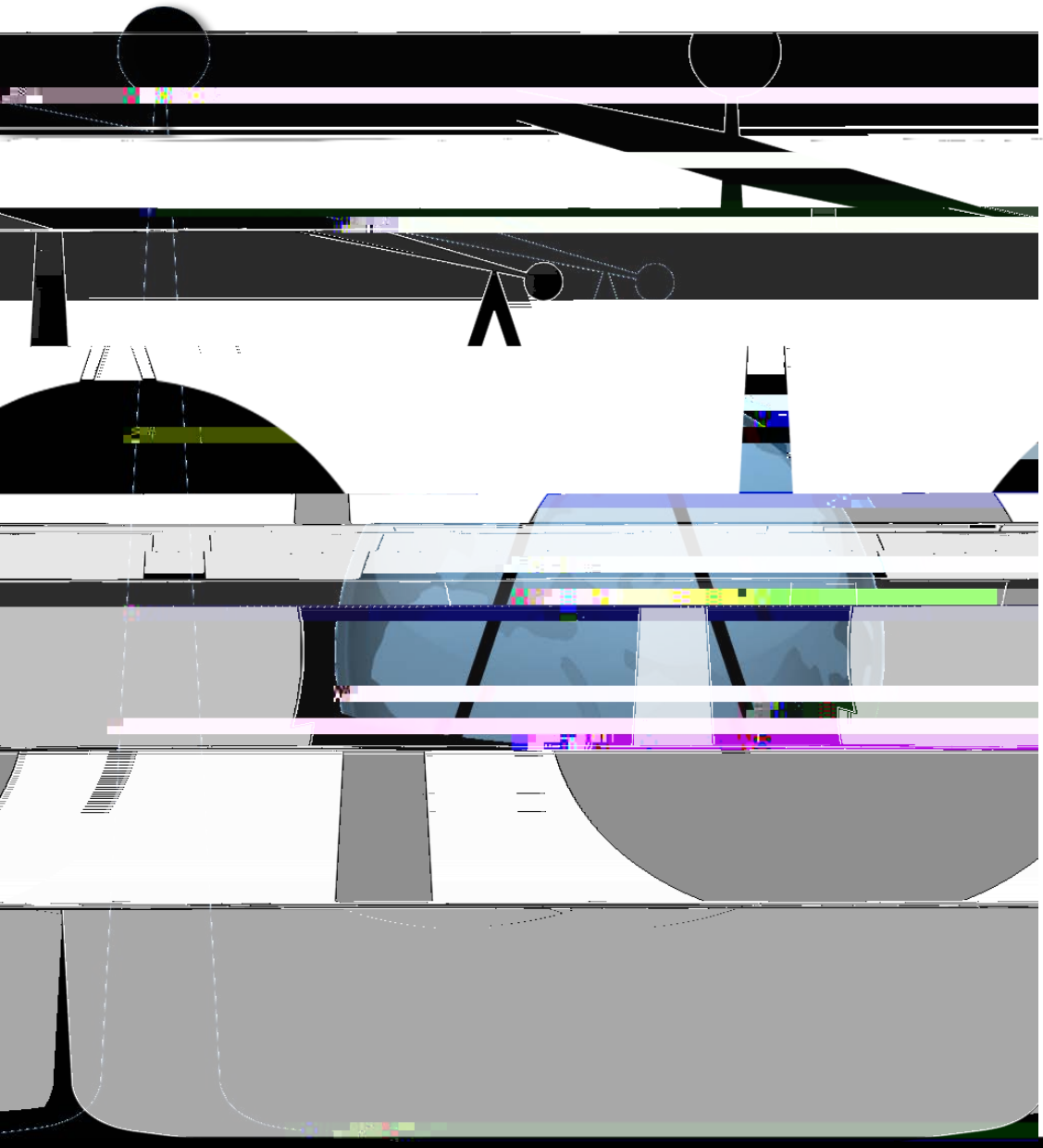
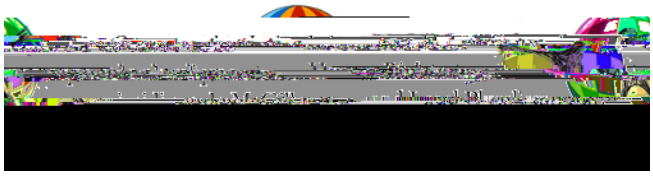
Falling Through the Cracks:
Canadian Indigenous Children with Disabilities



International Human Rights Internships Program - Working Paper Series



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Abstract

This paper discusses Indigenous children with disabilities in Canada and examines their experiences with federal and provincial jurisdictional and funding disputes. It explores Canada's adversarial legal and policy techniques to delay implementation and funding of Jordan's Principle, the effects of the Canadian Human Rights Tribunal decision, and the recommendations of a recent independent Canadian research project. Finally, it suggests ways to advance Jordan's Principle in Canada as well as other alternatives to improve the situation of Indigenous children with disabilities.

Such an understanding and perspective on disabilities is quite the contrary to the western perception of a disability. That is, the meanings of disability from the Euro-Western definition

A. Understanding disability in the human rights context

This paradigm shift permeates the notion of disability in the human rights context.[23] The Convention on the Rights of Persons with Disabilities (CRPD) affirms that disability is a consequence of the interaction between persons with impairments and the environment.[24] It is only when the environment fails to accommodate the needs of the child that disability occurs.[25] This way of understanding disability is fundamentally different from viewing disability as a consequence of the individual's impairment. In the past, disability was interpreted as a medical model, which means that disability was linked to various medical conditions.[26] In some regions, for example in Central and Ea med an(ab)-1 (i)-2.001 Tc 0.02(.)]TJE18 -1ietrsabiliy was iay

Ultimately, if a child's environment does not favour inclusion of people with disabilities, the marginalisation and discrimination that they will face will be greater.[30] The State of the

communities, jurisdictional health wrangling, and funding inequities further create a disadvantage to Indigenous children's environments, perpetuating their disabilities.[35]

B. Contributing factors to the disabling environments on reserves

Poverty, disease, alcoholism and unemployment among Canadian Indigenous persons; lack of appropriate services; lack of adequate funds for existing services; jurisdictional disputes about service provision: (r)30.4 (v)55 ( )]TJ5T7d (i)-9.1 8are only a fewf the common barriers that affit health and se provider for Indigenous children with disabilities.[36]

Poverty, disease, alcoholism and unemployment among Indigenous Canadians continue to be an issue.[37] The statistics are dismal and disgraceful. Children raised in this environment have more physical and emotional problems than other children and are more likely t become disabled or beome chronically ill beforehan children from the g eneral population.[38]

services to any minority group should be but often is not. Appropriate services might include establishing an Independent Living Centre in rural areas and on reserves, providing accessible reservation housing, arranging equipment purchase and repair, and providing transportation to and from remote areas to services in urban areas or making such services available in remote areas.[42]

Jurisdictional disputes about service provision actually lead the list of major headaches for Indigenous communities. Such disputes are the source of some of the most inhumane acts ever committed against innocent people, all carried out within "the letter of the law".[43] These situations come about because each agency declares itself the "provider of last resort", which means it is not going to provide the "first dollar" for a service if another agency might provide it.[44] For Indigenous people who have multiple providers (Indian Health Service, Bureau of

C. Situating the health inequalities in the overall human development indicators

Indigenous people in Canada suffer persistent health inequalities as a result of individual and structural uncertainty.[48] Over time, the progress in the health and well-being of Indigenous populations, compared to non-Indigenous populations, has been inconsistent.[49] The health inequalities faced by Indigenous Communities in Canada can be situated in the overall human development indicators. By applying the United Nations Development Programme's Human Development Index (HDI) to Indigenous people in Canada and by examining the trends in the HDI scores, a difference can be noted between their score compared to Canada as a whole.[50] HDI measures average wellbeing in a country by considering health, education and income, but does not measure the disparities between different regions or groups within a country.[51] The difference between the HDI score of non-Indigenous and Indigenous Canadians fell is significant when considering the discrepancy between the overall ranking of Canada's HDI and Canada's Indigenous people's HDI. Canada's HDI grants them the eighth rank in the world while Canada's Indigenous Population ranks 33.[52] This disparity highlights the inequality of the overall health and socioeconomic status of Indigenous communities in Canada versus the rest of the Canadian population.

The recent improvement in overall HDI scores for Indigenous peoples in Canada marks the recent progress achieved by the nation.[53] Nonetheless, considering Canadian Indigenous Population ranked 25 spots lower than the rest of the country proves that further improvements

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[48] Carlos R Quiñonez & Josée G Lavoie, "Existing on a boundary: the delivery of socially uninsured health services to Aboriginal groups in Canada" 33 (2009) Humanity & Society 35 at 40.

[49] Martin Cooke, Francis Mitrou, David Lawrence, Eric Guimond & Dan Beavon, "Indigenous well-

in the social, economic, and physical health of Indigenous peoples are necessary.[54] The resulting picture is best described as one of inconsistent progress. These improvements cannot be taken for granted and to witness the gap further closing between the two HDI calculations in the future, additional efforts have to be made.

Part II: Canadian Legal Framework and Policy Techniques

A. International Conventions to which Canada is a Signatory

Canada is a signatory to the UN Convention on the Rights of the Child (CRC)

encountered in Canada and in all societies.[59] The initial draft text of the CRPD did include a

B. National Laws and Policies for Disability Rights

Federally, the Canadian Charter of Rights and Freedoms (Charter) ensures some protections for people with disabilities.[66] Article 15 of the Charter guarantees equality before and under the law for people with a disability.[67] The issue of disability has become a policy priority in Canada, evident in several policy papers.[68] Moreover, the Canadian Human Rights Act prohibits discriminatory practices.[69] Though more general, this provision ensures that no one in Canada be denied good, services, facility or accommodation on the basis of discriminatory practices.

Jordan's case, the Manitoba and federal governments fought for who should pay for his at home care. Consequently, Jordan was deprived of receiving the services he deserves until the governments established the payment issue.[73]

The explanation behind this debate is that responsibility for services to First Nations children is often shared by federal, provincial/territorial and First Nations governments.[74] In contrast, funding and delivery of these same services to most other children in Canada falls solely under provincial and territorial jurisdiction.[75] Accordingly, First Nations children face unique challenges in accessing services, and their rights under the CRC, CRPD, DRIP, the Charter, and the Human Rights Act are neglected because of bureaucratic disputes on funding and services for Indigenous communities. Jordan's wait for a resolution to settle the federal and provincial jurisdictional disagreement ended when he died in a Winnipeg hospital on February 2, 2005, at 5 years old, hundreds of kilometres away from his family's community and before Jordan could experience living in a loving home.[76]

that service.[78]

the First Nation's total health care funding from the Federal government.[84] Therefore, the Health Director at the PLFN Health Care Centre contacted the Atlantic Regional Home and Community Care Coordinator at Health Canada as she believed Jeremy(g)-3 (o)-1 (v)Tm( )Tj-0.D2 (o)-1b(at)1 (t

of dispute between levels of government.[89] Thus, the First Nation is entitled to be reimbursed

exclude intra-governmental disputes. That is, disputes occurring between two federal government departments cannot make grounds for a case to be considered under Jordan's Principle. In addition, it fails to consider existing formal payment disputes as the primary indicator of a jurisdictional dispute thus eliminating all cases that involve service gaps that are already identified and widely known.[100]

Second, the procedure to apply for Jordan's Principle lacks a consistent mechanism for repayment of costs incurred by the family or organisations providing interim services.[101] The family needs to be involved in a local case conferencing process and have the situation brought to the attention of a government employee appointed to oversee Jordan's Principle cases. Following the local case conferencing, the family must take part in a multi-step formal case conferencing process, that can potentially be lengthy.[102] The costs of services required will only be covered after normative provincial/territorial standards have been assessed and a jurisdictional dispute has been formally declared by both levels of government. While this procedure is undertaken, the child may go without the needed services.[103]

Third, on the systemic level, documentation reveals a severe lack of accountability, transparency, and stakeholder participation. First Nations have been fully excluded from the discourse, development and implementation of Jordan's Principle. Publication of Jordan's Principle processes are not made accessible to the public and there are no mechanisms aside from going to court to appeal decisions made in Jordan's Principle cases.[104]

F. Canadian Human Rights Tribunal Decision

On January 26, 2016, the Canadian Human Rights Tribunal (CHRT or Tribunal) released its decision substantiating all aspects of the claim and ordering Canada to immediately cease its

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[100] Ibid

[101] Ibid See e.g. Picton, supra note 83.

[102] Jordan's Principle Working Group, supra note 44 at 15.

[103] Ibid

[104] Ibid page 15.

discriminatory conduct.[105] The Tribunal retained jurisdiction and ordered Canada to provide compliance reports. The CHRT, consisting of a three-member panel, found that Canada's flawed and inequitable provision of First Nations child and family services is discriminatory pursuant to the section 5 of the Human Rights Act on the grounds of race and national ethnic origin.[106] The Tribunal also found that Canada's failure to ensure First Nations children can access government services on the same terms as other children via Jordan's Principle was also discriminatory and contrary to the law. Consequently, it ordered the federal government to "immediately implement the full meaning and scope of Jordan's Principle.[107] Canada had to stop applying the discriminatory definition of Jordan's Principle and finally ensure to immediately take measures to implement the full definition of Jordan's Principle like it was advanced by First Nations and endorsed by the House of Commons.[108]

Unsatisfied with Canada's progress, the Tribunal issued a compliance order on April 26, 2016. This order found that the federal government was not respecting the January 2016 judgment delivered by the Tribunal regarding the full implementation of Jordan' s Principle.[109] It also noted that the discussions the federal government was having with partners and stakeholders were developing rather slowly. Again, the Panel ordered Indigenous and Northern Affairs of Canada (INAC) to "immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities)".[110] Going forward, the government organisation to be contacted first must pay for the service the child needs without policy review or case conferencing.[111] Finally, the order granted the INAC until

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[105] First Nations Child and Family Caring Society et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2, T1340/7.

[106] Ibid at para 468.

[107] Ibid at para 481.

[108] Ibid.

[109] First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10, T1340/7008.

[110] Ibid at para 33.

[111] Ibid

May 10, 2016 to report on the long-term plan for the definition and full implementation of Jordan's Principle, including a confirmation that this order was implemented.[112]

Government Response to the Compliance Order

INAC's May 10, 2016 report outlined five steps the government has taken since the January 26, 2016 decision.[113] First, it eliminated the requirement for a child to have multiple disabilities. Second, it expanded Jordan's Principle to include disputes within the federal government departments and applies to all jurisdictional disputes. Third, it ensured that services for any Jordan's Principle case will not "be delayed due to case conferencing or policy review", confirming that services or suite of services will be implemented in a timely manner.[114] The government generally stated in the fourth step that "Canada committed to provide the necessary resources to implement Jordan's Principle".[115] Finally, the report stated that INAC had initiated discussions with the provinces/territories on Jordan's Principle.[116]

Although INAC complied with the order and respected its two-week delay to respond to the April 26, 2016 decision, the report was rather disappointing. Considering the length and detail of the two Tribunal's decision, the INAC's two-page response is inadequate to address the scope and seriousness of the issue. They did not care to elaborate further on the mechanisms

Part III: The Way Forward

A. Provincial/Territorial Ombudsmen Offices for Families of Children with Disabilities

The existence of jurisdictional tensions and divisions between federal, provincial, and band

rights. Although this system was established in a European country for legal capacity challenges, the idea can be used in parallel for Indigenous children with disabilities because just like Swedish persons with disabilities, Canadian Indigenous children with disabilities are pushed between authorities and caught up in jurisdictional disp

may not concern housing or occupation but relationships or existential matters. An ombudsman must be able to discuss such matters as walk and not just 'fix' things.

B. Accessing Inclusive Education for Indigenous Children with Disabilities

The Global Partnership for Education notes that "education is one of the most effective ways to break the cycle of discrimination and poverty that children with disabilities often face".[127] However, Indigenous are often segregated from the education the rest of the community receives.[128] In the Matter of the Childrdu(at C)-NPJ 0 Tw (Tw 12 Tj -0.001 Tc 0.046 Tw 2

and specialised support either in the classroom or outside the classroom.[134] These factors are especially present on Canadian Indigenous Reserves.[135] Thus, one of the core solutions to empower Indigenous children with disabilities is to ensure that funding is specifically allocated for schools to make necessary changes to improve accessibility of inclusive education. While

problem of substance and alcohol use, initiating the process of individual and community healing.[142] Essentially, the solutions to the problems surrounding Indigenous welfare for children with disabilities will have to come from within the communities themselves. This change can only be achieved if those communities are empowered and are recognised to have the ultimate responsibility for their children.[143]

Empowering Indigenous communities to take responsibility for their children will be easier if the Band is also granted with the power to control services for their children. Moreover, Indigenous leadership is necessary for the advocacy for the rights of Indigenous children with

children with disabilities have be05TT1 (b)-1.1 (1 (b)-g(e)1 l(e)1 (b)-(h)-1(i)-2(b)- (i)-2 a.1 6)- (i)-2 o(i)-2.1

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