Bureaucratic Immunity as a Barrier to Change: Dismantling the Structures at the Heart of the *Indian Act*

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Abstract

The purpose of this paper is to emphasize the impossibility of dismantling the *Indian Act* without also dismantling the accompanying colonial bureaucracy that has grown around it. This bureaucracy sustains a colonial federal-Indigenous relationship and stands in the way of meaningful change because it acts as a barrier to accountability. Our approach is not intended to legitimize Crown assertion of sovereignty, but to grapple with the reality of the Canadian government's coercive power over Indigenous peoples through bureaucratic immunity. We use the term "bureaucratic immunity" as a descriptor for the lack of federal bureaucrats' accountability for their actions with respect Indigenous people, and the communities and nations these bureaucrats ostensibly serve. We argue that bureaucratic immunity is facilitated by the twin conventions of ministerial responsibility and bureaucratic anonymity, as well as by what we refer to as "the rule of law void". Throughout the paper, we present some short- to mid-term solutions to increase federal accountability to Indigenous peoples, thereby fostering a relationship based on respect.

I. Introduction

The relationship between the Canadian federal government and Indigenous peoples has always been a colonial one, characterized by domination[1] rather than by mutual respect. The current federal government was elected in 2015 on a platform that promised a serious revamping of this relationship. It has repeatedly articulated its commitment to "a renewed relationship with Indigenous Peoples, based on the recognition of rights, respect, co-operation, and partnership."[2]

In August of 2017, Prime Minister Trudeau split Indigenous and Northern Affairs Canada (INAC) into two departments: Indigenous Services led by Minister Philpott, and Crown-Indigenous Relations led by Minister Bennet.[3] The government presented this split as an initial step in the eventual dissolution of INAC and dismantling of the oppressive *Indian Act*.[4] The Prime Minister noted that the structures in place at INAC were created at a time when the federal government's engagement with Indigenous Peoples, including its approach to the *Indian Act*, was "paternalistic" and "colonial".[5] Structural change was thus required.

The purpose of this paper is to emphasize that it is not possible to contemplate meaningfully dismantling the *Indian Act* without also dismantling the colonial bureaucracy that has grown up around it, sustaining and perpetuating a colonial federal-Indigenous relationship. The reorganization of that bureaucracy under two new departments does not dismantle it. We argue that federal bureaucrats' lack of accountability – for their actions, and to the Indigenous people, communities, and nations they ostensibly serve – poses a barrier to dismantling the colonial bureaucracy. We use the term "bureaucratic immunity" to refer to this lack of accountability, and argue that it must come to an end. Getting rid of the *Indian Act* and splitting INAC into two departments does nothing to address the problem of bureaucratic immunity.

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[1] E.g. see Aaron Mills, "Constitutional Stories: Pride, Violence, and Citizenship in Canada" (2015) 17 *Cairo Review* 115 at 121; Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[2] Eg. See Justin Trudeau, Prime Minister of Canada, *New Ministers to support the renewed relationship with Indigenous Peoples* (Ottawa: August 28, 2017) on-line: <https://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples> [*New Ministers*].

[3] *Ibid.*

[4] *Ibid.*

[5] Robert Fife, Bill Curry, & Shawn McCarthy, "Trudeau pledges to end Indian Act in cabinet shuffle" *The Globe and Mail* (28 August 2017) online: <www.theglobeandmail.com/news/politics/trudeau-shuffles-cabinet-and-pledges-to-end-indian-act/article36099306.>

We start with an important disclaimer on the scope and limits of this paper. We then move into a brief overview of the structure of government at the federal level in Canada, including the role of bureaucrats within the executive branch of government. We then delve into discussion of several inter-related facets of bureaucratic immunity: the twin conventions of ministerial responsibility and bureaucratic anonymity, and what we term the "rule of law void." We highlight the roles they play in upholding bureaucratic immunity and perpetuating colonial ways of relating. In our conclusion, we suggest that bureaucratic immunity must be dismantled by ending the practice of bureaucratic anonymity, and by filling the rule of law void. Meaningful dismantling of the *Indian Act* is not possible if bureaucratic immunity persists.

II. An Important Disclaimer

Before delving further into discussing the need to address bureaucratic immunity, we start with a disclaimer that the discussion that follows largely takes an "internal" look at Canada's constitution and governance. It attempts to engage with and assess Canadian constitutional principles and governance practices on their own terms, according to their own logic. It does not delve into the fundamental existential question of the legitimacy of Crown sovereignty in Canada, built, as it has been, overtop of Indigenous sovereignties.[6]

Our approach is not intended to legitimize Crown assertion of sovereignty. Rather, it stems from a place of grappling with the reality that the Canadian government exercises coercive power over Indigenous peoples, pursuant to constitutionalized powers, and the exercise of this power greatly impacts the lives of Indigenous peoples. Any proposals contained in this paper are envisioned as short- to mid-term solutions intended to increase federal accountability to Indigenous peoples and thereby foster a relationship based on respect. The longer-term goal, however, must be to facilitate and realize Indigenous self-governance, displacing federal or provincial jurisdiction with Indigenous jurisdiction.

In a related vein, it is important for us to clarify that any reference to a "rule of law void" is not intended to suggest that there were no systems of law in place in Indigenous communities prior to imposition of British/Canadian law. Rather, the term is used in reference to the failure of

[6] See Kerry Wilkins, "Reasoning with the Elephant: The Crown, its Counsel and Aboriginal Law in Canada" (2016) 13(1) Indigenous L.J. 27 at 53-56.

governments, following imposition of British/Canadian law on Indigenous communities and attempts to displace and suffocate Indigenous legal and governance systems, to structure and delimit the exercise of governmental power in the Indigenous context through legislation. Such structuring and delimiting is the norm in the non-Indigenous context.

III. The Structure of Government in Canada at the Federal Level

The Three Branches of Government

There are three branches to Canada's Westminster system of constitutional parliamentary democracy: the executive, the legislative, and the judicial. The executive branch is often described as the decision-making branch. It is responsible for setting the policy agenda and managing the bureaucracy. The legislative branch – Parliament – is the law-making branch: it is responsible for debating proposed legislation and deciding whether to pass such legislation into law. The principle of parliamentary supremacy means that Parliament may "make or unmake any law whatever", provided the law is in accordance with the Constitution.[7] In simplistic terms, the judicial branch interprets and applies the law, including the Constitution.

Parliament is comprised of the Queen (as represented by the Governor General), the House of Commons, and the Senate. The members of the House of Commons, also known as Members of Parliament, are elected during federal elections to represent the people of their respective ridings in the House. The members of the Senate, also known as Senators, are appointed by the Governor General on the advice/recommendation of the Prime Minister, based in part on regional representation.

The Executive is comprised of the Queen/Governor General, the Prime Minister, and Cabinet. The Queen is the titular head of state, and all executive power vests in her.[8] In practice, power is concentrated in the hands of the Prime Minister and the ministers serving in Cabinet.[9]

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[7] Lorne Sossin, "Speaking truth to power? The search for bureaucratic independence in Canada" (Winter 2005) 55(1) UTLJ 1 at 3, quoting from AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915, reprinted with a new introduction (and different pagination) Indianapolis: Liberty Classics, 1982) at 3-4. Constitutional constraints include the division of powers between the federal and provincial levels of government, the requirement to uphold the *Charter of Rights and Freedoms*, and the prohibition against unjustified infringement of Aboriginal and treaty rights.

[8] Wilkins, *supra* note 6 at 30; *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 9 [*Constitution Act, 1867*].

[9] Paul G. Thomas, "The Changing Nature of Accountability" in B. Guy Peters & Donald J. Savoie (Canadian Centre for Management Development), eds, *Taking Stock: Assessing Public Sector Reforms* (Montreal & Kingston: McGill-Queen's University Press, 1998) 356 at 358.

The Queen acts through the Governor General who is appointed by her.[10] In practice, the Governor General almost always acts pursuant the advice of Cabinet, which is almost always comprised solely of elected officials who have been selected by the Prime Minister from the political party with the most seats in Parliament.[11]

Each cabinet member is tasked with a specific portfolio of responsibilities, which usually corresponds with a specific government department. The assigned cabinet member is the Minister of that department/portfolio.

The Staff Supporting the Executive

There are two categories of staff supporting the Executive: partisan political staff, and non-partisan civil servants (AKA "public servants", "bureaucrats", or, collectively, "public service" or "civil service").[12] Political staff members work for particular Ministers. They are expected to maintain and increase the governing party's popularity and credibility, assist with the development and implementation of the governing party's political agenda, and support the success of their respective Ministers. Political staff members "give political advice to their ministers and frequently are the ones communicating their ministers', or the government's, political agendas to the public service."[13] Political staff will rarely remain employed upon a change of government; there is not even an expectation that they remain employed under the same government once their minister leaves Cabinet.[14]

Bureaucrats, on the other hand, work for the Crown and are expected to be non-partisan, even though they take instructions from the government of the day.[15] They are expected to "produce and preserve good government and to do everything possible consistent with that imperative, and with the law, to assist the government in power to achieve effectively its legislative and policy agenda."[16] A civil servant's security of tenure is much more secure than that of a

[10] Wilkins, *supra* note 6 at 30; *Constitution Act, 1867*, s. 10.
[11] Wilkins, *ibid.*
[12] *Ibid.,* at 33.
[13] *Ibid.*
[14] *Ibid*.
[15] Wilkins, *ibid.;* Sossin, *supra* note 7 at 3; David E. Smith, "Clarifying the Doctrine of Ministerial Responsibility as It Applies to the Government and Parliament of Canada" in *Restoring Accountability* - Research Studies, Vol.1 Parliament, Ministers and Deputy Ministers, Commission of Inquiry into the Sponsorship Program and Advertising Activities (Ottawa: Public Works and Government Services) 101 at 104.
[16] Wilkins, *supra* note 6 at 33-34.

political staffer's, as it does not depend on a particular political party being in power; rather, "the 'civil service', like the Crown itself, enjoys continuity through transitions of government."[17]

Kerry Wilkins has described the important governance role of bureaucrats in the following way:

> It is the public service, then, that provides the continuity and the repository of experience on which good government depends. Elected politicians, even those appointed to Cabinet, rarely have significant prior experience carrying out the work of government in the departments or ministries assigned to them; as a result, those chosen as ministers must rely, often heavily, on the advice and expertise of their public servants […] in preparing for public events and in deliberating about and making key decisions.[18]

Thus the partisan work of Ministers relies largely on the work of bureaucrats, who are expected to be non-partisan. Bureaucrats, in many settings, are nonetheless "deeply enmeshed in politics, in the sense of developing and influencing policy preferences; shaping legislative, regulatory, and policy instruments; and defining outcomes through the exercise of discretion and control over implementation."[19]

Lorne Sossin argues that the "boundary between the partisan interests of ministers and the impartial duties of civil servants represents the defining internal dynamic within the executive branch of government."[20] This internal dynamic, and constitutional principles and norms which have developed around it, challenge the "traditional, one-dimensional view of the executive branch of government" and suggest that the Executive "must be seen in pluralistic terms, as a complex web of political arrangements, institutional relationships, constitutional obligations, and legal duties."[21]

IV. Ministerial Responsibility and Bureaucratic Anonymity: The Theory

As outlined above, in Canada's cabinet-parliamentary system, power is concentrated in the hands of the Prime Minister and Cabinet Ministers.[22] Canadian Constitutional texts are largely

[17] Sossin, *supra* note 7 at 4.
[18] Wilkins, *supra* note 6 at 34.
[19] Sossin, *supra* note 7 at 7.
[20] *Ibid.* at 3.
[21] *Ibid.,* at 3-4.
[22] Thomas, *supra* note 9.

silent on how the abuse of such power is to be prevented, and the accountability of those exercising it to be ensured. The Canadian Constitution, however, encompasses not only written Constitutional texts, but also "the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."[23] Several important constitutional conventions exist that promote the principle of responsible government.

Geoffrey Marshall refers to an "iron triangle" of constitutional conventions that promote accountability and responsible government: (bureaucratic) political neutrality, ministerial responsibility, and bureaucratic anonymity.[24] For the purposes of this paper, we focus on ministerial responsibility and bureaucratic anonymity. We argue that, in today's sprawling administrative state, the conventions offer insufficient guarantees of accountability and in fact contribute to bureaucratic immunity.

Ministerial Responsibility

Kenneth Kernaghan suggests that ministerial responsibility is the "most important and most contentious of the three conventions."[25] It is widely seen as being fundamental to the system of responsible government in Canada, and some authors suggest that its importance cannot be over-stated.[26] In 2002, the Auditor General of Canada described ministerial responsibility as "the cornerstone of our democratic parliamentary system."[27]

Despite the recognized importance of this convention, ministerial responsibility is not easily defined.[28] At its simplest, it means that ministers are accountable to Parliament for their actions while in office, but it extends beyond responsibility for personal actions. There are two

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[23] *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753, at 874; Reproduced with approval in *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at para 32 [*Quebec Secession Reference*].

[24] Sossin, *supra* note 7 at 8, citing to Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Oxford University Press, 1984) at 210.

[25] Kenneth Kernaghan, *The Future Role of a Professional Non Partisan Public Service in Ontario* (Panel on the Role of Government, Research Paper Series No. 13, 2003) at 3.

[26] E.g. Donald J. Savoie, Breaking the Bargain: Public Servants, Ministers, and Parliament (Toronto: University of Toronto Press, 2003) at 3, as quoted in Scott Pruysers, "Ministerial Responsibility Revisited: Myths and Current Practices in Canada" (2010) 4 J. Parliamentary & Pol. L. 341 at 341;Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 48 [*Constitutional Conventions*], quoted in Sossin, *supra* note 7 at endnote 19.

[27] As quoted in Kernaghan, *supra* note 25 at 3.

[28] Kernaghan, *supra* note 25 at 3-4. Sossin, *supra* note 7 at 9, citing to Kernaghan.

types of ministerial responsibility: collective, and individual. For the purposes of this paper, we focus on individual responsibility.[29]

Individual responsibility places the onus of departmental accountability on the shoulders of ministers. For every action taken by the government, there is a minister who is directly responsible to Parliament for it.[30] Ministers assume legal responsibility for their departments and are answerable to Parliament for the actions of the department. As Lawrence Lowell explained in the early 20th century, "[T]he minister is alone responsible for everything done in his department."[31] This individual responsibility, in the traditional view, means that ministers can be forced to resign their positions due to serious errors in policy or administration committed within the department.[32] In other words, ministers "take the fall" for policy or administrative errors, and do not blame bureaucrats.[33]

A ministerial resignation sends a strong message to the public that someone is taking responsibility for the mistake in question and is paying for it.

Bureaucratic Anonymity

The convention of bureaucratic anonymity is complementary to those of ministerial responsibility and a politically neutral public service. The convention requires that bureaucrats remain unknown and unnamed to the public. Bureaucratic anonymity requires public servants to "provide objective [i.e. non-partisan] advice in private" to the political executive, and to "carry out policies loyally and efficiently".[34] It also requires them to "avoid actions which entangle themselves (and the governments they currently serve) in partisan controversies that could

[29] But briefly: collective responsibility can be broken down into the "confidence principle" and the "unanimity principle" (Pruysers, *supra* note 26, citing to Geoffrey Marshall (see *supra* note 24)). In such a situation, the government must resign in its entirety or seek dissolution of Parliament. In other words, it must "sink or swim together as one single administration", and the individual popularity or competency of an individual Minister is irrelevant (Prusyers, *supra* note 26 at 344). The unanimity principle requires ministers to support the positions of their cabinets in public, or to remain silent about dissent. The alternative is resignation (Thomas , *supra* note 10 at 359; see also Smith, *supra* note 15 at 106). Thomas points out that this principle serves to limit accountability, by promoting an element of secrecy within the constitutional order: Cabinet decisions are made in private where dissent is discussed, yet an outward image of cabinet unity clouds any dissent or discussion of what may be controversial about a decision.

[30] Pruysers *supra* note 26 at 348, citing to Geoffrey Marshall (see *supra* note 24) at 4.

[31] Quote reproduced in Pruysers, *supra* note 26 at 348.

[32] Thomas, *supra* note 9 at 359.

[33] Resignation is not the only form of answerability to Parliament. It is seen as lying on the extreme end of a spectrum or scale of accountability, with the obligation to inform and explain policies to Parliament lying on the opposite end:.Pruysers, *supra* note 26 at 346-347.

[34] Thomas, *supra* note 9 at 364.

undermine the confidence of future governments in their professional objectivity and capabilities."[35]

The "iron triangle" of conventions are inter-related. Pursuant to (individual) ministerial responsibility, ministers publicly accept responsibility for departmental decisions and actions, and do not credit or blame the bureaucrats working for them. Leaving bureaucrats anonymous prevents them from becoming entangled in partisan wrangling, and serves to further the convention of political neutrality of the political service. This latter convention is rooted in the belief that effective government requires a public service that will diligently serve the government of the day, regardless of political preferences. The Supreme Court has endorsed MacKinnon A.C.J.O.'s statement that, "It is difficult to take exception to […] [the] conclusion that: 'Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power.'"[36] Thus bureaucratic anonymity is justified on the basis that it is needed to help ensure political neutrality; the convention of ministerial responsibility, in theory, ensures that despite such anonymity, someone is still held to account for mistakes or errors of bureaucrats.

V. Ministerial Responsibility and Bureaucratic Anonymity: The Practice

The traditional view of how the conventions of ministerial responsibility and bureaucratic anonymity work does not reflect the reality of governance in today's administrative state. In the early 21st century, in the wake of the sponsorship scandal and subsequent Gomery Commission into the misuse and misdirection of public funds for partisan ends, the status of responsible government and of ministerial responsibility was hotly debated. Justice Gomery asked "why it is that we have a system of responsible government, yet no one is prepared to accept responsibility for the abuses committed in the administration of the sponsorship initiatives."[37] Ministers did not accept responsibility according to the traditional understanding of the convention of ministerial responsibility, while bureaucrats were able to continue to hide behind the convention of bureaucratic anonymity and the idea that responsibility did not lie with them.

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[35] Thomas, *supra* note 9 at 364.
[36] *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, 1987 CanLII 71 (SCC), at paras 99-100.
[37] As reproduced in Pruysers, *supra* note 26 at 342.

As discussed further below, the same question asked by Justice Gomery in relation to the acceptance of responsibility for sponsorship scandal abuses can be asked today in relation to harmful and discriminatory federal conduct towards First Nations children.

A Shift in Ministerial Responsibility

The traditional view that ministerial responsibility required a minister to accept responsibility and resign for an administrative or policy error in his or her department is no longer reflected in practice. The traditional view developed at a time when the machinery of government was significantly smaller than it is now.[38] Sossin contrasts the "skeletal civil service staffing the nineteenth-century colonial government" with the "vast public sector" of today's administrative state.[39]

Research by Sharon Sutherland demonstrates that the traditional understanding of the convention it is not adhered to in practice: she found that of the 151 ministers who resigned in Canada between 1867 and 1990, only two had resigned for "maladministration in their portfolio."[40] Paul G. Thomas suggests there is now a recognition that absolute ministerial responsibility may not be realistic. He describes a shift in ministerial responsibility away from "a legal liability requiring resignation" and "towards answerability before a usually sceptical audience in parliament".[41] He suggests that ministerial responsibility now gives rise to loss of reputation and not to loss of office.[42]

Because the conventions of ministerial responsibility and public service anonymity "complement and reinforce one another" and have "become part of a holistic framework of political and bureaucratic accountability"[43], one would expect a shift in one convention to be accompanied by a shift in the other. After all, "[c]hanging one part of the traditional accountability

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[38] Diana Woodhouse suggests that "the most striking feature of British administration in the first quarter of the nineteenth Century was the extent to which the work of government departments was performed by ministers themselves.": Diana Woodhouse, "Ministerial Responsibility in the 1990s: When do Ministers Resign" (1993) *Parliamentary Affairs 46*: 3(1) as reproduced in Pruysers at p. 349.

[39] Sossin, *supra* note 7 at 10. Departments today employ tens of thousands of civil servants, making it impossible for the Minister to personally perform most of a department's work. By way of example, Pruysers, *supra* note 26 at 349 states in his 2010 article that the "relatively small" Department of Fisheries and Oceans Canada employed close to 10,000 people.

[40] As found in Smith, *supra* 15 at 107.

[41] Thomas, *supra* note 9 at 359.

[42] *Ibid* at 359.

[43] *Ibid* at 364.

framework has implications for other parts of the framework."[44] If ministers are no longer taking the fall for bureaucrats' actions, one would expect there to be a parallel shift in the convention of bureaucratic anonymity towards an acceptance of the practice of publicly calling bureaucrats to account for their actions.

No Real Accompanying Shift in Bureaucratic Anonymity

Alarmingly, the shift in ministerial responsibility has not been accompanied by a shift in bureaucratic anonymity that is needed to maintain adequate accountability.[45] Justice Gomery's comments on the shift in ministerial responsibility reflect this troubling reality: he opined that "it is tempting to conclude that the doctrine of ministerial responsibility has become a process of mutual deniability."[46] In other words, bureaucrats continue to operate in a culture of public impunity, even though ministers no longer take public responsibility for the actions of bureaucrats.

The combination of a shift away from ministerial resignation and the maintenance of bureaucratic anonymity has negative implications for accountability. If ministers do not actually resign when bureaucrats make mistakes, and bureaucrats are protected through the related convention of bureaucratic anonymity, how, then, can accountability be ensured? The shift that has occurred in ministerial responsibility necessitates a rethinking of the convention of bureaucratic anonymity. The convention has bred a culture in which individual bureaucrats can too easily approach their work in a detached and irresponsible manner, disconnected from the individuals on whose lives they have a direct influence. Particularly in the modern-day sprawling administrative welfare state – in which ministers can no longer reasonably be expected to manage and direct their departments as closely as they did in previous eras, and in which the decisions of bureaucrats have important repercussions on the lives of members of the public – this culture of bureaucratic disconnection and impunity must change.[47]

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[44] Thomas, *supra* note 9 at 364.

[45] Some commentators have noted that bureaucratic anonymity is no longer as strong as it used to be. Kernaghan (*supra* note 25 at 20) describes it as "weakened". Thomas (*supra* note 9 at 360) notes that bureaucrats in the present day "are better known in the sense that parliamentarians, pressure group representatives, and interested members of the public are better able today to identify the occupants of important positions within the bureaucracy."We argue, however, that this change has not been accompanied by a normative shift regarding the desirability of bureaucratic anonymity, or a shift away from a culture in bureaucracy influenced by the notion of bureaucratic anonymity and accompanying public impunity.

[46] As reproduced in Pruysers, *supra* note 26 at 342.

[47] See Michael Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 2010) for a convincing discussion about the importance of understanding the role of "street-level

Hannah Arendt critiqued bureaucratic anonymity, observing it can lead to a situation of "rule by nobody".[48] When no one is accountable to the public, no one can truly be said to rule. This is the crux of the problem of the changed conception of ministerial responsibility unaccompanied by a change to the traditional protection of bureaucratic anonymity. In a "rule by nobody" situation, bureaucratic immunity flourishes: bureaucrats continue to exercise their discretion and public authority, but there is no one to hold accountable for their actions.

On November 27, 2015 the Prime Minister established criteria for ministerial staff and "exempt staff" in the form of a document entitled, "Open and Accountable Government 2015".[49] Examples of the work of "exempt staff" include reviewing briefings and other advice prepared by the department, assisting the Minister in developing policy positions, speechwriting, preparing and delivering politically oriented communications, liaising with other offices and caucus, and providing advice as a specialist in a particular field.[50] Exempt staff are required to comply with the Ethical Guidelines established in Annex A of this document. Of particular interest are the provisions contained in Part I: Ethical Guidelines and Statutory Standards of Conduct:

> Ethical Standards: Public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced.
>
> Public Scrutiny: Public officer holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the close public scrutiny, an obligation that is not fully discharged by simply acting within the law.

Bureaucratic anonymity is at odds with the obligations in these guidelines. It is not possible to be both accountable to the public, and invisible from it. While the public is able to scrutinize publicized official actions even if they are performed by anonymous "nobodies", the purpose of such scrutiny is significantly diminished and resulting accountability highly speculative at best. For the public to be properly informed about the compliance of "exempt staff" with respect to their

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bureaucrats" in shaping public policy. By "street-level bureaucrats," Lipsky is referring to "[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work" (at 3). Lipsky challenges the notion that social policy can be properly understood by looking only at top-down influences: he argues it is necessary to analyse the actions of service providers to understand how policy actually takes shape, and goes so far as to suggest that street-level bureaucrats are in fact policy makers.

[48] Hannah Arendt, *The Human Condition*, 2d ed (Chicago: University of Chicago Press, 1958/1998) at 40.

[49] Justin Trudeau, Prime Minister of Canada, *Open and Accountable Government* (Ottawa: November 27, 2105) online: <https://pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government>.

[50] *Ibid*, Annex I Code of Conduct for Ministerial Exempt Staff, Introduction.

ethical and official duties, the public must know whom they are scrutinizing. Otherwise, we are left with more lip service to accountability without any real or substantial change.

An Example: Implementing Jordan's Principle

Looking at the federal government's discriminatory implementation of Jordan's Principle may provide a helpful jumping-off point for thinking about how the shift in ministerial responsibility, combined with the maintenance of bureaucratic anonymity, contribute to bureaucratic immunity and insufficient government accountability.

Background[51]

Jordan's Principle is a child-first principle developed to prevent the harm occasioned to First Nations children by governmental disputes over responsibility for funding and provision of public services to First Nations people. It is named in honour of Jordan River Anderson, a boy from Norway House Cree First Nation who was denied a fundamental opportunity that would have been open to him had he been non-Indigenous: the opportunity to receive needed public services and supports to live outside of a hospital setting, in accordance with medical advice. Jordan's Principle is intended to apply to situations where a jurisdictional dispute arises between different levels or departments of government regarding funding/provision of a service to a First Nations child. The Principle states that, where the service would be publicly funded/provided for a non-Indigenous child, the government/department of first contact must fund/provide the service in question for the First Nations child. It can then sort out its jurisdictional dispute with, and seek reimbursement from, other levels/departments of government afterwards. The premise is simple: jurisdictional disputes should not prevent or delay First Nations children from receiving services that are available to non-First Nations children.

The term "Jordan's Principle" was first used by First Nations advocates in 2005, the year that Jordan died. In 2007, the House of Commons unanimously adopted a motion urging the federal government to adopt a child-first principle based on Jordan's Principle. Cabinet decided to respond.

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[51] First Nations Child and Family Caring Society of Canada, "Jordan's Principle" online: <https://fncaringsociety.com/jordans-principle>; Vandna Sinha & Anne Blumenthal, "From the House of Commons Resolution to *Pictou Landing Band Council and Maurina Beadle v. Canada*: An Update on the Implementation of Jordan's Principle" (2014) 9(1) First Peoples Child & Family Rev 80.

Initial Discriminatory Implementation

In 2007, the federal budget included $11M that was ear-marked as interim funding for Jordan's Principle cases. In 2008, the federal government started to work with some provinces to implement its own vision of Jordan's Principle. Bureaucrats from Health Canada and from Aboriginal Affairs and Northern Development Canada were involved with Jordan's Principle implementation, and in 2009, the two departments entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle*.[52]

In 2010 and 2011, the federal government made statements to the effect that no Jordan's Principle cases had been identified. Meanwhile, First Nations advocates and service providers were insisting that Jordan's Principle cases were common; First Nations children often experienced delays, disruptions, or denials of public services available to their non-Indigenous counterparts. In 2012, the federal government eliminated the untouched Jordan's Principle fund one year before its sunset date.[53]

In 2015, the Assembly of First Nations published a report by the Jordan's Principle Working Group ("JPWG")[54] which distilled the way in which the federal government's so-called implementation of Jordan's Principle allowed it to claim there were no Jordan's Principle cases: it could make this claim because of the very narrow way in which it had defined both "jurisdictional dispute" and "Jordan's Principle." Rather than addressing the structural problems that give rise to situations where First Nations children experience inequitable denial, delay, or disruption in public services, the federal government, through a sleight of hand involving definitional gymnastics, defined away the problem. The problem-ridden structure was left in place, and children and their families continued to suffer as a result.

In 2016, the Canadian Human Rights Tribunal rendered a long-awaited decision about whether the federal government was discriminating against First Nations children in its funding and provision of on-reserve child welfare services and in its implementation of Jordan's

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[52] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 354 [*Caring Society I*].
[53] Anne Blumenthal & Vandna Sinha, "No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle" (2015) 6(1) International Indigenous Policy Journal Art. 6.
[54] The Jordan's Principle Working Group (2015), *Without denial, delay, or disruption: Ensuring First Nations children's access to equitable services through Jordan's Principle* (Ottawa: Assembly of First Nations) online: <http://health.afn.ca/uploads/files/jordans_principle_english.pdf> [JPWG Report]

Principle.[55] In its thorough and strongly-worded decision, the Tribunal found that the federal government was discriminating against First Nations children in both regards, and confirmed the findings of the JPWG report. The CHRT ordered INAC "to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle."[56]

The most generous interpretation that can be given to the relevant Ministers and to the bureaucrats tasked with assisting in developing a plan for federal "implementation" of Jordan's Principle is that they were unaware of the discrimination and harm they were perpetuating through the limiting definitions developed as part of the federal implementation strategy. If they were unaware of this between 2007 and 2016, the CHRT decision has since made this discrimination and harm abundantly clear; the Ministers and bureaucrats could not, going forward from 2016, reasonably rely on ignorance or misunderstanding to excuse their actions.

Continued Discriminatory Implementation

In April 2016, the CHRT released a second ruling. Upon reviewing INAC's compliance with the initial January 2016 ruling, the CHRT found that INAC had made little progress in properly implementing Jordan's Principle.[57] It ordered full implementation of the Principle within two weeks. Despite the clarity of the CHRT's initial findings and order, the federal government continued to apply restrictive definitions in its "implementation" of Jordan's Principle, and thereby continued to discriminate against, and inflict harm on, First Nations children and families trying to access public services.

In September 2016, the CHRT issued a further compliance order which also emphasized continued federal attempts to limit the application of Jordan's Principle through narrow definitions of the principle.[58]

In May 2017, the CHRT issued another decision and order, finding that the federal government was still not in compliance with previous orders regarding Jordan's Principle:

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[55] *Caring Society I, supra* note 51.
[56] *Ibid.,* at para 481 (emphasis removed).
[57] *First Nations Child and Family Caring Society et al. v Attorney General of Canada (Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 10, at paras 30-34 [*Caring Society II*]; See also Churchill, M. & Sinha, V. "Reclaiming the spirit of Jordan's Principle: Lessons from a Canadian Human Rights Tribunal ruling" forthcoming in *Canadian Review of Social Policy*.
[58] *First Nations Child and Family Caring Society et al. v Attorney General of Canada (Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 16, at paras 30-34 [*Caring Society III*].

> Canada's definition of Jordan's Principle does not fully address the findings in the [January 2016] *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.[59]

In other words, the CHRT found that the federal government was continuing to discriminate against First Nations children and their families by continuing to apply a restrictive definition of Jordan's Principle. The CHRT made specific orders regarding the definition and scope of Jordan's Principle, and the necessity of properly publicizing these.[60]

Who Can be Held to Account for Discriminatory Implementation?

Who can the public, including First Nations children, families, and communities, hold to account for these ongoing discriminatory practices of the federal government? The discrimination is reprehensible and inexcusable. The decision to continue applying narrow definitions of Jordan's Principle is nothing short of a decision to continue to engage in illegal conduct. The harms of this illegal conduct are well-documented and often tragic, resulting at times in children's deaths. Surely someone should be held to account for this.

Yet so far, no one has. The Tribunal continues to issue findings of ongoing discrimination on the part of the federal government and concomitant orders to cease such discrimination. No Minister has resigned or otherwise publicly accepted, in any meaningful way, responsibility for the illegal conduct of the implicated departments. No bureaucrats involved in crafting the federal government's implementation of Jordan's Principle have been named and shamed, or disciplined in any public manner.[61]

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[59] (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14, at para 67 [*Caring Society IV*].
[60] *Ibid*., at para 135.
[61] Several bureaucrats have testified in the *Caring Society* cases, thus they have been named in a public setting. This naming, however, has not been accompanied by any official action or words indicating that these officials' conduct was deemed inappropriate or reprehensible. Furthermore, in 2011, rather than being held to account for the discriminatory manner in which Jordan's Principle was being narrowly interpreted and applied, the federal Jordan's Principle Implementation Team was nominated for AANDC's Deputy Minister's Recognition Award: Aboriginal Affairs and Northern Development Canada (2011). *2011 Deputy Minister's Recognition Award Nomination Form – Jordan's Principle Implementation Team*. Exhibit number 327 filed at the Canadian Human Rights Tribunal for T-1340/7708. As cited in Cindy Blackstock (2015), "Should Governments be Above the Law? The Canadian Human Rights Tribunal on First Nations Child Welfare" in 40(2) Children Australia.

One might argue that it would not be appropriate to hold bureaucrats responsible for implementing the governing party's political agenda, as directed by the political executive, since this is what they are supposed to do. This argument, however, does not hold water. It is true that the constitutional convention of a politically neutral public service imposes a duty of loyalty on bureaucrats to assist with implementation of the policy agenda of the government of the day. It does not follow, however, that bureaucrats are to follow cabinet instructions blindly and unquestioningly. As Lorne Sossin explains, "While providing 'loyal administration' to the government of the day, civil servants must, at the same time, always remain sufficiently independent of the political executive to exercise impartial judgment in the public interest."[62] This is because civil servants "are the guardians of a public trust underlying the exercise of all public authority."[63] The constitutional principle of the rule of law places obligations on all civil servants.[64] The rule of law requires that bureaucrats be prohibited from agreeing to carry out directions from the political executive that they know to be unlawful.[65]

Conclusion

The continued illegal conduct of the federal government in its so-called "implementation" of Jordan's Principle, coupled with the lack of proper public accounting for this conduct, provides a contemporary example of the problem of a changed conception of ministerial responsibility with continued protection of bureaucratic anonymity. No minister has resigned or otherwise publicly taken the blame for the federal government's ongoing discriminatory – and therefore illegal – conduct. And while it is difficult to imagine that none of the bureaucrats involved in developing the federal government's plan for implementing Jordan's Principle knew that the limited definitions being used by the federal government were unlawful, none of them have been publicly held to account.

The convention of bureaucratic anonymity is shielding these bureaucrats from responsibility for the discriminatory, and therefore illegal, implementation of Jordan's Principle.

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[62] Sossin, *supra* note 7 at 24. See Wilkins, *supra* note 6 at 31-33 for a critique of the use of the ill-defined concept of "public interest." He suggests that the term "rules out deliberate illegality and the more obvious forms of self-dealing, but after that it means pretty much what the governing party of the moment wants it to mean, by virtue of the fact that the governing party is the one the people most recently chose to govern them" (at 31).

[63] Sossin, *supra* note 7 at 2.

[64] *Ibid.,* at 44-47.

[65] *Ibid.,* at 46-47.

The lack of ministerial resignation, coupled with the shield of bureaucratic immunity, sends a strong message to the public that no one in government will accept responsibility for the ongoing discrimination perpetrated against First Nations children. This is a clear example of Arendt's suggestion that bureaucratic anonymity can lead to "rule by nobody." Ministerial responsibility and bureaucratic anonymity have resulted in bureaucratic immunity for public servants who have played key roles in perpetuating the federal government's discriminatory, unlawful, and harmful conduct towards First Nations children.

VI. The Rule of Law Void

In the Indigenous context, the lack of accountability flowing from bureaucratic immunity is amplified and exacerbated by the lack of statutory and regulatory schemes delimiting the scope of bureaucrats' authority in providing public services and establishing clear lines of accountability.

When people think of the huge amount of discretionary control that federal bureaucrats have exercised in the lives of Indigenous people, Indian Agents are often the first category of bureaucrat that comes to mind. Historically, pursuant to the federal *Indian Act*, Indian Agents were afforded an enormous amount of discretion in affecting the social and economic well-being of Indigenous communities, yet they were not accountable to the members of these communities.

The *Indian Act* has rightly been criticized as an oppressive piece of colonial legislation that needs to be dismantled. But bureaucratic immunity enabled by rule of law voids must also be dismantled. Somewhat ironically, then, it is not simply the existence of the *Indian Act*, but rather a long-standing *absence* of other federal legislation relating to Indigenous people that is one of the contributing factors to bureaucratic immunity that must be addressed to move away from a colonial federal-Indigenous relationship. Today, rather than having to deal with the discretionary power of Indian Agents, Indigenous people have to deal with the discretionary power of bureaucrats responsible for administering various public services. While the same is true of non-Indigenous people, a crucial difference between the discretionary power that many Indigenous people confront and the discretionary power non-Indigenous people confront is the degree of clarity regarding the source and scope of such power.

Generally speaking, in the off-reserve context, the numerous programs and services provided by the welfare state are grounded in legislative and regulatory schemes enacted by the

provincial and territorial legislatures. These schemes help establish and clarify the rights of members of the public, and the roles and responsibilities of those involved in providing services. They help clarify the scope and source of authority of bureaucrats involved in service provision, and establish clear lines of accountability.

In the on-reserve context (and also in the area of Indigenous health both on- and off-reserve),[66] otherwise purportedly similar public services have not been built around legislative and regulatory schemes. While the constitutional division of powers grants the federal government jurisdiction over "Indians and lands reserved for Indians", the federal government has not enacted legislation to help clarify the rights of public service recipients, or the roles and responsibilities of those involved in providing services. It has nonetheless established an elaborate bureaucracy charged with administering these services. This observation applies to education, health, other social services, and more. The elaborate bureaucracy that administers on-reserve public services has no legislative base.[67] We refer to this statutory/regulatory gap as the "rule of law void".

The Supreme Court has recognized the rule of law as an unwritten constitutional principle,[68] and has determined that it "embraces at least three principles":[69]

(1) "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power";[70]
(2) "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order";[71] and
(3) "the exercise of all public power must find its ultimate source in a legal rule."[72]

In the on-reserve context, there is no order of positive laws governing receipt and provision of public services; instead, there is a series of policies, protocols, and contracts intended to guide program administration. The possibility of sourcing in a legal rule the exercise of public power by bureaucrats charged with administering these programs is questionable.

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[66] Through the federal Non-Insured Health Benefits (NIHB) program.
[67] and various health services to Indigenous people regardless of place of residency (though NIHB)
[68] *Reference re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721 at para 66 [*Manitoba Language Rights]*
[69] *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21 at para 20.
[70] *Manitoba Language Rights*, *supra* note 68 at paras 59-60.
[71] *Ibid.*
[72] *Quebec Secession Reference, supra* note 23 at para 71, reproducing the sentence from *Reference re Remuneration of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para 10.

The Non-Insured Health Benefits Program (NIHB) is an example of a statute-less federal program that relies on bureaucrats exercising significant discretionary power over matters of great importance to Indigenous people's well-being. This national program "provides coverage to registered First Nations and recognized Inuit for a specified range of medically necessary items and services that are not covered by other plans and programs."[73] The NIHB program may cover items/services from the following categories:

- Dental care;
- Eye and vision care;
- Medical supplies and equipment;
- Drugs and pharmacy products;
- Mental health counselling; and
- Medical transportation to access medically necessary services.

Someone who has unsuccessfully applied for NIHB coverage may invoke a three-stage appeal process. The program exists entirely pursuant to policy, however.

In 2000, the Auditor General reiterated concerns about the lack of a legislative base for the program:

> In our 1993 Report, we noted that the absence of specific enabling legislation for the Non-Insured Health Benefits program left a gap in the definition of purpose, expected results, and outcomes of the program benefits. We recommended that the Department seek a renewed mandate from the government to clarify the program's authority base, purpose and objective. Our 1997 audit found that the renewed policy mandate defined the nature of the program, including its purpose and objective as well as the principles governing it. However, it did not address the need to clarify the authority base for the program. There is still no specific legislation recognizing non-insured health benefits."[74]

Writing not about NIHB but about water quality on reserve, Constance MacIntosh explains, "Instead of enacting protective legislation, the federal government has released unenforceable protocols and guidelines" that provide "no chain of lawful accountability for reserve residents to call upon, nor do they ensure a remedy if water is unsafe or the infrastructure shows signs of

[73] Government of Canada, "Non-Insured Health Benefits (NIHB) Program - General Questions and Answers" (updated April 10, 2018) online: <https://www.canada.ca/en/indigenous-services-canada/services/first-nations-inuit-health/non-insured-health-benefits/benefits-information/non-insured-health-benefits-nihb-program-general-information-questions-answers-first-nations-inuit-health-canada.html>

[74] Canada, *Report of the Auditor General of Canada* (2000) at para 15.6.

failure."[75] She elaborates on harmful shortcomings of relying on "cloudy policies and practices" rather than statutory regimes: "Reserve communities have no answers about how the quality of their living standards will be assured, how their well-being fits into the governmental regime, and who is responsible for what, should problems arise."[76]

This ambiguity regarding responsibility, applicable to the issue of water quality and questions regarding administration of health and social services, erodes accountability and promotes bureaucratic immunity by making it difficult to determine what exactly bureaucrats are responsible for, to whom they are accountable and on what basis, and what exactly program beneficiaries are entitled to.

In November 2017, the Auditor General of Canada, Michael Ferguson, expressed frustration with the way in which bureaucrats running federal Indigenous programs tend to ignore the goals of the people they are meant to serve and instead focus on government metrics. He pointed to the federal government's oral health program for First Nations and Inuit as an example. As reported by the Globe and Mail, Mr. Ferguson's audit of the program, which runs at a cost of $200-million annually, found the following:

> [T]he goal of bureaucrats in the Indigenous Affairs department is to manage the payments for dental services used by the First Nations and Inuit people, and […] they have no strategy to improve the oral health of their clients, despite knowing for many years that Indigenous people have far more dental problems than other Canadians.[77]

Hannah Arendt's observations about Great Britain's colonial government of India in *The Origins of Totalitarianism* provide an informative and critical view of the Kafkaesque mechanisms through which bureaucratic anonymity operates in the context of colonialism. In India, bureaucratic anonymity arose from the realization of colonial governors that their personal influence over Indian officials would serve to control public affairs more effectively than a formal

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[75] Constance MacIntosh, "Testing the waters: Jurisdictional and policy aspects of the continuing failure to remedy drinking water quality on First Nations reserves" 39 Ottawa L 63 at paras 9, 12.
[76] *Ibid*., at para 16.
[77] Chris Wattie, "Audits of Indigenous programs get little attention, watchdog says", *The Globe and Mail* (November 27, 2017) online: <https://www.theglobeandmail.com/news/national/audits-of-indigenous-programs-get-little-attention-watchdog-says/article37106734/>

treaty. Stivers notes that "an informal relationship could be adjusted as circumstances dictated and made it easy for the home government to deny responsibility for any difficulties that came up."[78]

As in Arendt's example of colonial India, a similar logic can be attributed to the existence of the federal rule of law void regarding Indigenous public services in Canada: providing a legislative base for such programs would formalize them and clarify rights and responsibilities. Permitting a rule of law void to reign, on the other hand, permits ambiguity and allows bureaucrats to make adjustments to the administration of these programs as circumstances dictate, cloaked in a cloud of ambiguity and escaping scrutiny. It also makes it easy for the federal government to deny responsibility for any difficulties that surface.

Indeed, the federal government has long tried to shirk responsibility for any difficulties or shortcomings by arguing that its involvement in the funding/provision of health and social services to Indigenous people is based purely on policy decisions, not grounded in legal obligations. While this argument was rejected by the Canadian Human Rights Tribunal in 2016 in relation to First Nations child welfare services,[79] the decision not to legislate regarding public services may flow from a desire to continue denying legal responsibility. The absence of legislation permits great uncertainty and ambiguity. This rule of law void, particularly in conjunction with bureaucratic anonymity improperly justified by ministerial responsibility, sustains bureaucratic immunity and a colonial federal-Indigenous relationship.

VII. Conclusion

The federal government's announcement of its intention to dissolve INAC and dismantle the *Indian Act* point to the political executive's desire to establish a renewed relationship with Indigenous peoples and move away from oppressive and colonial ways of relating. While we could not agree more with the necessity of establishing a relationship based on respect rather than domination, we have attempted in this paper to demonstrate our skepticism that the federal government's current approach will be successful if the issue of bureaucratic immunity is not addressed. We have attempted to demonstrate that, in order to achieve its goal, the federal government must pay more attention to the nefarious effects of bureaucratic immunity, which is

[78] Camilla Stivers, "Rule by Nobody: Bureaucratic Neutrality as Secular Theodicy" (2015) 27 Administrative Theory & Practice 242 at 245.
[79] *Caring Society I, supra* note 52 at para 78.

enabled by the twin conventions of ministerial responsibility and bureaucratic anonymity, and by a rule of law void in the realm of Indigenous public services.

As the Truth and Reconciliation Commission explains, "for governments, building a respectful relationship involves dismantling a centuries-old political and bureaucratic culture in which, all too often, policies and programs are still based on failed notions of assimilation."[80] A narrow focus on bureaucratic structure, at the expense of bureaucratic culture, will set the federal government up for failure. Yet in announcing its intention to dissolve INAC, the federal government noted, "The dedicated public servants at INAC work hard every day to help build a better country and improve the lives of Indigenous Peoples. *This work will continue, but under new structures* that will better position the Government of Canada for success."[81] The federal government has not yet turned its mind to the necessity of compelling fundamental change not only in bureaucratic structure, but also in the bureaucratic culture that has developed over centuries of colonial governance.

Furthermore, while the federal government seems eager to effect significant change on a short timeline, Kerry Wilkins explains that the public service tends to be "a conservative force in government" that "does not, as a general rule, welcome change".[82]

The federal government has failed to grapple with the ways in which bureaucratic immunity and concomitant lack of accountability have contributed to the government's historically "paternalistic, colonial way"[83] of relating with Indigenous peoples. No matter how many changes it makes to the structure of its bureaucracy, the federal government will not succeed in moving away from this way of relating with Indigenous peoples if it does not also address the culture of anonymous, unaccountable bureaucratic power.

Paul G. Thomas has argued that "the debate over the continuing relevance of ministerial responsibility has obscured the emergence of new forms of accountability and stood in the way of discussions about trade-offs among different accountability systems".[84] He suggests that "[a]ny

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[80] The 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* at 20-21, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.
[81] *New Ministers, supra* note 2.
[82] Wilkins, *supra* note 6 at 35.
[83] Fife et al, *supra* note 5.
[84] Thomas, *supra* note 9 at 384, citing Stone 1995: 523-5.

realistic approach to the achievement of accountability within the modern administrative state must rely greatly on the subjective sense of responsibility on the part of public servants."[85]

We hope that this paper has helped illustrate some ways in which such a sense of responsibility, which must include the responsibility for accountable government and the responsibility to negotiate honestly and openly with Indigenous peoples, can be fostered in bureaucrats. First of all, the convention of bureaucratic anonymity must be discarded.[86] It is past time for the civil servants engaging in the advising of ministers, the shaping of legislative and policy instruments, and the administration of public services to be named and held accountable for their actions or inactions. Bureaucratic anonymity threatens the legitimacy of executive action regarding Indigenous peoples who have a right to transparency and accountability from government. The time for paternalistic decision-making by faceless "nobodies" on behalf of Indigenous peoples is over. Permitting the naming and shaming of bureaucrats is one way in which a sense of personal responsibility can be fostered in bureaucrats.

Additionally, filling the current rule of law void regarding public services will clarify roles and responsibilities, delimit the legitimate scope of bureaucratic authority in administration of such services, and establish lines of accountability. This clarity will foster a sense of personal responsibility in bureaucrats by clarifying their responsibility, and facilitating easier public recourse to remedies when such responsibility is not properly exercised. While the long-term goal is for this rule of law void to be filled by exercise of Indigenous jurisdiction according to Indigenous systems of governance and law, steps should be taken to fill this void in the interim. The federal government should work in conjunction with Indigenous people, and where appropriate the provinces, to establish statutory and regulatory regimes that will help clarify rights, roles, and responsibilities with respect to public services for Indigenous people. And, of course, the individual bureaucrats who contribute to such work must not be allowed to hide behind the veil of anonymity and lack of accountability that was the privilege of their predecessors.

[85] *Ibid*. We would add that this subjective sense of responsibility should be coupled with recognition of objective responsibility.

[86] We do not suggest that its related convention of neutrality of the public service must also be discarded in its entirety; we believe that political neutrality can be sufficiently safeguarded even while anonymity is no longer protected.

Additionally, turning to Indigenous legal principles and practices regarding accountability in relationships will provide further insight into how a sense of subjective responsibility can be fostered in bureaucrats.

In short, the veil of anonymity that has protected bureaucrats under the guise of ministerial responsibility and the ambiguity of the rule of law void cannot continue. Accountability, transparency, and honesty are crucial components of moving towards reconciliation and change. Speaking of dismantling the *Indian Act* cannot be meaningful unless we also speak of ending bureaucratic immunity.