁴ *Ibid*, Article 43.

all countries that declared sovereignty over Indigenous Peoples and built similar master narratives that continue to thrive on colonization.²⁰⁵ Australia and New Zealand have now signed the document – along with Canada – though Canada’s distinct position is that UNDRIP must not interfere with law.²⁰⁶

Canada’s primary concern was a diminishment of its own political autonomy,²⁰⁷ a euphemism for continuing its colonialist regime unabated.²⁰⁸ Prior to ratification, Canada sought to have various articles within UNDRIP removed, particularly those relating to self-determination.²⁰⁹ Indigenous Peoples refused to change the wording of the document on the basis that UNDRIP only provided to Indigenous Peoples the rights already enjoyed by settler colonialists.²¹⁰ After three years of wrangling, Canada conceded²¹¹ – sort of. By 2010 Canada announced its agreement in principle with UNDRIP but so there would be no doubt as to Canada’s position, the government released a Statement of Support.²¹² The Statement qualified Canada’s international commitment by pronouncing UNDRIP as

²⁰⁵ M. Georgis and Nicole VT Lugosi’s "(Re) inserting Race and Indigeneity in International Relations Theory: A Post-colonial Approach," *Global Change, Peace & Security* 26, no. 1 (2014): 71-88, is an example of when international relations theory continues to be silent with respect to colonization and a colonial legacy or post-colonial theory. Drawing on the premise of this article with respect to UNDRIP, it is not a surprise that these four countries in particular then would be resistant to the document’s content.

²⁰⁶ Aboriginal Affairs and Northern Development Canada, "Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," November 12, 2010, <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

²⁰⁷ S. Edwards, "Tories Defend 'No' in Native Rights Vote," *The Montreal Gazette*, September 14, 2007, www.canada.com/montrealgazette/news/story.html.

²⁰⁸ UN General Assembly, 2007b, 12-13, records that when UNDRIP was presented for a ratification vote by member states, Canada’s Ambassador John McNee stated Canada’s objections before the General Assembly as follows:

Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties.

²⁰⁹ *Ibid.*

²¹⁰ J.Y. Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving U.N. Recognition* (Saskatoon: Purich Publishing, 2008), 119.

²¹¹ Considerable political pressure was brought against Canada from various Indigenous groups, such as the Assembly of First Nations, along with various human rights groups and grassroots organizations. Among the more persuasive arguments for Canada to sign UNDRIP was a letter signed by Canada’s own constitutional and legal experts, "Open Letter—UN Declaration on the Rights of Indigenous Peoples Canada Needs to Implement This New Human Rights Instrument," *NationTalk*, May 1, 2008, <http://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument/>.

²¹² Canada’s UNDRIP Statement, *supra*, note 206.

aspirational rather than customary international law.²¹³ In other words, Canada may one day respect the rights of Indigenous Peoples – just not yet. For now, it is a placeholder on a national wish list. The Reports of TRC²¹⁴ and its accompanying Calls to Action,²¹⁵ call upon Canada to give meaning to UNDRIP but the resistance of the former Conservative government remains steadfast.²¹⁶

The *Vienna Convention on the Law of Treaties*,²¹⁷ to which Canada is a signatory, requires Canada to act in good faith and refrain from any conduct or omission that would serve to defeat the purpose and object of a treaty is a reason for Canada to resist signing. Canada is bound by the *Vienna Convention* to uphold the terms of the *United Nations' Charter of Human Rights*. Unilaterally diluting the UNDRIP from customary international law to an aspirational document offends the *Vienna Convention* in meaning and spirit.

²¹³ P. Joffe, "UN Declaration on the Rights of Indigenous Peoples Not Merely" Aspirational," 22 June 2013." (2013) at <http://rights.info.yorku.ca/files/2013/06/UN-Decl-Not-merely-aspirational-Jun-22-13.pdf>.

²¹⁴ Honoring the Truth, Reconciling for the Future, wherein the Commission states at page 202 that Canada's resistance to fully accepting UNDRIP in Canadian law means Canada will no longer be able to rely upon the Doctrine of Discovery, which is a violation under Article 7, to uphold the legal fiction that all land title vests with the Crown; http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

²¹⁵ Truth and Reconciliation of Canada: Calls to Action, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

²¹⁶ Shortly within the completion of this thesis Stephen Harper's Conservative Party of Canada was defeated by Justin Trudeau's Liberal Party of Canada, the latter of whom won a majority of Parliamentary seats. Part of the Liberal Party of Canada's election platform related to UNDRIP, by stating the formulation of a new nation-to-nation relationship with Canada's Indigenous Peoples and in particular stated its commitment to Indigenous rights, which can be found here: <https://www.liberal.ca/liberal-statement-anniversary-declaration-rights-indigenous-peoples/>. Time will tell if the Liberal Party of Canada reverses the current federal government resistance and implements UNDRIP.

²¹⁷ 23 May 1969, 1155UNTS 331, Can TS 1980 No 37, Articles 18 and 26 state, respectively:

- A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
- (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
 - (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Canada became a signatory to the Vienna Convention on the Law of Treaties in October, 1970.

Terms contained within UNDRIP such as consent,²¹⁸ self-government²¹⁹ and respect for culture,²²⁰ are not optional for Canada if the socio-economic gap will ever be closed. There is an a parallel avoidance of responsibility with respect to Canada's conduct relating to UNDRIP and the behavior of the Stonechild inquiry where colonialism is entirely ignored and racism is tacitly addressed. International legal obligations in UNDRIP are reduced to possibilities merely by issuing a statement to that effect. Once again, important opportunities to revise the master narrative are lost as Canada continues to treat Indigenous Peoples as inside outsiders. Given Canada's normalized failure to live up to obligations in treaties with Indigenous people, Canada's UNDRIP position should perhaps not be surprising.²²¹ With respect to the Complaint, UNDRIP supports the right to identify with an Indigenous Nation as a citizen and a right to culture.²²² The Caring Society Complaint is also concerned with what is taken from Indigenous Nations when young citizens are taken and what is stolen from the child and their families by denying access to culturally relevant care. Why then, would Canada bother with UNDRIP?

In an age where international trade is tantamount to domestic economic success, it is generally accepted that state actors (governments) alter their identity based on

²¹⁸ UNDRIP, *supra*, note 116.

²¹⁹ *Ibid*, at Article 4.

²²⁰ *Ibid*, Articles 5 and 8.

²²¹ As set out by Audrey Macklin in "Historicizing Narratives of Arrival: The Other Indian Other," *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, H. Lessard, R. Johnson and J. Webber (eds.), (Vancouver: UBC Press, 2011) at page 30, Canada has consistently maintained that "jurisdiction over the lands belongs to the settlers," which has in turn been upheld by successive governments and the courts over the years. Further, in his book, *First Nations? Second Thoughts*, Tom Flanagan – former Conservative advisor and political strategist – conveniently reinvents facts to conform neatly with a colonialist master narrative by recasting the First Nation/Canada treaties at 134-135 as thus:

Treaties are an aspect of the state system [...] From this perspective, it is clear that the many agreements made over the centuries between Indians, on the one hand, and Great Britain or Canada, on the other, are not treaties in the international sense. They could not be, because, as shown earlier in this book, Indians were not organized into states and did not possess sovereignty in the technical sense. Great Britain, and then Canada, as the successor state to Britain, have always upheld their own sovereignty by right of discovery and prescription, and they have both regarded Indian tribes as subject people.

²²² UNDRIP, *supra*, note 116, Articles 2 and 6.

international institutions so as to appear valuable on the international stage and draw more influence and thereby trade.²²³ Signing international customary documents, such as declarations and conventions increases a state's international standing and overall reach. Similarly, violating international agreements decreases influence.²²⁴ With all but the United States having signed UNDRIP, Canada joined the international community by appearing supportive of Indigenous Peoples rights.²²⁵ In this way, in order to continue to exert influence and not find itself at a foreign policy disadvantage, it is in Canada's interest to have domestic laws and policies in place that make room for and respect Indigenous Peoples in a meaningful way.²²⁶ Indeed, Canada's banks, whose business is also conducted on the international stage, have already signed the voluntary Equator Principles,²²⁷ which require the 'free, prior and informed consent' of Indigenous Peoples relating to, among other things, financing in mining and extraction industry operations. Canada should consider its position carefully before its current anti-UNDRIP strategy results in diminishing returns on the international stage for both country and economy.

There is no getting around the way that Canada's adoption of UNDRIP formally recognizes Indigenous Peoples and their distinct status along with an international obligation to protect and promote their human rights.²²⁸ Perhaps unsurprisingly, to date there has been little progress in Canada towards the implementation of UNDRIP by any

²²³ A. Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics," (1992) *International Organization* 46(2), 391-425.

²²⁴ *Ibid*, Wendt.

²²⁵ Joffe, *supra*, note 213.

²²⁶ T. Dunne and Nicholas J. Wheeler, *Human Right in Global Politics* (Cambridge: Cambridge University Press, 1999), at 14.

²²⁷ D. H. Schepers, "The Equator Principles: A Promise in Progress?" *Corporate Governance: The International Journal of Business in Society* 11.1 (2011), 90-106; S. Herz, K. Genovese, K. Herbertson, and A. Perrault, (2008) "The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?" *Center for International Environmental Law, Oxfam Australia, World Resources Institute August, 2008*.

²²⁸ R. Stavenhagen, "Making the Declaration Work," in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, C. Charters and R. Stavenhagen (eds.), 352-371 (2009 Somerset: Transaction Publishers).

measure.²²⁹ In 2004, then UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, visited Canada and reported “unacceptable gaps between [indigenous] Canadians and the rest of the population in educational attainment, employment and access to basic social services.”²³⁰ Though a number of recommendations were included in Stavenhagen’s report, none were implemented as evidenced by the 2013 follow-up visit by then Special Rapporteur on the Rights of Indigenous Peoples, Dr. James Anaya, who in turn declared Canada faces a crisis when it comes to the human rights situation of Indigenous Peoples.²³¹ Anaya’s official report echoed the concerns of Stavenhagen from a decade earlier and reaffirmed a continuation of the same human rights violations against Indigenous Peoples. Anaya stated the range of violations ran the gamut from disrespect for treaty and land rights to unaddressed violence against Indigenous women and girls, access to health care, housing, education, safe drinking water to the welfare and protection of Indigenous children.²³² Anaya expressed serious concern for the lack of sufficient and proper consultations with Indigenous Peoples in order for Canada to obtain the necessary free, prior and informed consent – particularly in relation to resource extraction – required under Article 10 of UNDRIP.²³³

2.6.3 International Agreements in Domestic Courts

In spite of the Canadian government’s seeming refusal to fully operationalise human rights when it comes to Indigenous Peoples; its hostile treatment of international

²²⁹ Joffe, *supra*, at note 213.

²³⁰ *Ibid.*

²³¹ J Anaya, “Statement Upon Conclusion of the Visit to Canada” October 15

<http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.

²³² *Ibid.* Anaya

²³³ *Ibid.* Anaya

human rights experts; the general disdain for international reports on Canada's human rights record; and, the casting of UNDRIP as an aspirational versus legal document, we can find some hope in the way the Supreme Court of Canada has been considering international obligations in the context of human rights.²³⁴ Recently, in *Tsilhqot'in*,²³⁵ the Supreme Court determined that the Crown breached its duty to consult with Indigenous Peoples in relation to Indigenous title lands. While the court did not consider UNDRIP's Article 10 requiring "free, prior and informed consent" of Indigenous Peoples with respect to land issues, *Tsilhqot'in* moves the law a step closer insofar as Indigenous title further entrenches and protects the land rights of Indigenous Peoples as set out in UNDRIP. The case creates a form of Indigenous title similar to provincial title, in that it cannot be sold off and the future benefit of the land by generations to come must be considered.²³⁶ Similarly, in *Grassy Narrows*,²³⁷ the Supreme Court of Canada extended the doctrine of honour and duty to consult to include the provincial Crowns,²³⁸ thereby further entrenching the requirement to obtain "free, prior and informed consent" regardless of the division of powers in the *Constitution, 1867*.

In *Baker v. Canada (Minister of Citizenship and Immigration)*,²³⁹ an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and convention, in this instance the United Nations' Convention on the Rights of the Child. The Court held the Minister's decision should follow the values found in

²³⁴ A. Warner La Forest, "Domestic Application of International Law in Charter Cases: Are We There Yet?" (2004) 37 UBC Law Rev 157 at 157-159. For a broader discussion see also S.J. Toope, "Canada and International Law," (1998) 27 Can Council Int'l L Proc 33; L. Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The Charter at 25 in an International Perspective," (2007) 45 Osgoode Hall LJ 239 at 250.

²³⁵ *Tsilhqot'in*, *supra*, note 117.

²³⁶ *Ibid*, at 294, para. 74.

²³⁷ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

²³⁸ For more on the doctrine of the duty to consult see: *Haida Nation*, *supra* at note 23.

²³⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

international human rights law. Similarly, UNDRIP should be considered by the Tribunal if it wants to openly confront whether First Nations children can expect fairness in a human rights regime designed without Indigenous participation. *Baker* authorizes the Tribunal to be 'fair and just' by drawing on best principles in international human rights relating to Indigenous Peoples, namely the principles found in UNDRIP.

Still it is important to exercise caution. To truly build a new narrative and maintain international standing, the courts, commissions, inquiries and tribunals should carefully consider how they are using international documents and be on guard so as not to only use them to bolster predetermined conclusions,²⁴⁰ of Crown sovereignty or settler population dominance, which may merely end up further entrenching Canada's master narrative to the continued exclusion of Indigenous Peoples.²⁴¹ If this approach is taken, Canada's adoption of UNDRIP may be reshaped into a vehicle that maintains status quo when it comes to Indigenous Peoples while wrapping the nation up in a cloak of liberal values such as inclusivity and equality²⁴² – the language of human rights used for human wrong.

²⁴⁰ A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992), at 89, wherein the author argues that at least insofar as the Court considers labour relation cases and international labour agreements that "the Court considers international law where it is supportive of a predetermined conclusion but ignores it when it is not." Therein lies a danger – particularly to the well steeped story of Crown sovereignty over Aboriginal Peoples that the Courts may turn to international agreements for the purposes of supporting the subversion of rights of Aboriginal Peoples in favour of the rights of the settler population whom too often the Court seems reluctant to imposition.

²⁴¹ Borrows, *supra*, note 136; see also, Joffe, *supra*, at note 213.

²⁴² S. Engle Merry, "Resistance and the Cultural Power of Law," *Law & Soc'y Rev.* 29 (1995), 11.

2.7 The Canadian Human Rights Act Amendments & First Nation

2.7.1 Collective, Government & Individual Rights

In 2008, Canada announced amendments to the *Canadian Human Rights Act* (“CHRA”), which took effect in 2010.²⁴³ Prior to 2008, section 67 of the CHRA stated: “[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.”²⁴⁴ By way of operation, s.67 explicitly shielded the federal government and First Nation governments from complaints of discrimination relating to actions arising from or pursuant to the *Indian Act*. Initially, it was argued section 67 was a necessary measure when inserted in 1977 in light of the government’s undertaking not to revise the *Indian Act* pending the conclusion of ongoing consultations with the National Indian Brotherhood²⁴⁵ and others on broad *Indian Act* reform.²⁴⁶ It was part of an agreement to change nothing until the problems inherent in the *Indian Act* itself were addressed. Given the *Indian Act*, among other things, defines who is an Indian and who is not, the *Act* subsequently also determines who among Indigenous Peoples have rights and who do not.²⁴⁷ For example, prior to 1985 amendments, the *Indian Act* provided that Indian women lost status upon marriage to a non-Indian while non-Indigenous women marrying a registered Indian man gained status.²⁴⁸ Meanwhile, the Indian status of men and their children was not affected by marriage though the status of Indian women and

²⁴³ *An Act to Amend the Canadian Human Rights Act*, S.C. 2008, c. 30.

²⁴⁴ Section 67, CHRA, S.C. 2007.

²⁴⁵ The National Indian Brotherhood, formed in 1968 to represent registered First Nations people, became the Assembly of First Nations in 1982.

²⁴⁶ House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 6A:23, 10 March 1977.

²⁴⁷ M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Can. Hum. Rts. YB* (1989), 3.

²⁴⁸ W. Moss, "Indigenous Self-Government in Canada and Sexual Equality under the Indian Act: Resolving Conflicts between Collective and Individual Rights," *Queen's LJ* 15 (1990), 279.

their children was revoked.²⁴⁹ Forcing Indian women to forgo their Indian status upon marriage to a non-Indian offends Articles 1, 2, 6 and 8 of UNDRIP, which allows for Indigenous Peoples to have access to fundamental freedoms, be free from discrimination, claim their own identity, nationality, culture and not to be subjected to forced assimilation, respectively.

2.7.2 Not Everyone Is In Favour of CHRA Amendments

Eliminating s.67 of the CHRA allowed First Nation people to sue the federal government and their own First Nation governments for acts of discrimination – a first in Canadian history. The Indigenous community itself was divided on these changes.²⁵⁰ To some it heralded progress by finally allowing Indigenous Peoples access to the human rights already enjoyed by Canadians.²⁵¹ To others change represented a further erosion of the collectively forged laws of Indigenous Peoples by introducing the language and law of individual rights.²⁵²

²⁴⁹ Section 12(1)(b) of the Indian Act prior to 1985 allowed for gender discrimination. In 1985 amendments were made to the Indian Act that no longer removed an Indian woman's status if she married a non-Indian man but the amendments did not address the gender discrimination already suffered by countless Aboriginal women who lost their Indian status prior to 1985. Sharon McIvor, an Aboriginal woman who lost status prior to 1985 on the basis of marriage to a non-Indian man, brought a civil claim against Canada, *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, which was ultimately decided by the British Columbia Court of appeal (and denied leave for the Supreme Court of Canada). Though the decision allowed for McIvor to regain her status and status for her children but ultimately the Court did not entirely accept McIvor's legal arguments and ended up transferring the discrimination by another generation.

²⁵⁰ Quebec Native Women's Association, "Presentation to Hearing of the First Nations Constitutional Circle" (Montreal: Q.N.W.A., 6 February 1992).

²⁵¹ *Ibid*, at 1. In a presentation to the First Nations Constitutional Circle in Montreal in February 1992, the QNWA stated:

It must be clearly understood that we have never questioned the collective rights of our Nations, but we strongly believe that as citizens of these Nations, we are also entitled to protection. We maintain that the individual rights of Native Citizens can be recognized while reaffirming collective rights. This is why we would like to be in a position to rely on a *Charter* guaranteeing the rights and freedoms of all Native Citizens.

²⁵² For a more in-depth discussion of the conflict between Aboriginal collective rights and individual rights in the Canadian legal system see Borrows, Canada's Indigenous Constitution; see also T. Isaac, "Individual Versus Collective Rights: Aboriginal Peoples and the Significance of *Thomas v. Norris*," *Man. LJ* 21 (1991), 618.

2.7.3 CHRA Amendments & the Indian Act

It is a well-established principle of modern statutory interpretation that exceptions to quasi-constitutional human rights legislation are to be narrowly construed.²⁵³ Accordingly, the application of the CHRA by the Canadian Human Rights Tribunal and the courts has turned on whether the *Indian Act*, or regulations or by-laws made under the *Indian Act*, give the federal government and First Nation governments express authority to undertake the contested action or decision.²⁵⁴ If so, even in complaints where the discrimination was obvious or egregious, s.67 operated to prevent the Tribunal's review. Setting aside the discrimination written into the *Indian Act* itself.²⁵⁵ and in spite of s.67, a handful of complaints have been successfully filed with the Tribunal where the alleged discrimination did not fall within the federal government or First Nation's government's authority under the *Indian Act*.²⁵⁶ These cases illustrate that s. 67 did not fully shield discriminatory actions or decisions of the federal or First Nation governments.²⁵⁷ In other complaints, however, the authority of the *Indian Act* has operated as a protection for federal and First Nation governments in what would otherwise be considered human

²⁵³ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

²⁵⁴ B. Morse et al., *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act*, Canadian Human Rights Commission, October 2005.

²⁵⁵ Even now, the *Indian Act*, requires any Indian child of a certain age living on reserve or on public land (S.C. 1956, c. 40, s. 1; R.S.C. 1970, c. I-6, s. 4(3); R.S.C. 1985, c. I-5, s. 4(3).) to attend such school as the federal Minister of Aboriginal Affairs may choose to designate (S.C. 1932-33, c. 42, s. 1; S.C. 1951, c. 29, ss. 113-118; R.S.C. 1952, c. 149, ss. 113-118 as amended by S.C. 1956, c. 40, ss. 28-29 and S.C. 1956, c. 40, s. 30; R.S.C. 1970, c. I-6, ss. 114-119; R.S.C. 1985, c. I-5, ss. 114-119). Notably, throughout the entire period of the *Indian Act* regime that provides Canada – in particular the Minister of Indian Affairs – so much power and control over the lives of Indian people, the Minister has lacked statutory authority to order that a Protestant Indian child attend a Roman Catholic school or a Roman Catholic child a Protestant school.

²⁵⁶ *Ibid.*

²⁵⁷ In *Desjarlais v. Piapot Band No. 75*, [1989] 3 F.C. 605 (C.A.), a band council motion of non-confidence resulting in the firing of a band administrator was found not to fall within the section 67 exception, as it was “nowhere, expressly or by implication, provided for by the *Indian Act*”; in *Jacobs v. Mohawk Council of Kahnawake*, [1998] 3 C.N.L.R. 68 (CHRT), a similar finding applied to the denial of services funded by the Department of Indian Affairs to persons not within the band's criteria for membership, as the funding arrangement required the band to provide services according to the Department's eligibility criteria; in *McNutt v. Shubenacadie Indian Band*, [1998] 2 F.C. 198 (T.D.), section 67 did not apply to a band council decision on eligibility for social assistance that was not authorized by the *Indian Act*; in *Courtois v. Canada (Department of Indian Affairs and Northern Development)*, [1991] 1 C.N.L.R. 40 (CHRT), section 67 did not apply to a band council “moratorium” on education services for the children of reinstated women, as the council had no authority over such services under the *Indian Act*.

rights violations.²⁵⁸ Expert observers consider the result has been “an inconsistent and arbitrary application of the [CHRA] to the First Nations people, communities and governments that are subject to the *Indian Act*.”²⁵⁹

2.7.4 Leading Up to the CHRA Amendments

In 2001, the Canadian Human Rights Review Panel was appointed to conduct a comprehensive review of the CHRA and acknowledged the significant implications of the section 67 issue for Indigenous people. The Panel’s report indicates that different segments of the Indigenous population consulted raised a range of human rights concerns related to the limited availability of government and band programs and services.²⁶⁰ Although some participants in the review process argued against the application of the CHRA to Indigenous governing bodies, “all the groups representing Indigenous women asked for the repeal of [the section 67] exception.”²⁶¹ Moreover, echoing the Canadian Human Rights Review Panel, *A Matter of Rights*, also stressed that, “[i]n repealing section 67, it is important to ensure that the unique situation and rights of First Nations are appropriately considered in the process of resolving human rights complaints.” In the Panel’s view, this would best be accomplished by the addition of an interpretive clause to the CHRA in order that “individual claims to be free from discrimination are considered in light of legitimate collective interests.”²⁶² Can the

²⁵⁸ In *Laslo v. Gordon Band (Council)*, [2000] F.C.J. No. 1175 (C.A.) (Q.L.), the section 67 exception applied to a band council’s denial of housing to a reinstated First Nations woman that was explicitly authorized by the *Indian Act*; in *Canada (Canadian Human Rights Commission) v. Canada (Department of Indian Affairs and Northern Development (re Prince))*, [1994] F.C.J. No. 1998 (T.D.) (Q.L.), the Court found that the *Indian Act* authorized a departmental policy requiring First Nations students to attend the school closest to their home.

²⁵⁹ W. Cornet, “First Nations Governance, the Indian Act and Women’s Equality Rights,” in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Papers*, (Ottawa: Status of Women Canada 2001).

²⁶⁰ Canadian Human Rights Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice) (2000).

²⁶¹ *Ibid*, 129.

²⁶² Morse, *supra*, note 245, at 14.

Canadian human rights system²⁶³ founded on colonialist assumptions of dominance over Indigenous Peoples be trusted – including the consideration of individual claims of discrimination in light of collective rights?

2.7.5 Who Decides the Remedies? Appointing CHRA Commissioners

A key component of trust for the legal system is connected to the process of appointing decision-makers. Competence of national human rights institutions and a guarantee of institutional independence are among the main areas covered by the 1993 Paris Principles. The Paris Principles²⁶⁴ are intentionally drafted in broad language to ensure the varying interest of the all parties involved are met while allowing for different systems of human rights protection to continue to exist throughout the world.²⁶⁵ Canada’s human rights system, while compliant to the language of the Paris Principles, is not an international leader.²⁶⁶

For example, Canada’s executive appoints commissioners and decision-makers sitting on human rights tribunals versus a public appointments process that is achieved through an act of Parliament²⁶⁷– the latter lending openness and transparency to the process. Further, Canada could, though it does not, require decision-makers and commissioners in the human rights system to report directly to all of Parliament versus the Executive. This approach unnecessarily raises the specter of criticism relating to the

²⁶³ By “human rights system” I refer to commissions, tribunals, courts and other public institutions whose are created through mandate or enabling legislation and are established by Canadian law to both protect and promote human rights.

²⁶⁴ Formally known as the *Principles Relating to the Status of National Institutions*, annexed to *National Institutions for the Promotion and Protection of Human Rights*, CHR Res 54, UNESCO, Supp No 2, UN Doc E/1991/22, (1992); GA Res 48/134, UNGAOR, 48th Sess (1993) Annex [*Paris Principles*].

²⁶⁵ M. Yalden, “The Paris Principles Twenty Years After,” *14 Arguments in Favour of Human Rights Instruments*, Shelagh Day, Lucie Lamarche & Ken Norman (eds.), Toronto: Irwin Law 2014), 191-206, at 194.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

independence of the human rights system when an open appointment process coupled with an official act of Parliament would significantly remedy such concerns.

2.7.6 Who Does Not Decide the Remedies? No Indigenous Appointments

The appointment process is of considerable importance, particularly in light of the wave of Indigenous complaints on their way to the Canadian Human Rights Tribunal.²⁶⁸ While the Stonechild and MJI reports recommend increasing the numbers of Indigenous police officers, there is no parallel call for appointing Indigenous decision-makers within the Canadian human rights system. Predictably, the *CHRA* was amended in 2008, yet there has yet to be an appointment by the Executive who is Indigenous and steeped in an understanding of Indigenous collective rights. If changes were made to the *Act* in 2008 and subsequent Annual Reports of the Commission provide clear numbers as to the growing volume of Indigenous-based complaints, the Tribunal needs to maintain legitimacy, which may prove difficult, without a single commissioner being possessed of expertise to human rights as it relates to Indigenous laws.

Canada's less than transparent approach to appointments may, however, be part of a general Canadian trend that leans away from respecting human rights in favour of an open-season attack.²⁶⁹ Consider the current federal government's "refusal to admit that there is any serious discrimination or inequality in Canada"²⁷⁰ or that Canada even has a colonial history.²⁷¹ Moreover, the government's position in reference to the escalating number of murdered and missing Indigenous women in Canada – which continues to

²⁶⁸ Canadian Human Rights Commission, *Annual Reports*, 2010-2014.

²⁶⁹ S. Day, "Government Hostility, Systemic Discrimination, and Human Rights Institutions," in *14 Arguments in Favour of Human Rights*, (Toronto: Irwin Law, 2014), 19-53, S. Day, *supra*, at note 124.

²⁷⁰ *Ibid*, at 21.

²⁷¹ Harper, *supra*, note 120.

climb into the thousands – is that the matter is not one of human rights but rather is resolvable through Canada’s national Economic Action Plan.²⁷² When asked why there is a steadfast refusal to call a national inquiry into the deaths and disappearances of so many Indigenous women, then Prime Minister Stephen Harper simply stated “um it, it isn’t really high on our radar, to be honest.”²⁷³ This is the same government responsible for the appointments of Commissioners to human rights agencies. Could any Indigenous complainant come to reasonably expect fairness by decisions-makers who are not reflective of them within a human rights system that is itself seems under assault? Taken together, these elements do not create the best environment for the Tribunal to use its broad statutory mandate and remedial powers to close the socio-economic gap; to assume risk; to demonstrate respect for Indigenous laws; or even to strive to create something intersocietal. Nonetheless, in accordance with the Caring Society Complaint, human rights generally were not the only ones being squeezed by the Canadian government. First Nation children on reserve have been another ongoing target.

2.8 Some Conclusions

In this chapter I have examined the First Nation Child and Family Caring Society and Assembly of First Nations’ Complaint to the Canadian Human Rights Tribunal and how it offers opportunity to shift the master narrative by addressing colonialist underpinnings

²⁷² In essence, the position of the majority government, which is not being at all effectively challenged by any other party, is that Indigenous women (and by implication, the men who attack them), just need a job and then they somehow magically will no longer find themselves the victims of violence. Though there is considerable criticism in relation to human rights railed against the majority party – which is justifiable and well-earned – there is less criticism about the role of the Official Opposition. For more see: <http://www.swc-cfc.gc.ca/violence/efforts/action-eng.pdf>; J. Jeffries http://www.vice.com/en_ca/read/call-off-the-search-party-conservatives-confirm-mmiw-have-themselves-to-blame;

²⁷³ From an interview aired December 17 on CBC with Peter Mansbridge and then Prime Minister Harper <http://www.cbc.ca/news/politics/full-text-of-peter-mansbridge-s-interview-with-stephen-harper-1.2876934>. With recent changes in leadership of Canada’s federal government, the Interim Conservative Party leader, Rona Ambrose – replacing the outgoing Stephen Harper – has offered a sudden reversal of position and is now stating the Conservative Party supports an inquiry. For more see: Susana Mas’ article <http://www.cbc.ca/news/politics/rona-ambrose-will-support-inquiry-missing-murdered-indigenous-women-1.3308463>.

– along with its sibling, racism²⁷⁴ and assumptions of white supremacy – through an effective use of remedies. I have cautioned against the Tribunal finding ‘administrative failings’ on the part of Canada since, as seen in Stonechild, these hold little substantive value. Such a finding may lead only to a remedy of funding equality. I have posited that for meaningful resolution, the Tribunal must craft remedies that hold real value in closing the socio-economic gap by acknowledging Canada’s legal legacy of oppressing Indigenous Peoples and addressing the systemic issues which give rise to the Complaint in the first instance – that Indigenous Peoples are not fully people, deserving of dignity. I have also tried to illustrate that if remedies are to be effective, they must be built upon *Minaadendamowin* – respect for Indigenous Peoples, laws, languages, culture, values, families, children. Respect means something more than a nod. It means making actual substantive change to the power structure of the legal apparatus and crafting remedies that support Indigenous Peoples’ decisions on how best to care for and support Indigenous families and children. I have proposed this might take the form of meaningful appointments to the Canadian Human Rights Tribunal – not just amending s.67, *CHRA*. *Minaadendamowin* also means, Canada has to become more transparent in relation to appointments that includes appointees familiar with Indigenous laws.

2.8.1 Returning to the valley

Contrary to former Prime Minister Harper’s statement in Pittsburgh at the gathering of world leaders, Canada does indeed have a history of colonialism. It was brutal and violent. It is ongoing. The people of the valley have something to teach us

²⁷⁴ In B. Lawrence and E. Dua, "Decolonizing Antiracism," *Social Justice* (2005), 120-143, the authors contend that too often Indigenous Peoples and perspectives are left out of anti-racism movements. This ignoring – to the point of exclusion – of Indigenous Peoples in anti-racist contexts typically leaves Indigenous Peoples themselves working against the settler population’s dominance without other marginalized allies who too often experience and fight against incidents of racism.

about how we conduct ourselves when faced with difficult problems, such as the socio-economic gap between Indigenous and non-Indigenous Canadians. Rather than consider why they had lost fire and how their own actions may have contributed to or even caused the problem, the people looked outward and simply took what they believed was rightfully theirs. They had shifted so fundamentally away from being good that they cast aside their obligations and responsibilities. They forgot to live with *Minaadendamowin*.

Likewise, Canada – and every actor on the human rights stage believing themselves to be doing what is right – might give pause and look inward. Continuing to ignore the promises set out in the *Royal Proclamation of 1763*, of international declarations on human rights and the rights of Indigenous Peoples and other human rights commitments may only perpetuate our current problems. If the very structure of the legal system and the human rights sphere is rooted in colonialism and stands upon assumptions that are wrong in law – such as sovereignty and white supremacy – how might the Canadian human rights regime effectively construct remedies in the Complaint that address systemic issues effecting Indigenous Peoples?

Animikii lashed out at being tricked and his lesson of withholding fire undone. The great bird remembered the original instructions of the people of the valley and sought a stringent means by which to restore harmony. Closing the gap and reconciling relationships will be difficult and complicated as well as require a drawing in of Indigenous laws to give meaningful effect of any remedies. But right now it is only Indigenous Peoples carrying the burden of the socio-economic gap while Canada continues to live off the lands and resources. Continuing in this way seems to inevitably lead to a day when a higher price will be extracted.

Consider too the continued assumption of sovereignty over Indigenous Peoples who have never been conquered nor ceded sovereignty to the Crown; the deft avoidance of naming colonialism though inquiry after inquiry; the steadfast refusal to admit and fundamentally change colonialist assumptions in law; the turning away from addressing settler colonialism to occasionally renaming it racism wherein Indigenous Peoples are also typically ignored²⁷⁵ and contribute to their many entanglements with Canadian law. It is helpful to recall that Indigenous Peoples once offered shelter to settlers who gained entry by seeking friendship and peace. Though we know, like the rabbit slipping into Animikii's nest, there was another agenda, poignantly articulated by Treaty Commissioner Morris in 1882 when he stated, "the queen wishes her red children to learn the cunning of the white man."²⁷⁶ Cunning indeed. Until the settler population comes to terms with their original intentions, deception, subsequent obligations, promises and responsibilities, Indigenous Peoples will continue to be lashed with the lightning strikes of colonialism.

The boy thought himself doing good work by stealing fire for his people but he was duplicitous. Similarly, Canada justifies taking Indigenous children and placing them in residential schools or in an underfunded child welfare system because Indigenous people need to be civilized in the ways of the west – as though breaking promises and stealing children is the conduct of the rational and civilized. Recall that the birch was an ally to the boy as Indigenous Peoples were to the first settlers. Might the story remind us what results when we take what is not ours? It does not matter how many lies we tell to

²⁷⁵ *Ibid.*

²⁷⁶ B. Stonechild, *The New Buffalo: The Struggle for Aboriginal Post-Secondary Education in Canada* (University of Manitoba Press: Winnipeg, 2006), at 19.

justify our actions. What we are really doing is requiring others to bear the scars of an ongoing deception.

CHAPTER 3 – GWAYAKWAADIZIWIN (HONESTY):
CHILD AND FAMILY CARING SOCIETY

*Sihkooseu & Wesukechak*²⁷⁷

Sihkooseu (weasel) and Wesukechak were once good friends but no more. A great Chief, who loved and cared for his daughter, sent word out that the first suitor able to guess the young woman's secret name would be wise enough to marry her. Believing the one who first spoke her secret name would be for her, the young woman agreed. Wesukechak, along with many others, decided to enter the contest but Wesukechak is not like everyone else and was determined to win by any means. So, he went to the old net maker, Spider, and asked that he find out the secret name. Agreeing to help – as friends often do for one another – Spider walked up a tall tree, spun a long, silken thread and floated down into the camp of the Chief and his daughter, who were talking about the challenge. In this way, Spider discovered the young woman's secret name and hurried off to tell his friend.

But the journey back was long and there was no wind to help Spider travel quickly. Worried he would be too late; Spider saw Sihkooseu and enlisted his help. Sihkooseu meant to find Wesukechak and tell him the secret but somewhere along the way as he ran, Sihkooseu thought things over. He decided he liked the idea of marrying the young woman himself more than he liked being friends with Wesukechak. So,

²⁷⁷ Wesukechak (also known as Wiisagejaak, Wisakechahk, Weesakaychak, etc.) is a trickster in Cree culture. He appears in many stories and is a transformer so one never knows when Wesukechak may appear. Often he finds himself on adventures that are full of humour. He is a spirit imbued with powers and a friend to people, sometimes teaching lessons the hard way or that are otherwise difficult to convey. This story was told to me by John Snake in Rama First Nation as part of his efforts to convince me to embark on this research and thesis work. I am grateful to have found a place for it within my thesis. I was not certain for a while – of both a place for the story within my thesis and my thesis itself.

Sihkooseu turned around and ran to the Chief's camp. Upon arrival Sihkooseu declared the young woman's secret name was Forever-and-Ever. Though surprised, the Chief and his daughter set a date to marry. Sihkooseu was so happy he forgot about his trickery but soon Spider learned what had happened and told Wesukechak all about it.

Angry, Wesukechak ran to the Chief and his daughter. Learning of the deceit the Chief and his daughter were furious with Spider for listening; with Wesukechak for cheating; and with Sihkooseu for his trick. Finding them all at fault, the Chief declared his daughter unbound and free to choose for herself. She chose none of them. Sihkooseu heard about the Chief's anger and that of his daughter but it was Wesukechak's ire toward him that frightened him the most. Even now Sihkooseu is afraid of Wesukechak, which is why he runs, stops, listens and runs again, trying to dodge Wesukechak's vengeance.

3.1 Overview

“When...the [Indian] child lives with his parents who are savages; he is surrounded by savages, and though he may learn to read and write, his habits and training and mode of thought are Indian. He is simply a savage who can read and write.”

– Former Prime Minister John A. MacDonald,
(House of Commons Debates, 1883)

In this chapter, I detail the Complaint, which serves to ground this thesis. I then trace the passage of the Complaint through the Canadian Human Rights Tribunal process and subsequent judicial review. I seek to demonstrate Canada's response to the Complaint was wholly inconsistent with then Prime Minister Harper's apology on behalf of Canada for the Indian Residential Schools and serves as another example of Canada's profound inability to express honesty in its relationship with Indigenous Peoples. Along

the way, I also consider the actions of Canada in relation to the Chair of the Tribunal and Dr. Cindy Blackstock of the FNCFCFS. After exploring these doctrinal and extra-doctrinal happenings, I turn to the ways in which the human rights frame might facilitate or stymie efforts to pursue Indigenous People's rights and a return to a system in which First Nations people raise their children pursuant to their laws and cultural practices.²⁷⁸ Children were so deeply woven into First Nations culture that they quickly became the centerpiece of colonial expansion through assimilation policies.²⁷⁹ I examine the importance of the Complaint because the raid on First Nations children continues.²⁸⁰ I also explore Canada's policy of denial of rights and dignity when it comes to Indigenous Peoples as well as the measures by which Canada is prepared to go to deny as seen by its conduct in response to the Complaint. This chapter examines how room might be made by the Tribunal for the inclusion of Indigenous laws with respect to a systemic remedial order aimed at closing the socio-economic gap. I examine the importance of truth and process as well as the tension between the individual and collective rights of Indigenous Peoples raised within human rights. Finally, in this chapter I consider what is at stake in the Complaint – which is more than equality of funding but also Indigenous legal orders and culture, making the Complaint in some ways precedent setting.

²⁷⁸ Final Report of the Royal Commission on Aboriginal Peoples (Vol. 2), page 982, (RCAP).

²⁷⁹ The Statement of Apology from then Prime Minister Harper, which he declared in the House of Commons on June, 11, 2008 that the residential school era had a “profoundly negative” impact because:

[i]t removed and isolated children from the influence of their homes, families, traditions and cultures, to assimilate them into the dominant culture. We now recognize that it was wrong to separate children from the rich and vibrant cultures and traditions, that created a void in many lives and communities and we apologize for having done this. We now recognize that, in separating children from their families...and we apologize for having done this.

²⁸⁰ *Report on Equality Rights of Aboriginal People*, (2010) Canadian Human Rights Commission, at 3, http://www.chrc-ccdp.gc.ca/sites/default/files/equality_aboriginal_report.pdf. United Nations Committee on the Rights of the Child; Concluding Observations: Canada, U.N. Committee on the Rights of the Child, 61st Sess., CRC/C/CAN/CO/3-4.

3.1.1 Attacking Indigenous Laws Through Indian Residential Schools

The Caring Society Complaint creates an opportunity for the Tribunal to not only equalize funding for child welfare but also narrow the socio-economic gap. The Complaint is deceptive insofar as it may appear on its surface to be a matter of an alleged discrimination in funding but it is deeply rooted in Canada's colonialist past. The fundamental problem raised by the Complaint is not new nor is it previously unknown to Canada. In 1966, a confidential departmental report of the now Indigenous and Northern Affairs Canada, estimated that 75 percent of the children in Residential Schools were from houses which, by reason of overcrowding and parental neglect or indifference were unfit residences for school children.²⁸¹ Though almost forty years ago, by 1966 generations of Indigenous Peoples had already attended Residential Schools, returned to reserves or urban centres and as is the testament of the Residential School initiative, had little experience with healthy, productive family life.²⁸² Many were trying to recover from the abuse inflicted in the schools and were living in the extreme poverty to which Canada consigned Indigenous Peoples.²⁸³ It is a commonly held misconception that First Nation children are in foster-care to escape physical and sexual abuse. Rather, the escalating numbers of First Nation children in care continues to climb is driven by poverty, which is often viewed as bad parenting versus economic status; poor-housing;

²⁸¹ RCAP, *supra*, note 278, ch.10, p.13.

²⁸² E.T. Woods, "A Cultural Approach to a Canadian Tragedy: The Indian Residential Schools as a Sacred Enterprise," *International Journal of Politics, Culture, and Society* 26.2 (2013), 173-187.

²⁸³ P. Menzies, "Homeless Aboriginal Men: Effects of Intergenerational Trauma" J.D. Hulchanski, P. Campsie, S. Chau, S. Hwang, (eds.), *Finding Home: Policy Options for Addressing Homelessness in Canada* (Toronto: University of Toronto) (2009) www.homelesshub.ca/FindingHome; see also R. Claes, and D. Clifton, *Needs and Expectations for Redress of Victims of Abuse at Native Residential Schools* (Ottawa: Law Commission of Canada, 1998).

and caregiver substance abuse²⁸⁴ – predictable results from Residential School abuses. In this way, little has changed since the 1966 department report because Canada has not changed how it seeks to resolve the real issues.

Canada continues to act as though the problem lies with Indigenous families for poor parenting rather than acknowledge a key contributing factor is the breaking of Indigenous families – in the name of civilizing the savages. Canada continually fails to acknowledge colonialism and the imposition of laws that are not Indigenous as contributing factors to the ongoing systemic crises, such as First Nation children in care. The Complaint seeks to address this by asking the Tribunal to order both a remedy for equal funding and to construct systemic remedies addressing the colonialist underpinnings that sees so many First Nation children enter the child welfare system in the first instance. As we shall see through the testimony of Elder Joseph later in this Chapter, First Nations had systems that care for children and placed them at the center of the community versus shipping them away.

The Complaint recognizes the legacy of the Indian Residential School policy and its impacts on the numbers of First Nation children in foster care, through intergenerational damage, which is explored further in this Chapter. The Complaint is also concerned with the foreseeability of the intergenerational impacts of the abuses at Residential School. This foreseeability raises serious questions about why the same government who created Residential Schools, and later apologized for their role in causing damage and destruction, also continues to fund First Nation child welfare at a

²⁸⁴ B. MacLaurin, Fallon, B., Daciuk, J., Billingsley, D., Tourigny, M., Mayer, M., ... & McKenzie, B. *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* (Ottawa: Canada: Health Canada) (2001).

rate twenty-two percent lower than what is available on average in the provinces for all other Canadian children.²⁸⁵

3.1.2 Historical Disadvantage

As demonstrated through various exercises of law and assertions of authority throughout this thesis, the history and difference in funding, assert the complainants, necessitates a finding of historical disadvantage.²⁸⁶ Meanwhile, Canada steadfastly denies the funding level is a problem and any responsibility for redress, leaving the costs to be borne by Indigenous Peoples. The underfunding of a system which is currently removing First Nation children at ten times the rate of removal for all other Canadian children is both part of and perpetuates the legacy²⁸⁷ of Indian Residential Schools across additional generations of Indigenous families and communities.²⁸⁸ These elements conspire to create an historical disadvantage being lived out by First Nations children and families in Canada.

3.2 Nature of the Complaint & Legal Process

3.2.1 Overview

The Complaint before the Tribunal centers on fundamental human rights principles as well as access to justice for Indigenous Peoples, in particular First Nations children.²⁸⁹ The Complaint brings up old questions about the possibilities for using Canadian law

²⁸⁵ Report of Parliament's Standing Committee on Public Accounts, Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General, 40th Parliament, 2nd Session (Ottawa: Communication Canada) (2009), at 5.

²⁸⁶ Submissions, First Nation Child and Caring Society, at 18.

²⁸⁷ C. Blackstock, "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada Wins, Equality and Justice Lose," *Children and Youth Services Review* 33.1 (2011), 187-194, at 187.

²⁸⁸ A. Bombay, K. Matheson and H. Anisman "Intergenerational Trauma: Convergence of Multiple Processes among First Nations Peoples in Canada," *Journal of Aboriginal Health*, (2005) 6.

²⁸⁹ Auditor General of Canada's Report to the House of Commons, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada (2008).

towards the liberation of Indigenous Peoples.²⁹⁰ The Complaint is a challenge to colonialist policy towards Indigenous families and the state's right to distribute public monies drawn from the very lands and resources wrongfully taken by the Crown,²⁹¹ but it does so in a process with ties to that first colonialist root. If the jurisdiction of Indigenous Peoples was respected and the as set out by Dr. Blackstock:

[E]quality of their relationships with the Crown were recognized at the center of political and legal relationships, the dichotomy evident in this case between recognition of participatory rights through the delegation of service delivery to First Nations child and family service agencies but not distributive rights would not persist.²⁹²

3.2.2. An Introduction to Potential Models of Remedy Structure

Negotiations rather than a Complaint would provide the better and likely more comprehensive outcome of addressing the funding discrepancy with respect to both funding care of First Nation children but also structuring a system of culturally accessible and relevant child welfare. Both the First Nations Child and Family Caring Society²⁹³ and the Assembly of First Nations²⁹⁴ actively sought to negotiate closing the socio-economic gap between the lives of First Nation children living on-reserves and all other Canadian

²⁹⁰ For more on the possibilities of using colonialist processes to decolonize see: A. Lorde, "The Master's Tools Will Never Dismantle the Master's House," *Feminist Postcolonial Theory: A Reader*, 25 (2003), 27.

²⁹¹ Blackstock, *supra*, note 287.

²⁹² *Ibid.*

²⁹³ The First Nation Child & Family Caring Society of Canada is a non-profit entity founded in 1998 as a result of a national meeting of many First Nations child and family service agencies and is Canada's only national organization serving First Nation children and families. Its mandate is to provide research, policy development and recommendations and professional development for First Nation child and family workers. The Caring Society was foundational in establishing Jordan's Principle see Blackstock, *supra*, at note 287 and also Shannen's Dream – a movement started by Shannen Koostachin before her accidental death in 2010 that advocates for equality in education between Canadian and First Nation children with a focus of building comfortable and safe schools on-reserves.

²⁹⁴ In response to Canada's 1968 so-called White Paper calling for the assimilation of First Nations people in Canada, the National Indian Brotherhood was formed, which was the predecessor to the Assembly of First Nations, which is a national organization of First Nations in Canada who together elect a National Chief as a means of advocating on the national level for issues impacting First Nations, such as First Nation justice issues, education, health, children and families. The Assembly of First Nations' offices are in Ottawa.

children.²⁹⁵ For its part, however, Canada has demonstrated no political will to resolve the problems it has created with respect to First Nation children and families on reserve or off. Consider the Charlottetown²⁹⁶ and the more recent Kelowna Accords,²⁹⁷ the latter of which specifically called for unprecedented investments in education and child welfare, while the former more generally addressed First Nation self-government that would include child welfare. Still, willingness to engage in these talks has been rare and usually ends in failure the efforts are real nonetheless. These talks, and failures, form the backdrop to the Complaint, which alleges Canada provides inadequate funding for First Nation child and family services programs leading to an adverse impact in child and family services otherwise available to the Canadian public. The complainants contend this amounts to discrimination²⁹⁸ within the meaning of section 5, *Canada Human Rights Act* (“CHRA”).²⁹⁹ By no means is this complaint alone in alleging discrimination by

²⁹⁵ Continued negotiations and meetings have been held over the course of years between First Nation leadership and Canada by at least three National Chiefs – Matthew Coon Come, Phil Fontaine and Shawn A-in-Chut Atleo. The crisis with First Nation children was and remains a serious concern among First Nations Chiefs who have passed a series of resolutions relating to the problem. It is telling that all of the resolutions spanning over a decade have been adopted by consensus, including resolutions no. 60/2000, Ratification of the National Policy Review concerning First Nations Child and Family Services; no.5/2004, A Call for Immediate Action on the First Nation Child and Family Services Federal Funding Crisis; no.23/2004, First Nation Child & Family Services; no. 53/2006 First Nation Child & Family Services; no 56/2007, Adoption and Custody of First Nations children; no. 14/2008, Emergency Resolution on Child and Family Services; no. 63/2008 Implementation of Jordan’s Principle; no. 36/2011, Support for Child Welfare; and, no. 17/2012 Chiefs Task Force on Child and Family Services.

²⁹⁶ The Charlottetown Accord was negotiated in 1992 and ultimately failed to gain sufficient support. The Accord included Aboriginal self-government (albeit with a three year waiting period after the date the Accord passed), and therein would have facilitated First Nation control over child welfare. For a good discussion on the Charlottetown Accord see: M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*. Thompson Educational Publishers, 1994; see also J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics," *UNBLJ* 43 (1994), 19. To review the full text of the Accord, see:

<http://www.thecanadianencyclopedia.com/en/article/charlottetown-accord-document/>.

²⁹⁷ The Kelowna Accord was announced in November 2005 and was the most comprehensive modern document negotiated between Canada and Aboriginal organizations. It failed to gain support prior to a federal election, which the subsequent Conservative Party voted against – though it had support among Liberals and New Democratic Party. The Accord called for an investment of over \$5 billion over the course of a five-year period aimed specifically at closing the gap between Aboriginal and non-Aboriginal Canadians. It included significant investments in health and education of Aboriginal Peoples and would have provided the much needed funding to support healthy Aboriginal families and children. For the full text of the Accord see: <http://www.thecanadianencyclopedia.ca/en/article/kelowna-accord/>.

²⁹⁸ Memorandum of Fact and Law of the Complainant, First Nations Child and Family Caring Society, para.12.

²⁹⁹ *CHRA*, *supra*, note 16, section 5 provides:

It is a discriminatory practice in the provision of goods, services facilities or accommodation customarily available to the general public:

(a) to deny, or to deny access to, any such good, service facility or accommodation to any individual; or

Canada against First Nations. The Canadian Human Rights Commission has reported a surge in human rights complaints filed by Indigenous complainants against Canada and First Nation governments since the 2010 repeal of section 67, *CHRA*, from less than thirty to over three hundred where the number has remained relatively steady.³⁰⁰

3.2.3 Deny, Deny, Deny...

Canada's legal response to the Complaint has been denial of any responsibility for the problem. As we have seen in Chapter 2, Canada's denial is in keeping with settler-colonialism. Denial is consistent with the outcome of the Stonechild Inquiry, which dismisses hate against Indigenous Peoples as an administrative shortcoming; with Manitoba's continued jailing of Indigenous Peoples in jaw-dropping numbers while ignoring the Manitoba Justice Inquiry Report recommendations; with allowing Indigenous women and girls to be assaulted, exploited and murdered in astounding numbers while Canada's offering in response to the crisis is a federal Economic Action Plan.³⁰¹ Canada continues to reject its own data and findings on First Nation child welfare while steadfastly refusing to acknowledge systemic discrimination exists.

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

³⁰⁰ *Annual Reports, supra*, note 268.

³⁰¹ In Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women and Girls (Ottawa: 2014), The Honourable Dr. K. Kellie Leitch, P.C., O.Ont., M.P., Minister of Labour and Minister of Status of Women states in the Forward:

The Action Plan will consolidate and build on existing Government initiatives, and ensure we are using the best tools at our disposal to prevent violence, support victims and protect Aboriginal women and girls...through Economic Action Plan 2014...

The Action Plan centers around investing in skills training for Aboriginal women (at page 8) – on the assumption they just need a legitimate job – and more policing on-reserves (at page 5) – notwithstanding so many of the murdered and missing women disappear from urban centers. For more see Peirce, *supra*, at note 87. Canada posits the solution is simple economics.

3.2.4 Canada's Trickery and Flawed Logic

While Canada's main argument is that it merely provides funds and not a service within the meaning of section 5, *CHRA*, it continues to argue that the lack of a comparator group suggested that there was no discrimination. In addition, by way of response to the initial Complaint, Canada argued the Tribunal should not hear the Complaint on the merits. Since Canada only funds First Nation child welfare on-reserves while provinces fund all other child welfare there are no comparably situated Canadian children. No comparator group, no discrimination and no need to continue to a full hearing.³⁰² As added measure, no sympathetic Tribunal either.

Further disrupting the process and calling into question the appointments of Tribunal representatives, as explored in Chapter 2, Canada replaced the original Tribunal chair.³⁰³ This was illustrative of Canada's mounting disdain against Indigenous Peoples and, as set out in this Chapter, the representative who filed the Complaint.³⁰⁴ Within days of assuming control of the Tribunal and without meeting with the parties, the new chair, Chotalia, vacated all hearing dates.³⁰⁵ Canada followed with an unsuccessful motion seeking to strike the Complaint.³⁰⁶

Overall, Canada vigorously resists that substantive funding equality is owed to First Nations people living on reserve. By way of example, furthering a lack of regard for systemic equality, Canada brought an application arguing the Tribunal has no

³⁰² File No. T1340/7008, Notice of Motion of Respondent (Canada) for an Order to dismiss the Complaint.

³⁰³ Caring Society Winter Newsletter,

2011, <http://www.fncaringsociety.com/sites/default/files/NewsletterWinter2011.pdf>.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ Federal Court Order of Madame Prothonotary Roza Aronovitch, November 24, 2009, File No. T-1753-08.

jurisdiction³⁰⁷ (though interestingly when the Chair vacated hearing dates a few weeks earlier, jurisdiction was not an issue). Finally, in March 2011 – just over four years after the complaint was filed in 2007 – Chair Chotalia dismissed the matter.³⁰⁸ The Tribunal found merit in Canada’s position that there cannot be discrimination if there is no comparator group and therefore Canada’s funding could not be discriminatory.³⁰⁹

The comparator group argument raised by Canada rests on a terribly flawed premise. If followed to conclusion and applied to the hundreds of outstanding human rights complaints filed since 2010, First Nation people living on-reserve who identify discrimination in the difference between their access to services or the level at which those services are funded when compared to other Canadians, would be unable to successfully make out a discrimination complaint, because of a lack of a comparator group. Following Canada’s logic, access to human rights will be unavailable to Indigenous Peoples on many occasions in relation to complaints of discrimination related to services of the federal government. This is particularly so because First Nations are a federal responsibility under section 91(24), *Constitution Act, 1867*, while many social services and programs fall within the provinces 92(13) power. Therefore, as the provinces are not responsible for Indians and lands reserved for Indians, a comparator group for Canada’s delivery of a program or service for Indians or on lands reserved for Indians is not possible.

³⁰⁷ Notice of Motion, the Attorney General of Canada (representing the Minister of Indian and Northern Affairs), an Order to dismiss the complaint, December 21, 2009, File No. T-1753-08.

³⁰⁸ Ruling, Shirish P. Chotalia, Q.C. (Tribunal Chairperson), March 3, 2011, File No. T-1753-08.

³⁰⁹ *Ibid.*

3.2.5 Let's Try It Again and Get This Right

On judicial review, different principles prevailed. On April 18, 2012 Justice Mactavish³¹⁰ rendered her 107-page³¹¹ decision in favour of the Complainants, which included the Canadian Human Rights Commission, by setting aside Chair Chotalia's dismissal of the complaint and ordering a newly constituted panel to hear the matter. Canada argued the Tribunal did not dismiss the matter "summarily" but rather on the basis of a hearing on the comparator group issue.³¹² On the question of whether the *CHRA* even permits the Tribunal "to decide an issue that could determine the outcome of a case before embarking on a full hearing on the merits,"³¹³ Mactavish, J., held that the Tribunal would be able to substantively conclude issues in the Caring Society complaint without hearing all of the evidence on every issue raised.³¹⁴ It must, however, be correct in law, and the Tribunal's conclusion that there was no comparator group hence, no basis for a discrimination complaint was not correct in law. Chair Chotalia concluded the repeal of s.67 of the *CHRA* had no relevance to the Caring Society complaint because "the amendment merely subjected the Government of Canada and First Nations to the prohibitions against discrimination on prescribed grounds in their provision of services to Indigenous persons."³¹⁵ Subsequently, the Tribunal concluded there was no differentiation and adverse impact in the provision of services by Canada to First Nation

³¹⁰ Now a Justice of the Federal Court of Canada, Mactavish was former chair of the Canadian Human Rights Tribunal in 1998. Her considerable expertise in human rights law is reflected in her Ruling.

³¹¹ I note the length of this decision, and later the Federal Court of Appeals decision on Canada's appeal of Justice Mactavish's decision because I am of the view that when the court wants to ensure a good decision is rendered that will impact the law, shape something important for years to come, time is taken to craft a careful judgment – such as Justice Mactavish's. That the Court of appeal took only a few pages to uphold the judicial review provides another message – Justice Mactavish's decision is correct now get on with the merits of the complaint, Canada.

³¹² *Commission, supra*, note 23.

³¹³ *Ibid*, para. 119.

³¹⁴ *Ibid*, para .113.

³¹⁵ *Ibid*, para 228.

children on-reserves.³¹⁶ In contrast, Justice Mactavish stated the *CHRA* is quasi-constitutional and as such the Tribunal is mandated to “give effect to the fundamental Canadian value of equality.”³¹⁷ Moreover, human rights complaints are often “the final refuge of the disadvantaged and the disenfranchised.”³¹⁸ This includes Indigenous Peoples in Canada. Given these awesome responsibilities, the Tribunal’s decision on the comparator group question was “unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.”³¹⁹

Mactavish J., found the Tribunal’s conduct on dismissing the complaint based on Canada’s ‘lack of a comparator group’ argument without hearing the merits to be unfounded and the Tribunal had compounded the error by failing to provide reasons for its ruling. In addition, Mactavish J., pointed out that in fact there was evidence available that would support comparisons but the Tribunal failed to consider the significance of Canada’s own adoption of provincial child welfare standards through both its First Nation child welfare programming manual (“manual”) and funding policies, such as Directive 20-1.³²⁰ The combination of the manual, policies and content of Director 20-1 – which, among other things, establishes funding amounts – collude to demonstrate Canada did not merely invent child welfare standards for First Nation children on reserve but rather had built the system based on Canadian children subject to provincial programs and services. Therefore, though a comparator is not required, Canada’s consideration of other Canadian children in provincial child welfare regimes would have sufficed.

³¹⁶ *Ibid.*, para. 229.

³¹⁷ *Ibid.*, para 244; see also *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 at 615.

³¹⁸ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SRC 321, [1992] SCJ No. 63 (QL), at para.

18.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, at paras. 391-395.

Still unwilling to proceed on the merits, Canada appealed Justice Mactavish's ruling. In a 14-page decision, the Federal Court of Appeal unanimously endorsed Mactavish's ruling.³²¹ The whole matter was returned to the Tribunal for a full hearing.

3.2.6 Retaliation and Trickery for Bearing Witness

Even after the benefit of the Federal Court ruling and the decision on appeal, Canada remained aggressive about finding ways to undermine the very access to human rights processes it provided to Indigenous Peoples with its 2008 amendments to the *CHRA*. In December 2009, the First Nation Child and Family Caring Society of Canada sought to amend its Complaint against Canada to include an additional complaint of retaliation under section 14.1, *CHRA* against Dr. Blackstock, who was instrumental in bringing the Complaint.³²² The Caring Society alleged that shortly after the initial complaint against Canada in 2007, AANDC officials set about to bar her from meetings with Canadian officials and Indigenous leadership. Prior to the Caring Society's complaint, Canada itself had sought Dr. Blackstock's expertise on child welfare issues.³²³ The Caring Society further alleged that Canada's conduct prevented Dr. Blackstock from providing services to child welfare agencies seeking her expertise.³²⁴ Internal government emails Indian and Northern Affairs Canada (INAC) and the Department of Justice substantiated the claim that they colluded to monitor Dr. Blackstock's private Facebook page and Twitter account in an effort to discover "other motives" for filing the initial

³²¹ *Canada, supra*, note 22.

³²² *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)*, 2012 CHRT 24, <http://canlii.ca/t/fz6v2>.

³²³ Closing Submissions, First Nation Child and Family Caring Society, paras. 40-44.

³²⁴ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14 (CanLII), at para 2, <http://canlii.ca/t/gjfgv>.

Complaint.³²⁵ In October 2012, the Tribunal allowed the amendment of the original Complaint, saying any other decision would “permit the respondent [the Attorney General of Canada] to engage in retaliation against representatives of charitable organizations that have filed complaints on behalf of victims.”³²⁶

The evidence ultimately supported the retaliation component, for which the Tribunal awarded the maximum penalty of \$20,000 in favour of the Caring Society³²⁷ for “pain and suffering as well as for willful and reckless misconduct.”³²⁸ Though disappointing the Tribunal did not find a broader problem within the government that would allow for such retaliation against Dr. Blackstock, when it comes to a finding on the merits of the Complaint, there remains a lot at stake for how the Tribunal may craft effective systemic remedies.

3.2.7 Making Room in Canada’s Laws for Indigenous Peoples to Bring Challenges

Canada amended the *CHRA* in 2008 with the stated intent of making domestic human rights accessible to Indigenous Peoples that are already enjoyed by non-Indigenous Canadians. In other words, making more room for Indigenous Peoples to access Canada’s laws. Yet when the first complaint makes its way through the human rights system, as we have seen, Canada’s response is denial. The Caring Society

³²⁵ *First Nations Child and Family Caring Society, supra*, note 322, para 11.

³²⁶ *Ibid.* at para. 11. Though outside the parameters of this thesis, consider too that since 2012, Canada is attempting to minimize its future exposure in relation to child welfare and charitable organizations filing future complaints by simply denying or taking away charitable status of various organizations. See Dean Beeby, CBC News, Giving Tree Foundation to be Stripped of Charity Status, <http://www.cbc.ca/news/politics/giving-tree-foundation-to-be-stripped-of-charity-status-1.3074967>. Less charities means less risk of a human rights complaint being filed on behalf of victims. Giving Tree Foundation is a child welfare focused charity.

³²⁷ The Tribunal, however, found that since the conduct giving rights to the substance of the retaliation complaint was restricted to Dr. Blackstock and not a systemic issue of retaliatory behavior on the part of government against individuals for filing human rights complaints, there were no remedial orders for training of government employees. See FNCFCS, *supra*, note 324.

³²⁸ *Ibid.*

complaint filed “on behalf of all First Nations children who want the same opportunity to live safely in their family homes as other children.”³²⁹ In spite of Canada’s practice of denial, the Complaint was heard by a newly constituted Tribunal panel starting February 25, 2013 and concluding after thirteen weeks of hearing dates in October of 2014. But as previously stated, this Complaint is not only about equality of funding but also creating effective systemic remedies and making room for Indigenous laws.

The very structure of courts and tribunals and their adversarial nature raises concerns of participation by Indigenous Peoples and outcomes³³⁰ even when the subject matter is fundamentally important and relevant to Indigenous Peoples themselves. For example, the experience of colonial violence committed by state officials, such as with the Indian Residential Schools, is part of the collective psyche shared by Indigenous Peoples.³³¹ Could Indigenous Peoples reasonably expect to have their grievances related to Residential Schools heard in a process that is culturally-relevant and thereby more meaningful than a structure that further imposes colonial rule?

Such structure concerns were illustrated more broadly in the unfolding of Canada’s Truth and Reconciliation Commission of Canada (“TRC”).³³² The TRC process

³²⁹ Opening Statement before the Tribunal, C. Blackstock, September 14, 2009.

³³⁰ L. Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law," *Queen's Law Journal* 27.2 (2002); S. Engle Merry, "Legal Pluralism," *Law and Society Review* (1988), 869-896.

³³¹ E. Duran and B. Duran, *Native American Postcolonial Psychology*, (Albany, NY: Statue University of New York Press) (1995); Bombay, *supra*, note 288; P. Dudgeon, M. Wright, Y. Paradies, D. Garvey and I. Walker “The Social, Cultural and Historical context of Aboriginal and Torres Strait Islander Australians” in N. Purdie, P Dudgeon and R. Walker, eds., *Working Together: Aboriginal and Torres Strait Islander Mental Health and Well being Principles and Practice*, (Canberra: Office of Aboriginal and Torres Strait Islander Health, Department of Ageing)(2010).

³³² The Truth and Reconciliation Commission (TRC), was formed as part of the Indian Residential School Settlement Agreement, which began implementation in September 2009. Under the Settlement Agreement, Canada has certain obligations with respect to the TRC, namely:

- To date, Canada has disclosed over 4.2 million documents to the TRC. As per the Settlement Agreement, Canada is making accessible to the TRC all relevant documents related to Indian residential schools spanning over a century.
- To ensure high level participation at each of the TRC's national events, the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and senior departmental officials participated in each event: Winnipeg, Manitoba in June 2010; Inuvik, Northwest Territories in June 2011; Halifax, Nova Scotia in October 2011; and, Saskatoon, Saskatchewan, in June 2012;

was intended to be open and available to Indigenous Peoples. The commission travelled to the places more easily accessed by witnesses, and created a physical circular structure more in keeping with many Indigenous processes than the traditional courtroom setup. As this process was ongoing, the Crown's simultaneous aggression towards the Complaint was egregious. Canada could have – in the spirit of truth and reconciliation – agreed to resolve the Complaint by providing non-discriminatory levels of funding, or better yet view the Complaint as a chance to address historical wrongs by making room for First Nations children's access to culturally relevant services.³³³

The TRC arose out of the Indian Residential School era, as a public acknowledgment of Canada's legacy of stealing Indigenous children and the continued impacts on the wellbeing of former students, their families and their communities. The TRC seeks truth, like the Canadian Human Rights Tribunal, but does so through a structure intended to be more user-friendly, in part by developing procedures less tightly bound up in the 'truth-seeking' structure of the colonial state.³³⁴

Internationally, Truth and Reconciliation commissions are often found in transitional societies recovering from a national trauma typically brought on by atrocities of civil war, mass violence, dictatorships and/or genocide such as in post-apartheid Republic of South Africa.³³⁵ Canada's TRC, like other such commissions, asserts that

Montreal, Quebec in April 2013; Vancouver, British Columbia in September 2013; and, Edmonton, Alberta in March 2014. The Governor General also attended the Winnipeg national event.

³³³ T. Libesman, *Decolonising Indigenous Child Welfare* (New York: Routledge) (2014), at 56.

³³⁴ For a further discussion on transnational justice as a means for exploring history education in the wake of systemic violence and deeply rooted identity-based conflict – such as Indian Residential Schools – as an effective means of shifting history, ideas about identity and negative, racist views of marginalized groups see: J. Dierkes, T. Yoshida, P. Clark, A. Kitson, R. Valls, E. Oglesby, T. Sherlock et al. *Teaching the Violent Past: History Education and Reconciliation*, Elizabeth A. Cole (ed.), (Plymouth: Rowman & Littlefield Publishers, 2007); and, N. Roht-Arriaza, & J. Mariezcurrena, (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: Cambridge University Press, 2006); B.A. Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30.1 (2008), 95-118; and R.G. Teitel, "Transitional Justice Genealogy," *Harv. Hum. Rts. J.* 16 (2003), 69.

³³⁵ D. Mendeloff, "Truth-seeking, Truth-telling, and Post-conflict Peace-building: Curb the Enthusiasm?" *International Studies Review* 6.3 (2004), 355-380.

how Canadians learn about these injustices is as important as learning truths about what happened.³³⁶

In *Unsettling the Settler*,³³⁷ Paulette Regan writes that Canada might learn something about using truth and reconciliation commissions through looking at other nations such as South Africa and Peru. For example, insofar as commissions are a structure of western legal regimes and not Indigenous ones, the process will inherently hold western values. That stated, the TRC worked to ensure the hearings were structured around Indigenous understandings of truth-telling. There is a lesson for the Tribunal here in both expanding a mandate to its fullest and working within an existing legal model – such as a truth and reconciliation commission – to find a way out of the status quo and address systemic problems, even with the process itself.

3.3 Human Rights, Indigenous Rights and Equality: Strategic Choices

3.3.1 Individuals & the Collective

The Complaint was brought within Canada's human rights regime and provides opportunity for the Tribunal to consider Indigenous laws when creating systemic remedies. If the Tribunal wants to narrow the socio-economic gap, it should ensure space for and rely on Indigenous means of protecting children. Within the sphere of universal human rights, emphasis is on the western concept of rule of law and the assertion of equality between individuals³³⁸ versus the collective rights of Indigenous Peoples,

³³⁶ P. Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada*, (Vancouver: UBC Press, 2010).

³³⁷ *Ibid.*

³³⁸ D. Ivison, P. Patton and W. Sanders, *Political Theory and the Rights of Indigenous Peoples*, (Cambridge: Cambridge University Press, 2000), at 2.

including their potential right to be governed by Indigenous legal orders.³³⁹ Individual rights hold promise for the individual when used as a political maneuver against state action. In *Taking Rights Seriously*, Dworkin argues, individuals “have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury.”³⁴⁰

Individual rights apply to and are useful for Indigenous people, but must not always subordinate collective rights, in particular the group “right to cultural protection”.³⁴¹ The tension between the individual and collective rights of Indigenous Peoples can be seen in the context of Indigenous laws addressing child welfare protection.

3.3.2 Finding Space for Indigenous Laws in Seeking to Remedy Loss

As we shall see, the intergenerational complexities attributed to Indian Residential Schools contribute significantly to the Complaint being about more than just discrimination in funding. The impacts of such a vicious act of taking children damaged families, communities and the entire country. Taking a child is not just about the child. Elder Robert Joseph³⁴² testified before the Tribunal in the Complaint to explain the

³³⁹ R.N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights," *Ariz. L. Rev.* 32 (1990), 739; R. A. Williams Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *Duke Law Journal* (1990), 660-704; R. L. Barsh, "Indigenous peoples in the 1990s: From Object to Subject of International Law," *Harvard Human Rights Journal*, 7 (1994), 33.

³⁴⁰ R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

³⁴¹ K. Engle, "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999," *Human Rights Quarterly* 23, No. 3 (2001), 536-559, at 541; see also S. Speed, "At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research," *American Anthropologist* 108, No. 1 (2006), 66-76.

³⁴² Elder Robert Joseph testified on behalf of the Complainants. Elder Joseph is an hereditary Chief of the Gwa wenuk First Nation and attended residential school in Alert Bay, off the coast of Vancouver Island. He shares his knowledge and wisdom in the Big House and as a Language Speaker with the University of British Columbia, an internationally recognized art curator and as co-author of "Down from the Shimmering Sky: Masks of the Northwest Coast." In, he received an Honorary Doctorate of Law Degree from the University of British Columbia for his

importance of children and the collective among his people, the Kwakwaka'wakw, by describing the *Heiltsu gula* – the “Enough Time Has Passed” ceremony.³⁴³ When a child is born to the Kwakwaka'wakw, they are thought to be deciding whether to stay in the mortal world or return to the spirit world.³⁴⁴ This hovering takes some time. The Kwakwaka'wakw tempt the newborns to stay by showering them with love.³⁴⁵ Should a child remain after ten months, the *Heiltsu gula* is performed.³⁴⁶ It is a colossal event at which the entire village and many guests attend to acknowledge the child's permanence. Held in a *Gukwdzi* (“Bighouse”), the ceremony illustrates the sacredness of the family's bond to the child and is a transformative moment in a child's life. Before witnesses the family affirms they will do all they can to ensure the child will live a good life, be cared for and kept safe.³⁴⁷

During the *Heiltsu gula*, women step forward declaring their commitment to mentor the child in the meaning of life among the people, and most importantly show the child what love means.³⁴⁸ The Keepers of the Chants sing, drawing in the people's ancestors and creating sanctuary in the *Gukwdzi*.³⁴⁹ A speaker rises conveying of the

distinguished achievements in serving BC and Canada. In 2014, he received the Jack P. Blaney Award for Dialogue from Simon Fraser University and an Honorary Doctorate of Divinity from Vancouver School of Theology for his work in reconciliation and renewing relationships between Aboriginal peoples and all Canadians.

<http://reconciliationcanada.ca/chief-dr-robert-joseph/>

³⁴³ Complaint, Elder Joseph Transcripts, page 14-15, Volume 42.

³⁴⁴ I was struck by the similarity of the *Heiltsu gula* and what I have come to understand through my own teachers, such as Elder Vern Harper, of Cree culture when we wait until a child is around two before they are given their first strawberries. For the Cree this is about the age when enough time has passed and we know a child has chosen to stay among us. Grandparents and parents sit on a blanket with a basket of berries. They call to the child and when the child arrives on the blanket they are hugged and fed berries while their name is whispered to them for the first time; thanks is given and songs are sung to them for choosing to stay. It is understood that the child's first taste of sweetness will then be associated with their name and family; that the berries connect and bind these elements all together so that throughout the child's life she or he knows they are loved and cared for. This is conducted in front of witnesses who by attendance show the child they too are here to help. In this way, the *Heiltsu gula* is representative of the ceremonies held by First Nations throughout Canada that speak to and demonstrate the value placed on children and the importance of the collective roles, rights and responsibilities.

³⁴⁵ Elder Joseph, *supra*, at note 343, 14.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, 14-15.

³⁴⁸ *Ibid.*, 17.

³⁴⁹ *Ibid.*, 17-18.

importance of the gathering.³⁵⁰ Parents step out from behind a screen (a metaphorical barrier between spirit and mortal worlds), cradling their child and leading extended family into the *Gukwdzi*.³⁵¹ Medicine people follow with an abalone shell containing sacred medicine purifying the *Gukwdzi* and all those within.³⁵² A matriarch snips a locket of hair from the child and sings it in the shell with the medicines further signifying the sacredness of children.³⁵³

Nearing the end of the *Heiltsu gula* a vase is filled with, *kwa-lasta* (“life-giving water”), in which women bathe the child.³⁵⁴ Okra is smudged to on the faces of the child and all those inside the *Gukwdzi* as an invitation to become part of the child’s life, thereby marking the beginning of the responsibilities of the many helpers, guardians and mentors who have committed to care and provide for the child throughout his or her life.³⁵⁵ Armlets and wristlets are placed on the child signifying protection from harm.³⁵⁶ Young men step forward and offer mentorship, committing to remain part of the child’s life forever.³⁵⁷ Songs are sung.³⁵⁸ The child and all of the people are bound.³⁵⁹ The *Heiltsu gula* is complete.³⁶⁰ All this care is taken, all of this thoughtfulness considered, all this participation is necessary for the singular purpose of binding the child to family; to people; to place. The *Heiltsu gula* is reflective of the Kwakwaka’wakw’s beliefs that children are central to the universe.³⁶¹

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, 15.

³⁵⁵ *Ibid.*, 18.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*, 19.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*, 16.

Placing the *Heiltsu gula* in juxtaposition with the experience of residential schooling, wherein children underwent an immediate, violent and brutal transition from being at the centre of the universe, to non-entities where they no longer carried a name but were assigned numbers.³⁶² Children were not valued for who they were, but rather were brutally transformed towards a colonialist end.³⁶³ First Nation children were stolen and “one of the greatest tragedies...was that the children never experienced love; [it] was simply absent in their lives for a long time.”³⁶⁴ The children and grandchildren of Residential School students are now finding their way into foster care in ever increasing numbers. As we have seen with the *Indian Act*, the policy of removing children to Indian Residential Schools was not the only racist and discriminatory act by Canada against Indigenous Peoples. The Indian Residential Schools policy stole children, broke families; and attacked Indigenous languages, cultures and legal orders that if left undisturbed created binding agreements among families and communities, compacts and lawful relationships.

Elder Joseph’s testimony stands as evidence to what might be restored if the Tribunal’s remedies also seek to address the very system that allowed for the Kwakwaka’wakw’s children, among other Indigenous Peoples’, to be taken in the first instance. On a more systemic level, an order might be considered that provides sustainable funding for Indigenous communities to give effect to child welfare laws such as those found within the *Heiltsu gula* ceremony. Restoring the health and socio-economic status of communities leads to healthier more functional homes and families. Stronger communities and families mean fewer children in child welfare.

³⁶² B. Sellars *They Called Me Number One*, (Vancouver: Talonbooks, 2012).

³⁶³ *Ibid*, 35.

³⁶⁴ *Ibid*, 16.

3.4 What is at Stake in this Complaint?

3.4.1 Addressing Intergenerational Trauma

As set out earlier, the Complaint appears to be a matter of discrimination in relation to the provision of a federal service – the provision of child welfare funding – but it is also about the ugly colonialism in Canada’s past and present. Indian Residential Schools set in motion a cycle of trauma that Indigenous Peoples in Canada continue to experience,³⁶⁵ insofar as it set out to “cut the artery of culture”³⁶⁶ of Indigenous Peoples. Indeed, the legal and archival records demonstrate a traumatic alteration of community and family bonds for Indigenous Peoples.³⁶⁷ Overtime the Schools were highly successful at loosening the bonds between parent and child; extended family; community; people; and place.³⁶⁸ This untying translated into loss of Indigenous languages, teachings and learning of Indigenous legal orders,³⁶⁹ as well as a legacy of alcohol and drug abuse problems, depression, dependency, isolation, suicide, homelessness, sexual abuse and violence.³⁷⁰

The trauma experienced by First Nation children in the Indian Residential Schools has led to elevated incidents of depression and suicide, which has been transmitted down

³⁶⁵ S. Fournier and E. Crey, *Stolen From Our Embrace: the Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Toronto: Douglas and McIntyre, 1997).

³⁶⁶ Testimony of Dr. John Milloy, Transcript Volume 35 at pp 175-177; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl., 3rd Sess., No. 56 (February 8, 2011) at page 2, (Mary Polak, Minister of Children and Family Development, Governments of British Columbia).

³⁶⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission of Aboriginal Peoples*, in *Looking Forward, Looking Back*, Vol.1 (Ottawa: Government of Canada, 1996).

³⁶⁸ P.J. Morrissette, “The Holocaust of First Nation People: Residual Effects on Parenting and Treatment Implications,” *Contemporary Family Therapy* 16(5), 381-392.

³⁶⁹ B. Elias, J. Mignone, M. Hall, S. P. Hong, L. Hart, & J. Sareen, “Trauma and Suicide Behaviour Histories Among a Canadian Indigenous Population: An Empirical Exploration of the Potential Role of Canada's Residential School System,” *Social Science & Medicine*, 74(10), (2012) 1560-1569.

³⁷⁰ *Ibid*, at 1561.

to subsequent generations of Indigenous Peoples who had at least one parent attend an Indian Residential School.³⁷¹ By preventing First Nation children from being raised within families who once made lifelong commitments to a child, such as we have seen in the *Heiltsu gula*, and substituting a foreign institution, former students had limited exposure to parental modeling and when they became parents themselves repeatedly struggled.³⁷² Subsequently, unstable households with lower levels of education for both the former students and their children are often the results.³⁷³ This cycle continues today in that there is a persistent white supremacist presumption that First Nations people are naturally bad parents³⁷⁴ – rather than people struggling with Canadian government sponsored infliction of severe pain – leading their children to be taken into foster care.³⁷⁵ The effects of Indian Residential Schools are long-term. Indigenous Peoples “with greater childhood adversity were at greater risk for intimate partner violence, both being a victim and perpetrating intimate partner violence.”³⁷⁶ Further, such childhood trauma is also associated with impaired worker performance so that those with higher childhood trauma have more missed days at work and lower performance, which in turn leads to socioeconomic challenges.³⁷⁷ In addition to depression, perception of discrimination by former students and their families is a further stressor that can re-traumatize or trigger episodes of violence, depression or encourage substance abuse.³⁷⁸ These elements

³⁷¹ A. Bombay, K. Matheson, and H. Anisman, "The Impact of Stressors on Second Generation Indian Residential School Survivors," *Transcultural Psychiatry* 48.4, (2011) 367-391, at 380.

³⁷² P.J. Morrisette [Holocaust], *supra*, note 368.

³⁷³ E. Bougie and S. Senecal, "Registered Indian Children's School Success and Intergenerational Effects of Residential Schooling in Canada," *The International Indigenous Policy Journal* 1.1 (2010), 5 – 43, at 7.

³⁷⁴ M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women," *Queen's LJ* 18 (1993), 306; J.S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986*. Vol. 11. (Winnipeg: University of Manitoba Press) 1999. Dr. Milloy was an expert witness in the Complaint, testifying on behalf of the Complainants.

³⁷⁵ Bombay, *supra*, note 371.

³⁷⁶ Testimony of Dr. Amy Bombay, Transcript, Volume 40 at pages 103-105.

³⁷⁷ *Ibid*, pages 105-107.

³⁷⁸ Bombay [2011], *supra*, note 371, at 370.

collude to a long-term, devastating impact on Indigenous families and communities who suffer from higher levels of mental and physical health complications well into adulthood and transmit the challenges onto the next generation. These same traumas are seen today in First Nation children in care.³⁷⁹

Something has got to give if Canada is going to be a safer place for Indigenous women to live and for children to be raised by their own families – not the state. We know what that legacy looks like. That stated, a considerable dose of skepticism remains on the part of many Indigenous Peoples when it comes to Canada’s ability to pivot on its colonial past and set a course for a more conciliatory future.³⁸⁰ Might room be made for Indigenous legal orders in relation to children and family structures? If one of the major contributing factors to large numbers of First Nation children in care relates to Canada’s imposition of its laws without regard for Indigenous legal orders, such as those found within the *Heiltsu gula*, is the Tribunal able to construct remedies that makes room for such laws? Can the Tribunal create systemic remedies that allows for Indigenous Peoples to reestablish their own child welfare services without Canada’s further interventions? Reasonable doubt remains given the ongoing penchant for decision-making within Canada’s legal system that supports the status quo.

3.4.2 Precedent Setting

The Complaint is the first of many waiting to proceed through the system and is “a major test of the extent to which Indigenous Peoples living on reserves can use the

³⁷⁹ See: Fournier, *supra*, at note 365; A. K. Matheson, and H. Anisman "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma," *Transcultural Psychiatry* 51.3 (2014), 320-338, at 333; K. Czyzewski, "Colonialism as a Broader Social Determinant of Health," *The International Indigenous Policy Journal* 2.1 (2011), 5; N. Trocmé, D. Knoke, and C. Blackstock "Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child Welfare System," *Social Service Review* 78.4 (2004), 577-600.

³⁸⁰ Coulthard, *supra*, note 11.

Canadian Human Rights Act to bring about real, tangible change in their communities”;³⁸¹ thereby escalating the significance of the ultimate decision of the Tribunal and the outcome of an inevitable judicial review by the Courts. As discussed, there is a lot at stake and the issues are complicated. The number of complaints is rising and long-outstanding issues – such as underfunded on-reserve education, access to safe drinking water, and a right to housing – all await their turn to be heard.³⁸² The number of waiting complaints and the continued widening of the socio-economic gap centrally places the Tribunal as an agent of change making its approach to systemic orders all the more considerable.

3.5 Some Conclusions

In this chapter, I have tried to describe the difficulties of bringing a challenge, which at its height, aims at decolonization, through a structure imposed and governed by the rules and traditions of the colonial state. I described the Complaint and the road it travelled from the Tribunal in the first instance to judicial review and appeal, as well as Canada’s retaliatory conduct against Dr. Blackstock for bringing the Complaint. I have highlighted Canada’s vigorous effort to prevent a hearing on the merits and the reversal of the Tribunal’s dismissal by the courts. I have considered the ways in which the Tribunal process itself exists in conflict with many Indigenous traditions with respect to truth telling and adjudication, before turning to concerns about the clash of individually based human rights under the *CHRA* and the collective rights of Indigenous Peoples, such as those in UNDRIP. Finally, I have attempted to illustrate the reasons that Indigenous

³⁸¹ *Ibid.*

³⁸² *Annual Reports, supra*, note 268.

Peoples should accept the risks and contradictions inherent in the bringing of this complaint, in this venue. I have also set out that room should be made for Indigenous legal orders, which structure the coexistence of collective and individuals differently from the mainstream and includes how child welfare could be reestablished based on the collective responsibilities of a community.

Consider fundamentally that when Indigenous Peoples are able to “gain influence over the central institutions in their communities – the schools, the justice system, the child welfare system – Indian and Métis people have already demonstrated that they can repair the damage caused by centuries of racism and neglect.”³⁸³ No system or idea is perfect. But Canada’s continued violence against Indigenous Peoples and their children is the incredibly damaging and colonialism a fundamentally flawed and violent system. Though Indigenous Peoples’ own legal orders may also not be perfect they were created by and for Indigenous Peoples while Canada’s master narrative continues to leave deep scars on Indigenous Peoples.

That Grandfather of Gwayakwaadiziwin can be difficult. Sometimes Gwayakwaadiziwin means good people might feel uncomfortable but discomfort does not make good people bad. Contrarily, it makes good people better. Gwayakwaadiziwin may bring the Tribunal around to constructing meaningful systemic remedies if there are first admissions and acceptance that the Tribunal’s structure is part of a colonialist root that thrives on maintaining the status quo in relation to the socio-economic gap between Indigenous and non-Indigenous Canadians.

The story of Wesukechak and Sihkooseu instructs us on many elements relating to Gwayakwaadiziwin. Not a single character in the story is honest. Everyone seeks

³⁸³ G. York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester and Opren Dennys, 1989).

personal enrichment by either keeping secrets or telling them. In the same way Wesukechak tries to win a contest through deception for his own cause, so too does Canada perpetuate a colonial narrative that is simply untrue in order to maintain control of lands and resources. Colonialist assumptions about culture and race allow the country to sustain the great lie that Indigenous Peoples are in need of civilization; thereby justifying continued state-sanctioned removal of children from families and communities, which is then underfunded – just like Indian Residential Schools.

Does Spider’s decision to spy for his friend echo the retaliation portion of the complaint brought against Canada for spying on Dr. Blackstock as a means to discredit the complaint itself? Ultimately the retaliation complaint was substantiated and like Spider brought about some trouble for Canada – though the Tribunal sought only to sanction with a penalty of fines not remedies that might address the systemic nature of a structure that allows for such spying in the first instance. But Spider’s espionage also calls into question the use of power and police services that do favours for friends.³⁸⁴

Does not the former Prime Minister’s apology for the era of residential schools (and the school programs themselves); Canada’s refusal to entrench UNDRIP into Canada’s laws; a lack of national outrage at the numbers of murder and missing women; and the country’s ongoing failure to address the gap between the quality of life of Indigenous and non-Indigenous Peoples in Canada all conspire – like Sihkooseu and Spider – to claim a prize unfairly won through trickery and deceit? The apology certainly speaks to the deceit of Canada saying sorry while simultaneously continuing policies that perpetuate harm.

The story also reminds us of the importance of being able to choose for ones’ self. We might then find that Indigenous communities should be left to choose the most effective

³⁸⁴ See Bill C-51, the so-called *Anti-terrorism Act, 2015*, for another parallel of using friends to spy.

child welfare services for themselves. Perhaps the Tribunal, like the Chief, will get angry enough to declare all bets are off when it comes to the wholesale of First Nation children. Maybe then the Tribunal will find that current levels of funding for First Nation children in care, along with a lack of accessible culturally-relevant child welfare and family services, is discriminatory. Maybe the Tribunal will see the Complaint is part of a larger narrative meant to maintain the vast socio-economic gap. Perhaps the Tribunal, like the Chief, will be so affronted at the trickery that it too will declare Indigenous Peoples free to choose for themselves how to best care for and protect the community's own children; how to structure family; how to bind children to family; people; and place.

Enough time has passed.

**CHAPTER 4 – AAKODE’EWIN (BRAVERY):
DISCRIMINATION & REMEDY CONSIDERATIONS**

*Coyote & Old Woman of the Sea*³⁸⁵

In the time when the animals were preparing for the people to come there was an Old Woman who came from the ocean. Her long hair was made of kelp and her face and body shifted and moved as though made from water. Her cloak was made of dead fish and fastened together with crab claws. All of the animals were frightened of her for too many times she had unleashed her cruel streak upon them, taking baby birds who hopped too close to the waves, pulling down little seals into the murky depths, slipping her hair around small fish and squeezing them tight.

One day, Coyote found himself padding along a soft sandy beach and came upon a long line of animals meandering this way and that. He approached his brother, Bear, and asked what was happening. Bear said none of the animals wanted to stand in line but the Old Woman held them in place with her power. Curious, Coyote trotted to the front and watched as the Old Woman tied the animals one by one onto a cradleboard and threw them out into the sea shouting they must go forever. After some time the board would float back with nothing but a few bones on it.

Coyote was horrified. He desperately wanted to run away.

But did not want to leave the other animals to their fate and he knew when the people came they would not be able to live long with such a mean being. So he began to pace back and forth, back and forth (as Coyotes often do), while he used one of his gifts

³⁸⁵ For more of this story, see S. Strauss, *Coyote Stories for Children*, (Hillsboro: Beyond Words Publishing, 1991), at 13 – 20.

from the Creator, imagination. You see, in another time, in an earlier story when Coyote got his name, the Creator gifted Coyote with both imagination and the power to return to life. After pacing for a while, Coyote hatched a plan.

He ran to the head of the line and stood in front of everyone else where he employed another of his skills – bragging. Coyote very loudly told the Old Woman that anyone can go out to sea on a board and return alive. It was easy, he said. He said that if he can do it so could the Old Woman. Well, the Old Woman was very proud and would not be bested by Coyote so she agreed to Coyote’s dare.

The Old Woman strapped Coyote to the board and sent him out. All of the animals in line knew that this was their only chance to live so they raised up their voices together and shouted for Coyote to come back. Then they waited.

They waited some more. There was no sight of Coyote or the board, only foamy waves crashing on the shore.

After more time passed, the animals started to laugh. Coyote had used his power to return to life and came surfing back to shore on the cradleboard. The Old Woman was tied to the board, thrown out to sea and all of the animals shouted for her to never come back and she never did.

Grass Dancers³⁸⁶

At a powwow,³⁸⁷ there are always dancers.³⁸⁸ Dressed in full regalia³⁸⁹ and moving in large numbers, it is a spectacular sight that is unparalleled. The order in which

³⁸⁶ Vern Harper, Cree Elder as well as John Snake, Rama First Nation member and Culture Coordinator (teacher and friend), have shared with me a number of teachings over the years relating to many subjects, including powwow songs and dancing, which is how I have to come to understand the role of the grass dancer as I have set it out.

³⁸⁷ For a more in-depth discussion on the history and structure of powwows see T. Browner, *Heartbeat of the People: Music and Dance of the Northern Pow-wow*. University of Illinois Press, 2004; O.T. Hatton, "In the Tradition: Grass Dance Musical Style and Female Pow-wow Singers," *Ethnomusicology* (1986), 197-222; O.T. Hatton, O. Thomas. "Performance Practices of Northern Plains Powwow Singing Groups," *Anuario Interamericano de Investigacion*

the various styles of dancers enter the powwow ring is always the same. The men who grass dance come in first. Why? Settlers sometimes perceive this as sexist. This reaction is indicative of cultural arrogance and a continued unwillingness to consider the possibility that Indigenous cultures, laws and practices may actually offer a positive contribution to Canadian society.

Returning to our powwow, closer observation of the movements of grass dancers' feet reveals they are at once certain and light – like those of a good hunter who is able to move silently. The colourful ribbons and yarn on their regalia is reflective of many kinds of grasses that fill forests, fields and meadows. As the men dance, the regalia moves in a way that mimics blowing grasses. The role of the grass dancer is essential – like that of a worthy diplomat – to coax the grasses into lying down, in order for the people to come together. These dancers are asked move sure footedly but gently so that the grass beneath their feet bends but does not break. In this way, when the powwow is over, when all of the dances have been danced, when the sounds of the drum have faded, when the songs have been sung, when the gathering dwindles and the people leave, the grasses will stretch themselves awake again. Grass dancers are sent in first because they make room for the rest to follow.

Musical (1974), 123-137; M. Mattern, "The Powwow as a Public Arena for Negotiating Unity and Diversity in American Indian Life," *American Indian Culture and Research Journal* 20.4 (1996), 183-201.

³⁸⁸ For more on powwow dancers see, R. DesJarlait, "The Contest Powwow Versus the Traditional Powwow and the Role of the Native American Community," *Wicazo Sa Review* (1997), 115-127.

³⁸⁹ Browner, *supra*, note 378.

4.1 Overview

Like numbers and law, remedies matter.³⁹⁰ In this Chapter I argue that when it comes to crafting remedies intended to close the socio-economic gap between Indigenous and non-Indigenous Canadians the complications multiply. The purpose of remedies in relation to human rights is multifold – punitive, compensatory, deterrent, restorative –³⁹¹ and may take both monetary and non-monetary forms.³⁹² In this Chapter I will argue that proper and well-considered remedies in the Complaint would embrace both reparation for the alleged discrimination at issue and systemic measures intended to preclude and minimize future discrimination.³⁹³ I argue here that remedies should include respect for and engagement with Indigenous legal orders, such as those found in the *Heitsl gula* for example, will not necessarily eliminate all of the problems associated with the current child welfare crisis. They could, however, at least begin to alter the power imbalance that sees Indigenous Peoples’ children taken away from families already broken from the Indian Residential School legacy. This Chapter explores the premise that not only should remedies address the Complaint but also the very system that allowed the Complaint to arise. How might the Human Rights Tribunal make room in the construction of systemic remedies in the Complaint for Indigenous Peoples and their laws?

³⁹⁰ K. Roach and R. Sharpe, Remedies for Discriminatory Profiling (2009), CIAJ 2009 Annual Conference, Taking Remedies Seriously, 392.

³⁹¹ C. Cunneen, "Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights," *Restorative Justice and Civil Society* (2001), 83-98; M. Gibbs, "Using Restorative Justice to Resolve Historical Injustices of Indigenous Peoples," *Contemporary Justice Review* 12.1 (2009), 45-57.

³⁹² Roach and Sharpe, *supra*, note 390, at 393.

³⁹³ *Ibid.*

4.2 Human Rights: A Universal Idea?

4.2.1 Individual vs. Collective forms of Rights

Over the past century or so, the turn to individual rights in Western law has been profound,³⁹⁴ such as the development of a vast body of common law; the *Charter of Rights and Freedoms*;³⁹⁵ the *Canadian Human Rights Act*;³⁹⁶ the *Employment Equity Act*;³⁹⁷ the *Canada Labour Code*;³⁹⁸ and the like, supporting individual rights with a human rights emphasis.³⁹⁹ The focus on individual rights has gone along with very little attention to Indigenous Peoples, let alone indigenous legal cultures.⁴⁰⁰ But what happens when individual rights clash with cultures sharing the same space, cultures that may place *collective* conceptions of rights at the center of their legal orders?

³⁹⁴ R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978). Among other things, Dworkin asserts a functionalist account of rights that essentially holds the distinctive element about rights generally is that they function as a trump card when played against collective values, goals and ideals. As such, rights are carried by the individual so as to distinguish them from collective rights as per Y. Dinstein, "Collective Human Rights of Peoples and Minorities," *International and Comparative Law Quarterly*, 25(01), (1976) 102-120.

³⁹⁵ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁹⁶ *Canadian Human Rights Act*, R.S.C. 1985, c H-6.

³⁹⁷ *Employment Equity Act*, S.C 1995, c 44.

³⁹⁸ *Canada Labour Code*, R.S.C. 1985, c L-2.

³⁹⁹ J. L. Coleman contends in *The Practice of Principle*, (Oxford: Oxford University Press, 2001), that from a legal positivist's perspective the only rights that exist are those that are enforceable and exist by virtue of legislation, common law, etc. That stated, there is a spectrum among legal positivists that allows on one end 'inclusive legal positivists' for morality to be a condition of legality while on the other end, J. Raz, in "Legal Positivism and the Sources of Law," *Arguing About Law* (2013), 117, posits 'exclusive legal positivists' offer no allowance for morality in law. In my view, whether a positivist (exclusive or inclusive, Dworkinian, natural lawyers, etc.), all accept the foundational tenant that law is based on individual rights and argue among themselves as to how such matters should be determined.

⁴⁰⁰ *R. v. Willocks* (1995), 22 O.R. (3d) 552 (S.C.J.) alleged a provincially funded criminal diversion program aimed specifically at Aboriginal offenders contravened s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*; *Campbell v. British Columbia (A.G.)* 2000 BCSC 1123, 189 D.L.R. (4th) 333 (B.C.S.C.) (*Campbell*), challenged the constitutional validity of the Nisga'a Treaty; *R v. Huovinen*, 2000 BCCA 427, 188 D.L.R. (4th) 28, challenged preferential access to the fishery afforded to holders of Aboriginal community fishing licenses under the British Columbia Fishery Regulations; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 claimed that Aboriginal community fishing licenses infringe s. 15 of the *Charter*; *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708, 108 O.R. (3d) 647, leave to appeal granted 2012 ONSC 2323, 112 O.R. (3d) 782 (Div. Ct.), appeal dismissed as moot 2013 ONSC 632 (Div. Ct.), challenged provincial delegation to mining company of procedural aspects of duty to consult; *Moulton Contracting Ltd. v. British Columbia*, 2013 BSCS 2348 (*Moulton*), rev'd 2015 BCCA 89 (*Moulton* (C.A.)), a corporation claimed damages against Crown for failure to fulfill duty to consult defendant First Nation and for failure to warn of possible blockade, where the Crown ultimately provided a settlement payment to the private corporation for damages while paying nothing to the Aboriginal families whose livelihood was disrupted as a result of Moulton's harvesting activities.

4.2.2 Human Rights & Cultural Contentions

In his article, “The Attack on Human Rights”,⁴⁰¹ Michael Ignatieff argues there are three archetypes at issue in the ongoing human rights/cultural contention, namely: Islam, East Asia and the West itself.⁴⁰² Ignatieff posits universality of human rights discourse in the West relies on the separation of church and state, which denotes a sovereign, independent individual in opposition to Islam’s structure.⁴⁰³ The “Asia model” (as Ignatieff refers to it), challenges the idea of universal human rights insofar as the region’s relative economic success allows for the assertion that community and family rank ahead of individual rights, democracy and individual freedoms.⁴⁰⁴ Finally, within the West itself, Ignatieff suggests human rights are often seen as a Western construct of limited applicability.⁴⁰⁵

Ignatieff primarily focuses his analysis on states. As such, an Indigenous model is not contemplated. Though the state analysis provides a high level view it forecloses possibilities of Indigenous contributions to human rights discussions insofar as the West too often considers Indigenous Peoples conquered. This may be evidence human rights are “a Western construct of limited applicability”⁴⁰⁶ by perpetuating the colonialist master narrative and sets up a framework where Indigenous Peoples engage in human rights discourse against the state and less so within their own nations. This may be why increasingly Indigenous Peoples are embracing a worldwide expansion of a “human

⁴⁰¹ M. Ignatieff, "The Attack on Human Rights," *Foreign Affairs – New York*, 80.6 (2001), 102-116.

⁴⁰² *Ibid*, 102.

⁴⁰³ *Ibid*, 104, at which Ignatieff sets out part of the tension between Islam and the West in a human rights discourse is that too often the West makes a faulty assumption that “fundamentalism and Islam as synonymous” thereby fundamentally misunderstanding the issues from the outset and failing to make room for cultural difference, let alone nuance. Similarly, the West often makes sweeping assumptions relating to Indigenous Peoples, such as all Indigenous Peoples are the same.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ A. Pollis, P. Schwab, and N. Eltringham, *Human Rights: A Western Construct with Limited Applicability* (Chicago: University of Chicago Press, 1980).

⁴⁰⁶ *Ibid*.

rights culture⁴⁰⁷ and are arguing for rights ranging from property rights,⁴⁰⁸ customary land tenure⁴⁰⁹ to water rights⁴¹⁰ with some success while diverting less attention to a human rights discourse within Indigenous cultures – though such undertakings may also be useful to resolving disputes within Indigenous cultures. Might Ignatieff's non-inclusion of Indigenous Peoples as an influence in human rights be reflective of my earlier concerns that the system itself is not capable of seeing its own role in ongoing colonization and continues to find ways to construct and absence of Indigenous legal orders in spite of evidence Indigenous Peoples globally are entering into the human rights arena?

Ignatieff – working with the views of Adamantia Pollis and Peter Schwab – describes the idea of human rights as a “twentieth-century fiction dependent on the rights traditions of the United States, the United Kingdom and France and therefore inapplicable in cultures that do not share this historical matrix of liberal individualism.”

⁴¹¹ This idea finds grounding in the theory of cultural normative relativism⁴¹² most

⁴⁰⁷ H. Stacey, “Relational Sovereignty,” 55 *Stan. L. Rev.* (2003), at 2029.

⁴⁰⁸ *Mayagna (Sumo) Awa Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001), ruled that under Article 21 of the American Convention on Human Rights, Nicaragua has an obligation to protect property rights of Indigenous Peoples. For a discussion on how the limits of human rights regimes may complicate and irritate Indigenous Peoples' experiences endemic to colonization even after success in international human rights forums, see J. Bryan, “Dilemmas of Indigenous Land in Awas Tingni v. Nicaragua,” *Anthropology News*, (Sept. 2006), at 22.

⁴⁰⁹ *Aurelio Cal v. Belize, Supreme Court of Belize* (Claims No. 171 and 172, Oct 18, 2007), held in favour of Indigenous property rights based on customary land tenure and cited the UNDRIP.

⁴¹⁰ The Navajo were successful in lobbying to recognize water and subsistence rights as against federal and corporate interests. See: *Mission/Vision*, Navajo Nation Human Rights Commission, http://www.nnhrc.navajo-nsn.gov/mission_vision.html.

⁴¹¹ Ignatieff, *supra*, note 401, 104.

⁴¹² In relation to human rights, cultural normative relativism theory essentially holds that not all human rights are culturally relevant (widely-accepted), or cross-culturally based as set out above in Ignatieff's tri-model example. For more see: S. Lawson, "Democracy and the Problem of Cultural Relativism: Normative Issues for International Politics," *Global Society: Journal of Interdisciplinary International Relations* 12.2 (1998), 251-270; C.M. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-cultural Contexts," *Human Rights Quarterly* (1994), 740-752. There is also some scholarship offering nuance to the wording 'universal human rights' that seems to be the pivot point for critique of the universality of human right by setting out a distinction between substantive human rights – namely those rights held by all humans, such as a right to be born free – and conceptual human rights – such as a right to religious freedom – which may allow room for cultural differences. For more see: J Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29.2 (2007), 281-306.

versions of which become “practically unintelligible to Western philosophers,”⁴¹³ as they suggest:

What is right or good for one individual or society is not right or good for another, even if the situations involved are similar, meaning not merely that what is thought right or good by one is not thought right or good by another (this is just descriptive relativism over again), but what is really right or good in the one case is no so in another.⁴¹⁴

This is because “Western philosophers presume that the concept of morality makes no sense unless it is universally applicable.”⁴¹⁵ Such a presumption only assists in validating the position of critics that human rights is the West’s modern-day exercise of its imperial past and ongoing insatiable quest for dominance, power and control of the entire world.⁴¹⁶ In his analysis of the internal challenges to the notion of global human rights Ignatieff concludes that with a pluralistic world, changes are coming to human rights and that the main contribution human rights may make to historical human development is relegating the hierarchical ordering of civilizations and cultures into the past.⁴¹⁷

If Ignatieff is correct about the coming change, if Western law and philosophy is open to the richness and deeper nuance in the theory of cultural normative relativism perhaps we will be able to find our way to meaningful access to human rights and remedies for Indigenous Peoples. The coming ‘leveling out of cultures’ must include the Western mainstream recognizing its own status as a culture amongst others. This would also entail Canada’s recognition of the way white supremacy has influenced Canada’s responses to Indigenous Peoples, including the taking of Indigenous children into

⁴¹³ A.D. Renteln, *International Human Rights: Universalism versus Relativism* (New Orleans: Quid Pro Books, 2013), 72.

⁴¹⁴ W.K. Frankena, *Ethics (Foundations of Philosophy)*, (New Jersey: Prentice Hall, 1973), at 109.

⁴¹⁵ Renteln, *supra*, note 413, at 72.

⁴¹⁶ Ignatieff, *supra*, note 401, 105.

⁴¹⁷ *Ibid.*

Residential Schools and now child welfare. Perhaps these changes Ignatieff forecasts will make room in human rights discourse for the inclusion of other legal orders, such as those of Indigenous Peoples, and openly recognize that in Canada's situation (at least) the human rights regime continues to draw benefit from ongoing colonialism.

Operationally, this may look something like the powwow dance rings, in which the grass dancers are sent in first to coax the grasses into bending but not breaking. Relinquishing the premise that human rights are universal, allows room for other cultural values to enter the ring and produce something new, something neither entirely Western nor Islamic nor Asian nor Indigenous but something intersocietal.⁴¹⁸ Alternatively, failing to release a tight grip on the idea of universal human rights will continue to provide nourishment to critics who see human rights as the West's advancement of imperialism.

4.3 Human Rights & Indigenous Legal Orders

4.3.1 Value of Indigenous Laws in Systemic Remedies

*All victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively.*⁴¹⁹

Indigenous legal orders are too often neither understood nor included within the human rights sphere. Systemic remedies in the Complaint should address the systemic

⁴¹⁸ B. Slattery, "The Generative Structure of Aboriginal Rights," *Supreme Court Law Review* 38, 2d (2007), 595-628.

⁴¹⁹ *Review of Further Developments in Fields with which the Sub-Commission has Been Concerned: Study Concerning the Rights of Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report Submitted to Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 42d Session, at 1, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990), quoting from Sub-commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1988/11 (Sept. 1, 1988).

issues, such as the ongoing benefits derived by Canada through maintenance of the status quo, which denies room for Indigenous legal orders. To be effective systemic remedies should create space for the development and sustainable funding of culturally relevant and accessible child welfare services and cultural relevance is sourced in Indigenous laws. In Canadian law, it is a fundamental tenet that there cannot be a right without an adequate remedy.⁴²⁰ Recognizing and including Indigenous legal orders is both symbolic and of practical importance with respect to a more inclusive master narrative and a human rights regime that is reflective of Indigenous and non-Indigenous people. Without this inclusion, there is a practical failure of justice. Eliminating the socioeconomic gap between Indigenous and non-Indigenous people in Canada is not possible without including and relying upon Indigenous law – particularly as a means of crafting sufficient remedies. Part of the balance to be struck when constructing remedies is between seeking what is possible – or a well-worn path, such as on-line training modules for findings of workplace harassment – and crafting ambitious and pragmatic remedies.⁴²¹ Moving to the latter will be a significant challenge to the decision makers.⁴²²

The Complaint offers significant opportunity to effect change by drawing on Indigenous laws. The Tribunal’s enabling legislation creates a broad latitude to “make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order”⁴²³ a number of possible remedies as discussed further below.⁴²⁴ While the complaint uses a funding disparity to empirically illustrate the

⁴²⁰ Roach, *supra*, note 390, at 396.

⁴²¹ D. Kennedy, "International Human Rights Movement: Part of the Problem?" *Harvard Hum. Rts. J.* 15 (2002), 101.

⁴²² *Ibid.*

⁴²³ *CHRA*, s.53(2).

⁴²⁴ Section 53 of *CHRA* sets out the Tribunal’s general remedial powers:

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54 make an order against the person found to be engaging or to have

discrimination, the complainants are not singularly concerned with funding. They present a variety of arguments about systemic discrimination.⁴²⁵ The Complaint seeks to establish systemic discrimination and thereby call upon the Tribunal to craft systemic remedies.

4.3.2. The Call for Culturally-Relevant Child Welfare

On the assumption the Tribunal finds substantiation of the Complaint (assumed throughout this Chapter), remedies must take on the context of settler-colonialism - not merely rename it racism, or revert to blaming individual bad actors. Remedies should not seek a more efficient administration of colonialism – as happened in the aftermath of the Stonechild murder. Instead, systemic remedies should focus on ameliorating the lack of a culturally relevant First Nation child welfare system. This will require making room for

engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Section 54

No order that is made under subsection 53(2) may contain a term

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.

⁴²⁵ Closing Submissions, Assembly of First Nations, paras. 510-513.

Indigenous legal orders. It will also require creating access to and sustainability of funding for culturally relevant child welfare services. Culturally relevant child welfare services would actively take on the ongoing colonialism by creating space for Indigenous legal orders that have been denied.

4.4 Systemic Remedies for Systemic Problems

4.4.1 Considering Proactive Systemic Remedies

Systemic means “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.”⁴²⁶ The fact that effective remedies for systemic human rights violations will differ from traditional common law approaches to remedy has been recognized for decades in Canadian jurisprudence. In a complaint brought by Action Travail des femmes (*Action Travail*) 1987, the Canadian Human Rights Tribunal ruled Canadian National Railway Co. (CNR),⁴²⁷ had discriminated against women in its hiring practices for certain types of front line railway positions (so-called ‘blue-collar’ jobs), otherwise thought to be the work of men. As part of a comprehensive remedial order, the Tribunal required at least one-in-four new employees hired by CNR for ‘blue-collar’ positions be filled by a woman until the overall employment rate at CNR reached thirteen percent – the national percentage at the time of women working in equivalent jobs elsewhere. The Supreme Court of Canada unanimously upheld the Tribunal’s decision and therein its jurisdiction for ordering such remedies and reinstated the Tribunal’s original order.

⁴²⁶ *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.

⁴²⁷ *Ibid* at 1138.

As the *Action Travail* decision was making its way to toward the Supreme Court of Canada (and after the decision was released), the public debate largely focused on the desirability of various elements of affirmative action initiatives.⁴²⁸ The Court confirmed the Tribunal's remedial power to counter sexual discrimination by creating required standards based on comparative data (i.e. general employment rates for women working in blue-collar jobs). In the context of the Complaint, these proactive and systemic remedial powers offers the Tribunal a chance to initiate an effort to close the vast socio-economic gap.

4.4.2 Credible First Starts in Crafting Systemic Remedies

Canada has more than exceeded the Court's definition of 'systemic' when it comes to discrimination against Indigenous Peoples. The crafting of systemic remedies in response to the Complaint will also not be so comprehensive as to resolve all of the ongoing impacts of colonization but rather should lay the foundation for a good start. Considerations relating to the crafting of systemic remedies in the Complaint matters because – as I have noted earlier – there is a growing number of human rights complaints relating Indigenous Peoples, and remedies offered to this Complaint might be viewed like the TRC's Calls to Action. This is to say the systemic remedies arising from the Complaint may serve as a blueprint for approaching the myriad other complaints entangled in ongoing colonization. In contrast, a failure to offer effective, systemic remedies will only further risk diminishing the legitimacy of the Tribunal in the eyes of

⁴²⁸ S.P. Chotalia, "Sexual Harassment Laws in Canada," *International Journal of Discrimination and the Law* 7.1-4 (2005), 199-227; L.M.G. Clark, "Liberalism and the Living-Tree: Women, Equality, and the Charter," *Alta. L. Rev.* 28 (1989), 384; C. Agocs, "Affirmative Action, Canadian style: A Reconnaissance," *Canadian Public Policy/Analyse de Politiques* (1986), 148-162; D. Greschner, "Affirmative Action and the Charter of Rights and Freedoms," *Canadian Woman Studies* 6.4 (1985).

Indigenous Peoples, and would risk illustrating that the Tribunal is simply another organ of the colonial and oppressive state. Immediately requiring changes in the level of funding is one thing. Creating culturally appropriate child welfare, however, is another.

4.4.3 Partners in Solutions: Remedies & Process

Such a huge remedial task would have to start with a process in which Indigenous organizations and governments will be involved. The Tribunal may also draw upon the systemic remedies in *Hughes*.⁴²⁹ James Hughes requires the use of a wheelchair. His assigned polling station in a 2008 federal by-election was not accessible. The Tribunal found discrimination, and ordered individual damages but importantly, also found that Elections Canada had engaged in systemic discrimination against Canadians with disabilities. As a result, the Tribunal ordered direct consultation between persons with disabilities and Elections Canada.⁴³⁰ *Hughes* supports the premise that in recognition of systemic discrimination, remedies must include the direct involvement of the group discriminated against. Here the Tribunal's remedial order on consultation allowed the government to understand what they had done, what they missed and that the group involved were experts who were part of the solution, not the problem.

4.4.4 Consultation and Process as Elements of Effective Systemic Remedies

A process to really address systemic discrimination against Indigenous Peoples is a collective one and should include federal government representatives, the provinces and a wide-ranging representation of Indigenous Peoples. Here, in some ways, the Kelowna Accord is instructive though not new in its call for the inclusion of Indigenous Peoples in

⁴²⁹ *Hughes v. Elections Canada*, 2010 CHRT 4.

⁴³⁰ *Ibid*, at paras. 79-80.

the resolution of complicated problems. With respect to socio-economic issues, such as First Nation child welfare, Indigenous Peoples are part of the solution, not the problem. Indeed, in her 1984 Royal Commission Report, *Report of the Commission on Equality and Employment*, Justice Abella stated:

The central issues for native people are their exclusion from relevant decision-making, the fragmented and uncoordinated programming, the problem of uncoordinated policy approaches, the absence of federal/provincial/municipal coordination of service delivery systems, and the constant sense that they are forever subject to the discretion of people who do not understand their culture. ⁴³¹

Justice Abella highlights the typical relationship between Canada and Indigenous peoples, one in which the federal government tells First Nation governments what to do. In contrast, the approach adopted in the Kelowna Accord was different. A round-table process was created to promote dialogue and allow direct Canada-Indigenous engagement.⁴³² It involved 147 representatives at the round-tables, federal government, ten representatives from the provinces and the remaining participants were Indigenous, representing twenty-seven different Indigenous organizations⁴³³ Overall, in the more global Roundtable-to-Kelowna process, there were over a thousand participants. The vast majority were Indigenous but the group also included provincial Premiers and the then Prime Minister Paul Martin.⁴³⁴

The Tribunal cannot compel the Prime Minister let alone the Premiers to a table to solve the First Nations child welfare crisis. But if the Tribunal is as courageous as it once was when it compelled CNR to hire more women to numbers established by the Tribunal,

⁴³¹ Justice R. Abella, *Report of the Commission on Equality and Employment* (Ottawa: Minister of Supply and Services Canada, 1984), at 38.

⁴³² C. Alcantara and J. Nelles, "Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance," *Publius: The Journal of Federalism* 44.1 (2014), 183-204.

⁴³³ L. Patterson, *Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005* (Ottawa: Parliamentary Information and Research Service, 2006), at 2.

⁴³⁴ *Ibid*, at 2-5.

creating a process by which systemic discrimination against Indigenous Peoples and setting practical expectations is not outside the Tribunal's purview. The elements of Kelowna are what matters here – such as direct engagement with Indigenous Peoples, and engagement of the political will of the Crown, full participation of all key stake-holders and senior decision-makers with authority to make commitments. These could be replicated by the Tribunal vis-à-vis a systemic order. This model of direct engagement is the most effective way by which the socio-economic gap might be closed because it draws upon First Nation solutions with Canada's support – financial and political.

The Tribunal can start by ordering Canada to work with First Nations, including Indigenous child welfare agencies across the country, in open roundtable dialogues. To that end, like the Kelowna Accord, a roundtable allows for Indigenous representatives to “sit down on the same side of the table, as partners.”⁴³⁵ As partners, here is another place where room can be made for Indigenous legal orders relating to children and family. Not only does such a process hold potential for sustainable resolution to the First Nation child welfare crisis at the centre of the Complaint but also holds promise for systemic resolution by fundamentally altering the status quo and working toward reconciliation, founded on the principle of equality and mutual respect.⁴³⁶ Indeed, such an Order would be consistent with the Crown's constitutional duty to meaningfully consult and accommodate Indigenous Peoples,⁴³⁷ which is also included in all stages of high-level decision-making⁴³⁸ – such as at a round-table series with the appropriate representatives of Canada with the power to enter into agreements on First Nation child welfare and

⁴³⁵ Government of Canada, *Roundtable Report*, 19 April 2004, 28-34; *Canada-Aboriginal Peoples Roundtable and Sectoral Tables, 2004-2005*, http://www.aboriginalroundtable.ca/index_e.html.

⁴³⁶ *R. Van der Peet*, [1996] 2 SCR 507, para. 50; see also remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, Ottawa February 5, 2013 and Toronto, May 28, 2015.

⁴³⁷ *Beckman v. Little Salmon Carmacks First Nation*, [2010], SCR 103.

⁴³⁸ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010], SCR 650.

make change. Consultation has constitutional value for both Canada and Indigenous parties as already set out by the Court. These precedents should offer the Tribunal some comfort with respect to the inclusion of consultation as part of a systemic remedial order.

Right now, it seems like in the story of Coyote and the Old Woman of the Sea, Indigenous families are standing in a long meandering line and one by one they are being strapped onto a board and thrown away. A well-structured systemic remedy meant to address the gap is a strong step toward destroying the colonialist pattern of Canada knowing what is best for First Nation children. Now is the time for the Tribunal to be brave.

4.4.5 Individual versus Systemic Remedies

It is of course possible that the Tribunal will be tempted to offer individual and not systemic remedies. I argue below that *Moore*,⁴³⁹ where a claim was filed by a parent of an individual child seeking both individual and systemic remedies, can be distinguished from the circumstances of the complaint in at least three ways.

Jeffrey Moore had a number of complicated and severe learning disabilities that required intense remediation. He was originally being educated in public school, where his learning needs were met. When funding cuts meant these services could not be provided, Moore was advised to attend private school. He did. At this point, however, Moore's father filed a human rights complaint on Moore's behalf alleging discrimination based on his disabilities with respect to services otherwise available to the public. The British Columbia Human Rights Tribunal found both individual and systemic discrimination against students with severe learning disabilities. After wending its way

⁴³⁹ *Moore v. British Columbia (Education)*, 2012 SCR 61, [2012] 3 S.C.R. 360.

through the court system, the case was resolved when the Supreme Court of Canada unanimously found the public school system discriminated against Moore.

The Court reaffirmed that access to services must be meaningful.⁴⁴⁰ In *Moore*, that access was to education generally, not access to special needs services specifically.⁴⁴¹

In her reasons in *Moore*, Abella J. stated:

[t]he remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

In other words, though the Court found discrimination, it was individual not systemic, as the Tribunal initially found. In relation to the Complaint, discrimination is about access to child welfare generally. Moreover, to be meaningful in the wider context of the Complaint, which references the cultural destruction caused by Canada stealing children, it must be about access to culturally relevant child welfare.

The Caring Society's Complaint is also seeking a finding of systemic discrimination. Does *Moore* suggest a similar "direct" or "individual" approach to the discrimination in the Complaint? Does *Moore* support only a narrow finding of discrimination, and therefore a narrow scope of remedies? Is what I have been arguing for in terms of remedies precisely what Justice Abella suggests would be the role of a Royal Commission, not a Human Rights Tribunal? The answer to these questions is no.

⁴⁴⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 71, which was a decision relating to the accessibility and use of interpreters; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at 381-82, involving discrimination on the basis of mental disability.

⁴⁴¹ *Moore, supra*, note 439, paras. 28-30.

There is considerable evidence before the Tribunal in relation to the system-wide discrimination faced by First Nation children in care. Second, the Complaint is filed by the Caring Society on behalf of all First Nation children, compared to *Moore*, in which the complaint was filed by Jeffrey's father on his son's behalf. Third, though the Tribunal itself is not a Royal Commission, it may rely on the work of previous Royal Commissions in designing remedies. The Final Report of the Royal on Aboriginal People (RCAP) provides the very type of evidence referred to in *Moore*. In order to not offend *Moore*, the Tribunal must find systemic discrimination on the evidence placed before it by the parties. Further, it must focus on the issues as raised by the Complaint – namely systemic discrimination based on a long history of First Nation children on-reserves in care, which is how the Complaint has been structured. These elements considerably distinguish the Caring Society complaint from *Moore*.

In the same way that Coyote wanted to run from the terrifying situation he found himself in, he knew he could not leave the others there to suffer a horrible fate. The situation impacted everyone. The Old Woman of the Sea abused her power to the point of causing the fatal end of others. So, Coyote used his imagination to create a plan, one that overcame not only his own fear but brought the reign of widespread fear to an end. With such broad remedial powers, the Tribunal then, might use its imagination in creating remedies that brings the gap to an end and addresses the whole of the Caring Society's complaint.

4.5 Supervisory Orders for Recalcitrant Governments

The resolution of this Complaint is ripe for a supervisory order by which the Tribunal might remain seized of the matter to monitor Canada's good faith in working toward the closure of the socio-economic gap – at least insofar as it relates to First Nation child welfare. For twenty years and counting, *Doucet-Boudreau*⁴⁴² remains the leading decision in Canada with respect to supervisory orders and has been the subject of considerable controversy among legal scholars.⁴⁴³ Here the trial judge retained jurisdiction when he ordered the government of Nova Scotia to comply with the *Charter* and meet the deadlines to provide French language schools, which it had consistently failed to do. In particular, the trial judge required Nova Scotia to attend a series of hearings and report to the Court on its progress.

Ultimately, such systemic orders are useful when a party has “proven themselves unworthy of trust.”⁴⁴⁴ Similarly, regarding Crown conduct less than trustworthy in relation to Indigenous Peoples, the Supreme Court has stated on occasion, as recently as *Manitoba Métis Federation*, that honour of the Crown should be at the heart of its relationship with Indigenous Peoples.⁴⁴⁵ In *Doucet-Boudreau*, it was of particular importance that delay with respect to the provision of French language education, the French language and therefore the right to the French language in education and other

⁴⁴² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 [“*Doucet-Boudreau*”], allowing an appeal from the Nova Scotia Court of Appeal (2001), 203 D.L.R. (4th) 128 [“C.A. decision”] setting aside a decision of the Nova Scotia Supreme Court (2000), 185 N.S.R. (2d) 246 [“Trial decision”].

⁴⁴³ R. Dixon, (2009). “The Supreme Court of Canada, Charter Dialogue, and Deference,” *Osgoode Hall LJ*, 47, 235; K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

⁴⁴⁴ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 SCR 1120, para. 157. For more on the Charter and systemic equality remedies see: B. Cossman, and B. Ryder, “Customs Censorship and the Charter: The Little Sisters Case,” *Const. F.* 7 (1995): 103.

⁴⁴⁵ In both *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, among other cases the Supreme Court of Canada has set out the significant importance of honour of the Crown. Yet, Canada has the most to gain by ignoring honour and maintaining status quo.

services, was at considerable risk of extinguishment within the region. This is paralleled in the Complaint; without proper funding for culturally appropriate First Nation child welfare services, First Nation culture, laws and families are at risk of extinguishment. Moreover, through an earlier examination of colonialism, Canada, if left to its own devices, may lean toward maintaining the status quo versus proactively working to close the socio-economic gap. The facts of the Complaint demonstrate the difference in funding for child welfare services of First Nation children living on-reserves versus all other Canadian children has been ongoing for decades.⁴⁴⁶ Specifically, the Complainants argue: Canada's own reports that set out a funding model policy and then unilaterally freeze the rates upon signing of agreements results in continued discrimination and inequitable treatment of First Nations children.⁴⁴⁷

The Final Report and Calls to Action of Canada's Truth and Reconciliation Commission, the Final Report of the Royal Commission on Aboriginal Peoples and the now decade old Kelowna Accord all detailed these problems. Canada is aware of these problems.⁴⁴⁸ At the heart of the supervision should be an ongoing examination to ensure that any financial remedy is not just immediate but ongoing, and to ensure that there is an investment in a culturally appropriate Indigenous child welfare system. Though the *CHRA* allows for most follow-up matters to be overseen by the Commission, such an order would not exclude the Commission's role in implementation of the Tribunal's remedial orders. In other words, the Commission might be required to work with the parties, consult with First Nation child welfare agencies nationally, meet with First

⁴⁴⁶ Closing Submissions, Assembly of First Nations

⁴⁴⁷ *Ibid.*

⁴⁴⁸ In addition to the evidence listed, at the Assembly of First Nations' Annual Assembly in Montreal, July 2015, the National Chief stated that between 1981 and 2011 there was no difference –no progress made – in the gap between Aboriginal and non-Aboriginal Canadians. The length of time demonstrates the gap is not just a government of the day issue but a Canadian issue.

Nation Elders, such as Elder Joseph, and collate First Nation-based practices and laws relating to children and report back to the Tribunal, if so directed. Remaining seized of the matter may improve conduct on the part of the Crown in the resolution of this case. It may also prompt the Crown to consider how to effectively resolve hundreds of similar complaints already in the system.

Supervisory orders, however, are not without controversy.⁴⁴⁹ This is of particular concern in relation to *Charter* rights,⁴⁵⁰ such as discrimination – systemic or otherwise – because though the Tribunal is mandated to address discrimination the discomfort of some is it might overreach and adopt an interpretation that is counter-majoritarian in nature.⁴⁵¹ But remedies devised by the Tribunal could respect the choice of provision of services by Canada to First Nations. Supervisory remedies do not have to be either intrusive on the executive or straining.⁴⁵² Rather, such a remedy must be crafted as a means to leave the “detailed choices of means largely to the executive,”⁴⁵³ provided those means are consistent with the law of non-discrimination.

Further, by retaining jurisdiction, the Tribunal will both recognize the significant time frame that will be required to effectively meet the remedial order, and will ideally prevent further costs and delay that would arise should the parties seek further legal

⁴⁴⁹ The main controversy is in relation to counter-majoritarianism, as set out above. There is also, however, some discussion on the level of court engagement: Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "Charter Dialogue Revisited-Or 'Much Ado About Metaphors'" (2007), 45 Osgoode Hall L.J. 2; R. Haigh, and M. Sobkin "Does the Observer Have an Effect: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts," Osgoode Hall LJ 45 (2007), 67, K. Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481; K. Roach, "Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience" (2005) 40 Tex. Int'l L.J. 537; and K. Roach, "A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue" (2007) 57 U.T.L.J. 449.

⁴⁵⁰ R. Dixon, *supra*, at note 443; K. Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49, at 54.

⁴⁵¹ J. B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129; and, M. Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995), 94 Mich. L. Rev. 245 at 292 – 299.

⁴⁵² K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994), para. 13.80.

⁴⁵³ *Ibid.*

redress through applications, motions and other procedural mechanisms.⁴⁵⁴ Canada's strategy in the Complaint has been to use procedure to delay and even strike the entire matter. This is not a party whose conduct gives rise to an assumption of willing compliance.⁴⁵⁵ Moreover, there are considerable risks that the gap will continue and maybe grow, should the Tribunal fail to remain seized of the complaint.⁴⁵⁶ A supervisory order is a strong signal that the Tribunal will supervise "the reconstruction of the social institution in order to bring it into conformity" with the law.⁴⁵⁷

Carefully considering the terms of a supervisory remedy may also be helpful as a means to address the colonial underpinnings complicating the very structure of the Tribunal, which was created without the input of Indigenous Peoples who now seek redress before it. The supervisory order, may for example, require Elders or other community members to be part of an oversight committee, like the *Heitsl gula* model, asked to bear witness from the outset. The Order might also require ongoing reporting take place in First Nation communities across Canada as a means to remind all present what they are working toward. In other words, a well-structured supervisory order might find room to include and foster Indigenous legal orders and processes.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ K. Roach and G. Budlender. "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" *South African Law Journal* 122.2 (2005): p-325; see also *Little Sisters*, *supra*, at note 60. Roach, *supra*, at note ** [Constitutional Remedies]. In the supplementary judgment of *Reference re: Language under the Manitoba Act, 1870*, [1985] 2 SCR, 357, 26 DLR (4th) 767, the court retained jurisdiction to allow for compliance of the parties and to elaborate on its original judgment. Contrarily, in *R. v. Askov* [1990] 3 SCR, 1199, 59 CCC 93d) 449, the court did not retain jurisdiction and was unable to reconsider the implications of its decision regarding a speedy trial being unheeded until over a year and a half later in *R. v. Morin*, [1992] 1 SCR 771, 71 CCC (3d) 1.

⁴⁵⁷ O. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978), at 69.

4.6 Some Conclusions

As noted throughout this thesis there is a general level of well-earned mistrust by Indigenous Peoples in relation to legal forums, such as the Tribunal, yet still there is opportunity. Though there is a wariness since the 2007 adoption of UNDRIP at the United Nations, there is some evidence of resistance to the status quo as measured by the increasing level of activity in various human rights forums worldwide by Indigenous Peoples. There is growing engagement in the global human rights movement creating a jurisgenerative moment that is shaping what human rights may mean,⁴⁵⁸ perhaps beyond the scope of Ignatieff's trinity of ideology.

In this chapter, I have argued that the principles of human rights are not settled. As such, room should be made to ensure the inclusion of Indigenous legal orders in the expansion of human rights. The theory of cultural normative relativism offers some support in this regard, so long as Canada approaches inclusion with an open mind. The issues raised in the Complaint are complicated and require considerable effort on the part of the Tribunal with respect to remedies that address both the discrimination in funding but also the importance of systemic remedies aimed at narrowing the socio-economic gap. To that end, the Tribunal should immediately order parity with respect to funding, and order the (monitored) creation of culturally relevant First Nation child welfare that is within the control of Indigenous Peoples.

Indigenous Peoples' access to human rights, internationally has a "generative force and potential to loosen colonization's bind"⁴⁵⁹ Within three years of UNDRIP's adoption at the General Assembly, the four dissenting nations – including

⁴⁵⁸ K.A. Carpenter and A. Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review* 102 (2014).

⁴⁵⁹ Stacey, *supra*, note 407.

Canada – had changed their position and adopted the Declaration, though for Canada it remains aspirational. This shift is considerable insofar as the decisions resulting from Indigenous Peoples’ access to domestic human rights regimes have begun to shape the international human rights law as well.⁴⁶⁰ In other words, there is momentum for the Tribunal to pick-up on and create remedies that fundamentally transform the relationship between Canada and Indigenous Peoples by closing the gap – and it starts with the return of First Nations children to the jurisdiction of First Nations people. On the other hand the Tribunal must supervise the Commission’s direct engagement with First Nations to craft sustainable solutions with respect to First Nations child welfare or run the risk of making no difference at all.⁴⁶¹ Such Kelowna-style discussions, as suggested above, must have clear objectives and the Tribunal must be prepared to supervise the process if there is to be any constraining of Canada’s clear habit of acting only in its own interests⁴⁶² and any enforcement of real change.⁴⁶³ The story of the *Old Woman of the Sea and Coyote*, reminds us to be brave, like Coyote, and not to get in line just because someone who may be more powerful and frightening demands it.

Like Coyote, we too have been gifted with imagination. When confronted with the cruelty of colonization, discriminatory conduct on those who claim power and the

⁴⁶⁰ J. Anaya, “Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law,” 22 Wash. U. L.J. & Policy 107 (2006), 108. For more on Indigenous Peoples’ contributions to international law generally see also: L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002); J. Anaya, *Indigenous Peoples in International Law*, (New York: Oxford University Press, 2004), 15-72.

⁴⁶¹ L. A. Miranda, “Indigenous Peoples as International Lawmakers,” 21 U. PA. J. Int’l. L., (2010), at 204 where it states “While indigenous peoples’ participation may serve to lend greater legitimacy to international human rights law and lawmaking processes, such participation may not effectively deliver material gains”; see also, D. Champagne, “Can UNDRIP Be Enforced?” *Indian Country* (Mar. 5, 2012).

⁴⁶² J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, Vol. 199 (Oxford: Oxford University Press, 2005).

⁴⁶³ J. Anaya, *Indigenous Peoples in International Law*, (New York: Oxford University Press, 2004), at 105-131 wherein the author provides an overview of implementation and enforcement mechanisms.

like, we must take time to get things right. There is a lot at stake. Individuals. Collectives. Cultures. Societies. Legal Orders. Families. Humans.

Like the line up of animals in the Old Woman of the Sea and Coyote, there is a long, twisting line of theories and views in relation to what human rights entails. Whether a legal positivist – regardless of where you may place yourself on the spectrum – a philosopher, theorist, natural law practitioner, adjudicator or the like, the debate between universalism and relativism can be distracting. The Old Woman of the Sea reminds us not to be arrogant with our theories, philosophies and conduct. There cannot be *de facto* universalism in relation to human rights unless everyone agrees. As evidenced by the debate itself, everyone does not agree human rights values, as currently constructed, are universal. The difference is cultural. Therefore, unless room is made to allow for other cultural perspectives and other legal orders – such as those of Indigenous Peoples – to reshape the engagement of humans with human rights, there will continue to be disharmony as to how we decide the ways in which we will treat each other and the ways we expect all humans to be treated. Until then, culture after culture will be strapped to a cradleboard and tossed out to sea only and return with only indistinguishable bones. The inclusion and sphere of influence Indigenous legal orders might contribute to the evolution of human rights must be meaningful, deep and entrenched.

Perhaps here, like the animals – who knew their chance when they saw it all called out together for Coyote to come back – we all need to come together and find a way. Grass dancers are instructive too. Do they not remind us by their movements that we should move softly but sure-footedly and make room for the others to join in the circle and dance? What might that look like in relation to closing the socio-economic

gap? Though some remedial considerations are expressed above, are we not also only limited by our legal imagination?⁴⁶⁴ This is what Aakode'ewin looks like.

⁴⁶⁴ P. Macklem, "First Nations Self-government and the Borders of the Canadian Legal Imagination," *McGill LJ* 36 (1990), 382.

**CHAPTER 5 –
NIBWAAKAAWIN (WISDOM) & DABAADENDIZIWIN (HUMILITY):
CONCLUSIONS**

Fire & Hummingbird

Once, before the people came, there was a great green forest with many well-worn paths from the animals visiting each other every day. In a barren land far away where nothing grew, there lived a tiny spark. He was glum and lonely. One day, little Spark convinced South Wind to carry him away to the north where he could make friends. Feeling sorry for Spark, South Wind blew the little one to the great forest and left him resting on a leaf. Spark nestled in and ate the leaf. It felt good because while he ate, Spark changed. He became a flame. He was bigger, stronger and more powerful now but the forest was still so vast and he was so small. That will change soon, he thought. He jumped to the next leaf and the next – growing larger each time he ate. The transformation and power felt so good that Spark forgot all about being lonely and wanting to make friends. Being a flame was not enough either. He craved more. Soon, he grew so big he became Fire and consumed the whole tree, then the next and the next until the entire forest was alight.

The forest-dwellers ran for their lives. The crawlers, the diggers, the fliers and the runners all made their way to the sandy shores of the great lake. There they stood in silence, watching as Fire consumed their home and destroyed all the paths that they travelled to visit with each other.

After some time passed a few of the animals suggested they leave this place to Fire and journey around the lake to build a new home on the other side. Others thought they should just sit and wait for Fire to leave so they could rebuild all that they once

knew. Sides were taken. Division grew. Soon an argument broke out and the animals – who were once family – began yelling at each other while Fire feasted on their home. As they all drew in a breath to unleash more harsh words there was a moment of silence. And in that pause, they heard a sound overhead.

It was a hum. It was the kind of hum that tickles ears and brings smiles of wonder to faces.

The animals forgot their argument. They stared in amazement at their small friend, hummingbird. She hummed as she flew over their heads, dipped her beak into the lake, flew toward the forest and sprayed droplets of water on Fire. She did not pay any mind to the animals' argument. She did not heed their division. She did not abide by their worry. She was too busy for such distractions.

Hummingbird was no match for all-powerful Fire yet he grew annoyed with the tiny bird. To frighten her, Fire formed a giant face and as hummingbird approached he swelled up to his biggest self and shouted at her “Little hummingbird! What are you doing?”

Hummingbird hovered in the air as only she can – it is one of her gifts. She looked Fire in the eyes. As though generously providing Fire a moment to come to the answer on his own, she threw her wings back, puffed up her chest, lifted her chin and floated held the silence before answering.

I am doing everything that I can.

5.1 Some Final Reflections

*As Aboriginal people we understand what would change our destiny but only through a convergence of our own self-determination and a willingness of Canada to decolonize can real change take place. This is not a partisan or ideological issue. Canadians must be prepared to return original jurisdiction to the Indigenous nations whose homelands the state of Canada rests within. Canadians and Indigenous nations need to negotiate real partnerships of mutual respect and benefit or face a certain future of mutual misery and conflict.*⁴⁶⁵

– Robert Lovelace, 2011

Decisions matter.⁴⁶⁶ I begin and end with the story of Fire & Hummingbird as a feint, a sleight of hand. Its few short paragraphs contain an answer to the question I have posed in my thesis regarding how we might close the socio-economic gap between Indigenous and non-Indigenous people living in Canada, because within this particular story lay all of the Seven Grandfather teachings. Though I have carried this story for many years now, I did not see the answer to my question until almost the very end of my writing. Indeed, this story was the last one to find its way into my thesis. Perhaps another lesson for me in wisdom? Recall that “Ojibway tradition tells us that there were Seven Grandfathers who were given the responsibility by the Creator to watch over the Earth’s people. They were powerful spirits ...*Nibwaakaawin ...Zaagi’idiwin ...Minaadendamowin ...Aakode’ewin...Dabaadendiziwin ... Debwewin.*”⁴⁶⁷ These seven watchers show us how to conduct ourselves if we really want change.

The socio-economic gap is so vast it can feel as overwhelming as Fire. Fire can also feel as powerful and insatiable as colonialism, which is nowhere more evident than in Canada’s response to the Complaint specifically and its conduct in response to colonialism generally. Specifically, Canada has taken a consistent position of denial in

⁴⁶⁵ R. Lovelace, “Attawapiskat and Colonialism: Seeing the Forest and Trees”, Rabble, December 2011, <http://rabble.ca/news/2011/12/attawapiskat-and-colonialism-seeing-forest-and-trees>.

⁴⁶⁶ R. Dworkin, *Law’s Empire*, (Harvard University Press, 1986), at 3.

⁴⁶⁷ Benton-Benai, *supra*, note 3.

relation to the Complaint and action to prevent the matter being heard on its merits – even trying to replace the Chair.

More generally, Canada’s steadfast refusal to enact UNDRIP domestically, while proclaiming publicly at international forums, such as G20, that Canada has no history of colonialism is disturbing. Canada does have a history and a present of colonialism. It is violent and ugly and our leaders lie about it. Violence is violence whether it is administered in a singular, sweeping action that is over quickly, such as a shooting, or gradually, slowly, over a long period of time. As we have seen in earlier chapters, relating to power and authority such as the police and the Starlight Tours, the “problem is not simply overworked and overstressed police officers; the problem is *racist* police officers and a system that allows ignorance to flourish.”⁴⁶⁸ The problem is not only legal discourse, the courts, tribunals or the actors within it but the colonialism of the master narrative that is allowed to thrive through national, collective consent that continues unabated, unchanging. So, perhaps it is through swelling numbers of human rights complaints that Canada will finally be honest about its colonial past and the Tribunal will be brave enough to imagine remedies.

Systemic remedies, cleverly crafted, will address the systemic discrimination the Caring Society complaint – among others yet to be heard – if the Tribunal is wise enough to take the opportunity before it and can harness enough humility draw Indigenous Peoples in as partners, Kelowna Accord roundtable style. To oversee implementation of a more harmonious relationship, the Tribunal itself must be seized of the outcome of the Order. Though the Commission has a key role to play in hosting dialogue, the Tribunal retains the authority to expedite matters and prevent compounded abuse of process so that

⁴⁶⁸ Lugosi, *supra*, note 134.

the merits of culturally relevant child and family services are not further delayed.

Indigenous Peoples are the solution to the socio-economic gap, not the problem, which is all the more relevant because denying a history of colonialism allows Canada to continue with its policy of denial. Denial of Indigenous Peoples to be able to construct and raise families in culturally appropriate way. Denial of Indigenous Peoples rights to land: deny, deny, deny. Those Seven Grandfathers may be distilled down to what it means to be decent and how we all might treat each other. They offer intercultural insight that might lead to finding a way to end Canada's policy of denial and unravel the ongoing maintenance of the status quo through legal structures. The Grandfathers might lead us to make room for Indigenous cultures and laws.

We are all responsible for our choices, our actions. Hummingbird's home was on fire. Rather than tarry or argue about who is at fault and what is the best way to fix it, she set to work. Yet, the numbers of First Nation children in care exceeds the numbers of students at Indian Residential Schools and is growing. We have to get to work and douse the fire that continues to consume lives of Indigenous children and families. Together we must come to understand *Debwewin*, and have *Minaadendamowin* for each other and our respective ways through *Gwayakwaadiziwin*. We must show *Aakode'ewin* when we find ways and means to address the gap between Indigenous and non-Indigenous Canadians. But to achieve key milestones we will have to harness our collective *Nibwaakaawin*. Canada will have to acknowledge its colonialist underbelly and approach Indigenous Peoples with *Dabaadendiziwin*. These are big tasks but no bigger than the socio-economic gap that Canadians allow to continue every day by accepting the master narrative.

Finally, even the casual reader can quickly calculate that if there are Seven Grandfather teachings yet only five chapters and the last chapter focused on two of those Grandfathers, one was missed. I intentionally left the seventh because though one Grandfather leads to another, there is one that comes at the very end (or the very beginning or somewhere along the way or all along the way – those Grandfathers can be tricky). It is, of course, *Zaagi'idiwin*. This is the Grandfather that will keep us all together, which whether we like it or not is where we find ourselves. As then Chief Justice Lamer wrote in *Delgamuukw*⁴⁶⁹, “Let us face it. We are all here to stay.”⁴⁷⁰ As seen with Elder Joseph’s testimony, Indigenous Peoples already have legal orders that regulate family and children; already place children central to the universe; are already possessed of a rich understanding of collective and individual responsibility toward each child. Elder Joseph reminds us that every person, every child matters and we must show them *Zaagi'idiwin*. Enough time has passed.

For my part, I strive to be hummingbird and respect those Seven Grandfathers in everything I do. Admittedly, sometimes I am weary and just want to walk around the lake looking for a fresh start. Other times I am so overwhelmed I just want to sit and wait, ready to be rebuild from whatever is left over after all the consuming is done. On my very worst days, I wonder if I might be Fire and take too much, forgetting to be kind and make friends along the way. It is my deepest hope that out of all the contributions I have made and the ones I still hope to make, that I will live very few days as Fire and many more as hummingbird, doing everything that I can.

Hai-hai. All my relations.

⁴⁶⁹ *Delgamuukw*, *supra*, note 445.

⁴⁷⁰ *Ibid.*

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