

Indigenous Child Welfare in Canada

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*This paper is primarily a case study of the Canadian Human Rights Tribunal case *Caring Society v Canada* and seeks to accomplish three things. First, to create a theoretical foundation built upon historic instances of discriminatory/assimilationist policies based upon theoretical understandings of social reproduction, biopolitics, and neoliberalism. Second, to situate *Caring Society* within said theoretical framework for the purpose of determining the context in which it occurs and the role of the case's context in producing discriminatory/assimilationist policy. Third is the application of both the theoretical framework as well as *Caring Society* to determine how the Canadian state engages in nation building through processes of othering and framing Indigenous peoples as a foreign threat to the security of the Canadian identity. In doing so, I not only argue that Indigenous child welfare is the perpetuation of residential schools, but that it systematically breaks down Indigenous children and Indigenous communities in response to their perceived threat through processes of othering and nation-building.*

Introduction

Cindy Blackstock's paper, entitled "Residential schools: Did They Really Close or Just Morph Into Child Welfare?" (Blackstock 2007, 71), serves well as a theoretic and analytic point to begin this paper. Though my primary focus deals with *Caring Society v Canada* and how the case impacts our understanding of Indigenous peoples as citizens (and tensions therein), I will also discuss the historic, economic and social factors the permeate and foreground this case.

As Blackstock poses in her article, despite the last residential school having closed in 1996, does the settler colonial practice of nation-building continue through the Canadian state's exertion of control over the processes of social reproduction, othering, and the construction of foreignness in relation to its Indigenous peoples? In exploring this question, I will critically discuss the Canadian state's control over social reproduction through policy, legislation, and discourse, and how there has been a continuing tension between Indigenous traditions and the capitalist settler (and therefore gendered and racialized) construct of the family and citizenship. Building on this framework, I will discuss the more recent forces of neoliberal policy, and how it complements and motivates the state's control over social reproduction. The recent implementation of neoliberal policies by the state will be explored through the practices of

devolution of responsibility in the Indigenous child welfare system, as well as the biopolitical and fiscal tensions created in conflicts over land claims and Indigenous peoples' *sui generis* status in Canadian constitutional law. Having built a framework on the basis of social reproduction and neoliberalism, I will return to *Caring Society v Canada* and apply said framework. I then conclude with discussions regarding the processes of othering, security, and foreignness in Canadian nation-building and how this defines citizenship and the Canadian political community. In doing so, I argue that Indigenous child welfare systems are a perpetuation of the residential school system in that they, in practice, achieve the same thing: the exertion of control over the economic, familial, and social makeup of the Canadian national identity. Further, I argue that this is due to the perception of Indigenous people and their values as a threat to that very same identity, as well as the gendered and racialized construction of citizenship discussed above. However, I contend that the context in which this occurs has become increasingly complex in the light of the developing neoliberal state of politics of the Canadian government since the late 20th century and will attempt to tease this out in this paper.

Social Reproduction

In her writing, Bezanson identifies social reproduction as the “fleshy, messy, and indeterminate stuff of everyday life” (Bezanson 2018, 153). She elaborates that it permeates the macro, meso, and micro levels at which we analyze politics and power. While I fully agree with Bezanson’s broad definition of social reproduction, it would be outside the scope of this essay to attempt a full analysis of what she defines. The relevance of Bezanson’s framework to this paper is how the state controls social reproduction in *Caring Society* and Indigenous child welfare. Accordingly, I wish to focus on the parts of social reproduction that the Canadian state, in relation to the Indigenous peoples that reside within the confines of its settler colonial borders, seeks to exert power over in order to define the Canadian identity. In doing this, I will focus on the macro themes of social reproduction like settler colonialism and federalism; institutions and policies contained in the meso level, such as Policy Directive 5.1; and the micro level “transmission of culture, norms, socialization (including to racism) as well as love, support, and material/physical care” (Bezanson 2018, 153). While Bezanson also identifies neoliberalism as a macro level ideology through which we can analyze social reproduction, in light of its more contemporary relevance to my analysis, I will discuss it in a later section of this essay.

The Micro Level: Legal and Social Understandings of Indigenous Fathering

In beginning an analysis of social reproduction at the micro level, family must be considered as the focal point of social reproduction, through socialization and parenting. Within this paper, I will broadly define socialization as the process by which individuals transmit ideology, culture, and parenting practices. This will express the historical impact of settler colonial policies of assimilation, as well as how Indigeneity may be at conflict with the normative white settler identity.

Jessica Ball, a clinical psychologist with a background in public health and childhood development wrote: “Fathering in the Shadows.” Ball examines “systemic barriers to positive fathers’ involvement, including socioeconomic exclusion due to failures of the educational system, ongoing colonization through Canada’s Indian Act, and mother-centrism in parenting programs and child welfare practices” (Ball 2009, 29). Specifically, in relation to my discussion of social reproduction, Ball relates

the fact that “that most Indigenous men and women in Canada are either survivors of residential schools or have suffered “secondary trauma” (2009, 32), with the experiences of fathers who felt that the “lack of exposure to positive fatherhood in their childhoods” is “best accounted for many of the challenges they faced when they became fathers” (2009, 34). The experience of modern Indigenous fathers would clearly impact socialization through the institution of the family. Such an impact is not merely in terms of “good” fatherhood, but *Indigenous* fatherhood. Some fathers express concerns regarding the recovery of “Indigenous forms of family life and men’s roles as teachers, guides, providers, and guardians of the spiritual life of the family” (Ball 2009, 39). Modern Indigenous fathers are concerned about reviving their traditional role as transmitters of Indigenous culture, and therefore the transmission of indigeneity in the family.

We can also observe control over the type of social reproduction discussed above continued in the settler colonial formations of custody and legal paternity. Ball touches briefly on the fact that in the Canadian system of jurisprudence, the legal paternity of Indigenous fathers relies on the father’s signature being on the witnessed birth record (2009, 43). Ball identifies several factors that exist as barriers to Indigenous fathers being able to sign their child’s birth record, and further discusses research that indicates a father’s name being present on a birth record is correlated to his involvement with a child and even child mortality (2009, 43). The barriers of Indigenous fathers being unable to sign their child’s birth certificate demonstrates that settler colonial legal constructs (and barriers Indigenous fathers face in conforming to them) not only affect the transmission of culture, but the individual life.

In terms of custody, Friedland, the author of “Tragic Choices,” discusses the tension between the loss of Indigenous communities and the loss of individuals in custody decisions regarding Indigenous children. While her paper speaks to the much broader issue of speaking about difficult factors regarding Indigenous custody decisions, her analysis of the case *D.(H.) v. H.(M.)* is relevant to my discussion surrounding social reproduction. There must be a degree of caution in giving weight to Friedland’s writing, because while she may seem to support her arguments by the evidence that she provides, by her own admission this particular work is “following an intuition through legal theorists and case law, rather than a thorough or empirical analysis of the present situation” (Friedland 2009, 255). Friedland contrasts two parts of the judge’s reasoning in deciding not to award custody to the biological grandfather of a child of Indigenous heritage: “his not [being comfortable] with “traditional spiritual practices”” and his “approach to parenting which is too ‘hands off’” (Friedland 2009, 231). Friedland argues that the judge “is ignoring what is possibly an embedded cultural practice of child rearing, common to many Aboriginal communities” (Friedland 2009, 231). In doing this, Friedland posits that the “grandfather seems to be judged for not being “Aboriginal” enough on the one hand, and (perhaps) for being too traditional on the other” (Friedland 2009, 232).

Neoliberalism: A Meso and Macro Understanding of Social Reproduction through Legislation and Policy

In Bezanson’s analysis, she takes a more economic and neoliberal understanding of social reproduction than the micro level analysis constructed above. However, in understanding the transmission of economic and ideological values contained within this section, the micro-level familial form of social reproduction that I have discussed deepens our understanding of social reproduction.

In discussing Grammond and the implications of Ball's work, we begin to see the importance of federal legislation and policy in relation to this case. Grammond, now a Justice of the Federal Court, wrote "Federal Legislation" while a Professor of Civil Law, and published this article in the *Journal of Law and Social Policy*. Grammond explicitly contends that "the child welfare system is perpetuating the harms of residential schools through different means" (2018, 132). In exploring traditional Canadian "Indian" policy, he examines the historic use of federal jurisdiction over Indigenous affairs "based on paternalistic assumptions and was aimed at assimilation" (Grammond 2018, 139). In contrast, MacDonald points to the fact that "the shift to 'autonomous' child welfare includes all the hallmarks of a privatization project including: re-regulation, re-privatization, co-optation, de-politicization and individualization" (2007, 22). Such a privatization project represents a growing shift in federal policy, oft-identified in academic writing, that shows a neoliberal tendency to increase the devolution of control over services without providing adequate resources to manage such control.

In the context of *Caring Society v Canada* and the case's broader implications for Indigenous child welfare, a shift towards neoliberal policies can be seen in the financial incentivization of removing children from their communities. Bezanson explains that the Tribunal found that "AANDC/INAC's funding structure incentivizes removing children and placing them into care rather than focusing on prevention and support" (2018, 159), a practice "built upon historical state practices of child removal and extended generational damage" (Bezanson 2018, 160). Grammond supports this in connecting it to an Ontario Superior Court of Justice ruling regarding the Sixty's Scoop that "held that the federal government was negligent when it failed to ensure the protection of the cultural identity of Indigenous children placed in foster care or adopted" (2018, 133). Further, throughout his paper Grammond explores the legal theory of "double aspect," in which both the federal and provincial governments may legislate in terms of Indigenous issues, but "[Parliament has] jurisdiction to legislate on Indigenous child and family services if it chooses to do so" (2018, 138).

Connecting this to my discussions of explicitly *social* (micro level) reproduction, one can see that neoliberal policies both permeate and motivate the Canadian state's exertion of control over social reproduction, in two distinct ways. The first that I discussed is in terms of child welfare funding, and the creation of a funding scheme that incentivizes the removing of Indigenous children from their communities. The second, is the lack of federal legislation regulating Indigenous child welfare, when Parliament has the constitutional grounds to do so. The significance of this is that it demonstrates that government policy continues to engage in assimilation and the destruction of traditional paths of Indigenous cultural transmission. Despite having clear authority to introduce legislation that would resolve or mediate the issue, the federal government has not done so. We must be cognizant that this also takes place within a broad settler colonial structure, and the federal exercise of legislative power over "Indians, and land reserved for the Indians" through the *Constitution Act, 1867* is itself an act of colonization. Within such a context, neoliberalism has further confounded the way in which we look at this issue in that it supports settler colonial practices and disincentivizes federal intervention.

Pasternak's "The Fiscal Body of Sovereignty" can lend further assistance in analyzing the relationship between the Canadian state's neoliberal policies in relation to Indigenous issues. Though she examines land claims, band management, and financial conflicts, Pasternak's analysis and connecting of these issues to those of surplus populations in capitalist societies and biopolitics is particularly

relevant. One can draw a direct analogy between band management and child welfare, as the federal government fails to provide adequate funding to Indigenous programs for them to achieve their intended goals. Pasternak also notes, through Marx and Li, that “surplus populations are not always created as a strategy of capitalism, but can be ‘a sign of their limited relevance to capital at any scale’” (2015, 15). When discussing the context of government funding for any service, the creation of surplus populations suggests that the provision of capital to a surplus population would be allocated based on its relevance to capital.

Further biopolitical implications can be considered in “The Fiscal Body of Sovereignty” in a settler colonial context, in that Indigenous peoples are not considered nation-to-nation partners, but rather as “neo-liberal Canadian subjects who must embrace market citizenship in order to secure necessary funds to eat and have shelter” (Pasternak 2015, 15). In the case of Indigenous bodies on reserves, they are fiscally discriminated against to the point that they are no longer seen as humans with extra-fiscal value, but as subjects to be integrated into the market. As Pasternak notes, this can become a matter of literal life and death. The claim of market integration can be connected with Indigenous fathering, in which fiscal limitations to Indigenous fathers signing the birth record, itself a settler colonial legal construct, is correlate to infant mortality.

Applying the Theoretical Framework: *Caring Society v Canada*

Having built a theoretical foundation on which to examine the case at hand, I will now apply that foundation to the circumstances of *Caring Society* and then return to a theoretical discussion to explore the relevance of my findings. While the claim that the Canadian state perpetuates residential schools has a certain shock factor considering the gross abuses that occurred, the contemporary perpetuation of the schools is more nuanced. Further, the real importance lies in how we can use this assertion to define Indigenous-settler relations as well as how the settler state defines itself by othering and framing Indigeneity as foreign.

According to Bezanson, “[f]ederalism, neoliberal governance, and social reproduction are thus central to [*Caring Society*]” (2018, 172). As I have established, a system exists in which neoliberal motivations create and motivate the structural continuation of residential schools. Two primary instances of this occur. The first is an expression of a broader neoliberal trend seen in government policy by which responsibility is given to First Nations without a lack of adequate or permanent funding, superfluous and harmful reporting expectations, and/or interference from the Canadian state based on the created perception of incompetence or even criminal behaviour in Indigenous leadership. Such funding and policy schemes, in the case of Indigenous child welfare, are expressed in Policy Directive 5.1 (“First Nations Child and Family Services”), as well as findings that “[o]n-reserve child welfare system receives up to 38% less funding than elsewhere” (Fontaine 2016). The second instance is a more specific expression of neoliberalism that deals specifically with jurisdiction and policy direction within Indigenous child welfare. The federal government’s refusal to legislate despite clear jurisdiction to do so under the legal doctrine of double aspect, as well as the Tribunal’s finding that funding programs create an environment where removing children from their communities is incentivized, account for this expression of neoliberalism.

In applying Joyce Green's definition of colonization (that includes a restriction of cultural self-determination) to *Caring Society v Canada*, it becomes clear that the Canadian state's policies are colonial and assimilationist. The existence of restrictions on cultural self-determination is obvious in considering the first section of the theoretical framework that I have laid out, dealing with control over social reproduction. Whether or not these policies are intentional becomes irrelevant at a certain point because, as Friedland writes, Indigenous child welfare is not merely an issue of community and cultural survival, but the survival and wellbeing of individual children (2009, 225-226).

Processes of Othering, Foreignness, and Building the Canadian National Identity

As Bezanson points out, the concept of social reproduction is "large and messy" (2018, 153) and becomes yet more complicated when applied to the history and nuance of Indigenous-Settler relations. However, at the risk of flattening the complex analysis of the issue I have developed above, I will attempt to summarize it in order to create a starting point from which I can discuss othering, foreignness, and the Canadian identity.

As in *Caring Society*, by exerting control over social reproduction, the Canadian state's intentions and motivations are threefold. First, to break down traditional methods of cultural and social transmissions in the family, seen historically in residential schools and contemporarily through the settler colonial institutions of custody, legal paternity, and the fiscal incentivization of removing Indigenous children from their communities. Second, to frame Indigenous issues (both child welfare and land claims) in terms of fiscal responsibility, essentially removing questions of sociocultural and biological life from consideration and furthering the state's neoliberal policies. Third, and drawing from the previous two, the incorporation of Indigenous surplus populations into the economic, social, and cultural folds of the settler colonial society.

In examining how the Canadian state racializes, others, and names Indigeneity and the people within that category as foreign, I will draw upon the works of Gaucher in "Monogamous Canadian Citizenship," and Abu-Laban and Dhamoon in "Dangerous (Internal) Foreigners." I seek to combine the frameworks provided in both papers, with the goal of seeing how the Canadian state engages in nation-building through the process of othering, and as a result, how it forms our perception of citizenship and political community in relation to Indigenous peoples.

Starting with Abu-Laban and Dhamoon, they provide an invaluable framework to explain how the Canadian state creates perceptions of foreignness around *internal* groups. They argue that "[f]oreignness ... is ... subject to variation according to the specific ways in which discourses of a nation, security, and racialization interact" (Dhamoon and Abu-Laban 2009, 166). Dhamoon and Abu-Laban gives specific focus to the aspect of security, which "serve[s] as specific alibis for, a) specific forms of nation-building and, b) constructions of the omnipresent danger posed by radicalized Others" (Dhamoon and Abu-Laban 2009, 166). In the case of *Caring Society* and Indigenous child welfare, the settler colonial and neoliberal motivations for control over social reproduction comes into play. This is specifically through discourses of a need for fiscal responsibility, the danger of financial mismanagement, and protecting the settler colonial concept of the family. These provide "security threats" that allow for the construction of Indigenous peoples as internal dangerous foreigners. While Abu-Laban and

Dhamoon focus on physical security, this analysis is supported by Gaucher in her analysis of the Canadian government's characterization of polygamy as a "foreign threat" and "barbaric cultural practice," despite its occurrence within Canadian borders (2016).

Conclusion: Social Reproduction, Neoliberalism, and Indigenous Peoples as Citizens

Within such a framework, we can observe that the Canadian state perceives and enforces the perception that indigeneity, and those who adhere to it, are foreign and threatening to the settler conception of the Canadian identity. These processes of othering and the framing of Indigenous people as foreign is evident in my use of neoliberalism and social reproduction in order to ground *Caring Society* in the historic and colonial context in which it was created. This has profound implications in how we see Indigenous peoples as Canadian citizens, particularly as those with a *sui generis* relationship to the Canadian state. Despite that relationship and the state's fiduciary responsibility to Indigenous peoples, the state continues to shun constructive policy making and discourse in favour of assimilationist policies that seek to exert control over social, familial, and economic forms of social reproduction, in part by reinforcing a perception that indigeneity is foreign to (settler) Canadian values, to the point that Indigenous lives may be deemed surplus and risk death. While neoliberalism may have changed the medium and means by which the state achieves this, as I have shown, neoliberal policies in the Canadian government motivate and complement assimilationist practices.

In tandem, such neoliberal and assimilationist policies severely impact the ability of Indigenous peoples to substantively belong and participate in Canadian society and political community, for unless they renounce their Indigeneity, they will continue to be the subject of such policies. Further, if we apply T.H. Marshall's definition of social citizenship to *Caring Society*, it is obvious that the state others the concept of Indigenous citizenship in the building of a settler Canadian identity. Though issues of jurisdiction are not wholly within the scope of this essay, Pasternak's conceptualization of Indigenous bodies as jurisdictional subjects in "Jurisdiction and Settler Colonialism" may apply here (2014), in that Indigenous bodies are also seen to be jurisdictional objects in what I have detailed in this paper. Further analysis of the connection between social reproduction, jurisdiction, and Indigenous citizenship may add more depth to my analysis, particularly regarding the *sui generis* relationship in practice.

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