YELLOWHEAD BRIEF #124 | JANUARY 12 2023

Accountability Mechanisms for Child Welfare Advocacy: An Interview with Naiomi Metallic

by Kelsi-Leigh Balaban & Hayden King

IN 2016, THE CANADIAN HUMAN RIGHTS TRIBUNAL found that Canada discriminated against First Nations children by knowingly and chronically underfunding child welfare services, and failing to meet Jordan's Principle. Some changes have occurred as a result, but this required going back to the Tribunal over 20 more times, and there are still outstanding questions about compensation from the ruling and long-term reform. Meanwhile, in 2019 the Federal Government passed An Act respecting First Nations, Inuit and Métis children, youth and families, designed to empower communities to re-assume child welfare jurisdiction and impose national minimum standards to protect children and families in provincial systems in the meantime. But communities are still struggling to realize the promise of these changes, with disputes still common. In an effort to resolve these conflicts, Naiomi Metallic co-wrote a proposal for the Dept. of Indigenous Services Canada (ISC) called **"Doing Better for Indigenous Children and Families: Jordan's Principle Accountability Mechanisms."** This interview offers an overview of that proposal, its rationale, and potential outcomes.

Hayden King: It seems like child welfare legislation and policy is sort of the crux of this government's record on Indigenous issues. We have a really important court case being heard at the Supreme Court around self-government in relation to child welfare, and maybe generally, and we also have the settlement agreement which has ultimately led to a breakdown in the relationship between the Assembly of First Nations (AFN) and the Caring Society in Canada. So I wanted to ask, at the outset, where are we at in child welfare in Indian country right now? What are you seeing across the country in terms of the actual implementation of this legislation?

Naiomi Metallic: It's a really fascinating time, and I think the trajectory is a good one, although never perfect. We have the court case, which has so many layers to it, and so many questions, and I don't think the Supreme Court will be able to answer them all. Nor do I think it necessarily should at this point, either. So there is that. There are communities that are passing their own laws right now, and some that have been in place for about over a year. It's a mixed reaction in terms of the provinces. We have Quebec's saying the legislation is unconstitutional, while B.C. has changed its own provincial legislation to accommodate First Nations in light of C92. And Alberta is just like, "No, we don't want to deal with any of this. We're pretending it doesn't exist." So all of these communities are moving forward but the legal architecture is still a bit of a mess — not a mess in a bad way; it's like a mess that is propelling us in a better direction.

Kelsi Balaban: We want to get into the specific barriers faced in the child welfare system that might help communities as they work through the inconsistencies. You've written this report on accountability, of course, and the need for independent accountability mechanisms. First, can you tell us what is an accountability mechanism?

Naiomi Metallic: Yeah, it's a broad concept. Essentially, it refers to various mechanisms that allow for government institutions to be monitored and held accountable for their actions. Norms or standards may not have been followed, like human rights standards, or the norms of the Department of Indigenous Services Act or constitutional standards or UNDRIP.

Mechanisms are ways to make sure governments do the things they should and are caught when they're doing things they shouldn't. You can have a whole spectrum of mechanisms that speak to accountability.

This can include data gathering of government activities, monitoring how a service is delivered.

There can be internal accountability mechanisms, whistleblower legislation, or somebody internally who's a human rights champion that you go to with concerns. If there's something going wrong internally within an institution, somebody can raise a complaint or concern. Somebody can look into it, and there's a resolution. We say in the report that given Canada's (and the provinces') track record on services for First Nations' children and families, we need more than this. We need external accountability bodies.

External accountability is where the oversight body is arms-length from the government. In this model there are different layers of oversight. Some can have softer oversight powers where they'll talk to the institution and have the authority to work out issues. They might have the authority to ask for information and data and not have it be withheld, and make recommendations up the chain of command. This is the sort of work an ombudsperson often does. We call for this in the report, but we also call for a Tribunal as well. Independent tribunals exist to hear complaints and can make decisions that bind the government to take action.

In the report, we say that some sort of ombuds body is needed (we call it an Advocate so that it's clear that it can advocate on behalf of Indigenous children and families, but it is a form of ombuds), as well as a Tribunal.

Hayden King: As I was reading the report, I was like, okay, all of these seem to be ways to address but also mitigate conflict. Is it the case that C-92 is just so imperfect that we have all these potential sources of conflict that need to be addressed through accountability processes? Or is this something that is common to legislation?

Naiomi Metallic: Whenever governments provide any services, it's possible for there to be conflict and complaints. And it's normal to have external accountability bodies to oversee government actions. Ombuds and other accountability bodies already exist for provincial services and for some federal services, but nothing exists for oversight of ISC. In all likelihood, this lack of oversight facilitated the discrimination that was found by the Canadian Human Rights Tribunal against ISC.

C-92 is the first piece of legislation attempting to address short-comings in Indigenous child welfare, which, actually, is not perfect at all – it's unclear on federal funding obligations, **for example**. But it nonetheless provides some internal accountability on the feds as well as the provinces in terms of child welfare services. We suggest in our report that C92 should be one of the laws overseen by the accountability bodies that we're recommending. But, recall, our report is not just about C92, it's about accountability on Jordan's Principle and services to Indigenous children and families more broadly.

For the longest time, there has been no legislated standards to hold ISC accountable. C92 is a start, but it doesn't cover the field by a long-shot. There is a lot more we need to see for real accountability.

Now, in the recent Department of Indigenous Services Act, some delivery standards are laid out and can be used to **hold ISC more accountable**, but for the longest time there was nothing. And when there is nothing, it's really hard to hold the government accountable. So actually, I think legislation is helpful. Legislation can be a mechanism for accountability in itself, because it has standards upon which you can point to very directly and say you must do X or Y.

Every province has their own child welfare legislation,

and almost every province has a child advocate, or an Ombudsman, to hear complaints and act as a sort of accountability mechanism. But in the process of government institutions carrying out their day-to-day functions, there will be conflicts, there will be issues, and there will be mistakes. In ISC's case, add over 150 of colonialism, paternalism and the Indian Act to the mix, and the chances of problems is that much higher. And so it's a way of holding the machines of a government to account — short of having to go all the way to court. It's a faster, cheaper, easier, more accessible way for people to do this. That model exists in every province for every provincial child welfare. But the problem is, there's nothing for ISC or at the federal level, and that's actually a big gap. Canada acts like it's normal, but it's a massive gap.

Kelsi Balaban: That's a really helpful breakdown. So, you're talking about these gaps in standards that are there right now and some accountability needs. Can you elaborate on what those needs are and how we can address those needs through accountability mechanisms?

Naiomi Metallic: Yeah. Well, I guess the thing is that for the longest time, when ISC has made any decision — and they make so many decisions that really impact the lives of First Nations people — there has been virtually no recourse. So, sticking with the example of children and families, ISC provides social assistance (basic income for families), assisted living services, child welfare services, housing, and other essential services. They don't provide anywhere near the level of funding or services that citizens in the provinces take for granted. So there's another big gap. And then you ask for a service, which your neighbour off-reserve gets, but you're denied. What is your recourse? Except for going to court or to the human rights commission, there isn't any. That's not normal.

A lot of this has to do with Jordan's Principle, the idea that the federal and provincial governments should not be denying services based on fighting over who pays for First Nations. Dr. Cindy Blackstock and Caring Society has been fulfilling an advocacy role, I'd say, since the Tribunal Rulings to ensure governments are fulfilling their obligations under Jordan's Principle. They help children, families and communities fight for services when these have been denied. They ask questions of ISC, poke and prod them on the reasons for denials, they get pro-Bono lawyers involved, and are prepared to take matters to court or human rights if needed. It's amazing that the Caring Society does this, but, at the same time, deeply concerning that children and families have to go to these lengths to get basic services that everybody else gets to take for granted.

That raises a whole problem about ISC's approach to Jordan's Principle. Jordan's Principle is just a band-aid for a gap that was recognized by the Canadian Human Rights Tribunal — that all of ISC's services for families and children are underfunded and underserviced. Jordan's Principle requires ISC to fill those gaps individually as people come to ask for them. But that is not the long-term solution to the bigger problem; the long-term solution is to fix those programs to ensure they meet the substantive equality needs of children and families. Jordan's Principle program is only a short term solution; it is wrong for ISC to think otherwise.

Part of the problem here is also the culture of bureaucracies. At ISC, there are levels of racism and ignorance but also a desire to do good. People get so wrapped up in this system and following policies and funding authorities, that they fail to see how their own individual actions impact First Nations children and families — some of the most vulnerable people in Canada. It's almost like a gravitational pull. People may have gone into public service with the best of intentions but then find themselves as a cog in the wheel. And in an environment where there's all these other issues — colonialism, racism, paternalism — there's just all this stuff that's been stewing at ISC for ages.

Hayden King: Yes, absolutely. There is a certain path dependency at ISC as well, where anything resembling a new precedent is terrifying. But that's exactly what we're talking about there — a model for concrete change. So can you tell us about the accountability mechanisms you've proposed? Because it's not just one accountability mechanism; we're talking about three accountability mechanisms.

Naiomi Metallic: We've proposed three accountability mechanisms: a Tribunal, Child Advocate, and National Legal Services for Indigenous Families.

Initially, we thought of proposing a tribunal as the sole accountability mechanism. However, once you have a tribunal at play, everything gets very adversarial very

quickly. People dig in. They don't talk; they don't share. You're just putting everything in front of this decision-maker. And we're still in a world where things are extremely unbalanced when it comes to litigation. The government has unlimited funds from taxpayer dollars to fight lawsuits. And First Nations communities and the individuals do not and often find themselves buried in court procedures that they cannot afford. So other options are required.

Still, a tribunal is important. There is definitely the need for a body with the power to make binding orders against the government. Look at the impact of the **Canadian Human Rights Tribunal**: we've seen how critical that has been because the government gets told to change their ways, and they change a little bit. Having the Tribunal give further rulings after the main 2016 decision to hold Canada in check has been key. It shows the need for ongoing oversight.

The other mechanism we called for was a Child Advocate. Every other province has one, and what they do is soft advocacy, meaning they don't make binding decisions like the Tribunal, but work behind the scenes to address complaints and problems and encourage change. They have the authority to be able to communicate with the government to compel them, to give them information, to work with them to solve problems. We also suggest that the Child Advocate, when communities and families decide they want to go to the tribunal or the courts or some other forum)\, has the ability to refer them to paid legal services (our third mechanism). This is to address the extreme resource imbalance between government and First Nations when it comes to litigation that I mentioned earlier.

Taken together, we say both the hard advocacy of a tribunal, which can be effective but take longer and be expensive, and the softer advocacy of a Child Advocate to attempt to solve problems informally, as well as make systemic recommendations, are necessary to hold governments accountable in the area of Indigenous child and family services.

We also say these two paths should also remain open; parties can go to the Tribunal at any time, for instance, or try to have the Advocate address their issues. More avenues — and capacity — means greater accountability.

Kelsi Balaban: We started this conversation talking about this being a really interesting and exciting time with a lot of movement forward. And then, throughout this conversation, it's been illuminated how this history has been really laborious and hard-fought and dependent on the goodwill of the government of the time. What do you expect to happen to the child welfare landscape if we don't have accountability mechanisms in place?

Naiomi Metallic: One thing I fear is again just returning to the status quo after the Canadian Human Rights Tribunal ends its supervisory jurisdiction over the **Caring Society case**, and then starting from scratch when there is backsliding. There have been changes, and I am more hopeful about that, despite the inconsistencies and challenges remaining.

But we need these accountability pathways. Even though Dr. Cindy Blackstock and her wonderful band of volunteer lawyers do amazing advocacy on a shoestring budget, this is not sustainable, nor is meeting all the needs. The other existing forums–provincial child advocates, using Canadian and provincial human rights when available, have their limitations, as we discuss in the report. That's why we wanted a one-stop shop in the form of the Child Advocate/ Ombuds and Tribunal.

I hadn't talked about it too much, but the three mechanisms we discussed would have jurisdiction both over the federal government and the provinces. Many provinces' ombuds are doing enough on Indigenous issues, and, in Canada, it's a weird anomaly that there is no way to bring both the federal and provincial governments before the same human rights body at the same time. Such siloing just exacerbates the Jordan's Principle problem.

So, without these changes, it just means more of the status quo. It'll mean no oversight of ISC; it'll mean uncertainty when a new government gets elected. And it will mean Dr. Blackstock and others will have to continue these fights indefinitely with limited capacity. Children and families will continue to fall through the cracks.