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## Canada's Residential Schools and the Right to Integrity

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Canada's Residential Schools and the  
Right to Family Integrity

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*Apart from characterizations of the residential schools system as imposing cultural genocide, it is possible to understand the system in terms of a legal wrong involving violations of family integrity. The 19th and early 20th centuries saw increasing state intervention in families generally so as to impose compulsory education. However, wrongs in this intervention were recognized, and international law developed toward a right of family integrity that led to changes in non-Indigenous contexts. Evidence from the TRC shows that Canada did not respond as quickly in the Indigenous context, thus permitting an identification of how the residential schools system violated international law at least in its latter decades. Focus on this international law right of family integrity has potential application to other contexts of interference with Indigenous families and is thus a helpful legal approach that should be adopted.*

*Outre la qualification du système des pensionnats indiens comme imposant un génocide culturel, il est possible de comprendre le système sous l'angle d'un tort juridique impliquant des violations de l'intégrité familiale. Au XIXe siècle et au début du XXe siècle, l'intervention de l'État s'est accrue dans les familles en général pour imposer l'éducation obligatoire. Cependant, les torts de cette intervention ont été reconnus et le droit international a évolué dans le sens d'un droit à l'intégrité familiale qui a conduit à des changements dans des contextes non autochtones. Les données de la CVR montrent que le Canada n'a pas réagi aussi rapidement dans le contexte autochtone, ce qui a permis de déterminer comment le système des pensionnats indiens a violé le droit international, du moins dans les dernières décennies. L'accent mis sur ce droit international du droit à l'intégrité de la famille peut s'appliquer à d'autres contextes d'ingérence auprès des familles autochtones et constitue donc une approche juridique utile qui devrait être adoptée.*

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*Introduction*

- I. *Historical background and development of residential schools*
- II. *Context: 19th and early 20th century understanding of parental rights to choose children's education*
- III. *International law on family integrity and associated parental choice concerning education*
- IV. *Examples from survivor testimony*
  1. *Apprehending and transferring children without parents' consent: Howard Stacy Jones, Doris Judy McKay*
  2. *Removing children from the home against parents' wishes: Lynda Pahpasay McDonald, Albert Marshall*
  3. *Inability to prevent abuse: Ben Pratt*
  4. *Hindering parent-child communication: Doris Young, Tina Duguay, Loretta Mainville*
  5. *Alienation of children from parents and community: Vitaline Elsie Jenner, Florence Horassi, Agnes Moses*

*Conclusion and implications*

*Introduction*

Canada's residential schools represent a protracted and painful part of Canadian history that is only now receiving the attention it has always warranted.<sup>1</sup> For the better part of a century, the Canadian government removed thousands of First Nations<sup>2</sup> children from their homes, families,

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1. Throughout this article, unless context indicates otherwise, "residential schools" refer to both the smaller schools technically referred to as "residential" (around 500 students) and the larger schools technically referred to as "industrial" (over 1000 students). While there were differences in the two styles of school, they both involved the removal of children from home and family.

2. The terminology used to refer to Canada's Indigenous peoples has developed over time. Section 35 of the *Constitution Act, 1982* recognizes three groups of "Aboriginal peoples": Indians, Métis, and Inuit. While "Indian" still functions as a legal term, the term "First Nations" is more accepted except where "Indian" is necessary. The Inuit are a separate ethnic and cultural group originating in northern Canada, while the Métis are a third distinct group with ancestral origins in mixed European and First Nations ancestry but with distinctive contemporary cultural identities. For the purposes of clarity, this paper will address only the residential school experience of the First Nations people of Canada. While Métis and Inuit children did attend residential schools, their experience and their legal relationship with the federal government was and continues to be distinct. The paper will generally use the terms "Indigenous" and "First Nations" as pertinent to the context, except where a different term is necessary for legal precision.

and communities in the name of education and assimilation. The motives behind this action were variable across different actors, but whatever they were, the results were disastrous. The history has been comprehensively detailed in the multi-volume report of Canada's Truth and Reconciliation Commission (TRC) released in summary version in mid-2015 and in full version later in 2015 following upon six years of work.<sup>3</sup>

Grappling with the legacies of the residential schools system raises many issues for governments and other institutions. Significant moments in the process have included Prime Minister Stephen Harper's historic 2008 apology in the House of Commons,<sup>4</sup> the Pope's 2009 expression of sorrow and regret to First Nations leaders for the role played in the residential schools system by the Catholic Church,<sup>5</sup> and of course the 2015 report of the TRC.

The TRC chose to describe the wrong of residential schools as "cultural genocide."<sup>6</sup> Some reports and writers in other countries have described analogous policies in similar terms,<sup>7</sup> although some that used genocide

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3. The published summary of the report is itself 536 pages: Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015).

4. See "Prime Minister Stephen Harper offers full apology on behalf of Canadians for the Indian Residential Schools system," Speech of 11 June 2008 (Ottawa, Ontario), online: <[www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649](http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649)>.

5. See, e.g., "Pope expresses 'sorrow' for abuse at residential schools: AFN's Fontaine Says He Hopes Statement Will 'Close the Book' on Apologies Issue," *CBC News* (29 April 2009), online: <[www.cbc.ca/news/world/pope-expresses-sorrow-for-abuse-at-residential-schools-1.778019](http://www.cbc.ca/news/world/pope-expresses-sorrow-for-abuse-at-residential-schools-1.778019)>. There were controversies in early 2018 concerning a Canadian call for the pope to apologize again, and there may yet be further discussion on the issue.

6. See, e.g., *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, *supra* note 3 at 1; Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation*, vol 1 of Report of the Truth and Reconciliation Commission of Canada (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 6.

7. See, e.g., the findings in ch 14 of the report of Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them Home* (Commonwealth of Australia, 1997), where the Inquiry finds that "from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide"; Andrew Woolford, *This Benevolent Experiment: Indigenous Boarding Schools, Genocide, and Redress in Canada and the United States* (Lincoln: University of Nebraska Press, 2015) (characterizing Canada's residential schools and American boarding schools as both part of a process of colonial genocide); Tamara Starblanket, *Suffer the Little Children: Genocide, Indigenous Nations, and the Canadian State* (Atlanta: Clarity Press, 2017) (putting the American boarding schools and Canadian residential schools in a common framework). There are many other examples as well, and of course a vast literature in Australia after the Stolen Generations report. On the complex interfaces of the legal definition and other meanings of the term, see notably Robert van Krieken, "Cultural Genocide Reconsidered" (2008) 12 *Australian Indigenous LR* 76. See also Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016).

terminology later sought to retreat from it.<sup>8</sup> Use of such terminology has become a generalized assertion about much colonial policy by a certain group of scholars in Indigenous studies circles.<sup>9</sup> The term “cultural genocide” was prominent in the TRC commissioners’ prior comments on the report,<sup>10</sup> and it was also adopted in a speech by the Chief Justice of Canada shortly before the release of the summary version of the report,<sup>11</sup> a surprising intervention by the Chief Justice given the potential for related legal issues to end up before the Court.<sup>12</sup> The term ultimately received very substantial media coverage.<sup>13</sup>

This terminology had been debated in various ways through the term of the TRC, likely because it is subject to some significant complexities and international controversies. One of the researchers working for the TRC published an opinion piece in the wake of the report’s release defending the term as carefully considered terminology.<sup>14</sup> While mid-2015 polling

8. See notably the later statement of the Chair of Australia’s National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Sir Ronald Wilson, who said that “[w]ith hindsight, I think it was a mistake to use the word genocide...once you latch onto the term ‘genocide,’ you’re arguing about the intent and we should never have used it”: *The Bulletin* (Sydney), (12 June 2001), 27.

9. Much of the vast scholarly discourse about settler colonialism is strongly associated with a view that governmental policy was genocidal, being oriented to elimination of Indigenous populations to clear land for settlement. For the leading statement on settler colonialism, see Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8:4 *J. Genocide Research* 387. Some scholarly circles now take it as a given that the American state is genocidal in nature, with a recent example being Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton: Princeton University Press, 2017) at 4, 23, and 278 (containing rapid assertions that American Indian policies constituted genocide under the legal definition of genocide).

10. It was hinted at in some comments, albeit sometimes in the context of comments in which there were indications that a determination of genocide would not be a proper role for the TRC, such as in a co-authored op-ed co-authored by TRC Chair Murray Sinclair: Murray Sinclair & Stuart Murray, “Confronting the truth on human and indigenous rights,” *Toronto Star* (8 November 2014), online: <[www.thestar.com/opinion/commentary/2014/11/08/confronting\\_the\\_truth\\_on\\_human\\_and\\_indigenous\\_rights.html](http://www.thestar.com/opinion/commentary/2014/11/08/confronting_the_truth_on_human_and_indigenous_rights.html)>.

11. Sean Fine, “Chief Justice Says Canada Attempted ‘Cultural Genocide’ on Aboriginals,” *Globe and Mail* (28 May 2015), online: <[www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/](http://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/)>. Chief Justice McLachlin made this statement several days ahead of the release of the TRC Report, which went on to apply the same characterization, on 2 June 2015.

12. In private conversation, some practitioners who work for Aboriginal communities or organizations have expressed misgivings about the Chief Justice’s use of the term in the circumstances in which she adopted it, with concerns arising from their standpoint in light of the potential to which it gave rise for it to result in calls for her recusal on future cases. Obviously, we now know that she avoided such an outcome during her term on the Court, but some still had those concerns throughout her time there, depending what cases had managed to reach the Court.

13. A google search of “TRC and cultural genocide” turns up hundreds or thousands of media reports referring to the “cultural genocide” finding.

14. David MacDonald, “Five reasons the TRC chose ‘cultural genocide,’” *Globe and Mail* (6 July 2015), online: <[www.theglobeandmail.com/opinion/five-reasons-the-trc-chose-cultural-genocide/article25311423](http://www.theglobeandmail.com/opinion/five-reasons-the-trc-chose-cultural-genocide/article25311423)>

data showed that many Canadians agreed with the term<sup>15</sup>—and the gravity of the term has no doubt helped bolster arguments for responses to the historic wrong of residential schools in terms of the TRC's ninety-four calls for action<sup>16</sup>—it was nonetheless a charged term in many respects.<sup>17</sup> As a legal term, “genocide” would imply a high degree of intentionality that has a complex relationship to a bureaucratic system operated by myriad people with varying motivations. As a term in international law, it would imply a responsibility on other states to respond—states around the world have been reluctant to recognize “genocides” specifically because of the resulting consequences.<sup>18</sup> Moreover, the status of “cultural genocide” in international law is complex and uncertain in a variety of ways.<sup>19</sup>

In this article, we consider an alternative way of conceptualizing a central wrong of Canada's residential schools system.<sup>20</sup> We delineate an inherent human right to family integrity, which is violated by state disruption of the family. We show how legal recognition of this right gradually, implicitly emerged in contemporary international human rights law during the time when Canada's residential schools were in operation. In doing so, although referring to other work that has advanced an analogous

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15. Laura Hensley, “Residential school system was ‘cultural genocide,’ most Canadians believe according to poll,” *National Post* (9 July 2015).

16. The use of terms with specific legal meanings (or even claimed histories in relation to those terms) calling for action in contexts in which they do not legally fit is often an attempt to try to claim some of the aura of the legal term. Cf. Simonne Horwitz & Dwight Newman, “A Legal-Historical Consideration of Links Between Canadian and South African Racial Policies” (2010) 36:4 *Commonwealth Law Bulletin* 691 (exploring reasons for the circulation of inaccurate claims about Canada's purported links to South African apartheid). See also Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford: Oxford University Press, 2016).

17. In terms of some of the more critical commentary on the TRC, Hymie Rubenstein and Rodney Clifton wrote an article specifically to challenge the “cultural genocide” conclusion: “Cultural Genocide and the Indian Residential Schools,” *C2C Journal* (9 November 2015) and Aboriginal law specialist Timothy McCabe has argued that the “cultural genocide” focus of the TRC may actually reflect certain preconceived frames and even anti-Christian spiritual commitments held by the TRC commissioners: Timothy McCabe, “Reconciliation and the Aboriginal Peoples: The Secular State Tries Its Hand” (September 2016) 25:3 *Christian Legal Journal* 5. See also Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools*, 2nd edn. (Toronto: University of Toronto Press, 2017) (suggesting that the TRC fostered a selective and simplified narrative relating to the residential school experience, sacrificing traditional objectives of history for the sake of a particular preselected narrative concerning the residential schools).

18. For a discussion of this point, see Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002).

19. See Novic, *supra* note 16.

20. For those who find the “genocide” approach compelling, this approach is an “additional” approach. We do not take a specific view on the merits of using a genocide approach in analyzing residential schools, so we frame our approach neutrally as an “alternative” approach.

argument,<sup>21</sup> we engage with further international law sources on family integrity so as to seek to establish such an argument in international law. Although we leave open the possibility of grounding a right to Indigenous family integrity domestically in s. 35 of Canada's *Constitution Act, 1982*, we focus on the international human rights claim, given the scope of comparable policies not only domestically but also outside of Canada.<sup>22</sup>

We suggest that developments related to this right offer an important lens for understanding how residential schools came to be established in a period when rights in relation to the family were receiving less recognition—or were being actively overridden in the name of state policy grounded in contemporary social reformist thought—and in how residential schools came eventually to be abolished. We also suggest that considering this right allows for some important temporal distinctions, with the latter phase of residential schools being more readily recognized as evidencing Canadian breaches of international law norms on family integrity.<sup>23</sup> Finally, understanding residential schools in terms of a right to family integrity and against family disruption offers a helpful analytical lens concerning the wrong of residential schools, while also helping to delineate important future policy paths. It has potential practical benefits in offering a legal argument that could identify legal wrongs in the context of various state interferences with Indigenous families without the intention and associated evidentiary requirements of a genocide frame.

To be clear, we do not see this argument as changing anything with respect to the litigation process on residential schools, which is largely over—at least in respect of the widespread set of circumstances covered by the TRC Report, whose adoption was required by the final settlement agreement on the class action litigation concerning First

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21. Cf. Sonja Starr & Lea Brilmayer, "Family Separation as a Violation of International Law" (2003) 21:2 Berkeley J Intl L 213 (discussing the need for international law norms on family disruption); Asbjørn Eide, *Economic, Social, and Cultural Rights: A Textbook*, 2nd ed (The Hague: Kluwer Law International, 2001) at 263 (referencing parental rights to oversee the education of their children).

22. We also take no view in the present paper on the possibility of grounding such a right in s 26 of the *Charter of Rights*. The implications of s 35 for family law contexts are underdeveloped, and there has been very little analysis of the content of s 26 generally.

23. By today's standards, the removal of children from their homes for the purposes of erasing their cultural identity and indoctrinating them into a new way of living and thinking is recognized as a major breach of several facets of international law, not least the right of parents to oversee the education of their children: Eide, *supra* note 21 at 263.

Nations residential schools.<sup>24</sup> However, there are three ways in which our argument nonetheless matters. First, our argument is still pertinent to how this vital aspect of Canadian history is understood in the longer term, and we introduce a different lens than that utilized by the TRC. Second, it may help to frame litigation in some residential schools situations not covered by the TRC or the Settlement Agreement, since the government of Canada does not recognize some closely analogous schools (such as certain Métis residential schools and residential schools operated without federal government support) as having been “residential schools.” Third, while there has been a partial recent settlement of claims arising from the “Sixties Scoop” removal of Indigenous children from their communities through the child welfare system for fostering and adoption,<sup>25</sup> there are ongoing issues with the child welfare system that are the subject of ongoing policy-making and that could be the subject of future litigation. Our paper both helps with the understanding of history and bears on possible ways of framing responses to these ongoing issues.

Our discussion is situated against a set of deeply marred historical legacies. Residential schools, aiming at cultural assimilation, involved an immense intrusion into families and communities. As First Nations parents lost authority to determine how their children would be educated and raised, those children in turn lost the chance to experience their parents' love, support, protection, and instruction, to build normal, healthy relationships with their immediate and extended family, and to learn about their family's traditions, culture, and way of life.<sup>26</sup> First Nations communities today face

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24. There were also individual suits, notably *HL v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401. However, ultimately, there were applications to courts in nine Canadian jurisdictions for approval of the residential schools settlement agreement in resolution of the class actions that had been commenced: *Northwest v Canada (Attorney General)*, 2006 ABQB 902; *Quattell v Canada (Attorney General)*, 2006 BCSC 1840; *Semple v Canada (Attorney General)*, 2006 MBQB 285; *Kuptana v Canada (Attorney General)*, 2007 NWTSC 01; *Ammag v Canada (Attorney General)*, 2006 NUCJ 24; *Baxter v Canada (Attorney General)*, Court File 00-CV-192059CP (15 December 2006) (Ont SCJ); *Bosum v Canada (Attorney General)*, Judgment of 15 December 2006 (Que SC); *Sparvier v Canada (Attorney General)*, 2006 SKQB 533; *Fontaine v Canada (Attorney General)*, 2006 YKSC 63. The Settlement Agreement has been posted online as *Indian Residential Schools Settlement Agreement*, online: <[www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf](http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf)>.

25. A settlement was agreed in late 2018 for those who did not opt out of it, with final claims forms due in by August 2019. See <[www.sixtiesscoopsettlement.info](http://www.sixtiesscoopsettlement.info)> for developing information.

26. These claims are extensively documented and are also present in pertinent literature and narrative. For one example of the latter, see the discussion of how the residential schools legacy receives contemporary expression in Aboriginal gang membership at various points in Joe Friesen, *The Ballad of Danny Wolfe: Life of a Modern Outlaw* (Toronto: McLelland & Stewart, 2016).



familial and social dysfunction to varying degrees, with much of that dysfunction reflecting ongoing legacies from residential schools.<sup>27</sup>

Within a set of complex social connections and conditions, we develop one particular argument on residential schools and their interference with First Nations family integrity. We do so because of their particularly profound impact, while acknowledging that an array of government policies have had (and continue to have) negative impacts on First Nations communities. In focusing on one policy, we do not purport to offer a full description of the wrongs of the colonial project. Rather, we try to show one example of a specific international rights violation that is tangible, identifiable, and susceptible of broad consensus.

To do so, in Part I, we briefly set out the historical backdrop to Canada's residential schools system and development of that system. In Part II, we show how this system's development was interconnected with broader intervention of the state into families during the same era. However, in tracing this broader history, we show how intervention in families was carried out in a particularly dramatic way and extended over a longer period of time in the First Nations context as compared to other contexts. In Part III, we discuss international law sources on the right to family integrity and related parental authority over education, showing the presence of these international law norms in their current form from at least the 1940s. In Part IV, we draw on a number of specific examples from the TRC Report that show direct impacts on families. We also show how the material in these examples, even though lacking in certain pertinent details that the TRC did not record, can nonetheless establish a case that the residential schools system came to be in violation of international law. Finally, we gesture toward conclusions for various other areas of Indigenous policy, suggesting the potential to extend this approach in future work to contribute to better respect for Indigenous families in other contexts as well.

### I. *Historical background and development of residential schools*

The residential schools system is situated, in the first instance, against a longer historical backdrop of interaction between European states and

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27. See, e.g., *R v Ipeelee*, 2012 SCC 13 at 60; "Aboriginal Corrections," in *Annual Report of the Office of the Correctional Investigator 2013–2014*, Government of Canada. online: <[www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV](http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV)>; Aboriginal Children in Care Working Group, *Aboriginal Children in Care: Report to Canada's Premiers* (Council of the Federation Secretariat, July 2015) at 7, online: <[www.canadapremiers.ca/phocodownload/publications/aboriginal\\_children\\_in\\_care\\_report\\_july2015.pdf](http://www.canadapremiers.ca/phocodownload/publications/aboriginal_children_in_care_report_july2015.pdf)>.

Canada's Indigenous peoples.<sup>28</sup> European exploration of what is now Canada, apart from brief Norse forays in the 10th and 11th centuries, began in the early 16th century.<sup>29</sup> By the 18th century, the French and the British were vying in full force for control of the territory. In 1759, during the Seven Years' War (also known, locally, as the French and Indian War), the British overpowered the French, establishing their authority in the region vis-à-vis other European powers. However, Britain's relationship with the First Nations already resident in the region remained unsettled.

Condemnation of atrocities committed by the Spanish conquistadors against the indigenous peoples of Latin America had fostered in the British a "distaste for violent dispossession" of First Nations in North America.<sup>30</sup> Thus, the British Crown typically recognized the sovereignty and independence of indigenous peoples to an extent, seeking to bring them under its authority via persuasion and agreement rather than by force. On one reading of British policy, it treated First Nations as distinct groups operating within independent structures of governance that were entitled to a degree of respect.<sup>31</sup>

However, another reading sees the British approach as having been more inconsistent, treating Indigenous peoples as "simultaneously... subject and independent," respecting their political structures while still asserting authority.<sup>32</sup> In the Royal Proclamation of 1763—a hugely symbolic document for Canadian Aboriginal peoples today<sup>33</sup>—the British government recognized the existence of First Nations and acknowledged

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28. We are indebted to a presentation by Justice Harry Slade, Chairperson of the Specific Claims Tribunal, and Alisa Lombard, Legal Counsel for the Registry of the Specific Claims Tribunal, on September 16, 2013 in Ottawa, ON that has helped to inform some of the thinking on the structure of the general historical background.

29. PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York: Oxford University Press, 2004) at 88.

30. McHugh, *ibid.* at 89-92. On the origins of treaty-making, see also generally JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

31. McHugh, *ibid.* at 92-106. That said, the full interpretation of the attitudes underlying these policies were complex. See, e.g., Alain Beaulieu, "The Acquisition of Aboriginal Land in Canada: The Genealogy of an Ambivalent System (1600-1867)" in Saliha Belmessous, ed. *Empire by Treaty: Negotiating European Expansion, 1600-1900* (Oxford: Oxford University Press, 2015).

32. McHugh, *ibid.* at 104. In his widely cited work on the *Royal Proclamation*, Indigenous scholar John Borrows notes a dual element to the *Proclamation*, which simultaneously presumed an intention to enter into treaty relationships and presumed British dominion: John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1998), 169 at 169-170.

33. Some case law has referenced its historic significance in terms like the following: "the Royal Proclamation must be interpreted in light of its status as the 'Magna Carta' of Indian rights in North America and Indian 'Bill of Rights'": *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 86.

Aboriginal title to lands not specifically ceded to the Crown, a fact celebrated by many First Nations groups in Canada. However, the Royal Proclamation also prohibited settlers from interfering with or acquiring those lands, thereby limiting the opportunities for First Nations to deal with their lands as they saw fit.<sup>34</sup>

In the 19th century, the Crown's conception of its own authority over First Nations began to expand. As the British solidified their control over what is now Canada and increased settlement, the independent existence of First Nations became increasingly inconvenient. First Nations became less important as military allies and clashes with an expanding settler population increased. Around this time, the British government began to treat First Nations as subjects rather than allies.<sup>35</sup>

In 1867, the country of Canada took official shape pursuant to the *British North America Act*. The *Act* presumed British sovereignty over First Nations, granting the federal government jurisdiction over Indian people and their lands.<sup>36</sup> It ignored the fact that much of the territory covered by the *Act* had not been ceded by First Nations to the Crown, by treaty or otherwise.<sup>37</sup>

Settlement proceeded rapidly after Confederation. As more and more settlers poured into the Canadian west, the presence of First Nations in the territories to be settled became a larger issue for the Canadian government. In keeping with the historic British preference for subjugation by consent,<sup>38</sup> the Canadian government continued to seek treaties with various First

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34. *Royal Proclamation of 1763*, Government of Canada, online: <[www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a6](http://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a6)>; For an important discussion of restrictions on alienation of First Nations lands and their complex impacts on First Nations communities, see Malcolm Lavoie, "Why Restrain Alienation of Indigenous Lands?" (2016) 49 UBC L Rev 997. See also generally Stuart Banner, *How the Indians Lost Their Land* (Cambridge: Harvard University Press, 2005).

35. By way of example, British authorities ceased to respect tribal governance in regard to matters such as criminal prosecutions and began to treat First Nations people as subjects of colonial law: McHugh, *supra* note 29 at 107.

36. This includes jurisdiction over reserves, lands held pursuant to aboriginal title, and attempts to extinguish this title: see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 173-176. However, the provinces hold general jurisdiction over land and resources in Canada. This jurisdiction is subject to existing trusts, which include aboriginal title and reserves. Both federal and provincial governments, therefore, have had a significant stake in claims to aboriginal title and the development of Canada's relationship with its First Nations.

37. In *Roberts v Canada*, [1989] 1 SCR 322, Wilson J. for the court commented at 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty." See also *Guerin v The Queen*, [1984] 2 SCR 335 at 378 and *Delgamuukw*, *ibid* at para 114.

38. See generally Beaulieu, *supra* note 31.

Nations in relation to that territory.<sup>39</sup> Also in keeping with British practice, however, “the pattern of formal engagement [via the treaty-making process] was usually a prelude to the undermining or removal of the sovereignty it purported to acknowledge.”<sup>40</sup>

Following Confederation, the federal government moved quickly to assert control over Canada's First Nations. This was accomplished primarily via the *Indian Act*, originally passed in 1876 as a consolidation of other pieces of legislation and remaining in force today (albeit in a highly amended form). The effort represented then-current ideas, which conceived of colonial administration as a system set up for the benefit of those being administered. As a result, the law was marked by paternalism from the outset.<sup>41</sup> This control and paternalism was manifested in a variety of policies, including the residential schools system.

Residential schools were residences away from the family home where First Nations children were placed, for purposes of education, by or under the authority of the government of Canada.<sup>42</sup> Larger residential schools, containing more than 1,000 students each, were called industrial schools. The Canadian government's involvement in residential schools began in the late 19th century and endured for nearly 100 years. While the government began to phase out the schools in 1969, the final residential school did not shut down until 1996.<sup>43</sup>

Canada's first residential schools for First Nations children were not government institutions: rather, they were voluntary institutions operated by Christian missionaries. The first such residential school to become truly established was the Mohawk Institute, established in the 1830s by Protestant missionaries and destined to become Canada's longest-running residential school.<sup>44</sup> Its model was not unique to Canada: by the 1840s, both European and Indigenous children were attending a variety of industrial

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39. In fact, all of the numbered treaties, covering the bulk of the ceded land mass within the country, were completed after 1867: see “Pre-1975 Treaties of Canada,” Indian and Northern Affairs Canada, online: <[www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc\\_1100100032308\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf)>.

40. McHugh, *supra* note 29 at 112.

41. On the historical origins of the *Indian Act*, see generally John Leslie & Ron Maguire, eds, *The Historical Development of the Indian Act*, 2nd ed (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1978).

42. The Settlement Agreement is at note 21, *supra*.

43. The longest-running residential school in Canada was on the George Gordon First Nation in Saskatchewan from 1888 to 1996.

44. JR Miller, *Shingwauk's Vision: A History of Residential Schools* (Toronto: University of Toronto Press, 1996) at 360.

schools throughout the British Empire, Europe, and the USA,<sup>45</sup> situating residential schools firmly within trends in nineteenth century education.

In 1845, a government report to the legislative assembly of Upper Canada proposed the establishment of government-funded boarding schools for First Nations students.<sup>46</sup> The suggestion was further developed in the Ryerson Report, submitted in 1847.<sup>47</sup> In the meantime, in 1846, the government began to support church-operated residential schools.<sup>48</sup>

First Nations parents and leaders were not opposed to education: in fact, they often sought it, recognizing that their culture would not survive unless they learned to operate within a rapidly changing world. In the 1840s and 1850s in Upper Canada, some First Nations were so enthusiastic to see the development of educational facilities that they entered into financial partnerships, using their treaty moneys to contribute toward the establishment of boarding schools in partnership with government and churches.<sup>49</sup>

As treaties were developed across the West, many of the treaties promised the establishment of schools on reserves.<sup>50</sup> Numbered treaties 1-7, for instance, all contain clauses devoted to education, explicitly stating that the Crown will provide either a school or, in the case of Treaty 7, a teacher to serve the needs of each reserve.<sup>51</sup> The difference in Treaty 7 as compared to the other numbered treaties suggests actual attention to educational commitments in the treaties, although precise reasons for the distinction in wording may not be known.

As time went on, however, the Canadian government began to reject First Nations parents' and leaders' requests for on-reserve day schools.<sup>52</sup> While day schools would obviously have been less disruptive

45. John S Milloy, *"A National Crime": The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 13.

46. Glynn Sharpe, "Residential Schools in Canada: History, Healing and Hope" (2011) 1:1 Intl J Learning & Dev 213; Charles Bagot, "Report on the Affairs of the Indians in Canada, laid before the Legislative Assembly 20th March 1845," online: <[www.nctr.ca/assets/reports/Historical%20Reports/Bagot%20report.pdf](http://www.nctr.ca/assets/reports/Historical%20Reports/Bagot%20report.pdf)>.

47. "Report of Dr. Ryerson on Industrial Schools," online: <[www.nctr.ca/assets/reports/Historical%20Reports/Ryerson%20Report.pdf](http://www.nctr.ca/assets/reports/Historical%20Reports/Ryerson%20Report.pdf)>.

48. Dale Cunningham et al., "Canada's Policy of Cultural Colonization: Indian Residential Schools and the Indian Act," n 36, in Catherine Bell, Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008), 446 [Bell & Napoleon, *First Nations Cultural Heritage*]; Sharpe *supra* note 46 at 213.

49. Milloy, *supra* note 45 at 16-17.

50. Kent Roach, "Blaming the victim: Canadian law, causation, and residential schools" (2014) 64 UTLJ 569.

51. Government of Canada, "Treaty Texts," online: <[www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340](http://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340)> accessed 23 January 2016.

52. Sheila Carr-Stewart, "A Treaty Right to Education" (2001) 26:2 Canadian J Education 125 at 131.

for First Nations children and their parents, they interfered with Canada's developing aims in First Nations education.

European social thought in the 19th century subscribed to the theory of social evolution. This theory distinguished "civilized" races from "uncivilized" races, suggesting that a clash between the two would destroy all members of the uncivilized race who were unable to evolve quickly and adapt to civilization. This ideology provided school and government officials with justification for what Milloy has called "a concerted attack on the ontology of [First Nations] children."<sup>53</sup> Traditional rhythms, practices, mindsets, and relationships were to be intentionally wiped out and replaced with their European counterparts. Faith in the superiority of Euro-Canadian civilization allowed school and government officials to persuade themselves and others that this was truly in the children's best interests.<sup>54</sup>

Although there was ongoing competition between potential policies of developing more day schools or developing residential schools, the federal government came to a view in favour of residential schools. A key report at the outset of the 1880s explained that this was based on dissatisfaction over the experience with day schools, in which educators were required to share formative influence over First Nations children with the children's families and community: "the Indian day school is...under the best of circumstances, attended with unsatisfactory results... The Indian youth, to enable him to cope successfully with his brother of white origin, must be dissociated from the prejudicial influences by which he is surrounded on the reserve of his band."<sup>55</sup>

When Hector Langevin, federal Minister of Public Works, spoke in favour of a residential schooling plan to Canada's House of Commons, he opined in harsh utilitarian terms: "[I]n order to educate the children properly we must separate them from their families. Some people may say that this is hard but if we want to civilize them we must do that."<sup>56</sup>

Government support for day schools thus gave way in the course of the 1880s to a preference for residential schools.<sup>57</sup> Department of Indian Affairs policy analysis expressed a view that such a model offered better

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53. Milloy, *supra* note 45 at 37.

54. Milloy, *ibid* at 27.

55. Parliament of Canada, Sessional Papers, 1880-81, #14 (DIA) at 7-8, cited in DJ Hall, *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905* (Montreal: McGill-Queen's University Press, 2015) at 190-191.

56. Hector Langevin, Hansard, 22 May 1883, 1377.

57. Cunningham, *supra* note 48 at 446.

educational prospects.<sup>58</sup> Over the subsequent decades, many day schools would be closed and replaced by residential schools.

The residential schools policy, along with harsh compulsory attendance provisions, came to be entrenched in the *Indian Act*. In 1894, amendments to the *Indian Act* empowered the Governor in Council to establish its own residential schools and to make regulations imposing fines or prison sentences on First Nations parents whose children did not attend government-controlled schools.<sup>59</sup> T. Mayne Daly, the Superintendent General of Indian Affairs responsible for the amendments, explicitly informed Parliament that this was in order to prevent First Nations parents from interfering with the government-sponsored educational process.<sup>60</sup> In 1920, further amendments to the *Indian Act* imposed compulsory education on all First Nations children from 7-15 years old.<sup>61</sup> Parents who failed to ensure their children's attendance without reasonable excuse could be held liable for a fine or jail time.<sup>62</sup>

These policies were not without contemporary critics, in various forms. Some members of parliament complained of the government's policy costing too much, and the government, under successive administrations, was under continual pressure to justify the costs of implementing a First Nations educational system.<sup>63</sup> But within the civil service, there were those who questioned an aspect of the residential schools approach itself, namely, the intentional destruction of the parent-child relationship. In a 1908 letter, Frank Oliver, the Superintendent General of Indian Affairs, commented to prominent social reformer Samuel Hume Blake as follows:

[O]ne of the most important commandments laid upon the human by the divine is love and respect by children for parents. It seems strange that in the name of religion a system of education should have been instituted, the foundation principle of which not only ignored but contradicted this

58. Hall, *supra* note 55 at 290.

59. *An Act to Further Amend "The Indian Act."* 57-58 Victoria, ch 32 (assented to 23 April, 1894). Note that it is unclear what regulations, if any, were ever made pursuant to these powers. See Dale Cunningham et al., "Canada's Policy of Cultural Colonization: Indian Residential Schools and the Indian Act," in Bell & Napoleon, *First Nations Cultural Heritage*, *supra* note 48 at 462.

60. "[Indian] parents have interfered and taken boys away just when they were beginning to learn a trade." Quoted in Cunningham, *supra* note 48 at 449, citing *House of Commons Debates*, 37 (22 June 1894) at 5552.

61. *An Act to Amend the Indian Act*, 10-11 George V, ch 50 (assented to July 1, 1920), s A10(1).

62. *Ibid*, s A10(3).

63. See discussion in Hall, *supra* note 55 at 212. Criticisms of the costs of First Nations education were a constant Liberal refrain during implementation of the residential schools policy.

command.<sup>64</sup>

Sadly, this observation produced little change. Residential schools remained in operation for many decades following Oliver's observation, subjecting several generations of First Nations children to the weakening and destruction of family bonds before the system was finally brought to an end.

Perhaps unsurprisingly, residential schools began to fall out of favour with the Canadian government around the time when the international community began to take serious notice of parental choice in education as a fundamental human right. However, it took several decades for the Canadian government to seek alternatives and actually close the schools, and their motives in doing so were in any event mixed.

Indeed, in the 1930s, the Canadian government began to realize that the residential schools were not integrating First Nations children into the broader Canadian population in the ways they might have imagined they would. It also continued to see that the schools were much more expensive than day schools. Principally as a result of these considerations, the government began to consider putting an end to the residential system. Sadly, the churches operating most of the schools opposed this move, continuing to argue that First Nations children had to be removed from their homes and families if they were to be properly educated and integrated into Canadian society.<sup>65</sup>

The conflict over whether to discontinue residential schools, combined with a lack of government will, left the bulk of residential schools in operation until the 1970s. Changes did begin during the 1950s, including a new focus on secondary education for Indigenous children, which had previously been neglected based on prejudiced assumptions concerning their capabilities.<sup>66</sup> However, even as residential schools continued operating despite new policy thinking on a range of associated matters, both formal and informal compulsion to attend the schools continued. Contrary to some popular discussion of their ceasing to be compulsory in

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64. As cited in Milloy, *supra* note 45 at 28. There were other civil service voices that raised contemporaneous concerns on account of other issues. After a 1907 tour of residential school facilities, Chief Medical Health Officer Dr. Peter Henderson Bryce exposed appalling health standards in residential schools. He was able to publish publicly on these issues only following his retirement: PH Bryce, *The Story of a National Crime: An Appeal for Justice to the Indians of Canada* (Ottawa: James Hope & Sons, 1922).

65. *Canada's Residential Schools: The History, Part 2: 1939 to 2000* (in vol 1 of *The Final Report of the Truth and Reconciliation Commission of Canada*) (Montreal & Kingston: McGill-Queen's University Press, 2015) at 5, online: <nctr.ca/reports.php>.

66. Miller, *supra* note 44 at 390.



1948 or 1951, amendments to the *Indian Act* in 1951 maintained attendance compelled by statute and the administration of the *Family Allowance Act, 1944* provided for financial consequences (in the form of lost “baby bonuses”) for parents in the event of children not attending school.<sup>67</sup>

Over time, the residential schools gradually ceased to be the primary means of educating First Nations students as day schools became much more common. Roughly eight thousand students remained enrolled in residential schools when the government officially took over the residential schools from the churches in 1969.<sup>68</sup> That transfer of authority commenced the process of closing the schools, although the last residential school remained open until 1996.

In the 1990s, First Nations individuals and groups began to speak out about the negative experiences of former residential school students. In addition to the overall dynamics of the schools as an intrusion into Indigenous families and cultures, their institutional organization had permitted widespread physical and sexual abuse.<sup>69</sup> This advocacy led to the commencement of a number of class actions on behalf of those students.<sup>70</sup> In 2007, the Indian Residential Schools Settlement Agreement brought several of these actions to an end. Article 7 of the Settlement Agreement mandated the establishment of a Truth and Reconciliation Commission intended, among other things, to provide the opportunity for former students to bear witness to their experiences in the schools.<sup>71</sup>

The Truth and Reconciliation Commission was established in 2008. After the resignations of the first three commissioners with the chair resigning after claiming insubordination by the other two commissioners and the other two resigning to allow the TRC a fresh start,<sup>72</sup> it was re-established in 2009 and held hearings in 300 communities from 2010 to 2014. It published its final report in December 2015. In the course of its operations, it ran events and hearings across Canada, providing both public and private opportunities for former students to remember and

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67. See: *ibid* at 170 and 468.; SC 1951, c 29, ss 115-19; *Family Allowance Act, 1944*, SC 1944-5, c 40. On the administration of the *Family Allowance Act*, Miller has identified bureaucratic memos pointing to administrative enforcement of a penalty such that parental refusal to ensure a child was in school would “result in the immediate cancellation of the allowance” (Acting director, mimeographed memorandum to Inspectors, Agents, Principals, etc. 6 April 1945, AD, HR 6506 .C73R 12, cited in Miller, *ibid* at 170, 468n.)

68. *Canada’s Residential Schools: The History, Part 2*, *supra* note 65 at 9.

69. See generally Agnes Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg: Pemmican Press, 1996).

70. See the list at note 21, *supra*.

71. *Indian Residential Schools Agreement*, *supra* note 21.

72. See Bill Curry, “Two remaining Truth and Reconciliation commissioners resign,” *Globe and Mail* (31 January 2009).

speak about their experiences. The Final Report of the TRC documented these narratives and set out 94 calls to action intended to foster healing between First Nations and other Canadians.<sup>73</sup>

II. *Context: 19th and early 20th century understanding of parental rights to choose children's education*

The residential schools' interference with family integrity originated in removal of family authority over children's education. By way of context, it is thus instructive to consider the residential school situation in the context of broader education policy and practice of the late 19th and early 20th centuries. It was during the latter part of the 19th century that developing social thought on children and education came to favour compulsory attendance and to support more interference in the family in order to provide state aid to children. In the 20th century, there was some realization of the excesses of these educational policies, although this was realized more rapidly in the non-Indigenous context than in the Indigenous context.

State involvement in education is a historically recent development. Speaking in general terms, the governments of European nations only began to attempt to regulate education in the 18th century.<sup>74</sup> That said, there had been some earlier precedents, and they show ongoing patterns of greater state readiness to interfere with poorer families, as well as a gradual expansion of general statist impulses. As an early example, the 1563 and 1601 English Poor Laws required poor and unemployed children to participate in a nation-wide apprenticeship program. These laws provided an early pattern of state involvement in the family, oriented around the idea of encouraging economic independence among those whose circumstances were perceived by the state to be at odds with this goal.<sup>75</sup> Notably, these interventions in the family tracked the ongoing pattern of targeting the poor and the marginalized.

Similar legislation for the indenturing of orphans and the children of beggars followed in the 1730s through 1790s in some of the American

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73. Report of the Truth and Reconciliation Commission of Canada, *supra* note 6.

74. Asbjørn Eide, *Economic, Social, and Cultural Rights: A Textbook*, *supra* note 21 at 247.

75. Cf Daniel J Rose, "Compulsory Education and Parental Rights: A Judicial Framework of Analysis" (1989) 30 Boston College LR at 866-867. On the development of state authority over guardianship in the 1700s, see also: *Eyre v Countess of Shaftesbury* (1722), 2 P Wms. 103, 24 ER at 659; Sarah Abramowicz, "English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody" (1999) 99 Columbia LR at 1352.

colonies.<sup>76</sup> Amongst other developments along similar lines, New York City provided for the compulsory indenturing of begging or vagrant children by the 1820s, again marking a readiness of the increasingly welfare-oriented state to interfere with children without parental consent.<sup>77</sup>

The first general compulsory school attendance law in the United States was adopted in 1852 in Massachusetts. It required every person in control of a child 8 to 14 years of age to send that child to public school for at least twelve weeks, with six of them consecutive, per year. Defences included illness, infirmity, poverty, or provision of education at another school.<sup>78</sup> Compulsory education laws followed over the subsequent decades across the United States.<sup>79</sup> Contemporaneously, the state was also ready to round up children in poor living conditions and to transfer them on “orphan trains,” even if the children were not orphans, and thereby move them from eastern cities to new opportunities in the west.<sup>80</sup> One author has suggested that they were “an early example of the use of child welfare services to ‘save’ children by removing them from ethnic or racial communities,” with a later example being American Indian boarding schools.<sup>81</sup>

The same social thought on the relationship between children and parents had a profoundly international impact and affected Canada as

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76. See Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* (New York: MacMillan, 1902). See, e.g., *An Act for the Better Regulation of Apprentices*, Laws of Maryland 1793, c. 45 (available in William Kilty, ed, *The Laws of Maryland: 1785–1799* (Annapolis: Frederick Green, 1800)).

77. Nathaniel C Hart, *Documents Relative to the House of Refuge, Instituted by the Society for the Reformation of Juvenile Delinquents in the City of New York, in 1824* (New York: Day, 1832) at 303-305. See also *Ex parte Crouse*, 4 Whart. 9 (Pa. 1838) (Court considering *habeas corpus* application in context of similar legislation adopted in Pennsylvania and rejecting father’s application on basis child being removed from poverty); *In re Flynn* (1848), 2 De G & Sm 457 (similar decision in English Court of Chancery, further exemplifying the international patterning around similar principles).

78. Mass Gen L, ch. 24, SS 1, 2, 4 (1852).

79. By 1900, 30 states had compulsory attendance laws, and almost all did by 1918: Daniel J Rose, “Compulsory Education and Parent Rights: A Judicial Framework of Analysis” (1989) 36 Boston College LR at 868.

80. Mark E Courtney, “Child Welfare: History and Policy Framework,” in Terry Mizrahi & Larry E Davis, eds, *Encyclopedia of Social Work*, 20th ed (Oxford: Oxford University Press, 2008).

81. *Ibid.*

well.<sup>82</sup> Toward the late 1800s, Canadian law slowly shifted in its approach to the relationship between children and parents. Children were no longer perceived exclusively as under the care of their parents, and although the threshold for state interference remained high, the state did begin to consider itself the rightful protector of abused and neglected children.<sup>83</sup> One of the further expressions of this shift was the gradual imposition of compulsory education throughout Canada.

Ontario introduced the first truancy laws in 1871, subjecting parents of children between 7 and 12 (increased to 8 and 14 in 1891) to a fine if those children did not attend school for at least four months per year.<sup>84</sup> Notably, however, this did not apply to children who did not live within reasonable distance of a school (two miles away for children under 10 and three miles away for those over 10, unless the school provided a means of transportation): i.e., where attendance would require the child to live away from the family home.<sup>85</sup> British Columbia, Prince Edward Island, and Nova Scotia quickly followed Ontario, introducing compulsory education in 1873, 1877, and 1883 respectively. New Brunswick (1905), Saskatchewan (1909), and Alberta (1910) were slightly further behind. Due to a particularly fervent conflict with a Catholic minority, Manitoba did not introduce compulsory education until 1916. Newfoundland and Quebec were the last to follow, in 1942 and 1943.<sup>86</sup> Like Ontario, most provinces initially required education for a narrower age range and a limited number of weeks per year, with both of these requirements expanding gradually over time.

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82. These developments were contemporaneous with those in other jurisdictions as well. For example, the introduction of compulsory education took place across Australia from the 1870s through 1890s: Ann R Shorten, "The Legal Context of Australian Education: An Historical Exploration" (1996) *Australia & NZ JL & Educ* 1. In England, Archibald Henry Simpson wrote in his major treatise on the law and children concerning the traditional position of parental choice in education, combined with recent changes through parliamentary action: Archibald Henry Simpson, *A Treatise on the Law and Practice Relating to Infants* (London: Stevens & Haynes, 1875) at 235-238. There were also moves to compulsory schooling in Continental Europe in the 1880s: Richard Laishley, *Report Upon State Education in Great Britain, France, Switzerland, Italy, Germany, Belgium, and the United States of America: Including a Special Report Upon Deaf-Mute Instruction* (Wellington: George Didsbury, 1886) at 29-31.

83. R Brian Howe, "Do Parents have Fundamental Rights?" (2001) 36:3 *J Canadian Studies* at 66-67.

84. Philip Oreopoulos, *Canadian Compulsory School Laws and their Impact on Educational Attainment and Future Earnings* (Analytical Studies Branch Research Paper Series, Statistics Canada; Minister of Industry, May 2005) at 8, online: <[www.publications.gc.ca/Collection/Statcan/11F0019MIE/11F0019MIE2005251.pdf](http://www.publications.gc.ca/Collection/Statcan/11F0019MIE/11F0019MIE2005251.pdf)>.

85. *Ibid.*

86. *Ibid* at 9.

These various developments marked an international trend toward state readiness to interfere in the family, ostensibly to promote the welfare of children. There was a strong perspective that the state was under a fundamental duty to children themselves. As stated in the League of Nations' *Declaration of the Rights of the Child* in 1924, "The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed...."<sup>87</sup> The state was quite ready to interfere in the family to help children it considered to be "backward" and "delinquent," as exemplified in developments across various jurisdictions in this period. To some extent, the residential schools system consisted in a harsh and extreme application of developing social thought. That said, there were clear inequalities in the interference in Indigenous families. During the same period, parents were able to succeed in a number of cases where they asserted parental authority over their children's schooling, sometimes but not always by asserting denominational school rights.<sup>88</sup>

Ultimately, there was a recognition that the readiness of the state to interfere in families for laudable goals of child welfare could go too far. In the United States, a meaningful turning point was the United States Supreme Court decision of 1925 in *Pierce v. Society of Sisters*.<sup>89</sup> In this case, the appellant private school argued that legislation requiring all parents to send their children to public schools was unconstitutional. The Court agreed, referring to the interference with "[t]he fundamental theory of liberty upon which all governments in this Union repose" and holding that parents have a right to make decisions concerning their children's education.<sup>90</sup>

This view received expression within the post-War human rights system, the foundations of which rested heavily on religious systems.<sup>91</sup> In the 1948 *Universal Declaration of Human Rights*, article 16(3) states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State," and article 26(3) states that "[p]arents have a prior right to choose the kind of education that shall

87. League of Nations, *Geneva Declaration of the Rights of the Child* (26 September 1924).

88. See, e.g., *MacDonald v MacDonald* (1905), 14 BR 330 (in chambers); *Barrett v City of Winnipeg* (1891), 19 SCR 374, var'd [1892] AC 445 (PC); *Rogers v Bathurst School District No 2*, (1896), 1 NB Eq Cas 266.

89. *Pierce v Society of Sisters*, 268 US 510 (1925).

90. *Ibid* at 534-535.

91. See generally, Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015). For a more detailed perspective within the history of a particular article of the *UDHR*, see also Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (Cambridge: Cambridge University Press, 2017).

be given to their children.”<sup>92</sup> As discussed below, the appearance of these ideas in further instruments demonstrates the growth over time of a larger international law norm.<sup>93</sup>

Even as this norm was expanding, residential schools continued to demonstrate an extreme version of a larger movement by the state toward intervention in families in the name of education. It is the case that government control over non-Indigenous education increased with the advent of compulsory education in the early 20th century. Over time, parents found that they had less freedom than anticipated in regard to their children's education.<sup>94</sup> However, as the TRC observed, “non-Aboriginal children were not required to attend schools where they could not return to their families each day.”<sup>95</sup>

### III. *International law on family integrity and associated parental choice concerning education*

Over the later years when the residential schools were operating, the international community began to officially recognize principles of the family as a fundamental unit and an associated commitment to parental oversight in matters of education—though not at first explicitly applying that principle in Indigenous contexts. We suggest in this section that the way in which these principles were layered in terms of a foundational principle of family integrity and a resulting commitment to parental control over education has both textual support and support in subsequent legal applications of these principles. The clearly developed law that can be found in both key United Nations instruments and in some regional human rights jurisprudence, notably at the European Court of Human Rights (ECHR), can ground an argument for the existence of pertinent customary international law principles that have real potential for application to contexts of interference with Indigenous families. In this section, we seek to develop these arguments, showing, in particular, a significant, expanding jurisprudence that has interpreted pertinent human rights instruments in a

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92. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No. 13, UN Doc A/810 (1948) 71.

93. See Part III, below.

94. See, e.g., *R v Hildebrand*, [1919] 3 WWR 286 (MBCA) and *R v Ulmer* (1922), [1923] 1 WWR 1 (ABCA.), in which the plaintiff fathers' concerns about use of the German language and religious education were not sufficient to exempt a Mennonite and a Lutheran child (respectively) from the obligation to attend a public or certified private school.

95. *Canada's Residential Schools: The Legacy* (vol 5 of *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queen's University Press, 2015) at 13.

manner consistent with our suggestions (albeit in largely non-Indigenous contexts to date).

We acknowledge, of course, that our argument implicitly builds upon a growing body of scholarship on international law protecting the family from the state. Two decades ago, Adair Dyer aptly described the “internationalization of family law” underway in a multi-decade process of treaty development increasingly offering international law protections to the family.<sup>96</sup> Early twentieth-century treaties had been focused on seeking to develop uniform conflict-of-laws principles on family law matters. But later treaties have brought more extended international family law concepts.<sup>97</sup> Dyer’s seminal piece focuses meaningfully upon those treaties bearing on child abduction and child protection. In this section, we will discuss other broader provisions on the family as unit of society and ongoing treaty references to parental authority in relation to education.

Writing about past Australian policies on removal of Indigenous children, a leading American scholar, Lea Brilmayer, argued in an important article fifteen years ago that a confluence of different international law norms on the family together supported a norm against family separation.<sup>98</sup> And she suggested that drawing upon this norm had the potential to overcome challenges that lie in the path of other approaches to legal conceptualization of the wrongs at stake in Indigenous policy involving removal of children. Notably, she undertook this work in part because of her concern that a focus on genocide has the danger of trapping matters into endless debates about intent due to the especially elevated intent requirement in the legal definition of genocide. This very question has led to a number of litigated cases on Australian Indigenous policy being turned back by the courts.<sup>99</sup> A norm against family separation, Brilmayer suggested, offers more potential for successful argument on such issues.<sup>100</sup> At the same time, elements of her work remained relatively equivocal on the status of a norm against family separation other than where identified in a specifically applicable treaty instrument.

Our proposed manner of conceptualizing a right against interference with family integrity, which brings together a series of already recognized norms, responds to similar concerns and enables the possibility of

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96. See Adair Dyer, “The Internationalization of Family Law” (1997) 30 U Calif Davis LR at 625.

97. For a more recent work partly considering family law in transnational perspective, see John Eckelaar & Rob George, eds, *Routledge Handbook of Family Law and Policy* (London: Routledge, 2014).

98. Starr & Brilmayer, *supra* note 21.

99. *Ibid* at 239-240.

100. *Ibid* at 234-243.

identifying a specific internationally wrongful act in Canada's conduct in its residential schools policy. Our argument builds implicitly upon the Brilmayer argument, but we have engaged differently with the international law sources and we seek to formulate the argument in a more robust way than developed in her helpful original formulation of an analogous right. We do not focus simply on family separation, but we consider provisions on family integrity that could bear on a variety of state impacts on the family. We also consider provisions specifically on familial authority in relation to education which could ground Indigenous control of education even in circumstances not involving separation but still involving assimilative educational policy. In undertaking our analysis, we have had the advantage of being able to draw on a later, larger body of interpretive jurisprudence than was available to Brilmayer. Her argument has provided important foundations, but we believe that it is possible to go farther.

In particular, we would claim that international law has moved towards a protection of family integrity within customary international law. Making a claim with respect to a norm of family integrity puts matters at a more fundamental level, avoiding the blurring effect of complex arguments permitting family separation in certain instances that seemingly led Brilmayer against finding a definitive customary norm.<sup>101</sup> There is a customary norm, in our view, such that the family is to be recognized as a unit fundamentally autonomous from the state, and there is international law material amply supporting such a conclusion. A concomitant norm recognizes that parents—or other family members in their place, an important point in the context of complex family and kinship structures<sup>102</sup>—exercise fundamental authority in relation to decision-making over education. There are, of course, exceptions, but these exceptions should not be used to deny the existence of the original rule. This is, we would suggest, the view clearly present in international law material at least from the 1948 adoption by the United Nations General Assembly of the *Universal Declaration of Human Rights* (UDHR).<sup>103</sup> The UDHR recognizes the family as a unit entitled to protection from the state, both in general and in terms bearing on parental choice in education. First, in general terms, Article 16(3) provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>104</sup> Second, Article 26(3) of the UDHR states that “parents

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101. See *ibid.*

102. We thank Terry LeBlanc for discussion on this point. Indigenous family and kinship structures can have significant complexities.

103. *Universal Declaration of Human Rights*, *supra* note 92.

104. *Ibid.*, art 16(3).



have a prior right to choose the kind of education that shall be given to their children.” The drafters of the UDHR included Article 26(3) as a means of guarding children and parents against an overreaching government. With the experience of the Hitler Youth in particular fresh in their minds, the drafters had serious concerns about any government that might “deprive parents of control of their children.”<sup>105</sup>

Notably, the Canadian delegate was present but abstained from voting on Article 26(3).<sup>106</sup> The US, with a history of residential schools similar to those in Canada, actively opposed its adoption. Johannes Morsink, commenting on the motivation behind that decision, notes that the excuses raised by the US for their opposition to the bill were “weak.” He accordingly concludes, “we are entitled to suspect that either worries about money or about minority cultural rights played a role in the shift of the U.S. position. I do not think it was money.”<sup>107</sup>

While the UDHR is not a treaty or convention, meaning that it does not have legal force as such,<sup>108</sup> it is considered by many to be expressive of customary international law.<sup>109</sup> As a result, its provisions are strong candidates for customary international law status, subject to the way in which those provisions and the rights they articulate are addressed in other instruments.

As we will show, the same combination of a general respect for the family and an associated right of parental choice in relation to a child’s education

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105. *Ibid.*, art 26(3). William A Schabas, *The Universal Declaration of Human Rights: The travaux préparatoires* (Cambridge: Cambridge University Press, 2013) vol 3 at 2674, 2683. See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), at 266. Note that while Canada did not enter into binding treaty enforcing this right until the adoption of the ICCPR in 1976 (see below), the First Protocol to the European Convention on Human Rights, executed by a number of signatories to the UDHR, contains an explicit guarantee of parental rights to oversee children’s education in Article 2: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Drafting discussions relating to a proposed amendment that would have deleted this section indicate that fear of totalitarianism similar to the Nazi regime was the primary motivating factor in retaining the section and protecting parental oversight of education: see *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights: Volume II: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly 10 August–18 November 1949* (The Hague: Martinus Nijhoff, 1975), at 62, 68, 96, and 100.

106. Morsink, *ibid* at 266.

107. Morsink, *ibid* at 269.

108. These sources appear in the widely accepted list of sources contained in art. 38(1) of the Statute of the International Court of Justice, Annex to the Charter of the United Nations, 1945, 1 UNTS XVI. There are, of course, other sources, notably general principles and *ius cogens* that could have bearing, but they present additional complexities.

109. See generally, Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 Ga J Intl & Comp L 287.

appears across various instruments, both in “soft law” instruments such as General Assembly declarations and in widely ratified binding treaty instruments.<sup>110</sup> Moreover, they have been the subject of interpretation in the Human Rights Committee and in important regional human rights bodies, notably the European Court of Human Rights. Our view, then, is that these dimensions from the UDHR have status as customary international law, as evidenced by their widespread acceptance.<sup>111</sup>

We recognize that the emphasis under international law on children's rights, articulated most notably in the 1959 UN *Declaration of the Rights of the Child*, raises a complicating factor. In that context, the child's best interests are treated as the only relevant principle guiding those responsible for his or her education.<sup>112</sup> Specific efforts to include a clause explicitly mentioning either parental choice concerning education (proposed by the International Catholic Child Bureau) or religious dimensions to education (proposed by Guatemala and Israel) were rejected.<sup>113</sup>

However, the subsequently adopted—and very widely ratified—*Convention on the Rights of the Child (CRC)*<sup>114</sup> contains several provisions that support a view that the children's rights context does not override the role of the family or parental authority on education. First, although mandating compulsory primary education, the CRC also provides that such education need not be state education, with article 29(2) indicating that no aspect of its education-related articles “shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”<sup>115</sup>

Second, these provisions are embedded within a CRC text as a whole that contains many references to the family. The family appears in the CRC's preamble as “the fundamental group of society and the natural environment for the growth and well-being of all its members

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110. On soft law generally, cf. also Mauro Barelli, “The Role of Soft Law in the International Legal System: the Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 ICLQ 957.

111. On establishing custom from treaties, see generally Philippe Sands, “Treaty, Custom and the Cross-fertilization of International Law” (1998) 1 Yale Human Rts & Dev LJ 4.

112. *Declaration of the Rights of the Child*, UNGA Res 1386 (XIV), UN Doc. A/RES/1386/XIV (20 November 1959).

113. Douglas Hodgson, *The Human Right to Education* (London: Dartmouth Publishing, 1998) at 190.

114. *Convention on the Rights of the Child*, GA res 44/25, annex, 44 UN GAOR Supp. (No 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.

115. *Ibid.*, art 29(2).

and particularly children.<sup>116</sup> Amongst the umbrella provisions opening the treaty, governments agree in general terms that they must defer meaningfully to parents, with article 5 stating that they will “respect the responsibilities, rights and duties of parents...to provide...appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”<sup>117</sup>

Third, a number of specific provisions within the CRC also implicitly recognize children as being embedded within families and having an overarching right to family integrity, with resulting primary parental authority over fundamental decisions involving their children. A number of these CRC provisions are worth detailing. Children have a right to family relations: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”<sup>118</sup> Indeed, children are recognized as embedded within families that have dimensions of authority in their lives: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”<sup>119</sup>

Finally, as in the UDHR’s opening provision, in line with these underlying principles, Governments are not to unlawfully interfere with children’s family or home: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence [...].”<sup>120</sup> Parents and children are not to be separated except on very strict conditions and protections, in the context of other values being at stake but with a constant respect for the value of the family: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”<sup>121</sup> Family reunification is encouraged in abduction and refugee

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116. *Ibid*, preamble.

117. *Ibid*, art 8(1).

118. *Ibid*, art 7.

119. *Ibid*, art 5.

120. *Ibid*, art 16.

121. *Ibid*, art 9(1). Further subsections of this Article constrain on what grounds and procedures such best interest determinations to intervene can be made.

settings, and family contact in youth justice settings.<sup>122</sup> There is throughout an implicit emphasis on family integrity and the primary place of children within their families.<sup>123</sup>

Apart from the children's rights context, other soft law instruments also recognize rights of the family, including through provisions on educational choice. For example, the 1960 UNESCO *Convention Against Discrimination in Education*,<sup>124</sup> ratified by more than a hundred states (albeit not by Canada), identifies agreement that "[i]t is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities" for education, including liberty to choose institutions providing for the child to be educated in light of the parents' religious and moral convictions.<sup>125</sup>

Perhaps most significantly in developing an argument for customary international law principles on the family, the two international human rights covenants, elaborate the position of the UDHR and entrench protection of family integrity, including parental authority concerning education. Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*, using the same language as article 12 of the UDHR, sets out the fundamental guarantee: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...."<sup>126</sup> The next article, bridging family rights with freedom of religion and belief, provides in article 18(4) that "[t]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."<sup>127</sup>

The *International Covenant on Economic, Social, and Cultural Rights (ICESCR)* follows the same approach, with emphasis first on the place of the family and then specific instantiation in educational choice in the context of an article bridging the family with religious and conscientious freedom. Thus, article 10(1) reemphasizes the place of the family in general terms, stating that "[t]he widest possible protection and assistance

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122. *Ibid.*, arts 10, 22, 37.

123. See also discussion of various articles of the CRC in Jonathan Todres, Mark E Wojcik & Chris R Revaz, eds, *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (Leiden: Brill, 2006).

124. *Convention Against Discrimination in Education* (UNESCO), 14 December 1960 (entered into force 22 May 1962).

125. *Ibid.*, art 5(1)(b).

126. *International Covenant on Civil and Political Rights*, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, art 17(1).

127. *Ibid.*, art 18(4).

should be accorded to the family, which is the natural and fundamental group unit of society....”<sup>128</sup> Shortly thereafter, article 13(3) states the principle of parental liberty in educational choice: “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>129</sup> In these instruments, state educational policy comes to be placed as subject to rights of family integrity and associated rights of parental authority concerning education.

We are obviously highlighting provisions that bear on family integrity and associated parental authority in relation to education. As with any right, there are particular circumstances in which these principles are subject to limits for the protection of other values, such as where necessary to prevent abuse of children. However, even in contemplating separation of families in those circumstances, the international instruments encourage the most limited separations necessary to the attainment of the required protections.<sup>130</sup> The presence of exceptions does not negate the existence of the original norm.

The key text in article 12 of the UDHR, offering the assurance that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...,”<sup>131</sup> is carried forward in article 17 of the ICCPR. It was also adopted within article 8 of the *European Convention on Human Rights*, which states as follows: “Everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>132</sup> These two contexts have seen significant legal interpretation of the right set out initially in article 12 of the UDHR. In the ICCPR context, this interpretation has been through the pertinent expert mechanism, the United Nations Human Rights Committee (HRC). In the *European Convention* context, it has been through the European Court

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128. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3 (entered into force 3 January 1976), art 10(1).

129. *Ibid.*, art 13(3).

130. See, e.g., the detailed rules within *Convention on the Rights of the Child*, *supra* note 114 & 123, art. 9.

131. UDHR, *supra* note 92.

132. ICCPR, *supra* note 126.

of Human Rights.<sup>133</sup> Together, these bodies of jurisprudence further set out the application of the right to family integrity vis-à-vis the state in a manner that clarifies the protection offered.

Three pertinent principles established within its case law stand out from the HRC's determinations on article 17 of the ICCPR. First, the scope of family-associated privacy interests includes a protection of moral autonomy from the state. This principle is implicit in the HRC's 1991 determination in *Coeriel v. The Netherlands*, in which the HRC held that the scope of the article protected a right of individuals to change their names where the name change resulted from religious motivations—any state restraint that would block that would have to meet the strict standards for rights limitation.<sup>134</sup> Second, the article may properly be applied in the context of different Indigenous familial structures. A key holding in *Hopu and Bessert v. France* saw the Human Rights Committee apply the article to hold that disruption of ancestral burial grounds could be an interference with the family.<sup>135</sup> Third, state steps that separate family members are *prima facie* interference with the family that violates the article. This has been held in the context of immigration removals, with such removals triggering the application of the article and thus requiring full analysis of any state justifications.<sup>136</sup>

In the European Court of Human Rights, the parallel right similarly protects moral autonomy of the family from the state: “Family life...and especially the rights of parents to exercise parental authority over their children...is recognized and protected by the Convention, in particular by Article 8.”<sup>137</sup> Indeed, even a requirement to disclose excessive information concerning philosophical and moral views held within a family has been held to violate the article.<sup>138</sup> This principle, recognized in jurisprudence on Article 8 but with supplementation from Protocol No 1 to the Convention,<sup>139</sup> has led to a position where parents exercise fundamental

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133. For analytically engaged overviews of interpretation of the right in these instruments, see, e.g., Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford: Hart/Bloomsbury Academic, 2017); Maribel González Pascual & Aida Torres Pérez, eds, *The Right to Family Life in the European Union* (London: Routledge, 2017).

134. *Coeriel v The Netherlands*, Communication No 453/1991, UN Doc. CCPR/C/52/D/453/1991 (1994) (HRC).

135. *Hopu and Bessert v France*, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1, IHRL 2148 (1997) (HRC).

136. See, e.g., *Francesco Madafferi v Australia*, Communication No 1011/2001, UN Doc. CCPR/C/81/D/1011/2001 (2004) (HRC).

137. *Nielsen v Denmark*, App No. 10929/84 (ECtHR Judgment of 28 November 1988) at 61. See also *Marckx v Belgium*.

138. *Folgero and Others v Norway* [GC], (2008) 46 EHRR 47.

139. This protocol was adopted 20 March 1952 and came into force 18 May 1954.

authority on education as a corollary to the autonomy of the family: “The right of parents to ensure the education of their children in accordance with their religion and philosophical convictions [is] an integral part of the right of custody”<sup>140</sup> and continues even in the context of children in state care.<sup>141</sup> There has been much further jurisprudence within the European Convention system on various associated issues,<sup>142</sup> but the basic point for present purposes is that there is further recognition of the human rights dimensions of family autonomy from the state and the related parental choice over education.

International law’s redevelopment of principles emphasizing parental choice in education and family integrity took on full force throughout the latter half of the twentieth century. However, the initial recognition during this period in the *Universal Declaration of Human Rights* implicitly speaks backward in time as well. The UDHR responded to wrongs that had been committed, most dramatically in the wartime contexts to which it immediately responded, but to other wrongs as well.

Although widespread theories of education supported state interference in the family for educational purposes during the 19th century, the residential schools system had ceased to be in conformity with international norms by the latter decades of its existence.

Given the necessary chronologies, the case studies in the next section all appear to describe Canadian violations of international law as it would properly have applied to Indigenous families. Rather than responding quickly to international norms related to family integrity in the Indigenous context, Canada perpetuated a system long after it should have realized its tragic errors. Recognition of international law principles on family integrity permits the identification of Canadian violations of international law in this context.

#### IV. *Examples from survivor testimony*

Canada’s violation of international law principles on family integrity is evident in various instances of survivor testimony. In broad terms, disregard for First Nations parents manifested in the residential school system in a number of ways. As a number of examples in this section will make clear, some parents found that their children had been apprehended or transferred to different schools without their knowledge. Other parents were coerced into giving up their children against their wishes. Some who

140. *X v Sweden*, App No 7911/77 (ECmHR decision of 12 December 1977).

141. *Aminoff v Sweden*, App No 10554/83, ECmHR Decision of 15 May 1985.

142. For discussion, see Draghici, *supra* note 133, ch 6.

had themselves experienced abuse in residential schools had no way of protecting their own children from the same treatment.

One of the most tragic broader impacts of residential schools was the way it turned children against their parents and families. The combination of separation from family and exposure to negative messages and stereotypes at school caused many children to return home with a deep sense of alienation from their parents and their culture. While the schools were unsuccessful in regard to their stated aim of assimilating First Nations children into non-First Nations communities, they were quite successful at alienating First Nations children from their own parents and people. The following case studies examine several methods by which this was accomplished.

As an aside, the documentary evidence from the Truth and Reconciliation Commission is currently being reviewed to prevent the inadvertent unauthorized release of personal information. As a result, it is available only in an incomplete form, and may or may not have been recorded. At present, no specific dates can be attached to these case studies, although many of the individuals who gave evidence before the TRC voluntarily provided names by which they are identified in the materials. The names we use here are drawn from the TRC Report and are thus a matter of public record. However, that is in many instances the only information the TRC Report provides.

Logically, though, examples involving survivors who testified to the TRC cannot reflect the earliest decades of the residential schools regime and, in most cases, may be presumed to represent some of the later decades of the residential schools system. Thus, the events reported in the following narratives likely coincide with the middle or latter portion of the 20th century, a period when international law was beginning to more clearly articulate the rights of parents and children vis-à-vis education. The implications of that articulation did not come quickly to the Canadian government in the First Nations educational context. As a result, a number of profound interferences with family integrity took place in the context of Canada's residential schools. The various forms of those interferences are illustrated in the anecdotal evidence provided to the TRC and reported below.

1. *Apprehending and transferring children without parents' consent: Howard Stacy Jones, Doris Judy McKay*

Some Indian agents took children away to residential schools without even informing their parents. Howard Stacy Jones, for instance, reports that he was taken to the Kuper Island School from the public school at Port



Renfrew against his own will and without his mother's knowledge: I was kidnapped from Port Renfrew's elementary school when I was around six years old, and this happened right in the elementary schoolyard. And my auntie witnessed this and another non-Native witnessed this, and they are still alive as I speak. These are two witnesses trying, saw me fighting, trying to get away with, from the two RCMP officers that threw me in the back seat of the car and drove off with me. And my mom didn't know where I was for three days, frantically stressed out and worried about where I was, and she finally found out that I was in Kuper Island residential school.<sup>143</sup>

Other children were transferred from one school to another without their parents' knowledge or consent. Doris Judy McKay reports that this happened to her in the 1950s:

I found out that I was transferred to Birtle without them letting my parents know or anything they just transferred us. Then my mother didn't find out 'til later on that we were in Birtle, when we wrote her a letter from there. She was pretty upset about it.<sup>144</sup>

2. *Removing children from the home against parents' wishes: Lynda Pahpasay McDonald, Albert Marshall*

Other parents knew that their children were being taken, but could do nothing about it. Many, particularly those with smaller children at home, were forced to surrender their children under threat of jail time. Lynda Pahpasay McDonald recalls a loving and simple early childhood. Her parents raised their children in a cabin along a trapline near Sydney Lake, Ontario. Hunting, storytelling, traditional music, and traditional medicine were all part of her daily life.

When she was four or five years old, Lynda was taken from her parents and flown to a residential school nearly 300 km away in Kenora, Ontario. She recalls witnessing her mother's grief as the plane carrying the children took off:

I looked outside, my mom was, you know, flailing her arms, and, and I, and she must have been crying, and I see my dad grabbing her, and, I was wondering why, why my mom was, you know, she was struggling.

She told me many years later what happened, and she explained to me why we had to be sent away to, to residential school. And, and I just couldn't get that memory out of my head, and I still remember to this day what, what happened that day. And she told me, like, she was so hurt, and, and I used to ask her, "Why did you let us go, like, why didn't

143. *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Ottawa; Truth and Reconciliation Commission, 2015) at 23.

144. *Ibid* at 101.

you stop them, you know? Why didn't you, you know, come and get us?" And she told me, "We couldn't, because they told us if we tried to do anything, like, get you guys back, we'd be thrown into jail." So, they didn't want to end up in jail, 'cause they still had babies at, at the cabin.<sup>145</sup>

Albert Marshall hated and blamed his parents for years for sending him to residential school in Shubenacadie, Nova Scotia. Later in life, however, he learned that his parents had been forced to choose between sending him alone or losing all three of their children. When he asked his brother what had been the reaction to his departure, he received the following response:

He didn't answer me for a while, a long time. He says, "Nobody said anything for days," because my father was crying every day. Finally my father told the family, "I failed as a father. I couldn't protect my child, but I just couldn't because you know what the Mounties, the priest, the Indian agents told me? They told me, if I don't, if I resist too much then they would take the other younger, younger brother and younger, younger children." Then he says, "It was not a choice. I could not say, take them or take the three of them. But I couldn't say nothing and I know I have to live with that."<sup>146</sup>

### 3. *Inability to prevent abuse: Ben Pratt*

As time went on and multiple generations of First Nations children were taken away to residential schools, parents found that they were unable to protect their children from abuse that they themselves had experienced. Ben Pratt, a student at the Gordon residential school in Saskatchewan, was repeatedly raped and abused by residence supervisor William Starr. It was only years later, as an adult, that he told his mother what he had gone through.

When Pratt told his mother about his experience, he said, "she screamed, and she started crying, and I continued telling her what was happening when I was there. And the look on her face, the anger and the rage that came out of her, she screamed and yelled, and she went quiet for a long time." After that, she disclosed to him that she also had been sexually abused at residential school when she had been a child. It was a heartbreaking and significant moment for both of them:

And the things she told me that happened to her as a girl, from the fathers that run the school or worked there, the anger that came up inside me was so painful. I bent over, and I couldn't sit up straight, how much anger and

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145. *Ibid* at 15.

146. *Ibid*.

rage I had inside when she was telling me what happened. We talked for a good half-hour to an hour, me and my mother. Then it's the first time I ever heard my mom tell me "I love you, my boy."<sup>147</sup>

4. *Hindering parent-child communication: Doris Young, Tina Duguay, Loretta Mainville*

Some school officials actively hindered parents who attempted to stay in touch with their children. School officials often considered visits home to be demoralizing or detrimental to students.<sup>148</sup> They also frequently interfered with letters and packages from parents to children. Doris Young was raised in a loving home by parents and grandparents who cared deeply for her and her siblings. When she arrived at school, though, the staff interfered with the letters and parcels that her parents tried to send to her:

My mother would, would write us letters, and my dad, and we never received them, or they'd send parcels, and they were opened, and we, we just don't know what happened to them, but I know that my mother when I, when I would, we'd come home, and said she would write to us. Her English was limited, but she still wrote, and my dad send, would send us money, but we never received it either.<sup>149</sup>

Many schools read any letters written to or received from the students' parents before passing the letters on to their intended recipients. This had a discouraging effect on communication:

One of Tina Duguay's letters to her parents was blocked because she had mentioned another student in the letter, and a second letter was blocked because she described school activities. "So, I used to wonder, 'what in the heck am I supposed to talk about?' You know I want to write letters to Mom and Dad, 'what am I supposed to say?' So, letter writing started to dwindle, and they didn't hear from me that often."<sup>150</sup>

Even parents who moved or lived near the residential schools were prevented from maintaining contact with their children. Frequent visits by parents to their children at school were sometimes actively discouraged.<sup>151</sup> Loretta Mainville's parents lived near enough to the school that she could see their house from the window. When her father tried to visit her, though, he was turned away:

147. *Ibid* at 161.

148. Milloy, *supra* note 45 at 30.

149. *The Survivors Speak*, *supra* note 143 at 100.

150. *Ibid* at 100.

151. Milloy, *supra* note 45 at 30.

And I remember one time we were, we were always in lineups all the time, and, and one time we were going by a hall, and I saw him. He had work boots and his work clothes, and he was talking to a nun, and apparently later on I found out that the nuns refused him a visit, but he tried to visit us all the time, but they wouldn't allow him.<sup>152</sup>

5. *Alienation of children from parents and community: Vitaline Elsie Jenner, Florence Horassi, Agnes Moses*

Many parents found that children who had loved them when they left despised them when they came back home. Vitaline Elsie Jenner came from a family of 12. Her father worked but occasionally relied on welfare in order to prevent his children from going hungry. In 1951, he was told that he would no longer receive any benefits unless eight of his 12 children went to residential school. He found himself forced to send most of his children away in order to ensure that the rest had enough to eat.<sup>153</sup>

Vitaline was unwilling to leave her family: she cried, fought, and resisted when her mother put her hand into the hand of the supervising nun at the residential school:

So, she grabbed it, and I was screaming and hollering. And in my language I said, "Mama, Mama, *kâya nakasin*" and in English it was, "Mom, Mom, don't leave me." 'Cause that's all I knew was to speak Cree. And so the nun took us, and Mom, I, I turned around, and Mom was walking away. And I didn't realize, I guess, that she was also crying.<sup>154</sup>

The school experience for Vitaline was extremely negative, involving sexual abuse, disproportionate punishment, confinement, and a bout of tuberculosis.<sup>155</sup> When she was permitted to leave, though, she found herself unhappy, ashamed of her parents and culture:

In the summers, when I went home from the residential school, I did not want to know my parents anymore. I was so programmed that at one time I looked down at my mom and dad, my family life, my culture, I looked down on it, ashamed, and that's how I felt.

...

I didn't want to be an Aboriginal person. No way did I want to be an Aboriginal person. I did everything. Dyed my hair and whatever else, you know, just so I wouldn't look like an Aboriginal person, denied my heritage, my culture, I denied it.<sup>156</sup>

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152. *The Survivors Speak*, *supra* note 143 at 100.

153. *Ibid* at 14.

154. *Ibid* at 36-37.

155. *Ibid* at 87-88, 155, 179.

156. *Ibid* at 106.

She was not alone. Many other students reported similar feelings of shame and disgust at their families and heritage after spending time in residential schools. Florence Horassi reported:

When I was in residential school, then they told me I'm a dirty Indian, I'm a lousy Indian, I'm a starving Indian, and my mom and dad were drunkards, that I'm to pray for them, so when they died, they can go to heaven. They don't even know my mom had died while I was in there, or do they know that she died when I was in there? I never saw my mom drink. I never saw my mom drunk. But they tell me that, to pray for them, so they don't go to hell.<sup>157</sup>

Agnes Moses stated that both she and her sister fell prey to this same mindset, having been forbidden by school officials to speak to their mother in their first language:

The worst thing I ever did was I was ashamed of my mother, that honourable woman, because she couldn't speak English, she never went to school, and we used to go home to her on Saturdays, and they told us that we couldn't talk Gwich'in to her and, and she couldn't, like couldn't communicate. And my sister was the one that had the nerve to tell her. "We can't talk Loucheux [Gwich'in] to you, they told us not to."<sup>158</sup>

Many other students also reported similar feelings of anger and shame toward their parents after spending time at the residential schools.<sup>159</sup> Some gradually recovered their sense of pride in their family roots and identity. Others, though, were never able to settle back into their home communities: while they did not fit in with the non-First Nations population, they also struggled to fit in at home.<sup>160</sup>

Though anecdotal, survivors' stories illustrate that the residential school system repeatedly and profoundly interfered with the integrity of First Nations families. Their testimony, coming as it did to a TRC that operated in the first decades of the 21st century, shows that these interferences were continuing relatively late in the operation of the residential schools and, indeed, through a time period when international law had already been moving in a different direction.

### *Conclusion and implications*

In 1894 T. Mayne Daly, the Superintendent General of Indian Affairs, assured Parliament that First Nations children in residential schools

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157. *Ibid* at 104.

158. *Ibid* at 105.

159. *Ibid* at 105-107.

160. *Ibid* at 107.

were “treated as parents would treat their children.”<sup>161</sup> This claim is demonstrably untrue. However, it did become a sadly self-fulfilling prophecy. As multiple generations of First Nations children were raised in residential schools over time, many learned too late that their only knowledge of parenting was derived from the way they had been raised in residential schools. Time and time again, survivors have reported the shame and grief of realizing, in the process of raising their own children, that their parenting style reflected not the tolerance and wisdom of a loving family but the cold, angry, and often abusive treatment they themselves had endured. Though the residential schools have long been closed, their negative legacy continues to wreak havoc on First Nations children, parents, and families.

In this paper, we have presented an argument that the interference with family integrity was a particularly insidious effect of Canada's residential schools and can be identified as a specific, tangible legal wrong. Although state interference with the family in the name of education policy commenced in non-Aboriginal contexts, its development in Canada's residential school system took a different turn. The operation of the residential schools demonstrated a greater readiness to interfere in First Nations families than in non-Aboriginal families, continuing well past the time when states were realizing their obligations to limit their interference in the family. Interference with family integrity was a particular wrong of residential schools. Ultimately, the utilitarian and colonialist underpinnings of residential schools fostered the violation of international law.

Focusing on family integrity allows us to establish this important conclusion without engaging with the significant complexities of ‘cultural genocide’ and its uncertain standing under international law.<sup>162</sup> It thereby helps to establish a more secure foundation for the assertion that the residential schools system breached international law, at least in the system's later years.

That there was such a breach in the context of the First Nations residential schools will not, of course, have direct remedial implications in light of the associated lawsuits having been settled. However, the conclusion that there was a violation of a specific norm of international law does have bearing on how we understand Canada's history, and that could have broader implications in various ways. Moreover, there could yet be direct implications for litigation concerning issues analogous to

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161. Quoted in Cunningham, *supra* note 48 at 449n., citing *House of Commons Debates*, 37 (22 June 1894) at 5553.

162. See the complex discussions in Novic, *supra* note 16.

those presented by First Nations residential schools, such as conceivably for other residential schools not yet recognized by the government.

Perhaps more significantly yet, we would also note the flexibility of this family integrity-based approach in response to related issues—notably, the ongoing operations of the child welfare systems in their interaction with Indigenous children and families. The suggestion that such systems are inherently genocidal, while present amongst some more radical scholars,<sup>163</sup> raises an extraordinarily challenging legal burden. It also raises the difficult issue of the attribution of outright evil motives to a diverse range of actors working within a flawed system. By contrast, recognition of a norm against state interference with family integrity, recognizing certain limits on the norm as well as significant applications, would allow for a more nuanced and more successful application of international law. We believe that this approach provides grounds to challenge the most significant flaws in the child welfare system's engagement with Indigenous families and thus to work towards improvement of that system. Here, we have used a context where extensive documentary material is readily available. Although we cannot develop a full argument on the child welfare system here, as that would call for a new range of investigation arguably comparable to the TRC, we highlight the future potential of our mode of argumentation as a further advantage of the legal approach articulated in this article.

Over time, international law has moved to greater recognition of fundamental human rights. It has done so in response to an era in which ideas of the period led the state to feel ever-freer to interfere with family integrity. Today, international law provides a framework for responding to such state excesses and for protecting the integrity of families. In doing so, it speaks powerfully to the violations of international law within Canada's residential schools system, and it provides a powerful means of understanding extensions of that system in ongoing policy.

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163. See, e.g., such a suggestion in Starblanket, *supra* note 7.