

**The Broad Implications of the *First Nation Caring Society* Decision:
Dealing a Death-Blow to the Current System of Program Delivery (CSPD) On-Reserve
& Clearing the Path to Self-Government**

Introduction.....	2
Part 1 – The history and longevity of CSPD.....	3
1. The genesis of the ‘comparability’ standard	3
2. The genesis of program devolution.....	11
3. Program devolution is not self-government.....	21
4. The persistence of CSPD despite calls for self-government.....	23
Part 2 - Key Problems and Harms with CSPD	28
1. Living conditions have not improved	29
2. Problems with comparability standard.....	31
a) Premised on assimilation	31
b) Leaves First Nations out of policy development	32
c) Not culturally appropriate.....	34
3. Problems with contribution agreements.....	38
a) No say and no choice	38
b) No real flexibility.....	39
c) Too many reports and controls	40
d) Lack of timely funding	42
e) Not appropriate	43
4. No legislative framework.....	46
a) Violation of the rule of law: too much discretion.....	46
b) Little to no access to justice.....	53
c) Little Accountability or Oversight by Parliament	58
5. Severe funding issues.....	60
a) A knowingly narrow approach to comparability	60
a) Exacerbated by 2% Funding Cap	63
6. Cumulative impacts	66
a) Promotes vilification and infantilization of First Nations	66
b) A Department without focus and a clear conflict of interest	69
Part 3 - The <i>Caring Society</i> decision and its implications for CSPD.....	72
1. Summary and key findings of the <i>Caring Society</i> decision.....	72
2. Tools for dismantling the CSPD	74
a) Confirms Canada’s Responsibility / Accountability to First Nations	75
b) Finds systems that perpetuate historic disadvantage endured by Aboriginal people are discriminatory	77
c) Finds comparability standard discriminatory and equality demands needs-based, culturally appropriate services	79
3. Where to from here?	81
CONCLUSION	87

Introduction

On January 26, 2016, the Canadian Human Rights Tribunal (the “Tribunal”) released a watershed decision in a complaint spearheaded by the First Nations Child and Family Caring Society of Canada, its Executive Director, Dr. Cindy Blackstock, and the Assembly of First Nations (the “*Caring Society*” decision).¹ The complaint alleged that Canada, through its Department of Indigenous and Northern Affairs (“INAC” or the “Department”), discriminates against First Nations children and families in the provision of child welfare services on reserve. In its decision, the Tribunal found that INAC’s design, management and control of child welfare services on reserve, along with its funding formulas, cause a number of harms to First Nations children and families that amount to discrimination, most notably among these is the systemic underfunding of such services. Canada has decided not to appeal the decision.²

The decision is the first in Canada to begin to examine the problems and harms existing within the current system of program delivery in First Nations communities. These problems and harms are not unique to the delivery of child welfare on reserve, but extend to all core services including health, social welfare, assisted living, daycare, education, housing and infrastructure, policing and emergency services. In First Nations communities, all of these services, although delivered by First Nations themselves, are governed by a complex web of federal funding directives, policies and funding agreements, wherein the primary program delivery standard is ‘comparability’ with the provinces/territories services. The current system of program delivery on reserve has been variously described as “program devolution”, “self-management”, and “self-administration”.³ In the *Caring Society* decision itself, the Tribunal referred to this system as the “programming/funding approach.”⁴ Unless referring to a specific feature of this system, I will

¹ *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 (“*Caring Society*”).

² CBC News, “Federal government won’t appeal ruling that found it discriminated against children on reserves,” February 22, 2016.

³ Rae, J., “Program Delivery Devolution: A Stepping Stone of Quagmire for First Nations?” (2009) 7 (2) *Indigenous LJ* 1 at 6-17; see also Cornell S., Curtis, C., and Jorgensen, M., “The Concept of Governance and its Implications for First Nations” in *Joint Occasional Papers on Native Affairs*, No. 2004-02, at 8-10.

⁴ *Caring Society*, *supra* note 1, para. 83.

generally refer to all of it herein as the ‘current system for program delivery’ on reserve, or “CSPD” for short.

Over the years, the Auditor General of Canada has raised numerous concerns with CSPD. In 2011, the Auditor General went so far as to say that it “severely limit[s] the delivery of public services to First Nations communities and hinder[s] improvements in living conditions on reserves.”⁵ The CSPD, which has been in place for decades despite several calls for reform by the Auditor General and others, is so convoluted that it is almost impenetrable. But the *Caring Society* decision has shed light on *some* of its ugly features and, most importantly, arms First Nations with the necessary tools to finally dismantle this entirely unacceptable system.

In this paper, my aim is to do a few things. First, I will detail how CSPD has come to be, how it operates and how it has persisted over numerous decades despite several calls to implement self-government in its stead. Next, I endeavor to shed a light on *all* of its ugly features by setting forth an inventory of all of the problems and the harms it causes First Nations people. Systemic underfunding is but one among many of the serious harms caused by CSPD. Finally, I discuss how the *Caring Society* decision has discredited significant parts of CSPD and how the decision can be used to unravel the rest. I will argue that the decision points us to the one true alternative to this unacceptable system—First Nations self-government—which is long overdue.

Part 1 – The history and longevity of CSPD

1. The genesis of the ‘comparability’ standard

The first two centuries of relations between Indigenous peoples and Europeans in what is now known as Canada has been described as the era of “Nation-to-Nations relations”, characterized by friendship, trade partnership, inter-dependence and mutual respect. This era saw several *Peace and Friendship Treaties* signed between British and several First Nations, as well as the *Royal Proclamation of 1763*, wherein the British Crown referred to “the several Nations or Tribes of Indians with who We are connected” and imposed the requirement of obtaining the

⁵ 2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, “Programs for First Nations on Reserves” (“2011 Auditor General Report”), at 5.

consent of these Nations in any transaction dealing with their lands, which in turn could only be legally conducted with representatives of the Crown.⁶

This relationship changed dramatically, however, when Europeans' objectives towards this land went from seeking goods for trade to settlement and nation-building in the mid-1800s. Once the objective became settlement, Indigenous people were no longer regarded as allies or trading partners, but instead seen as impediments to expansion and primitive "savages".⁷ Colonial governments sought to segregate First Nations on small and less-than-desirable parcels of land, hoping they would eventually become extinct from disease and starvation.⁸ Following Confederation in 1867, and having jurisdiction over "Indians and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*,⁹ the federal government pursued an active policy of assimilation through the *Indian Act*, enacted in 1876,¹⁰ as well as through policy.¹¹

In the late 1800s and up until the end of the First World War, despite First Nations being destitute, displaced and ravaged by disease, Canada's policy for providing relief assistance to Indians was *ad hoc*. It was provided only periodically and reactively, on an *ex post facto* basis each time need was established.¹² Between the wars, relief was even further tightened and generally only available to the elderly, ill and the infirm.¹³ At this time, Canadian policy deemed it dangerous to accord welfare relief to Indians. According to Hugh Shewell:

Indian relief and education policies were concerned with turning Indians into moral, thrifty workers. Indians were perceived as lazy, idle, and intemperate, and this perception served to explain their dependence on the state and to justify the government's obsessive fear of that dependence.¹⁴

⁶ See *Report of the Royal Commission on Aboriginal Peoples* ("RCAP Report"), Volume 1, "Looking Forward, Looking Back", Chap. 5, "Stage Two: Contact and Co-operation".

⁷ See RCAP Report, *ibid.*, Chap. 6, "Stage Three: Displacement and Assimilation"; see also *Summary of the Final Report of the Truth and Reconciliation Commission of Canada – Honouring the Truth, Reconciling for the Future*, Introduction, at 1-26 ("TRC Summary Report").

⁸ See RCAP Report, *supra* note 6, Chap. 6, at 136.

⁹ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(24).

¹⁰ *Indian Act*, SC 1876, c 18.

¹¹ TRC Summary Report, *supra* note 7.

¹² Shewell, H., *'Enough to Keep Them Alive' – Indian Welfare in Canada, 1873-1965* (Toronto: University of Toronto Press, 2004) at 327.

¹³ *Ibid.* at 329.

¹⁴ *Ibid.* at 328.

When it came to issues relating to child welfare, children in need of protection were apprehended by the Indian agent and either placed with another family on the reserve or sent to residential school.¹⁵

The Second World War had a tremendous impact on the social and economic policies of countries throughout the World, including Canada. By the end of the war, Canada was a nation concerned about equality and the rights of citizenship.¹⁶ As well, following the war came the rise of the welfare state in Canada and, with this, a great expansion of laws dealing with essential services enacted by both provincial governments and Canada.¹⁷ Furthermore, following the Second World War, as noted by Shewell and Spagnut, Canadians became more aware of the impoverishment of Indians and, with a certain collective shame, sought the amelioration of their condition.¹⁸ On the recommendations of the 1944 Parliament Committee on Post-war Reconstruction, Canada appointed a 'Joint House of Commons and Senate Committee on Indian Affairs' whose mandate was to enquire into the policies of the Indian Affairs Branch of Department of Mines and Resources as well as into the general conditions of Indians living on reserves.¹⁹

The Committee's reports and recommendations consistently focused on the need to advance Indians to full citizenship and equality. As in earlier times, the necessity for Indians to be assimilated was a given, but, as noted by Shewell and Spagnut, the tone of this assumption had changed: "It was no longer a question of subjugating Indians and of degrading their cultures, but of extending to them their rightful opportunities to be full and equal citizens of Canada."²⁰ The ethos of this period could be characterized as embracing 'formal equality', which subscribes to the notion that everyone should be treated identically.²¹ Pursuant to this ethos, Indians ought to

¹⁵ Harris-Short, S., *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children – Protection the Vulnerable Under International Law* (Ashgate Publishing Company: Burlington, England, 2012) at 44.

¹⁶ Shewell, H., and Spagnut, A., "The First Nations of Canada: social welfare and the quest for self-government" in *Social Welfare with Indigenous Peoples*, ed., Dixon, J., and Scheurell, R.P., London: Routledge, 1995, at 2 ("Shewell and Spagnut").

¹⁷ See G.V. Harten, G. Heckman and D.J. Mullen, *Administrative Law - Cases, Text, and Materials*, 6th ed. (Edmond Montgomery Publications: 2010), Chapter 1, at 3-4 and 8.

¹⁸ Shewell and Spagnut, *supra* note 16 at 3.

¹⁹ *Ibid.* at 3.

²⁰ *Ibid.*

²¹ Hogg, P., *Constitutional Law of Canada* (5th ed.) (loose-leaf), Chap. 55, at para. 55.6(e).

be treated as like all other citizens and their legal status as “Indians” and different legal entitlements arising therefrom (treaties, reserves, the *Indian Act*, etc.) were perceived as holding First Nations back from becoming full citizens.

This ethos of formal equality is reflected in a number of actions undertaken by Canada pursuant to the Joint Committee’s recommendations. For example, in 1949, to symbolize its commitment to make Indians into ‘citizens’, Canada made INAC a branch of the Department of Citizenship and Immigration.²² In 1950, the Joint Committee reported that First Nations on reserves were excluded from many federal social programs and most provincial and territorial services that were now provided to Canadian citizens. In response, the Committee recommended that provinces and territories be more involved in delivering and funding social services to First Nations.²³

In 1951, the *Indian Act* underwent significant amendments, with Parliament removing some of the more overtly discriminatory provisions from the *Act* (such as the prohibition on seeking legal representation, and compulsory enfranchisement).²⁴ Heretofore, the *Indian Act* did not contain any laws regarding welfare or other essential services,²⁵ and Parliament did *not* seek to change this with these amendments despite the provinces having passed several laws on essential services by this time. Instead, among the more significant additions to the *Indian Act*, was the inclusion of s 88 (then s 87) which provides that “all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province” except to the extent such laws were inconsistent with the *Indian Act* or regulations or by-law thereunder and subject to the terms of any treaty or other federal law.²⁶ On its face, s 88 appears to delegate

²² Shewell and Spagnut *supra* note 16 at 3.

²³ Canada, INAC, Income Assistance Program – National Manual, 2005, at 13.

²⁴ See *Indian Act*, SC 1951, c 29.

²⁵ It is a common misconception that the *Indian Act* is a comprehensive statute covering all manner of subjects having to do with First Nations people. The scope of the *Indian Act* is actually quite narrow covering only about seven discrete areas: (1) Indian registration and Band membership rules (ss 5-14); (2) Indians’ collective interests in reserve lands (how they can be surrendered, transferred, leased, expropriated, etc.) and a quasi-private property regime for Band members (ss 18-41, and 53-60); (3) Indian wills and estates (ss 42-52); (4) taxation of Indians and exemption from seizure of property on reserve (ss 87 and 89-90); (5) election of Band Councils (ss 74-80); (6) the by-laws powers (ss 81-86); and (7) schools on reserve (ss 114-122).

²⁶ *Indian Act*, 1951, *supra* note 24 at s 87 (now *Indian Act*, RSC 1985 c I-5, s 88).

any matters not covered by the *Indian Act* or its regulations to provincial jurisdiction, including legislation over essential services on reserve.²⁷

It appears there was little discussion and debate about the meaning of the s 88 at the time it was passed, and there is little on the public record providing a clear explanation of the government's rationale for it.²⁸ Kerry Wilkins suggests that, at minimum, it was intended to clarify that Indians had the right to sue in tort, contract and for debts that came due, as well as to address and acknowledge the widespread sense that provincial law should not constrict treaty rights.²⁹ Wilkins also suggests that a driving factor behind the provision was the Joint Committee's strong emphasis that the "provinces had a role to play in achieving the recognized long-term goal of assimilation – or in later idiom, "integration" – of the Indian peoples into mainstream society."³⁰ Wilkins observes, however, that s 88 would have been beyond anything the Joint Committee had contemplated:

Even here, though, Parliament in enacting s. 88, went well beyond the special joint committee's recommendations. The approach recommended by the committee, and later endorsed explicitly by the federal minister, clearly emphasized cooperation, consultation, and coordination between the two orders of government in pursuit of the long-term objective [of assimilation]. Nothing in these reports, and next to nothing in the public consultation informing them, encouraged or supported *unilateral federal* imposition of provincial legislative regimes on Indians.³¹

If s 88 was intended to be a delegation to the provinces in the area of social services over Indians, it was ineffective because it was done unilaterally, as pointed out by Wilkins. Parliament could not force the provinces to extend services to Indians—and spend provincial revenues on them—if the provinces were unwilling. As matter of constitutional law the proposition is suspect,³² and, more importantly, that is what actually happened. The provinces and territories did not automatically assume legislative and fiscal jurisdiction over Indians with

²⁷ Section 88 was initially regarded the basis for the application of provincial laws to Indians. However, the Supreme Court of Canada clarified in *Dick v. La Reine*, [1985] 2 SCR 309 that provincial laws that do not touch on the core of "Indianess" apply to Indians *ex proprio vigore* (of their own force). See also *R. v. Morris*, [2006] 2 SCR 915.

²⁸ Wilkins, K., "Still Crazy After All These Years": Section 88 of the *Indian Act*," (2000) 38(2) Alta. L.R. 458 at 460.

²⁹ *Ibid.* at 462.

³⁰ *Ibid.* at 463.

³¹ *Ibid.* at 464 [emphasis in original].

³² *Ibid.* at 471.

the passing of s 88; they continued to see Indians as a federal responsibility. The only exception was in the case of the extension of provincial child welfare laws on reserve, notably, the child apprehension provisions in cases of abuse or neglect and this was not something that occurred overnight.³³ Indeed it only started to occur once the federal government agreed to reimburse the provinces for their costs in the mid-1960s.³⁴ Further, most of the provinces only extended their apprehension services in cases of abuse or neglect and did not offer or fund prevention and early-intervention services.³⁵

With s 88 being largely ineffective as a means of delegating responsibility over Indians to the provinces and territories, the federal government then sought to negotiate with the provinces for their assumption of jurisdiction over essential services to Indians.³⁶ In this regard, Canada was successful in persuading one province. The 1965 *Memorandum of Agreement Respecting Welfare Programs for Indians* between the Government of Canada and the Government of Ontario instituted a costs sharing arrangement respecting the application of provincial welfare laws to Indian reserves in the province.³⁷ Following its success with Ontario, Canada sought to formalize a legal process for entering such arrangements. In 1966, Canada enacted the *Canada Assistance Plan*, legislation which permitted Canada and individual provinces to enter cost-sharing agreements over the delivery of provincial social programs on reserve.³⁸ However, no other province or territory would agree to sharing responsibility with Canada over the provisions of services on reserve.

Meanwhile during the time Canada was attempting to get the provinces and territories to provide social programs on reserve, First Nations on reserve subsisted without access to the types of services provided in the provinces, many living in extreme poverty and prevented by law from exercising their traditional activities of hunting, fishing and gathering that their ancestors' relied on to sustain themselves. Eventually, the circumstances of endemic poverty on reserves gave

³³ Some provinces would become involved, but only in "life or death" or "only in the most extreme cases of neglect." See Johnson, P., *Native Children and the Child Welfare System*, (Canadian Council on Social Development in association with James Lorimer & Company: Toronto, 1983) at 7-16.

³⁴ See Harris-Short, *supra* note 15 at 44; see also Johnson *ibid*.

³⁵ Johnson *ibid*.

³⁶ See INAC, Income Assistance Program – National Manual, *supra* note 23 at 13.

³⁷ See Shewell & Spagnut, *supra* note 16 at 16.

³⁸ *Canada Assistance Plan*, 1966 SC c. 45 [repealed SC 1995, c 17, ss. 31-32] ("*CAP*"), Part II, "Indian Welfare".

rise to a further Joint Parliamentary Committee review of Indian Affairs' policies and progress beginning in 1959.³⁹ Before the Committee, Indian Affairs officials maintained that progress was slow partly because of varying degrees of Indian readiness to enter 'modern' Canadian life and partly because of the reluctance of the provinces to extend their service on reserve.⁴⁰ The Committee recommended Canada stay the course and called for more federal-provincial cooperation.⁴¹

Mounting pressure for Canada to take action to address Indian poverty led to an independent study of Indian Affairs in 1963, *A Survey of the Contemporary Indians of Canada*, known as the Hawthorne Report.⁴² The report called for the integration of Indians into Canadian society through full extension of social, political and civil rights, but at the same time protecting Indians' historically special status. It recommended Indian Affairs should continue to advocate for Indian interests and co-operate with them on future policy, and criticized the provinces for being indifferent to the plight of First Nations.⁴³ Despite this admonition, the provinces continued to insist that Indians were the sole responsibility of the federal government.⁴⁴ The Hawthorne Report was never fully endorsed by the federal government.

Faced with unwillingness from most of the provinces, Canada finally responded to the Indian poverty crisis in 1964. In June 1964, Indian Affairs sent a request to Treasury Board for approval of a request by the Department to adopt (and therefore spend) the equivalent provincial and local municipal welfare rates for Indians on reserve "as a means of rectifying the present inadequacy of the Indian Affairs Branch scale of assistance" and specifying that this would entail spending "not only be in respect to food but also for clothing, fuel, household equipment, public utilities such as water and electricity, rent, etc. as may be applicable."⁴⁵ In July 1964, the

³⁹ Shewell and Spagnum, *supra* note 16 at 4.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.* at 4-5.

⁴⁴ *Ibid.*

⁴⁵ Citizenship & Immigration, Indian Affairs Branch, "Authority to Introduce Increased Rates of Assistance to Indians - Details of Request to the Honourable The Treasury Board", Ottawa, June 16, 1964.

Treasury Board approved the Department's proposal "to adopt provincial or local municipal standards and procedures for the administration of relief assistance for Indians."⁴⁶

Within days of this, the Director of the Indian Affairs Branch sent a letter to the supervisor of each regional office, advising of the approval. The import of the approval was described as "mak[ing] available to Indians the full range of assistance at the same scales and under the same eligibility conditions as other needy persons in the province in which they reside." The letter also provided instruction on how Indian Affairs would proceed in implementing the approval. The directive noted that it was likely not possible "to adopt all aspects of provincial policy to departmental administration" and that, instead, each region was being asked to develop their own "draft regulations which you feel should be applied to the administration of relief assistance for Indians of your region." The letter went on to explain that the drafting of said regulations should involve the "examination and adaptation of provincial regulations to our own particular situation" and would also require consultation with provincial welfare authorities.⁴⁷

Although referred to as "regulations" by the Director of the Indian Affairs Branch, what subsequently unfolded was not the development of "regulations" in a legal sense, but the creation of regional policy manuals for the provision of social assistance on reserve modelled upon provincial welfare laws and policies. The practice has continued to the present day.⁴⁸ Initially, the services under these policies were provided directly by Indian Affairs personnel, but this would change with Canada's policy shift to program devolution, detailed below.

As well, over time Canada's approach regarding welfare services on reserve—to provide a level of service comparable to the provinces—was expanded (via treasury board approvals) to include all other essential service areas. This includes child welfare, assisted living, education, policing, emergency services, health, day care, housing and infrastructure. Although relevant treasury board authorities have been updated periodically, comparability with provincial/territorial

⁴⁶ Treasury Board Minute, T.B. 627879, dated July 23, 1964.

⁴⁷ Department of Citizenship and Immigration, "Circular 107 – Application of Provincial General Welfare Assistance Programs", Ottawa, July 20, 1974.

⁴⁸ See for example INAC, Atlantic Regional Office, 1967 Social Welfare Regulation; and INAC, 1991 New Brunswick Social Assistance Manual—First Nations Social Development Manual. Within the last twenty years, national program manuals were also created in order to provide guidance to the regions. See INAC, Income Assistance Program – National Manual, 2005, *supra* note 23.

standards has generally remained the governing standard for the provision of all essential services on reserve.⁴⁹

2. The genesis of program devolution

Canada's emphasis on citizenship and formal equality for Indians during the post-Second World War period came to head in June 1969, when the government, under the administration of Pierre Elliott Trudeau, tabled its *Statement of the Government of Canada on Indian Policy*, known as "the White Paper." Pursuant to the ethos of 'formal equality', the White Paper recommended fundamental changes to the status of Indian people in Canada, notably the end of the distinct status for Indians, the dissolution of Indian Affairs, the repeal of the *Indian Act* and its replacement with an *Indian Lands Act*, so that Indians could be quickly shepherded into mainstream society with its attendant services and opportunities.⁵⁰

Heralded by the government as a progressive move in tune with social reform and civil rights, First Nations, on the other hand, condemned the proposal as the ultimate attempt at assimilation.⁵¹ In fact, First Nation opposition was so intense that the federal government withdrew the White Paper in 1971 and declared an end to its assimilation policy.⁵² An unintended consequence of the White Paper was to fuel a national First Nations resistance movement and the creation of regional and national advocacy bodies, including the National Indian Brotherhood (which would eventually become the Assembly of First Nations). Following this, First Nations began to assert Aboriginal title and Aboriginal and Treaty rights in the courts, demanded seats at the negotiation table to settle outstanding claims, and called for self-government.⁵³

These events led to some changes within the federal government. Following the withdrawal of the White Paper, INAC began to place more emphasis on community development and Indian

⁴⁹ See Memorandum of Understanding between the Department of Indian and Northern Development and the Treasury Board, August 1990.

⁵⁰ Shewell and Spagnut, *supra* note 16 at 5.

⁵¹ See Johnson *supra* note 33 at 6-7.

⁵² *Ibid.*

⁵³ *Ibid.*

band management training.⁵⁴ In 1976, a Cabinet committee on First Nations social policy recognized, among other things, that Aboriginal efforts at self-definition, self-management, and self-determination should be encouraged, and that Aboriginal concepts of community priorities are valid and should be considered by government when planning projects and programs.⁵⁵ Also, in 1976, Canada published a Government / Indian Relationships paper which accepted the special Indian identity in Canadian society.⁵⁶

In 1978, the House of Commons, still under the Trudeau's Liberal government, appointed a special house committee to study Indian self-government, made up of sitting MPs and representatives from First Nation organizations, who sat over three years, hearing from a wide array of interested parties, including INAC staff as well as First Nations. The Committee's report (called the "Penner Report", as it was chaired by Ontario MP Keith Penner) was groundbreaking in its approach.⁵⁷ It repudiated Canada's assimilation policy and called on the federal government to entrench Indian self-government in the constitution.⁵⁸ In addition to that, the Report proposed a number of legislative measures, to occur irrespective of constitutional entrenchment, to immediately begin implementing self-government in a flexible manner and at a pace suitable the needs and capacities of each First Nation.⁵⁹ The Report suggested that the scope of powers of First Nation be akin to the powers of provincial governments and urged for there to be fiscal transfers similar to the inter-governmental transfers between federal government and the provinces.⁶⁰ Finally, the Report recommended the phasing out of INAC within five years, to be replaced with a "Ministry of State for Indian First Nation Relations" to protect and advocate for Indian rights and interests, as well as to manage and co-ordinate Canada's fiscal relationship with First Nations.⁶¹

⁵⁴ Shewell and Spagnut, *supra* note 16 at 17.

⁵⁵ INAC, Income Assistance Program – National Manual, 2005, *supra* note 23.

⁵⁶ INAC, "Indian Band Government Legislation" (1982) (National Archives).

⁵⁷ Canada, House of Commons, Report of the Special Committee on *Indian Self-Government in Canada*, First Session of the Thirty-second Parliament, 1980-81-82-83 ("Penner Report"). Available online: <http://caid.ca/PennerRep1983.pdf>.

⁵⁸ *Ibid.* at 43-44.

⁵⁹ *Ibid.* at 46-50.

⁶⁰ *Ibid.* at 94-102.

⁶¹ *Ibid.* at 133-134.

The Department's primary response to the changing discourse on First Nations issues occasioned by negative reaction to the White Paper, was to put greater emphasis on program devolution to First Nations. Program devolution is the transfer of resources and responsibility for delivery of programs from INAC to First Nations and their institutions. In other words, instead of INAC staff delivering programs and services directly, First Nations receive funding from the federal government and are then expected to hire their own staff to provide these programs and services to community members. As will be detailed further below, in order to do this, INAC enters funding arrangements with First Nations.

According to some accounts, some *ad hoc* program devolution had begun prior to the withdrawal of the White Paper in the 1950s and 60s.⁶² In 1979, Treasury Board approved the first set of "Terms and Conditions for Contributions to Indian Bands and Organizations" explicitly authorizing funding arrangements with First Nations to be entered for the purpose of devolution.⁶³ Services such as social assistance, child care, education, and community infrastructure were among the first to be transferred from INAC to First Nations.⁶⁴

However, program devolution would become a clear policy objective in the 1980s and 90s, especially after the release of the Penner Report. Ironically, the Penner Report (for many of the same reasons discussed in Part 2) was highly critical of the practice of program devolution and called for its discontinuance in favour of immediate implementation of First Nation self-government.⁶⁵ Why Canada would then enthusiastically embrace devolution after the Penner Report thoroughly impugned the practice, can be explained by a change in government. Although Pierre Trudeau's Liberal government reacted favourably to the policy direction recommended by the Penner Report and even introduced Bill C-52, entitled "*An Act relating to Self-Government for Indian Nations*," which incorporated many of the recommendations from the Penner Report; the Liberals were defeated by the Progressive Conservative government of

⁶² INAC, "Communications Strategy – Task Force on Devolution", March 16, 1992 (National Archives); and Shewell & Spagnum, *supra* note 16 at 38.

⁶³ Penner Report, *supra* note 57 at 20.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 20-35 and 84-94.

Brian Mulroney, who came to power in September 1984.⁶⁶ Bill C-52 died on the order paper, not having gone beyond First Reading, and the Mulroney government took the Penner Report in a markedly different direction.

Under the reign of the Progressive Conservatives from 1984 to 1993, program devolution came to be seen as the gateway to First Nation self-government. The Penner Report recommendations for constitutional entrenchment of self-government and the passing of legislation to implement this right were largely forgotten. Internal INAC documents from this period characterize devolution as falling along a 'continuum' from "simple devolution" to "full devolution."⁶⁷ "Simple devolution" was conceived as essentially the delegation of INAC program administration.⁶⁸ "Full delegation" was conceived as self-government.⁶⁹

At this time, funding agreements became the cornerstone of the government's approach to the 'continuum of devolution.' In this regard, it is important to note that there various ways that the federal government can disburse moneys to third parties, including via:

Contribution agreements - Contributions are either advance payments or reimbursements of eligible expenditures incurred by the recipient for an agreed purpose. Eligible expenses are defined in the contribution agreement and must be made in the pursuit of defined performance requirements. They are subject to audit, evaluation and reporting requirement.⁷⁰

Grants - Grants are transfer payments requiring less accounting and oversight.⁷¹ In more recent years, Canada has begun to place conditions on grants, though the classic model of grants is that of being unconditional. Instead of meeting strict conditions, recipients are expected to provide an understanding of the use to which the funds will be put. Grants

⁶⁶ Cumming, P.A., and Ginn, D., "First Nation Self-Government in Canada" (1986) Nordic Journal of International Law 55.1-2 86 at 100-107.

⁶⁷ INAC, "Overview – Devolution Task Force" (Draft – 17/3/92) (National Archives).

⁶⁸ *Ibid.*

⁶⁹ INAC "Devolution" (Draft – 9/8/92) (National Archives).

⁷⁰ Treasury Board of Canada Secretariat, *From Red Tape to Clear Results – The Report of the Independent Blue Ribbon Panel on Grant and Contribution Programs*, December 2006, ISBN: 978-0-662-49799-8, at 3.

⁷¹ *Ibid.* at 20.

are usually not audited, though perhaps subject to some reporting or disclosure requirements.⁷²

Intergovernmental transfers - Contribution and grants are the key funding mechanism Canada uses to transfer funds to businesses, not-for-profits, individuals, as well as to provincial, territorial and municipal governments in some instances.⁷³ Beyond these, there are also inter-governmental transfers between Canada and the provinces and territories, and these are for such things as equalization payments and the social and health transfers to the provinces and territories.⁷⁴ Such transfers are unconditional and the lines of accountability for spending these funds are between the government receiving the funds and its citizens. The provinces receiving the payments are free to spend the money in accordance with their own priorities.⁷⁵

Up until the mid-1980s, all devolution of programming to First Nations was transferred through contribution agreements which puts tight controls on how funds are to be spent. Contribution agreements require reimbursement of actual costs and do not allow First Nations to retain or carry forward any surpluses at the end of a fiscal year.⁷⁶ Any surpluses must be returned to Canada at the end of the fiscal year.

The Penner Report had been harshly critical of the use contribution agreements given their restrictiveness and focus on accountability between First Nations bands and INAC, instead of between First Nation bands and their members. As an alternative, the Report urged for the use of unconditional grants or intergovernmental transfers, in tandem with its call for legislation implementing self-government.⁷⁷ The Mulroney government largely ignored this recommendation, and instead sought to address the problem by examining how contribution agreements could be made more flexible and promote greater First Nation accountability to membership.

⁷² *Ibid.* at 3.

⁷³ *Ibid.* at 1 and 5.

⁷⁴ *Ibid.* at 9.

⁷⁵ Hogg, *supra* note 21, Chap. 6 at 10.

⁷⁶ Institute of Governance, "Special Study on INAC's Funding Arrangements – Final Report", 22 December 2008 ("IOG Report") at 13.

⁷⁷ Penner Report, *supra* note 57 at 81-102.

Thus, in the late 1980s, the Treasury Board of Canada approved two additional funding mechanisms specifically designed for First Nations, the flexible transfer payment (FTP) and the alternative funding arrangement (AFA).⁷⁸ These arrangements also allowed for First Nations to have one single arrangement on devolution as opposed to a number of separate contribution agreements for each devolved program.⁷⁹ The main features these mechanisms are as follows:

Flexible transfer payments (FTP) – allows First Nations to retain surpluses generated from a particular program (except income assistance) provided the minimum program requirements are met. The intention behind this ability to retain surpluses was to create an incentive for First nation to more effectively manage their programs to ensure surplus at the end of the year. Surpluses could be retained for use at the Band Council's discretion.⁸⁰

Alternative funding arrangements (AFA) – provides five year funding and the flexibility to transfer funds across programs in addition to the ability to retain surpluses (and the responsibility for deficits). To be eligible for such agreements, First Nations must meet various entry requirements. Funding is also conditional upon meeting individual program terms and conditions. These are intended to provide First Nations some control over meeting community needs and priorities by giving First Nations the opportunity to enhance programs by using any generated surplus, transferable across different programs.⁸¹

Using the four types of funding mechanisms available in different combinations—grants, contributions, FTPs and AFAs—into the 1990s and beyond, INAC essentially began to offer two types of funding agreements to First Nations:

⁷⁸ INAC, Income Assistance Program – National Manual, 2005, *supra* note 23 at 15; see also INAC, Departmental Audit and Evaluation Branch, “Evaluation of the Alternative Funding Arrangement (AFA) and Flexible Transfer Payment (FTP) Funding Authorities”, December 2005 (“2005 Evaluation Report”) at 12.-13.

⁷⁹ IOG Report, *supra* note 76 at 11.

⁸⁰ *Ibid.* at 13; see also 2005 Evaluation Report, *supra* note 78 at 12-13.

⁸¹ IOG Report, *ibid.* at 12; see also 2005 Evaluation Report, *ibid.* at 13.

- 1) Comprehensive Funding Agreements (“CFAs”) – these are made up of a combination of grants, contributions and FTPs for a variety of programs and services, and have a term of one year. This means that for some programs covered under FTP, the Band would retain any surplus, and for other programs covered under contribution (e.g., income assistance and other programs), Bands cannot retain any surplus.
- 2) Block Funding Agreements (“Block Agreements”) – these are made up of a combination of grants, contributions, FTPs and AFAs for a variety of programs and services. These can be multi-year agreements. For those programs funded under AFA, transfer of surpluses between programs is possible. Such agreements can be limited to only INAC programs (in which case, they are called DIAND First Nation Funding Arrangements (DFNDAs) or encompass funding from both INAC and federal departments, such as Health Canada (in which case they are called Canada First Nation Funding Arrangements (CFNFAs)).⁸² To be eligible for Block Agreements, Bands are assessed for their suitability to enter such agreements.⁸³

Although having different names and some special features, it is important to appreciate that these funding mechanisms are still in the nature of contribution agreements. Despite allowing some flexibility and retention of surplus funds, use of those funds remains conditional upon First Nations adhering to the minimum terms and conditions for each program.⁸⁴ Such program term and conditions are those set by treasury board approvals, which, as discussed above, for virtually

⁸² IOG Report, *ibid.* at 13-14. In 1986, consistent with what was happening within INAC, Health Canada also announced its “Indian Health Transfer Policy” proposing to devolve health services to First Nation. See Culhane Speck, D., “The Indian Health Transfer Policy: A Step in the Right Direction, or Revenge of the Revenge of the Hidden Agenda?” (1989) 5:1 Native Studies Review 187; MacIntosh, C., “Envisioning the Future of Aboriginal Health under the Health Transfer Process” (2008) Health Law Journal (Special Edition) 67.

⁸³ The criteria assessed includes: (1) experience in administering programs; (2) sound organization for purposes of program management; (3) processes and procedures in place for program management and financial control; (4) mechanisms in place to support accountability; (5) in a sound financial position or if problems exist, have a plan in place which has been operating effectively over a six month period to remedy the problem; (6) a sufficiently detailed financial plan for the period of the agreement. See IOG Report, *supra* note 76 at 14.

⁸⁴ The grant portions of both CFA and Block Agreements are only for financing the institution of band government and their administration. This is the only amount that is unconditional. See RCAP Report, Volume 2, *Restructuring the Relationship*, at 405.

every essential service on reserve requires ‘comparability’ with provincial and territorial standards, as well as any additional requirements imposed by INAC policies.⁸⁵

Furthermore, both types of agreements impose reporting and accountability requirements on First Nations, as well as provisions permitting INAC’s intervention in a First Nation’s financial administration of its affairs in the case of default under the agreements.⁸⁶ The funding agreements require First Nations to submit numerous reports on spending for different programs, and whether these are monthly, quarterly, or annual depends on the program terms and conditions, as well as the type of funding (CFA or Block Agreements). In addition to these reports, the agreements require First Nations to prepare annual consolidated financial statements and disclose these to community members upon request, in addition to the Band’s conflict of interest policy, annual report of activities, and fiscal plans.⁸⁷

Where a First Nation is found in default, the agreements provide for three escalating levels of intervention, which go from the First Nation having to implement a remedial management plan, to the imposition of a Department-appointed co-manager, who works with the First Nations in managing their financial affairs, or Department-appointed third part-manager in the worst case scenario, who completely takes the First Nations’ financial administration.⁸⁸ A 2013 INAC

⁸⁵ For example, INAC’s First Nation and Tribal Councils National Funding Agreement Model for 2016-2017 incorporates by reference the following policies: (1) the *Band Employee Benefits Program Policy*; (2) the *Band Support Funding Program Policy*; (3) the *Professional and Institutional Development Program Guidelines*; (4) the *Indian Registry Report Manual*; (5) the *Elementary and Secondary Education Program National Program Guidelines*; (6) the *High-Cost Special Education National Program Manual*; (7) the *New Paths for Education National Program Guidelines*; (8) the *Success Program National Program Guidelines*; (9) the *Education Partnerships Program National Program Guidelines*; (10) the *Summer Work Experience Program*; (11) the *Skills Link Program National Program Guidelines*; (12) the *Post-Secondary Student Support Program and University and College Entrance preparation Program National Program Guidelines*; (13) the *Post-Secondary Partnerships Program National Program Guidelines*; (14) the *First Nation and Inuit Cultural Education Centres Program National Program Guidelines*; (15) the *Social Programs – National Manual*; (16) the *Lands and Economic Development Services Program Guidelines*; (17) the *Land Management Manual*; (18) the *Community Opportunity Readiness Program Guidelines*; (19) the *Strategic Partnerships Initiative Program Guidelines*; (20) the *Protocol for AANDC-Funded Infrastructure*; (21) the *Interim Resources Management Assistance (IRMA) Program Guidelines*; and (22) *DIAND Search and Recovery Guidelines*.

⁸⁶ The agreements provide that default can arise (1) where the terms and conditions of the funding arrangement are not met; (2) where the auditor gives an adverse opinion on the financial statement of the First Nation; (3) where the First Nation has a cumulative deficit equivalent to 8% of the total revenues; or (4) where the health, safety or welfare of the First Nation members is being compromised. See IOG Report, *supra* note 76 at 15.

⁸⁷ DIAND/ First Nation Funding Agreement, 2007-2008, clause 4.6 and 4.7.

⁸⁸ IOG Report, *supra* note 76 at 15.

Directive 205 – Default Prevention and Management now also identifies the possibility that INAC can terminate a funding agreement.⁸⁹

This model of devolution has largely remained the same since the late 1980s. INAC has made some changes to the funding mechanisms and agreements since this time, but these can be mainly characterized as tweaks to the existing framework, rather than substantial changes to the nature of these agreements.⁹⁰ In recent years, under Stephen Harper's Conservative government, many of these changes involved a tightening of controls over First Nations.

In 2010-2011, the existing agreements were consolidated into one funding agreement model called the Aboriginal Recipient Funding Agreement ("ARFA"), containing identical general provisions, such as on reporting and disclosure obligations and default provisions, with the selection of either CFA versus Block conditions made pursuant to schedules in the agreement.⁹¹ The ARFA considerably modified what had previously been the most attractive feature of Block Agreements, which was the ability for First Nations thereunder to retain surplus funds from other programs and have the flexibility to use these to enhance existing programs or redesign/establish programs to meet community priorities.⁹² In effect, the ARFA imposed a requirement that, in order to use surplus funds, First Nations would have to obtain the permission of INAC.⁹³ In

⁸⁹ This raises an alarming question about how First Nation community members would receive essential services. The *Directive* states, in such situations, INAC will "take other actions as the Responsible Official deems necessary under the circumstances to minimize impacts on the service population and protect the public's interest", but the exact actions or plan to be followed is not specified.

⁹⁰ The AFA and FTP funding authorities were replaced in 2010-2011 by a new funding mechanism, which continued to allow for funding mechanisms akin to the FTP and AFA, but added an additional "flexible contribution approach" to the menu of funding mechanisms, which allowed funds to be moved within cost categories of a single program during the life of the project/agreement. (See INAC, Implementation Status Update – Report to the Audit and Evaluation Committee", June 27, 2008; see also INAC, "Frequently Asked Questions – Funding Approaches.")

⁹¹ See INAC, "Implementation Status Update", *ibid.* The ARFA was renamed the "National Funding Agreement Model for First Nations and Tribal Councils" in 2013-14. See INAC Presentation, "Oversight of Transfer Payments: AANDC's Risk-Based Approach – FMI Workshop Presentation" June 4, 2013, p. 3.

⁹² DIAND/ First Nation Funding Agreement, 2007-2008, clause 3.1.7, "The Council is entitled to retain any unexpended Block Funding. The Council is responsible for expenditures in excess of the Block Funding transferred under this Agreement."

⁹³ Aboriginal Recipient Funding Agreement (ARFA), 2012-2013, Schedule "DIAND-1A", clause 5.2.1 (b): "Subject to the default provisions of this Agreement, the Council will be released from the obligation to reimburse Unexpended Block Funding to DIAND ... if all of the following conditions have been met: ... (b) the Council submits to DIAND a plan for expenditure of Unexpended Block Funding that is acceptable to DIAND, at any time on or before the day that falls one hundred and twenty (120) days after the expiry or termination of this agreement; (c) DIAND notifies the Council of acceptance of the Council's plan for expenditure of Unexpended Block Funding..."

2013-2014, INAC loosened this requirement to some extent, exempting expenditures “on a program, service or activity that is similar to and has the same purpose” of an existing program under the Block from the requirement to obtain INAC pre-approval.⁹⁴

The ARFA also introduced additional accountability measures from previous agreements, introducing a requirement for First Nations to retain all financial and non-financial records for each program, service or activity funded under the agreement for a period of seven years and the ability for INAC or any other funding federal department to undertake an audit in order to assess First Nations compliance with a given agreement, or review the First Nations’ program management or financial control practices.⁹⁵ It also requires First Nations to prepare a budget for each fiscal year, and to disclose such to community members upon request.⁹⁶

In addition to the above controls, in 2011-2012, the Department, under the Harper government, introduced a further level of oversight to this system requiring each First Nation recipient of such funding agreements to annually undergo a “General Assessment.” These are analysis undertaken by INAC staff, using a “General Assessment (GA) Workbook” for each First Nation recipient (of which there are over 600).⁹⁷ Staff carry out these assessments independently from the First Nations, with the First Nations given 30 days to review and comment on these once they are completed.⁹⁸ From these assessments, the Department then labels each First Nations as either “low”, “medium” or “high” risk. These findings can affect which type of funding agreement a First Nation can be eligible for, and their duration, as well as the recipient’s reporting requirements. First Nations labelled “low risk” may be required to submit fewer reports. Conversely, those labelled “high” or “medium” risk may be subject to more frequent and invasive departmental monitoring and reporting requirements.⁹⁹

⁹⁴ Amending Agreement for Subsequent Years of an ARFA/NARFA for Fiscal Year 2013/2014, Schedule “DIAND-1A” Block Contribution Funding.

⁹⁵ Aboriginal Recipient Funding Agreement (ARFA), 2012-2012, see clauses 4.3 and 8.1.

⁹⁶ *Ibid.* at clause 6.2.

⁹⁷ The General Assessment Workbook scores First Nations’ capacity and accountability in four areas: 1) Governance; 2) Planning; 3) Financial Management; and 4) Program Management. See online: <https://www.aadnc-aandc.gc.ca/eng/1390855955971/1390855996632>.

⁹⁸ February 20, 2015, Letter to Michipicoten First Nation from INAC Ontario Region, online: <http://www.michipicoten.com/wp-content/uploads/2015/03/AANDC-2014-15-Risk-Assessment.pdf>.

⁹⁹ INAC, “General Assessments” online: <https://www.aadnc-aandc.gc.ca/eng/1322761862008/1322762014207>.

In 2013, the Harper Conservative government also passed the *First Nations Financial Transparency Act* requiring all First Nations to annually publish their consolidated financial statements on their websites, failing which INAC could withhold any moneys payable under a First Nation's funding agreement, or impose remedial action up to terminating such agreements.¹⁰⁰ Prior to this, the annual audits submitted by bands under their contribution agreements were generally subject to the *Access to Information Act*, but a band could refuse access to non-band members where the requested audit contained confidential information concerning the band's private commercial transactions, financial holdings or own source revenue.¹⁰¹ Some First Nations objected to the *First Nations Financial Transparency Act's* intrusive requirement to publish information unrelated to the expenditure of public funds on the internet and challenged this in the courts.¹⁰² As of January 2016, Justin Trudeau's Liberal government had ceased enforcing the *Act* and said it would work in partnership with First Nations on a way forward to improve accountability and transparency.¹⁰³

The growth of program devolution to First Nations from INAC (as well as other departments, such as Health Canada) over the past few decades has been significant. For example, in 1971, 16% of INAC's total budget was administered by First Nations. By 1976, this rose to 31%, which increased to 50% by 1983,¹⁰⁴ and 75% by 1992.¹⁰⁵ In 2015, 86% of the Department's budget consists of funding transferred to First Nations (and others).¹⁰⁶

3. Program devolution is not self-government

Although at the point when program devolution began to be formalized in the 1980s, the Mulroney government envisioned devolution as extending all the way to self-government under the 'continuum of devolution', what has existed as devolution since this time is not self-

¹⁰⁰ *First Nations Financial Transparency Act*, SC 2013, c. 7, ss. 7-8, and 13.

¹⁰¹ See *Montana Band of Indians v. Canada (Minister of Indian Affairs and Northern Development)*, [1989] 1 FC 143 (TD).

¹⁰² See *Onion Lake Cree Nation v. Canada*, FC T-2428-14; *Canada (Attorney General) v. Cold Lake First Nations*, 2015 FC 1197.

¹⁰³ CBC, "Carolyn Bennett reinstates funds frozen under First Nations Financial Transparency Act", Dec. 18, 2015.

¹⁰⁴ Penner Report, *supra* note 57 at 20.

¹⁰⁵ INAC, "The Deputy's Notes on Devolution: The Next Step," April 13, 1992 (National Archives).

¹⁰⁶ INAC, Financial Statements for the Year Ended March 31, 2015 (Unaudited), available online: www.aadnc-aandc.gc.ca/eng/1445002892771/1445002960229

government. While there are varying definitions and models of First Nation self-government, its core feature is the existence of real decision-making power resting in the hands of Indigenous peoples.¹⁰⁷ It is difficult to see how First Nation program devolution as it exist in Canada today can be characterized as providing real decision-making powers where the federal government controls program standards and funding, which in turn are based on provincial comparability.

The Penner Report clearly recognized that devolution is not self-government: “control over programs, policies and budgets remain with the Department.”¹⁰⁸ Shewell and Spagnut have observed that, while program devolution is an improvement over the past when social services on reserve were only provided on an *ad hoc* basis, it is “a long way from Indian autonomy and control over their own programmes.”¹⁰⁹ Judith Rae argues that instead of “self-government”, program devolution is better characterized as “self-administration” or “self-management.”¹¹⁰ The Federal Court of Appeal has also characterized program devolution as “self-administration”.¹¹¹

It is not only the fact that First Nations must adhere to provincial comparability standards that makes devolution a far cry from self-government. First Nation contribution funding agreements impose conditions beyond comparability, such as numerous reporting and disclosure requirements. Under funding agreements, INAC can intervene in a band’s management of its finances, to varying degrees up to imposing a third-party manager or even terminate a funding agreement. All of this point to the clear conclusion that it is Canada who is very much in control under program devolution and not First Nations. All of these features make up the current system for program delivery (CSPD) on reserve.

¹⁰⁷ Cornell, *supra* note 3 at 10-14.

¹⁰⁸ Penner Report, *supra* note 57 at 20.

¹⁰⁹ Shewell & Spagnut, *supra* note 16 at 21-22.

¹¹⁰ Rae, p. 7.

¹¹¹ *Canada (Attorney General) v. Simon*, 2012 FCA 312, at para. 5.

4. The persistence of CSPD despite calls for self-government

Here, I detail how CSPD has managed to persist despite calls from First Nations since the withdrawal of the White Paper for recognition of their inherent right to self-government and several attempts to move Canada towards self-government.

First, there was the entrenchment of s 35 in the *Constitution Act, 1982*, only inserted after intense pressure from Aboriginal leaders, which recognizes and affirms the Aboriginal and Treaty rights of the Aboriginal peoples of Canada, but is silent on the right to self-government.¹¹² Even now, after 30 years of jurisprudence interpreting s 35, it remains unclear whether the right to self-government is right protected by s 35. In *R. v. Pamajewon* (1996), the Supreme Court held “without deciding that s 35(1) includes self-government claims” that if self-government was included in s 35, any such rights would have to be proven by the same test used to prove other Aboriginal rights, established in *R. v. Van der Peet* (1996).¹¹³ This test requires proof that the precise subject-matter over which the First Nation legislates is (1) a subject over which the ancestors of the First Nations governed prior to contact with Europeans; and (2) such governance was integral to the distinctive culture of the First Nation. The restriction placed on the right of Aboriginal self-government in *Pamajewon* has been roundly criticized as unduly limiting First Nations’ ability to self-govern.¹¹⁴ The Court has yet to revisit its ruling, although it has had at least two opportunities to do so.¹¹⁵

¹¹² *Constitution Act, 1982*, s 35.

¹¹³ *R. v. Pamajewon*, [1996] 2 SCR 821 at para. 24.

¹¹⁴ See B.W. Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1997), 42 McGill L.J. 1011; Vicaire, P.J., “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context” (2013), 58 McGill L.J. 607 at 656-657; Dalton, J.E., “Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government” (2006), 21 No. 1 Can. J.L. & Soc’y 11 at 19-20; McNeil, K., “The Jurisdiction of Inherent Right Aboriginal Governments”, *supra*, at 13-14; Moodie, D., “Thinking Outside the 20th Century Box: Revisiting *Mitchell* – Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government since *Calder*: Search for Doctrinal Coherence” (2003-2004) 35 Ottawa L.R. 1; Hogg, *Constitutional Law of Canada*, *supra*, Chap. 28, at 26.

¹¹⁵ In 2008, the Court denied leave to hear a case which would have required it to squarely reconsider its decision in *Pamajewon*: see *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al.*, 2008 CanLII 18945 (SCC). In 2011, it denied leave to hear a case that would have allowed it to directly address the right of self-government again: see *Chief Mountain et al. v. Attorney General of Canada, et al.*, 2013 CanLII 53406 (SCC).

Second, there was the 1983 Penner Report, which as noted earlier, was extremely critical of devolution and called on the government to immediately implement self-government both through constitutional amendment and legislation.¹¹⁶ Although Pierre Trudeau's Liberal government was receptive to the Report and introduced legislation incorporating many of its recommendations, the government was replaced by Mulroney's Progressive Conservative before any the bill could reach second reading.¹¹⁷

Third, instead of getting rid of devolution, the Progressive Conservatives reacted to the Penner Report by expanding devolution, seeing self-government as one end of the 'continuum of devolution'. It did so by creating more flexible funding mechanisms in the late 1980s. However, given that these mechanisms were nonetheless in the nature of contribution agreements, they did little to move First Nations beyond self-administration.

Fourth, in 1992, following the total exclusion of Aboriginal people from the constitutional talks on the failed Meech Lake Accord,¹¹⁸ Aboriginal groups' insistence on participating in the negotiations on the Charlottetown Accord would have led to an amendment to s 35 recognizing Aboriginal peoples' "inherent right of self-government within Canada."¹¹⁹ However, the Accord was put to a nation-wide referendum (the self-government provision being one of many proposed amendments) and, unfortunately, failed.

Fifth, in 1992-93, the Progressive Conservative government committed to a "Phase 2" of its previous devolution efforts, promising devolution of most of the remaining departmental functions, including land, revenues and trusts services of the department with a significant downsizing in INAC staff.¹²⁰ However, plans changed course when the Progressive Conservatives were defeated in late 1993 by the Chretien Liberals.

¹¹⁶ Penner Report.

¹¹⁷ Cumming and Ginn, *supra* note 66.

¹¹⁸ Shewell and Spagnut, *supra* at 7-8.

¹¹⁹ This amendment would have specified Aboriginal peoples' jurisdiction "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions," and "to develop, maintain and strengthen their relationship with their lands, waters and environment." See Hogg, P. and Turpel, M.E., "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 Can. Bar Rev. 187 at 189-192.

¹²⁰ INAC, March 27, 1992, letter to Letter to I.D. Clark, Secretary of the Treasury Board (National Archives).

Sixth, in 1995, the federal Liberal government implemented a formal policy recognizing the inherent right of Aboriginal self-government.¹²¹ The policy, which is still in force, outlines 30 areas, divided into categories, in which Canada agrees that Aboriginal governments may exercise jurisdiction. However, it does not allow First Nations to unilaterally implement self-government, but instead mandates implementation only through negotiated agreements.

Seventh, in 1996, the Royal Commission on Aboriginal Peoples ("RCAP") released a five-volume report focusing on the need for a renewed 'nation to nation' relationship. The Report concluded that Aboriginal people possess inherent self-government jurisdiction over core areas including matters vital to the life, welfare, culture and identity of their peoples and local matters, which could be exercised unilaterally by First Nations without negotiation with other governments.¹²² To permit the implementation of these powers, the Report urged Canada to embrace a new fiscal relationship with First Nations that replaced existing financial arrangements with one that supported meaningful and effective self-government based on the principles of self-reliance, equity, efficiency, accountability and harmonization.¹²³ In this way, First Nations would be become a third order of government.¹²⁴

Eight, in 1998, the Chretien Liberals released its response to the RCAP Report entitled, *Gathering Strength – Canada's Aboriginal Action Plan*, which committed, among other things, to strengthening Aboriginal governance and developing a new fiscal relationship between First Nations and Canada.¹²⁵ By this, the government committed to providing Aboriginal communities, "the tools to guide their own destiny and to exercise their inherent right of self-government."¹²⁶ However, Canada remained unwilling to accept unilateral exercise of inherent self-government even over core internal matters and continued to define self-government as

¹²¹ Ottawa, 1995 Federal Policy Guide, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government".

¹²² RCAP, Vol. 2, *supra* note 84 at 159. By contrast, RCAP recommended that jurisdiction over matters on the periphery of these core issue had to be negotiated and agreed to between Aboriginal groups and the federal and provincial governments.

¹²³ *Ibid.* at 267-269.

¹²⁴ *Ibid.* at 270.

¹²⁵ Serson, S., "Reconciliation: for First Nations this must include First Fairness" in Aboriginal Healing Foundation, *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, 2009, 147 at 150-51. ISBN 978-1-897285-72-5

¹²⁶ Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of *Gathering Strength — Canada's Aboriginal Action Plan*, Ottawa, Ontario, Jan. 7, 1998.

“well-defined, negotiated arrangements with rights and responsibilities that can be exercised in a coordinated way.”¹²⁷

In addition to its unwillingness to embrace the RCAP Report’s recommendations on self-government, the government’s attempt to reduce the deficit would also inhibit its ability to realize RCAP’s recommendation for a new fiscal relationship. Around this time, the government undertook a program review of all federal departments to find efficiencies in order to reduce the deficit. All departments were expected to do their part to reduce spending. In the case of INAC, the Department was reluctant to cut any core programs given the rapidly growing First Nations population, so it agreed to a compromise that instead of program cuts, INAC funding increases for 1996-97 would be limited to 3% growth and would be capped at 2% in the following years.¹²⁸ The funding cap was only supposed to remain in place for a couple of years, but instead remained in place for nearly twenty years until March 2016.¹²⁹ A past Deputy Minister of INAC has argued that the 2% was the primary reason why the RCAP Report never got the attention from government that it deserved.¹³⁰

Ninth, the Liberal government’s main initiative to deliver on its *Gathering Strength* commitment to strengthening Aboriginal governance was by proposing national legislation in the early 2000s, Bill C-7, the *First Nations Governance Act*.¹³¹ The bill was explicitly not intended to address the inherent right of self-government, the delivery of programs or services, or a broad review of the *Indian Act*, but “to provide the tools many First Nations leaders have called for to run their communities efficiently and fairly.”¹³² The bill proposed to amend the *Indian Act* to require bands to design and adopt codes for leadership selection, the administration of government and financial management accountability. As well, the bill proposed to reorganize and ‘modernize’

¹²⁷ Serson, *supra* note 125.

¹²⁸ *Ibid.* at 152. See also Assembly of First Nations, “Fiscal Fairness for First Nations” (2006).

¹²⁹ In December 2015, Justin Trudeau’s Liberal government vowed to lift the cap, and in the March 2016 budget, the governments did commit to funding beyond previous capped levels. See CBC, “First Nations welcome lifting of despised 2% funding cap”, December 10, 2015 and APTN News, “Budget 2016: Trudeau Liberals blow 2 per cent cap with ‘unprecedented’ \$8.4 billion investment,” March 22, 2016. However, how the lifting of the cap will immediately affect First Nations has not yet been clarified by the Department.

¹³⁰ Serson, *supra* note 125, at 149

¹³¹ Bill C-7, *First Nations Governance Act*, 2nd sess., 37th Parl., 2002.

¹³² Library of Parliament Legislative Summaries, “Bill C-7: the First Nations Governance Act” (Ottawa: 10 October 2002, revised 18 December 2003).

the by-law powers under the *Indian Act*. Although it received some support, the Assembly of First Nations and scholars were highly critical of the bill, charging that it had been drafted without real consultation and accommodation, it posed a threat and was an infringement to the inherent right of self-government, and it imposed more bureaucratic control over the lives of First Nations people without resolving long-standing social and economic issues, such as urgent needs in matters of health, housing and employment.¹³³ Ultimately, given the resistance, the bill failed to become law.

Tenth, although not explicitly a self-government initiative, the Liberal government, under Paul Martin, in 2004-2005, led a series of roundtables between federal representatives, First Ministers of the Provinces, Territorial leaders and the leaders of the five national Aboriginal organizations, with the objective of closing gaps and raising the standard of living for Aboriginal peoples (partly caused by the 2% federal funding cap) by 2016. This culminated with an accord signed in November 2005, entitled, *First Ministers and National Aboriginal Leaders: Strengthening Relationships and Closing the Gap* (also called the "Kelowna Accord"). The parties sought to achieve better results in the areas of relationships, education, health, housing, and economic opportunities, as well as to increase Aboriginal peoples' capacity to participate in the development of policies, programs and services that affect them. At the time, the Assembly of First Nations noted that the Accord was the start of Aboriginal control over change ranging from policy to the implementation of programs.¹³⁴ The federal government committed \$5.1 billion in spending in this regard over an initial five-year period.¹³⁵ However, the Martin Liberal minority government was defeated in late 2005, and a Conservative minority government came to power in 2006, under Stephen Harper, who did not proceed with the implementation of the Kelowna Accord.

¹³³ *Ibid.* and see also Cassidy, F., "The First Nations Governance Act: A Legacy of Loss" Policy Options – The Public Forum for the Public Good (online), April 1, 2003; and Provat, J., "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous L.J. 177; and McNeil, K., "Challenging Legislative Infringement of the Inherent Aboriginal Right of Self-Government" (2003), 22 Winsor. Y.B. Access to Just. 329.

¹³⁴ Frideres, "A Critical Analysis of the Royal Commission on Aboriginal Peoples Self-Government Model" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008) 123, at 125.

¹³⁵ Parliament of Canada, "Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005", 4 May 2006, PRB 06-04E.

Finally, through the Harper Conservative government's reign, few initiatives were undertaken to further advance Aboriginal self-government through legislative action.¹³⁶ Although comprehensive claim and self-government negotiation tables continued under the Harper government, some First Nations perceived progress under these tables to have virtually slowed to a halt.¹³⁷ (To date, only a dozen of such agreements have been signed since the 1970s.¹³⁸) Further, as noted earlier, under Harper, controls and accountability over First Nations increased (and, consequently, First Nations flexibility and control over their own affairs decreased).

The pattern we see emerge over this period are fits and starts of attempts to advance First Nations self-government and well-being, interrupted with changes in government. Beyond this, especially both with the Mulroney Progressive Conservatives and Chrétien's Liberals, we see significant discomfort in embracing robust conceptions of self-government, seemingly based on concerns that First Nations are not sufficiently 'advanced' enough for this. It is possible similar concerns are also behind the Supreme Court of Canada's very tepid recognition of self-government to date. Meanwhile, through all these failed attempts to make changes, the current system of program delivery (CSPD) on reserve continued unabated.

Part 2 - Key Problems and Harms with CSPD

Some have argued that self-administration, while not self-government, is beneficial for First Nations because it nonetheless provides them with some autonomy, presents opportunities for the development of capacity and increases the relevance of Aboriginal governments in the daily life of communities.¹³⁹ However, I agree with Judith Rae, who argues strongly in her piece, "Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?", that while

¹³⁶ I am only aware of two initiatives that could be seen as giving greater legislative control to First Nations: the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 authorizes First Nations to pass their own matrimonial property laws (ss. 7-11); and *An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement*, SC 2014, c 38 removed the Ministerial disallowance power at s. 82 of the *Indian Act*, *supra*, giving bands greater control over passing by-laws.

¹³⁷ See Globe and Mail, "Yukon first nation worried self-government will collapse without funding", Sept. 19, 2012; APTN, "PM Harper failing to fulfill Mulroney's Oka promise on modern treaties", April 8, 2015.

¹³⁸ See N. Metallic, "Les droits linguistiques des peuples autochtones" in *Les Droits Linguistiques au Canada*, 3^{ième} ed., Éditions Yvon Blais, 2013, p. 935-937.

¹³⁹ Papillon, M., "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance", Chapter 14 in Bakvis, H. and Skogstad, G. (eds), *Canadian federalism: performance, effectiveness, and legitimacy*, 3rd ed., Oxford University Press, 2012, 284-301.

devolution was perhaps well-intended and could have been beneficial as a transitional tool by preparing First Nations for self-government through capacity building, it has been in place too long and has led to a number of problems. Rae identifies these as including (1) poor program quality and cultural mismatch; (2) entrenchment of a dysfunctional governance structure; and (3) building inertia and further obstacles to positive change.¹⁴⁰ She argues that because of other unintended problems, including underfunding and weak progress towards genuine self-government, program devolution is not functioning as a transitional tool to self-government, but only making matters worse. It is a “quagmire” in which a dysfunctional, unjust and ineffective system is entrenched, causing untold damage to First Nations people who rely on the system’s programs and services, and creating its own obstacles to positive change.¹⁴¹

While Rae focused primarily on program devolution, I have chosen to discuss all aspect of the current system of program delivery (CSPD) on reserve, including the comparability standard, devolution, and the particularities of the funding agreements. While Rae attempted to illustrate the problems with devolution by reference to two case studies (one on education and the other on child welfare), my approach will instead be to attempt to exhaustively catalogue the myriad problems and harms the CSPD it is causing First Nations.

1. Living conditions have not improved

As noted in the introduction, the Auditor General of Canada suggested that the CSPD has in fact hindered improvements in living conditions on reserves.¹⁴² While there is little statistical data available beyond 2011, numbers of suggest little marked improvement in the socio-economic conditions of First Nations people living on reserve in Canada. While only making up 7% of the population, Aboriginal children make up 48% of children in foster and permanent care. Secondary school completion rate for First Nations students on reserve is only 49%. The number of First Nations adults that live in overcrowded homes is 23.4%. Nearly 32.2% of household water is unsafe to drink and 34% communities still get water by truck, from wells, or collected from rivers, lakes or water plants. 37.3% of First Nation households require major repairs. In

¹⁴⁰ Rae, *supra* note 3 at 22-23.

¹⁴¹ *Ibid.* 3.

¹⁴² 2011 Auditor General Report, *supra* note 5 at 5.

2006, the unemployment rate for First Nations people living on reserve was 25%, approximately three times the rate for non-Aboriginal-Canadians. Suicide rates among First Nation youth are five to seven times higher than other young non-Aboriginal Canadians.¹⁴³

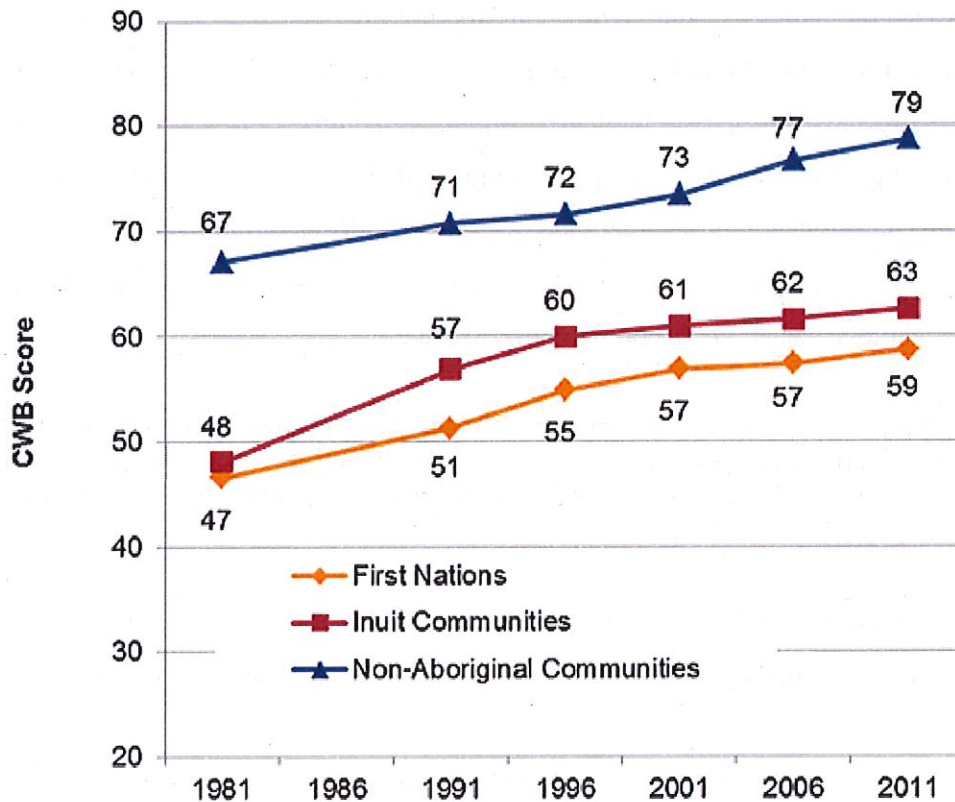
Community well-being index scores, tracked by the Department and based on the 2011 National Household Survey indicate that, while national averages have been increasing across all types of communities; the gap between First Nations and non-Aboriginal communities has been persistent over the past 30 years remaining 20 points apart.¹⁴⁴ Below, I reproduce the Department's graph charting the index since 1981. The gap between First Nations and Inuit communities is also noteworthy. Although, First Nations and Inuit were virtually at the same index score in 1981, Inuit have advanced several points beyond First Nations in the last 30 years. The gap may be attributable to the fact that, unlike First Nations, Inuit have not been under CSPD. All but one Inuit group in Canada have concluded land claim agreements with Canada that include self-government provisions¹⁴⁵ and these have led to improvements in Inuit well-being.¹⁴⁶

¹⁴³ See Statistics Canada, Living arrangements of Aboriginal children aged 14 and under, April 13, 2016; Assembly of First Nations, Fact Sheet – Quality of Life of First Nations, July 2011; and Assembly of First Nations, Fact Sheet – Quality of Life of First Nations, July 2011.

¹⁴⁴ INAC, "Ministerial Transition Book: November 2015." The community well-being index is described a composite index comparing results for education, employment, income and housing among non-Aboriginal communities, on-reserve First Nations and Inuit communities. Scores are out of 100.

¹⁴⁵ INAC, "Inuit" (online: <https://www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191#sc4>).

¹⁴⁶ See Papillon, M., "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance", *infra* note 170.



2. Problems with comparability standard

a) *Premised on assimilation*

As the history in Part 1 reveals, Canada's primary program and funding standard on reserve, namely provincial comparability, is rooted in the goal of assimilation. While Canada's underlying justification for assimilation changed after the Second World War—going from seeing Indigenous peoples as groups whose cultures needed be eradicated to Indigenous peoples seen as being held back by their special legal status as “Indians”—the goal always remained the same: First Nations' absorption into mainstream society.

As seen in Part 1, throughout the 1950s and into the 1960s, the federal Joint Committee emphasized the integration of Indians into mainstream society. Having the provinces and territories assume greater and greater responsibility over Indians was key in this regard, although

the federal government came up short on persuading all but one of the provinces to do so. The 1964 Treasury Board authority authorizing the funding of services on reserve based on provincial comparability was the federal government's indirect manner of achieving what it had failed to do directly via s 88 or Part II of the *Canada Assistance Plan*—get the provinces' to assume responsibility for Indians.¹⁴⁷ Thus, although with its withdrawal of the White Paper, Canada officially declared an end to assimilation policy in 1971, as observed by Shewell and Spagnut, the policy of assimilation nonetheless continues to run through Canada's program delivery to First Nations based on the comparability standard:

Although the federal government dropped the legislative proposals of the White Paper the program objectives remained in place. ... What could not be accomplished through legislation could still be done through the relentless expansion of federal and quasi-provincial programmes.¹⁴⁸

In other words, the backbone of the CSPD—the comparability standard—perpetuates the policies of assimilation and colonialism that have been with Canada since at least Confederation.

b) Leaves First Nations out of policy development

Under the comparability standard, First Nations are in effect subject to a government twice-removed. Although the federal government has all the control, it abdicates a significant part of this control to provincial policy. Provincial policy, in effect, determines rates, eligibility criteria, services standards, etc., on reserve. However, the provinces have have no *direct* contact with First Nations vis-à-vis legislative or policy reform because “Indians and lands reserved for Indians” are not the provinces' legislative or fiscal responsibility according to the *Constitution Act, 1867* and all provinces (except Ontario in regards to welfare) have refused to assume such responsibility despite Canada's urgings.

¹⁴⁷ Shewell and Spagnut, *supra* note 16 at 3 and 44-46.

¹⁴⁸ *Ibid.* at p. 6. See also Papillon, M., “Playing Catch-up with Ghosts: Income Assistance for First Nations on Reserve” in Beland, D., and Daigneault, P.-M., *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective*, University of Toronto Press, 2014. In the context of Canada's Indian health policy see Culhane Speck, *supra* note 82 at 192.

When First Nations raise concerns to the Department about program policy on reserve, they are told by INAC that it has no control over provincial policy and the First Nations are encouraged by the Department to participate in provincial public engagement sessions if they have concerns. For example, a presentation to Atlantic First Nations on income assistance on reserve included the following slide:

As comparability to provincial rate structures forms the legal basis of INAC's authority to fund income assistance, these rates cannot be negotiated with INAC. Provinces retain the authority to set their own rate structures for income support programs.

Each of the four Atlantic provinces has a public engagement policy in place. As provinces entertain changes to their income assistance rates structures and/or program criteria, there will be opportunities for public engagement and comment.¹⁴⁹

This 'passing the buck' to the provinces, so to speak, to deal First Nations policy concerns, is unreasonable and completely unresponsive to the needs of First Nations. The provinces have no legal obligation to First Nations in the circumstances. As noted by Shewell and Spagnut, in the context of social assistance on reserve:

[T]he fact that the federal government chooses to deliver Social Assistance according to provincial regulations is only of incidental interest to the provinces. Because First Nations are not direct recipients of provincial Social Assistance, whatever they might think of provincial programmes is of little concern to the provinces.¹⁵⁰

This situation leaves First Nations without any real means of effectuating changes in essential services policy. Except in the case of child welfare legislation,¹⁵¹ provincial laws do not *directly* apply to First Nations, and there is no legal basis for provincial officials to see First Nations on reserve as interested stakeholders in provincial essential services policy.

¹⁴⁹ INAC, "INAC Social Program Manual – Presentation to Atlantic Policy Congress of First Nations Chiefs", May 19, 2011, at slide 9.

¹⁵⁰ Shewell & Spagnut, *supra* note 16 at 43.

¹⁵¹ Even in the case of child welfare laws that do apply on reserve, there have been issues with provincial governments engaging First Nations on reserve in reform: see Thompson, R., "N.S. child protection changes too rushed and overreaching", *Chronicle Herald Op. Ed.*, December 8, 2015.

Furthermore, provincial legislatures are largely not representative of First Nations people (most First Nations people on-reserve do not even vote, let alone run, in provincial elections¹⁵²); elected provincial officials are more often than not completely unaware of what life is like on First Nation reserves; and the issues facing First Nations peoples are unlikely to be top-of-mind when provincial legislatures debate social policy and laws, *especially* when provinces have no legal responsibility for funding essential services on reserve.

Finally, even if First Nations were able to convince the provinces to consider First Nations' particular policy concerns with provincial legislation out of the sheer goodness of their hearts, the constitutional doctrine that prevents provincial laws from 'singling out' Indians, that is, creating special rules for Indians (whether for ameliorative or adverse purposes), likely limits the extent to which provinces can accommodate First Nations interests.¹⁵³

c) Not culturally appropriate

Provincial essential services laws tend to be informed by Euro-Canadian concepts such as capitalism, liberalism, individualism and other Western values. Such concepts are very different from the primary concepts that traditionally informed Indigenous communities' worldview and legal traditions and which survive today despite colonialism, such as kinship ties, interrelatedness and reciprocity, to name a few. It should not be surprising, therefore, to discover that imposing services on First Nations based on concepts from a foreign value system may not

¹⁵² See Jacobs, L.A., "Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization" (2009), prepared for Elections Canada; Ladner, K.L. and McCrossan, M., "The Electoral Participation of Aboriginal People," (2007), prepared for Working Paper Series on Electoral Participation and Outreach Practices.

¹⁵³ See *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Leighton v. British Columbia*, [1989] 4 WWR 654; and *Delgamuukv v. British Columbia*, [1997] 2 SCR 1010, at para. 179. The 'singling out' doctrine was somewhat attenuated, however, by the Court in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31, where it held that "[t]he mere mention of the word '[A]boriginal' in a statutory provision does not render it *ultra vires* the province." (at para. 66). Post *Kitkatla*, it would still appear that provincial legislation giving special treatment *specifically* to Aboriginal people would be *ultra vires*. But see J. Leclair, "The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters" (2003), 21 Sup. Ct. L.R. (2d) 73. See also K. McNeil, "Culturally Modified Trees, Indian Reserves and the Crown's Fiduciary Obligations" (2003), 12 Sup. Ct. L.R. (2d) 105 at 111, and see also *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 at para. 41, where Abella J. seemingly endorsed specific accommodation of First Nations interests in provincial child welfare legislation, though the case was about labour jurisdiction and the 'singling out' doctrine was not raised.

work or 'fit' very well. Shewell & Spagnut forcefully make this point specifically with regarding the imposition of provincial welfare standards on First Nations:

...the idea that Indian poverty can be relieved and solutions found through Euro-Canadian welfare state measures was, and is, a profoundly ethnocentrically misguided assumption [references omitted]. Historically, like any independent and economically self-sufficient peoples, First Nations had their own ways of coping with times of scarcity and hardship. ... The main impact of the Euro-Canadian Social Assistance programme has been its individualization of poverty and the undermining of collective and traditional patterns of helping, sharing and co-operation centred on interconnected kinship systems...¹⁵⁴

In a similar vein, the Assembly of First Nations has criticized the imposition of provincial social assistance rules as perpetuating a colonial form of dependency and keeping First Nations in poverty.¹⁵⁵

Patrick Johnson details how, with respect to child rearing, First Nations have a distinct and unique value system manifested in customs and traditions that have been passed down from generation to generation, and these approaches to child rearing may still prevail in First Nations communities.¹⁵⁶ He names many, but among these include a pacifistic approach to socializing and disciplining children, often seen negatively by Europeans as "permissive" parenting,¹⁵⁷ and having a broader concept of 'family' that includes grandparents, aunts, uncles, cousins, etc., and all play a role in raising children.¹⁵⁸ Johnson argues that differences in values between First Nations and Europeans contributes to the problems in First Nations child-welfare:

A system of child welfare is based on certain beliefs held by members of the dominant culture. Those beliefs evolve into normative standards of child rearing and define which practices should be considered good or bad, proper or improper. A problem arises if one set of standards is applied to a group with a different set of norms. Several observers

¹⁵⁴ Shewell & Spagnut, *supra* at note 16 at 41-42. The authors further point out how the underlying principle of the Euro-Canadian welfare system—access to the job market—is largely impractical in the context of First Nations, since many First Nations live in remote areas with little to no access to the job market.

¹⁵⁵ Quoted in Papillon, *supra*, at 8. See also INAC, Departmental Audit and Evaluation Branch, "Evaluation of the Alternative Funding Arrangement (AFA) and Flexible Transfer Payment (FTP) Funding Authorities", December 2005, at 25-26, where First Nations surveyed commented that social assistance proliferated dependency rather than providing a positive funding source for training or other programs to improve economic and social circumstances of the communities.

¹⁵⁶ Johnson, *supra* note 33 at 71.

¹⁵⁷ *Ibid.* at 68.

¹⁵⁸ *Ibid.* at 69.

have suggested that this is precisely what has happened to Native people, not only in Canada but in other countries as well, as they come into contact with child welfare services. A different approach to child rearing may have resulted in Native people receiving inappropriate and, perhaps, even discriminatory treatment by the child welfare system.¹⁵⁹

In a similar vein, Dr. Cindy Blackstock has argued that, in addition from underfunding of the services, the imposition of provincial child welfare laws on reserve is also inappropriate and harmful:

In an effort to stem the tide of removals, First Nations mobilized and began establishing their own child welfare agencies in the 1970s. ... [However] these agencies must wear the straightjacket of provincial legislation and federal government funding regimes that are often not culturally appropriate and are rarely grounded in research evidence relevant to First Nations. It would be reasonable for provincial and federal governments to impose child welfare policy and practice on First Nations child welfare agencies if they could muster evidence of the efficacy of their solutions, but in the vast majority of circumstances they have not. This wholesale imposition of provincial and federal child welfare systems creates an untenable situation that stifles innovation in a system that desperately needs it.¹⁶⁰

Other have argued that the First Nations poverty paired with Euro-Canadian norms on child rearing results in First Nations children being disproportionately apprehended on the grounds of ‘neglect’.¹⁶¹

Given its ties to assimilation and the comments about how provincial standards are not helping to improve conditions and seems to be causing harm in some cases, the obvious conclusion is that the comparability standards is not cultural appropriate for First Nations people. In this regard, many First Nation witnesses before the Penner Committee in the early 1980s asserted that First Nations control over key service areas was essential their cultural survival.¹⁶² Since this time, many scholars have argued that implementing self-government would lead to practical improvements in program delivery and improve well-being of First Nations generally, including

¹⁵⁹ *Ibid.* at 71.

¹⁶⁰ Blackstock, C., “The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice must lose, *Children and Youth Services Review* (2010), doi: 10.1016/j.childyouth.2010.09.001 (citations omitted) [emphasis added].

¹⁶¹ See Sinha, V., Ellenbogen, S. & Trocmé, N., “Substantiating Neglect of First Nations and non-Aboriginal Children” (2013) *Children & Youth Service Review*, 35(12), pp. 2080-2090.

¹⁶² Penner Report, *supra* note 57 at 35.

in the areas of education,¹⁶³ health services,¹⁶⁴ child welfare,¹⁶⁵ social assistance/social development, among others.¹⁶⁶ In this regard, John Hylton argues:

The conclusion of the analysis is inescapable—existing social programs that have been imposed on Aboriginal people by the governments of the dominant society have failed Aboriginal people and the Canadians who have supported them. Programs designed and run by Aboriginal people for Aboriginal people, on the other hand, have generally proved to be more effective and no more costly. This is one more reason Canadian public policy ought to support the movement towards Aboriginal self-government.¹⁶⁷

To build on Hylton's point, there is a growing body of evidence that clearly establishes that when First Nations can design their own programs and services, they achieve improvements in their quality of life. For example, owing to a successfully negotiated a sectoral self-government agreement, since 1999, Mi'kmaq people in Nova Scotia exercise legislative and administrative control over primary and secondary education on reserves in the province.¹⁶⁸ This has resulted in high school graduation rates of First Nations students on reserve in Nova Scotia being double (and in some cases triple) the graduation rates of First Nations students in schools on reserves in the rest of the country.¹⁶⁹ Martin Papillon also raises statistics showing that of Indigenous groups in modern land claim agreements fare better in terms of well-being in terms of income level, employment, housing and education than First Nations who remain in the current system of program delivery on reserve.¹⁷⁰

¹⁶³ Restoule, J.-P., "Aboriginal Education and Self-Government – Accessing Success and Identifying the Challenges to Restoring Aboriginal Jurisdiction for Education" in *Aboriginal Self-Government in Canada – Current Trends and Issues*, 2nd ed. (Saskatoon: Purich Publishing Ltd, 1999), 373-392.

¹⁶⁴ Lavoie, J., O'Neil, J., Reading, J., Allard, Y., "Community Healing and Aboriginal Self-Government" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008) 173-205.

¹⁶⁵ Durst, D., "The Wellness of Aboriginal Children: Seeking Solutions Through Self-Government" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008), 187-204.

¹⁶⁶ Hylton, J.H., "The Case for Self-Government : A Social Policy Perspective" in *Aboriginal Self-Government in Canada – Current Trends and Issues*, 2nd ed. (Saskatoon: Purich Publishing Ltd, 1999) 78-91; see also Shewell & Spagnut, *supra* note 16 at 42 and 48.

¹⁶⁷ Hylton, *ibid.* at 78.

¹⁶⁸ See *Mi'kmaq Education Act*, SNS 1998, c 17 and *Mi'kmaq Education Act*, SC 1998, c 24.

¹⁶⁹ See *Education Canada Magazine* "In Nova Scotia, a Mi'kmaq Model for First Nation Education" (date unknown) (online).

¹⁷⁰ M. Papillon, "Aboriginal Quality of Life under a Modern Treaty" IRPP Choices, Vol. 14, no. 9, August 2008, ISSN 0711-0677, p. 12. However, he also raises that inadequate funding of some land claims had resulted in those Indigenous groups only being in marginally better situations than other Indigenous groups at 14.

3. Problems with contribution agreements

a) No say and no choice

Whether CFA or Block Agreements, First Nations largely have no say in the content of these agreements. These are standard form agreements (also called adhesion contracts) prepared by INAC and, as seen above, the Department may add tweaks at whim (or even more substantial changes as seen in the case of the ARFA agreements). INAC sends new agreements to First Nation bands by correspondence for review and signing. While these are sent in advance of the expiration of existing funding agreements, as by found by an internal evaluation, INAC often provides renewal documents too close to the signing deadline to permit for meaningful discussion between the Department and First Nations (or to permit time for the First Nations government to discuss the contents with community members).¹⁷¹ Hence, there is no real negotiation, as observed by 2008 report undertaken by the Institute on Governance:

There is no real negotiation of funding arrangements with First Nations and Tribal Councils. They are drawn up and delivered for approval by Chief and Council or the Tribal Council with very little discussion. First Nations and Tribal Councils perceive it as a "take it or leave it" proposition. Budgeting, allocations and formulae are not well understood and budgets may be cut without warning. For most recipients, there is little discussion of their plans or outcomes; little guidance on best practices; and little opportunity to network and share experiences with others in the same region or across the country.¹⁷²

As noted by the report, the choice available to First Nations is really one of either 'take it or leave it'.¹⁷³ However, the vast majority of First Nations who lack sufficient (or any) own sources resources to sustain their communities, in effect, have no choice since these agreements control the flow of funds to support basic, essential services programs that the community cannot do without. As stated by one First Nation in a news article on concerns about signing its 2013-2014 CFA Agreement, "Now signing off mean we don't get any dollars for our community for I

¹⁷¹ 2005 Evaluation Report, *supra* note 78 at 18.

¹⁷² IOG Report, *supra* note 76 at 31.

¹⁷³ Rae, *supra* note 3 at 10.

don't know how long. At the present time ... we don't have any economic opportunities as some other First Nations communities do; we're pretty isolated.”¹⁷⁴ The fact that these agreements are standard form (adhesion contracts), signed with no real negotiation and in the context of a power imbalance between First Nations and Canada has been recognized in the courts:

[T]he AFN [Attawapiskat First Nation] relies on funding from the government through the CFA to provide essential services to its members and as a result, the CFA is essentially an adhesion contract imposed on the AFN as a condition of receiving funding despite the fact that the AFN consents to the CFA. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the CFA confirms the public nature and adhesion quality of the CFA.¹⁷⁵

b) No real flexibility

As noted above, Block Agreements were introduced in the late 1980s as more flexible funding agreements for Bands, with the intent of promoting greater First Nations control and to build capacity towards self-government. In essence, these agreements allowed First Nations, after minimum program requirements were met, to use any surplus funds left over for program enhancement or even designing supplementary programs. However, an INAC evaluation of Block Agreements in 2005 found that inadequate funding of agreements resulted in few surpluses being available for program enhancement.¹⁷⁶ It was further found that, because First Nations under Block Agreement bear the risk of paying for any deficits, and the main draw—surplus flexibility—is illusory due to inadequate funding, First Nations are generally not opting into Block Agreements.¹⁷⁷ Thus, these instruments have done little to assist First Nations in moving toward self-government even though they were designed with this explicit purpose.

Further, as noted above, in the last decade under the Harper government, there was a significant shift away from permitting flexible use of surplus funds when INAC introduced a requirement

¹⁷⁴ Chief Casey Ratt of Barriere Lake Nation in Quebec in Windspeaker, “‘A gun to our heads’ Pressure to sign new funding agreement more widespread than first thought”, by Ball, D.P. (2013) 13:1. See also, Regina Leader-Post, “Peepeekisis Cree Nation members gather on highway to protest federal funding agreement,” March 24, 2016.

¹⁷⁵ *Attawapiskat First Nation v. Canada*, 2012 FC 948, at para. 59.

¹⁷⁶ See 2005 Evaluation Report, *supra* note 78 at 15, 17 and 28.

¹⁷⁷ The number of bands and tribal councils in Block Agreements represents a minority of First Nations versus those in CFAs (about 19% vs. 70% in 2008), and the numbers have been declining since 1996: see 2005 Evaluation Report, *ibid.* at 11 and IOG Report, *supra* note 76 at 1 and 24.

for pre-approval of any plans for use of surplus in 2011-12. Similarly, although older versions of Block Agreements specifically permitted First Nations to develop their own written policies for program delivery (so long as minimum program standards were adhered to),¹⁷⁸ INAC under the Harper government went so far as to deny in court the fact that First Nations ever had the ability to do so.¹⁷⁹ As well, although Block Agreements were originally designed to lessen monitoring and reporting requirements on bands, they now impose just as many reporting requirements as CFA Agreements.¹⁸⁰ Thus, any flexibility that could be once said to exist in Block Agreements is now long gone.

c) Too many reports and controls

As noted in Part 1, First Nations are subject to significant reporting requirements under their funding agreements (and these are now largely the same between CFA and Block Agreements¹⁸¹). To this was added the requirement for each band to annually be subject to a ‘General Assessment’ in 2011-12, whereby INAC staff independently assess whether a First Nation is either “low”, “medium” or “high” risk. These findings can affect which type of funding agreement a First Nation can be eligible for, and their duration, as well as applicable reporting requirements.¹⁸² In addition, in 2011-12, a clause permitting Department staff to undertake discretionary audits for program compliance was added to the funding agreement template.¹⁸³

Evaluations carried out on behalf of the Department have repeatedly concluded that the reporting requirements on First Nations under their funding agreements are excessive and onerous.¹⁸⁴ To give a sense of the numbers of reports a First Nation must file with INAC, a 2002 Auditor General’s report found that the average First Nation was required to complete 168 reports

¹⁷⁸ See 2007-08 Block Funding Agreement, clause 4.4.2.

¹⁷⁹ See *Simon v. Canada (Attorney General)*, 2013 FC 1117, at para. 16.

¹⁸⁰ See 2005 Evaluation Report, *supra* note 78 at 14; see IOG Report, *supra* note 76 at 3.

¹⁸¹ 2005 Evaluation Report, *ibid.* at 19-21.

¹⁸² INAC, “General Assessments” online: <https://www.aadnc-aandc.gc.ca/eng/1322761862008/1322762014207>.

¹⁸³ Aboriginal Recipient Funding Agreement (ARFA), 2012-2012, see clauses 4.3 and 8.1.

¹⁸⁴ 2005 Evaluation, *supra* note 78 at 19; IOG Report, *supra* note 76 at 43.

annually just to keep funding for basic services flowing to their community.¹⁸⁵ Since this time, Canada has made efforts to decrease reporting requirements.¹⁸⁶ For the year 2016-17, the number of reports is down to 37, though about 30% of these must be filed quarterly or monthly.¹⁸⁷ Although an improvement over 2002, this is still not an insignificant number of reports. In the recent words of the Department, although there were some reductions in reporting requirements, “Risk-based compliance work, program reviews, internal monitoring and audits of program and policy implementation will continue to be the standards operating procedure for [INAC].”¹⁸⁸ It bears emphasizing here that if reports are not received on time, this triggers a possible default under the funding agreements and intervention by INAC up to or including withholding funds or cancelling an agreement.

One of the problems identified with excessive reporting requirements has been strain on the capacity of First Nations.¹⁸⁹ In this regard, a 2008 evaluation report has noted that some First Nations have many of their staff dedicated to full time to accounting and reporting for INAC's funding rather than to the delivery of services to community members.¹⁹⁰ A 2011 report by the Auditor General of Canada echoed similar concerns and concluded that INAC attempts to reduce reporting had been unsatisfactory.¹⁹¹ It has been further noted that the Department is constantly changing coding and the format of forms to be filled out by the bands, and First Nation staff having to constantly learn new approaches, which adds more complexity, confusion and time spent on filing reports.¹⁹² A further frustration that has been noted is the occurrence of INAC staff losing or misplacing reports and funding being halted because of INAC's error.¹⁹³

Evaluations of INAC's reporting requirements have also found that, although there is a proliferation of reporting, the data obtained by INAC is not being used to help build sustainable

¹⁸⁵ Office of the Auditor General, 2002 December Report of the Auditor General of Canada, Chapter 1 – Streamlining First Nations Reporting to Federal Organizations, at 8.

¹⁸⁶ INAC, “Oversight of Transfer Payments: AANDC's Risk-Based Approach – FMI Workshop Presentation”, June 4, 2013, at 4.

¹⁸⁷ *Ibid.* and INAC, “The Reporting Guide” online: http://www.aadnc-aandc.gc.ca/eng/1385559716700/1385559777677?utm_source=ReportingGuide&utm_medium=url.

¹⁸⁸ INAC, “Modernizing Grants and Contributions”, Jan. 11, 2013.

¹⁸⁹ RCAP, Vol. 2, *supra* note 84 at 408.

¹⁹⁰ IOG Report, *supra* note 76 at 42.

¹⁹¹ 2011 Auditor General Report, *supra* note 5 at 4.

¹⁹² Penner Report, *supra* note 57 at 91.

¹⁹³ IOG Report, *supra* note 43.

capacity within First Nations¹⁹⁴ or to improve outcomes in First Nations communities.¹⁹⁵ This is corroborated by an independent study in 2013 examining the extent to which INAC considers community-participation and cultural sensitivity in evaluating its on-reserve programs.¹⁹⁶ It found that INAC evaluations rarely focus on the program's beneficiaries, and the recommendations were not focused on long-term goals. Instead, INAC was primarily preoccupied with providing accounts to the federal governments on dollars spent.¹⁹⁷ The Institute on Governance has suggested that poor and irrelevant data analysis is depriving Parliament of information that could be used to improve the circumstances of First Nation: "It is difficult for Parliament to get a complete picture of what is being achieved, where there has been progress, what the gaps are, and what measures are being taken to reduce the gaps."¹⁹⁸ First Nations themselves have also questioned the value of all of their reporting to INAC, as they do not receive any feedback on their reports and they are not being used to increase funding.¹⁹⁹

In light of the above, one is left to question what value all this reporting serves, especially when it appears (based on results now coming out of INAC's 'General Assessments') that INAC characterizes over 75% of First Nations as being 'low risk'.²⁰⁰

d) Lack of timely funding

A consistent problem raised with the funding agreements, in addition to reporting issues, is the late receipt of funds by First Nations from INAC. First, there can be significant delays in concluding agreements that result in delays in payment and jeopardizing First Nations' ability to implement agreed upon projects or programs.²⁰¹ Second, often funds from the Department are

¹⁹⁴ *Ibid.* at 2.

¹⁹⁵ 2005 Evaluation Report, *supra* note 78 at 21-22; IOG Report, *ibid.* at 2 and 33.

¹⁹⁶ Jacob, S., and Desautels, G., "Evaluation of Aboriginal Programs: What Place is Given to Participation and Cultural Sensitivity?", April 2013, Vol. 4:2, The International Indigenous Policy Journal, Article 1.

¹⁹⁷ *Ibid.* at 16.

¹⁹⁸ IOG Report, *supra* note 76 at 37.

¹⁹⁹ *Ibid.* at 43.

²⁰⁰ The percentage of First Nations scoring low risk on the Governance Section of the General Assessment 76% for 2013-2014 and 77% for 2014-2015 (the results on other sections were not published); see AANDC 2013-2014 Performance Report, p. 26 and AANDC 2014-15 Performance Report, p. 22.

²⁰¹ IOG Report, *supra* note 76 at 2. This was also raised as a problem in the 1983 Penner Report.

late and do not arrive by the beginning of the fiscal year. As a result, First Nations can incur large debt financing charges because funding is not provided on time.²⁰²

e) Not appropriate

A number of reports have been highly critical of using funding agreements largely in the nature of contribution agreements to fund First Nations governments. The 1983 Penner Report argued that in order for First Nation governments to effectively govern the affairs of their people, their funding relationships with the federal government needs to be on the same level as transfer agreements between the federal government and provincial governments, that is, unconditional.²⁰³ The Penner Report further observed that contribution agreements misplace accountability as between First Nations and the Department,, instead of focusing on accountability as between First Nations and their members.²⁰⁴ More recent reports have also raised this problem.²⁰⁵

As noted earlier, the 1996 RCAP Report urged Canada to embrace a new fiscal relationship with First Nations that replaced existing financial arrangements with ones that support meaningful and effective self-government based on the principles of self-reliance, equity, efficiency, accountability and harmonization.²⁰⁶ More recently, in 2006, an Independent Blue Ribbon Panel tasked with evaluating Canada's grants and contribution program, found that the use of contribution arrangements with First Nations to be "fraught with problems and leads to a costly and unnecessary reporting burden on recipients."²⁰⁷ The Panel suggested that fiscal arrangements with First Nations should be treated more like intergovernmental transfer rather than typical contributions arrangements.²⁰⁸

²⁰² 2005 Evaluation Report, *supra* note 78 at 24.

²⁰³ Penner Report, *supra* note 57 at 89.

²⁰⁴ *Ibid.*, at 94.

²⁰⁵ 2005 Evaluation Report, *supra* note 78 at 19.

²⁰⁶ *Ibid.* at 267-269.

²⁰⁷ Blue Ribbon Panel Report, *supra* note 70 at 8.

²⁰⁸ *Ibid.*

The 2008 evaluation undertaken by the Institute on Governance concluded that contribution agreements were not appropriate vehicles for funding First Nations. The Institute's conclusions were as follows:

Despite the centrality of funding arrangements to the Department and their importance in terms of INAC's relationship with First Nations, Tribal Councils and other Indian-administered organizations, we conclude that they are not appropriate. There is a lack of clarity about the overall objectives of the funding arrangements, a lack of coherence among programs and funding authorities that make up the arrangements, and no clear leadership at INAC Headquarters. There is limited engagement of the recipients. The movement of First Nations, Tribal Councils and other Indian-administered recipients towards increasingly responsive, flexible, innovative and self-sustained policies, programs or services is not being promoted.²⁰⁹

The Auditor General of Canada, in a scathing 2011 report, stated, "We see several problems with the use of this funding mechanism [contribution agreements] for the provision of core government services," and going on to echo the same concerns raised by the Institute of Governance above.²¹⁰ Others have charged that Canada's approach to funding First Nations is "paternalism hidden in the form of rhetoric about increased accountability" and is hindering First Nation's advancement towards self-government.²¹¹

Despite several reports raising alarm bells over a thirty year period, the Department seems unwilling to consider real change. In 2011, the Department did commission a report to consider alternative funding models that provide more flexibility. However, with obvious paternalistic undertones, the report dismissed out-of-hand the suggestion that agreements akin to intergovernmental agreements could be appropriate:

[P]rovincial governments differ in some notable ways from Aboriginal governments. Generally speaking, provincial governments:

- Serve large populations, so benefit from economies of scale
- Are responsible for delivering essentially a common set of public services
- Serve residents with needs that are quite similar
- Have access to well-qualified staff

²⁰⁹ IOG Report, *supra* note 76 at 2.

²¹⁰ 2011 Auditor General Report, *supra* note 5 at 3.

²¹¹ January 4, 2016, Globe & Mail, "Forcing reports to Ottawa undermines First Nations accountability", by Salterio, S. and Evans, R.

- Have many years of experience in managing program delivery and time-tested good-governance, assurance and accountability mechanisms in place
- Raise most of their revenue from their own sources, rather than depending on federal transfers.

Therefore, when the federal government transfers funds to provinces with few strings attached, it can be reasonably confident that the money will be applied efficiently and in the public interest. If it isn't, there is good reason to believe that the public will hold their provincial representatives primarily responsible through the provincial institutions (e.g., Provincial Parliaments) and assurance bodies (e.g., Provincial Auditors General).

Arrangements that resemble federal-provincial transfers may work for a very few innovative First Nations. But, according to Gusen, three main problems would persist in most cases:

- The system would not respond well to inter-community differences in need.
- The accountability mechanism would not reflect the fact that almost all First Nations' funding comes via the transfer and that they consequently have almost none of their residents' own money to account for.
- The inadequate capacity to manage the full range of province-like programs.²¹²

As will be seen further below, problems in capacity within First Nations is largely a product of inadequate federal funding; thus, it is a problem of INAC's creation, which as seen above, then relies on dismiss calls for reform! That is not acceptable, nor as seen below, does it appear justified. Finally, the above report was also dismissive of the suggestion that non-conditional grants would be appropriate for the majority of First Nations:

AANDC will favour the use of grants whenever appropriate and desirable, taking into account the differences that exist in the risk profiles, capacities and other circumstances characterizing [First Nations]. "Appropriate" and "desirable" refer to those [First Nations] whose risk profiles, capacities and other circumstances established through such instrumentalities as the General Assessment or certifications by agreed-upon third parties recommend and warrant the use of grants. It may be realistic to expect that only 10-15% of the over 600 [First Nations] currently funded through contributions may qualify, at least in the first "wave".²¹³

It should be pointed out that the assumption in this report that only 10-15% of First Nations would have a low risk profile grossly underestimates what would later be the findings of recent

²¹² INAC - Audit and Evaluation Sector, "Special Study: Evolving Funding Arrangements with First Nations – Final Report", November 2011, prepared by Donna Cona Inc., at 39. The author was unable to find the referenced 'Gusen Report' online, including on the INAC website.

²¹³ *Ibid.* at 6.

'General Assessment' evaluations undertaken by INAC. Such evaluations have found that over 75% of First Nations are 'low risk'. Basically, the whole tenor of the report is that First Nations are not able to control their own financial affairs except under close supervision and control by the Department. It smacks of paternalism.

4. No legislative framework

a) Violation of the rule of law: too much discretion

It is important to appreciate that both the comparability standard and program devolution exist outside of any legislative framework. The system runs only on Treasury Board authorities, INAC policies and funding agreements. No legislation or regulation specifically authorizes INAC to provide these services in this way. The only law that can be linked to Canada's provision of services on reserve is the very general authorization given to the Department under its enabling legislation, the *Department of Indian Affairs and Northern Development Act*, to act in relation to "Indian Affairs".²¹⁴ Beyond that, there are financial acts, such as the annual federal *Appropriation Act* and the *Financial Administration Act*, but these merely authorize Departmental spending and have nothing to do with the substance of programs on reserve.²¹⁵

Canada's approach to providing essential services on reserve is in stark contrast from other governments (namely the provinces and territories) who provide essential services to their citizens. In every province and territory you will find legislation governing essential services, from social assistance, child welfare, child care, and the provisions of health and education services, to policing and emergency services.²¹⁶ Such legislation, and regulations promulgated thereunder, set out definitions of key program terms, the purposes of the legislation, eligibility criteria for services, rates, factors that a government officials must consider when exercising

²¹⁴ *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6, ss. 2(1) and 4. Canada's legislative jurisdiction of "Indians and lands reserved for Indians" stems from s. 91(24) of the *Constitution Act*, 1982.

²¹⁵ *Financial Administration Act*, RSC 1985, c F-11. All federal spending must be authorized by a law passed by Parliament, and these are the instruments, as opposed to specific legislation, that Canada uses to transfer money under funding agreements.

²¹⁶ See *Administrative Law*, *supra* note 17 at 3-4 and 8.

discretion under the legislation, and dispute resolution mechanism (e.g., right of appeal, etc.), among other things.²¹⁷

Canada's approach to essential services on reserve violates the rule of law. In particular, I mean the rule of law understood as the "principle of legality". This principle expressing the notion that, within a legal system, published laws should exist in order to bind both ordinary citizens and government alike. Having published laws serves to (1) protect against arbitrary exercises of power by the government, and (2) inform citizens of the standards governing themselves and others. This was the concept of the rule of law affirmed by the Supreme Court of Canada in *Re Manitoba Language Rights* at paras. 59-60:

The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. ...

Second, 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. Law and order are indispensable elements of civilized life. ...²¹⁸

The problem with Canada's violation of the rule of law here is more than an academic one. When there is no law, what exists in its place is discretion.²¹⁹ Where a government official possesses too much discretion, this can create opportunities for abuse of power. Such abuse of power can take the form of arbitrary decision-making by a government official.²²⁰ As well, perhaps less sinister but just as problematic, too much discretion creates opportunities for significant variances in interpretation of key program terms and requirements by different

²¹⁷ On the inadequacies of this approach in the context of First Nation education on reserve, see Mendelson, M., "A Second Look at the *First Nations Control of Education Act*", Caledon Institute of Social Policy, August 2014, at 3-4.

²¹⁸ *Re Manitoba Language Rights* [1985] 1 SCR 721 at paras. 59-60 [emphasis added].

²¹⁹ See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 6th ed. (1902) at 184. For Dicey, the primary purpose served by the rule of law is to limit the exercise of arbitrary power by government. The basic notion is that laws serve to limit arbitrary actions by officials by constraining the exercise of discretion.

²²⁰ A.V. Dicey wrote that "wherever there is discretion there is room for arbitrariness" (*ibid.*), but in the modern welfare, government officials will necessarily need to exercise some discretion, even if operating under legislation or regulation (see M. Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in *Administrative Law in Context*, 2nd ed. (Edmond Montgomery Publications, 2013, at 42). But there are degrees of discretion. On the one hand there is relatively 'weak' discretion, where an official has discretion to make a decision it still has to be exercised within factors set out in legislation. On the other hand, there can be 'strong' discretion, where an official can act unbounded by any rules (see R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), at p. 32-33). 'Strong' discretion is what exist in the case of Canada's provision of services on reserve and presents too much opportunity for arbitrary power.

government staff, leading to inconsistent positions, confusion and uncertainty, which can all impact the quality and level of services received by the end user, in the present case First Nations individuals, families, children and communities.

I would argue that the current system of service provision on reserve, given that it exists absent any legislative framework, operates entirely on the basis of government officials' discretion and creates conditions ripe for (1) multiple inconsistent interpretations and approaches to key program requirements causing confusion and uncertainty; and (2) abuse and arbitrary decision-making. I provide some examples below.

(1) Conflicting interpretations of 'comparability'

The fact that the Department's 'comparability' standard is not defined in legislation has resulted in a number of problems (some discussed here and further in the next section regarding systemic underfunding of programs). In regards to being the main service standard for the delivery of social assistance, recall that the 1964 Treasury Board called for adoption of "adopt provincial or local municipal standards", but a contemporaneous directive issued by the Department in 1964 called for flexibility in creating policy manuals based on provincial standards.²²¹ However, the Department has interpreted its standard differently, and sometimes inconsistently, over the years.

First, it would appear that different regional offices of the Department have taken different approaches to updating their policy manuals to conform with changes in provincial social assistance rules. A directive from the Director of the Social Development Directorate at INAC headquarters provides that regions are to automatically adopt changes in provincial programs.²²² This appears to have been followed in the province of Alberta.²²³ However, this does not appear to have been followed in at least both the Atlantic and British Columbia regions, where manuals produced in the early 1990s have not been updated by regional officials for over two decades.²²⁴

²²¹ Circular 107, *supra* note 47.

²²² INAC, "Social Program – Design and Control" authored by Gobeil, O., Director of Social Development Directorate, January 14, 1982 (National Archives).

²²³ 2005 Evaluation Report, *supra* note 78 at 15, 20.

²²⁴ *Simon v. Canada*, *supra* note 78 at para. 13-14; and see 24hrsVancouver entitled, "B.C. First Nations lose social funding", May 20, 2015, online. The Auditor General of Canada, in a 1994 report, had identified the Department's

To be fair, what was happening in the Atlantic Region during part of this period, starting in 1999, was a joint partnership between the Atlantic First Nations and the Department to develop a First Nations-designed, culturally-based, social assistance manual for Bands in the region.²²⁵ The Department invested \$15 million in this project.²²⁶ A draft of the final manual was submitted to the Department in 2007, but by that time, the government had changed from the Liberals to the Harper Conservative government. The First Nations did not hear anything further regarding their draft manual until 2011 when they were advised that it was rejected due to the fact that its content went “beyond program guidelines” (although Department staff had previously encouraged and supported the First Nations in the creation of the manual).²²⁷

In the summer of 2011, the Atlantic First Nations were advised by Regional officials that the existing 1994 regional manuals needed to be updated to be ‘compliant’ with program authorities and, in this regard, the manuals would now have to mirror the rates and eligibility criteria of the provinces.²²⁸ The Atlantic First Nations objected to this, claiming that the Department had not consulted them on these changes and the changes would have severe impacts on the communities, given that the Department now appeared to be taking a very narrow interpretation of provincial services as not including services previously allowed under the earlier 1994 manuals, such as shelter and utilities subsidies. Although INAC staff, in internal documents, recognized the changes would have adverse impacts including “lowering of amounts received by income assistance recipients in many cases”,²²⁹ “reducing shelter and fuel subsidies”, attracting a “legal challenge or human rights complaint”, causing “threats and harassment of staff in the field” and causing an “increased demand on Child and Family services, and other social

inability to remain fully knowledgeable and up-to-date on provincial standards and provide training as a key challenge with the ‘comparability’ system. See *1994 Report of the Auditor General of Canada to the House of Commons*, Vol. 14, Chap. 23, “Indian and Northern Affairs Canada – Social Assistance” (“1994 Auditor General Report”) at 14.

²²⁵ Political Accord between Her Majesty The Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development and the Mi’kmaq and Maliseet First Nations Chiefs”, March 27, 1999. This was based on commitments made by the then-Liberal government under *Gathering Strength*.

²²⁶ See INAC, “SUFA Accountability Template 2000”, at 2.

²²⁷ INAC, APC Manual Issues, 2011.

²²⁸ *Simon v. Canada*, *supra* note 178 at para. 20.

²²⁹ INAC, “Risk Assessment on implementation of revised Income Assistance program manual”, June 21, 2011. Note that under the previous manuals, individuals only received \$82 per week.

program” in the communities,²³⁰ the Department nonetheless maintained that these changes were inevitable in order to be “in compliance” with its program authorities, namely the 1964 Treasury Board authority.²³¹ What all of this demonstrates is that the Department’s interpretation of ‘comparability’ changed drastically as between the earlier Liberal government and the Harper Conservative government.

In what did eventually become a legal battle, entitled *Simon v. Canada*, the First Nations argued that the Department’s position on being ‘compliant with funding authorities’ was arbitrary and unreasonable because it was inconsistent with previous interpretations of ‘comparability’ under earlier governments, as well inconsistent with attempts by previous governments to foster greater control over programs on reserve.²³² Under the previous Liberal government, INAC’s interpretation of ‘comparability’ had been flexible and permitted some variance from provincial rules in order to meet the particular needs and circumstances of First Nations, especially for those First Nations in Block Funding Agreements.²³³ The First Nations were initially successful in their court challenge, the Federal Court finding that the INAC had deviated from its earlier interpretation ‘comparability’ and, in making the decision to change its interpretation, owed a duty to the First Nations to meaningfully consult with them and study the impacts of those changes in order to prevent harmful or unnecessary impacts. On appeal, however, the Federal Court of Appeal ultimately accepted the interpretation advanced by the Harper government that Canada’s funding authorities requiring mirroring of provincial rules with no flexibility and the government owed no administrative law duties to the First Nations in returning to this

²³⁰ *Ibid.*

²³¹ Evidence in the case suggested, however, the Region, with orders from Headquarters, were motivated by the substantial costs savings that would arise from the changes, and using them to invest in ‘active measures’ (employment creation initiatives).

²³² *Simon v. Canada*, *supra* note 178. In the interest of full-disclosure, I was legal counsel for the First Nation in the case.

²³³ See INAC, “Multi-Year Funding Agreements – Joint Briefing note for Operations Committee”, September 10, 1999, which held that INAC’s authorities would require First Nations, “at a minimum to deliver an [Social Assistance] program with the same general rate as the province, however, a First Nation would be able to offer subsidies or active measures programming, in addition to the general rate, that would be reflective of community needs.” See also INAC, “A Discussion Paper on Comparability” (2000), a p. 5, which stressed the need for flexibility and stated, “comparability does not mean that programs, services or funding must be identical in all cases.” See also INAC, “Income Assistance Program – National Manual”, *supra* note 23 at 17 which cited the standard as “reasonably comparable” to the province.

interpretation.²³⁴ The result is problematic, especially given that it simply ignores the fact that the Harper changes (even according to INAC staff) would have significant adverse impacts on many extremely vulnerable and marginalized First Nations' welfare recipients. The decision is really unresponsive to the reality of programing on reserve. It ignores the fact that most government policies are capable of having more than one meaning, and also suggests that the Department has no responsibility to consider how changes in interpretation might impact First Nations' well-being. The decision, in effect, endorses a very strict, assimilative interpretation of 'comparability', whereas the earlier interpretations given to comparability by previous governments (both Progressive Conservatives and Liberals) attempted, to some extent, to carve out some space for community-based rules. It also illustrates how much discretion the Department has and the relative ease with which it can make dramatic changes to programs on reserve. Had the 'comparability' standard been defined in legislation and the Department wanted it changed, at the very least, the government's changes would have been subject to some scrutiny through the legislative process.

As a matter of contrast (and further illustrating that INAC takes inconsistent positions on comparability) in the *Caring Society* case, INAC had argued that—when it comes to funding—comparability does not require the Department to mirror or provide similar *service* levels to the provinces, but is only required to maintain comparable *funding* levels to the provinces.²³⁵ INAC took a similar position with regards to providing assisted living services to a severely disable teenager on the Pictou Landing First Nation.²³⁶

(2) Retaliation for speaking out or raising concerns

As noted earlier, both CFA and Block Agreements are standard form agreements and not negotiated agreements. First Nations are presented with the choice of either to 'take it or leave it' when it comes to signing these agreements. However, given that these agreements flow the funds for core community programs, like social assistance, housing, assisted living, and

²³⁴ *Canada (Attorney General) v. Simon*, 2015 FCA 18, leave to appeal den'd: Chief Jesse John Simon, et al. v. Attorney General of Canada, 2015 CanLII 67635 (SCC).

²³⁵ *Ibid.* at para. 338.

²³⁶ *Pictou Landing Band Council v. Canada*, 2013 FC 342, where Canada unsuccessfully argued that it was not required to provide the same level of services as the provinces.

education, there is no real choice. Against this backdrop, changes made by the Department to the 2013-2014 funding agreement model (at this point the ARFA), were particularly contentious, with many First Nations from across the country raising different concerns with respect to new language added to their agreements.²³⁷ Around this time, many communities were concerned about how amendments to the federal *Fisheries Act* and the federal environmental protection act, buried in omnibus legislation, would affect their Aboriginal and Treaty rights and protested that these changes were made without proper consultation. They believed new language added to their funding agreements would be used against them to argue that they accepted such amendments (there is precedent for Canada taking this position – discussed further below). Despite the protests, INAC was unwilling to make changes to the ARFA model. Although many communities opposed the new language, most felt they had no choice but to sign. Five Saskatchewan First Nations refused to sign and were consequently placed into third party management, meaning the Department did flow the money for program delivery into the community, but overtook control of the Bands' financial management.²³⁸ Another First Nation, God's Lake First Nation, submitted their funding agreement with a cover letter stating they were signing under duress. The Band was told by the Department that it would have to retract its letter or risk having its funding discontinued.²³⁹

Similarly, in the Atlantic region at the same time, Mi'kmaq and Wolastoqewiyik First Nations were also concerned about language in their agreements that would seem to run contrary to a court injunction they had successfully obtained to prevent cuts to social assistance (related to the *Simon* case discussed above).²⁴⁰ Concerned that the Canada would argue that they 'agreed' to the cuts by signing funding agreements, many submitted their signed funding agreements with a

²³⁷ Windspeaker, "'A gun to our heads' Pressure to sign new funding agreement more widespread than first thought", by Ball, D.P. (2013) 13:1; Indian Country, "First Nations Claim Coercion as Harper Makes Aid Contingent on Legislation Support", April 6, 2013; NewTalk650, "First Nation rejects federal funding agreement"

²³⁸ CBC, "First Saskatchewan First Nations reject funding agreements – Chiefs say new federal rules ask for too much control," March 21, 2014. One of these Bands, Thunderchild First Nation, challenged INAC's actions in court and the results of that will be discussed in the section on 'Little to no access to justice'.

²³⁹ Winnipeg Free Press, "Agreement with feds signed 'under duress': First Nation", April 24, 2013.

²⁴⁰ Wabanaki Press, "Harper Government Pressures Poorest Community to Sign Agreement Despite Court Injunction", March 15, 2013; CBC, "Esgenoopetitj First Nation in 'lose-lose' over federal funding," March 19, 2013; CBC, "Membertou refusing to renew federal funding agreement", March 25, 2013, iPolitics, "Fiscal 'blackmail' in Canada's poorest quarter, March 17, 2013.

letter stating they were signed under duress.²⁴¹ Like in the case of the God's Lake First Nation mentioned above, the Department advised those First Nations that their agreements would not be accepted, and their funding not released, if submitted with duress letters.²⁴² These are all examples of abuses of power; First Nations have the right to raise legitimate concerns about their funding agreements without having the withdrawal of funding being leveraged to silence them. The examples also show the significant power imbalance that exists between First Nations and the Department.

Another example of abuse of power is the case of retaliation against the Attawapiskat First Nation. The case involved the decision of the Minister of INAC to put Attawapiskat in third party management²⁴³ after the Band declared a state of emergency regarding the state of housing and infrastructure on reserve. The First Nation alleged the decision was not based on financial reasons, but was retaliatory since the First Nation's Chief had stated in the media that the housing crisis was as a result of inadequate federal funding for housing and that the Harper government was attempting to blame the First Nation for the crisis in order to deflect the allegations regarding funding. The Federal Court of Canada found the Department's decision to place Attawapiskat in third party management to be unreasonable since there was no evidence supporting financial mismanagement by the Band to justify the imposition of third party management.²⁴⁴

b) Little to no access to justice

Although some First Nations have been able to successfully challenge the Department's abuse of discretion in the courts, as in the *Attawapiskat* case above, this is the exception and not the rule. There are likely many instances of abuse of power that go unchallenged. First Nations are among the poorest and most marginalized people in Canada. Historic neglect and mistreatment at the hands of government can create conditions where First Nations feel powerless to challenge

²⁴¹ Globe and Mail, "Distrust of Harper government grow over First Nation funding rules", April 1, 2013.

²⁴² Although no news stories were specifically published on this, I have several emails from representatives of Mi'kmaq and Wolastoqewiyik First Nations from this time period confirming this.

²⁴³ This means that a third party (normally an accountant) would manage the Band's finance and administration of federal funds, instead of Band doing so itself. This is an extreme remedy the federal government imposes on First Nations when there significant problems with the Band's financial management.

²⁴⁴ *Attawapiskat First Nation v. Canada*, *supra* note 174.

government decisions.²⁴⁵ The current system is so entrenched, it is likely that many First Nations take the abuses of powers, inconsistencies and incompetency by the Department for granted and do not realize how dysfunctional the system really is.

Many First Nations also lack the financial resources to proceed with legal action. Judicial review can easily cost in the tens of thousands of dollars, if not more, and Canada tends to vigorously defend such actions and this can serve to increase legal costs significantly. If legal fees can be used as an illustration, in 2012-2013 fiscal year, the Department had the highest litigation expenses (\$104 Million) of any federal departments (almost doubling the budget of the second-place department, the Canada Revenue Agency (\$66 Million)).²⁴⁶ It has also been reported that Canada spent over \$5.3 million in legal fees on the *Caring Society* decision alone.²⁴⁷

Some First Nations have been dissuaded from seeking redress due to concerns that, by proceeding with litigation, they may experience retaliation from government, such as the government pulling out of self-government or other negotiations, or otherwise being subject to adverse treatment such as in the case of *Attawapiskat*.²⁴⁸ Dr. Cindy Blackstock, the primary complainant in the *Caring Society* decision, in addition to being subject to government surveillance,²⁴⁹ was also found to have been subjected to retaliation by the Department.²⁵⁰

Aside from the serious access to justice issues that are always present for First Nations, the lack of a legislative framework with respect to core programming on reserve adds several additional barriers to First Nations achieving resolution of concerns regarding the current system of program delivery (CSPD) on reserve. To begin with, there are limited avenues for redress. The template model for funding agreements has always included dispute resolution provisions. The

²⁴⁵ See Alfred, T., "Colonialism and State Dependency", prepared for the National Aboriginal Health Organization Project, *Communities in Crisis*.

²⁴⁶ Law Times article, "Feds pouring big money into aboriginal litigation", November 11, 2013.

²⁴⁷ CBC, "Canada discriminates against children on reserves, tribunal rules", January 26, 2016.

²⁴⁸ *Attawapiskat First Nation v. Canada*, *supra* note 174.

²⁴⁹ Amnesty International Canada, Press Release, "Invasive surveillance of human rights defender Cindy Blackstock", May 29, 2013.

²⁵⁰ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14.

current provision, however, *does not* allow First Nation to invoke dispute resolution to challenge either (1) budget decisions made in accordance with program terms and conditions; (2) amount of funding provided by Canada under the agreement; (3) audits or evaluations permitted under the agreement; (4) default or remedial decisions; or (5) matters of policy.²⁵¹ The breadth of these exceptions essentially hollow out the alternative dispute resolution option and leave it meaningless.²⁵²

The only options, then, are the courts as well as human rights tribunals. And here again there are many problems. Certainly, the *Caring Society* decision is proof that human rights challenges against Canada relating to the CSPD is a viable option for redress, but this is the first decision of its kind and it resulted from nine-year battle, where Canada aggressively defended the claim, seeking to block the complaint at almost every turn.²⁵³ But for the perseverance of Dr. Cindy Blackstock and Assembly of First Nation, and the legal team that assisted them on a pro-bono basis, things may not have gone as they had. It should also be noted that the *Canadian Human Rights Act* contained a provision preventing complaints arising from the *Indian Act* until 2008,²⁵⁴ which, although not completely the case, was perceived by many First Nations to mean they were banned from bringing *any* complaints under the *Act*.²⁵⁵ Since the repeal, there have been more complaints filed by First Nations, including those similar to the *Caring Society* case alleging systemic underfunding in program delivery, including in education and policing, which have yet to be heard on their merits.²⁵⁶ However, the *Act* has its limitations. In one case, a Band was prevented from proceeding with a complaint alleging systemic underfunding by INAC

²⁵¹ INAC, Aboriginal Recipient Funding Agreement (ARFA), *supra* note 92, clause 12.3.1.

²⁵² First Nations for the IOG Report, *supra* note 76 at 38, specifically raised their desire to have an independent and enforceable dispute resolution mechanism between First Nations and the federal government regarding funding agreements.

²⁵³ See *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4; and *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, *aff'd* 2013 FCA 75.

²⁵⁴ *An Act to amend the Canadian Human Rights Act*, SC 2008, c. 30.

²⁵⁵ Canadian Human Rights Commission, "A Matter of Rights - Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act" (October 2005), p. 4.

²⁵⁶ See *Mississaugas of the New Credit First Nation v. Attorney General of Canada*, 2013 CHRT 32 and *Grand Chief Stan Louttit et al. v. AGC*, 2013 CHRT 27.

between large and small bands because it was unable to link this adverse treatment to a listed ground of discrimination in the *Act*.²⁵⁷

Turning to redress through the courts, the types of legal challenges that can be made are also limited. Attempts to address disputes between Canada and First Nations in this area based on arguments on s. 35 of the *Constitution Act, 1982*, s. 15 of the *Charter*, or claims based in Canada's fiduciary duty, have all been unsuccessful to date.²⁵⁸ Arguments based on administrative law arguments, namely breach of procedural fairness and substantive unreasonableness have met with greater success,²⁵⁹ but there are problems here as well. First, administrative law remedies can sometimes be ineffective in addressing the true scope of the dispute between a First Nation and the Department. For example, in a case involving the Thunderchild First Nation (one of the five Manitoba bands placed into third-party management for refusing to sign their annual funding agreements due to significant concerns relating to changes in language, as well as systemic underfunding), the Federal Court dismissed the First Nations challenge.²⁶⁰ The Court found that INAC's intervention policy permitted it to place bands in third party management where they refused to sign and there was a limited duty to consult about the decision to place the band in third party management. Thus, the Federal Court's decision was unable to address the broader justice issues the First Nations was concerned about, namely unilateral and arbitrary action by the Department in changing its funding agreements and chronic underfunding.

²⁵⁷ In *Mohawks of the Bay of Quinte v. Canada (Attorney General)*, 2014 FC 527, the applicants, representing four of the five largest First Nation in Ontario, alleged that the funding formula for core programs and services used by INAC discriminated against them by differentiating adversely based on band size. The claimants provided evidence that they received less funding per capita than small bands. However, the Commission rejected the complaint on the basis that Band size was not a listed prohibited ground of discrimination, despite the Applicants' attempts to link band size to the ground of ethnic origin. The dismissal was upheld by the Federal Court.

²⁵⁸ *Mousseau v. Canada (Attorney General)* (1993), 126 NSR (2d) 33 (NSCA) (decision regarding housing services on reserve); *Nolan v. Canada (Attorney General)* (1998), 155 DLR (4th) 728 (changes to employment programming for off-reserve Aboriginal groups); *Ochapowace Indian Band No. 71 v. Canada*, (1999) 167 Sask. R. 167 (auditing of Bands in Comprehensive Funding Agreements); *Day Star First Nation v. Canada (Attorney General)*, 2003 SKQB 261 (changes to post-secondary funding for First Nations); *Micmac First Nation v. Canada (INAC)*, 2007 FC 1036 aff'd 2009 FCA 377 (decision to stop education funding to landless Band).

²⁵⁹ *Pikangikum First Nation v. Canada (INAC)*, 2002 FCT 1246 (decision to place Band in co-management); *Attawapiskat First Nation v. Minister of Aboriginal Affairs and Northern Development*, *supra* note 174 (decision to place band in third party management); *Simon v. Canada*, *supra* note 178 (decision to cut social assistance).

²⁶⁰ *Thunderchild First Nation v. Canada (Indian Affairs and Northern Development)*, 2015 FC 200.

Further, there have been cases where the courts have suggested that administrative law remedies were not available due to the fact that INAC's activities did not arise out of legislative enactments.²⁶¹ In these and other cases, government lawyers strenuously argue that because INAC's activities arise from the exercise of discretion and relate to policy, they are either immune from judicial review, or INAC is entitled to a significant amount of deference.²⁶² Both types of arguments have been discredited in more recent case law,²⁶³ and should not be given any heed as they permit Canada to benefit from a state of affairs it has created by refusing to legislate.

In addition to immunity and deference to discretion, government lawyers advance other arguments related to the peculiar nature of service delivery on reserve in attempts to block legitimate claims. For example, in one case (as alluded to above), Canada argued that the fine print in First Nations' funding agreements meant that the First Nations had 'agreed' to the particular decision the bands were challenging in court (cuts to welfare) and therefore, their claim was moot.²⁶⁴ In another case, Crown lawyers advanced the argument that the funding agreements between First Nations and Canada meant that the relationship between them was purely contractual in nature and therefore precluded public / administrative law challenges.²⁶⁵ Both arguments were ultimately unsuccessful, but there is always the risk that a future court, with a judge unfamiliar with these issues, could easily accept such arguments.

Finally, these are extremely difficult cases to bring before the courts because of their sheer complexity. There is no statute to easily point to in order to establish what the applicable rules

²⁶¹ See *Lac Seul First Nation v. Canada (Minister of Indian Affairs & Northern Development)*, 2004 FC 1183 at para. 13 (changes to child welfare prevention services on reserve); and in *Simon v. Canada*, *supra* note 178, the applications judge suggested that without a specific statutory provision, review was not possible (see para. 30).

²⁶² The arguments were advanced in *Simon v. Canada*, *ibid.*

²⁶³ Since *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada has embraced a broad and purposive approach to administrative law. *Baker* jettisoned older approaches that limit review to exercises of statutory power in favour of a broader scope of review including discretionary decisions. See *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, at para. 33; *Doré v. Barreau du Québec*, 2012 SCC 12, at para. 28; and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 14.

²⁶⁴ See *Simon v. Canada (Attorney General)*, 2012 FC 387, at paras. 50-60.

²⁶⁵ See *Attawapiskat First Nation v. Canada*, *supra* note 174 at paras. 50-62 and see *Canada (Attorney General) v. Simon*, 2012 FCA 312 at paras. 28-31. In the latter case, the Federal Court of Appeal specifically noted the lack of any legislative framework as the *raison d'être* of the funding agreements, and therefore this could not preclude public law remedies (at para. 30).

are. Instead, there can be an overwhelming and confusing paper trail of dense, unclear and inconsistent funding authorities, policies, funding agreements, departmental reports and other departmental correspondence that form the record of decision. The record is prepared by the Department. It can be difficult for even a well-meaning judge to make any clear sense from this morass. Some judges are also very uncomfortable in wading into cases about government decisions over program benefits and socio-economic rights, and would prefer to leave such issues to the politicians. There is also a tendency of some judges I have observed, perhaps unintentionally, to place reliance on the Department and their counsel and to trust the narrative of events they present, even when there is documentary evidence to the contrary (buried somewhere in multi-volume books of the evidence containing the record). This puts First Nations at a significant disadvantage because they have no control over the evidence that is put forward. In this regard, there have been recent instances of relevant documents the Department should have produced coming to light near the end of, or even after a case.²⁶⁶

All in all, the odds are stacked against First Nations when they attempt to pursue remedies within the justice system challenging inequities and injustices within the current system for program delivery (CSPD) on reserve.

c) Little Accountability or Oversight by Parliament

Apart from calls to legislate over self-government, discussed in Part 1, there have also been calls for Canada to legislate over CSPD on reserve. The Auditor General of Canada, as early as 1994, suggested that the Department should have clear and substantive legislative authority for

²⁶⁶ See *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada*, 2013 CHRT 16, where, through an ATIP request, Cindy Blackstock found additional documents not disclosed by Canada in the human rights complaint, after which the Department further advised that it would seek to adduce an additional 50,000 additional documents. In the *Simon v. Canada*, *supra* note 178, a researcher conducting independent research for the Assembly of Nova Scotia Mi'kmaq Chiefs uncovered Circular 107 at the National Archives (*supra* note 47), which had never been disclosed in the case and is relevant to the long-standing interpretation by Canada of its 1964 Treasury Board authority and other similar funding authorities. See Mi'kmaq Rights Initiative, Press Release, "Document shows that the First Nations' Social Case would have had a different outcome", December 1, 2015, and CBC, "Mi'kmaq welfare fight with federal government given new life", Dec. 02, 2015. I am not necessarily suggesting that all such documents were intentionally withheld, as there is no direct proof of this. It is just as likely that given the morass of documentation, the Department staff themselves lost track of relevant documents, which is equally concerning.

carrying out major program activities on reserve, such as social assistance.²⁶⁷ The Auditor General would again reiterate the need for legislation over essential services again in reports in 2006, 2011 and 2013, respectively.²⁶⁸ The Assembly of First Nations has also called on the government to provide “a legislative funding base to provide First Nation Governments with a predictable and secure foundation upon which to make strategic decisions.”²⁶⁹

Despite these calls, Canada has done little to address these recommendations.²⁷⁰ Not having legislation has allowed Canada to minimize its responsibility towards First Nations. For years, the government has maintained that its provision of services on reserve is strictly a voluntary exercise of the federal spending power done as a matter of good public policy, and that it has no obligation to provide services pursuant its constitutional jurisdiction over Indians.²⁷¹ In court, the Department has tried to maintain that is only a “funder” and the provision of essential services on reserve is really a provincial responsibility.²⁷² As noted above, the provinces have largely eschewed responsibility for extending their services on reserve and, although the federal government chooses to adopt provincial rates and standards, there is no legal basis for the provinces (except with respect to child welfare legislation), to see Bands as a interested stakeholder or to consult them. In the circumstances, there is very little accountability by anyone to First Nations governments or communities. It has been noted in several reports and commentaries that this system also largely ignores accountability between First Nations governments and its community members.²⁷³ The Institute of Governance, in 2008, also noted

²⁶⁷ 1994 Auditor General Report, *supra* note 223.

²⁶⁸ Auditor General of Canada, *2006 Report of the Auditor General of Canada*, Chapter 5, “Management of Programs for First Nations”, at 2-3 and 9; Auditor General of Canada, *2013 Status Report of the Auditor General of Canada*, Chap. 6, “Emergency Management on Reserves” at 5-6.

²⁶⁹ 2011 Auditor General Report, *supra* note 5 at 5.

²⁷⁰ Assembly of First Nations, *Transforming the Relationship – Sustainable Fiscal Transfers for First Nations*, Pre-Budget Submissions, 2010, August 13, 2010.

²⁷¹ The only essential service area Canada has attempted to legislate with regard to is education during the term of the Harper government. The government *First Nations Education Act* was extremely contentious, drawing criticism that it gave too much control to the federal government. On this, see Mendelson, *supra* note 216.

²⁷² Shewell & Spagnut, *supra* note 16 at 15; INAC, *Income Assistance Program National Manual* (2005), *supra* note 23 at 15; Culhane Speck, *supra* note 82 at 190-191; MacIntosh, C., “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in *Frontiers of Fairness* (Toronto: University of Toronto Press, 2005), 6-7.

²⁷³ Canada has taken this position in both the *Caring Society*, *supra* note 1 and *Simon*, *supra* note 178, decisions.

²⁷⁴ Salterio & Evans, *supra* note 210; Rae, *supra* note 3 at 24; Imai, S., “The Structure of the Indian Act: Accountability in Governance”, Research Report No. 35/2012 for Comparability Research in Law & Political Economy; see also Culhane Speck, *supra* note 82 at 205-206.

that there was nothing within the Department by way of accountability standards of INAC staff towards First Nations.²⁷⁴

The formal lines of accountability created by the CSPD is that Bands are accountable to the Department for the spending of program dollars and the Department, in turn, is responsible to Parliament to account for its spending. It was noted earlier that the Department does poorly at obtaining data on outcomes and consequently its reports to Parliament do not show where the gaps are and where progress can be made.²⁷⁵ Among the dangers identified by the Auditor General in 1994 of Canada not legislating over programs on reserve, was an undermining of Parliament's control and accountability.²⁷⁶ This is borne out by the observation about the quality of reports going to Parliament from the Department; if Parliament is not getting regular reports on outcomes (but only data on dollars spent), it cannot engage in a well-informed policy debate about the programs it provides on reserve, what is the appropriate role for the Department and whether it is meeting this role, and what long-term outcomes Canada wants to achieve in terms of the well-being of First Nations. When this does not occur, debate on First Nation policy is likely to be mostly reactive, responding to crises as they arise.²⁷⁷

5. Severe funding issues

a) A knowingly narrow approach to comparability

The issue here is a continuation of the problem identified above regarding no legislated definition of the meaning of the 'comparability' standard; it is open to interpretation by the Department and, when it comes to funding, it has not been interpreted in a generous way. Although INAC says it provides funding for comparable services, indeed, several reports suggest otherwise.

²⁷⁴ IOG Report, *supra* note 76 at 3 and 38.

²⁷⁵ *Ibid.* at 37.

²⁷⁶ 1994 Auditor General Report, *supra* note 223 at 14-15.

²⁷⁷ This is currently playing out (April 13, 2016), in response to a rash of suicide attempts in the Attawapiskat First Nation: see CBC, "Attawapiskat suicide crisis: MPs hold emergency debate over suicide attempts," April 13, 2016.

Numerous Auditor General of Canada reports have found that the Department in fact does not know—and *does not track*—whether it is funding a comparable level of services compared to the provinces. A 1994 report on Social Assistance noted, “it is difficult for the Department to ensure that eligible Indians living on reserve are receiving social assistance services comparable with other recipients in the general population of the same province.”²⁷⁸ A 2004 report on Education noted, “At present, the Department does not know whether the funding provided to First Nations is sufficient to meet the education standards it has set...”²⁷⁹ A 2008 report on Child Welfare states, “We found that INAC has not analyzed and compared the child welfare services available on reserve with those in neighbouring communities off-reserve.”²⁸⁰ A 2013 report on Emergency Management on Reserves notes, “the Department does not know if First Nations communities on reserve are receiving emergency services comparable to those available elsewhere in Canada.”²⁸¹ Finally, a 2014 report found that policing services on reserve are not equal in quality and level of service to policing services found in off-reserve communities.²⁸² In a general 2011 report on “Programs on First Nations Reserves”, the Auditor General observed that:

It is not always evident whether the federal government is committed to providing services on reserves of the same range and quality as those provided to other communities across Canada. In some cases, the Department’s documents refer to services that are reasonably comparable to those of the provinces. But comparability is often poorly defined and may not include, for instance, the level and range of services to be provided.²⁸³

A 2005 evaluation found that base funding levels for many programs had not been amended or reviewed for several years.²⁸⁴ There have also been findings of shortcomings in the funding formula for specific programs. For example, in education, the funding formula is 15 years out of date and does not cover many responsibilities associated with education services delivery, such as curriculum development, standardizing teaching approaches, providing teachers’ aids,

²⁷⁸ 1994 Auditor General Report, *supra* note 223 at para. 23.48.

²⁷⁹ Auditor General of Canada, *2004 Report of the Auditor General of Canada to the House of Commons*, Chap. 5, “Indian and Northern Affairs Canada – Education Program and Post-Secondary Student Report”, at para. 5.50

²⁸⁰ Auditor General of Canada, *2008 Report of the Auditor General of Canada to the House of Commons*, Chap. 4, “First Nations Child and Family Services Program – Indian and Northern Affairs Canada”, at para. 4.19

²⁸¹ 2013 Auditor General Report, *supra* note 268 at 3.

²⁸² Auditor General of Canada *2014 Report of the Auditor General of Canada*, Chap. 6, First Nations Policing Program—Public Safety Canada”, at 23-25.

²⁸³ 2011 Auditor General Report, *supra* note 5 at 2-3.

²⁸⁴ 2005 Evaluation Report, *supra* note 78 at 16.

planning, education policy development and budgeting.²⁸⁵ Funding for teachers' salaries on reserve is low and has not been updated for some time, resulting in high turn-over and inability to attract teachers with more than five-years' experience.²⁸⁶ With regard to social assistance, INAC budgets only cover reactive programs and not preventative initiatives such as psychological and other support services, or employment training.²⁸⁷ With regard to child welfare, INAC funding formulas are based on flawed assumptions on the percentages of children in care and families using services, are not regularly reviewed or updated to reflect inflation / cost of living, and underfund prevention services.²⁸⁸ Health transfers to fund public health services on reserve have been criticized as not including funding for training of staff, underfunding administrative costs and consequently preventing wage parity with health services professional off-reserve, and not keeping pace with program costs or demand.²⁸⁹ As well, the general funding for band management and administration costs, such communications, human resources management, and information technology services, have also been found to be inadequate.²⁹⁰

In a 2006 document entitled, called *Explanation on Expenditures of Social Development Programs*, the Department described all of its social programs as “...limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances.”²⁹¹ It goes on to say that if it's current social programs were administered by the provinces this would result in a significant increase in costs for INAC.²⁹²

Aside from reports attesting to chronic underfunding, a quick scan of news stories in First Nations communities the last couple of years reveals that underfunding of services on reserve is frequently attributed a number of tragic events such as: a rash of suicides attempts and suicides

²⁸⁵ *Ibid.* at 15. See also Drummond, D., and Kachuck Rosenbluth, *The Debate on First Nations Education Funding: Mind the Gap* (2013), Working Paper 49 (Kingston: School of Policy Studies, Queen's University).

²⁸⁶ *Ibid.* at 25.

²⁸⁷ *Ibid.* at 20.

²⁸⁸ See *Caring Society*, *supra* note 1 at paras. 121-394.

²⁸⁹ Culhane Speck, *supra* note 82 at 200-2001; MacIntosh, “Envisioning the Future of Aboriginal Health under the Health Transfer Process”, *supra* note 82 at 72.

²⁹⁰ IOG Report, *supra* note 76 at 3 and 42.

²⁹¹ Quoted in *Caring Society*, *supra* note 1 at para. 267.

²⁹² *Ibid.*

in the Attawapiskat First Nation, Pimicikamak Cree Nation and Mushkegowuk Council;²⁹³ house fire deaths in Pikangikum First Nation and Makwa Sahgaiehan First Nation;²⁹⁴ an outbreak of children with skin conditions on the Kashechewan First Nation;²⁹⁵ violence and murders in the First Nations communities of Manitoba Keewatinowi and La Loche;²⁹⁶ and drug and related crimes in the Moose Cree First Nation.²⁹⁷ First Nation underfunding is also attributed in recent news stories as responsible for: the dismantling of community policing services in the Atikamekw First Nation and the Mashteuiatsh First Nation;²⁹⁸ little to no fire protection in most First Nations' communities;²⁹⁹ lack of progress in improving safe drinking water on reserve;³⁰⁰ a public health crisis in 33 Northern Ontario First Nations communities;³⁰¹ and severe underfunding in First Nations schools.³⁰²

a) Exacerbated by 2% Funding Cap

The problems with the Department knowingly taking a narrow approach to “comparability” and underfunding programs, have been further exacerbated by the 2% funding cap instituted under

²⁹³ CTV News, 'A national tragedy': AFN demands action, funding for Attawapiskat', April 11, 2016; Winnipeg Free Press, “Support flows to First Nation - Therapists on-site, actor's help sought in suicide crisis”, March 11, 2016 and CBC, “Cree communities launched and funded own inquiry into 'suicide pandemic' - Faced with hundreds of suicide attempts, Mushkegowuk Council launched The Peoples Inquiry,” March 16, 2016.

²⁹⁴ Saskatoon Star Phoenix, Editorial, “Fire deaths preventable”, April 2, 2016; CBC, “Makwa Sahgaiehan First Nation fire reflects inadequate resources for reserves - Fire services underfunded, but regulation of building codes and safety practices also lacking,” Feb. 20, 2015.

²⁹⁵ The Canadian Press, “Medical crisis ongoing for Ontario reserves”, March 29, 2016.

²⁹⁶ National Post, “Anger, confusion as Manitoba RCMP charge 15-year-old boy with murder of 11-year-old Teresa Robinson”, March 18, 2016.

²⁹⁷ Timmins Press, “Moose Cree/NAPS aim to stem tide of illegal drugs,” Jan. 13, 2016.

²⁹⁸ CBC, “Obedjiwan dismantles police service, SQ takes over,” April 1, 2016; CNW Newswire Company, “Chronic Underfunding of First Nations Police Forces a Dire Reality: Mashteuiatsh is not an Isolated Case”, Dec. 1, 2015.

²⁹⁹ Canadian Underwriter, “Nearly half of Canada's First Nation reserves have 'little to no' fire protection: Report”, Dec. 21, 2015; National Post, “‘Hanging on by a thread’: Fire department of Canada's most populated First Nation struggles to stay afloat,” July 13, 2015.

³⁰⁰ CBC, “Bad water: 'Third World' conditions on First Nations in Canada - Two-thirds of First Nations have been under at least 1 water advisory between 2004 and 2014,” Oct. 15, 2015; CBC, “La Loche hopes for better future after deadly shootings, struggles with youth suicides,” Jan. 25, 2016; NetNewsLedger, “Children are getting sick, our people are struggling – Neskantaga FN Chief Moonias,” Oct. 6, 2015; PR Newswire Company, “Federal party leaders urged to end drinking water crisis in First Nation communities once and for all,” Oct. 13, 2015; CTV News, “Ottawa sued in push for safe drinking water on reserves,” June 16, 2014.

³⁰¹ APTN, “33 First Nations declare public health emergency,” Feb. 24, 2016.

³⁰² CBC, “First Nations schools vulnerable to teacher impersonators, educator says - Officials face challenges in a 'school system that's severely in crisis,' says Jamie Wilson,” Nov. 11, 2015; CBC, “First Nations students get 30 per cent less funding than other children, economist says - Don Drummond counters Indigenous Affairs' claim that funding gap cannot be measured,” March 14, 2016.

the Chrétien Liberals in 1996-97 discussed in Part 1. The funding cap was only supposed to remain in place for a couple of years, but instead remained in place for nearly twenty years until March 2016.³⁰³

The effect of the funding cap was to limit spending on core programs—education, child welfare, income assistance, First Nation government support, housing, capital and infrastructure and regulatory services programs³⁰⁴—to only 2% growth per year. The result was that funding for these programs has not keep pace with the demands in First Nations communities given population growth and inflation. Writing in 2009, Judith Rae details the impacts of the cap as follows:

Given that the population of First Nations people relying on these programs has grown by 25 per cent in the same period, and inflation alone was 2 per cent per year, the effect has been a marked *decrease* in the real purchasing power of the First Nations governments who are providing essential social services to their citizens. In November 2006, Indian Affairs itself calculated this decrease in purchasing power at 6.4 per cent, while the Assembly of First Nations calculated a 15 per cent loss. The shortfall accumulated just from the cap was over \$1.3 billion in education- and skills-development alone, as of September 2007. This is merely the amount that would be required to restore funding to previous levels, let alone meet the actual needs or provide for ongoing development.³⁰⁵

As well, as noted earlier, the impacts of the 2% cap were particularly hard-felt by those First Nations, who, exhibiting strong financial management, had been encouraged by INAC to enter Block Agreements, which normally have five years terms. The budget for these bands was fixed at the outset, based on population numbers and inflation at the time of signing. If there was an increased demand on service (for an example, high birthrate, or new members gaining status), or increases in program costs³⁰⁶ or inflation, the budgeted funding could not keep pace.³⁰⁷ As a result, these First Nations could find themselves in a significant deficit (if not able to cover short-

³⁰³ In December 2015, Justin Trudeau's Liberal government vowed to lift the cap, and in the March 2016 budget, the governments did commit to funding beyond previous capped levels. See CBC, "First Nations welcome lifting of despised 2% funding cap", December 10, 2015 and APTN News, "Budget 2016: Trudeau Liberals blow 2 per cent cap with 'unprecedented' \$8.4 billion investment," March 22, 2016.

³⁰⁴ INAC Cost Drivers Study, quoted in Rae, *supra* note 3 at 27, footnote 107.

³⁰⁵ Rae *ibid.* at 27.

³⁰⁶ This could occur where provincial programs costs increase (such as in the case of social assistance). The Department expected First Nations to accommodate these increases from their own-source revenues: see 2005 Evaluation Report, *supra* note 78 at 15, 20.

³⁰⁷ *Ibid.* at 17 and 27.

falls with their own-source revenue) and possibly in automatic default circumstances if the deficit exceeded 8% of their operating budget.³⁰⁸ To make matters worse, at the time of renewal of these Block Agreements, INAC does not review them with First Nations to ensure they met community needs, but simply does a “roll-over”, that is, use previous budget calculations with a 2% budget adjustment.³⁰⁹ Although there is a clause in the Block Agreements that permits budgets to be increased in “exceptional circumstances”, the reported experience of First Nations who have attempted to invoke the clause is that “nothing seems to qualify.”³¹⁰ In the circumstances, it is apparent why so few First Nations have opted into Block Agreements in recent years, given the risks it creates for them.

How the 2% funding cap could remain in place as long as it has (20 years) is astounding. Serson has also observed that caps placed on the growth of federal equalization payments, and health and social transfers to the provinces during this period were lifted in short order and funding to them has grown significantly; for example the health and social transfer increased by 33 per cent from 2004-05 to 2009-10.³¹¹ After considering all possible rationales to explain this double-standard, Serson concludes, “they lead to the unfortunate conclusions that the federal government is practicing a subtle form of discrimination.”³¹² The Assembly of First Nations has also argued that not having legislation over funding has contributed to the problem. Without legislation, INAC can treat its budgets for core services to First Nations as ‘discretionary’, allowing the Department to do what it wishes with such funding, including keeping the 2% funding cap in place for two decades.³¹³ Another example of INAC treating essential services funding as ‘discretionary’ came to light in June 2015 when a leaked internal INAC document revealed the Department had held back over \$1 billion in approved spending for core services over the previous five years.³¹⁴ These examples are consistent with the theme examined above;

³⁰⁸ IOG Report, *supra* note 76 at 25.

³⁰⁹ 2005 Evaluation Report, *supra* note 78 at 29.

³¹⁰ IOG Report, *supra* note 76 at 25.

³¹¹ Serson, *supra* 124 at p. 154. See, also, similar calculations by the Assembly of First Nations in 2010, who note that transfer payment to the provinces have been increasing by 6% annually: AFN, *Transforming the Relationship*, *supra* note 268.

³¹² Serson, *ibid.* at 156.

³¹³ AFN, *Transforming the Relationship*, *supra* note 268 at 1.

³¹⁴ CBC, “Aboriginal Affairs spending shortfall amounts to \$1B, internal document says - 5-year federal analysis of ‘lapsed’ spending lists top underspending departments”, June 05, 2015.

that the unlegislated, discretionary nature of Canada's current system perpetuates numerous problems with the current system of program delivery on reserve.

6. Cumulative impacts

a) Promotes vilification and infantilization of First Nations

It should be painfully obvious by this point that First Nations and their leaders are trapped in what now seems to be a deeply entrenched, dysfunctional system that is not of their choice and over which they have no control. What is even worse is that First Nations leaders bear the brunt of public perception as being responsible for this mess, and the more that the *status quo* persists, the more it is used to justify why First Nations are *not* ready for the obvious alternative—self-government.

Examples of First Nations being vilified in the media for being corrupt, incompetent, and ultimately responsible for the poverty and social problems in their communities abound.³¹⁵ One need only read the comment section of any online news story about conditions on reserve to become acquainted with this reality. While there have been cases documenting fraud and corruption by First Nations leaders, this is a small minority and by no means representative of the ethics and commitment of First Nations leaders generally.³¹⁶

As a brief aside, I note that while much of this animus comes from sectors of non-Indigenous Canadian society, there are First Nations communities members who share some of these views, at least with respect to the corruption and incompetence of First Nations leaders. At the community level, many First Nations people may not fully appreciate the extent to which their

³¹⁵ National Post, Todd MacKay, "All politicians must disclose basic financial information - including First Nations politicians," Jan. 16, 2016; National Post, Lois Frank, Harley Frank and Todd MacKay, "First Nations leaders benefit from transparency," March 16, 2016.

³¹⁶ From my own experience working with First Nations leaders in Atlantic Canada, the vast majority of well-meaning, hard-working individuals who want to help their community members.

leaders are forced to operate within a dysfunctional and discriminatory system they don't control, and that the day-to-day problems they experience are the products of decisions made by people in Ottawa and at regional offices of the Department. In the circumstances, it is understandable that they would focus their anger and frustration at the leaders within their line of sight.³¹⁷

A particularly nasty stereotype, that the CSPD seems to breed, is that large sums of taxpayers money have been invested in First Nations communities (i.e., that 'pots of money' have been have been thrown at First Nation issues by successive government over a number of decades).³¹⁸ To someone on the outside, knowing little to nothing about First Nations and program issues on reserve, this is perhaps what devolution may look like. (This is certainly not helped by media who constantly cite spending in First Nations as being "in the billions of dollars" without explaining (1) that this money is for basic essential services on reserve (and not charity), (2) the number of communities and individuals served by this funding, or (3) that this funding is insufficient.³¹⁹)

For many who hold this erroneous 'pots of money' assumption, when they are confronted with stories of abject poverty and related social and health problems on reserve, instead of questioning their assumptions about the 'pots of money,' they instead prefer to believe that First Nations leaders have somehow stolen or mismanaged the 'pots of money.'³²⁰ This message is extremely damaging to First Nations, utterly false, and yet still relatively pervasive. Indeed, it was a barely concealed message in many statements and actions of the Harper government. As observed by the Assembly of First Nations regarding comments made by then Minister of INAC, John Duncan, during the Harper administration:

³¹⁷ See Culhane Speck on this point as well, *supra* note 82 at 207.

³¹⁸ See for example, National Post Commentary by Jesse Kline, "Killing aboriginal with our kindness", May 14, 2013.

³¹⁹ As pointed out by Wab Kinew, the billions of dollars goes to assist a population the size of New Brunswick, and New Brunswick spends more on its population than Canada does on First Nations (see YouTube, "Strombo: Soap Box: Wab Kinew, Jan. 2012). See also Cassidy, *supra* note 132, who is similarly critical of media portrayal of First Nations spending.

³²⁰ Another common reaction by some is to argue for private property rights for First Nations, the suggestion being that if First Nations just joined the commercial mainstream, their problems would be solved. This is a veiled argument for First Nations assimilation that is not responsive to real problems that exist in First Nations communities. See, for example, Bains, R., "Ottawa Should Grant Property Rights on First Nations Reserves," April 7, 2016.

After claiming that they are spending \$10 billion and this is enough, the Minister adds “let’s get value for the money we are currently spending.” If there is enough money, but the results are so bad on the ground, the implication can only be that there is mismanagement and corruption at the First Nation level. But none of it is true...³²¹

Further, this type of thinking was clearly motivating the Harper governments *First Nations Transparency Act* and the push for even tighter control within existing funding agreements.³²²

Less vile, but perhaps equally pernicious, an uninformed understanding of the CSPD works to confirm paternalistic stereotypes that First Nations are not capable of managing their own affairs, or, at the very least, are still ‘not ready’ to assume self-government.³²³ It permits First Nations to continue to be infantilized as they have since Confederation. This is evidenced in both the Mulroney’s Progressive Conservative and Chrétien’s Liberal governments’ unwillingness to fully embrace calls by the Penner Report and the Royal Commission of Aboriginal Peoples’ Report, respectively, for real self-government. Both governments’ proposed alternatives to self-government, the ‘continuum of devolution’ under Mulroney and the *First Nations Governance Act* under Chrétien, were premised on the assumption that First Nations were ‘still not ready’ for self-government. This is corroborated by the comments of then Minister of INAC, Robert Nault, in 2002 justifying taking steps amounting to less than self-government, when he said “we are about 60 years away from achieving the full implementation of the inherent right [of self-government].³²⁴ Like vilification, the infantilization of First Nations also deflects blame away from the government for problems on reserve, because it is premised on First Nations (though unwittingly, as children) being the source of their misfortune.³²⁵

If First Nations are ‘not ready’ for self-government it because they have been put in a system that, while it purports to be building their capacity to become self-governing, is so dysfunctional

³²¹ AFN, “Fiscal Fairness”, *supra* note 127.

³²² See also Salterio and Evans, *supra* note 210, who argue that the *First Nations Accountability Act* “of animosity and mistrust between First Nations people and the general Canadian population, blurring the reality that First Nations have the skills to govern themselves.”

³²³ Rae, *supra* note 3 at 43 also argues that some people may mistake devolution for self-government and conclude that it has failed

³²⁴ Cassidy, *supra* note 132 at 2.

³²⁵ See Rae, *supra* note 3 at 24: “Some have suggested that devolution leaves First Nations to “do the Department’s dirty work” by allowing INAC to offload responsibility for reducing Aboriginal social-economic deprivation. Arguably, this lets INAC off the hook, thus reduced public pressure on the federal government, and it simultaneously makes FNs look incompetent, thus increasing public skepticism about Aboriginal self-government.”

and underfunded that it sets them up for failure. But what evidence is there that shows First Nations are not ready for self-government? In spite of being hostages to a broken system, according to INAC's own 'General Assessment' data, over 75% of First Nations have been appropriately managing their financial and administrative affairs. That First Nations are capable of sound financial and administrative management is further supported by the 2008 Institute of Governance study that found that, in 2007, 84% of First Nations required no intervention by the Department for default under the funding agreements, and of the remainder, less than 2% required third party management. Further, the overwhelming reason for intervention was debt due to the 8% automatic default,³²⁶ which as noted earlier, is often triggered due to the fact that the growth of the budgets in Block Agreements have been capped at 2% since 1996-97 (with the budget formula simply 'rolled-over' at renewal time), and have not been keeping pace with population growth, program changes or inflation. In other words, most First Nations' default is a product of the system, not First Nation financial mismanagement or incompetency!

b) A Department without focus and a clear conflict of interest

Although the Department's national program manuals set out program objectives that talk about "improving well-being" for First Nations through providing comparable services to the provinces,³²⁷ evaluations of the Department have found that INAC really has no clear objective driving it with respect to administering this system. As noted earlier, it has been noted that the data collected by INAC from its numerous reports is not being used to improve outcomes for First Nations communities.³²⁸ This led the Institute on Governance, in its 2008 evaluation report, to observe:

The policy objective related to funding arrangements is not clear. Is it to progressively move [First Nations] towards self-government through the assumption of increased responsibilities? Is it to achieve better outcomes by providing greater flexibility to those that are closest to the provision of services, more knowledgeable about the needs of communities or recipients, and more culturally sensitive?³²⁹

³²⁶ IOG Report, *supra* note 76 at 27.

³²⁷ See, for example, INAC, Aboriginal Affairs and Northern Development Canada, "National Social Programs Manual" (Canada: 2011).

³²⁸ 2005 Evaluation Report, *supra* note 78 at 21-22; IOG Report, *supra* note 76 at 2 and 33.

³²⁹ IOG Report, *ibid.* at 30.

As a first point, it bears pointing out that the lack of clear objectives in this system is part and parcel of the problem of having no legislative framework underpinning this system. If there was legislation on program delivery on reserve, the objective of providing such programs would be articulated either in a preamble, a purpose clause, or even through the legislative debates leading to its passage. Department staff would be required to adhere to the spirit of that objective in all their work. Not having legislation leaves the objective(s) of this system to the discretion of the Department.

Second, as seen in Part I, the initial objective behind devolution was to assist First Nations move towards self-government. But the means of achieving this—funding mechanisms in the nature of contribution agreements tied to the comparability standard—is in tension with that objective. On the one hand, INAC staff are expected to be advocates and advisors to First Nations in their transition to self-government, but, on the other hand, they are required to monitor First Nations, ensuring they are compliant with minimum program standards under the funding agreements and file all necessary reports and audits. The two functions are at odds with each other. The Penner Report made this observation as early as 1983: “There is a fundamental conflict between the monitoring and advisory roles of DIAND employees.”³³⁰

Not only is there a clash between the two functions, but an employee’s own pecuniary self-interest would necessarily favour the function that ensures his or her continued employment. As a Departmental employee, working towards First Nations self-government almost guarantees that one is working towards putting oneself out of a job.³³¹ On the other hand, monitoring First Nations adherence to contribution agreements requires the expenditure of significant staff resources. This would include: (1) creating and updating forms, (2) training and advising First Nations on filing such forms and monitoring whether First Nations submit the forms, (3)

³³⁰ Penner Report, *supra* note 57 at 92.

³³¹ This is because, under self-government, similar to the provinces’ use of equalization and health and social transfers, First Nations would be accountable to their members, not the Department for their spending, and would determine their own accountability measures towards their citizens in this regard. The jobs of many INAC staff would become superfluous. Also, recall that the Penner Report, as part of its recommendation to immediately implement self-government, called for the phasing out of INAC within five years and replacing with much smaller a “Ministry of State for Indian First Nation Relations” whose role would be to protect and advocate for Indian rights and interests, as well as to manage and co-ordinate Canada’s fiscal relationship with First Nations: Penner Report, *ibid.* at 133-134.

analyzing the forms and producing reports, (4) ensuring compliance with program standards and audit requirement and (5) now, as of 2010-11, carrying out individual General Assessment on over 600 separate First Nations. The monitoring function necessarily requires a significant staff complement.

There are many indications that, over the past 20-30 years, the Department has clearly come to prioritize its monitoring functions over other objectives, whether that be assisting First Nations transition toward self-government, or even, more simply, ensuring the system promotes the well-being of First Nations people. First, contrary to what was initially intended, the Department's staff has *increased* under devolution, not decreased. Although part of the Mulroney government's plan regarding the 'continuum of devolution' was to significantly downsize the Department's complement of staff, this did not materialize. Granted some downsizing did happen in the 1980s-1990s (going from 8,000 employees in 1976 to 3,800 in 1992³³²), staffing levels at the Department then began to rise steadily in the 2000s. In 2010, staffing levels had increased by 42% since 1992 (to 5,371 employees). Although there has been some reduction in staff since, in 2015, there were still some 4,684 employees at the Department (an increase of 23% since 1992).³³³ Thus, devolution has led to significant growth in staff since the mid-1990s. Increases in staff means an increase in administrative costs and that more of the Department's budget is being diverted from direct investment in First Nations communities and into the Department's operating costs. The Penner Report's warning of this danger went unheeded.³³⁴ In 2015, the Department spent over \$1 Billion on operational costs, including staff salaries.³³⁵

Next, recent evaluations of the Department include staff observations that INAC resources are increasingly being used for monitoring and compliance.³³⁶ They also include First Nations' observations that INAC staff are focused on their policies and programs, not priorities of First Nations.³³⁷ Ultimately, the evaluations conclude that the Department's main focus is on following up on reports, compliance reviews and audits rather than preventative or proactive

³³² INAC, "The Deputy's Notes on Devolution: The Next Step," *supra* note 104.

³³³ Treasury Board of Canada, "Population of the Federal Service by Department", available online at: <http://www.tbs-sct.gc.ca/psm-fpfm/modernizing-modernisation/stats/ssa-pop-eng.asp>.

³³⁴ Penner Report, *supra* note 57 at 89.

³³⁵ INAC, 2015 Financial Statements (Unaudited), *supra* note 105.

³³⁶ 2005 Evaluation Report, *supra* note 78 at 28

³³⁷ IOG Report, *supra* note 76 at 39

measures.³³⁸ The 2008 evaluation report by the Institute on Governance observed that this remains to be the case “[i]n spite of years of criticism ... about excessive and misdirected accountability and reporting requirements.”³³⁹ And, even in spite of that critique, the Department has continued on undeterred. In 2013-14, the Department reaffirmed that monitoring is its bread-and-butter work, stating that “Risk-based compliance work, program reviews, internal monitoring and audits of program and policy implementation will continue to be the standards operating procedure for [INAC].”³⁴⁰

My point here is that the *status quo* creates an incentive for Departmental employees to prioritize monitoring activities over First Nations helping transition to self-government or otherwise improving the well-being of First Nations. The Department and its employees are in a clear conflict of interest under the current system. Because of this, one can also expect that the Department will be very resistant to any reform of this system, because it directly benefits INAC staff by keeping them employed.

Part 3 - The *Caring Society* decision and its implications for CSPD

Part 2 reviewed the serious problems and numerous harms caused by the current system for program delivery (CSPD) on reserve that render it completely unacceptable. These problems and harms have been known for some time (the 1981 Penner Report identified most of them). Yet First Nations experience significant barriers in attempting to break free of the CSPD and move towards the only real alternative, self-government. Here I explore how the *Caring Society* decision finally provides with First Nations with the legal arguments to bring about the end of CSPD.

1. Summary and key findings of the *Caring Society* decision

The *Caring Society* complaint was filed with the Canadian Human Rights Commission in 2006 by the Assembly of First Nations and Dr. Cindy Blackstock, Executive Director of the Caring

³³⁸ *Ibid.* at 3, 36 and 42-43.

³³⁹ *Ibid.* at 12.

³⁴⁰ INAC, “Modernizing Grants and Contributions”, Jan. 11, 2013.

Society, on behalf of First Nations children and families. The Commission referred the complaint to Canadian Human Rights Tribunal (the “Tribunal”) in October 2008. The complaint faced several procedural challenges raised by Canada, including an attempt to prohibit the Aboriginal Peoples Television Network (“APTN”) from recording the hearing, and to dismiss the case on the basis that the Tribunal lacked jurisdiction to hear complaint under the *Canadian Human Rights Act*.³⁴¹ The decision of the Tribunal was released on January 26, 2016. Canada will not be appealing the decision.

Specifically, the case alleged that funding of child welfare services on reserve by INAC pursuant to the First Nations Child and Family Services Program (FNCFS) is inequitable and insufficient. Reports cited in the case estimated that services for child welfare on reserve receive 22% less funding than provincial child welfare programs.³⁴² The Tribunal’s decision spans 494 paragraphs and is over 170 pages long. The Tribunal reviewed numerous reports from the Auditor General of Canada, the Assembly of First Nations and from the Department, both public and internal, as well as heard from several witnesses. It concluded from this significant body of evidence that the funding models used by INAC do in fact significantly underfund child welfare services on reserve and this creates incentives to remove children from their homes as a first resort rather than as a last resort.³⁴³ More specifically, the harms identified by the Tribunal included:

- (1) inadequate funding formulas based on flawed assumption of First Nation families’ needs;³⁴⁴
- (2) funding formulas that do not keep pace with inflation and cost of living;³⁴⁵
- (3) arbitrary denials by the Department to fund similar kinds of prevention services available within provincial systems;³⁴⁶

³⁴¹ *Canadian Human Rights Act*, RSC 1985, c H-6. As noted above, it was also discovered through an ATIP request that Canada failed to produce thousands of arguably relevant documents, which served to prolong a decision on the merits even longer. Cindy Blackstock was also successful in a complaint that Canada retaliated against her for bringing the complaint.

³⁴² *Caring Society*, *supra* note 1 at para. 153, 262

³⁴³ *Ibid.* at para. 344.

³⁴⁴ *Ibid.* at para. 458.

³⁴⁵ *Ibid.*

- (4) failure to study and failing to ensure First Nations receive levels of service comparable to the provinces/territories, despite several reports suggesting the services are not comparable and the Auditor General recommending a comparative (gap) analysis;³⁴⁷
- (5) failure to ensure First Nations receive culturally appropriate services;³⁴⁸
- (6) failure to ensure coordination between child welfare and other core federal programs, including Income Assistance, Assisted Living, Non-Insured Health Benefits, etc., resulting in service gaps, delays and denials for First Nations children and families;³⁴⁹ and
- (7) the cumulative effect of these adverse impacts is to perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the residential schools system.³⁵⁰

The Tribunal found these denials and adverse impacts were based on the protected characteristics of race and/or national ethnic origin as the child welfare program is specifically aimed at First Nations living on reserve.³⁵¹ Simply stated, the Tribunal found INAC's conduct was discriminatory because it "widens the gap between First Nations and the rest of Canadian society rather than narrowing it."³⁵² In the result, the Tribunal calls on INAC to "REFORM" its child welfare program "in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve."³⁵³

2. Tools for dismantling the CSPD

Although specifically about the FNCFS Program, many of the harms identified by the Tribunal are the same as those affecting all services on reserve identified in Part 2, including inadequate funding formulas and funding that does not keep pace with inflation, arbitrary decision-making,

³⁴⁶ *Ibid.* at para. 230.

³⁴⁷ *Ibid.* at paras. 335-336, 338, 393, 462, and 464.

³⁴⁸ *Ibid.* at paras. 339, 423-426, 458.

³⁴⁹ *Ibid.* at paras. 362-381.

³⁵⁰ *Ibid.* at para. 426 and 459.

³⁵¹ *Ibid.* at paras. 395-398.

³⁵² *Ibid.* at para. 403.

³⁵³ *Ibid.* at para. 463 [emphasis in original].

confusion/inconsistency around the 'comparability standard', and lack of culturally appropriate services. As well, there were important legal conclusions reached by the Tribunal that can be harnessed by First Nation to demand change, not only to the FNCFS program, but to bring about the end of the CSPD on reserve and finally replace it with self-government.

a) Confirms Canada's Responsibility / Accountability to First Nations

As it does with regard to all services on reserve, Canada argued in *Caring Society* that its role in the provision of child welfare services on reserve is strictly limited to funding and being accountable for the spending of those funds. On this basis, it argued that the *Canadian Human Rights Act* did not apply, as "funding" is a not service contemplated under the *Act*, and, more broadly, it argued child welfare was under provincial jurisdiction and the federal government only became involved in child and family services "as a matter of social policy under its spending power" and not pursuant to any obligations owing under s. 91(24) of the *Constitution Act, 1867*.³⁵⁴

These arguments were soundly rejected by the Tribunal, who, in addition to finding that funding, in itself can constitute a service under the *Act*,³⁵⁵ also found that INAC's role in child welfare services is key. First, because the manner and extent of INAC's funding significantly shapes the child and family services provided.³⁵⁶ Second, beyond funding, INAC provides policy direction and oversight, as well as negotiates and administers agreements with First Nations and/or provinces/territories regarding child welfare services.³⁵⁷ The Tribunal found that INAC is "not a passive player" in its arrangement with First Nations and/or the provinces/territories.³⁵⁸ It found that, ultimately, it is INAC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on reserve.³⁵⁹ Overall, the Tribunal noted that INAC in fact exercises significant control, discretion and influence over child welfare services on reserve "through policy and other administrative

³⁵⁴ *Ibid.* at paras. 34 and 78.

³⁵⁵ *Ibid.* para. 40.

³⁵⁶ *Ibid.* para. 71

³⁵⁷ *Ibid.* para. 66 and 73.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.* paras. 73, 75-76.

directives” and First Nations children and families are a vulnerable category of people vis-à-vis INAC in this regard.³⁶⁰

Further, the Tribunal thoroughly dismissed INAC’s attempts to minimize its responsibility and pass it off to the provinces, making a strong statement in this regard:

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament’s exclusive legislative authority over “Indians, and lands reserved for Indians” by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish [INAC]’s constitutional responsibilities. ...

[84] Similarly, [INAC] should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territory. [INAC] should not be allowed to escape the scrutiny of the CHRA because it does not directly deliver child and family services on reserve.

[85] As explained above, despite not actually delivering the service, [INAC] exerts a significant amount of influence over the provision of those services. Ultimately, it is [INAC] that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit [INAC] holds out and intends to provide to First Nations children and families.

[86] Parliament’s constitutional responsibility towards Aboriginal peoples, in a situation where a federal department dedicated to Aboriginal affairs oversees a social program and negotiates and administers agreements for the benefit of First Nations children and families, reinforces the public relationship between [INAC] and First Nations in the provision of the FNCFS Program and the related provincial/territorial agreements.³⁶¹

The Tribunal also found that INAC, within various policy documents, had undertaken to provide child welfare services in the “best interests of the child” and with the objectives of providing culturally-appropriate services and promoting the safety and well-being of First Nations children.³⁶²

³⁶⁰ *Ibid.* para. 105.

³⁶¹ *Ibid.* at paras. 83-86 [emphasis added].

³⁶² *Ibid.* at para. 105.

These findings are a strong confirmation of Canada/INAC's responsibility over child welfare services, and there is no reasonable basis to see why they would not apply with equal force to all other programs Canada provides on reserve. As noted in Part 2, Canada has long used the fact of its not having legislated to minimize its responsibility over services on reserve. These findings by the Tribunal will now prevent Canada and the Department from evading accountability. In fact, the Tribunal went so far as to use the above findings to suggest that Canada may owe First Nations specific fiduciary duties in the circumstances.³⁶³ First Nations' vulnerability to the extensive control and discretion that Canada exercises over the delivery of child welfare services was a significant factor in the Tribunal's analysis on fiduciary duty.³⁶⁴ As discussed in Part 2, there have been several examples of abuse of INAC's discretion under the current system of program delivery (CSPD) on reserve in recent times and, the Tribunal has breathed new life into the fiduciary duty doctrine as mechanism for redress from abuse of INAC's discretion. However, the Tribunal also made findings that will permit First Nations to achieve the elimination of the CSPD, and all the extensive discretion in it, altogether, as I turn to next.

b) Finds systems that perpetuate historic disadvantage endured by Aboriginal people are discriminatory

The Tribunal's decision makes it clear that INAC, in providing services on reserve, cannot perpetuate the historical disadvantage endured by Aboriginal peoples.³⁶⁵ In this regard, the Tribunal found strong links between the residential school system and the on reserve child welfare system. The Tribunal observed that when residential schools started to close in the 1960s, the extension of child welfare services on reserves came to be seen as its replacement in the eyes of government authorities.³⁶⁶ At the time, the assumptions underlying significant numbers of First Nations children taken into state care via the 'Sixties Scoop' were the same

³⁶³ *Ibid.* at paras. 99-110. The Tribunal ultimately held it was not necessary to decide the point to address the complaint, but suggested there was very likely specific fiduciary duties owing because INAC's exercise of extensive discretion stood to affect important interests of First Nations, namely First Nations' Aboriginal rights to transmission of their Indigenous languages and cultures.

³⁶⁴ *Ibid.* at para. 105.

³⁶⁵ *Ibid.* at para. 403.

³⁶⁶ *Ibid.* at paras. 218, 413-414

assumptions underlying the residential school system; namely that First Nations parents were not capable of properly caring for their children.³⁶⁷

The Tribunal found that the FNCFS program continued to perpetuate the legacy of residential schools today because Canada's systemic underfunding of the program creates incentives to remove children from their homes as a first resort rather than as a last resort.³⁶⁸ The Tribunal also suggested that the removal of children by child welfare authorities and placement in non-Indigenous homes resembles the residential school system because it also stands to adversely impact on First Nations' children ability to learn their languages and culture, which the Tribunal found are Aboriginal rights that all First Nations children possess.³⁶⁹ Finally, the Tribunal also suggested that the child welfare system perpetuates the residential school era because First Nations have little to no control over this system:

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces.³⁷⁰

The implications of the Tribunal statements and findings here, are extremely significant. The key message from the Tribunal here is that perpetuating systems that are assimilative—prohibiting or adversely impacting First Nations ability to exercise their culture and control their own destinies—are discriminatory. Without going so far as explicitly saying so, the Tribunal has suggested a strong connection between First Nations' equality rights and their right to self-government. This is bolstered by the final significant legal conclusion of the Tribunal in *Caring Society*, which I turn to next.

³⁶⁷ *Ibid.* at para. 413.

³⁶⁸ *Ibid.* at para. 344.

³⁶⁹ *Ibid.* at para. 109.

³⁷⁰ *Ibid.* at para. 426 [emphasis added].

c) *Finds comparability standard discriminatory and equality demands needs-based, culturally appropriate services*

While the Tribunal found that the funding of child welfare services was far below and not comparable to similar services in the provinces and territories, it concluded that equality for First Nations requires *more* than just providing the same level of funding. In this regard, the Tribunal found that INAC's long-held 'reasonable comparability' standard is *itself* discriminatory. According to the Tribunal, an approach on reserve that seeks to mirror funding provided by the provinces and territories is not consistent with substantive equality as it does not consider the distinct needs and circumstances of First Nation children and families living on reserve, including their cultural, historical and geographical needs and circumstances.³⁷¹ In the words of the Tribunal:

[465] [INAC]'s reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require [INAC] to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.³⁷²

According to the Tribunal, in order to meet the governing standard of equality, both funding *and* services on reserve must meet the needs of First Nations children and families and be culturally appropriate. The Tribunal found that INAC's funding, as it was inadequate, obviously prevented the services provided by the FNCFS Program from being culturally appropriate: "If funding does

³⁷¹ The Tribunal suggests that, while provincial legislation and standards can be a useful reference for assessing the adequacy of funding and services on reserve, it cannot be *the* sole, or driving, reference point: see *ibid.* at para. 462.

³⁷² *Ibid.* at para. 465.

not correspond to the actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate?”³⁷³

This finding, like the Tribunal’s suggestion that human rights prohibiting systems which, by design or by effect, perpetuates First Nation assimilation, bolsters the connection between First Nations’ equality rights and their right to self-government. The connection is demonstrated in the following rhetorical question: how can a program meet the needs of the community and be culturally appropriate if the standards underlying it are not designed and controlled by First Nations themselves? Or, as stated by a member of the Carrier-Sekani Tribal Council, quoted in the 1981 Penner Report, “The principle is simple. Only Indian people can design systems for Indians. Anything other than that is assimilation.”³⁷⁴

To be clear, the Tribunal never goes as far in its reasoning to *directly* make this connection between substantive equality and First Nation self-government. But it is a significant implication of the decision, especially given the Tribunal’s comments that equality prohibits perpetuating of historic disadvantage like the legacy of residential schools. That being said, there is a tension in the reasons between this and the continued imposition of provincial child welfare standards on reserve. Taken to its logical conclusion, the finding that services on reserve must meet community needs and circumstances and be culturally appropriate—if it results in the ‘comparability standard’ being found discriminatory—also suggests s 88 of the *Indian Act*, or, more generally, the application of provincial child welfare legislation on reserve, is discriminatory.³⁷⁵ As detailed in Part 1, INAC only adopted the comparability standard after its attempts to unilaterally delegate services to the provinces through s. 88 largely failed (except with regard to child welfare). The comparability standard was then adopted in order obtain the same results that s 88 failed to achieve (imposition of provincial/territorial standards on reserve—except that Canada paid for the services). Thus, one would think that if the comparability standard is discriminatory, so too would be s 88 or the legal doctrine that allows

³⁷³ *Ibid.* at para. 425.

³⁷⁴ Penner Report, *supra* note 57 at 29.

³⁷⁵ As stated above at note 27, although s 88 was regarded as basis for provincial legislation, including child welfare legislation, applying on reserve, the Supreme Court of Canada later clarified that most provincial laws apply *ex proprio vigore*.

provincial child welfare laws to apply on reserve *ex proprio vigore*.³⁷⁶ For the most part, the Tribunal remained largely silent on the imposition of provincial child welfare laws on First Nations via s 88 of the *Indian Act* or otherwise. The Tribunal's only comments about s. 88 was to suggest that it does not "diminish [INAC]'s constitutional responsibilities [to First Nations]."³⁷⁷ To be fair to the Tribunal, the complainants did not challenge s 88 of the *Indian Act* or the imposition of provincial child welfare laws by operation of the doctrine *ex proprio vigore*, but only the funding of the FNCFS Program. Thus, the Tribunal was not asked to decide whether the imposition of provincial child welfare laws on reserve, whether via s 88 or not, was itself discriminatory and it may not have wanted to have address the issue head-on.³⁷⁸

3. Where to from here?

The Tribunal ordered INAC to cease its discriminatory practices and reform the FNCFS Program.³⁷⁹ However, the Tribunal declined to give further order on remedy, retaining jurisdiction and inviting the parties to return and make further submissions, which is now ongoing.³⁸⁰ It goes without saying that the decision is only binding on INAC with respect to the FNCFS Program. However, the Tribunal's finding that the comparability standard is discriminatory, while not binding on other INAC programs on reserve *per se*, is nonetheless persuasive precedent. Given that the comparability standard and program devolution via contribution agreement are inextricable linked, and, together are the source of so many harms adversely impacting First Nations and perpetuating harms of the past (assimilation) and stereotyping of First Nations (vilification and infantilization), it would seem Canada's current system of program delivery on reserve, in total, violates First Nations' substantive equality rights.

³⁷⁶ *Ibid.*

³⁷⁷ *Caring Society*, *supra* note 1, para. 83.

³⁷⁸ There is also an outstanding issue, working its way through the court of whether provisions in the *Indian Act* should be challenged through human rights legislation, or under the *Charter*: see *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13, 2015 FC 398, reasons on appeal pending; see also *Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30 and *Nacey, Rainville, Dennis v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 20. With this line of cases, the Tribunal may have wanted to avoid the additional cost and complexity of this issue, preferring to leave it for another day.

³⁷⁹ *Caring Society*, *supra* note 1, para. 474.

³⁸⁰ *Ibid.* at paras. 475-494.

While it is true that the decision of an administrative tribunal decision generally carries less weight as precedent than an appellate or Supreme Court of Canada decision, it bears noting that recent Supreme Court of Canada decisions reinforce the Tribunal's finding that, as opposed to mirroring services, substantive equality requires services that meets the needs and circumstances of the particular group being services. In 2008, the Court reaffirmed that the governing standard of equality in Canada is substantive equality and not formal equality³⁸¹ and using a formal equality analysis based on mirror comparator groups is detrimental to a proper substantive equality analysis.³⁸² In addition, in recent cases involving services to be provided to Anglophone and Francophone communities, the Supreme Court affirmed that substantive equality can mean distinctive content in the provision of similar services, depending on the nature and purpose of the services in issue, as well as the characteristics of the population to be served.³⁸³ In another case, the Supreme Court stated, "The designated beneficiaries of a service' may and undoubtedly should affect how those services are delivered."³⁸⁴

As well, the current running beneath the surface of the *Caring Society* decision—that, as a matter of substantive equality, First Nations should exercise control (i.e., self-government) over programs on reserve—is further supported by the constitutional principle of "subsidiarity". In recent years, Supreme Court of Canada has endorsed this principle of federalism, which stands for the proposition that law-making and its implementation are best achieved at the level of government that is closest to the citizens affected and thus must be responsive to their needs, to local distinctiveness, and to population diversity.³⁸⁵ At least one early commentary on the

³⁸¹ See *R. v. Kapp*, [2008] 2 SCR 483 at paras. 14-15.

³⁸² See *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, at para. 2.

³⁸³ *DesRochers v. Canada (Industry)*, [2009] 1 SCR 1994 and *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21.

³⁸⁴ *NIL/TU, O Child and Family Services Society*, *supra* note 152 at para. 45. This is in the context of provincial child welfare legislation aiming to accommodate First Nations interest. The decision is problematic, however, in that it is in tension with the constitutional rule against provincial legislation 'singling out' First Nations for favourable or adverse treatment (see note 152 above). It also takes for granted the application of provincial child welfare laws on reserve, which, based on the reasoning in the *Caring Society*, may well be discriminatory.

³⁸⁵ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 3. In this case, the principle was applied to uphold a municipal law alongside similar provincial and federal laws. Although in both *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 and *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 there was some debate between the members of the Court about the expanse of the principle of subsidiary, specifically whether the principle could preclude federal regulation where a matter may be regulated by the provinces, this does not seem to have diminished the articulation of the principle in *Spraytech* as it relates municipal governments.

Caring Society decision also draws a link between the need for broad reform of programs on reserve in light of the decision to be consistent with the principle of subsidiary.³⁸⁶

In my view, First Nations self-government over programs and services on reserve, with adequate funding meeting the needs and circumstances of communities, based in appropriate fiscal mechanisms that do not impose program standards and monitoring conditions, with a legislative (or even a constitutional) foundation to clearly define objectives (and prevent future governments from easily resiling from this course), is the only way forward. As well, as noted earlier, several scholars have written that implementing self-government this is the only way real improvements can occur for First Nations. In the words of Shewell and Spagnut:

The solution is a nutshell summary of the 1983 Penner Report. More importantly, it speaks plainly and simply to the principles of jurisdiction, of self-government for the future: the right of First Nations to conduct their own affairs in ways appropriate to themselves and to their own needs and priorities, without fear of external judgement and with the realization that mistakes will be made but that their resolution will be found from within.³⁸⁷

Furthermore, for decades, scholars have argued that self-government is an inherent Aboriginal right, recognized and affirmed by s. 35 of the *Constitution Act, 1982*.³⁸⁸ Now the *Caring Society* decision also suggests its recognition is a matter of human rights.³⁸⁹

Federal legislation (or provincial legislation in the case of child welfare laws), or worse, federal policies alone, attempting to accommodate First Nations needs and circumstances through advisory committees, or the like, will not be sufficient to meet the standard set by *Caring Society* case. This would continue to house control with the federal government, as was the case with the Harper government's failed attempts to pass the *First Nations Control of First Nations*

³⁸⁶ Papillon, M., « Premières Nations : comment mettre fin au régime de citoyenneté à deux vitesses? » in *Le Forum Au Service du Bien Public* (online : www.policyoptions.irpp.org), February 11, 2016.

³⁸⁷ Shewell & Spagnut, *supra* note 16 at 48.

³⁸⁸ See, for example, McNeil, K. "The Jurisdiction of Inherent Right Aboriginal Governments", Oct. 11, 2007, Research Paper for the National Center for First Nations Governance; Hutchins, P.W., "The Golden Thread of Continuity, the Federalism Principle and Treaty Federalism – Where's the Gap?", March 3, 2009, Paper presented at National Center for First Nations Governance "Rebuilding our Nations" Conference.

³⁸⁹ The right to self-government, as part of the larger right of self-determination, is recognized as a fundamental collective human right of Indigenous peoples under international law. See Gunn, B.L., "Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination" (2016) 38 Dalhousie L.J. 237.

Education Act.³⁹⁰ As well, these types of ‘advisory’ committees were initially set up under the 1975 James Bay and Northern Quebec Agreement and were later found to be a failure. In this regard, an evaluation of the Agreement found, “...the Agreement gave rise to a plethora of committees and commissions whose powers overlap to such an extent that no one knows exactly who is responsible for what... The role of native representatives in those bodies is mostly symbolic and government mostly makes policy decisions without consultation.”³⁹¹ To repeat the quote cited in the Penner Report: “Only Indian people can design systems for Indians. Anything other than that is assimilation.”³⁹²

Some have suggested that the ideal process for achieving this outcome is through tripartite negotiations between the federal government, provinces and territories and First Nations.³⁹³ However, I have concerns that such a process may unduly prolong resolution of a problem that requires immediate attention. Recall that there have been tripartite tables on self-government in existence since the mid-1970s, which have only resulted in about a dozen concluded agreements to date. The need for reform is urgent. Further, it is not obvious to me that the participation of the provinces is necessary. The provinces have eschewed any real role in the delivery of programs on reserve. The *Caring Society* decision confirms that services on reserve engage the federal s 91(24) jurisdiction, suggesting that any role for the province is incidental. For these reasons, I believe bilateral discussions, between the federal government and First Nations, would be the most appropriate. While there are broader self-government issues that certainly do touch on the provinces more directly, for example, land and resource issues beyond reserves boundaries, these can be left for existing tripartite negotiations. As suggested by RCAP, not all self-government issues need be tackled at once.

As well, the parties should not necessarily need to start from scratch. The Penner Report and the RCAP Report both contain very detailed and sound recommendations and also recognized that a

³⁹⁰ See Mendelson, *supra* 216 at 10-16.

³⁹¹ See M. Papillon, “Aboriginal Quality of Life under a Modern Treaty,” *supra* note 169 at 13.

³⁹² Penner Report, *supra* note 57 at 29.

³⁹³ Papillon, M., “Playing Catch-up with Ghosts: Income Assistance for First Nations on Reserve”, *supra* note 147 at 10-11; and Papillon, M., « Premières Nations : comment mettre fin au régime de citoyenneté à deux vitesses? », *supra* note 386.

one-sized fits all approach may not necessarily be appropriate or feasible.³⁹⁴ As well, the Assembly of First Nations, drawing on these reports, has already made sound proposals on how First Nations' fiscal relationship with Canada needs to be transformed.³⁹⁵

The current political climate is favourable to these negotiations. As of October 2015, Canada now has a federal government who campaigned on changing the relationship between First Nations and Ottawa for the better. Indeed, in the Prime Minister's mandate letter to the new Minister of INAC he stated, "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."³⁹⁶ Further, very recently, the Minister of Justice (and First Nations lawyer), Jody Wilson-Raybould, during a special House debate on the suicide crisis in the Attawapiskat First Nation, announced her government's commitment to "complete the unfinished business of Confederation" and replace the *Indian Act* with a "reconciliation framework" that would outlast the life of this administration."³⁹⁷ Thus, if there was ever a time where sufficient political will could be garnered to reform the highly problematic system of program delivery on reserve, now is that time.

However, one also to be realistic and recognize that past attempts to reform this system (reviewed in Part 1) teach us that the federal government's efforts to-date have yet to result in change and, in fact, have resulted in the system becoming more dysfunctional and entrenched. Since the release of the *Caring Society* decision, Cindy Blackstock has spoken publicly about her disappointment with the federal government's response thus far.³⁹⁸ Also, some members of the public and media who believe the stereotypes about 'big pots of money' and First Nations leadership corruption and mismanagement will also speak out loudly against reform efforts. As well, politicians, even well-meaning one, have been susceptible in the past to believing the

³⁹⁴ See Penner Report, *supra* note 57 at 57-60, 94-102 and 133-134; RCAP, *supra* note 84.

³⁹⁵ AFN, "Transforming the Relationship", *supra* note 267.

³⁹⁶ Mandate Letter to Minister of Indigenous and Northern Affairs, Carolyn Bennett, from Prime Minister Justice Trudeau, November 13, 2015.

³⁹⁷ APTN News, "During suicide debate Justice Minister says it's time for First Nations to shed *Indian Act* 'shackles'", April 13, 2016.

³⁹⁸ Toronto Star, "Cindy Blackstock, since mom to 163,000 kids", March 27, 2016; APTN, "Federal Liberal budget failed First Nation children, families: Blackstock", March 22, 2016.

stereotype that First Nations just ‘are not yet ready’ for self-government. As well, Department staff, given their conflict of interest, would likely see such reform as putting their jobs in jeopardy. Also, after several years under the Harper government, most staff are likely conditioned to see their function as monitoring and ensuring ‘compliance’ and to see First Nations as ‘not ready’ for self-government. For these reasons, INAC staff are unlikely to eagerly embrace and assist their political masters in undertaking this reform. Thus, even with substantial political good will, the task will be challenging. However, now with the *Caring Society* decisions, proponents of reform now have additional arguments that, not only is First Nation’s self-government a matter of respecting inherent s. 35 rights, but a matter of respecting human rights and, practically, is the only way that will lead to real improvements in the lives of First Nations people in this country.

While working in partnership with the other levels of government may be the ideal way of moving forward, First Nations should keep their options open and not rest all their hopes on the federal government coming through for them. The *status quo* is unacceptable and it should not continue any longer. The *Caring Society* decision tells us it violates substantive equality. Some have argued that First nations control over programs and services on reserve is already possible now without the need for further negotiation or legislative recognition by Canada or the provinces. RCAP and some scholars have argued that Aboriginal people possess inherent jurisdiction over core areas including matters vital to the life, welfare, culture and identity of their peoples and local matters, which can be exercised unilaterally by First Nations without negotiation with other governments.³⁹⁹ In addition, elsewhere I have argued that the *Indian Act* by-law powers, in light of the recent repeal of the Ministerial dissolution power, can now be harnessed, in tandem with the inherent right, to empower First Nation governments to legislate over a wide range of local matters affecting their communities.⁴⁰⁰ There already exists a

³⁹⁹ RCAP, Vol. 2, *supra* note 268 at 159. By contrast, RCAP recommended that jurisdiction over matters on the periphery of these core issue fell had to be negotiated and agreed between Aboriginal groups and the federal and provincial governments. See also McNeil, K., “The Jurisdiction of Inherent Right Aboriginal Governments”, *supra* note 387.

⁴⁰⁰ See Metallic, N., “Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later”, forthcoming in UNBLJ in 2016.

precedent of a First Nations child welfare by-law that, given to the *Indian Act* paramountcy rules, supersedes provincial legislation.⁴⁰¹

The challenge will be, if First Nations begin to exercise self-government unilaterally, whether the Department will seek to insist on First Nations following funding agreement program terms and conditions and view those who do not comply as in default and institute intervention up to or including third-party management or terminating agreements. Any such response from the Department would, according to the decision in *Caring Society*, be discriminatory as preventing First Nations from obtaining funding in order to provide community-based, culturally appropriate services, enabling First Nations to seek redress from the Canadian Human Rights Commission. The decision states that tying funding to providing services that mirror providing services is discriminatory. Thus, the decision provides significant leverage for First Nations to now push back on the Department.

CONCLUSION

In this article I have endeavoured to tell the long story and explain the sordid details of how First Nations have come to be saddled with an extremely dysfunctional and problematic system for program delivery on reserve, over which they exercise no real control. Various government administrations, as well as staff of the Department of Indian Affairs and Northern Development have been complicit in the perpetuation of this unacceptable system based on assimilation.

The system is causing numerous serious harms to First Nations peoples, including: (1) it is not culturally appropriate to the needs and circumstances of First Nations and not improving conditions on reserve; (2) it excludes First Nations from policy development (i.e., the provinces don't generally consult First Nation over essential services since they do not have legislative or fiscal responsibility for these services); (3) it operates on the basis of standard-form funding agreements where First Nations are given the choice to 'take it or leave it' and most cannot afford to 'leave it'; (4) the agreements are conditional upon First Nations adhering to excessive

⁴⁰¹ This is the *Spallumcheen Indian Band By-law #3 - A By-law of the Care of our Indian Children*, discussed in Metallic, *ibid.* See also Johnson, *supra* note 33 at 107-108; and the entire text of the by-law is appended to the decision of *Alexander v. Maxime* (1995), 56 B.C.A.C. 97.

reporting and disclosure requirements that tie up significant time and resources for First Nations front-line staff; (5) while Department staff undertake significant monitoring of First Nations, they do not monitor (and do not report to Parliament) on whether the system is improving outcomes; (6) the funding agreements are too rigid and not appropriate for a fiscal relationship between two levels of governments; (7) the system operates with no legislative framework which gives significant discretion to the Department which can be (and is) subject to abuse of power; (8) it allows for inconsistent and fluctuating interpretations of program terms such as ‘reasonable comparability’; (9) it makes it extremely difficult for First Nations to obtain access to redress where the First Nations have concerns or dispute the Department’s administration of the system; (10) the system provides little opportunity for Parliament to oversee the Department’s administration of the system or have regular discussions about the efficacy of the system (except in times of crises); (11) all programs are knowingly underfunded; (12) funding agreements were capped from 1996-97 until March 2016 and funding did not keep pace with population growth, program changes or inflation; (13) the system perpetuates stereotypes that First Nations cannot competently manage programs either due to corruption and mismanagement or because First Nations are inept children not capable of handling their own affairs; and (14) Department staff are in a clear conflict of interest under this system, which causes them to prioritize their monitoring functions over improving conditions for First Nations.

The recent *Caring Society* decision is a powerful indictment of this system. First, it finds that Canada and the Department having knowingly been underfunding services to the most vulnerable people on reserve, First Nations children. Second, it finds that child welfare services on reserve has been perpetuating a system reminiscent of the residential schools system because First Nations children are being separated from their families, language and culture and “the fate and future of many First Nations children is still being determined by the government.”⁴⁰² Third it finds the ‘comparability standard’ to be discriminatory because it insists on mirroring of provincial standards and funding, instead of promoting programming reflective of First Nations needs and circumstances. Although only dealing with the Department’s child welfare program, the decision has broad implications for the delivery of programs on reserve, suggesting the whole system is inconsistent with the standard of substantive equality. While the decision does not

⁴⁰² *Caring Society*, *supra* note 1 at para. 426.

speaking directly about self-government, this would appear to be the inevitable result of a human rights-compliant approach since the only way for programs to be truly culturally appropriate and meet community needs and circumstances is for them to be designed and controlled by First Nations. Anything else perpetuates assimilation.

The *Caring Society* decision therefore arms First Nations with very powerful arguments to push for the dismantling of the current dysfunctional, discriminatory and wholly unacceptable system for program delivery on reserve in favour of self-government.

BIBLIOGRAPHY

Statutes

An Act to amend the Canadian Human Rights Act, SC 2008, c. 30
An Act to amend the Indian Act (publication of by-laws) and to provide for its replacement, SC 2014, c 38
Bill C-7, *First Nations Governance Act*, 2nd sess., 37th Parl., 2002
Canada Assistance Plan, 1966 SC c. 45 [repealed SC 1995, c 17, ss. 31-32]
Canadian Human Rights Act, RSC 1985, c H-6
Constitution Act, 1867, 30 & 31 Vict, c 3, s. 91(24)
Constitution Act, 1982, s 35
Department of Indian Affairs and Northern Development Act, RSC 1985
Family Homes on Reserves and Matrimonial Interests or Rights Act, SC 2013, c 20
Financial Administration Act, RSC 1985, c F-11
First Nations Financial Transparency Act, SC 2013, c. 7
Indian Act, RSC 1985 c I-5
Indian Act, SC 1876, c 18
Indian Act, SC 1951, c 29
Mi'kmaq Education Act, SC 1998, c 24
Mi'kmaq Education Act, SNS 1998, c 17

Cases

114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40
Alexander v. Maxime (1995), 56 B.C.A.C. 97
Association des parents de l'école Rose-des-vents v. British Columbia (Education), 2015 SCC 21
Attawapiskat First Nation v. Canada, 2012 FC 948
Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 SCR 817
Canada (Attorney General) v. Cold Lake First Nations, 2015 FC 1197
Canada (Attorney General) v. Simon, 2012 FCA 312
Canada (Attorney General) v. Simon, 2015 FCA 18
Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445, aff'd 2013 FCA 75.
Catalyst Paper Corp. v North Cowichan (District), 2012 SCC 2
Chief Jesse John Simon, et al. v. Attorney General of Canada, 2015 CanLII 67635 (SCC)
Chief Mountain et al. v. Attorney General of Canada, et al., 2013 CanLII 53406 (SCC)
Day Star First Nation v. Canada (Attorney General), 2003 SKQB 261
Delgamuukw v. British Columbia, [1997] 2 SCR 1010
DesRochers v. Canada (Industry), [2009] 1 SCR 1994
Doré v. Barreau du Québec, 2012 SCC 12
Dunsmuir v. New Brunswick, 2008 SCC 9
First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2015 CHRT 14

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development), 2011 CHRT 4
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
First Nations Child and Family Caring Society of Canada v. Attorney General of Canada, 2013 CHRT 16
Grand Chief Stan Loutit et al. v. AGC, 2013 CHRT 27
Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), 2002 SCC 31
Lac Seul First Nation v. Canada (Minister of Indian Affairs & Northern Development), 2004 FC 1183
Leighton v. British Columbia, [1989] 4 WWR 654
Matson et al. v. Indian and Northern Affairs Canada, 2013 CHRT 13, 2015 FC 398
Micmac First Nation v. Canada (INAC), 2007 FC 1036, aff'd 2009 FCA 377
Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) et al., 2008 CanLII 18945 (SCC)
Mississaugas of the New Credit First Nation v. Attorney General of Canada, 2013 CHRT 32
Mohawks of the Bay of Quinte v. Canada (Attorney General), 2014 FC 527
Montana Band of Indians v. Canada (Minister of Indian Affairs and Northern Development), [1989] 1 FC 143 (TD)
Montréal (City) v. Montreal Port Authority, 2010 SCC 14
Mousseau v. Canada (Attorney General) (1993), 126 NSR (2d) 33 (NSCA)
Nacey, Rainville, Dennis v. Aboriginal Affairs and Northern Development Canada, 2014 CHRT 20
NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45
Nolan v. Canada (Attorney General) (1998), 155 DLR (4th) 728
Ochapowace Indian Band No. 71 v. Canada, (1999) 167 Sask. R. 167
Onion Lake Cree Nation v. Canada, FC T-2428-14
Pictou Landing Band Council v. Canada, 2013 FC 342
Pikangikum First Nation v. Canada (INAC), 2002 FCT 1246
Quebec (Attorney General) v. Lacombe, 2010 SCC 38
R. v. Kapp, [2008] 2 SCR 483
R. v. Pamajewon, [1996] 2 SCR 821
R. v. Sutherland, [1980] 2 S.C.R. 451
Re Manitoba Language Rights [1985] 1 SCR 721
Reference re Assisted Human Reproduction Act, 2010 SCC 61
Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada, 2013 CHRT 30
Simon v. Canada (Attorney General), 2012 FC 387
Simon v. Canada (Attorney General), 2013 FC 1117
Thunderchild First Nation v. Canada (Indian Affairs and Northern Development), 2015 FC 200
Withler v. Canada (Attorney General), [2011] 1 SCR 396

Journal Articles & Texts

- Alfred, T., "Colonialism and State Dependency", prepared for the National Aboriginal Health Organization Project, *Communities in Crisis*
- B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997), 42 McGill L.J. 1011
- Blackstock, C., "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada wins, equality and justice must lose, *Children and Youth Services Review* (2010), doi: 10.1016/j.chilyouth.2010.09.001
- Cassidy, F., "The First Nations Governance Act: A Legacy of Loss" Policy Options – The Public Forum for the Public Good (online), April 1, 2003
- Cornell S., Curtis, C., and Jorgensen, M., "The Concept of Governance and its Implications for First Nations" in Joint Occasional Papers on Native Affairs, No. 2004-02
- Culhane Speck, D., "The Indian Health Transfer Policy: A Step in the Right Direction, or Revenge of the Revenge of the Hidden Agenda?" (1989) 5:1 Native Studies Review 187
- Cumming, P.A., and Ginn, D., "First Nation Self-Government in Canada" (1986) Nordic Journal of International Law 55.1-2 86
- Dalton, J.E., "Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006), 21 No. 1 Can. J.L. & Soc'y 11 at 19-20
- Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, 6th ed. (1902)
- Drummond, D., and Kachuck Rosenbluth, *The Debate on First Nations Education Funding: Mind the Gap* (2013), Working Paper 49 (Kingston: School of Policy Studies, Queen's University)
- Durst, D., "The Wellness of Aboriginal Children: Seeking Solutions Through Self-Government" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008)
- Dworkin, R., *Taking Rights Seriously* (Harvard University Press, 1977)
- Frideres, "A Critical Analysis of the Royal Commission on Aboriginal Peoples Self-Government Model" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008) 123
- G.V. Harten, G. Heckman and D.J. Mullen, *Administrative Law - Cases, Text, and Materials*, 6th ed. (Edmond Montgomery Publications: 2010), Chapter 1
- Gunn, B.L., "Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination" (2016) 38 Dalhousie L.J. 237
- Harris-Short, S., *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children – Protection the Vulnerable Under International Law* (Ashgate Publishing Company: Burlington, England, 2012)
- Hogg, P. and Turpel, M.E., "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995), 74 Can. Bar Rev. 187
- Hogg, P., *Constitutional Law of Canada* (5th ed.) (loose-leaf), Chap. 6, 28 and 55
- Hutchins, P.W., "The Golden Thread of Continuity, the Federalism Principle and Treaty Federalism – Where's the Gap?", March 3, 2009, Paper presented at National Center for First Nations Governance "Rebuilding our Nations" Conference

- Hylton, J.H., "The Case for Self-Government : A Social Policy Perspective" in *Aboriginal Self-Government in Canada – Current Trends and Issues*, 2nd ed. (Saskatoon: Purich Publishing Ltd, 1999)
- Imai, S., "The Structure of the Indian Act: Accountability in Governance", Research Report No. 35/2012 for Comparability Research in Law & Political Economy
- Jacob, S., and Desautels, G., "Evaluation of Aboriginal Programs: What Place is Given to Participation and Cultural Sensitivity?", April 2013, Vol. 4:2, The International Indigenous Policy Journal, Article 1
- Jacobs, L.A., "Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization" (2009), prepared for Elections Canada
- Johnson, P., *Native Children and the Child Welfare System*, (Canadian Council on Social Development in association with James Lorimer & Company: Toronto, 1983) – FN 33
- Ladner, K.L. and McCrossan, M., "The Electoral Participation of Aboriginal People," (2007), prepared for Working Paper Series on Electoral Participation and Outreach Practices
- Lavoie, J., O'Neil, J., Reading, J., Allard, Y., "Community Healing and Aboriginal Self-Government" in *Aboriginal Self-Government in Canada – Current trends and issues*, 3rd ed. (Saskatoon: Purich Publishing Ltd.: 2008)
- Leclair, J., "The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters" (2003), 21 Sup. Ct. L.R. (2d) 73
- Liston, M., "Governments in Miniature: The Rule of Law in the Administrative State" in *Administrative Law in Context*, 2nd ed. (Edmond Montgomery Publications, 2013
- MacIntosh, C., "Envisioning the Future of Aboriginal Health under the Health Transfer Process" (2008) Health Law Journal (Special Edition) 67
- MacIntosh, C., "Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health" in *Frontiers of Fairness* (Toronto: University of Toronto Press, 2005)
- McNeil, K. "The Jurisdiction of Inherent Right Aboriginal Governments", Oct. 11, 2007, Research Paper for the National Center for First Nations Governance
- McNeil, K., "Challenging Legislative Infringement of the Inherent Aboriginal Right of Self-Government" (2003), 22 Winsor. Y.B. Access to Just. 329
- McNeil, K., "Culturally Modified Trees, Indian Reserves and the Crown's Fiduciary Obligations" (2003), 12 Sup. Ct. L.R. (2d) 105
- McNeil, K., "The Jurisdiction of Inherent Right Aboriginal Governments", *supra*, at 13-14; Moodie, D., "Thinking Outside the 20th Century Box: Revisiting *Mitchell* – Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government since *Calder*: Search for Doctrinal Coherence" (2003-2004) 35 Ottawa L.R. 1
- Mendelson, M., "A Second Look at the *First Nations Control of Education Act*", Caledon Institute of Social Policy, August 2014
- Metallic, N., "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later", 2016 UNBLJ (forthcoming)
- Metallic, N., "Les droits linguistiques des peuples autochtones" in *Les Droits Linguistiques au Canada*, 3^{ième} ed., Éditions Yvon Blais, 2013
- Papillon, M. "Aboriginal Quality of Life under a Modern Treaty" IRPP Choices, Vol. 14, no. 9, August 2008, ISSN 0711-0677
- Papillon, M., "Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance", Chapter 14 in Bakvis, H. and Skogstad, G. (eds), *Canadian federalism*:

performance, effectiveness, and legitimacy, 3rd ed., Oxford University Press, 2012, p. 284-301

- Papillon, M., "Playing Catch-up with Ghosts: Income Assistance for First Nations on Reserve" in Beland, D., and Daigneault, P.-M., *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective*, University of Toronto Press, 2014
- Papillon, M., « Premières Nations : comment mettre fin au régime de citoyenneté à deux vitesses? » in *Le Forum Au Service du Bien Public*, Ferry 11, 2016
- Provart, J., "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous L.J. 177
- Rae, J., "Program Delivery Devolution: A Stepping Stone of Quagmire for First Nations?" (2009) 7 (2) Indigenous LJ 1
- Restoule, J.-P., "Aboriginal Education and Self-Government – Accessing Success and Identifying the Challenges to Restoring Aboriginal Jurisdiction for Education" in in *Aboriginal Self-Government in Canada – Current Trends and Issues*, 2nd ed. (Saskatoon: Purich Publishing Ltd, 1999)
- Serson, S., "Reconciliation: for First Nations this must include First Fairness" in Aboriginal Healing Foundation, *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*, 2009, at 147. ISBN 978-1-897285-72-5
- Shewell, H., *'Enough to Keep Them Alive'—Indian Welfare in Canada, 1873-1965* (Toronto: University of Toronto Press, 2004)
- Shewell, H., and Spagnut, A., "The First Nations of Canada: social welfare and the quest for self-government" in *Social Welfare with Indigenous Peoples*, ed., Dixon, J., and Scheurell, R.P., London: Routledge, 1995
- Sinha, V., Ellenbogen, S. & Trocmé, N., "Substantiating Neglect of First Nations and non-Aboriginal Children" (2013) *Children & Youth Service Review*, 35(12), 2080-2090
- Vicaire, P.J., "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill L.J. 607 at 656-657
- Wilkins, K., "Still Crazy After All These Years": Section 88 of the *Indian Act* at Fifty" (2000), 38(2) Alta. L.R. 458

Government Documents

- Auditor General of Canada *2014 Report of the Auditor General of Canada*, Chap. 6, First Nations Policing Program—Public Safety Canada"
- Auditor General of Canada, *1994 Report of the Auditor General of Canada to the House of Commons*, Vol. 14, Chap. 23, "Indian and Northern Affairs Canada – Social Assistance"
- Auditor General of Canada, 2002 December Report of the Auditor General of Canada, Chapter 1 – Streamlining First Nations Reporting to Federal Organizations
- Auditor General of Canada, *2004 Report of the Auditor General of Canada to the House of Commons*, Chap. 5, "Indian and Northern Affairs Canada – Education Program and Post-Secondary Student Report"
- Auditor General of Canada, *2006 Report of the Auditor General of Canada*, Chapter 5, "Management of Programs for First Nations"
- Auditor General of Canada, *2008 Report of the Auditor General of Canada to the House of Commons*, Chap. 4, "First Nations Child and Family Services Program – Indian and Northern Affairs Canada"

Auditor General of Canada, 2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, "Programs for First Nations on Reserves"

Auditor General of Canada, *2013 Status Report of the Auditor General of Canada, Chap. 6, "Emergency Management on Reserves"*

Canada, 1995 Federal Policy Guide, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government"

Canada, Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of Gathering Strength — Canada's Aboriginal Action Plan, Ottawa, Ontario, Jan. 7, 1998

Canada, House of Commons, Report of the Special Committee on *Indian Self-Government in Canada*, First Session of the Thirty-second Parliament, 1980-81-82-83 ("Penner Report"). Available online: <http://caid.ca/PennerRep1983.pdf>.

Canada, Library of Parliament Legislative Summaries, "Bill C-7: the First Nations Governance Act" (Ottawa: 10 October 2002, revised 18 December 2003)

Canada, Mandate Letter to Minister of Indigenous and Northern Affairs, Carolyn Bennett, from Prime Minister Justice Trudeau, November 13, 2015.

Canada, Parliament of Canada, "Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005", 4 May 2006, PRB 06-04E

Canada, Political Accord between Her Majesty The Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development and the Mi'kmaq and Maliseet First Nations Chiefs", March 27, 1999.

Canadian Human Rights Commission, "A Matter of Rights - Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act" (October 2005)

Citizenship & Immigration, Indian Affairs Branch, "Authority to Introduce Increased Rates of Assistance to Indians - Details of Request to the Honourable The Treasury Board", Ottawa, June 16, 1964.

INAC - Audit and Evaluation Sector, "Special Study: Evolving Funding Arrangements with First Nations – Final Report", November 2011, prepared by Donna Cona Inc.

INAC "Devolution" (Draft – 9/8/92) (National Archives).

INAC *Directive 205 – Default Prevention and Management* (2013)

INAC Presentation, "Oversight of Transfer Payments: AANDC's Risk-Based Approach – FMI Workshop Presentation" June 4, 2013

INAC, "A Discussion Paper on Comparability" (2000)

INAC, "Communications Strategy – Task Force on Devolution", March 16, 1992 (National Archives) – FN 62

INAC, "Frequently Asked Questions – Funding Approaches."

INAC, "General Assessments" online: <https://www.aadnc-aandc.gc.ca/eng/1322761862008/1322762014207>

INAC, "Indian Band Government Legislation" (1982) (National Archives).

INAC, "Inuit", online: <https://www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191#sc4>

INAC, "Ministerial Transition Book: November 2015"

INAC, "Modernizing Grants and Contributions", Jan. 11, 2013

INAC, "Multi-Year Funding Agreements – Joint Briefing note for Operations Committee", September 10, 1999

INAC, "Oversight of Transfer Payments: AANDC's Risk-Based Approach – FMI Workshop Presentation", June 4, 2013

INAC, "Overview – Devolution Task Force" (Draft – 17/3/92) (National Archives) – FN 67

INAC, "Risk Assessment on implementation of revised Income Assistance program manual", June 21, 2011

INAC, "Social Program – Design and Control" authored by Gobeil, O., Director of Social Development Directorate, January 14, 1982 (National Archives).

INAC, "SUFA Accountability Template 2000"

INAC, "The Deputy's Notes on Devolution: The Next Step," April 13, 1992 (National Archives).

INAC, "The Reporting Guide" online: http://www.aadnc-aandc.gc.ca/eng/1385559716700/1385559777677?utm_source=ReportingGuide&utm_medium=url.

INAC, 1991 New Brunswick Social Assistance Manual—First Nations Social Development Manual.

INAC, AANDC 2013-2014 Performance Report, p. 26 and AANDC 2014-15 Performance Report

INAC, Aboriginal Affairs and Northern Development Canada, "National Social Programs Manual" (Canada: 2011)

INAC, Aboriginal Recipient Funding Agreement (ARFA), 2012-2012

INAC, Aboriginal Recipient Funding Agreement (ARFA), 2012-2013

INAC, Amending Agreement for Subsequent Years of an ARFA/NARFA for Fiscal Year 2013/2014, Schedule "DIAND-1A" Block Contribution Funding.

INAC, APC Manual Issues, 2011

INAC, Atlantic Regional Office, 1967 Social Welfare Regulation.

INAC, Department of Citizenship and Immigration, "Circular 107 – Application of Provincial General Welfare Assistance Programs", Ottawa, July 20, 1974.

INAC, Departmental Audit and Evaluation Branch, "Evaluation of the Alternative Funding Arrangement (AFA) and Flexible Transfer Payment (FTP) Funding Authorities", December 2005

INAC, DIAND/ First Nation Funding Agreement, 2007-2008

INAC, February 20, 2015, Letter to Michipicoten First Nation from INAC Ontario Region, online: <http://www.michipicoten.com/wp-content/uploads/2015/03/AANDC-2014-15-Risk-Assessment.pdf>

INAC, Financial Statements for the Year Ended March 31, 2015 (Unaudited), available online: www.aadnc-aandc.gc.ca/eng/1445002892771/1445002960229

INAC, First Nation and Tribal Councils National Funding Agreement Model for 2016-2017 – FN 85

INAC, General Assessment Workbook, online: <https://www.aadnc-aandc.gc.ca/eng/1390855955971/1390855996632>

INAC, Implementation Status Update – Report to the Audit and Evaluation Committee", June 27, 2008

INAC, Income Assistance Program – National Manual, 2005

INAC, March 27, 1992, letter to Letter to I.D. Clark, Secretary of the Treasury Board (National Archives)

Statistics Canada, Living arrangements of Aboriginal children aged 14 and under, April 13, 2016

Treasury Board of Canada, "Population of the Federal Service by Department", available online at: <http://www.tbs-sct.gc.ca/psm-fpfm/modernizing-modernisation/stats/ssa-pop-eng.asp>.

Treasury Board of Canada, *From Red Tape to Clear Results – The Report of the Independent Blue Ribbon Panel on Grant and Contribution Programs*, December 2006, ISBN: 978-0-662-49799-8

Treasury Board of Canada, Memorandum of Understanding between the Department of Indian and Northern Development and the Treasury Board, August 1990.

Treasury Board of Canada, Treasury Board Minute, T.B. 627879, dated July 23, 1964

Other

Assembly of First Nations, "Fiscal Fairness for First Nations" (2006)

Assembly of First Nations, "Fiscal Fairness for First Nations", Fact-Sheet, 2006

Assembly of First Nations, Fact Sheet – Quality of Life of First Nations, July 2011

Assembly of First Nations, *Transforming the Relationship – Sustainable Fiscal Transfers for First Nations – A Submission to the House of Commons Standing Committee on Finance*, Aug. 13, 2010 –

Education Canada Magazine "In Nova Scotia, a Mi'kmaq Model for First Nation Education" (date unknown)

Institute of Governance, "Special Study on INAC's Funding Arrangements – Final Report", 22 December 2008

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* ("RCAP Report"), Volume 1, "Looking Forward, Looking Back"

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 2, "Restructuring the Relationship"

Truth and Reconciliation Commission, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada – Honouring the Truth, Reconciling for the Future*, Introduction

YouTube, "Strombo: Soap Box: Wab Kinew, Jan. 2012

News Articles

September 19, 2012, Globe and Mail, "Yukon first nation worried self-government will collapse without funding"

2013, Windspeaker, "'A gun to our heads' Pressure to sign new funding agreement more widespread than first thought", by Ball, D.P. (2013) 13:1

March 15, 2013, Wabanaki Press, "Harper Government Pressures Poorest Community to Sign Agreement Despite Court Injunction"

March 17, 2013, iPolitics, "Fiscal 'blackmail' in Canada's poorest quarter"

March 19, 2013, CBC News, "Esgenoopetitj First Nation in 'lose-lose' over federal funding"

March 25, 2013, CBC News, "Membertou refusing to renew federal funding agreement"

April 1, 2013, Globe and Mail, "Distrust of Harper government grow over First Nation funding rules"

April 6, 2013, Indian Country, "First Nations Claim Coercion as Harper Makes Aid Contingent on Legislation Support"

April 8, 2013, NewTalk650, "First Nation rejects federal funding agreement"

April 24, 2013, Winnipeg Free Press, "Agreement with feds signed 'under duress': First Nation"
 May 14, 2013, National Post Commentary by Jesse Kline, "Killing aboriginal with our kindness"
 May 29, 2013, Amnesty International Canada, Press Release, "Invasive surveillance of human rights defender Cindy Blackstock"
 November 11, 2013, Law Times article, "Feds pouring big money into aboriginal litigation"
 March 21, 2014, CBC News, "First Saskatchewan First Nations reject funding agreements – Chiefs say new federal rules ask for too much control"
 June 16, 2014, CTV News, "Ottawa sued in push for safe drinking water on reserves"
 February 20, 2015, Saskatoon Star Phoenix, Editorial, "Fire deaths preventable", April 2, 2016; CBC, "Makwa Sahgaiehc First Nation fire reflects inadequate resources for reserves - Fire services underfunded, but regulation of building codes and safety practices also lacking"
 April 8, 2015, APTN, "PM Harper failing to fulfill Mulroney's Oka promise on modern treaties"
 May 20, 2015, 24hrsVancouver entitled, "B.C. First Nations lose social funding"
 June 5, 2015, "CBC, "Aboriginal Affairs spending shortfall amounts to \$1B, internal document says - 5-year federal analysis of 'lapsed' spending lists top underspending departments"
 July 13, 2015, National Post, "'Hanging on by a thread': Fire department of Canada's most populated First Nation struggles to stay afloat"
 October 6, 2015, NetNewsLedger, "Children are getting sick, our people are struggling – Neskantaga FN Chief Moonias"
 October 13, 2015, PR Newswire Company, "Federal party leaders urged to end drinking water crisis in First Nation communities once and for all"
 October 15, 2015, CBC News, "Bad water: 'Third World' conditions on First Nations in Canada - Two-thirds of First Nations have been under at least 1 water advisory between 2004 and 2014"
 November 11, 2015, CBC News, "First Nations schools vulnerable to teacher impersonators, educator says - Officials face challenges in a 'school system that's severely in crisis,' says Jamie Wilson"
 December 1, 2015, KMKNO Press Release, "Document shows that the First Nations' Social Case would have had a different outcome"
 December 1, 2015, CNW Newswire Company, "Chronic Underfunding of First Nations Police Forces a Dire Reality: Mashteuiatsh is not an Isolated Case"
 December 02, 2015, CBC News, "Mi'kmaq welfare fight with federal government given new life"
 December 8, 2015, Chronicle Herald Op. Ed. by Thompson, R., "N.S. child protection changes too rushed and overreaching"
 December 10, 2015, CBC News, "First Nations welcome lifting of despised 2% funding cap"
 December 10, 2015, CBC News, "First Nations welcome lifting of despised 2% funding cap"
 December 18, 2015, CBC News, "Carolyn Bennett reinstates funds frozen under First Nations Financial Transparency Act"
 December 21, 2015, Canadian Underwriter, "Nearly half of Canada's First Nation reserves have 'little to no' fire protection: Report"
 January 4, 2016, Globe & Mail, "Forcing reports to Ottawa undermines First Nations accountability", by Salterio, S. and Evans, R.
 January 13, 2016, Timmins Press, "Moose Cree/NAPS aim to stem tide of illegal drugs"

January 16, 2016, National Post, Todd MacKay, "All politicians must disclose basic financial information - including First Nations politicians"

January 25, 2016, CBC News, "La Loche hopes for better future after deadly shootings, struggles with youth suicides"

January 26, 2016, CBC News, "Canada discriminates against children on reserves, tribunal rules"

February 22, 2016, CBC News, "Federal government won't appeal ruling that found it discriminated against children on reserves"

February 24, 2016, APTN, "33 First Nations declare public health emergency"

March 11, 2016, Winnipeg Free Press, "Support flows to First Nation - Therapists on-site, actor's help sought in suicide crisis"

March 14, 2016, CBC News, "First Nations students get 30 per cent less funding than other children, economist says - Don Drummond counters Indigenous Affairs' claim that funding gap cannot be measured"

March 16, 2016, CBC News, "Cree communities launched and funded own inquiry into 'suicide pandemic' - Faced with hundreds of suicide attempts, Mushkegowuk Council launched The Peoples Inquiry"

March 16, 2016, National Post, Lois Frank, Harley Frank and Todd MacKay, "First Nations leaders benefit from transparency"

March 18, 2016, National Post, "Anger, confusion as Manitoba RCMP charge 15-year-old boy with murder of 11-year-old Teresa Robinson"

March 22, 2016, APTN News, "Budget 2016: Trudeau Liberals blow 2 per cent cap with 'unprecedented' \$8.4 billion investment"

March 22, 2016, APTN News, "Budget 2016: Trudeau Liberals blow 2 per cent cap with 'unprecedented' \$8.4 billion investment"

March 24, 2016, Regina Leader-Post, "Peepeekisis Cree Nation members gather on highway to protest federal funding agreement"

March 27, 2016, Toronto Star, "Cindy Blackstock, since mom to 163,000 kids"

March 27, 2016, APTN, "Federal Liberal budget failed First Nation children, families: Blackstock"

March 29, 2016, The Canadian Press, "Medical crisis ongoing for Ontario reserves"

April 1, 2016, CBC News, "Obedjiwan dismantles police service, SQ takes over"

April 7, 2016, Bains, R., "Ottawa Should Grant Property Rights on First Nations Reserves"

April 11, 2016, CTV News, 'A national tragedy': AFN demands action, funding for Attawapiskat"

April 13, 2016, CBC News, "Attawapiskat suicide crisis: MPs hold emergency debate over suicide attempts"

April 13, 2016, APTN News, "During suicide debate Justice Minister says it's time for First Nations to shed *Indian Act* 'shackles'"

Exhibit: National Inquiry into Missing and
Murdered Indigenous Women and Girls

Location/Phase: Part III: Quebec City

Witness: Naomi Metalic

Submitted by: Big Canoe, C. Counsel

Add'l info: P03 b02 P0101

Date: MAY 14 2018

Initials

I/D

Entered

6J

A15